IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 146 of 2022

BETWEEN:

Michael Hannah Chebat Jr.

Claimant

AND

[1] The Guardian Newspaper Limited

[2] Alfonse Noble

Defendants

Appearances:

Mr. Leroy Banner, Attorney-at-law, for the Claimant

Defendants were absent and unrepresented.

2024: March 4;
March 18

JUDGMENT / ORDER

Application to set aside default judgment and application to assess damages consequent to default judgment

[1] **GOONETILLEKE, J.**: The Claimant filed this claim on 15th March 2022, by means of a Claim Form dated 10th March 2022. The Claim Form was served on the Defendant on 16th March 2022 and in proof of service, an affidavit of service dated 16th March 2022 was filed on 28th March 2022.

[2] According to **Rule 9.3**, of the **Supreme Court Civil Procedure Rules 2005 (CPR)**, the defendant is given a period of fourteen (14) days from the date of receipt of the Claim Form, to file an acknowledgement of service. In terms of **Rule 10.3** of the **CPR**, a statement of defence, if any, has to be filed twenty-eight (28) days after the date of service of the Claim Form. Accordingly, the date for filing an acknowledgement of service in respect of this claim, lapsed on 30th March 2022 and the date for filing the defence lapsed on 13th April 2022.

[3] As the defendant had failed to file a defence, the claimant, by motion dated 13th April 2022, moved to have a default judgment entered.

[4] Belatedly, on or about the 24th of April 2023, an acknowledgement of service on behalf of the defendant was filed in the Registry. In terms of **Rule 9.2(3)** of the **CPR**, the acknowledgement of service has no effect until it is received in the court office. In this instance, the effective date of the acknowledgement of service is the 24th of April 2023, the date on which it was filed in the registry.

[5] Consequent to the failure of the defendant to file a defence, a default judgment was entered on 6th May 2022.

[6] Thereafter, as a result of the default judgment, the claimant, by Notice of Application dated 1st June 2022, filed on 6th of June 2022, moved to assess damages in respect of the claim. The claim, in this matter, is related to a claim for defamation in regard to a publication by the defendants. The Notice of Application was supported by an affidavit of the claimant.

[7] The matter was set for assessment of damages on 25th July 2022. On that date, counsel for the claimant was indisposed and the matter was re-scheduled for 19th September 2022. The hearing on the next date did not take place due to the funeral of Queen Elizabeth II. The matter of assessment of damages was next taken up on 7th October 2022. On that date, the court ordered that written submissions should

be filed by parties and scheduled the hearing for 8th December 2022. When the matter came up on 8th December 2022, counsel for the claimant moved for further time to file the affidavit of the claimant and the written submissions. Accordingly, the hearing was once again rescheduled to 25th January 2023.

[8] On the next date, further time was again requested by the counsel for the claimant, for the filing of the affidavit in support of damages and for written submissions. The hearing was therefore adjourned to 29th March 2023. When the matter was taken up on 29th March 2023, the counsel for the claimant moved for an adjournment and submitted that the claimant was a minister of the government and therefore he was experiencing difficulties in filing the documents. The court having noted that this was the second occasion on which an adjournment was sought to file documents, adjourned the matter '*sine die*' (without a date) until an application for a hearing was moved for, by the claimant. On all these occasions, the defendant was absent and unrepresented.

[9] As no action had been taken by the claimant, when this matter was called up for report upon the order of the court, on 27th November 2023, Mr. Leroy Banner appeared for the claimant and Mr. O.J Elrington appeared for the defendants. On that date, Mr. Elrington moved to file an Application to vacate the default judgment. This was permitted. The claimant was also granted time, finally, until 18th December 2023 to file the claimant's affidavit for assessment of damages and written submissions. The hearing of both the Application to vacate the default judgment and the Application for assessment of damages was fixed for 12th February 2024.

[10] Thereafter, the claimant on 12th December 2023, filed an affidavit in support of assessment of damages. The written submissions on behalf of the claimant for assessment of damages, dated the 18th of December 2023, were filed on the 19th of December 2023.

