



[2024] JMCC Comm 13

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO. SU 2022 CD 00387**

**BETWEEN BONUS PARTS ACCESSORIES & AUTO IMPORTS LTD CLAIMANT**

**AND IAN DUNN DEFENDANT**

**IN CHAMBERS**

**Mr Harrington McDermott instructed by McDermott, Reynolds, McDermott for the Claimant**

**Mr Ronald Paris instructed by Paris & Co. for the Defendant**

**Heard: June 7, October 11, 12, 18 & March 7 & 13, 2024**

**Default Judgment – Extension of time- Whether evidence is required for entry of default judgment under rule 12.10(4) – Assessment of particulars of claim**

**WINT-BLAIR J**

- [1]** These proceedings concern two applications which were wended their way by way of circuitous routes to their joint disposition by this decision. The first to be heard was the application for an extension of time filed by the applicant/defendant Mr Ian Dunn on January 18, 2023. The applicant seeks an order that the time limited by

*“Order 10.3(1) to file a Defence to the Claim filed herein and served on the Defendant on the 24<sup>th</sup> August 2022 be extended to the 20<sup>th</sup> January 2023.”*

**[2]** The affidavit in support was filed by counsel Mr Paris who is on record for the applicant and also appeared at this hearing.<sup>1</sup> The evidence contained within the affidavit is not merely formal in nature, it can be characterized as stating matters of evidence and giving an opinion on the state of the evidence. That which remains and is not in dispute is that:

1. Messrs Ian Dunn and Robert Sprague are equal shareholders and directors of the claimant company.
2. It was deposed that there are two companies, the affiant did not name the other, however, it is known to the court that the other company is Bonus Car Rental and Auto Services Ltd. as other claims are running with the instant application by order.
3. The relationship between the parties broke down.

**[3]** The affiant relies on the absence of evidence in support of the allegations made by Mr Sprague such as:

- a. There was no allegation of theft merely an allegation of takings by the defendant, neither has any evidence of theft been produced.

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<sup>1</sup> The Legal Profession Act, The Legal Profession (Canons of Professional Ethics) Rules, Canon V(p): *“While appearing on behalf of his client, an Attorney shall avoid testifying on behalf of that client, except as to merely formal matters, or when essential to ends of justice, and if his testimony is material to the cause he shall, wherever possible, leave the conduct of the case to another Attorney.”*

- b. There is no evidence of a breach of fiduciary duty as Mr Sprague has produced no facts to support the allegation that by forming his own company, the defendant was in competition with and in conflict of interest with the claimant company.
- c. Further, there is no evidence that the defendant has been using the claimant's list of customers, its phones, uniforms, seals, social media pages and intellectual property.
- d. There is no evidence of financial loss or detriment suffered by the claimant as a result of the formation and entry into business of the defendant's company.
- e. There is no evidence that the defendant has damaged the claimant's relationship with numerous service providers or that the defendant operated a GPS tracker installation business under the auspices of the claimant without remitting any portion of the revenue to the claimant. There is no evidence of that company or any revenue earned by it.

**[4]** Both applications relied on the same evidence. The application for extension of Time was supported by the affidavit of Mr Ronald Paris.<sup>2</sup> Mr. Paris deponed that the orders sought by the applicant/defendant was made on the ground that the defendant is an equal shareholder and Director with Robert L. Sprague. The claimant company which would not exist were it not for the partnership which had existed between the two men, with Robert L. Sprague providing the financial wherewithal and the defendant being the man on the ground doing all the work needed to convert that monetary investment into profits.

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<sup>2</sup> Filed on January 18, 2023

- [5] The companies in the claim at bar both have assets that the partners can now argue and fight over as their partnership has now broken down completely. What is left to be done is a settling of their equal entitlement to the assets of the companies. There are no allegations in the pleadings filed herein that the defendant squandered any of the financial resources invested by Robert L. Sprague.
- [6] There are allegations by Robert L. Sprague of takings by the defendant from the claimant company as company shareholders and directors are wont to do. Funds invested by Robert L. Sprague have been accounted for in the books of both companies. Robert L. Sprague is a very successful American Accountant by profession and he has not produced any evidence of theft or breach of fiduciary duty by the defendant.
- [7] On the claim of breach of fiduciary duty by the defendant Mr. Sprague has not produced any facts to support the allegation that the formation of his own company by the defendant establishes without more than that company was in competition with and in a conflict of interest with the claimant company.
- [8] The defendant's company is situated in the parish of Westmoreland, far removed from, Saint James the place of business of the claimant company. No evidence has been put before this court to support the allegation that the defendant has been using the claimant company's customer list, its phones, uniforms, seals, social media page and intellectual property. Indeed, no such evidence exists. Nor has any evidence been adduced that the claimant company has suffered any detriment financial or otherwise as a result of the formation and entry into business of the defendant's company.
- [9] Mr. Sprague has not produced any evidence in support of his allegations that the defendant has damaged the claimant's relationship with numerous service providers nor the assertion that the defendant was operating a GPS Tracker Installation business under the auspices (whatever that may mean) of the claimant company without remitting any portion of the revenue to the claimant.

