IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

CL 61/2023

BETWEEN

QUEEN OF WORLD LTD — Plaintiff

And

KAROLINA RYCARDO COELHO — Defendant

Before: Registrar Narendra J Lalbeharry

Appearances: Hon. Akierra Missick for the Plaintiff
Mr. Martin Green for the Defendant

Hearing Date: 31st October 2023

Venue: Virtual

Delivered: 1st December 2023

Default Judgment – Setting aside Default Judgment – Reasonable prospect of Success – Restraint of Trade clause – Unilateral Variation of Contract – Meritorious Defence

Cases

1. *The "Saudi Eagle" [1986] 2 Lloyd's Law Reports 221*
2. *Evans v Bartlam [1937] AC 473*
3. *Burns v Kendel [1977] 1 Lloyd's Rep 554 and Vann v Awford*
4. *McCullough v BBC [1996] NI 580*
5. *Day v RAC Motoring Services Ltd [1999] 1 All ER 1007.*
6. *Vann v Awford (1986) Times, 23 April 83 LS Gaz 1725*
7. *Evans v Bartlam [1937] 2 All ER 646, [1937] AC 473*
8. *Tracy v O'Dowd and others [2002] NIJB 124*
9. *Brian Been v The Turks and Caicos Islands Tourist Board (CL 98 of 21) [2023] TCASC 51 (21 February 2023)*
10. *Osias Joseph dba Midtown Mall -v- Devon Hayles dba Platinum Fitness and as Fit X Gym (CL-44/21) [2023] TCASC 58 (24 April 2023)*

JUDGMENT

BACKGROUND:

1. The application before the Court is made pursuant to Order 13 r 9 seeking an Order setting aside the Judgment entered in Default of Defence in this matter on the 30th of August 2023.

2. By Writ and Statement of Claim filed on the 12th of May 2023 the Plaintiff alleged that the Defendant was employed pursuant to a written contract dated 1st October 2022 and that the Defendant resigned from the Plaintiff's company effective from 31st December 2022.

3. At paragraph 5 of the Statement of Claim the Plaintiff stated that by email dated 3rd January 2023 the Plaintiff wrote to the Defendant terminating the Defendant's employment. The reason advanced was the Defendants failure to respond to a request for documentation necessary to renew her work permit, and that subsequently the Plaintiff received a resignation letter from the Defendant on 4th January 2023.

4. At paragraph 6 of the Statement of Claim the Plaintiff re-states clause 8 of the said contract which states:

> **"Non - Competition and Confidentiality**
>
> As an employee you will have access to confidential information that is the property of the employer. You are not permitted to disclose this information outside of the company
>
> During your time of employment with the employer you may not engage in any work for another employer that is related to or in competition with the company and outlined in the job description. You will fully disclose to your employer any

other employment relationship that you may seek and which may be granted provided that (a) it does not detract from your ability to fulfill your duties and (b) you are not assisting another organization or yourself in competing with the employer.

It is further acknowledged that upon termination of your employment you will not enter into competition with your employer and solicit business from any of the employers clients for a period of at least 12 months."

5. The Plaintiff alleges in breach of this clause the Defendant has been providing competitive services at Hair Affair Beauty Salon in Morris Plaza, Providenciales to the Plaintiff's customers and has been soliciting the Plaintiff's clientele for services under the said salon and is using the Plaintiff's confidential business information for her own profit or benefits at the said salon. As a result, the Plaintiff claims damages and an injunction restraining the Defendant from acting in breach of the said contract.

6. After several failed attempts as set out in the affidavit of Demarko Holbert the Defendant was served with the Writ and Statement of Claim on the 27th of July 2023 as shown by an affidavit of service of Shashona Williams. On the 3rd of August 2023 the Defendant entered an Acknowledgement of Service within the stipulated time.

7. On the 30th of August 2023 the Plaintiff obtained judgment in the Default of Defence against the Defendant with damages to be assessed. On the 28th of September approximately one month after judgment was entered, Mr. Green acting on behalf of the Defendant filed an application to set aside default judgment on grounds as set out in the affidavit of the Defendant.

8. The Defendant stated in her affidavit that she was served with the Writ during a hospital appointment with her child. She stated shortly thereafter she attempted unsuccessfully to obtain legal aid and as an alternative was referred to the Bar Association Advice Clinic. She further stated that she unknowingly spoke to the Attorney for the Plaintiff Ms. Missick who indicated she could not assist and directed her to speak to another Attorney.

9. She further states that she mistakenly informed her attorney that she was served with the Writ on the 3rd of August 2023. She also stated that based on this fact she instructed her attorney to file the defence on or before 31st August 2023 and when he attempted to do so he was informed that default judgment had already been entered on the 30th of August. In her affidavit she states that she was informed by her attorney Mr. Green that a request was made to set aside judgment on the 18th of September, to Attorney for the Plaintiff Ms. Missick and which said request was refused.

THE DRAFT DEFENCE

10. Attached to the Defendant's affidavit is a draft defence and counterclaim. The Defendant admits paragraphs one and two of the said statement of claim. At paragraph three the Defendant alleges that she commenced employment with the Plaintiff on 8th December 2019 pursuant to an agreement made between the parties in August of that year and the said agreement was made orally. She alleges that a Written document was signed at the Plaintiff's request and which said document was in English, a language which the Defendant does not speak and that she is unaware of the contents of the document and has no idea whether it diverges from the oral agreement. At paragraph three she continues that the Plaintiff purported to alter the terms of employment unilaterally by means of a document, again in English, dated 1st October 2020 which the Defendant was compelled to sign.

11. At paragraph 4 the Defendant claims that it was orally agreed that the Defendant would work eight hours a day 6 days per week at a monthly salary of $1800.00. At paragraph 6 the Defendant alleges that the parties agreed that the Plaintiff would pay for the Defendant's airfare and provide a house for the Defendant together with her husband and child for the first six months of her employment and would pay for a private school for the child for the first month.

12. At paragraph 7 and 8 the Defendant stated there was an implied term of the contract that the Plaintiff would provide a safe system of work and that the Plaintiff would comply with all applicable employment laws.

13. At paragraph 9 the Defendant alleges that in breach of the contract the Plaintiff required the Defendant to work every day except Sundays for 12 hours with no break, no overtime was paid and indeed the base salary went largely unpaid. The Defendant also alleged that she was not permitted to take any holidays, nor permitted to take time off for medical reasons even when certified and payment in lieu of holidays was made sporadically but less than required by law. In further breach the Plaintiff failed to provide housing as agreed, or to arrange housing as required by law, causing the Defendant and her family to live in a shed with no running water and open to the elements until accommodation was provided to them by the church, furthermore no school fees were ever paid.

14. At paragraph 11 the Defendant alleges that on the 13th of February 2022 she was required by the Plaintiff to act as a model for a new fat treatment. As a result of the Plaintiff's negligence the Defendant suffered burns to her abdomen requiring medical treatment, this resulted in her physician asking that she refrain from work for 7 days to avoid infection and provided a certificate to this effect. The Plaintiff refused to permit this and as a result the wound became infected causing the Defendant to suffer

severe pain for a period of two months resulting in permanent scarring. The Defendant further alleges that she did not act to enforce her right after being told by the principal of the Plaintiff that she would deny the incident. At paragraph 12 the Defendant claims that the breaches outlined above were repudiatory both severally and cumulatively.

15. At paragraph 13 the Defendant admits that on the 6th of December (year) the Plaintiff wished to renew her work permit which had expired on the 11th of November (year). The Defendant alleges that she told the principal's husband that she did not wish to continue but on request she agreed to stay to the end of the month wherein the Plaintiff agreed to pay for their flight home. She alleges this promised payment for the flight was not made. At paragraph 15 the Defendant states that she has not started any business but is merely an employee and that she has not solicited any of the Plaintiff's clients or used any confidential information.

16. At paragraphs 17 and 18 of the said draft defence the Defendant counterclaims for breach of contract and negligence claiming damages personal injury.

SUBMISSIONS – APPLICANT/DEFENDANT

17. Counsel for the Applicant/Defendant referred the court to Order 13 r 9 and the note at 13/9/18 of the White Book. He submitted that that part provides a discretion to set aside a judgment that is not irregular. Counsel accepted that that judgment is regular. He also referred to the case of **Alpine Bulk Transport v Saudi Eagle**[1]. He submitted that in setting aside judgment it is not sufficient to show merely an arguable defence but it must be shown that a real prospect of success exists which carries some degree of conviction.

[1] [1986] 2 Lloyd's Rep. 221

18. Counsel submitted the reason for entering the Defence slightly late was because the Defendant was without Counsel and only after visiting a free legal aid clinic that she was able to consult with an Attorney, which facts are set out in her affidavit.

