[2016] JMCA Civ 39

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 118/2015

APPLICATION NOS 206/2015 & 61/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**RUSSELL HOLDINGS LIMITED**	**APPELLANT**
AND	**L&W ENTERPRISES INC**	**1ST RESPONDENT**
AND	**ADS GLOBAL LIMITED**	**2ND RESPONDENT**

Allan Wood QC, Miguel Williams and Joshua Sherman instructed by Livingston Alexander and Levy for the appellant

Kent Gammon instructed by Kent Gammon and Co for the respondents

4, 5, 7, 15 April and 1 July 2016

PHILLIPS JA

[1] I have read the draft judgment of my learned sister Edwards JA (Ag). I agree with her reasoning and conclusion and I have nothing further to add.

F WILLIAMS JA

[2] I too have read in draft the judgment of my sister Edwards JA (Ag) and agree with her reasoning and conclusion. I have nothing to add.

EDWARDS JA (AG)

[3] This is an appeal filed by Russell Holdings Limited (the appellant) challenging the decision of Morrison J to strike out its application to set aside a default judgment regularly obtained against it by L&W Enterprises Inc and ADS Global Limited (the respondents). Default judgment had been entered in favour of the respondents by P Williams J (as she then was) on 1 February 2013. The appellant had applied to set aside the judgment and the respondent applied to strike out that application. Morrison J heard both applications, granted the respondents' application and consequently ordered costs against the appellant.

[4] The matter came to this court by way of a notice of application for leave to appeal out of time, a notice of application for permission to adduce fresh evidence and an application to treat the application for leave to appeal as the hearing of the appeal. Notice and grounds of appeal were also filed on 1 December 2015 and supported by the affidavit of Khadine Colman, the appellant's former attorney-at-law, which was also filed on 1 December 2015. We heard the notice of application for permission to appeal as a preliminary matter and directed that an application be made in the Supreme Court by virtue of rule 1.8(2) of the Court of Appeal Rules (CAR). On 4 April 2016 the parties appeared before Morrison J in the Supreme Court where, on hearing an application made by the appellant, he granted leave to appeal.

[5] The appellant having obtained leave in the Supreme Court, we allowed the notice and grounds of appeal filed on 1 December 2015 to stand as properly filed and

heard arguments on the substantive appeal along with the notice of application for permission to adduce fresh evidence. Having heard extensive arguments from both parties we reserved our decision and on 15 April 2016 we permitted the fresh evidence to be adduced, allowed the appeal and set aside the orders of Morrison J. We also ordered that the default judgment be set aside with costs to the appellant both here and in the court below and gave the appellant permission to file a defence within 14 days of the date of this order. We promised to put our reasons in writing and this is in fulfillment of that promise. The orders granted are as follows:

1. Application no 206/2015 for leave to appeal directed to be heard in the Supreme Court.

2. Leave having been granted by Morrison J, on the 4 April 2016, the notice and grounds of appeal filed on 1 December 2015 is allowed to stand as properly filed.

3. On application no 61/2016 the following affidavit evidence be adduced as fresh evidence in the appeal:-

    I. Affidavit of Keith Russell sworn to on 14 March 2016.

    II. Affidavit of Joshua Sherman sworn to on 16 March 2016.

    III. 2nd Affidavit of Joshua Sherman sworn to on 1 April 2016.

    IV. Witness statement of John Spencer dated 13 November 2013 and admitted into evidence on 21 January 2016 during the hearing of the claimant's assessment of damages.

    V. Affidavit of John Spencer in response to affidavit of Keith Russell sworn to on 30 March 2016.

VI. Affidavit of John Spencer in response to the second affidavit of Joshua Sherman sworn to on 4 April 2016.

VII. Affidavit of John Spencer in response to the second affidavit of Joshua Sherman sworn to on 6 April 2016.

4. The appeal is allowed.

5. Orders 1, 2, and 3 granted by Morrison J on 30 September 2014, on the notice of application for court orders filed 22 August 2014, are hereby set aside.

6. Judgment in default of acknowledgment of service of the claim form and defence with loss of revenue to be assessed, granted to the respondents against the appellant on 1 February 2013, by P Williams J, is hereby set aside.

7. The appellant is permitted to file and serve its defence within 14 days of the date of this order.

8. Costs of this appeal and in the court below to the appellant to be agreed or taxed.

Background

[6] The appellant is the owner of commercial property situated at 1 River Bay Road, Montego Bay in the parish of Saint James. The 1st respondent is a company that was incorporated in the state of Nevada in the United States of America in 2009. The 2nd respondent is a company duly incorporated in Jamaica with registered offices at 21-22 Fairview, 11 Office Park, Montego Bay in the parish of Saint James.

[7] The appellant and the 1st respondent entered into an agreement for a lease in relation to six units which comprised 5,600 square feet of the property with an option to

lease for two more units when they became available and ready for occupation. By virtue of this agreement the appellant would lease to the 1st respondent the six units situated at 1 River Bay Road, Montego Bay in the parish of Saint James to commence on 5 January 2010, for a duration of three years with an option to renew for a further two years. Whilst no formal lease agreement had yet been drawn up or executed the parties agreed to certain terms of lease.

[8] The terms of the lease which were agreed are as follows:

> **"TERMS OF LEASE**
>
> **FIRST SCHEDULE**
>
> ITEM ONE
>
> 1. Description of the Said Land
>
> All those parcels of land being LOTS NUMBERED NINETEEN, TWENTY part of the CATHERINE HALL ESTATE at the intersection of RIVER BAY ROAD link road, and Lower Bevin Avenue, Catherine Hall Estate, Montego Bay, in the parish of Saint James, and being the lands comprised in Certificate of the Title registered at Volume 1004 Folios 590, 591.
>
> ITEM TWO
>
> 2. Description of Leased Premises
>
> The premises known as THE RUSSELL CENTRE, offices C1, C2, C3 C4, C5, C6=5,600 sq. ft.
>
> D & E1 at the same terms as above, commencing 30 days after landlord advises lessee of the availability and readiness of the premises.
>
> **ITEM THREE**
>
> 1. THE LANDLORD
>
> Russell Holdings Limited, owners of the Commercial Building (THE RUSSELL CENTRE) duly registered at 1 River Bay Road, Montego Bay, St. James.
>
> **ITEM FOUR**
>
> The Tenant
>
> L&W ENTERPRISES, INC, duly registered at

ITEM FIVE

The RENT

The lease is subject to proof of the approved Free zone status with General Consumption Tax waiver letter. The rent as stated below per annum:

Year 1: US$8.00 per sq. ft.
Year 2: US$9.00 per sq. ft.
Year 3: US$10.00 per sq. ft.

ITEM SIX

Other Terms of Rental

a.) Offices D & E-1 to be agreed at the same terms as above, commencing 30 days after landlord advises lessee of the availability and readiness of the premises.

b.) First right of refusal on any vacant offices.

c.) Signage & additional security will be allowed at Tenant's expense. The landlord must approve the placing of signage which when approved will be given in writing which will not be unreasonably withheld.

d.) The Tenant must produce drawings for general layout more specifically, electrical wiring and installation along with drawings for partitions to be installed for the lessor's approval which will not be unreasonably withheld.

LANDLORD LEASEHOLD IMPROVEMENTS

Air Conditioning of Offices C4, C5 with a 3 year warranty.
Offices D and E1,

- to be air conditioned,
- and All floors where not tiled, to be finished with tiles or commercial grade carpeting,
- and for the wall separating Office D & E1 to be removed, upon activation of Item two, point two.

ITEM FOUR

EFFECTIVE DATE

The lease will start January 5, 2010.

ITEM FIVE

THE TERM OF LEASE
Three (3) Year Lease with an option to renew for additional two years.

ITEM SIX
THE PERMITTED USE
Carrying on the business of Information Technology.

ITEM SEVEN
NOTICE OF TERMINATION OF LEASE
Both Lesser and Lessee are obliged to give a minimum of SIX months' [sic] Notice in writing as specified in Clause 12, Page 18.

ITEM EIGHT
OPENING AND CLOSING HOURS

ITEM NINE
SECUIRTY DEPOSIT
One Month's Rent of **US$3,734.00**

ITEM TEN
Special Notation

i.) Ron McKay of L&W Enterprises, Inc. and Khadine Colman the lessor's Attorney-at-Law, will confer and finalize the REMAINDER of the Lease Agreement.

ii.) This Agreement is binding on the parties and is signed pending the completion and signing of the formal Lease Agreement and none of the items contained herein shall be deviated from.

..."

[9] This 'terms of lease' was signed and sealed by the appellant but was not witnessed and was signed by only one director of the 1st respondent, Ron McKay, but not by the second director of the 1st respondent, John Spencer, and was neither sealed nor witnessed. A later formal lease document was drafted, however, this was never executed. It is important for the purposes of the arguments in this appeal to note that

the parties to this first draft lease were the appellant and the 1st respondent. A second lease document was also drafted but this was only signed by the 2nd respondent who in the second draft lease had replaced the 1st respondent as the party to the lease with the appellant.