- [10]** Mr Ian Dunn<sup>3</sup> deposed that he denies that the separation between the claimant and himself occurred as a result of the meeting held on the 9<sup>th</sup> of December 2020. He denied that this separation caused the claimant company to suffer loss of revenue. Any loss of revenue being experienced by the claimant cannot be attributed to him and his possession of the items stated in paragraphs 16 and 17 of Mr. Sprague's Affidavit.
- [11]** Mr Dunn deposed that he is quite prepared to return to the claimant its key, phone, uniforms consisting of three shirts, company stamp and seal and any customer lists which the claimant can identify as belonging to it and which are in his possession, as he does not have any intellectual property (which has not been identified) belonging to the claimant company.
- [12]** Mr Dunn stated that Mr. Sprague has not put forward any evidence of loss of revenue which the claimant has suffered due to his exit and possession of the items set out here in which he is prepared to return to the claimant. He noted that he had not established any business to compete with or which is competing with that of the claimant company since his departure therefrom.
- [13]** He is contesting the allegation that he took or misappropriated the alleged sums of \$1,451,073.00 and U.S.\$2,285.00 since at all material times both Mr. Sprague and himself were authorized to use funds in the companies' accounts without the prior approval of the other.
- [14]** The chronology of the matter:
- 1) The claim was filed and served on August 24, 2022.

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<sup>3</sup> Filed June 16, 2023

- 2) An acknowledgment of service indicating service on August 24, 2022 was filed on September 1, 2022 but was not served on the claimant's attorneys nor was a defence filed by that date.
- 3) The defence to the claim should have been filed by October 13, 2022, none was filed.
- 4) The application for entry of default judgment was filed on November 21, 2022.
- 5) The instant application for an extension of time to file the defence was filed on January 18, 2023.
- 6) Both applications were set down for hearing before Brown-Beckford, J on January 18, 2023. The learned judge made orders for the filing and service of an affidavit by the defendant by February 1, 2023, with the claimant to file its response within 21 days of receipt. The claimant was to file its affidavit in response to the affidavit of Ronald Paris by February 15, 2023. Skeleton submissions and authorities were to be filed and exchanged by May 4, 2023.
- 7) Both applications were adjourned for hearing to June 7, 2023, at 10:00 am for three hours.

### **The hearing**

- [15]** On June 7, 2023, Mr Paris complained that he had not been served with the affidavit of Robert Sprague, neither the supporting documents referred to in the application for entry of default judgment. This court made orders for the filing and service of the outstanding documents and permitted the defendant to file a response no later than June 16, 2023. Both applications were adjourned for hearing on October 11, 2023 and were heard on that date.

### **The application to extend time**

- [16]** In support of the application to extend time, Mr Paris submitted that the application was brought after a derivative order made by Palmer – Hamilton J. Counsel submitted that there is a good defence to the claim as without the work of the applicant, Mr Dunn, Mr Sprague would not have had anything to fight over and were it not for the investment of Mr Sprague, Mr Dunn could not have created wealth. The parties together acquired assets.
- [17]** Counsel submits that the application for leave to file a defence is to contest the claim. There is no evidence of misappropriation of funds or theft. In responding to the affidavit of Kenisha Gordon<sup>4</sup>, Mr Paris submitted that there is nothing in the affidavit of Mr Sprague that was not in accordance with the operations of the business and nothing in the company's constitution required the permission of the other director for the withdrawal of money from the company's account.
- [18]** Mr Paris further submitted that the application should be granted as it is in keeping with the overriding objective and that there is no documentary evidence to support the allegations being made. On the issue of Mr Paris as a deponent, it was submitted orally that there were discussions to retain additional counsel in the matter but he was unable to do so as he was unwell. He concluded that the failure to exhibit a draft defence was failure of counsel and that the applicant ought not to suffer as a result. These oral submissions did not form part of the affidavit of counsel Mr Paris.
- [19]** In response to the application to extend time, Mr McDermott submitted that although the defendant's application is entitled "Notice of Application to Extend Time to Comply with Court Order," the application is in substance an application for an

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<sup>4</sup> Filed February 15, 2023

extension to file the defence out of time. Such applications are made pursuant to Rule 10.3 (9) of the CPR, which states:

“... the Defendant may apply for an order extending the time for filling a Defence...”

**[20]** Rule 10.3(9) does not set out any conditions that must be satisfied when applying to file a defence out of time. The authorities establish however, that giving effect to the overriding objective is of paramount importance. In so doing some key factors considered by the court include:

1. The length of delay;
2. any explanation for the delay;
3. the merits of the defence;
4. the importance of complying with time limits: and
5. any prejudice to the other party.

