



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2018 No 63

**BETWEEN:**

**RONALD JAMES THORNE and LYNNE C THORNE**

**Plaintiffs**

**and**

**WESTPORT TRUST COMPANY LIMITED**

**Defendant**

*Application to set aside judgment in default of defence*

*Appearances*

*Bruce Swan* of Swan and Associates for the plaintiffs

*Ryan Hawthorne* of Trott & Duncan Limited for the defendant

Date of hearing: 16 February 2026

Date of Order: 16 February 2026

Date of Reasons: 19 March 2026

Martin J in Chambers

### **Reasons for Order**

#### **Introduction**

1. On 16 February 2026 the court set aside judgment in default of defence in this matter and gave directions for the service of the defence and the onward conduct of the proceedings. The court indicated that brief reasons would be given to support this decision and these are those reasons.

## **Background**

2. The plaintiffs are the principal beneficiaries of a family trust that was established by the first plaintiff for their benefit. The defendant is the trustee of that trust. The purpose behind the trust was to hold the shares of a company which operated a business as well as the title to the property from which the business operated (“the premises”). The plaintiffs managed and operated the business and were employed by the business. The premises and the shares were acquired by means of a bank loan to the defendant secured by a mortgage over the premises.
3. Legal title to the premises was held by the trustee and therefore the defendant was necessarily a party to the mortgage. The plaintiffs were the guarantors of the bank financing. The debt was apparently serviced from the income of the business. The business ran into financial difficulty, and the business was unable to sustain the mortgage payments to the bank. Efforts were made to regularise the position, but the arrears grew and eventually the bank took steps to enforce its security interest in the premises.
4. Before enforcing its security, the bank gave both the defendant (as trustee) and the plaintiffs (as guarantors) an opportunity to sell the property in order to repay the debt, but those efforts were not successful.
5. The details of the steps that were taken by the trustee and the guarantors to realise the equity value in the premises and reduce or discharge the bank debt are the subject of dispute, so it is not appropriate to go into details as to the rival contentions at this stage. It will suffice to say that the plaintiffs (as beneficiaries) have complained that the defendant (as trustee) failed to take appropriate steps to realise the property and/or minimise the risk of loss to the trust resulting from the enforcement of the debt obligation by the bank. It is alleged that the defendant’s failures as trustee amounted to a breach of the duties of trustee to preserve and protect the value of the trust assets for the benefit of the plaintiffs. The plaintiffs seek to recover damages for the loss to the trust as a result of the alleged breaches of trust.

## **Procedural history**

6. The plaintiffs issued a generally endorsed writ of summons dated 2 March 2018 seeking damages for alleged breaches of the Deed of Indenture of Settlement dated 30 June 2010. The defendant entered an appearance to the writ on 8 March 2018.
7. By summons filed on 16 July 2018, the defendant sought a dismissal of the writ as no statement of claim had been served. On 31 August 2018, the plaintiffs filed and served a statement of claim and by a Consent Order dated 17 September 2018, the defendant withdrew its application to dismiss the claim.
8. However, the defendant failed to file a defence within the required time prescribed by the RSC. On 27 November 2018, the plaintiffs applied for judgment in default of defence. Judgment in Default of a Defence was entered on 8 February 2019 (the “Default Judgment”).
9. By Summons dated 10 April 2019, the defendant applied to set aside the Default Judgment supported by a draft Defence. Unfortunately, the first plaintiff passed away in 2019. The defendant did not pursue the application to set aside out of respect for the plaintiffs. The affidavit of Mr Hawthorne in support of the set aside application exhibited a Management

Agreement executed between the plaintiffs (as beneficiaries) and the defendant (as trustee) as to the management of the trust assets, including the business and the premises.

10. Thereafter, no steps were taken by the defendant to progress that application, and no steps were taken by the plaintiffs to quantify the losses alleged. There followed some sporadic communications on a without prejudice basis, and eventually the application to set aside was brought on for hearing for directions. The hearing for directions took place on 23 October 2025, and leave was given to the defendant to file further evidence in support of the application to set aside judgement in default and for the plaintiffs to respond.
11. A procedural issue arose at the Directions Hearing about the identity of the first plaintiff, and it is proposed that the Estate of Ronald Thorne is to be substituted as the first plaintiff and that the second plaintiff is the “*Intended Executrix of the Estate and she is providing the instructions on behalf of the estate.*” The defendant does not object to that substitution.
12. An Affidavit of Perry P. Trott, a director of the defendant sworn on 30 October 2025 was filed and served in which Mr. Trott confirmed the factual assertions made in the draft Defence and exhibited the Indenture of Settlement. The plaintiffs did not file any evidence in response and so have filed no evidence for the Set Aside Application.