Application to set aside the default judgment

[11] On behalf of the defendants, on 19th December 2023, an Application was filed to set aside the default judgment under **Rule 13.2** of the **CPR** or in the alternative, under **Rule 13.3** of the **CPR**. Though the Application had been signed on the 28th of November 2023, it was filed 19th of December 2023. The grounds stated in the Application for vacating the default judgment were that the attorney for the defendants was not familiar with the electronic filing process and therefore assumed the courts' system

did not show whether the defence was filed or not. A further ground adduced for setting aside the default judgment was that the defendants were not served with the Application moving for a default judgment.

[12] In support of the Application to set aside the default judgment, the affidavit of Ms. Angelie Perez a paralegal at Elrington and Company was filed. According to that affidavit, the defendants retained the services of Elrington and Company on 29th April 2022. She states that an application for an extension of time for filing of the defence was uploaded on the Apex system of the court, on or about the 10th May 2022. She states that she verily believed that the application was uploaded; that no application for default judgment was served and that it was not until when this matter was set for report on the 27th of November 2023, that it was realized that an application for extension of time to file the defence had not been uploaded on the court's system. The affidavit of Ms. Perez has no annexes or exhibits in confirmation of any of the matters averred, nor does it contain a proposed statement of defence.

[13] On the 12th of February 2024, the date set for the hearing of the application to vacate the default judgment and the application to assess damages, Mr. O.J. Elrington, the counsel for the defendants was present, however, counsel for the claimant, Mr. Leroy Banner was not present. Mr. Elrington was asked by the court to support his application to vacate the default judgment, however, he noted that the counsel for the claimant was in another court and therefore Mr. Elrington moved to support his application on another date. This application was granted and the matter was adjourned to 4th March 2024 for hearing both the application to set aside the default judgment as well as the application to assess damages. Mr. Elrington was present in court when that date was granted.

[14] At the hearing on 4th March 2024, only the counsel for the claimant was present. Neither the defendants nor the Attorney-at-law for the defendants were present. As the defendants were absent and unrepresented, the court directed that the names of the defendants be called, outside the court, three times. There was no response, neither the defendants nor their attorney attended the court. The court also did not receive any motion for an adjournment by the Attorney-at-law for the defendants. In these circumstances, therefore, in terms of **Rule 39.4 (b)** of the **Civil Procedure Rules**, the court proceeded to hear the matter in the absence of the defendants.

[15] The court, nevertheless, considers the merits of the application filed on behalf of the defendants to set aside the default judgment**. Rule 13.2** of the **CPR** is couched in mandatory language; the court must set aside the default judgment if the requirements of **Rule 12.4** or **Rule 12.5** of the **CPR** have not been met. The default judgment, in this case, had been granted in terms of **Rule 12.5**, upon the request of the claimant, as the defendant had not filed a defence. On an examination of the facts of this matter, this court holds that the requirements of **Rule 12.5** of the **CPR** had been met when the application for default judgment was moved, therefore, **Rule 13.2** of the **CPR** is inapplicable to the present matter as it is clear that the defendant has been in default of filing a defence within the time required by law.

[16] Unlike **Rule 13.2**, **Rule 13.3** of the **CPR** gives the court the discretion to grant relief in an application for vacation of the default judgment. **Rule 13.3** has three conjunctive requirements to be satisfied by an applicant who moves for setting aside a default judgment. Firstly, the application to set aside the judgment must be made as soon as reasonably practicable after finding out that the judgment has been entered. In this instance, the judgment was entered on the 6th of May 2022. The application for setting aside the default judgment was filed on 19th December 2023. On the face of the record therefore, there has been a delay in filing the application to set aside the judgment and the requirement in **Rule 13.3 (1) (a)** of the **CPR** has not been complied with by the defendants.