**[21]** Mr McDermott submits that no explanation has been given by Mr Dunn for the delay in filing a defence nor exhibiting a draft defence in the supporting affidavit. The affidavit must exhibit a draft defence, whereas here there is none, therefore this must be explained by affidavit evidence.

**[22]** To enable the court to assess whether there is any merit to justify the grant of an extension of time, evidence must be adduced. It is the court's discretion to grant an extension of time and upon relying on **Peter Haddad v Donald Silvera**<sup>5</sup>, counsel submitted that this discretion is based on the affidavit evidence presented before the court.

**[23]** In the instant matter, the evidence shows that the defendant was served on August 24, 2022 and filed his application for extension of time to file his defence on January

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<sup>5</sup> unreported SCCA No 31/2003 delivered on 31 July 2007



18, 2023. The time for the filing of the defence expired on October 13, 2022. This, it is submitted, amounts to inordinate delay which ought not to be countenanced by the court.

[24] The defendant's application is supported by the affidavit of Ronald Paris, the defendant's attorney-at-law. As it pertains to the said affidavit, Counsel submits that the affidavit of Mr. Paris ought to be disregarded on the grounds that it provided:

- i. no explanation for the delay;
- ii. no draft defence;
- iii. inadmissible material;
- iv. no merit;
- v. no arguable case;
- vi. no indication as to why there was no retainer of additional counsel

[25] Mr McDermott submitted that the authorities make clear the consequences of not explaining the delay and that Mr Paris attempted to make submissions on the particulars of claim in a matter in which there is no defence indicating the defendant's version of events. There is therefore nothing before the court upon which to assess the merits of the defence.

[26] In responding to the affidavit made by Mr. Paris, Mr McDermott relied on the case of **Aston Wright v Attorney General of Jamaica**<sup>6</sup> to highlight that where an affidavit in an interlocutory proceeding is filed and purports to give evidence to the factual matters, the sources must be stated. Counsel went on to say that paragraphs 2 and 3 of Mr Paris' affidavit were inadmissible as he could not speak to certain factual events because he was not involved in the companies.

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<sup>6</sup> [2022] JMSC. Civ 25

- [27] In relation to Paragraph 4, Mr Paris does not address the allegation of misappropriation of funds and detention of company's property. However, there is the admission that the defendant was entitled to take the money. A director/ shareholder cannot just take money from the company. The company's assets and its money have not been determined by a court and until steps are taken to determine the company's entitlements then the assets and cash belong to the claimant company.
- [28] The affidavit of Kenisha Gordon exhibiting the judgment of Palmer-Hamilton J on derivative action cited evidence as to admissions made by the defendant regarding the taking property of the company and the refusal to return it. There is no defence to the claim. Even if there is some merit, and the extension could be granted, it will not be granted where the criteria has not been met
- [29] Paragraphs 16 and 17 of the Affidavit of Robert Sprague<sup>7</sup>, speak to the prejudice which the claimant has suffered as a result of the actions of the defendant which give rise to the Claim. In relying on the case of **Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery**<sup>8</sup>, it was submitted that the claimant will continue to suffer undue prejudice should the extension sought be granted. This is in the context of the significant pre-action delay and delay since the claim was served.
- [30] In conclusion, Mr McDermott submitted that in support of the overriding objective, the interest of justice would not be served and the application should be refused. There is no evidence to refute Mr. Sprague's averments and there is no evidence in relation to prejudice to Mr. Dunn. Costs cannot always remedy prejudice.

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<sup>7</sup> sworn to on November 21, 2022

<sup>8</sup> [2013] JMCA Civ. 23.

## Discussion

- [31] The defendant breached rule 10.3(1) of the CPR which states that, as a general rule, the defence should be filed within 42 days of service of the claim form. Under rule 10.3(9), a party who fails to file a defence within the prescribed time can apply for an order extending time for filing the defence. Rule 26.1(2)(c) provides, among other things, that the court may extend or shorten the time for compliance with any rule even if the application for an extension is made after the time for compliance has passed.
- [32] This court has a discretion to enlarge the time within which the defendant may file a defence. Neither rule 10.3(9) nor rule 26.1(2) particularises any of the factors to be considered in exercising that discretion, therefore the court is required to have regard to the overriding objective of dealing with the case justly.
- [33] In **Fiesta Jamaica Limited v National Water Commission**<sup>9</sup>, the court settled that there was no rigid formula to be applied, rather the application had to be viewed by reference to “the criterion of justice.” In **Fiesta Jamaica Limited v National Water Commission**, an application for extension of time to file a defence (supported by an affidavit with a draft defence exhibited) was refused by a judge at first instance, and summary judgment granted. On appeal, consideration was given to whether the affidavit supporting the application “contained material that was sufficiently meritorious” to have warranted the order sought.
- [34] Harris JA, writing on behalf of this court, said:

*“16. ...The question arising is whether the affidavit supporting the application contained material which was sufficiently meritorious to have*

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<sup>9</sup> [2010] JMCA Civ 4

*warranted the order sought. The learned judge would be constrained to pay special attention to the material relied upon by the appellant not only to satisfy himself that the appellant had given good reasons for its failure to have filed its defence in the time prescribed by Rule 10.3(1) of the Civil Procedure Rules (C.P.R.) but also that the proposed defence had merit.”*

- [35]** The factors to be taken into account are delay, explanation for the delay, prejudice to the other side, effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties which might be relevant to the question of prejudice. Whether the affidavit in support of the application was sufficiently meritorious to warrant the order sought. Special attention should be given to the material relied on by the application in order for the court to satisfy itself that there were good reasons for the failure to have filed a defence in time as prescribed by rule 10.3(1) but also that the proposed defence had merit.
- [36]** The applicant having filed an acknowledgement of service had 42 days after service of the claim form to file a defence and did not do so. There was no application to extend time before the court prior to the expiry of time for filing the defence. There was no explanation for allowing for time to file the defence to elapse on January 13, 2023 or any reason for the filing of the application after time had elapsed, on January 18, 2023.
- [37]** There is no affidavit of merit before the court. No draft defence was exhibited and the affidavits of Mr Dunn and his attorney did not set out any factual matters or evidence which could be relied on to ground and/or substantiate a defence to the action. There was also no statement, as to the facts which would be relied on by the defendant to challenge the claim.<sup>10</sup>

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<sup>10</sup> National Commercial Bank Jamaica Ltd. v Owen Campbell and Tousehane Green [2014] JMCA Civ 19

- [38] The absence of a draft defence is not fatal to the application, however, if the affidavit of merit has not been produced, an applicant will only be successful if he can convince the court that it would be just to extend time.<sup>11</sup> The applicant will also have to convince the court that it should enlarge time based on its reasons for failing to comply with the time limit and that there is merit to the defence.<sup>12</sup> The court is also to be mindful of the overriding objective.
- [39] The decision to extend time is discretionary. It is for the applicant to explain to the satisfaction of the court the efforts made to secure the evidence concerning the affidavit of merit and the reason for its absence where there is no such affidavit.
- [40] It was held by the Court of Appeal in the case of **Barrington Green and another v Christopher Williams**<sup>13</sup> that the case of **The Attorney General & Others v Rashaka Brooks Jnr & Another** was an exception to the general rule:

*The principle that an application to extend time to file a defence can succeed without “evidence of merit” demonstrating, among other things, that there is merit in the defence, applies only to a narrow set of special circumstances none of which have been disclosed in the facts of the instant case. The defaulting entity in that case was a state agency which demonstrated difficulty in obtaining specific instructions in the matter. The explanation for the delay in filing a defence to the claim was that it was awaiting a scientific report that was germane to the issues in the case. The deponent for the Attorney General’s Department had also explained to the court’s satisfaction, “the efforts made to secure the evidence concerning the*

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<sup>11</sup> The Attorney General & Others v Rashaka Brooks Jnr & Another [2013] JMCA Civ 16

<sup>12</sup> see B& J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2

<sup>13</sup> [2023] JMCA Civ 5

*elements of merit and the reason for its absence” (para. [21]). The absence of instructions resulted in there being no draft defence for the consideration of the master.*

- [41] The circumstances of **Rashaka Brooks** do not obtain in the instant case; therefore the defendant is obliged to produce evidence of a meritorious defence or evidence that would satisfy the court that it would be just to extend time given that failure.
- [42] The overriding objective of dealing with cases justly means that the imperative of doing justice requires that unmeritorious defences be shut out at the earliest opportunity. This also saves expenses and enables the court to divert its resources to those cases which need to proceed to trial.
- [43] The affidavit of Ian Dunn on this application challenges the claim and states that the proposed defence to be relied on is really one where the partnership has broken down irreconcilably, and the assets should be split equally. The affidavit lends itself to a desire for resolution and denies any wrongdoing, it asserts that the claimant will be put to proof at trial. The affidavit mirrors that of counsel and was also without the draft defence attached.
- [44] There is no delay in the filing of the application between the expiry of the deadline for filing and the date of filing of the application. There is no explanation for allowing the effluxion of time to overtake the application. There is no reason why a draft defence has not been attached to the affidavit of either Mr Paris or Mr Dunn.
- [45] As already indicated, the overriding objective requires that the court should have regard to factors such as the reasons for the delay, prejudice and other effects of the delay, and the court’s role in saving expenses and managing resources. It is necessary for this court to determine and evaluate any considerations arising from the reasons given as to why a defence was not filed within the time limit prescribed, and whether irrespective of the delay, in the interests of justice, the case should proceed to trial. These conditions are in furtherance of the overriding objective. I

find that there is insufficient material upon which to exercise a discretion to grant the application sought by Mr Paris and for the foregoing reasons, the application to extend time is refused.

