



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024 no 332

BETWEEN:	JAVON BURCHALL	PLAINTIFF
	-AND-	
	BRIAN BENNETT	DEFENDANT

Application to set aside judgment in default of defence; Rules of the Supreme Court 1985 Order 13 rule 9.

Date of hearing: 15 September 2026

Date of Order: 1 October 2026

Date of Reasons: 1 October 2026

Dantae Williams of MDM Limited for the plaintiff

Craig Rothwell of Cox Hallett Wilkinson Limited for the defendant

Martin J in Chambers

REASONS FOR ORDER

Introduction

1. This is an application to set aside judgment in default of defence which was entered in this matter on 5 February 2025. The court refused the extension at the conclusion of the hearing and promised to issue brief reasons for doing so. These are those reasons.

Background

2. The plaintiff issued the present proceedings by way of specially endorsed writ on 7 November 2024 seeking damages for misrepresentation in relation to a contract for the purchase of a BMW 2017 X5 vehicle and a limousine permit for BD\$120,000. The contract was concluded on 1 December 2023 and the first instalment of BD\$110,000 was payable at the time of the contract and the balance of BD\$10,000 was to be paid upon completion of the transfer. The plaintiff paid BD\$100,000 on 27 December 2023 and BD\$10,000 a few days later.
3. The defendant was required to obtain a transfer certificate for the transfer of the vehicle from the Transport Control Department prior to the payment of the second instalment by the plaintiff. The defendant failed to obtain the transfer test certificate because the vehicle failed the first transfer test. The plaintiff then arranged to have the vehicle tested but the vehicle was again failed as a result of 3 unspecified faults. The plaintiff alleged that the vehicle was unfit for the purpose it had been sold as a result of various defects. He obtained an estimate of the cost of repair which amounted to just under BD\$20,000 to get the vehicle into roadworthy condition.
4. Subsequently, the plaintiff issued proceedings and claimed BD\$55,000 for costs associated with the vehicle and an assessment of damages for his loss of earnings and special damages of BD\$1595.38 for the assessment of the vehicle.
5. The defendant failed to enter an appearance or a defence to the action in the time permitted under the Rules of the Supreme Court 1985 and the plaintiff accordingly entered judgment in default of defence on 5 February 2025. The plaintiff then applied for the assessment of damages or loss of income in December 2025. This application came before the court on 8 January 2026. At that hearing, the defendant appeared in person and indicated his intention to apply to set aside the judgement in default of defence. There was no formal application before the court at that time, but the defendant indicated orally that he had instructed an attorney to apply to set aside the judgment.
6. The court gave directions for the application for the assessment of damages and allowed the defendant 14 days in which to file his application to set aside. If the defendant failed to do so, the court directed that the hearing of the application for assessment of damages would proceed. An order was filed reflecting those terms and which was later served on the defendant. The defendant failed to issue his application to set aside the judgement within 14 days and failed to apply to extend the time in which to do so. The plaintiff's directions for the hearing of the assessment of damages therefore took effect.
7. The plaintiff next issued a writ of *fiere facias* for the enforcement of the judgment of BD\$56,595.38 and also applied to examine the defendant as a judgment debtor as to his means to pay the judgment sum. The plaintiff also prepared his evidential materials to quantify his loss of earnings claims.
8. The defendant failed to attend the examination as to his means and a warrant for his arrest was issued to secure his attendance. The defendant then instructed new counsel to apply to set aside the judgment by summons dated 31 August 2026. This came before the court for hearing on 15 September 2026.

The application to set aside judgment

9. The application to set aside the judgment was issued 17 months after judgment in default had been entered.
10. The defendant put in an affidavit in support of this application dated 15 July 2026 and exhibited a draft pleading setting out the grounds for defence and counterclaim. The grounds of defence were to the effect that the vehicle was suitable for operation on the road at the time of the sale and that the faults identified by the BMW dealer were only estimates and related to issues that were either not serious or were subject to further diagnosis and verification.
11. The defendant asserted that the plaintiff's claims were excessive and that the plaintiff had retained the vehicle worth BD\$55,000 and a permit worth BD\$65,000 but had only paid BD\$110,000 for them (sic). The defendant counterclaimed for the additional BD\$10,000 being the remaining sum due in relation to the purchase price. The defendant said that he had allowed the plaintiff to take the vehicle in order to get it tested and had expected it to be returned to him.
12. In his affidavit, the defendant explained that he had not realised that he had to put in a defence when he was originally served with the proceedings because he did not hear anything further from the plaintiff. The defendant said he did not realise a judgment had been entered in default of defence until he was served with the application for the assessment of the plaintiff's loss of earnings claim. The defendant said that he knew that the court had given him 14 days in which to make his application to set aside the judgment in default on 8 January 2026, but he did not do so because he did not think he needed to. He said he had explained his position to the court and thought that this was sufficient to prevent any further action being taken against him.
13. During 2025 the defendant said he had been dealing with a serious criminal charge against him which had taken his full attention and that also affected his financial ability to be able to afford to instruct an attorney. The defendant says he believes he has a good defence to the claim and asks for the judgment in default to be set aside.