[10] The relationship between the parties broke down and on 7 February 2011 the respondents filed a claim against the appellant seeking damages for breach of contract pursuant to the lease, loss of revenue as a consequence of the breach of contract, damages to capital assets of the respondents' companies, the costs of improvements made to the property and an injunction. A further amended claim form and further amended particulars of claim were filed 10 December 2015.

[11] The appellant did not file an acknowledgement of service or a defence in response to the claim, and as a result on 5 October 2012 the respondents applied for a default judgment. This application was supported by an affidavit of John Spencer filed on 16 October 2012 in which he stated that he was "a Director of the Claimant companies and duly authorised to swear to this Affidavit". In his affidavit he outlined, amongst other things, the relationship between the two respondent companies, the general agreement between the parties, the executed terms of the lease, the significance of the unsigned lease, the alleged breaches of contract and the resultant loss sustained by the company. There were two exhibits annexed to John Spencer's affidavit. These were an appendix with production hours for stated periods and a requisition form from the registrar of the Supreme Court. Of significance to the

arguments in this appeal is the fact that he avers, inter alia, in paragraph 3 of the affidavit that:

> "...the 1st Claimant company is a private limited liability company registered in Jamaica and has a commercial interest in the 2nd Claimant..."

[12] On 1 February 2013 the notice of application for court orders to enter default judgment in favour of the respondents against the appellant came on for hearing before P Williams J. At the hearing the appellant's attorney contended that she had not been served with the claim form and particulars of claim but only with an application for an injunction, thus the reason for not filing an acknowledgment of service or a defence. After hearing both parties, P Williams J accepted the respondents' evidence that the claim form and particulars of claim had been properly served on the appellant's then attorney-at-law and found therefore, that service had been properly effected. The judgment in default of acknowledgment of service and defence was entered in favour of the respondents and the following order made:

> "Judgment in Default of Acknowledgement of Service of Claim Form and Defence for the Claimants with loss of revenue to be assessed."

[13] It is important to note even at this stage that in the affidavit of John Spencer filed on 16 October 2012 in support of the application for entry of default judgment, he states that the 1st respondent is a private limited liability company registered in Jamaica. This, as the course of events unfolded turned out not to be true and the respondents have now asserted that it was in fact stated in error. The affidavit also

indicated that the 1st respondent was a call centre hiring over 100 persons with a commercial interest in the 2nd respondent.

[14] On 16 June 2014 the appellant applied to set aside the default judgment obtained by the respondents. The grounds of the application were two-fold. The first was on the basis of non-service of the claim form and particulars of claim and the second was on the basis that the appellant had a good defence. If the first ground succeeded the judgment would be set aside as of right pursuant to rule 13.2 of the CPR, the second ground would be pursuant to rule 13.3. But I will return to that later.

[15] The application to set aside the default judgment was supported by the affidavit of Keith Russell, a director of the appellant, and was filed on 16 June 2014. Attached to that affidavit was a draft defence which had the following documents annexed, namely: the agreed terms of lease, the first draft lease signed by the two directors of the 1st respondent and sealed, witness statements of Andrew Williams, Rupert R Hodges and Dwayne Swaby, as well as five emails between the parties concerning the proposed increase in rent.

[16] On 22 August 2014, the respondents applied to strike out the appellant's application to set aside the default judgment as an abuse of process of the court. This application was supported by the affidavit of John Spencer filed on 22 August 2014 relying on and exhibiting his earlier affidavit filed on 16 October 2012 and which was considered by P Williams J in the earlier proceedings for entry of default judgment. The affidavit filed on 22 August 2014 spoke to the issue of service of the claim form and

particulars of claim on the appellant's attorneys-at-law. In addition, exhibited in that affidavit was also an affidavit from Aleksandra Balyasnikova-Smith filed on 20 April 2011, which addressed the issue of the service of the claim form and the particulars of claim on the appellant at its registered office, by fax transmission and on their attorneys–at-law Murray and Tucker.

[17] On 30 September 2014 when both applications came on for hearing before Morrison J, he granted the respondents' application to strike out the appellant's application to set aside the default judgment on the ground that the appellant's application was as an abuse of the process of the court. No reasons for the learned judge's decision were supplied to this court. The appellant filed notice and grounds of appeal and notice of application for permission to file appeal out of time on 1 December 2015. On 17 March 2016 the appellant filed notice of application to adduce fresh evidence and for the application to be treated as the hearing of the appeal. Khadine Colman of the firm of Murray and Tucker who acted for the appellant at the relevant time filed affidavit dated 1 December 2015 in support of the appellant's application to this court, in which she deposed that the learned judge did not consider whether the appellant had a real prospect of success, but focused solely on the point that the correct procedure was for the appellant to have appealed the orders of P Williams J. I will first deal with the application for permission to file appeal out of time.

The application for leave to appeal out of time

[18] The appellant applied for leave to appeal under and by virtue of section 11 (1)(f) of the Judicature (Appellate Jurisdiction) Act (JAJA) and the Court of Appeal Rules (CAR). The orders of Morrison J required leave to appeal as the proceedings before him were interlocutory in nature.

[19] Section 11 (1)(f) states:

> "11-(1) No Appeal shall lie-
>
> ...
>
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a judge except-"

The restriction on appeals in the section goes on to list certain exceptions which are not applicable to this case.

[20] The application for leave to appeal is governed by rules 1.8(1), 1.8(2) and 1.7(2)(b) of the CAR. Rule 1.8(1) and 1.8 (2) states:

> "1.8 (1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought.
>
> (2) Where the application for permission may be made to either court, the application must first be made to the court below".

[21] Where a party seeking permission to appeal has not complied with the time given to do so, an application for an extension of time within which to do so must be

made. Rule 1.7(2)(b) of the CAR gives this court the general power to extend or shorten time.

[22] A preliminary point was raised by the court that the appellant had not made an application for permission to appeal to the court below before seeking permission in this court. Counsel for the appellant, Mr Wood QC, argued unsuccessfully that this court had a residual discretion to hear and determine the application despite rule 1.8(2) of the CAR. Learned Queen's Counsel argued that rule 1.14 of CAR allowed the court to dispense with procedural requirements in the rules and that the requirement to seek leave in the court below should be dispensed with in keeping with the overriding objective and to save time, and expense. He encouraged this court to adopt the approach approved in **Eldemire v Eldemire** (1990) 38 WIR 234, where the Privy Council approved a more modern approach of saving expenses by not taking technical objections, unless it was necessary to do so in order to produce fairness and clarification. That case involved a matter brought by way of originating summons which it was complained ought to have been brought by way of writ.

[23] Rule 1.14 of the CAR does allow the court to dispense with certain procedural requirements. It states:

> "1.14 On the application of any party, a single judge may dispense with any procedural requirements in these rules if he is satisfied that –
>
> (a) the appeal is of exceptional urgency; or
>
> (b) the parties are agreed; or

(c) the appeal relates to specific issues of law and can be heard justly without the production of the full record".

[24] Counsel for the respondents, Mr Gammon, submitted that rule 1.8 of the CAR must be read with section 11(1)(f) of the JAJA and that the rules must be complied with. He argued that under the rules permission must be requested firstly from the court below and the rules must be followed. He cited **Mechanical Services Company Limited v Clinton Ellis** [2015] JMCA App 20. In that case it was held that an application to set aside a default judgment was an interlocutory order for the purposes of section 11(1)(f) of the JAJA so that permission to appeal was required from either the court below or this court. He noted that the issue was whether this court was given a residual discretion in rule 1.14 of the CAR which, he stated, it was not but argued however, that even if there was such a residual discretion this court should not exercise that discretion in this case.

The ruling on the application for permission to appeal

[25] This court has never taken the view that there is any residual discretion in rule 1.14 of the CAR to dispense with the requirements in section 11(1)(f) of the JAJA and rule 1.8(2) of the CAR. Additionally, this application for leave relates to access to the court which requires different considerations. This court has stated in **Evanscourt and others v National Commercial Bank and ors** SCCA No 109/2007 Application No 166/07, delivered 26 September 2008 that where leave is required, as in the case of an interlocutory appeal, a notice of appeal filed before leave has been granted is a nullity. We, therefore, declined to depart from this court's time honoured approach of sending

such matters back for permission to appeal to be sought first in the court below. Consequently, the order was made for the application for leave to be heard in the court below and as indicated, it was heard and granted by Morrison J and so we proceeded to hear all the applications which were properly before this court.

