In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 142

BETWEEN:

(1) DAVID DANGLER MOIR
(CO-EXECUTOR OF THE ESTATE OF TIA DANGLER ANDREW, DECEASED)

(2) RONALD BROWN MOIR, JR
(CO-EXECUTOR OF THE ESTATE OF TIA DANGLER ANDREW, DECEASED)

PLAINTIFFS/RESPONDENTS

-and-

(1) MARK WALDRON ANDREW
(2) MARSHA LYNN ANDREW

DEFENDANTS/APPLICANTS

RULING

Date of Hearing: **6 December 2021**
Date of Ruling: **18 February 2022**

Appearances: **Sam Stevens, Carey Olsen, for Plaintiffs**

Saul Dismont, Marshal Diel & Myers, for Defendants

RULING of Mussenden J

Introduction

1. This matter came before me by the Defendants' Summons dated 18 November 2020 to set aside the default judgment dated 30 October 2020. It is supported by the First Affidavit of Mark Waldron Andrew sworn 16 July 2021 and Exhibit "**MWA-1**".

2. The Plaintiffs opposed the application. They relied on the Affidavit of David Moir which was sworn on 19 March 2020 and the First Affidavit of Joyce Waddell-Dublin sworn on 17 March 2020 and Exhibit "**JWD-1**" both in support of the Plaintiffs' *ex parte* application for an interim injunction against the Defendants.

Background

3. The Plaintiffs are US citizens and resident of Massachusetts. They are the co-executors and duly appointed personal representatives of the estate of their late mother, Tia Dangler Moir (**Tia**). A US citizen, Tia passed away in Bermuda on 18 October 2018 aged 89 having been a resident and homeowner on the island for over 40 years.

4. The First Defendant/Applicant Mark Andrew is Tia's step-son. He is the offspring of the late Bermudian David Andrew, Tia's second husband. Mark Andrew is a Bermudian.

5. The Second Defendant/Applicant Marsha Andrew is Mark Andrew's wife. Marsha Andrew is a US citizen and a Bermuda status holder.

6. David Andrew died in March 2012. From late 2012 until Tia's death, the Defendants acted (with the consent and agreement of the Plaintiffs) as Tia's full-time care givers and were remunerated by Tia and the Moir family for their services. They lived with Tia in her substantial shore-side Bermuda home, Commonland Point House, which is set on a plot of over 1.8 acres on the north side of Harrington Sound (**Tia's House**).

7. Tia's Last Will and Testament dated 28 June 2012 ("**Tia's Will**") *inter alia* bequeathed all of her tangible personal property to the Plaintiffs. As her co-executors and personal

representatives, the Plaintiffs are empowered to "*divide and distribute* [Tia's] *tangible personal property by any means they consider fair and practicable…*"[1].

8. Without notice to the Plaintiffs or any other member of the Moir family, in August 2014 Tia conveyed the remainder interest in Tia's House to Mark Andrew for $1 while retaining a life interest in the property for herself. The transaction was not revealed to the Plaintiffs until several months later. In Case No. 405 of 2019, the Plaintiffs are seeking to have the conveyance set aside, and Tia's House transferred back to Tia's estate, on the grounds that the Defendants procured the conveyance by exerting undue influence over Tia (the "**Conveyance Case**").

9. Between May and July 2019, the First Plaintiff David Moir came to Bermuda in his role as co-executor and personal representative, and in accordance with Tia's Will, to inspect, inventory, pack and ship to the United States all of Tia's tangible personal property located in Bermuda. In the course of that process:

    a. certain of Tia's possessions located in Tia's House that the Plaintiffs intended to have shipped to the US did not arrive at the intended destination in the US and have disappeared. The missing chattels are (a) a Monchablon oil painting; (b) a Sloop painting; (c) a pair of antique French prints; and (d) a bronze Italian firescreeen (the "**Missing Chattels**").

    b. certain of Tia's possessions which the Plaintiffs were aware of from photographs and discussions with family members could not be located in Tia's House. The disputed chattels are (a) a handmade, gold-braided wedding ring belonging to Tai Andrew; (b) a Lladro porcelain statute of two herons; (c) a Lladro porcelain statue of a family of eight elephants; (d) a Cloisonné artwork of herons; and (e) a framed painting of a Zebra (the "**Disputed Chattels"**).

10. In relation to the Missing Chattels, shortly after it was discovered they were missing the Plaintiffs instructed law firm Carey Olsen to speak with BEST Shipping, the company hired in Bermuda to transport Tia's possessions by sea freight to the US. The Plaintiffs

[1] See clause 6.2 of Tia's Will

formed the opinion based on the discussions they had with BEST Shipping that it was extremely unlikely that the Missing Chattels ever left Tia's House.

11. Following its conversations with BEST Shipping, Carey Olsen was instructed by the Plaintiffs to write to the Defendants requesting access to Tia's House in order to locate and collect the Missing Chattels, and also to enquire as to the whereabouts of the Disputed Chattels. Correspondence ensued between Carey Olsen and law firm Marshall, Diel & Myers for the Defendants which failed to resolve the issue.