[17] Secondly, in terms of **Rule 13.3(1) (b)**, the applicant who moves for setting aside the judgment must give a good explanation for failure to file an acknowledgement of service or defence, as the case may be. In this matter, Ms. Perez, the paralegal of the Attorney for the defendant, in her affidavit, only states that on the 29th of April 2022, the defendants retained the services of Elrington and Company and that on the 10th of May 2022, she uploaded a Notice of Application for extension of time to file the defence. She then stated that the Apex system was new to her and she believed the application for extension of time to file the defence was filed on the system. She goes on to state that it was only on the 27th of November 2023 when the matter was called in court, that she learned that the application for extension of time to file the defence had not been filed on the system. Regardless of the veracity of the statements made by Ms. Perez about uploading the application for extension of time to file the defence, Ms. Perez in her affidavit has not stated any reason whatsoever, as to why the defence itself was not filed. If she assumed that her application for extension of filing the defence had been uploaded on the system, the next step would have been to file the defence. There was no reason why this could not have been done

and no good explanation has been pleaded for not doing so. Clearly, therefore, the defendants are in default of filing a defence.

[18] Ms. Perez in her affidavit also takes up the position that the application for default judgment was not served on the defendants or their Attorney. There is no legal requirement to do so. The requirement of giving notice of an application for default judgment is only mandated if the default judgment is in respect of a claim for goods as provided for in **Rule 12.10 (2)** and **12.10 (3)** of the **CPR**. In all other instances, there is no requirement to give notice of an application for default judgment. This reasoning flows on a reading of **Rule 12.10** of the **CPR**, and from the application of the legal maxim; "*expressio unius, exclusio alterius"*; which means that the expression of one thing is the exclusion of another. The position of the defendants; that there was no notice of the application for default judgment, is therefore not a valid objection. Considering the above facts and circumstances of this matter, I hold that the requirement of **Rule 13.3(b)** of the **CPR**, in regard to offering a good explanation for not filing the defence, has not been met by the defendants.

[19] **Rule 13.4** of the **CPR** requires an application to set aside a judgment to be supported by evidence on an affidavit. **Rule 13.4 (3)** specifically requires such affidavit to exhibit a draft of the proposed defence. **Rule 13.3(1) (c)** read with **Rule 13.4 (3)** enables the court to assess if the defence that is proposed to be filed has a real prospect of success if the judgment is set aside. Without such a prospect, it would be an exercise in futility to set aside the judgment and waste the parties' and the courts' resources and time by proceeding further with a trial, when a judgment in default already exists.[1]

[20] The affidavit of Ms. Perez filed in support of the application to set aside the default judgment does not exhibit a draft of the proposed defence. Not only is the defence not appended to the affidavit, but also the affidavit itself makes no mention of a draft proposed defence.

[21] This court has already found that the defendants have failed to present a good explanation for not filing a defence. In view of the circumstances set out above, I also hold that **Rule 13.4 (3)** of the **CPR** in regard to exhibiting a draft proposed defence with the application to set aside the default judgment has also not been complied with by the defendants. Without such a draft proposed defence, the defendants

[1] *Redbourn Group Ltd. v. Fairgate Development Ltd.* [2017] EWHC 1223 (TCC), [69] –[73]

would also fail to satisfy **Rule 13.3 (1) (c)** of the **CPR** which requires there to be a real prospect of successfully defending the claim, if the default judgment is to be set aside. To set aside a judgment, the court must be aware of the evidence and position of parties in order to assess their merits.[2] A real prospect of successfully defending a claim cannot be assessed where no proposed defence is exhibited. That is the reason why **Rule 13.4 (3)** makes it mandatory that an application to set aside the default judgment should exhibit a draft of the proposed defence.

[22] Taking all the above matters into consideration, this court is not inclined to vary or vacate the default judgment entered on 6th May 2022.

Assessment of Damages

[23] The Claim Form dated 10th March 2022 claims as follows:

i. Damages including aggravated damages, for libel in respect of words published or caused or authorized to be published by the 1st defendant and the 2nd defendant in an article titled "*Chabet's Costly Panamanian Connection*" on pages 1 and 2 respectively of the Guardian Newspaper Volume 25 No.1, dated Sunday, January 9th 2022 along with a photo of the claimant which was published by the defendants and accessible to the general public from the 6th of January 2022 and remains accessible;

ii. An injunction restraining the defendants, whether by themselves, their agents, servants or otherwise from further publishing or causing to be published the same or similar or any similar words defamatory of the claimant;

iii. Interest and damages pursuant to sections 166 and 167 of the Supreme Court of Judicature Act, Chapter 91 of the Substantive Laws of Belize;

iv. Costs;

v. Any further and other relief that the court may deem meet.

[2] *E D & F Man Liquid Products v. Patel* [2003] EWCA Civ 472

[24] Paragraph 12 of the statement of claim gives particulars of aggravated damages stating variously that the offending article was published on the front page of the newspapers in bright bold headlines; it was also published on the internet giving the allegations wide and extensive publication that the claimant is an Attorney-at-Law and Senior Counsel and at the time of publication, a Minister of the Government; that the defendants made no attempt to contact the claimant prior to publication to verify the facts; that the defendants published the defamatory words knowing they were false; that despite the attorney-at-law of the claimant writing to the defendants complaining that the words were false, the defendants have failed to apologize and recall or remove the article complained of.

[25] The letter dated 13th January 2022, by the attorney-at-law for the claimant addressed to the defendants and exhibited marked "MHC-2" with the statement of claim, quantifies the damages to be paid to the claimant and demands a sum of **Fifty Thousand Dollars ($50,000.00)** in the following word:

> "*Pay to our client a sum of BZ$ 50,000.00 in order to compensate our client for the serious injury to his reputation which he has suffered, and the associated distress and embarrassment caused by the publication of your false and baseless allegations*".

[26] In the written submissions dated 18th December 2023, filed on behalf of the claimant for assessment of damages, the case of ***Karen Bevans v. Hon. John Briceno and others***[3] has been cited as a comparable case for assessment of damages. That judgment delivered in 2021, awarded sums of **Sixty Thousand dollars ($60,000.00)** in general damages and **Thirty Thousand Dollars ($30,000.00)** in aggravated damages. As such, considering inflation, the written submissions for the claimant urge the court to award **Seventy Thousand Dollars ($70,000.00)** as general damages and **Forty Thousand Dollars ($40,000.00)** as aggravated damages together with **Twelve Thousand Five Hundred Dollars ($ 12,500.00)** as costs.

[27] In claims for defamation and libel, the words uttered or published should be given their ordinary meaning. This has been held to be so in a long line of cases including ***Lewis v. Daily Telegraph Ltd.***[4],

[3] Claim No.77 of 2020, decided on 30th August 2020
[4] [1964] A.C. 234

Skuse v. Granada Television Limited[5] and ***Jeynes v. News Magazines Ltd.***[6] Among words alleged to be defamatory in the article published by the defendants are the following:

> "*Meanwhile this special friend of the minister continues to reside at a luxurious dwelling in San Ignacio paid for by the taxpayers' money at an exorbitant cost of $ 4,000 per month. It's a dwelling where neighbours say the minister himself spends much quality time. We're not sure if those regular visits are to deal with national health matters or person 'wellness' affairs. Inquiring minds certainly want to know*".

[28] There is both fact and innuendo or implication stated in the above-published passage. Lord Devlin, in his speech in the case of ***Lewis v. Daily Telegraph Ltd.,***[7] had this to say about implication:

> "*My Lords, the natural and ordinary meaning of words ought, in theory, to be the same for the lawyer as for the layman, because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood…But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that implication must be necessary as well as reasonable. <u>The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory.</u>*"[8] [Emphasis added]

[29] Having considered the passage cited, the article published and the legal authorities above, I hold that the words complained of, given their ordinary meaning and implication, convey the impression that the claimant has favoured an employee, is paying regular visits to the employee and has a relationship with the employee.

[30] I have also considered the issues of fair comment and privilege, as the alleged defamatory words were published by a newspaper to the public in a matter dealing with a public figure, a minister of the government. Westmin James J.(Ag), in **Karen Bevans's** case cited above, referred to the test of a

[5] [1993] EWCA Civ 34
[6] [2011] EWHC 3269 (QB)
[7] [1964] A.C. 234
[8] [1964] A.C. 234, 277

reasonable standard of journalism outlined in ***Reynolds TD v. Times Newspapers Limited***[9] which the court must consider. The non-exhaustive list of matters to be considered by the court includes:

a. The seriousness of the allegation. The More serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

b. The nature of the information, and the extent to which the subject matter is a matter of public concern.

c. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind or are being paid for the stories.

d. The steps taken to verify the information.

e. The status of the information. The allegations may have already been the subject of an investigation which commands respect.

f. The urgency of the matter. News is often a perishable commodity.

g. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

h. Whether the article contained the gist of the plaintiff's side of the story.

i. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

j. The circumstances of the publication, including the timing.

[31] Taking into consideration all these matters, I hold that the words published by the defendants in respect of the claimant refer to matters that are partly factual and partly comment. The comments have been made without any reference to the views of the claimant and the claimant's version of events has not been stated. In the light of the authorities cited above and the legal principles in relation to defamation, I hold that the defendants' publication in regard to the claimant, amounts to a defamatory statement by implication.

[9] [1998] EWCA Civ 1172

[32] In assessing damages, **Karen Bevan's** case referred to above has also set out the following factors to consider:

a. The conduct of the claimant;
b. The nature of the libel;
c. The mode and extent of the publication;
d. The absence or refusal of any retraction or apology;
e. The conduct of the defendant from the time the libel was published;
f. The impact on the claimant's feelings, reputation and career.

[33] The claimant as a minister at the time of publication was a public figure. He is entitled to protect his reputation and should have been given an opportunity to comment on the matter before the publication and his comments in reply should also have been published, if available. The failure to do so, together with the fact that the story received front-page coverage and the absence of an apology or retraction are factors that go against any mitigation of damages.

[34] In 2021, the court when considering damages in the **Karen Bevans** case, considered a number of comparable cases in which damages were awarded. The damages awarded in those cases were in the range between **Twenty-Five Thousand Dollars ($25,000.00)** to **Sixty Thousand Dollars ($60,000.00)** for general damages and **Thirty Thousand dollars ($30,000.00)** as aggravated damages. The court had considered inflationary factors when arriving at its decision in 2021, as the award of damages in the comparable cases previously considered had been decided a long time ago, in 1993, 2005 and 2006. In this matter, the letter[10] written on behalf of the claimant to the defendants in 2022, had demanded **Fifty Thousand Dollars ($50,000.00)** in damages. I find that this sum demanded by the claimant is within the range of damages considered by the court in the **Karen Bevans** case. No significant inflationary factors between the date of the letter of demand in January 2022 to the present (March 2023) have been specifically pleaded for consideration by the court to escalate the amount of damages from the sum originally demanded by the claimant. Hence, the court is not in a position to consider inflationary factors in this claim.

[10] Exhibited marked "MHC-2" annexed to the statement of claim

Disposition

[35] I, therefore, award the claimant **Fifty Thousand Dollars ($50,000.00)** in general damages as demanded by the letter[11] dated 13th January 2022 written on behalf of the claimant to the defendants, and a further sum of **Twenty-Five Thousand Dollars ($25,000.00)** as aggravated damages, being half the sum of general damages. The defendants are jointly and severally liable to pay these sums to the claimant.

[36] As there has been no retraction, clarification or apology by the defendants, the injunction sought by the claimant is also granted.

[37] Considering that there has been a failure to defend a default judgment and no trial, the sum of **Twelve Thousand Five Hundred Dollars ($12,500.00)** as costs suggested in the written submissions for the claimant, is excessive. I therefore award a sum **of Five Thousand Dollars ($5,000.00)** as costs to be paid to the claimant by the defendants.

IT IS HEREBY ORDERED THAT

(1) The defendants shall jointly or severally pay to the claimant damages for defamation in the sum of **Fifty Thousand Dollars ($50,000.00)** and aggravated damages in the sum of **Twenty-Five Thousand Dollars ($25,000.00)** with interest at the rate of 6% per annum from 9th January 2022, the date of publication.

(2) The defendants whether by themselves, their agents, servants or otherwise are restrained from further publishing or causing to be published the same or similar words defamatory of the claimant.

(3) Costs of **Five Thousand Dollars ($5,000.00)** is awarded to the claimant.

Rajiv Goonetilleke
High Court Judge

[11] Exhibited marked "MHC-2" annexed to the statement of claim