

Clarity provided on Bermuda court's discretionary power to set aside regular default judgments

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What has happened?

In two recent judgments Bermuda's Chief Justice Narinder Hargun has clearly articulated the applicable Bermuda law principles which the Court should apply when considering an application by a defendant to set aside a regular default judgment.

The key principles to note are as follows:

1. In making the application it is a defendant's burden to establish that its defence to the claim has a realistic prospect of success, which is one that carries some degree of conviction and is more than merely arguable.
2. The burden is discharged by a defendant filing credible affidavit evidence in support of its application which demonstrates a real likelihood that it will successfully defend the claim.
3. While (2) above will be the dominant factor in considering an application to set aside a regular default judgment, the Court can also take into account other factors in exercising its discretion including (i) the precise reason why the defendant did not enter an appearance and/or file a defence within the requisite timeframe; and (ii) any undue delay in bringing an application to set aside.

In both *Gibbons and Heyrana v DeSilva* [2020] SC (Bda) 43 Civ (6 October 2020) and *A et al v Cumberbatch* [2020] SC (Bda) 50 Civ (10 Nov 2020) the Chief Justice refused applications to set aside regularly obtained default judgments on the basis

that the defendants' affidavit evidence did not demonstrate that there was a real likelihood of their defences succeeding at trial.

Why is this important?

Both judgments bring in to stark relief the challenges and risks that confront defendants who do not comply with their obligations in responding to claims made against them by plaintiffs in the Bermuda Supreme Court and then have default judgment entered against them as a result.

While the general rule in commercial and civil matters is that it is a plaintiff's burden to prove the merits of its case against a defendant on the balance of probabilities, once a regular default judgment has been entered the burden of proof switches entirely to a defendant, which burden requires the defendant not just to show that it has an *arguable defence*, but that there is a *real likelihood that its defence is likely to succeed at trial*.

In short, by allowing a regular judgment in default to be entered a defendant in effect forfeits the right to require a plaintiff to prove its case on the merits until such time as the default judgment is set aside.

What is a regular default judgment?

A regular default judgment is one which cannot be impeached for any procedural irregularity in the manner in which it was

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sought and obtained. A classic example of an *irregular* default judgment is one which was obtained without the plaintiff having been validly served with originating process. The legal principles applicable to the setting aside of irregular default judgments are slightly different and are not addressed in this bulletin.

“Realistic prospect of success”

Chief Justice Hargun summarised a defendant’s burden in *Gibbons* at paragraph 20 as follows:

“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. A realistic prospect of success is one which carries some degree of conviction, and must be one 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.”

The Chief Justice restated these principles a month later in *Cumberbatch*.

The court may consider other factors

In *Gibbons* the Chief Justice held that while credible affidavit evidence was the “dominant factor” in deciding whether to set aside a regular default judgment, the Court could also take into account other factors – in line with the court’s broad discretion under Order 13 rule 9 of the Rules of the Bermuda Supreme Court 1985 (RSC) as well as its duty to deal with cases justly.

Delay

The Chief Justice accepted that a defendant’s delay in bringing a set aside application was one factor the Court could take into account in making its decision. But on the facts of *Gibbons* the Chief Justice held that as the delay was largely explained by a series of “unnecessary” applications by the plaintiffs he could not in those circumstances consider delay as a legitimate reason to set aside the default judgment.

It seems clear from the Chief Justice’s analysis in *Gibbons* that a delay in bringing the application will only be a relevant factor if the delay is entirely or predominantly the fault of the defendant, and even then if a defendant can demonstrate a real likelihood of its defence succeeding then, absent evidence that the setting aside of the default judgment would cause the plaintiff substantial injustice, the relevance of the delay is likely to be limited.

Oversight by a defendant’s legal counsel

As was the case in *Gibbons*, in the event that a regular default judgment is entered against a defendant because a defendant’s legal counsel fails within the requisite timeframe to (i) enter an appearance on behalf of the defendant in response to a claim and/or (ii) file a Defence, that oversight in and of itself will not generally be considered a sufficient reason for the default judgment to be set aside.

Adopting the English Court of Appeal’s reasoning in *Andrew Mitchell MP v News of the World Group Newspapers* [2013] EWCA Civ 1537, the Chief Justice held that an attorney overlooking a deadline can be taken into account by the Court in the overall exercise of its discretion, but by itself such an event should not be regarded as a good reason for setting aside a regular default judgment.

Deliberately ignoring proceedings

While not applicable to the facts in either *Gibbons* or *Cumberbatch*, in both cases the Chief Justice also referred to the principle, derived from the English case of *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle* [1986] 2 Lloyd’s Rep 221 CA, that if a defendant deliberately ignores a claim then, while that defendant is not subject to an estoppel at law, the Court must still consider such conduct “in justice” before exercising its discretion to set aside a regular judgment. In other words, in the event that:

- i. a defendant deliberately ignores a claim and then subsequently applies to have a regular default judgment set aside; and
- ii. the plaintiff can demonstrate that it would suffer significant injustice if the defendant’s application was granted.

Then the risk for a defendant is that the Court could exercise its discretion to refuse its application (in certain circumstances even if the defendant can demonstrate a real likelihood that its defence would succeed).

Continued



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