12. In accordance with their duties as co-executors and personal representatives of Tia's estate, the Plaintiffs filed and served a Generally Endorsed Writ of Summons (the "**Writ**") dated 10 June 2020 seeking *inter alia* a declaration that the Defendants have wrongfully converted certain chattels belonging to Tia's estate.

13. On 29 July 2020 the Defendants entered an appearance in response to the action.

14. On 25 August 2020 the Plaintiffs' Statement of Claim (the "**SOC**") was served on the Defendants' counsel.

15. On 30 October 2020, the Defendants having failed to file a Defence within 14 days after the service of the SOC, the Plaintiffs applied for and obtained a Default Judgment. The Default Judgment was obtained more than 8 (eight) weeks after the Defence was due.

16. On 18 November 2020, almost 3 (three) weeks later, the Defendants filed a Summons seeking to set aside the Default Judgment. However, contrary to the requirements of Order 19 rule 9 of the RSC, the Summons was not supported by affidavit evidence setting out the merits of the proposed defence and any reasons relied on for allowing the Default Judgment to be entered.

17. On 16 July 2021, almost nine months later, affidavit evidence in support of the Summons was filed, when the Defendants were faced with an unless order from the Court dated 8 July 2021.

Affidavit Evidence of Mark Andrew

18. Mark Andrew gave an explanation in his affidavit as to why a Defence was not filed. His reasons were as follows:
    a. Marsha Andrew was served with the Writ in this matter. He was never served. When he found out about it, he thought that it was to do with the Conveyance Case. He was not familiar with court proceedings as he had never been sued by anyone or sued anyone.
    b. When he received the SOC in this matter, he did not realise that he had to provide another Defence in addition to the one already provided in the Conveyance Case. He noted that the SOC did not say that he had to file a Defence.
    c. His attorneys may have explained that he had to file a Defence, but he does not recall as it was a very stressful period for several reasons. He and Marsha Andrew had two US actions and a Bermuda action by the Plaintiffs against them. They were travelling between the US and Bermuda for the purpose of emptying Marsha Andrew's US house and selling it and shipping contents to Bermuda. They were helping to arrange their son's wedding and renovate his house all during the disruption of the Covid pandemic. In addition, he was operating his office furnishings business at a time when offices were closing down in Bermuda. Also, he and Marsha Andrew take care of their elderly parents who have health issues.
    d. It was during that busiest, anxious and most challenging time of their lives that they missed the deadline for filing their Defence.
    e. He noted that he understood from his counsel that it is common practice for attorneys to first contact opposing counsel prior to filing Default Judgment but that his counsel were never notified by opposing counsel prior to seeking Default Judgment.

19. Mark Andrew explained the process that took place at Tia's House in respect of the contents. In May 2019, paralegals from the Plaintiffs' attorneys attended Tia's House to start the process of emptying items that the Plaintiffs wanted. From approximately 30 June until 3 July 2019, packers from BEST Shipping attended Tia's House. They were under

the complete charge of David Moir who had sole direction of them and directed what items were to be taken. Marsha Andrew gave no direction at all at any time. David Moir explained that he was taking what he wanted and whatever was left behind could be thrown away or they could have it. Mark Andrew explained that he and his wife Marsha Andrew did not interfere with or have anything to do with the items David Moir had packed by BEST Shipping. They had no knowledge of what happened to them and they would not have wanted them as they have no real understanding of art. He had heard David Moir saying that one of Tia's paintings was valuable but he had no idea which one and he had expected it was shipped. The same applied to the painting of a Sloop, the French prints, the brass fire screen and Tia's wedding ring which was on a box in her bedroom dresser, which David Moir took.

20. Mark Andrew gave explanations about specific items of which he and Marsha Andrew had some knowledge:
    a. The Lladro Statues – These were not part of Tia's estate as they were given to Mark Andrew by Tia and his father prior to his father's death. In any event, David Moir did not take them.
    b. The Cloisonné artwork of herons. These were not part of Tia's estate as they were given to Marsha Andrew prior to Tia's death. In any event, David Moir did not take them.
    c. The framed painting of a zebra. This was not part of Tia's estate as it was given to Marsha Andrew's daughter Emily prior to Tia's death. In any event, David Moir did not take it.
    d. The boat named "Puffin" which was collected by Peppercorn Marine and taken to BEST Shipping for shipping. He took the mast and spars to BEST Shipping as they had been left behind and receipt of the same has been confirmed.
    e. The Peter Woolcock "Croquet Nut" was left behind unwanted.
    f. The Walker Bay rowboat was left behind unwanted.
    g. Tia's ashes which were divided into four portions were left behind.

21. Mark Andrew stated that the Plaintiffs first raised the issues with the items nine months later on 17 February 2020 in a letter to his attorneys. There were two lists – the Missing Chattels the Plaintiffs say they intended to ship from Tia's House to the US in May 2019 and the Disputed Chattels which they say could not be located during the inventory. Correspondence between the parties followed and he was served with an injunction on 8 April 2020 prohibiting him and Marsha Andrew from removing or disposing of the items the Plaintiffs were seeking.