### **The Application to set aside Default Judgment**

- [46] The application for Default Judgment was supported by the Affidavit of Robert Sprague<sup>14</sup> who deponed that the defendant was a director and shareholder of the Claimant who resigned from his office of director on or about the 9<sup>th</sup> of December 2020 and had not worked or engaged with it thereafter.
- [47] Notwithstanding this, the defendant, on July 13, 2020, withdrew US\$285.00 from the claimant's bank account without the company's or Mr. Sprague's authorization and on or about December 4, 2020 and refused to provide Mr. Sprague with the customer list relating to the claimant's sale of motor vehicle oil.
- [48] On November 25, 2020, the defendant withdrew J\$400,000.00 from the claimant's bank account without the company's or Mr. Sprague's authorization and on December 10, 2020, he withdrew a further J\$650,000.00 and US\$2,100.00 from the company's bank accounts without the company's authorization or that of Mr. Sprague.
- [49] On December 11, 2020, the defendant's wife, Mrs. Allen-Dunn, took J\$401,073.00 in cash from the file cabinet in the back room of the claimant company and changed the password to the sales and inventory system. She also refused to turn over the keys, phones, uniforms, seal, intellectual property and other property of the claimant.

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<sup>14</sup> Filed on November 21, 2022

- [50]** Mr. Sprague deponed that he had to hire a locksmith to break all the locks to the shop and purchase new keys as a security measure. The claimant also spent J\$98,550.00 to regain access to the sales and inventory system. On or about the 29<sup>th</sup> of December 2020, Mr. Sprague received correspondence from the defendant's Attorneys-at-Law, Ronald Paris instructed by Paris & Co. that "...his [the defendant's] 'ownership' means that he does not need the consent nor agreement of his co-owner to do what he has done..."
- [51]** Mr Sprague was advised by his attorneys-at-law and verily believes that the defendant, as a shareholder and former director, does not have any legal claim of entitlement to the property belonging to the claimant.
- [52]** On the 8<sup>th</sup> of December 2020, Mr. Sprague met with Mr. Dunn to discuss a formal separation from the claimant company and the other company for which they both were shareholders. Mr. Sprague offered to relieve Mr. Dunn of his debt of J\$2,849,000.00 in exchange for shares in the claimant company. Mr. Dunn declined this offer and said that he would rather take Mr. Sprague to court.
- [53]** Since the defendant's resignation, he has begun the operation of a competing business named Falcon Auto Parts & Vehicles Accessories Limited formerly named Global Auto Parts & Accessories ("the competing business"). The defendant also started selling products out of his home using the logo of the claimant. He retained control over the claimant's social media accounts and transferred them in the name of Global Auto Parts & Accessories.
- [54]** In total, the sums of J\$1,451,073.00 and US\$2,385.00 were taken from the claimant company by or under the direction of the defendant. The claimant alleged that its relationships with suppliers were damaged as Mr. Dunn informed suppliers not to sell Mr. Sprague's products on the claimant company's accounts. All of this occurred while Mr. Dunn was still using the claimant company's accounts with its suppliers to purchase items for his competing business.



- [55]** Mr. Dunn has caused customers to move from the claimant company to his competing business and took a large file with all of the claimant's potential motor oil customers.
- [56]** On the 9<sup>th</sup> of September 2021, Mr. Sprague sought leave to commence a derivative action on behalf of the claimant company to recover the sums of J\$1,451,073.00 and US\$ 2,385.00 and all the claimant's property including its keys, phones, uniforms, stamps seals intellectual property, customer list and other documents. This application was heard by The Hon. Mrs. Justice L. Palmer-Hamilton and leave was granted on 28 July 2022.
- [57]** On 24<sup>th</sup> August 2022 the claimant commenced proceedings against the defendant. On that date, the defendant was served with the Claim Form, Particulars of Claim, Prescribed Notes and Form of Acknowledgment of Service at 67 Old Hope Road in the parish of St. Andrew.
- [58]** While the defendants filed an Acknowledgment of Service on September 1, 2022, it was not served on Mr. Sprague's attorneys. The time for the defendant to file and serve the Defence expired on 13 October 2022. The chronology indicated applies.
- [59]** The filing of this claim stemmed from the actions of the defendant which have and continue to cause loss of revenue to the claimant. The continued deprivation of its key, phones, uniforms, stamps, seals, intellectual property, customer list and other documents is detrimental to the claimant's operations and earnings and is essential to the continuation of its business. The longer the defendant maintains possession over the claimant's property and the J\$1,451,073.00 and US\$ 2,385.00 which have been used in the advancement of the competing business, the more the claimant's business continues to lose.