The application to adduce fresh evidence

[26] The appellant's notice of application for leave to adduce fresh evidence filed on 17 March 2016 was in the following terms:

> "1) Leave to adduce fresh evidence, namely:
>
> (a) The Affidavit of Keith Russell sworn to on 14th March 2016 and the Affidavit of Joshua Sherman sworn to on 16th March, [sic] 2016 which confirms that the 1st Respondent, L&W Enterprises Inc., is not an incorporated company and that the evidence to that effect tendered to support the grant of the default judgment is false.
>
> (b) Witness Statement of John Spencer, filed on 13th November, 2013 and was admitted into evidence on the 21st January, 2016 during the hearing of the Claimants' Assessment of Damages.
>
> 2) That this Honourable Court treats the hearing of the application for leave as the hearing of the appeal.
>
> 3) Any other further relief that this Honourable Court deems just.
>
> 4) Costs of application to be costs in the appeal."

[27] The grounds on which the appellant sought the orders were as follows:

"1) The Applicant's Attorneys-at-Law caused a search to be done to ascertain the status of the 1st and 2nd Claimants who are stated to be private limited liability companies in the Claim Form and Particulars of Claim. It has since been confirmed by the Registrar of Companies that there is no record of the 1st Claimant, the company that purportedly entered into the lease agreement, ever being incorporated.

2) The 1st Respondent/Claimant therefore was never registered as a private limited liability company contrary to the Particulars of Claim and is in fact a non-existent entity incapable of filing and /or maintaining suit. The judgment in Default therefore has to be set aside on that ground that a non-existent entity cannot maintain an action and further the Defendant's defence is made out in the that the lease entered into with the 1st Claimant is void.

3) That in the Affidavit given in support of entry of the default judgment and again at the assessment of damages hearing which commenced on January 21, 2016 evidence was tendered on behalf of the Respondents in the form of a witness statement of John Spencer filed on 13th November 2013, Mr. Spencer deponed in his witness statement that he was a director of the 1st Respondent/Claimant and further that the 1st Respondent is a private limited liability company registered in Jamaica and has a commercial interest in the 2nd Respondent. He further testified that the Claimant companies are related in that they share similar objectives and directors and shareholders. He then goes on to state that the 2nd Respondent took over all the operations and commercial affairs of the 1st Respondent on or about the 1st December, 2009.

4) The evidence tendered to the Court to obtain judgment in default and again at the assessment of damages hearing by the witness for the Respondents has sought to and in fact has misled the Court and accordingly the judgment that has been obtained as a result is based on the fraud of the court.

5) The knowledge of the status of the 1st Respondent is a matter that was known to the Claimants and they clearly misled the Court. Accordingly, it cannot be said that the Defendant has not ascertained this new evidence with reasonable diligence. The Defendant cannot be faulted for

relying on the assurances of the Claimants and the evidence that the 1st Respondent was a company incorporated in Jamaica. In such circumstances, the Court being misled, has always allowed the material to be admitted and set aside any judgment which is a nullity. Further, this is a matter where once it is brought to the Court or it becomes aware of it [sic] must act on its own motion to admit the evidence.

6) The fresh evidence [sic] given by Mr. Spencer at the assessment of damages hearing could not have been discovered by the Defendant with due diligence as it pertains to matters solely between the Claimant companies in terms of their internal structure and operations. The fresh evidence is credible and is decisive of the result of the case as it supports the Defendant's position that it has a real prospect of successfully defending the claim and that the 1st Respondent should not have brought this claim and should not have been granted a judgment.

7) The fresh evidence sought to be adduced is probative and necessary in the interests of justice and will assist the court in the determination of the real issues in dispute.

8) The Court of Appeal should treat this application for leave to appeal as the substantive appeal given the fact the Claimants filed full submissions in response to the application. Further, the Court of Appeal in **The Junior Doctors Association v The Central Executive of the Junior Doctors Association and the Attorney General for Jamaica, SCCA No. 21/2000 delivered July 12, 2000** did so in similar circumstances where the order had been made in favour of a non-existent entity and was therefore held to be a nullity".

[28] The application to adduce fresh evidence was in relation to the capacity of the 1st respondent to institute legal proceedings and have a judgment entered in its favour. The fresh evidence sought to be adduced related to the status of L&W Enterprises Inc and the status of its directors. The respondents filed affidavit evidence in opposition to the appellant's application to adduce fresh evidence.

[29] Learned Queen's Counsel Mr Wood submitted on behalf of the appellant that the test for the admission of fresh evidence is that which was laid down in **Ladd v Marshall** [1954] 3 All ER 745. It was also submitted that based on this court's decision in **Henriques v Tyndall and others** [2012] JMCA Civ 18 and the line of English decisions which this case adopted, these rules are to be applied based on the overriding objective and as a result there is a relaxation of the tests and its application to interlocutory proceedings.

[30] Learned Queen's Counsel also submitted that based on the decision in **The Canada Trust Company and another v Stolzenberg and others (No 4)** All England Official Transcripts (1997–2008), judgment delivered on 12 October 2000 and Cooke JA's judgment in **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** Motion No 12/1999, judgment delivered on 6 December 1999, the strict application of the **Ladd v Marshall** principles are inappropriate in relation to interlocutory proceedings. He also cited the case of **Terluk v Berezovsky** [2011] EWCA Civ 1534.

[31] In relation to the application to adduce fresh evidence it was argued that the import and effect of the fresh evidence is that it not only shows that the 1st respondent was not a duly incorporated company at the time the judgment was entered and therefore not a legal person in whose favour a judgment could be entered, but shows equally importantly that the court acted on information that was false. It was further

argued, that based on the applicable principles, once the truth becomes known the court must proceed on the true facts and act on its own volition.

[32] Learned Queen's Counsel submitted that the delay in relation to the application to adduce fresh evidence was due to the fact that, like the court, it had been misled. He also pointed out that in addition, based on the authorities, a default judgment entered on false evidence about an issue which was material to what the court had to decide must be set aside once the court becomes aware of it and it must hear the matter afresh.

[33] He further contended that the fresh evidence was clearly cogent material and would be decisive in determining the appeal in the appellant's favour. Learned Queen's Counsel also noted that the fresh evidence showed that the 1st respondent was not a legal entity at the time the default judgment was entered and that would render the default judgment a nullity.

[34] Counsel for the respondents submitted that the court should refuse to hear the fresh evidence as the requirements in **Ladd v Marshall** have not been satisfied. Counsel noted that the information which the appellant was seeking to adduce into evidence was available at the time of the hearing. Counsel cited **Rose Hall Development Limited v Minkah Mudada Hananot** [2010] JMCA App 26. Counsel argued that the evidence contained in the affidavit of Joshua Sherman was available and could have been obtained with reasonable diligence. He argued that only in exceptional circumstances should such evidence be allowed. He also asked the court

not to rely on **Terluk v Berezovsky** which he says has not been judicially interpreted in these courts but to accept the decision in **Leighton Gordon v Patrick Thompson et al** [2012] JMCA App 24 which has been approved in **Ladd v Marshall**.

[35] Counsel also submitted that the evidence showed that the 1st respondent was incorporated in the state of Nevada in the United States of America at the time of entering into the lease. Counsel submitted that based on the course of dealings by the parties it was clear that the 2nd respondent was treated as a party to the lease agreement. Counsel argued further that the court should rely on the final draft lease that had not been executed where the 2nd respondent was the named lessee as governing the relationship between the parties. He argued that as a result the second limb of the criteria in **Ladd v Marshall** would not be met because even if the 1st respondent was not a duly registered company the 2nd respondent would still stand as a proper party to the agreement.

[36] Counsel contended that the substantive claim is not nugatory and the 1st respondent was only included out of an abundance of caution. Counsel also argued that if there was any uncertainty as to who was the proper party to the lease agreement this would have been clarified by the subsequent conduct of the parties evidenced in a series of correspondence between them. He relied on the decision in **Jamaica Public Service Company Limited v Rose Marie Samuels** [2012] JMCA Civ 42.

[37] According to counsel the fact that the 1st respondent was registered in the state of Nevada meant that it is a juristic person and is recognised as such under the laws of

Jamaica. He also pointed out that the 1st respondent would have had status as a juristic person at the time of the execution of the agreed terms of lease. He asked the court to take note of the two affidavits sworn to by Mr John Spencer, the first on 4 April 2016 and the second on 6 April 2016 in response to the appellant's applications before this court. Counsel also argued that the appellant was estopped from relying on the assertion that the 2nd respondent was not a party to the lease agreement as it knew or ought to have known that it was.

The ruling on the fresh evidence application

[38] In determining whether or not to allow the appellant to adduce the fresh evidence I considered whether the requirements laid down in **Ladd v Marshall** were applicable. The three requirements are:

> (1) "It must be shown that the evidence could not have been obtained with reasonable diligence at the trial"
>
> (2) "...the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive"
>
> (3) "...the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible".