22. Mark Andrew explained that the Plaintiffs had not filed any evidence to support their claim that he and his wife had stolen the packed items or that they were still in their possession in some way and they have not filed any evidence that the items belonged to Tia's estate. He stated that the case is not about money but that the items they say are theirs are very personal and sentimental items, which ownership he suggested can only be determined after a full hearing on the matter with witnesses and evidence. He requested the opportunity to defend the case.

23. Mark Andrew stated that there was no risk to the property as there was an order in place that prevented them from doing anything to the items in dispute. He stated that if the Default Judgment was not set side then they would never have the opportunity to have the case heard to establish that they do own the items and thus the Plaintiffs will have unjustly gained what rightfully belongs to the Defendants.

The Defendant's Submissions

24. Mr. Dismont submitted that the Default Judgment should be set aside for several reasons, namely that the Defendants have a defence with a realistic prospect of success and a degree of conviction and/or that it would be unjust to deprive them of a trial.

25. Mr. Dismont referred to the following in his arguments:

    a. The Rules of the Supreme Court ("**RSC**") Order 13 rule 9;

b. The Supreme Court Practice 1999 (the "**White Book**") at 13/9/7 on showing a meritorious defence; and
c. The White Book at 13/9/18 which sets out the Court's discretionary power.

26. Mr. Dismont submitted that the Court's discretionary power is thus: (a) unconditional; (b) not subject to any rigid rules; (c) to be used to avoid the injustice which may be caused by the default judgment; and (d) if the defendants can show merit to their defence, they should not be deprived the opportunity of proper adjudication. Further, the defence will have merits if it has "*a real prospect of success*" with "*some degree of conviction*".

27. Mr. Dismont submitted that in *Strachan v The Gleaner Company & Anor (Jamaica)* [2005] UKPC 33, the Privy Council approvingly cites *The Saudi Eagle* authority to set aside default judgments. Mr. Dismont submitted that the propositions in *The Saudi Eagle* were recently applied in *Gibbons & Heyrana v Desilva* [2020] Sc (Bda) 43 Civ.

28. Mr. Dismont thus submitted that the "*preferred view*" is that the defendant should provide "*credible affidavit evidence demonstrating a real likelihood that he will succeed in his defence."* But also, where "*there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial*". Thus, the Court should be reluctant to deny the Defendants the opportunity of having the substantive matters determined at trial as the claim is heavily dependent on the Court's assessment of opposing facts and the credibility of witnesses.

Reasons for the default

29. Mr. Dismont submitted that in *Evans v Bartlam* [1937] AC 473 having good reasons for the default are not a prerequisite of obtaining a set aside.

> *"It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there was a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment*

signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

30. Mr. Dismont submitted that the issue of reasons was also considered in *Gibbons & Heyrana v Desilva*. Mr. Dismont submitted that the Defendants were not ignoring the proceedings. They were in the most challenging year of their lives in that Covid has had negative disruptive effects on every aspect of our lives, our work and the Courts. He referred to the affidavit evidence of Mark Andrew as to his circumstances as a result of the Covid pandemic. In noting that Mark Andrew stated that he could not recall being served with the Writ and that he thought that on being served with the SOC it was to do with the Conveyance Case, it was understandable as he was under a lot of stress and juggling various matters. On this basis, Mr. Dismont submitted that the Defendants had good reasons for not being able to file a Defence.

Real prospect of success

31. Mr. Dismont submitted that in *Swain v Hillman* [2000] 1 All ER 91, the English Court of Appeal gave guidance as to how to approach "real prospect of success". Lord Woolf MR stated:

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

32. Mr. Dismont submitted that the Defendants have a real prospect of success as the Plaintiffs' case concerns claims with no real evidence and is merely speculative. Further, they claim that the Missing Chattels they shipped are missing and from that conclude that the Defendants must have stolen them. Mr. Dismont argued that the Plaintiffs cannot prove this on the balance of probabilities, nor can the Plaintiffs prove that the Defendants did not receive the Disputed Chattels as gifts. He cited the case of *In Re B* [2008] UKHL 35 where Lord Hoffman stated:

"2. If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

33. Mr. Dismont also cited the case of Secretary of State for the *Home Department v Rehman* [2001] UKHL 47 where Lord Hoffman stated:

"It would need more cogent evidence to satisfy [a judge] that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard that it was an Alsatian."

34. Mr. Dismont submitted that there is no evidence that the Defendants have done anything that the Plaintiffs have alleged. He noted that the Missing Chattels were packed and removed from Tia's House by a team of workers, stored in a truck over three days, stored in the shipper's warehouse, on the docks and then shipped to Massachusetts passing any number of people. He posed the question that if the Defendants had stolen the Missing Chattels why would they have explained the Disputed Chattels as gifts and why would they allow representatives to attend Tia's House. He submitted that such circumstances should be taken up with the shippers as the Defendants do not know where the items are that were shipped.