19. In reference to the Plaintiff's Statement of Claim he made the following submissions:
    a. that a basic problem exists in relation to the Contract as pleaded because the contractual term of restraint of trade, particularly in employment context, is very rarely enforced by the courts at all in any circumstances.
    b. that the Plaintiff claims that the Defendant has been soliciting clients but no clients are identified, additionally no loss and damage has been particularized.
    c. that the Plaintiff claims that it seeks an injunction, however it has been almost 12 months and no interlocutory injunction was ever sought so it appears that the injunction was never seriously pursued.
    d. that it seems highly unlikely that due to the modest financial circumstances of the Defendant that the Plaintiff had any serious intention of doing anything other than bullying and intimidating the Defendant by bringing this action.
    e. that it is far from clear whether there is any contract at all at least as far as restraint of trade is concerned. And it is to be noted that the evidence of the Defendant is not challenged or contradicted by the Plaintiff.
    f. that the Defendant does not speak English and did not know what she was being forced to sign.
    g. that whether the contractual term (restraint of trade) is actually binding in any way or at all is an issue for trial.
    h. that from the allegations made by the Defendant in the defence and counterclaim can lead to a finding that the Plaintiff was in repudiatory breach of contract and therefore unable to rely on any contractual term alleged

i. that in this case there is not only a real prospect of success on the Defendant's side but on the Plaintiff's side the case seems to be going nowhere and does not appear to be seriously pursued in any event and is fundamentally flawed.

20. On being questioned by the Court on whether there is merit in the defence, Mr. Green counsel for the Defendant responded as follows:
    a. The agreement was made orally and the Written document was signed at the Plaintiff's request.
    b. The document was in English a language the Defendant did not speak or and was not aware of the contents of the document and that it diverges from the parties oral agreement.
    c. The Plaintiff purported to alter the terms of the employment agreement unilaterally by means of the written agreement again in English.
    d. The Defendant was compelled to sign to the extent that the said terms were varied
    e. That the alleged restraint of trade clause on which the Plaintiff sues does not exist at all at least not as a contract between the parties
    f. The Plaintiff committed several breaches including non-payment of airfare housing and provision of a safe system of work
    g. Physical damage to the Defendant.

21. The Defendant's Counsel ended his submission saying that based on his submissions his client has a strong defence to the Plaintiff's claim.

SUBMISSIONS PLAINTIFF/RESPONDENT

22. In response counsel for the Plaintiff submitted that it is not the whether there is a strong defence to the claim, and it is not sufficient to merely show an arguable defence that would justify leave to defend. Instead, it must have a real prospect of success which in this case does not exist.

23. In response to Mr. Green's assertion that the Defendant does not speak or understand English, Counsel for the Plaintiff submitted that the Defendant does speak English, which may be an issue for determination at trial. In respect of the Defendant's Counterclaim, Counsel submitted that the Defendant's Counterclaim maybe subject to the **Limitation Ordinance CAP. 11.06**

24. Counsel further submitted that the Plaintiff genuinely believed that damage was done to them by the Defendant by not adhering to the terms of the employment contract on the contractual terms that they had jointly agreed to, which forms the main reason for opposing the application to set aside default judgment.

THE LAW

25. **The "Saudi Eagle"** [2] *supra* lays down the principles for setting aside default judgment. In that case Sir Roger Ormrod gave the judgment of the Court. He referred to the earlier and leading decision of the House of Lords in **Evans v Bartlam**[3] and said at page/para 223:

> "The following 'general indications to help the Court in exercising the discretion' (per Lord Wright at p 488) can be extracted from the speeches in Evans v Bartlam . . . bearing in mind that 'in matters of discretion no one case can be authority for another' . . .
>
> (i) a judgment signed in default is a regular judgment from which, subject to (ii) below, the Plaintiff derives rights of property;
>
> (ii) the Rules of Court give to the Judge a discretionary power to set aside the default judgment which is in terms 'unconditional' and the Court should not 'lay down rigid rules which deprive it of jurisdiction' (per Lord Atkin at p 486);

[2] [1986] 2 Lloyd's Law Reports 221
[3] [1937] AC 473

(iii) the purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;

(iv) the primary consideration is whether the Defendant 'has merits to which the Court should pay heed' (per Lord Wright at p 489), 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 if he has shown 'merits' the . . . Court will not, prima facie, desire to let a judgment pass on which there has been no proper adjudication (p 486 and per Lord Russell of Killowen at p 482).

(v) Again as a matter of common sense, though not making it a condition precedent, the Court will take into account the explanation as to how it came about that the Defendant . . . found himself bound by a judgment regularly obtained to which he could have set up some serious defence (per Lord Russell of Killowen at p 482)".

In applying these 'general indications' it is important in our judgment to be clear what the 'primary consideration' really means. In the course of his argument Mr Clarke, QC used the phrase 'an arguable case' and it, or an equivalent, occurs in some of the reported cases (eg **Burns v Kendel** [4]). This phrase is commonly used in relation to RSC O 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** supra.

[4] *[1977] 1 Lloyd's Rep 554 and Vann v Awford*

> 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."

26. In **McCullough v BBC**[5] Girvan J stated that *'the primary consideration is whether the Defendant has merits justifying the matter going to trial'.* He then referred to various passages from the speeches in **Evans v Bartlam** *supra* and the judgment of Sir Roger Ormrod in the **Saudi Eagle** case *supra* and concluded*:*

> "For my part I consider that the Defendant should succeed in an application to set aside judgment if he can show that he should in the interests of justice be permitted to defend the action and I do not read the speeches in **Evans v Bartlam** as being inconsistent with that view (in particular the passages in the speeches of Lord Wright and Lord Russell). The procedure for marking judgment in default is not designed to punish a Defendant in default by destroying his right to a fair and full hearing in relation to the Plaintiff's claim against him but rather is part of the disciplinary framework established by the rules of court which are designed to ensure the proper and timeous conduct of litigation. In cases of default the court's discipline can be justly enforced by costs and interest orders and by the imposing of strict timetables on the Defendant rather than by depriving him of his right to a fair adjudication of the Plaintiff's claim against him. If it is clear that a Defendant has in reality no defence to the Plaintiff's claim the setting aside of judgment would be unjust to the Plaintiff and would not be unjust to the Defendant since it would merely delay the enforcement of the Plaintiff's undoubted rights and send to trial an

[5] [1996] NI 580

indefensible case. If, on the other hand, there is a real triable issue between the parties, justice will normally require that the matter should be allowed to go to trial. In determining whether if there is a real triable issue between the parties I respectively differ from Sir Roger Ormrod for I see no compelling reason why the court should be required to form a provisional view of the probable outcome if the judgment were to be set aside. Such an exercise would have been carried out at an early interlocutory stage and inevitably would be so tentative that the court could rarely safely conclude what the probable outcome would be if the judgment were to be set aside. I do not see in justice why a Defendant should be deprived of the opportunity of presenting his defence merely because the court on the limited material available to it at that stage and on the inevitably somewhat superficial interpretation of that material concludes that the Defendant will probably fail. Experience shows that provisional views of probable outcomes can readily be shown to be fallacious when a matter is tried out. On the facts in the Saudi Eagle the court was satisfied, properly in my respectful view, that there was no defence to the Plaintiff's claim and hence the application failed on the grounds that it would have been contrary to justice to delay the Plaintiff further in enforcing his rights.

27. The principles were also considered in **Day v RAC** [6], an appeal against the decision of the county court judge dismissing the Defendant's appeal from a dismissal of his application to have judgment set aside in Default of Defence. The claim was in negligence. The Statement of Claim and a draft Defence were before the court. The county court judge took the view that there must be a real likelihood that a Defence would succeed. He did not consider there was a real likelihood that the Defence would succeed (though he did find that an arguable Defence had been demonstrated) and dismissed the appeal in the county court. Ward LJ in the Court of Appeal delivered the main judgment and observed that the proper approach for the court to adopt in

[6] Motoring Services Ltd [1999] 1 All ER 1007

such applications to set aside judgment appeared to have changed. He noted that in **Vann v Awford** [7]((a decision of Dillon and Nicholls LJJ referred to in **Allen v Taylor** [8]) the test was satisfied by demonstrating an arguable case. He then referred to the judgment of Sir Roger Ormrod in the **Saudi Eagle** case *supra* and stated his view that a change in approach was shown to have occurred in that judgment. He referred to what he described as the general factors set out by Sir Roger Ormrod (supra) and then stated that:

> "It should be stressed…that: 'The purpose of the discretionary power is to avoid the injustice which may be caused if judgment automatically went on default'
>
> At the heart, therefore, of this discretionary exercise is the need to do justice. Justice has to be done both to the Plaintiff, to the Defendant and, of course, and especially in this day and age, to the whole process of the administration of justice in these courts. But it may not be out of place to cite one other passage in the speeches of the well-known case of **Evans v Bartlam** supra and to remind everybody of the words of Lord Atkin:
>
> > "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 been obtained only by a failure to follow any of the rules of procedure.""

28. In **Tracy v O'Dowd and others**[9] Higgins J stated:

> "If the defence put forward has no prospects of success then the way ahead is clear. There is nothing to be gained by setting aside a regularly obtained

[7] (1986) Times, 23 April 83 LS Gaz 1725
[8] [1992] Lexis citation 2681; P.I.Q.R. 253.
[9] [2002] NIJB 124

judgment even on conditions and ordering a trial, the result of which is a foregone conclusion. If the situation is otherwise, that is, that it has not been demonstrated that the defence has no prospects of success, then it follows a fortiori and logically that the case must have prospects of success. Like Girvan J I find it difficult to see how the question, whether the defence is likely to succeed, can or should be determined on affidavit evidence when much may depend on the credibility or recollection of witnesses or the evaluation of forensic evidence or even the construction of a document. If it has not been demonstrated that there is no prospect of the defence being successful, is a Defendant, other matters being equal not entitled to have his side of the case heard. Is that approach not consistent with the need to avoid injustice?"

29. Thus, Lord Wright in **Evans v Bartlam** stated that the test was satisfied if the Defendant showed 'merits to which a court should pay heed' or demonstrated an 'issue which the court should try'. None of the Law Lords stated that a Defendant required to show a real prospect of success before judgment would be set aside, but each of them was content with being satisfied as to the negative requirement—if no possible defence was demonstrated no purpose was served in setting aside the judgment. If it cannot be said that there is no defence to the Plaintiff's claim then the court must consider whether to set aside judgment or not and a major factor in that decision will be whether or not to do so would be unjust in that a Defendant would be deprived of the opportunity to present his side of a triable issue between the parties.

30. Higgins J in **Tracy v O'Dowd and others** *supra* stated:

"I do not conclude that there is no possible defence to the allegations contained in the Writ and the letter of claim. The issue then is whether the interests of justice require that judgment be set aside and the case permitted to proceed to trial. I am satisfied that there are real triable issues between the parties

relating to whether the words complained of are defamatory of the Plaintiff, and whether they are open to the interpretation and innuendo alleged in the letter of claim. There are also triable issues whether the Defendants have a defence of justification, fair comment or qualified privilege and whether the article in question was published within this jurisdiction. As there are serious triable issues in the defamation proceedings and despite the absence of any satisfactory explanation about the failure to enter an appearance, I do not consider it would be in the interests of justice to exercise my discretion other than to extend the time within which an appearance may be entered."

31. In **Brian Been v The Turks and Caicos Islands Tourist Board**[10] Gruchot J on an application to set aside default judgment stated *" It is not possible to discern who is likely to win at trial, but it cannot be said that the defence has no prospect of success, (not that that is the test), but on the contrary, there is a question as to whether the 2007 decision by the Board was validly made and as Mr. Misick submitted, in order to determine that question the Court needs to view the evidence of the discussions that took place leading up to that decision, which are not presently before the Court.*

As per Nicholls LJ in Vann and anor. -v Awford and anor , "the court is concerned to do justice between the parties with regard to the Plaintiffs' claim, not to punish the defaulting Defendant, inexcusable though his conduct may have been". Accordingly, I am of the view that in order to do justice to the parties, the default judgment should be set aside and the Defendant have leave to defend the claim. I am not of the view that setting aside the default judgment would be an injustice to the Plaintiff. To allow the judgement to stand has the potential of conferring on the Plaintiff a significant benefit to which he may not be entitled.

[10] (CL 98 of 21) [2023] TCASC 51 (21 February 2023)

32. In **Osias Joseph dba Midtown Mall -v- Devon Hayles dba Platinum Fitness and as Fit X Gym (CL-44/21) [2023] TCASC 58 (24 April 2023)** the learned Gruchot J in refusing to set aside default judgment, at paragraph 26 stated "*For the above reasons I am not of the view that the Defence shows any defence to the claims, let alone one that has any real prospect of success".* The learned Judge ruled that no Defence was available and on that basis refused to set aside judgment.

33. On the facts the Defendant was served on the 27th of July 2023 with the Writ and Statement of Claim. She entered an acknowledgment of service on the 3rd of August 2023 and states at paragraph 2 of her affidavit that upon being served she sought to apply for legal aid and was unsuccessful in obtaining same. She further states on 26th August 2023 she visited a free legal advice clinic hosted by the Bar Association at which time she that from this time she spoke to an Attorney and obtained legal advice. Judgment was entered on the 30th of August 2023. The Defendant's Attorney attempted to file a defence on the 31st of August 2023. The Defendant states in her affidavit that she erroneously informed her Attorney that she was served on the 3rd of August 2023. The Defendant states that she did not enter a Defence within the stipulated time because she did not have an attorney. On the facts the Defendant seemingly used all attempts to ensure the Claim did not go undefended and immediately upon visiting the Legal Aid Clinic she caused her Attorney to file a Defence.

34. The authorities above seem to suggest the adoption of a compilation of factors which departs from the requirement to show only a real prospect of success by the defence which requires in some way a pre-judging of the matter without a trial. In determining 'real prospect of success' the court is required to delve into the factual merits of the case not through a trial but based on an interlocutory application with limited affidavit evidence. The draft defence supplied by an applicant cannot be truly tested and scrutinized as it would be at trial, there is therefore an inherent disadvantage in the

'real prospect of success test' against the Defendant in having to prove a real prospect of success with limited means. If the Defendant is unable to fulfil the requirements of this test a court is restricted from using its discretion in setting aside the judgement which Higgins J suggests can lead to injustice.

35. The compilation of factors in determining whether the court should exercise its discretion in setting aside a default judgment now include: -

    a. Whether the Defendant have shown merit in which a court should pay heed, justifying the matter going to trial.
    b. The court in using its discretion in setting aside judgment must give consideration by balancing the interests of justice for both parties.
    c. Whether there is a defence available and whether there are real triable issues involved.
    d. Whether the Defendant must be able to provide an explanation for how a judgment in default was entered.

36. On the facts of this case, I conclude the following:

    a. <u>Whether the Defendant have shown merit in which a court should pay heed, justifying the matter going to trial.</u>

       The Defendant (in the draft defence attached to her affidavit) holistically argues that an oral agreement was made by the parties but subsequently she made to sign a document which she did not understand as it was in English and she does not speak English. It is the Defendant's case that the said written document which she signed unilaterally varied the oral contract and therefore she is not bound by the said variation. The Defendant submits that the non-competition and restraint of trade clause never existed as part of the oral agreement and therefore not binding on her thereby putting the Plaintiff to proof. The Defendant further submits that although the Plaintiff pleaded that the Defendant breached the said non-competition and restraint of trade clause by soliciting clients belonging to the Plaintiff, no clients were identified. In the

courts view the Defendant's submissions has merit to which the court should pay heed, justifying this matter going to trial.

b. **The court in using its discretion in setting aside judgment must give consideration by balancing the interests of justice for both parties.**

An examination of the Plaintiff's Statement of Claim, and the proposed Defence show that both parties have alleged facts and issues which require determination by a court of law. Therefore, in setting aside judgment, both parties receive a benefit as they would both have an opportunity for their respective allegations to be heard and tested at trial, resulting in no disadvantage to either party. To refuse to set aside Judgment would result in the Defendant not being able to defend the claim and set forth her arguments on the existence of the non-competition and confidentiality clause.

c. **Whether there is a defence available and whether there are real triable issues involved.**

The court is of the view that a defence exists and a triable issue exist which includes:

i. The existence of an oral Agreement

ii. The existence of a written Agreement

iii. Whether the Restraint of Trade Clause forms part of the contract and if so, is it enforceable against the Defendant

iv. Whether the Defendant understood what she was signing

d. **Whether the Defendant must be able to provide an explanation for how a judgment in default was entered**

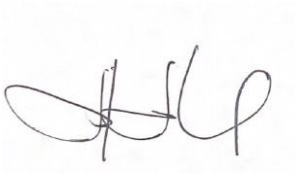
The Defendant set out a detailed explanation in her Affidavit which is summarized at paragraph 33 above providing a timeline showing how

Judgment was entered against. This court is therefore satisfied that an explanation has been provided.

37. In the circumstances this court exercises its discretion to set aside judgment entered on the 30th of August 2023 and order that time be extended for the Defendant to file and serve its defence.

38. Costs to be costs in the cause.

1st December 2023



Narendra J. Lalbeharry

Registrar of the Supreme Court

Turks and Caicos Islands