#### **The grounds for the application to set aside the judgment**

13. The trustee failed to enter a defence within the time provided by the rules. The explanation for this appears to be that there was a staff change within the trustee and the trustee’s management were unable to obtain clear details as to what had happened so as to be able to prepare a proper defence.
14. The defendant trustee now seeks to set aside the default judgment on the grounds that there is a good defence to the claim. The nature of the defence is (in essence) that there is a provision within the trust deed which provides for the exoneration and indemnity of the trustee for any breach of trust which falls short or fraud or deliberate wrongdoing. In addition, there is a similar provision contained in the management agreement which provides exoneration and indemnity except for wilful fraud or wrongdoing.
15. The defendant relies upon these provisions as a complete defence to the claims made and points out that no allegations have been made against the trustee that would amount to wilful fraud or wilful wrongdoing or dishonesty such as to deprive the trustee of the benefit of the exoneration and indemnity provisions. Accordingly, the defendant says that there is a good defence and that it ought to be allowed to put in a defence and that the allegations contained in the statement of claim should go to trial.
16. It should also be noted that the facts upon which the alleged breaches of trust are based are disputed, so that the defendant says that even if there were no exoneration or indemnity, the defendant would not be liable for breach of duty. However, the defendant says that the case is not one which can ever succeed because of the effect of the exoneration and indemnity provisions in the trust deed and the management agreement.

17. The plaintiffs oppose the application primarily on the grounds that it is too late to set aside the judgment, which was entered in February 2019, and it was time to move on to the assessment of damages now seven years later. There was no dispute that the clauses referred to were in the terms described above. It was also accepted that no allegation of wilful misconduct or fraud has been made against the defendant in the pleadings.

### **The legal standard for setting aside a default judgment**

The test for setting aside default judgment is not controversial. In **Adam Gibbons v Sean Desilva**<sup>1</sup> Hargun CJ (as he then was) considered the principles and cited paragraph 13/9/18 of the Supreme Court Practice 1999 at [17]:

*“The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on 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 a 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.”*

Hargun CJ then concluded at [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.”*

### **Exoneration and indemnity clauses**

18. It is very well established that exoneration clauses and indemnity provisions are enforceable in the context of company bye laws and deeds of trust, and if they are properly executed and their terms are applicable, they afford a complete defence to claims for breach of duty,

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<sup>1</sup> [2020] SC (Bda) 43 Civ

provided the conduct alleged falls short of fraud or dishonesty (or any other specified conduct such as wilful default or wilful neglect which are the most common examples)<sup>2</sup>.

19. In this case, no allegations of conduct which might qualify as wilful fraud or wrongdoing have been made which might displace the protection afforded by the exoneration and indemnity provisions. Any such allegations must be pleaded specifically and with due particularity<sup>3</sup>.
20. It may be that amendments may be made to the pleaded claims in the future, but for present purposes there are no allegations of fact which would support a claim to neutralise the effect of the exoneration and indemnity provisions. Even if such claims had been made, the defendant would normally have the right to a trial on the merits as to whether those claims were made out or to determine if the exoneration provisions are sufficient to defeat the claim on the particular facts of the case.
21. In the absence of any pleaded claims of wilful misconduct amounting to a breach of duty, it must follow that the defendant has a realistic prospect of success or a real likelihood of success at trial. Therefore, the defendant has discharged the burden of showing that it has a realistic prospect of success on the merits. It is to be stressed that the court is not here making any determination of the ultimate merits of the claim. Those merits will be determined by an examination of the relevant facts, after an assessment of the proper construction of the terms of the relevant exoneration clauses, hearing the evidence of witnesses and reaching its conclusion at a trial, having taken into account the submissions of the parties.

## Delay

22. The court has also considered the question of delay. The plaintiffs complain that the application has only lately been pursued and the court should not set aside a judgment after the passage of such a significant period of time. It is rightly said that a defendant must act with all due diligence to protect his or her rights, and there must be an end to litigation, so a judgment in default should not be set aside unless the defendant has acted promptly.
23. As to this objection, in this case, the court has taken into account the following factors: (i) the application to set aside was filed with due despatch and without inordinate delay (about 8 weeks) (ii) the reason for the delay was inadvertence due to a staff change at the defendant (iii) the plaintiffs did not rely upon the judgment and are not otherwise prejudiced by the setting aside of the judgment (iv) the plaintiffs have taken no steps to quantify their judgment by seeking an assessment of damages (v) the action has in effect been in 'limbo' since 2019 for reasons which are entirely understandable, namely the passing of the first plaintiff.
24. In this assessment, the court also takes into account that in claims of breach of duty of persons in a fiduciary position, justice normally requires that the defendant be given the opportunity to have a trial, and for the court to make findings of liability based on facts and law that have

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<sup>2</sup> **Barnsley v Noble** [2016] EWCA 799; **Global Distressed Alpha Capital Limited v Herman** [2023] CA (Bda)12 Civ. **Viscount of the Royal Court of Jersey v Shelton** [1986] 1 WLR 985 PC; **Armitage v Nurse** [1998] Ch 241.

<sup>3</sup> RSC Orders 7 7A 12 and 19: **Kingate Global Fund Ltd v PricewaterhouseCoopers** [2014] SC (Bda) 83 Com

been tested at a full hearing rather than establishing liability purely based on a default in filing a pleading. Therefore, the effect of the delay in this case does not justify the court in refusing the defendant the opportunity to defend the claim on the merits.

25. In the circumstances, the court considers that it is both just and appropriate to set aside the judgment in default and to allow the defendant to put in a defence and to give directions for the timely onward conduct of the matter to a trial.
26. The court therefore set aside the judgment in default and ordered service of the defence within 14 days with the plaintiffs to have 14 days to serve any reply. The court reserved the costs of the application to abide the outcome of the trial.

Dated this 19th March 2026



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**THE HON. MR. JUSTICE ANDREW MARTIN**  
**PUISNE JUDGE OF THE SUPREME COURT**