Other considerations

35. Mr. Dismont submitted that allowing the set aside does not create any loss to the Plaintiffs that cannot be remedied by a costs order. They would only lose taking advantage of the Defendants' inadvertent lack of attention. He argued that the case was not a simple money case but that it concerned items of sentimental value that are impossible to replace, thus there is no other opportunity for the Defendants to have a trial for the Court properly to assess the evidence. Further, this case would be held in tandem with the Conveyance Case.

The Plaintiffs' Submissions

The Law on setting aside Default Judgment

36. The Plaintiffs oppose the application for several reasons. First, Mr. Stevens submitted that the legal test for setting aside a regular default judgment is well established in Bermuda and was most recently articulated by Hargun CJ in *Gibbons & Heyrana v Desilva* [2] as set out below and *A,B,C and D v Jonathan Jon Cumberbatch* [2020] Bda LR 67.

37. Mr. Stevens referred the Court to paragraphs 17 to 20 of the judgment in *Gibbons & Heyrana v Desilva*, and paragraph 19 of the judgment in *A, B, C, and D v Cumberbatch* for the Chief Justice's fuller explication of the applicable principles but stated that the core test was neatly summarised by Chief Justice Hargun at paragraph 20 of *Gibbons & Heyrana v Desilva* as set out below.

38. Second, Mr. Stevens submitted that it is very important for the Court to have in mind the significant legal and practical consequences for a defendant once default judgment has been entered.

    a. First, it is the defendant who has the burden of persuading the Court that the default judgment should be set aside.

    b. Second, the bar for succeeding on such an application is far higher than the usual standard of proof in civil litigation. It is not sufficient, for example, for a defendant to prove to the court that it has an "arguable defence" that may succeed on the balance of probabilities. This is the standard a defendant must reach when seeking to defeat a plaintiff's application for *summary* judgment under Order 14, but this test has no application in the context of a regularly entered *default* judgment. See the statement of Sir Roger Ormrod in *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc. (The Saudi Eagle)* on page 223:

[2] A decision which was upheld by the Court of Appeal in [2020] CA (Bda) 2 Civ.

> "*In the course of argument* [counsel for the applicant] *used the phrase "an arguable case" ... The phrase is commonly used in relation to RSC Order 14, to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default judgment, it does not accord, in our judgment, with the standard indicated by each of their Lordships in Evans v Bartlam. All of them clearly contemplated that a defendant who is asking the Court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success ... Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the Plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the Court and with it the rights acquired by the plaintiff ...*"

39. Mr. Stevens submitted that a defendant faced with a default judgment in fact has to go much further: they must convince the court that their defence has a *real prospect of success,* which burden is ordinarily discharged by the defendant submitting *credible affidavit evidence* demonstrating a *real likelihood that they will succeed on their defence*.

40. Third, Mr. Stevens submitted further that while the above test will always be the primary consideration for the Court, in exercising its inherent discretion to set aside a regularly obtained default judgment, the Court is also entitled to consider all of the surrounding factual circumstances, including (but not limited to) the reasons provided by a defendant for failing to file a defence. The approach adopted by the English Court of Appeal case of *Andrew Mitchell MP v News Group Newspapers Limited* [2013] EWCA Civ 1537 at [41], which was endorsed by the Chief Justice in *Gibbons & Heyrana v Desilva*, is that there must be a "*good reason*" why the default occurred.

41. Mr. Stevens noted that the *Andrew Mitchell MP v News Group Newspapers Limited* case concerned the application of the English Civil Procedural Rule 3.9, which provides as follows:

> "*On an application for relief from any sanction imposed by a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need-*
> *(a) for litigation to be conducted efficiently and at a proportionate cost; and*
> *(b) to enforce compliance with rules, practice directions and orders*."

42. Mr. Stevens submitted that although the Chief Justice acknowledged at paragraph 28 of *Gibbons & Heyrana v Desilva* that CPR 3.9 has not been expressly incorporated into the RSC, he went on to say that "*having regard to the broad principles underlying RSC Order 1A, I consider that the general statement made by the English Court of Appeal in Andrew Mitchell can be taken into account in dealing with an application to set aside a default judgment regularly obtained.*" The *Andrew Mitchell MP v News Group Newspapers Limited* case concerned a defendant's solicitor simply overlooking the deadline by which to file a defence – which oversight the Court of Appeal unanimously found was *not* a good reason to set aside the default judgment in that instance.

43. Mr. Stevens submitted that the facts of *Andrew Mitchell MP v News Group Newspapers Limited* can and should be applied by analogy to the facts of this case even though, on the evidence, the fault appears to lie with the Defendants and not their legal counsel.

44. Fourth, Mr. Stevens submitted that in examining all of the circumstances in the exercise of its discretion, the Court is also entitled to examine the conduct of the defendant and consider whether the defendant has been "*full and frank*" in the evidence filed in support of the application. He argued that a good example of this in Bermuda was the approach of Bell JA in the Court of Appeal, where he stated, at paragraph 30 of his judgment in *Gibbons & Heyrana v Desilva*, that when a party asks a court to exercise its discretion in relation to setting aside a default judgment it is "*incumbent on* [the party so applying] *to be full and frank in his evidence*". The necessary corollary of this statement is that any failure in that regard by a defendant will weigh against the Court exercising its discretion in their favour. Indeed, this was one of the reasons relied on by Bell JA in dismissing the appeal in *Gibbons & Heyrana v Desilva* and upholding the Chief Justice's decision to refuse to set aside the default judgment in that case. Mr. Stevens submitted that the principle elucidated by Bell JA is of application to the facts of this application in light of the contents of the First Defendant's Affidavit.