Principles to be applied

14. On an application to set aside a judgment in default of defence the court is required to consider 2 separate issues¹. First, the court has to assess the reasons for the defendant's failure to file a defence and the subsequent delay in bringing the present application to set aside judgment, taking into account the balance of justice including the prejudice to the plaintiff caused by the delay and the length of the delay and any other relevant factors.
15. Second, the court has to consider the merits of the defendant's proposed defence because the court will not set aside a judgment in default of defence unless the defendant shows that the grounds of defence upon which he relies have a realistic prospect of success.

¹ See the explanation of the test in **Denton v TH White Ltd** [2014] EWCA Civ 906 at [24] and **M-L v P** [2016] SC (Bda) 12 Div.

16. The court will normally be slow to refuse a litigant the opportunity to defend a claim if there is some potential merit in the defence and will generally give primacy to the general principle that the court will not turn away a litigant from the judgment seat if there is a meritorious defence². But in weighing the interests of justice the court will also need to be satisfied that the delay in putting forward the defence has not been excessive, and that there has been a satisfactory explanation for the delay that justifies the court in exercising its discretion in the defendant's favour.

Court's assessment

Merits

17. In this case the defendant has failed to show that he has any arguable defence or that the grounds of his defence have any realistic prospect of success. The defendant has received the purchase price less BD\$10,000. The plaintiff has taken possession of the vehicle. Although the defendant says he did not agree that the plaintiff could keep the vehicle in his possession, he has taken no steps to recover the vehicle or to avoid the contract or to return the payment of BD\$110,000.
18. The defendant advanced no other grounds of defence which go to the reasonableness of the repair costs or produced any independent evidence to support his claim that those costs were excessive. He has simply relied upon his own opinion. Significantly, the defendant admitted that the vehicle did not pass the transfer test but did not (or perhaps could not) explain why. The defendant has also failed to set out any grounds of defence in relation to the loss of earnings claim except to assert that the losses claimed have been increased due to the plaintiff's failure to act promptly and reasonably.
19. None of these "grounds" have any realistic prospect of success because they do not disclose any arguable defence to the plaintiff's claim. The defendant received the purchase price and his claim to the balance of the BD\$10,000 would be offset by the plaintiff's claim for repair costs and loss of earnings.

Delay

20. The reasons for the defendant's default in serving a defence are not explained. First, the defendant says that he did not know he had to serve a defence. This is neither a credible nor a justifiable excuse. The specially endorsed writ makes it clear that the defendant has a limited period in which to enter an appearance and serve a defence. Second, the defendant was given an opportunity to make an application to set aside the judgment eleven months after the judgment in default had been entered against him. He failed to make the application as ordered.

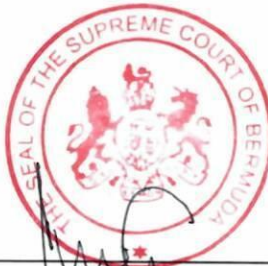
² See **Stewart v Fairmont Hamilton** [2013] SC (Bda) 51 App at [5] and **Trew v White and HSBC Bank Bermuda Limited** [2025] CA (Bda) 23 civ at [28].

21. It is relevant to note that this order was made after the conclusion of the criminal proceedings he was facing in 2025, which in any event do not justify a default in entering a defence to civil proceedings³. No explanation has been given for the delay or failure to comply with the court's order of 8 January 2026, and no application was made for an extension of time in which to comply with that order. No excuse has been offered for the defendant's failure to comply with the court's order.
22. To the extent that there is any serious dispute over the loss of earnings element of the plaintiff's claim, the defendant is still entitled to raise these points at the assessment of damages hearing.
23. Therefore, the delay was excessive and the failure to make the application in January 2026 was entirely unexplained and lacking in any credibility, and the grounds of the proposed defence have no realistic prospect of success, and thus the court dismissed the application accordingly.

Order

24. Therefore, the defendant's application was dismissed and ordered that the costs of the application are to be taxed on the standard basis if not agreed.
25. The court made the order on 15 September 2026 at the close of the hearing but indicated that it would provide reasons to follow, and that the court would sign the order when the reasons were published so as not to prejudice the defendant in terms of the starting date for the time for an application for leave to appeal (if one is to be made).

Dated this 1st day of October 2026



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

³ **Green v Mears Ltd** [2019] ICR 177 at 187H and **Somersall v St Regis Bermuda Resort** [2026] SC (Bda) 94 App.