- [60] Ms. Kenisha Gordon<sup>15</sup> deponed that the defendant was a director of the claimant company until he resigned on or about the 9<sup>th</sup> of December 2020. The defendant has acted in conflict with the claimant's affairs and breached his fiduciary duties to the claimant which is the basis on which this claim for sums and property belonging to the claimant should be recovered.
- [61] The relevant bank statements have been disclosed. They prove that the defendant has acted in breach of his fiduciary duty and has conducted acts of theft in the circumstances.
- [62] Further, in the judgment of Palmer- Hamilton, J, Her Ladyship in granting leave to bring a derivative action in the name and on behalf Bonus Parts, Accessories & Auto Imports Limited, against Ian Dunn, the defendant, found that Mr. Dunn admitted in his Affidavit in this matter; that he refused to provide the customer list and that he refused to turn over keys, documents, intellectual property, funds and other property as has been stated by the claimant.

#### **Submissions on Default Judgment**

- [63] The claimant has applied pursuant to rule 12.10(4) of the CPR for some other remedy, where there is no claim for damages. Rule 12.10(5) provides that”

*“An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 (service of application where order made on application made without notice) does not apply.”*

- [64] Mr McDermott relied on the dictum of Brooks, J (as he then was) in **National Commercial Bank Jamaica Limited and Jamaica Redevelopment Foundation**

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<sup>15</sup> Affidavit Filed June 16, 2023

**Inc. v Donovan Foote**,<sup>16</sup> which said that there is authority for the principle that where there is an application for judgment in default of defence or acknowledgment of service that the particulars of claim are deemed admitted as to the issue of liability.

**[65]** In support of the application for Default Judgment the pleadings allege that Mr. Dunn is taking funds from the company, and he (Mr. Dunn) has not addressed those matters in the affidavit in support of his application.

**[66]** Mr Dunn admits that he is prepared to return some of the property and in respect of other items, there should be no complaint as to customer list etc. Where there is an admission, there can be no defence to the claim of unlawful detention. If there is such a defence, it is not set out in any document, neither taking of money, breach of fiduciary duty nor the unlawful detention of property. The application ought to be refused with costs to the claimant.

**[67]** In response to the submission, Mr Paris submitted that the accusation of the taking of the company's money came before the derivative actions was filed. Mr. Sprague is bringing an action in the name of the company and they were both equal shareholders.<sup>17</sup>

**[68]** Mr Paris submits that in paragraph 3 of his affidavit, Mr. Dunn denies the allegations made by Robert Sprague. In paragraph 4 of Mr Sprague's affidavit, there is no evidence from Mr. Sprague that there was any use made of the customer list. As it relates to paragraph 6 of Mr Sprague's affidavit, the allegations are unsupported by

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<sup>16</sup> Claim No. 2000 C.L. N. 145; delivered November 16, 2006 at page 3

<sup>17</sup> per paragraph 3 of Mr. Dunn's affidavit.

facts, both Mr. Sprague and Mr Sprague were authorised to use funds in the company's accounts

- [69] It is submitted that the unsubstantiated allegations require a trial. In this case, whether Mr Dunn caused any loss of revenue to the company is a triable issue. In any event, Mr Dunn is prepared to return all the items, despite there being no definition of intellectual property for customer lists and questioned the absence of evidence of losses suffered by the lists being in possession of Mr. Dunn.

### **Discussion**

- [70] The claimant contends that this application is brought under rule 12.10(4) which requires that judgment in default in cases not involving money or goods, should be in a form that the court approves. Based on this, the court has to be satisfied that the conditions precedent for a grant of the default judgment are satisfied. Those preconditions are that the respondent was properly served with a valid claim form and particulars of claim in accordance with the rules and had not filed an acknowledgement of service indicating an intention to defend the claim or a defence within the time limited for by the rules. There was no application for an extension of time filed within the time specified. That application was filed after this one.
- [71] Having considered the affidavit evidence, the court is satisfied with the service of the claim and the failure of the respondent to serve an acknowledgement of service and to file a defence within the time limited within which to do so. The circumstances existed for the application to be made for the entry of default judgment to be granted.
- [72] Once those preconditions were met, as they were, the court is to proceed to an assessment of the particulars of claim to determine if it disclosed a reasonable cause of action upon which he could have granted default judgment in the terms sought by the appellant in his claim. As Brooks, P said:

*“[27] However, the rule is clear that the entitlement to the default judgment was to be informed by and adjudged on the facts averred in the particulars of claim and nowhere else. Thus, there is no requirement for evidence verifying the contents of the particulars of claim before a default judgment may be entered. There is also no requirement for an affidavit of merit containing a rehearsal of the particulars of claim. In the absence of any provision for affidavit evidence in proof of an assertion contained in the statement of case, the certificate of truth was sufficient to give the particulars of claim the force of law for the purposes of an application for a default judgment. The judgment should have been entered on what was disclosed in the particulars of claim, which would have been what was served on the respondent and to which no intention to defend had been indicated.<sup>18</sup>*

*[28] The rationale for the default judgment to be entered, based on what was disclosed on the particulars of claim, is obvious. This is because the case that would have been served on the respondent for a response to be filed by her, in accordance with the rules of court, would have been comprised within the four walls of the particulars of claim (along with any document on which the claimant seeks to rely, which is annexed to it). So the court would be acting on the premise, until the contrary is proved, that the respondent, having seen that case set out in the particulars of claim (with supporting documents, if any), does not intend to challenge or resist it. The failure of the respondent to respond to the particulars of claim upon service of it is tantamount to an acceptance or admission of the facts pleaded in it until the contrary is shown.*

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<sup>18</sup> Glen Cobourne v Marlene Cobourne

*[29] In Blackstone's Civil Practice 2004, at paragraph 20.7, the learned authors, in explaining the application procedure for default judgment under similar provisions in the Civil Procedure Rules, 1998 of England and Wales ('the English CPR'), stated, among other things: "There will be a hearing, and judgment will be entered for what it appears to the court that the claimant is entitled to on the statement of case (CPR r.12.11(1)). In other words, the court will consider the merits of the claim, albeit only as they appear in the particulars of claim." (Emphasis supplied) [30] It is, therefore, not at all clear what proof of the facts pleaded in the particulars of claim or what evidence in proof of the pleadings was required by the learned judge in the light of the clear dictates of rule 12.10(4). The learned judge's requirement for supporting evidence is, indeed, questionable within the framework of rule 12.10(4), in the face of his assertions that the claim was "unopposed" and that the particulars of claim comprised "uncontradicted allegations of facts". The hearing of the application for the default judgment was not a trial of the claim. The appellant was only entitled to the judgment on the merits of the particulars of claim and nothing else. It, therefore, follows that it was open to the learned judge to treat the pleaded facts as uncontradicted and, accordingly, as admitted, for the purposes of the default judgment. It was then for him to consider whether the appellant was entitled to judgment on those uncontested facts."*

**[73]** The claim and particulars of claim were filed on August 24, 2022. The certificate of truth was signed by Tahir Thompson, Attorney-at-Law on the instructions of the representative of the claimant company. That representative was said to have been outside of the jurisdiction.

**[74]** The gravamen of the claimant's statement of case has been set out above. The contest between the parties is not to be tried in this application. The affidavit evidence from Mr Paris raises evidence which the court should consider and raises questions as to the absence of other evidence. This court is not required to consider

evidence. The acknowledgment of service was filed on September 1, 2022, it was never served on the claimant's attorneys nor was a defence filed by that date. The claimant was deemed to have accepted the particulars of claim as the claimant had no knowledge of the intention to defend the action.

[75] The court has refused an extension of time for the reasons stated in that there is insufficient material upon which to exercise a discretion to grant the application sought by Mr Paris. In the circumstances, the defendant having accepted liability based on the particulars of claim, admissions made on the derivative action, admissions made to this court that property belonging to the claimant will be returned, there seems to be no debate on the pleadings.

[76] The directors are treated as trustees of the property of the company. Property in the possession of a director can be recovered in rem so far as traceable, either in law or in equity; and the company's claim will have priority over those of the director's creditors. The property of the company does not belong to the directors.<sup>19</sup>

[77] In the case of **Lux Locations Ltd v Yida Zhang**<sup>20</sup> the Privy Council held:

*72. Before proceeding further, it may be useful to summarise the Board's key conclusions on the proper approach to an application for default judgment where the claim is for some other remedy. In summary: (i) The court should first of all determine whether the relevant conditions in rule 12.5 (or rule 12.4) are satisfied. The Board is proceeding on the basis that for the purposes of rule 12.5(b) and (c)(i) it is sufficient that the defendant had not filed a defence (and the period for doing so had expired) at the date of the application. (ii) Even if the relevant conditions are satisfied, the court*

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<sup>19</sup> Gower and Davies Principles of Modern Company Law, 7<sup>th</sup> ed., page 426

<sup>20</sup> [2023] UKPC 3

*should not grant a default judgment if there is material before the court at the hearing of the application which would justify setting such a judgment aside. (iii) If there is no such material, the court should proceed to determine what remedy (if any) the claimant is entitled to on the statement of claim. For this purpose, the court will treat the allegations made in the statement of claim as true and legally valid unless (and to the extent that) it appears to the court that the statement of claim does not disclose any reasonable ground for bringing the claim or is an abuse of the process of the court. (iv) An appeal lies to the Court of Appeal from the court's decision on the application in the ordinary way.*

- [78] Where at the hearing of an application under rule 12.10(4) and (5) the court considers that such an explanation for failure to file a defence and that the defendant has a real prospect of successfully defending the claim, the court should, decline to enter judgment and grant an appropriate extension of time for filing a defence. There was no such defence nor an explanation for that failure.
- [79] I am satisfied on the pleadings that a case has been made out for the grant of an injunction against the defendant. Financial loss has been asserted as continuing but not sufficiently pleaded in the statement of case for there to be an assessment.

### **Costs**

- [80] In the case of **Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery**<sup>21</sup>, there were two appeals before the Court of Appeal. The appellants sought to set aside the orders made refusing the grant of an application to extend the time within which to file the defences. The learned master, after refusing the

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<sup>21</sup> [2013] JMCA Civ. 23.



application of the appellants, granted the respondents leave to enter judgment in default of defence.

- [81] In the appeal concerning Dockery, the respondent, had commenced proceedings against the appellant claiming damages for false imprisonment and malicious prosecution. The claim form was served and an acknowledgement of service was filed. However, with no defence having been filed, the respondent filed an application to enter judgment in default of defence. An affidavit in support of the application was filed.
- [82] In the appeal concerning Dixon, the respondent, had commenced proceedings against the appellant claiming damages for assault and battery. The claim form and particulars of claim were served on the appellant who filed an acknowledgment of service. Having failed to file a defence within the prescribed time, the appellant, sought leave to file and serve a defence out of time. An affidavit in support of the application was filed and a draft defence was exhibited. The respondent then made an application for leave to enter judgment in default of the defence.
- [83] The Appellate Court noted that the court is endowed with discretionary powers to grant an extension of time but will only do so when it is satisfied that there is sufficient material before it which would justify it in so doing. The court, in considering what is just and fair looks at the circumstances of the particular case.

*“[31] As pronounced in Haddad v Silvera, the payment of costs does not ameliorate any hardship which would be encountered by a party in circumstances of delay. The respondents have filed their claims against the appellant and are desirous of having the matter concluded by the court. In each case, leave has been granted for a judgment in default of defence to be entered against the appellant. Any attempt to deprive the respondents of their right to proceed with their claim, in these circumstances, would be unduly prejudicial to them. An order for an extension of time would preclude them from proceeding to take steps to realize the fruits of their judgments.*”

*In such circumstances, compensation by way of costs would not be an option.”*

*[32] In keeping with its duty to regulate the pace of litigation, the court has adopted a strict approach in giving consideration to an application for an extension of time, especially in circumstances where a poor excuse or no excuse has been advanced for a delay with complying with the rules. In Port Services Ltd v Mobay Undersea Tours Ltd and Fireman’s Fund Insurance Co SCCA No 18/2001 delivered on 11 March 2002, Panton JA (as he then was) speaking to the court’s reluctance to assist tardy litigants, said:*

*“In this country, the behaviour of litigants, and, in many cases, their attorneys-at-law, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions. The widespread nature of this behaviour is not seen or experienced these days, I daresay, in those jurisdictions from which precedents are cited with the expectation that they should be followed without question or demur here. ...*

*For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction.”*

*[33] In light of the failure of the appellant to proffer a satisfactory excuse for the delay in both cases, there being no material from which a defence to Dixon’s claim can be established and there being the likelihood of prejudice to the respondents, if the applications were granted, the interests of justice*

*would not have been served. Accordingly, the appeals are dismissed with costs to the respondents to be agreed or taxed.”<sup>22</sup>*

**[84]** Lord Edmund Davies L. J. in **Revici v Prentice Hall Inc.**<sup>23</sup> said:

*“... the Rules of the Supreme Court are there to be observed; and if there is non-compliance (other than of a minimal kind), that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted...”*

**[85]** The application for entry of default judgment is granted on the terms set out below.

**[86] Orders:**

1. Application for extension of time refused.
2. Application for entry of judgment in default of defence granted.
3. Judgment is entered on the claim for the claimant against the defendant in default of defence.
4. The defendant, Mr Ian Dunn, his servants and or agents or otherwise, are restrained from retaining possession of all property belonging to the claimant to wit:
  - i.* the sums of \$1,451,073.00 and US\$2,385.00
  - ii.* all keys, phones, stamps, seals, intellectual property, customer lists and documents;

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<sup>22</sup> Paragraph 31-33

<sup>23</sup> [1969] 1 All ER 772; [1969]1 W.L.R. 157

- iii.* All cash, assets and/or property in the possession or control of the defendant, Mr Ian Dunn his servants and/or agents be returned to the claimant within seven days of the date of this order.
- 5. Costs of the claim and costs of the application to the claimant to be agreed or taxed.