The Application of the law to the facts of this case

45. The SOC sought a declaration that the Defendants wrongfully converted chattels belonging to Tia's estate, namely the Missing Chattels, Disputed Chattels and the Puffin[3] items.

Missing Chattels

46. Mr. Stevens submitted that the Plaintiff's case on the Missing Chattels is as follows:
    a. Each of the Missing Chattels was clearly identified and photographed in Tia's House during the inventory process conducted by the First Plaintiff and Carey Olsen in May 2019, and during the pack of Tia's possessions in July 2019[4].
    b. No chattels were taken from Tia's House by BEST Shipping in July 2019 unless packed in one of the 173 securely sealed boxes that were shipped by the First Plaintiff to the United States[5].
    c. There is no evidence that any of the 173 boxes of Tia's belongings shipped to the US were opened or tampered with during transit[6].
    d. None of the 173 boxes shipped to the United States contained the Missing Chattels[7].
    e. The only credible explanation for this is that the Missing Chattels must still be located in Tia's House or have been moved to another location by the Defendants.

47. Mr. Stevens submitted that from the moment the Defendants were challenged, their position on the Missing Chattels has been evasive. He referred to *inter partes* correspondence in February and March 2020. The explanation from the Defendants was that the Plaintiffs had packed and shipped what they wanted, which included the "*majority*" of the Missing Chattels.

[3] In respect of the items associated with the Puffin, the Plaintiffs conceded that they did not wish to proceed with this aspect of the case and would consent to the judgment in default being varied to exclude the Puffin items.
[4] paragraph 49 of DM1 and paragraphs 10 to 17 of the Affidavit of Ms. Waddell-Dublin
[5] affidavit of David Sousa of BEST Shipping, in particular paragraphs 5 to 10
[6] paragraph 10 of Mr. Sousa's affidavit, paragraphs 45 to 47 of DM1 and paragraph 28 of DM2
[7] paragraphs 45-51 of DM1 and paragraph 28 of DM2

48. Mr. Stevens submitted that the Defendants' bare assertion that they have no knowledge of the whereabouts of the Missing Chattels is not sufficient to meet their burden of persuading the Court that there is a real likelihood that they will succeed if permitted to defend the Plaintiffs' claim in relation to the Missing Chattels.

49. Mr. Stevens submitted that the credibility of Mark Andrew is undermined by the clear evidence that that the Missing Chattels were in Tia's House during the inventory process and during the pack, would not have been removed by BEST Shipping unless contained in one of the 173 sealed boxes and were not found in any of those boxes which arrived in Massachusetts. Further, Mr. Stevens was critical of the fact that Marsha Andrew, who the Plaintiffs allege was heavily involved in the packing process and supervised BEST Shipping in the part of Tia's House where the Missing Chattels were located, had failed to file an affidavit of her own. Instead the Defendants rely on Mark Andrew speaking for his wife, which is evidence Mr. Stevens says the Court should reject because it means that Mark Andrew was never out of his wife's presence during the entirety of the three days that the packing took place.

Disputed Chattels

50. Mr. Stevens submitted that the Plaintiffs' case on the Disputed Chattels is as follows:
    a. Certain items of Tia's known by the Plaintiffs to exist as a result of conversations with family members and/or photos of the relevant items in Tia's House could not be located by the First Plaintiff during the inventory process.
    b. Through Carey Olsen the Plaintiffs wrote to the Defendants in February 2020 concerning the whereabouts of the Disputed Chattels.
    c. Other than Tia's wedding ring, the Defendants say that the balance of the Disputed Chattels (being two Lladro porcelain statues, a Cloisonné artwork of two herons and a framed painting of a zebra) were at some point in time gifted by Tia to various family members and therefore those items do not form part of Tia's estate.
    d. There is no evidence to corroborate the Defendants' claim that the above items were gifted by Tia as claimed and therefore the Defendants have no defence to the Plaintiffs' claim of conversion.

51. Mr. Stevens submitted that the Defendants' position on the alleged gifts made by Tia is contradicted by the contemporaneous documentary record and should be rejected. In respect of the Lladro statues, he referred to the Defendants' explanation that both Tia and David Andrew gifted them to Mark Andrew prior to David Andrew's death in 2012. However, a "**Gift List**" dated 23 February 2016 stated that Tia alone wished to gift the Lladro statues to Marsha Andrew. Mr. Stevens submitted that the Plaintiffs doubted that the Gift List was produced with Tia's knowledge and consent as there is no signed copy. Further, in any event, Mark Andrew's email dated 23 February 2016 contradicted his sworn evidence in this case on this point, namely that Tia would have no reason to gift something in 2016 that she had already given to Marsha Andrew. Mr. Stevens submitted that the same circumstances apply to the Zebra painting which appeared on the Gift List in 2016 but which Mark Andrew stated was already gifted to his daughter Emily prior to Tia's death. Mr. Stevens submitted that these contradictions cast significant doubt on the reliability of Mark Andrew's affidavit evidence.