[39] In **Rose Hall Development** the court recognized its power to consider an application for fresh evidence within the context of the Civil Procedure Rules (CAR). In that case the principles in **Ladd v Marshall** were applied against the background of

the overriding objective. This approach was adopted by this court in **Henriques v Tyndall and Others**. In **Terluck v Berezovsky** the English Court of Appeal noted:

> "The *Ladd v Marshall* criteria remain important ("powerful persuasive authority") but do not place the court in a straitjacket (*Hamilton v Al-Fayed (No 4)* [2001] EMLR 15 per Lord Phillips MR as he then was at paragraph 11). The learning shows, in my judgment, that the *Ladd v Marshall* criteria are no longer primary rules, effectively constitutive of the court's power to admit fresh evidence; the primary rule is given by the discretion expressed in CPR 52.11(2)(b) coupled with the duty to exercise it in accordance with the overriding objective. However the old criteria effectively occupy the whole field of relevant considerations to which the court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence".

[40] Rule 52.11(2)(b) of the English Court of Appeal Rules simply states that the appeal court will not receive fresh evidence unless it makes an order to do so. That rule did not spell out the principles on which the court will act to make such an order. Previous to the changes in those rules, the court would have made such an order on special grounds and those which were spelt out in **Ladd v Marshall**. The court now makes such orders based on the overriding objective and the criteria laid down in **Ladd v Marshall** which are now only relevant factors to be taken into account in arriving at a decision in accordance with the overriding objective.

[41] In **Canada Trust Company**, the parties to the appeal and indeed the appeal court accepted that the principles in **Ladd v Marshall** did not apply to interlocutory proceedings but applied strictly only to trials and hearings on the merits. In that case the court found that:

> "The notes in the Annual Practice and indeed the Court of Appeal decision in *Star News Shops Ltd v Stafford Refrigeration Ltd [*1998] 1 WLR 536 support the view that so far as appeals in interlocutory matters are concerned, since there has been no trial or hearing on the merits, 'the strict rules of *Ladd v Marshall* [1954] 1 WLR, 1489' do not apply; the Court of Appeal has in such appeals, "a general discretion" to admit fresh evidence; (see Otton LJ at 541 H). The indication from use of the word "strict" when applied to the rules in *Ladd v Marshall* would seem to support the view that in interlocutory matters a less strict regime exists."

[42] The court in **Canada Trust Company** seems to have taken the view that in the exercise of its "general discretion" the court should consider factors such as; the nature of the interlocutory application, the reason why the evidence was not adduced in the court below, the opportunity provided for putting in evidence in the court below and the nature of the evidence sought to be put in.

[43] In **Star News Shops Ltd v Stafford Refrigeration Ltd UPO (UK) Ltd and others** [1998] 1 WLR 536, Otton LJ said at page 542:

> "An application was made to adduce further evidence before us on behalf of the [appellants] as to what occurred before the judge, to explain why there was no affidavit and what has transpired since the order was made. It was agreed between the parties that this was not a situation where the strict rules of Ladd v Marshall (1954) 1 WLR 1489 apply; this is an interlocutory matter and there has not been a trial or hearing on the merits. Consequently the Court of Appeal has a general discretion to admit fresh evidence under R.S.C., Ord. 59, r. 10(2). An important factor to be taken into account in exercising that discretion is the reason why the evidence was not adduced in the court below".

[44] In **Dubai Bank Ltd v Fouad Haji Abbas and Another** (Transcript: Smith Bernal), judgment delivered on 17 July 1996, it was held that where the court below

had considered a matter and made decisions based on material information put before it, which material turned out to be false, then the Court of Appeal must consider the matter afresh. In considering the matter afresh the court acceded to an application to adduce fresh evidence on the basis that it was not available to be put before the judge even upon the exercise of due diligence and that it was of significance to the case of the bank. In **Dubai Bank** false evidence had been presented to the court below. It had not been checked because it had been assumed that persons acting for the bank had carefully checked to ensure the information was correct and therefore it was thought that there was no point in cross-checking. There was no evidence from the bank about how they came to be supplied with false information.

[45] In the light of the authorities which make a distinction in relation to the circumstances of a trial or a hearing on the merits where the principles in **Ladd v Marshall** are strictly applicable and the treatment of the issue in relation to interlocutory matters where they are not, it seems patently clear that it is not necessary to strictly apply all the requirements in **Ladd v Marshall** to the instant case. The reliance by counsel for the respondents on **Rose Hall Development** is misplaced as that case involved a trial and final judgment.

[46] As far as it concerns the availability of the evidence it could fairly be said that much of the blame for the delay in this information coming to light could be laid at the feet of the respondents. This is because based on the description of themselves as duly incorporated entities in their statement of case and sworn affidavits the appellant could

not be blamed for accepting and relying on this information rather than taking up valuable time and resources in cross checking whether the respondents were being honest in their claim as to their status or place of incorporation. Therefore, whilst it is accepted, that it was possible to get this information during the hearing of the application in the strictest sense, there was nothing to alert the appellant that this was in fact necessary. So, it is not reasonable to say that in doing its due diligence in relation to the hearing the search should have been done.

[47] Nevertheless, in all the circumstances I find that the appellant has satisfied the first requirement, as the information in the fresh evidence was not an issue at the time of the hearing of the applications. In addition, one should be able to rely on a party's description or statements about itself in documents sworn to and submitted to be relied on or considered by the court without time and resources being wasted by cross checking the truth of such statements.

[48] It is without question that based on the nature of the evidence it would have a great impact on the outcome of the appeal. I also find that the evidence is credible; it has not been challenged by the respondents except to say that at the time the lease was entered into the first respondent was duly incorporated in the state of Nevada and was therefore a juristic person.

[49] In the light of the above, we gave leave to adduce the fresh evidence and therefore took it into consideration in arriving at our decision.

The grounds of appeal

[50] The appellant filed notice and grounds of appeal challenging the following orders of Morrison J made on 30 September 2014 that:

> "(i) The Claimants' application that the Defendant's Notice of Application for Court Orders filed on the 16th June 2014 be struck out as being vexatious and an abuse of process of this Honourable Court and will obstruct the just disposal of these proceedings is granted.
>
> (ii) The Defendant's application to set aside the judgment in default of Acknowledgment of Service of claim form and Defence for the Claimants with loss of revenue to be assessed is refused.
>
> (iii) Costs to the Claimants to be paid by the Defendant to be agreed or taxed".

[51] The appellant also challenged the following finding made by the learned judge:

> "That the Learned Judge could not hear the Defendant's application to set aside the Default Judgment as the correct procedure would have been to appeal the order of the Honorable Miss Justice Paulette Williams when she entered Judgment in Default of Acknowledgement of Service and Defence against the Defendant on the 1st February, 2013".

[52] The appellant filed the following grounds of appeal:

> "(i) Pursuant to Rule 1.8(9) of the Court of Appeal Rules (CAR) the Appellant has a real chance of success.
>
> (ii) The Learned Judge in Chambers erred in law in holding that the application to set aside the Default Judgment was a wrong procedure, and that an appeal of the order of Miss Justice Paulette William [sic] to enter judgment in default should have been pursued.
>
> (iii) The Appellant had a right to make an application to set aside the Default Judgment and the Learned Judge should have proceeded to hear the application on the basis that the order of the Learned Miss

Justice Paulette Williams to enter judgment in Default was not on the merits.

(iv) The Defendant has a real prospect of successfully defending the claim and there was sufficient material placed before the Learned Mr. Justice Bertram Morrison which permitted him to set aside the Default Judgment however he failed to consider the Appellant's prospect of success."

[53] The appellant therefore sought the following orders:

"(i) Judgment in Default of Acknowledgement of Service of Claim Form and Defence for the Claimants with loss of revenue to be assessed to be set aside.

(ii) That the Defendant is granted permission to file and serve its Defence within fourteen (14) days of the Order".

The appellant's submissions on the appeal

[54] In relation to the substantive appeal it was submitted that this was the first and only such application made by the appellant; that Morrison J had clearly erred when he ruled that the application to set aside the default judgment entered by P Williams J, was not the proper procedure and that an appeal ought to have been filed to challenge the order made.

[55] Learned Queen's Counsel also submitted that in light of the decisions from this court such as **Rohan Smith v Elroy Pessoa and Nickeisha Samuels** [2014] JMCA App 25, which held that multiple applications could be made to set aside a default judgment, the application before Morrison J was properly made. It was argued that Morrison J was obliged to consider the application in relation to rule 13.3(1) and (2) of the CPR as to whether or not the appellant had a reasonable prospect of successfully

defending the claim based on the affidavit of Keith Russell and the draft proposed defence exhibited thereto and exercise his discretion accordingly.

[56] It was also submitted that based on the applicable principles, delay was a factor to be considered but it was not determinative of the application and the merits of the case was always of paramount importance. Learned Queen's Counsel accepted that there was undoubted delay in making the application to set aside the default judgment but he pointed to the explanation given by Khadine Colman that she did not appreciate that she could have applied for leave and that she also believed that she would have been allowed to contest the assessment of damages. It was contended that where the problem arose from the manner in which counsel had approached the matter, which turned out to be erroneous, the court may exercise its discretion in the appellant's favour. He also pointed to the affidavit of Keith Russell filed 17 March 2016 where he asserts that at all times the appellant relied on the advice and representation of counsel Khadine Colman in contesting the action brought by the respondents. In particular he claimed that the appellant relied on her advice in not filing an acknowledgment of service or defence on the basis that there was no proper service of the claim form and particulars of claim.

[57] Learned Queen's Counsel also contended that in **Barons Bridging Finance PLC v Nnadiekwe QBD** [2002] EWHC 4078, the court set aside a default judgment in circumstances where there was a delay of five years, in the interests of justice since the issues raised were never fully ventilated.

[58] It was also submitted that the lease agreement with a non-existent company was void and that the appellant did not enter into any lease agreement with the 2nd respondent. Learned Queen's Counsel also contended that based on the 'terms of lease' the defendant was responsible for their electrical needs and the appellant had not undertaken that responsibility. Further the losses claimed were as a result of the respondent's own actions, in that they failed to connect all four metres on the property in order to get sufficient power supply. It was argued that the claim by the respondents for losses for permanent improvements to the property was flawed as the draft lease on which they relied provided that all fixtures should be removed by them on determination of the lease.

[59] In relation to the damages it was submitted that the damages claimed were too remote. It was argued that the losses alleged related to a contract with a third party. Further, that there was no term in the contract notifying the appellant of the special requirements on which a claim for damages for loss of revenue could be based.

[60] Learned Queen's Counsel further submitted that the court ought to set aside the default judgment entered as there is incontrovertible evidence which shows that the judgment obtained is a nullity as it was entered based on material evidence which was false in substance relevant to the matter.

The respondents' submissions on appeal

[61] Counsel for the respondents submitted that the default judgment was a regularly obtained judgment and that it must necessarily be the case that the learned judge

looked at everything that was before him including the appellant's draft defence. The draft defence, it was submitted, was not considered by Morrison J to have a reasonable prospect of success and that he did apply his mind to rule 13.3 of the CPR in coming to his decision. It was submitted that the appeal should be dismissed on the basis that it is vexatious and frivolous.

Basis to hear the case afresh

[62] This court will not lightly interfere with a judge's decision arrived at after the due exercise of his discretion but will interfere if it was based on an misunderstanding of the law or a misapplication of the correct principles of law or the evidence before him or if the decision was so perverse that it must be set aside on the basis that no judge in the exercise of his judicial duties could have arrived at that decision (see Phillips JA in the case of **Rohan Smith** at paragraph [26] of that judgment).

[63] In this case the learned judge gave no indication of the basis upon which he arrived at his decision. The notes of evidence were singularly unhelpful and whilst it is not in every interlocutory matter that reasons are required, where the decision affects the substantive rights of the parties, the reasons should be clearly demonstrated or the parties and the appellate court should be able to glean from the evidence or the circumstances why the judge ruled in the way he did (see **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409). In **Eagil Trust Co Ltd v Pigott-Brown and another** [1958] 3 ALL ER 119 at 122 Griffiths LJ said:

> "When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decisions. They need not be elaborate."

Although Griffiths LJ was speaking specifically to applications to strike out, his observations are of general application.

[64] Learned Queen's Counsel submitted that the appeal concerned the correctness of the learned judge's decision to strike out the appellant's application to set aside the default judgment entered against it on the basis that the proper procedure was to appeal. He relied on the principles laid down in **Phonographic Performance Ltd v AEI Rediffusion Music Ltd** [1999] 1 WLR 1507 at 1523 and which was cited in the Civil Procedure, The White Book Service 2014, Volume 1, at paragraph 52.11.4, where it states, quoting Lord Woolf MR that:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

[65] The orders complained of were made by the learned judge in the exercise of his discretion. The decision in **Jamaica Citizens Bank v Dalton Yapp** (1994) 31 JLR 42 applying **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, and the decisions in cases such as **Attorney General v John McKay** [2012] JMCA App 2 and **Jamaica Public Service Company Limited v Rose Marie Samuels** all highlight the limited circumstances in which this court will interfere to set aside an order made in the

exercise of a judge's independent discretion. It will only do so where the judge's decision was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist.

[66] In describing the role of the Court of Appeal in examining the exercise of a discretion by the court below, Lord Diplock in **Hadmor productions Limited v Hamilton** made the following observation at page 1046:

> "On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own." (Emphasis supplied)

[67] In light of the failure of the learned judge to indicate the basis of his decision, this court, based on the authorities previously outlined, is bound to examine the matter afresh and consider whether the appellant has met the requirements of rule 13.3 of the CPR.

Was the learned judge correct to hold that the application to set aside was a wrong procedure and an appeal ought to have been filed?

[68] The question is whether the judge was plainly wrong in his view that the wrong procedure was adopted by the appellant and plainly wrong in failing to consider whether the appellant had a real prospect of defending the claim under rule 13.3 of the CPR. Learned Queen's Counsel submitted that the judge was in error and was bound to hear the application as no application on the merits was heard by P Williams J.

[69] The learned judge in ruling that the proper procedure was to file an appeal clearly misunderstood the law in relation to the challenges that can be made to the order entering a default judgment. This court will therefore consider grounds two and three together for convenience since they both challenge the learned judge's treatment of the application to set aside the default judgment.

[70] When a court is considering whether to set aside a default judgment regularly obtained, it must turn its attention to Part 13 of the CPR, rule 13.3 as amended in 2006. Though familiar to all civil practitioners it is worthwhile setting it out in full. It states:

> "13.3 (1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a

real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule the court must consider whether the defendant has:

a. applied to the court as soon as reasonably practicable after finding out that judgment has been entered.

b. given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."

[71] An application to set aside a default judgment may therefore be made under rule 13.2 or rule 13.3 of the CPR. Under rule 13.2 of the CPR, the court must set aside a judgment entered in default under Part 12 if the judgment was wrongly entered because the conditions to enter judgment in default of acknowledgment of service or defence have not been satisfied or the whole of the claim was satisfied before judgment was entered. In such a case a judgment in default must be set aside as of right. One basis for setting aside a default judgment as of right is if it can be shown that service of the claim form and particulars of claim was not properly effected.

[72] Under rule 13.3 of the CPR the default judgment may be set aside if the judge, in his discretion, is of the view that the applicant has satisfied the requirements of the rule, that is, that he has a real prospect of successfully defending the claim. Additionally, the court must consider whether the application was made promptly, if

there is a good explanation for the failure to file acknowledgment of service or defence and whether there would be any prejudice to the respondent in light of the overriding objective of doing justice between the parties.

[73] Since P Williams J entered judgment in default of acknowledgment of service and defence, it was open to the appellant to apply to set aside the judgment either under rule 13.2 or 13.3 of the CPR depending on the existing circumstances. P Williams J did not hear an application to set aside a judgment entered in default, but in fact entered such a judgment. In the same way the appellant would have had the right to apply to set it aside if it had been a judgment in default entered by the registrar, so too it had a right to apply to set aside the judgment in default entered by the court. Certainly, if it was attempting to set aside the default judgment as of right under rule 13.2 of the CPR one would expect that it would have presented new material that had not been canvassed before P Williams J as to the issue of service. The application being on two grounds, the other being that the appellant was claiming that it had a good defence on the merits with a real prospect of success, the learned judge was also obliged to consider the application in light of rule 13.3 of the CPR.

[74] No doubt, although he gave no reasons, the learned judge was influenced in his observation by the fact that P Williams J made a finding of fact when she found that the claim and particulars of claim were properly served. He may have felt that this was a finding that properly ought to be appealed. If that is so, he would have been incorrect.

[75] This effectively means therefore, that even if Morrison J was of the view that the issue of service had been traversed in the application to enter judgment before P Williams J, he was duty bound to hear the application to set aside the judgment on the basis of non service under rule 13.2 of the CPR and consider any new material presented as to service. The appellant's grounds in the application before him for setting aside being two-fold he was also obliged to consider the application as to whether the defendant had a good defence with a real prospect of success under rule 13.3 of the CPR.

[76] As a corollary to that point, even if the application before Morrison J was a second application to set aside the default judgment, he was still in error when he determined that the order of P Williams J ought to be appealed instead. This is because there is no general rule prohibiting an unsuccessful applicant for an order to set aside a default judgment from making a second application. This issue was considered in the case of **Rohan Smith.** In that case this court considered the issue settled since the judgment in **Granville Gordon and Aderaide Gordon v William Vickers and Lucille Vickers** (1990) 27 JLR 60 and **Trevor McMillan and Others v Richard Khouri** SCCA No 111/2002, judgment delivered on 29 July 2003. There is now no doubt that a court may entertain an application to set aside a default judgment even if a previous application had been made and dismissed. It also does not matter whether the previous application was heard on the merits and the evidence in the second application need not be evidence which was not available at the time of the first but

must be new in the sense that it had not been placed before the court at the hearing of the first application.

[77] In **Rohan Smith** the court referred to and approved the decision in **Trevor McMillan**. In that case the learned judge at first instance dismissed the second application to set aside the default judgment on the basis that it was the wrong procedure and that an appeal ought to have been filed. Harrison P (Ag) giving the judgment of the Court of Appeal said that:

> "A second and subsequent application may be made to the same or another judge of the Supreme Court to set aside such a judgment as long as the applicant can put forward new relevant material for consideration (**Gordon et al v Vickers** (1990) 27 JLR 60). Facts may be regarded as new material, although through inadvertence or lack of knowledge such facts were not placed before the court on the first occasion provided they are relevant (See also **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies et al** [1971] 1 WLR 550)."

[78] The issue was considered again in **Anwar Wright v The Attorney General** [2013] JMSC Civ 128, where Campbell J considered and applied the reasoning in both the **Gordon Vickers** and **Trevor McMillan** cases. There is no doubt therefore that Morrison J's approach was incorrect. Even if the learned judge was of the view that the hearing before P Williams J was a hearing on the merits he was wrong to have dismissed the application to set aside on the basis that it was an abuse of process because the wrong procedure had been followed.

[79] Applications to set aside a default judgment are made under Part 13.3 of the CPR which outlines the requirements that must be met. Morrison J was required to

consider whether the applicant met those requirements. Although counsel for the respondent had submitted that the court ought to accept that the learned judge had examined the application to strike out based on Part 26 of the CPR. With no reasons being provided, I am afraid I cannot agree with counsel's position as the views expressed by the learned judge that the wrong procedure was being followed could and very likely have influenced the learned judge's decision to strike out the application to set aside the default judgment.

[80] In the light of the view expressed by the learned judge, without more, it could reasonably be said that he did not address his mind to the relevant provisions of the CPR dealing with the application for setting aside a default judgment. In the light of this it can be said that he had not properly or judicially exercised his discretion in this matter. The orders of Morrison J cannot stand and must be set aside and this court must therefore, conduct its own assessment.

Principles applicable to the setting aside of a default judgment under rule 13.3 of the CPR

[81] Before beginning the assessment, I will first consider the principles applicable to the exercise of a discretion to set aside a default judgment. The focus of the court in hearing an application to set aside a default judgment regularly obtained under rule 13.3 of the CPR and in considering how to exercise its discretion should be on whether the applicant has a real prospect of successfully defending the claim. The court must also consider the matters set out in rule 13.3(2)(a) and (b) (see the judgment of this

court in **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, per Phillips JA). The primary consideration therefore is whether the appellant has a defence on the merits with a real prospect of success.

[82] For there to be a real prospect of success the defence must be more than merely arguable and the court, in exercising its discretion, must look at the claim and any draft defence filed. Whilst the court should not and must not embark on a mini trial, some evaluation of the material placed before it for consideration should be conducted. The application must therefore be accompanied by evidence on affidavit and a draft of the proposed defence.

[83] A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the factors in rule 13.3(2)(a) and (b) are considered against his favour and if the likely prejudice to the respondent is so great that, in keeping with the overriding objective, the court forms the view that its discretion should not be exercised in the applicant's favour. If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the end of the matter. If it is considered that there is a good defence on the merits with a real prospect of success, the judge should then consider the other factors such as any explanation for not filing an acknowledgement of service or defence as the case may be, the time it took the defendant to apply to set the judgment aside, any explanation for that delay, any possible prejudice to the claimant and the overriding objective.

[84] The prospect of success must be real and not fanciful and this means something more than a mere arguable case. The test is similar to that which is applicable to summary judgments (see Blackstone's Civil Procedure 2005, paragraphs 20.13 and 20.14 and the case of **International Finance v Utexafrica sprl** [2001] All ER (D) 101 (May). (See also **ED&F Man Liquid Products v Patel & another** (2003) Times, judgment delivered on 18 April 2003.)

[85] In Blackstone's Civil Procedure 2004 paragraph 34.13 the learned editors in reference to summary judgment applications argued that a defendant could show that the defence had a real prospect of success by:

(a) showing a substantive defence, for example v*olenti non fit injuria*, frustration, illegality etc;

(b) stating a point of law which would destroy the claimant's cause of action;

(c) denying the facts which support the claimant's cause of action; and

(d) setting out further facts which is a total answer to the claimant's cause of action for example an exclusion clause, agency etc.

[86] Accepting that the principles to be applied regarding a defence on the merits in summary judgment applications are similar to that in an application to set aside a default judgment regularly obtained, a defence with a real prospect of success in such an application may therefore involve a point of law, a question of fact or one comprising

a mixture of fact and law. A defence will have little prospect of success if it is weak or fanciful and lacking in substance or if it is contradicted by documentary evidence or any other material on which it is based. A defence consisting purely of bare denials may have little prospect of success (see **Broderick v Centaur Tipping Services** (2006) LTL 22/8/06 as cited in Stuart Simes's *"A Practical Approach To Civil Procedure"*, 15th edition at page 272, paragraph 21.21).

[87] In **Swain v Hillman** [2001] 1 All ER 91 Lord Woolf said that:

> "The words, "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or,…. directed the court to the need to see whether there was a 'realistic' as opposed to a 'fanciful' prospect of success."

[88] In the instant case, this court in deciding whether or not the appellant has a real prospect of successfully defending the claim will have to consider all the material which was before the court below and the fresh evidence presented to this court for consideration. Therefore, the affidavits filed by the appellants and those filed in response by the respondent, will be subject to assessment. Consideration will also be given to whether there was any delay in making the application to set aside the default judgment as well as the reasons for the failure to file the acknowledgment of service or defence.

Does the appellant have a good defence with a real prospect of success?

[89] The respondents in their claim form dated 1 February 2011, claimed for breach of contract pursuant to a lease between the 1st respondent and the appellant commencing on 5 January 2010, a sum representing the value of permanent improvements to the subject property, loss of revenue as a consequence of the breach of contract and damages to capital assets and interests. In its particulars of claim it is averred that the 1st respondent has a commercial interest in the 2nd respondent and that they are related in that they share similar objectives directors and shareholders. It is also averred that they are both private limited liability companies operating as call centre companies, both with registered offices in Jamaica. The respondents also aver that they both entered into a lease with the appellant in January of 2010. However, the signed terms of the lease had only the 1st respondent as a party to the agreement.

[90] It is now necessary to consider those aspects of the defence which the appellant claims has a real prospect of success. I will begin with the affidavit of Keith Russell filed on 16 June 2014 and which exhibited a draft of the proposed defence. This would have been the "affidavit of merit" before Morrison J for his consideration. In paragraph 3 Mr Russell referred to the lease agreement which was never properly executed. At paragraph 4 he alleged that the respondents were responsible for their own electrical needs and in failing to apply for the electrical requirements they were responsible for their own losses. At paragraph 6 he asserts that the appellant gave letters addressed to the Jamaica Public Service to the respondents for permission to connect four metres but

they chose to connect only two. At paragraph 10 he denied that the appellant was responsible for the appellant's losses.

[91] The proposed defence exhibited the agreed terms of lease signed by the 1st respondent and the appellant. It also exhibited the first draft of the lease signed by the respondents but not the appellant. The appellant denied that there was any discussion regarding the 2nd respondent at the time of the agreement for the terms of the lease. The defence also speaks to the letters for the four metres to be connected but the respondents chose to connect only two. It also averred that the respondents sought to connect the remaining two only after they began having electrical problems. The appellant also asserted that leakage and damage to the premise only resulted after the respondents began making modifications to the premises without permission, to create more space and accommodate more agents.

[92] The appellant further averred in its defence that the lease was not properly executed, rent was not paid and there had been negotiations for a new lease and that the appellant was not responsible for the respondents' loss. There was, therefore, a full affidavit of merit and draft defence which was before the learned judge for consideration. What it lacked however, was any explanation for the failure to file acknowledgment of service and defence in the time required by the rules.

[93] In considering whether the appellant has a real perfect of success I will also consider the issues raised by the fresh evidence, that is, whether there was a valid lease, whether the 1st respondent was a juristic entity and whether the default

judgment was a nullity. I will also consider separately whether there is a defence with a real prospect of success to the claim for breach of the contractual terms.

[94] The appellant's submissions on this aspect of the appeal were threefold. Firstly, it was argued that there was the question of whether the 1st and 2nd respondents were existing legal entitles at the time of the execution of the agreed terms of the lease. The appellant argued that they were not as at that time the 2nd respondent was not yet incorporated and the status of the 1st respondent was questionable. Secondly, the appellant argued that there was a triable issue as to whether the signatories to the agreed terms of lease on behalf of the 1st respondent company had authority to sign on its behalf as they were not listed as directors. Thirdly, it was also submitted that at least at the time of the judgment, the 1st respondent was not a valid legal entity and therefore the judgment in its favour was a nullity.

[95] Learned Queen's Counsel pointed to the affidavit of Joshua Sherman filed on 17 March 2016, where he indicated that the firm having lately come into the matter, the appellant's files were examined and it was revealed that no record of the incorporation of the respondents were on the file. A subsequent search at the Companies Office to ascertain the status of the respondents showed that the 1st respondent, despite its claim in the Supreme Court to being registered in Jamaica, was actually not incorporated nor registered in Jamaica.

[96] Mr John Spencer, in his affidavit filed on 31 March 2016, indicated that the 1st respondent is a company registered in the state of Nevada, United States of America.

The affidavit of Joshua Sherman filed on 1 April 2016, in response to that affidavit revealed that a search of the records in the state of Nevada as to the status of the 1st respondent revealed that L & W Enterprises Inc had been permanently revoked. Interestingly, Mr Joshua Sherman also deposed that neither the name of John Spencer nor Ron MacKay, both of whom claimed to be directors of the 1st respondent, appeared as a director of the 1st respondent in the state of Nevada's registry. The appellant's attorneys not content with just that information went on to request and did receive a certificate from the Nevada Secretary of State in respect of the status of the company L&W Enterprises Inc which was registered in the state of Nevada. That certificate confirmed that the company had been permanently revoked. The evidence is that the 1st respondent's status was revoked from 1 March 2011 and was permanently revoked 1st March 2015. Learned Queen's Counsel submitted, therefore, that the 1st respondent was a non-existent company incapable of filing or maintaining a suit.

[97] Mr John Spencer filed two affidavits in response, the first on 4 April 2016 and the second on 6 April 2016. The former was in response to the affidavit of Joshua Sherman filed on 1 April 2016. In it he claimed to be a director of the 1st respondent and that the 1st respondent was a valid company in 2009 when the 'terms of lease' was signed. He also claimed that on the state of Nevada website not all directors need be listed and that anyone can be a director, if they agree. He also made a curious statement that "we could be directors as claimed". In the latter affidavit he sought to clarify the arrangement with the 2nd respondent and the appellant. He claimed that the 1st respondent entered into the lease because the 2nd respondent was not yet a duly

registered company in Jamaica and that it was clearly expressed to the appellant that that lease would be temporary and the long term lease would be with the 2nd respondent. He also presented evidence intended to show that at all times the 2nd respondent was actively in the picture.

[98] The second point argued on behalf of the appellant was that the judgment had been obtained by the 1st respondent which was a non-existent company and that as the lease terms had not been agreed with the 2nd respondent, it was not a party to that lease and was therefore not entitled to the judgment. Learned Queen's Counsel argued that on either basis the judgment should be set aside and the matter determined at trial. He argued further that even if at the time of signing the terms of lease the 1st respondent had validly been in existence, by the time of judgment it was not. Learned Queen's Counsel also pointed out that it was also of concern as to whether the directors who signed the agreed terms of lease were authorised to do so as they do not appear as directors on the state of Nevada's registry. The draft of the proposed defence accompanying the affidavit of Keith Russell filed on 17 March 2016 incorporated all the material contained in the fresh evidence application.

[99] It is a fact that the authorities support the stance taken by learned Queen's Counsel. For example in **Lazard Brothers and Company v Midland Bank Limited** [1931] 1 KB 617, after a certain period, the Bank had ceased to exist as a juristic person so that the default judgment obtained against it after that period was a nullity

and consequently, no garnishee proceedings could be founded on it. The head note of that judgment reads per Scrutton LJ:

> "If it comes to the knowledge of the Court that it has entered judgment in default of appearance against a man who was at the time dead or a company which was at the time dissolved or non-existent according to the law of its country of origin, the Court is bound after hearing the parties interested, of its own motion to set the judgment aside."

[100] This case went to the House of Lords reported at [1933] AC 289, where the decision of the Court of Appeal was upheld, Lord Wright at page 296 holding that:

> "...a judgment must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and as soon as it appears to the court that the person named as the judgment debtor was at all material times at the date of the writ and subsequently non-existent…"

[101] In **Forbes and Forbes v Miller's Liquor Store** [2012] JMCA App 13, a preliminary point was taken by counsel for the respondent that the appeal was a nullity as the 1st applicant was deceased and had died before the appeal was filed. The court adopted the following propositions; firstly, that an attorney being a kind of agent, when his client dies, the authority of the attorney is thereby terminated. The court found that the appeal was a nullity, the applicant having died before it was filed and it could not continue with one applicant, it being a joint claim wherein both interests would have to be pursued on appeal.

[102] In **Russian and English Bank v Baring Brothers and Company Limited** (1932) 1 Ch 435 it was held that the action had to be stayed indefinitely as the

claimants no longer existed having been dissolved as a corporation. The court at page 442, quoting Atkins LJ in **Banque Internationale de Commerce de Petrograd v Goukassow** [1923] 2 KB 682, 691 stated that:

> "In the case of an artificial person, such as a foreign corporation, our law would look to the law of the country which created the corporation, and finding the corporation dissolved by that law, our Court must also treat the corporation as dissolved."

[103] The court also found that as a defunct corporation seeking to maintain an action, in the eyes of English Law, it was not a party but a mere name only with no legal existence and that a non-existent person cannot sue. The court went on to state that:

> "When once the Court is made aware that the plaintiff is non-existent, and therefore quite incapable of maintaining the action, it is bound to put an end to it."

It also held that a claim commenced in the name of a non-existing person, or company, was a nullity.

[104] The fresh evidence adduced really amounts to the fact that L&W Enterprises Inc, at the time of the institution of the claim and the entry of the default judgment was not a juristic person. It did not, therefore, have the capacity to institute legal proceedings or to have a judgment entered in its favour by the court as it was then a non-existent entity or an entity not recognised by law. It also indicates that at the time of the execution of the 'terms lease' and any time thereafter, the capacity and authority of the signatories could be viewed as questionable. The significance of this is that the appellant claims that the agreement for the lease was entered into with the 1st respondent L&W Enterprises Inc and that the 2nd respondent was not a party to it.

[105] There is no dispute that the executed 'terms of the lease' was with L&W Enterprises Inc. The evidence placed before this court revealed that at the time of the execution of that agreement L&W Enterprises Inc, was a company incorporated in the state of Nevada. At the time of the judgment entered by P Williams J it was a company temporarily struck from the registry of the state of Nevada. By the time the case was set for assessment of damages its status was permanently revoked.

[106] Importantly, this fresh evidence raises an issue which would go to the jurisdiction of the court to deal with the matter, where the capacity of one of the parties to bring or maintain the claim is in question. In the case of **Jarrott v Ackerley** [1914-15] ALL ER Rep Ext 1248, the court was dealing with a matter in which an under lease was demised to a society which was not registered as a company, trade union neither as a friendly or industrial and provident society but was in fact a club. The sublease was executed by a person purporting to act on behalf of the society but who had not been appointed under seal. The head lease was forfeited by the lessor for breach of covenant and notice was given to the society to give up possession. The society sued the lessors and the writ was amended to make three trustees of the society sue on behalf of all the members. It was held that the trustees had no status to sue. The defence raised the point of law that the trustees were not entitled to claim and that the under lease was made to a society which had no legal status and was not duly executed by any party to the lease. The court agreed that the trustees had no right to sue and that the under lease was purported to have been made to persons who have no legal status. It also

held that the plaintiffs were not under lessees within the meaning of the Conveyancing and Law of Property Act 1892.

[107] In Halsbury's Laws of England, 5th edition, volume 11, at paragraph 223, under the heading corporations it states that "a corporation which has ceased to have any juristic existence cannot sue or be sued". It cites the cases of **Russian and English Bank** and **Lazard Brothers** as authorities for this proposition. In **The Junior Doctors Association and The Central Executive of the Junior Doctors Association v The Attorney General** Motion No 21/2000, judgment delivered on 12 July 2000, this court considered whether an injunction could be sustained against an unincorporated body which was not a legal entity and was thereby incapable of suing or being sued. The proceedings against the association was held to be a nullity as it was an unincorporated body and therefore not a juristic person.

[108] The appellant having adduced fresh evidence which appears to be credible regarding the status of the 1st respondent, that is, that it might not be a juristic person either in this jurisdiction or in the state of Nevada and in light of the authorities, the default judgment entered in favour of the 1st respondent cannot stand and must be set aside.

[109] Another issue which arose from the fresh evidence is the question of the capacity of John Spencer and Ron Mackay to enter into any agreement on behalf of the 1st respondent. According to the affidavit of Joshua Sherman to which was attached the incorporation documents of the 1st respondent, neither John Spencer nor Ron Mackay

were listed as directors of the 1st respondent. In his affidavit evidence filed in response, John Spencer was content to declare that anyone can be a director and they could have been directors. The appellant therefore has a good defence with a real prospect of success as regards the legal capacity of the two directors at the time of the lease, whether there was a misrepresentation made by them which induced the appellant into signing a lease and whether the agreed terms of lease should be rescinded as a result.

[110] With regard to the defence that there was no lease agreement with the 2nd respondent, there were two draft lease documents, the first was intended to be entered into with the 1st respondent and the 2nd respondent is not mentioned. It is however unexecuted. The second draft mentions the 2nd respondent but it is not executed by the appellant. In examining the terms of lease it is clear that it was contemplated that there would be another agreement later. However, until that new or later document is signed superseding it, the signed lease terms would govern the relationship between the parties. Therefore, those are the terms that would bind the parties until the new agreement took effect. It was also clear from the material in this case that there was no agreement in relation to the rent to be paid in the unsigned lease. That is a vital aspect of a lease agreement. In light of that it cannot be said that the appellant's defence to the 2nd respondent's claim is fanciful. The appellant's defence as to whether there was a new lease with the 2nd respondent superseding the terms of lease has a real prospect of success. The appellant is entitled to have this issue determined at trial.

[111] As to the point raised by counsel for the respondents that even if the court were to find that the 1st respondent was not a juristic person, the 2nd respondent was in the picture, the letters exhibited in support of that contention were not decisive on the issue. The letter dated 11 January 2011 from the appellant's attorney-at-law is addressed to 'L&W Enterprises Ltd/ADS Global Ltd'. I do not find this to be decisive one way or the other because although the lease was in the name of L&W Enterprises Inc, it is not in dispute that the premises were occupied by ADS Global Limited. This letter merely informed that the premises were exempt premises for the purposes of the provisions of the Rent Restriction Act and reminding that a notice to quit had been served on the occupants. Neither does the minute of meeting with ADS Global Limited take the issue much further.

[112] It appears to me that there is very little doubt that the appellant would have a good defence with a real prospect of success as regards the status of the two directors and on the question of whether the 2nd respondent was a party to the lease. I find no difficulty in setting aside the default judgment obtained by the 2nd respondent on those bases.

The breach of contractual terms

[113] The respondents claim that the appellant's failure to provide sufficient air conditioning to acceptable office standard led to their losses. The essence of the appellant's defence, as contained in the draft defence to the claim, is that it is not liable or responsible for any of the losses or damage incurred by the respondents and that the

losses alleged would be as a result of their decision to only connect two of the four metres on the property.

[114] However, in submissions before the court it was argued that based on the terms of lease the appellant had not undertaken to provide additional electricity to the premises. The appellant averred that it was the respondents own failure to connect the four metres they required, which led to the electrical problems. The appellant also denied that there was any indication that the respondents had a special requirement in relation to the amount of electricity to be supplied, in order to properly carry on their business. Further, that there was no provision addressing this in the terms of lease and the losses being alleged were therefore remote.

[115] The appellant also denied that there was any leakage or damage to the property before the respondents took possession, but argued that the respondents reconfigured the space several times to accommodate more agents and to increase their work stations thereby making several unauthorised modifications to the building. In submissions, learned Queen's Counsel also pointed out that in the terms of lease the respondents were to conduct the business of information technology and at no time were they told that the respondents intended to operate a call centre. This, it was argued would result in the loss of revenue claim failing as being too remote.

[116] All these are factual disputes which in light of the proposed defence fall to be determined at a trial on the merits and it can in no way be said that the appellant's

defence to the respondents' factual assertions as to the breach of contract has no real prospect of succeeding.

[117] I will now consider the requirements under rule 13.3(2)(a) and (b). The default judgment was filed on 12 June 2013. The application to set aside the default judgment was filed 16 June 2014; almost exactly a year to date. That is by no means as soon as is reasonable practicable after finding out that judgment had been entered. There is no explanation as to why there was this lag in time in applying to set it aside. The rule requires the appellant to act promptly and whilst it does not specifically require an explanation for not doing so it is usually prudent to give one if one expects the application to meet with success. In **Peter Haddad v Donald Silvera** SCCA No 31/2003, Motion No 1/2007, judgment delivered 31 July 2007, it was said by Smith JA, at page 12-13, that:

> "As has been already stated, the absence of a good reason for delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension. But some reason must be proffered... The guiding principle which can be extracted [**Hashtroodi v Hancock** [2004] 3 All ER(D) 530] ...is that the court in exercising its discretion should do so in accordance with the overriding objective and the reason for the failure to act within the prescribed period is a highly material factor."

[118] Learned Queen's Counsel argued that the delay in making the application is only one factor to be considered and it should not be the decisive factor. He noted that the court had set aside a default judgment more than four years after it was entered in the case of **Barons Bridging Finance** where there was an allegation of breaches of the Consumer Credit Act and fraud.

[119] The respondents submitted that the inordinate delay had some bearing on the learned judge's decision and further, that the learned judge should not be faulted for ruling as he did in the light of rule 13.3 of the CPR and what was before him.

[120] The fact that the appellant's application was filed more than a one year after the default judgment was entered is significant. Phillips JA in **Rohan Smith**, where there were two applications to set aside, noted at paragraph [37] that the considerations in rule 13.3(2) of the CPR are equally applicable to the second application as it is to the first so that:

> "...the length of time between the dismissal of the first and the subsequent application would be an additional factor for consideration in keeping with the overriding objective of dealing with cases expeditiously and fairly as otherwise, subsequent applications could be made after prolonged delay with impunity."

[121] In this case only one application was made in June 2014. The delay of one year is inordinate but not decisive. Based on the circumstances of this case and in the light of the fresh evidence which was not before the learned judge in the court below and which would affect the validity of the judgment, I am of the view that the delay, although significant, should not determine the outcome of this matter.

[122] In the affidavit of Keith Russell in support of the application before Morrison J no reason was given for not filing an acknowledgement of service or a defence. In the notice of application for court orders to set aside the default judgment the grounds on which the application was based were that the appellant was never served and therefore could not have filed acknowledgment of service and defence in the time

prescribed by the rules. The grounds maintained that the attorney-at-law was retained to appear in the application for injunction filed by the respondents and that at that hearing the court ordered that the attorney-at-law be served with the claim form and particulars of claim. In the affidavit of Khadine Colman filed on 1 December 2015 in support of the application for leave to appeal before this court she indicated that the appellant did not file acknowledgment of service as at all material times its contention was that it had not been served with the claim form and particulars of claim and had instructed counsel only in respect of the injunction with which it had been served.

[123] In the affidavit of Keith Russell filed on 17 March 2016, he also states that the appellant relied on the advice of counsel and on her representation in contesting the claim brought by the respondents. He maintains that no acknowledgment of service or defence was filed based on the attorney's advice that the claim form and particulars of claim were not properly served.

[124] In the light of the explanation given by Khadine Coleman and Keith Russell, the appellant would have acted on advice of counsel, erroneous advice as it turned out to be, in not filing an acknowledgement of service or a defence in the time required. This court has consistently maintained that a litigant should not suffer due to counsel's error, or inadvertence.

[125] Even if the court were to find that the explanation given for failure was not a good one that is not the end of the matter. In **Thorn Plc v McDonald** (1999) CPLR 660 [1999] All ER(D) 989, the United Kingdom Court of Appeal stated that any failure

by a defendant to give a good explanation for the delay is a factor to be taken into account but is not decisive on the issue whether to refuse or grant the application to set aside the judgment.

[126] It seems to me that this court has taken, what one may term a protective approach to explanations involving the inadvertence of counsel which affects their client's rights. In **Murray-Brown v Harper**, Phillips JA said at paragraph [30] that:

> "The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorney errors made inadvertently, which the court must review. In the interest of justice, and based on the overriding objective, the peculiar facts of a particular case and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended."

[127] In **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Snr (his father and next friend)** [2013] JMCA Civ 16, where the explanation for the delay in filing a defence was attributed to administrative oversight, the court remarked that such oversight had been excused more than once on the basis "...that a deserving litigant ought not to be shut out because of an error by his attorney-at-law. It is usually when the behaviour is grossly negligent that the litigant's position is imperilled". In this case Khadine Colman's view of her client's legal position as regards the service of the documents, though erroneous, was not such as could be deemed to be grossly negligent.

[128] The next question for consideration is whether there is any compelling likelihood of prejudice to the respondents if the judgment is set aside. There is no evidence of undue prejudice to the respondent which would outweigh the possible prejudice to the appellant if the matter is not determined on the merits.

[129] In **Evans v Bartlam** [1937] 1 AC 473 at page 650 it was suggested that a court considering whether to exercise its discretion to set aside a default judgment should weigh the use of its coercive powers against the need for the court to hear cases on the merits and pronounce judgment. This is a balancing exercise which must take place against the background of the overriding objective.

[130] In the light of all the circumstances of this case this court was of the view that the appellant satisfied the requirements in Part 13 of the CPR and successfully demonstrated that it has a real prospect of successfully defending the claim, based on the defence they intend to mount. For all the reasons outlined above this court made the orders set out in paragraph [5] herein.