52. Mr. Stevens submitted that there is no evidence in support of the Defendants' position on the Disputed Chattels. He argued that Mark Andrew only makes assertions about the alleged gifts, had refused to provide explanations about them at the pre-action stage, has failed to explain the circumstances of them, and has made no attempt to explain the inconsistencies with the Gift List. Further, Marsha Andrew and Emily have provided no affidavit evidence of their own. Thus, as it was the Defendants burden to file credible affidavit evidence demonstrating a real likelihood that they succeed in their defence, the affidavit evidence of Mark Andrew is plainly unsatisfactory and has failed to discharge the burden.

Mark Andrew's failure to provide full and frank evidence

53. Mr. Stevens submitted that any failure to provide full and frank evidence will be a significant factor for the Court to take account of in deciding how it should exercise its discretion. He submitted that although Mark Andrew in his affidavit states that he was never served with the Writ, this is false as there is an Affidavit of Service filed by the

process service stating that he was served at Tia's House as well as a handwritten notice of such service on him. Also, he referred the Court to the Memorandum of Appearance filed on 29 July 2020 on behalf of both Defendants.

54. Mr. Stevens submitted that a false statement on oath is a serious smatter that fatally undermines the credibility of the entire evidence of Mark Andrew in this application and thus the Court cannot rely on the assertions of purported fact in his affidavit.

Reasons for the Defendants' failure to file a Defence

55. Mr. Stevens referred to the two reasons provided by Mark Andrew as to why the Defendants failed to file a Defence in this action, namely; (a) he did not understand that he had to file a Defence; and (b) the Defendants were extremely busy dealing with various personal and professional matters. He argued that in following *Andrew Mitchell MP v News Group Newspapers Limited* and *Gibbons & Heyrana v Desilva* these excuses are not good reasons for the failure to file a Defence such that the Court should grant relief.

56. In respect of the Defendants not knowing that they had to file a Defence, Mr. Stevens submitted that that was simply not credible as the Defendants have at all times been represented by competent counsel, who entered an appearance in this action on 29 July 2020. Also, the Writ clearly stated that they must file a Defence within 14 days of entering an appearance failing which judgment may be entered. He submitted that the explanation of Mark Andrew that their counsel "may have explained that we had to file a defence" but that he cannot remember either way is extraordinary and goes to the heart of Mark Andrew's lack of credibility.

57. In respect of the explanation by Mark Andrew that he was busy dealing with other matters, Mr. Stevens submitted that for reasons of public policy, the rule of law and the proper administration of justice, this excuse can never be regarded as a good reason for a party's failure to abide by Court rules and deadlines. He argued that if the Defendants needed more time to file a Defence then they could have filed a Time Summons and affidavit. As the first explanation came nine months after the Summons in the affidavit of Mark Andrew, then the Court should consider this as a clear breach of the requirement to file an affidavit

of merits in support of the Summons when considering all of the circumstances relevant to the exercise of its discretion.

The Law on setting aside a regular default judgment

58. The Rules of the Supreme Court ("**RSC**") Order 13 rule 9 states:

> "*The Court may on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.*"

59. The Supreme Court Practice 1999 (the "**White Book**") at 13/9/7 states:

> *"For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. For the meaning of this expression see …. Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc, The Saudi Eagle [1986] 2 Lloyd's Rep 221 at 223, Ca and note 13/9/18, "Discretionary powers of the court" below".*
>
> *On the application to set aside a default judgment, the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false (Vann v. Awford (1986) 83 L.S. Gaz 1725."*

60. The White Book at 13/9/18 states the following on the Court's discretionary power:

> *"The discretionary power to set aside a default judgment which has been entered regularly is unconditional and the court should not lay down any rigid rules which deprive it of jurisdiction. The purpose of the discretionary power is to avoid the injustice which many be caused if judgment follows automatically upon default. The primary consideration in exercising the discretion is whether the defendant has merits to which the Court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside judgment if the defendant has no defence, and because, if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. The forgoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in Alpine Bulk Transport Co Inc v v Saudi Eagle Shipping Co. Inc, The Saudi Eagle where the earlier cases are summarised. From that case, the following propositions may be derived:*
>
> > *"(a) It is not sufficient to show a merely 'arguable defence" that would justify leave to defend under O. 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.*
> >
> > *"(b) If proceedings are deliberately ignored this conduct although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside."*

61. In *Strachan v The Gleaner Company & Anor (Jamaica)* [2005] UKPC 33, the Privy Council approvingly cites *The Saudi Eagle* authority to set aside default judgments. At paragraph 21 it repeats the avoidance of any strict rules regarding the Court's power to set aside:

> *"A default judgment is one which has not been decided on the merits. The Court have jealously guarded their power to set aside judgments where there has been no determination on the merits, even to the extent of refusing to lay any rigid rules to govern the exercise of their discretion." See Evans v Bartlam [1937] AC 473 where Lord Atkin (discussing the provisions of the English rules in substantially the same terms said :*
>
> > *"The principle obviously is that, unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."*

62. The propositions in *The Saudi Eagle* were recently applied in *Gibbons & Heyrana v Desilva* [2020] Sc (Bda) 43 Civ where Hargun CJ stated:

> *"18. The editors of the Supreme Court Practice go on to state that the preferred view is that unless potentially credible affidavit evidence demonstrates a real likelihood that a defendant will succeed on fact no "real prospect of success" is shown and relief should be refused.*
> *19. In ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472, Potter LJ considered the issue of burden of proof in relation to the requirement of showing "realistic prospect of success":*
>
> > *"8. "I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in the Saudi Eagle that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable, as was formerly the case under R.S.C. Order 14…*
> > *9. In my view, the only significant difference between the provisions of CPR 24.2 and 13.3(1), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. That being so, although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under CPR 13.3(1) may encounter a court less receptive to applying the test in his favour than if he were a defendant advancing a timely ground of resistance to summary judgment under CPR 24.2.*
> > *10. It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in Swain v Hillman*

[2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and Three Rivers DC v Bank of England (No.3) [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95]."

20. It follows that in order to succeed in setting aside a default judgment, the defendant has the burden of proof of establishing that he has a realistic prospect of success [on his defence]. *A realistic prospect of success is one which carries some degree of conviction, and must be more than merely arguable. That burden is ordinarily discharged by the defendant filing "credible affidavit evidence" demonstrating a real likelihood that he will succeed in his defence. In the circumstances where there is a dispute on the facts, the Court is not bound to accept everything said by a party in his affidavit in support of the application to set aside a default judgment. The Court is entitled to consider whether there is real substance in the assertions being made by the defendant.*" [emphasis added]

63. In *Gibbons & Heyrana v DeSilva* in which the Plaintiffs obtained default judgment due to the defendant's counsel's preoccupation with a complex murder trial causing him to inadvertently fail to file a defence, Hargun CJ stated:

"26. Mr. McCosker, who appears for the Plaintiffs, argues that the Court is entitled to look at the Defendant's conduct and statements and ascertain if, in the circumstances, it should disentitle him from proceeding. In this regard, he relies upon the recent English cases which have made it clear that an attorney's failure to properly prioritise between competing client interests will not amount to a "good reason" to set aside a default judgment. In particular he relies upon the decision of the English Court of Appeal in Andrew Mitchell MP v News Group Newspapers Limited [2013] EWCA Civ 1537 at [41] where the Court stated:

"If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason… But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They

should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event."

Analysis of the Defendant's Applications

64. In my view, the Defendant's Applications to set aside the default judgment judgment should not be granted for several reasons.

No real prospect of success

65. First, in my view, the Defendants have failed to discharge the burden that their defence has a real prospect of success as set out in the *Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc* case. To my mind, in applying the reasoning of Hargun J in *Gibbons & Heyrana v Desilva* there is no real prospect of success as the evidence provided fails to carry some degree of conviction and is not more than merely arguable. Further, in my view, the affidavit evidence of Mark Andrew fails to establish credible affidavit evidence demonstrating a real likelihood that he will succeed in his defence.

66. In respect of the Missing Chattels, the Plaintiff's case is that the items were inventoried at Tia's House, then left there to be boxed and shipped to the US in 173 sealed boxes. Those boxes arrived in the US untampered, but none of the Missing Chattels were in the 173 boxes. The evidence is that Mark and Marsha Andrew reside at Tia's House and were residing there during the packing by BEST Shipping. The affidavit evidence of Mark Andrew suggests that the Missing Chattels went missing during the trucking process after the boxes left Tia's House and somewhere during the shipping process.

67. However, I agree with Mr. Stevens that the only credible explanation is that the Missing Chattels must still be located in Tia's House or have been moved elsewhere by the

Defendants, that is, after the inventory process was completed but before BEST Shipping boxed the chattels. Further, their explanations have been described by the Plaintiffs as evasive since the start of the correspondence between their counsel. Additionally, there has been no affidavit evidence from Marsha Andrew who the Plaintiffs assert was present during the packing process. Thus, it follows for me that the Defendants bare assertions that they have no knowledge of the whereabouts of the Missing Chattels is not sufficient to meet their burden of establishing that there is a real likelihood that they will succeed. The Defendants' defence lacks conviction.

68. I have considered the Defendants' arguments that that Plaintiffs' case concerns claims with no real evidence and that it is speculative. I disagree. The evidence in support of the Plaintiffs' case focused on the inventory that was carried out by the law firm personnel, the boxing of the contents into the 173 boxes by BEST Shipping and their shipping and arrival in the US untampered. In applying the case of *Swain v Hillman* on how to approach the "real prospect of success" test, in my view the Defence in respect of the Missing Chattels is fanciful rather than real, especially in the context of the contemporaneous records of the inventory and the packing and shipping.

69. In respect of the Disputed Chattels, the Plaintiffs' case is that the Disputed Chattels were known to be in Tia's House but were no longer there during the inventory process. The Defendants' explanation was that the Disputed Chattels had been gifted to other people before Tia's death and David Andrew's death in 2012. However, the Plaintiffs argue that the Lladro Statues and the Zebra painting appear on a Gift List in 2016. I agree with Mr. Stevens that the affidavit evidence of Mark Andrew fails to establish a real prospect of success in the Defendants' defence as it is a bare assertion of the gifts. There has been no affidavit evidence from the people who received the gifts explaining any context or reasons for the gifts which would have carried some weight in this assessment.

70. I have considered the Defendants' arguments that the Plaintiffs' case on the Disputed Chattels lacks evidence and is merely speculative. Again, I disagree. In my view, the Plaintiffs provided evidence that the Disputed Items did exist in Tia's House and that

records show that they appear on the Gift List. This calls for an explanation by the Defendants and in my view the Defendants' affidavit evidence of bare assertions of gifting amounts to a fanciful prospect of success.

Reasons for Defendants failure to file a defence

71. I have considered the reasons provided by the Defendants for their failure to file a Defence. In my view, those reasons are not good reasons primarily because the Defendants were served with the Writ and had instructed counsel, who had thereafter caused an appearance to be entered on their behalf. It seems to me that an inference can be properly drawn from that that the Defendants knew that the next step was that a Defence had to be filed, failing which some other litigation step would have to be performed. As they were already involved in litigation in the Conveyance Case, I am unable to accept that they thought that nothing should be done, especially as they had instructed counsel.

72. In respect of Mark Andrew's explanation about his personal life, his son's wedding, his business and the difficulties of the Covid pandemic, I do not accept that these are good reasons for not filing a Defence. The case of *Gibbons & Heyrana v DeSilva* cited the case of *Andrew Mitchell v News Group Newspapers Limited* which provided an example of a solicitor failing to file documents. The Court stated that merely overlooking a deadline on account of overwork or otherwise was unlikely to be a good reason. On the contrary, a good reason might be a party suffering from a debilitating illness or being involved in an accident. I agree with Mr. Stevens that for reasons of public policy, the rule of law and the proper administration of justice these excuses can never be regarded as a good reason for party's failure to abide by Court rules and deadlines.

Full and frank disclosure

73. I have considered whether Mark Andrew has made full and frank disclosure to the Court as Mr. Stevens complains that he denies being served with the Writ. However, the process server filed an Affidavit of Service of the Writ in this matter. In my view, it appears unlikely that a reasonable person would forget that a process server came to their house to

serve a writ on them personally. Mark Andrew stated that he is not familiar with litigation, which to my mind makes it all the more likely that he would remember being served with Court documents. Interestingly, counsel was instructed as a result of service of the Writ, as an appearance was entered. In light of these reasons, I am not satisfied that Mark Andrew has given full and frank disclosure to the Court on this point.

74. This view is also supportive of my findings that the reasons given by Mark Andrew do not amount to good reasons for failing to file a Defence. Also, I remind myself that any failure by a defendant to provide full and frank evidence will weigh against the Court exercising its discretion in their favour.

Barristers' Code of Professional Conduct 1981

75. Mark Andrew stated in his evidence that opposing counsel never notified his counsel prior to seeking Default Judgment and he had been advised that it was common practice to do so. This fact, which is unchallenged, caused me some concern.

76. The Barristers' Code of Professional Conduct 1981 (the "**Code**") states a follows:

> *"113(2) Where a barrister knows that another barrister is concerned in a case he should not proceed by default without enquiry and warning."*

77. In my view, the rule sets out that a default judgment should not be entered when there is counsel involved. Instead, counsel who is desirous of filing a default judgment should inquire with opposing counsel and give them a warning of the intention to file the same. Thereafter, the delinquent party can address the matter, failing which default judgment can be entered.

78. The evidence shows that counsel for the Plaintiffs was aware that the Defendants had counsel, as an appearance had been entered on behalf of the Defendants. In my view, the Plaintiffs' counsel should have given a warning to the counsel for the Defendants.

79. In light of these circumstances, I recognise that there is a tension between the case law on setting aside a Default Judgment and the Code. On the one hand, if the Plaintiffs' counsel had abided by the Code and given a warning, a Defence may or may not have been filed. If a Defence was filed then there would be no need for this application. If a Defence was not filed then Default Judgment would have been entered. On the other hand, Default Judgment was entered without warning. In resolving this tension, I am drawn to the White Book passage where it states that the "*the major consideration is whether the defendant has disclosed a defence on the merits".* That passage continues *"and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false (Vann v. Awford (1986) 83 L.S. Gaz 1725".* In light of these reasons, I will be guided by the major consideration, which is whether the Defendants have disclosed a defence on the merits, a point which I have already resolved in the Plaintiffs' favour.

Conclusion

80. For the reasons above, I refuse the Defendants' application to set aside the Default Judgment.

81. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiffs against the Defendants on a standard basis, to be taxed by the Registrar if not agreed.

Dated 18 February 2022

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT