[2013] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 123/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**LINTON WATSON**	**APPELLANT**
AND	**GILON SEWELL**	**1ST RESPONDENT**
AND	**MCKAY SECURITY & INVESTIGATIVE SERVICE LIMITED**	**2ND RESPONDENT**
AND	**RESTAURANTS OF JAMAICA LIMITED**	**3RD RESPONDENT**

Joseph Jarrett instructed by Forsythe and Forsythe for the appellant

Orane Nelson instructed by K Churchill Neita & Co for the 1st and 2nd respondents

25 July 2012 and 15 March 2013

PANTON P

[1] I have read the draft judgment that has been written by my learned sister, Phillips, JA. I agree with the reasoning and conclusion at which she has arrived, that this appeal ought to be dismissed.

MORRISON JA

[2] I too have read in draft the judgment of Phillips JA and agree with her reasoning and conclusion.

PHILLIPS JA

[3] This is an appeal from the decision of E Brown J (Ag), as he then was, given on 8 October 2010, in which he made the following orders:

> "i. The judgment in Default of Defence entered against the First Defendant and the Second Defendant, Gilon Sewell and Mckay Security and Investigative Service Limited respectively on the 20th February, 2010 be set aside;
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> ii. The Assessment of Damages heard on the 4th May, 2010 be deemed a nullity;
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> iii. The First and Second Defendants be permitted to file their Defence to the Claim within 21 days of this application;
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> iv. Costs to this Application to the Claimant/Respondent agreed at $40,000.00 to be paid within 14 days of the date hereof;
>
> v. Leave to appeal granted;"

[4] The notice and grounds of appeal were filed on 25 October 2010 and sought the reversal of the orders set out above; judgment in favour of the appellant to be restored; and interest on the sum awarded at the assessment of damages on 4 May 2010, with costs in the Court of Appeal, and in the court below to the appellant. There were three grounds of appeal challenging: (i) the learned judge's consideration of the issue of service of the originating documents, (ii) his interpretation of the relevant clauses in the Civil Procedure Rules 2002 (CPR), dealing with setting aside default

judgments, (rules 13.3 and 13.4), and (iii) the failure of the learned judge, as a result, to appreciate the prejudice suffered by the appellant.

[5] At the hearing of the appeal, the court was referred by counsel for the appellant to the notice of withdrawal of appeal filed on behalf of the appellant in respect of the 3rd respondent. Counsel also indicated that he intended to rely solely on the written submissions filed on the appellant's behalf. Counsel for the respondents agreed with that approach. However, he submitted that ground 2 required special attention from the Court. There was an amendment in 2006 to the CPR, hence the importance of the case **Kenneth Hyman v Audley Matthews and Anor** SCCA Nos 64 and 73/2003 delivered 8 November 2006, he said.

[6] The matter has had a somewhat unusual history. I therefore intend to set out the chronology of events as they unfolded in the court below; the pleadings filed on behalf of the appellant; and the application to set aside the default judgment with supporting evidence, which was before E Brown J (Ag). I will also refer to the affidavits of service of the relevant documentation herein, namely the original claim form and particulars, the default judgment, and the notice of the assessment of damages.

[7] (i) The claim form, which was filed on 2 March 2009, claimed against the 1st and 2nd respondents damages for personal injury and loss arising from an incident which took place on 19 November 2007, caused by the negligence of the respondents. The appellant contended that the claim form was served on the 2nd respondent on 4 March 2009, and on the 1st respondent on 17 April 2009.

(ii) On 25 June 2009, a request for default judgment against the 1st and 2nd respondents was filed on behalf of the appellant, and judgment was entered on 20 November 2009. The appellant further contended that the judgment and notice of assessment were served on the respondents on 19 April 2010.

(iii) The assessment of damages was heard and determined by P Williams J on 5 May 2010. The appellant also contended that an order for seizure and sale was served on the respondents on 24 August 2010.

(iv) The application to set aside the default judgment was filed on 1 September 2010.

(v) The order setting aside the default judgment entered on 20 November 2009 against the 1st and 2nd respondents, and deeming the assessment of damages against them made on 5 May 2010 a nullity, was made on 8 October 2010.

[8] In the particulars of claim the appellant was described as a businessman who was 38 years old, and who was at all relevant times a lawful customer at Kentucky Fried Chicken, located in Half Way Tree in the parish of Kingston. At all material times, the 1st respondent was a security guard employed to, and the servant and or agent of, the 2nd respondent. The 2nd respondent was a registered company duly incorporated

under the laws of Jamaica and having its registered offices at 14 Lancaster Road, Kingston 10 in the parish of Saint Andrew, and said to be the servant and or agent of the 3rd respondent. The 3rd respondent was also a registered company with registered offices in the corporate area and the owner of the premises on which the incident occurred (as the chain of restaurants under the Kentucky brand name was operated by the 3rd respondent). As nothing turns on any facts relevant to the 3rd respondent, no further reference will be made to it.

[9] The appellant pleaded that he had entered the said premises for the purpose of purchasing a meal, and due to false information received by the 1st respondent, he wrongfully assaulted and beat the appellant by striking him multiple times with a baton in the head and on the left forearm, resulting in severe personal injuries, loss and damage. It was pleaded that in so doing the 1st respondent acted with malevolence and spite towards the appellant, with the intention to humiliate, embarrass and ridicule him in the presence of others, so much so that the injury was "greatly aggravated".

[10] The particulars of injuries were detailed, which included lacerations, trauma, swelling and tenderness of the left forearm, loss of consciousness and fracture of the left distal ulna. The appellant claimed that the injuries suffered were as a result of the negligence of the respondents, their servants and or agents, and the particulars of negligence were duly set out. The expenses incurred by the appellant were itemized and pleaded as special damages, in an amount, as amended, of $32,517.50, and general damages were also claimed. No defence having been filed by the respondents, their contentions could only be foreshadowed by the evidence given in their affidavits

filed in support of the application before E Brown J (Ag) (and referred to later in this judgment). The 1st respondent claimed that he had acted in lawful self-defence, and was therefore not liable. He also claimed that he had been charged in respect of the said event which had occurred and placed before the Resident Magistrate's Court, and those charges had been resolved in his favour. It was the 2nd respondent's position that in those circumstances, as principal, it could not be vicariously liable for any injuries allegedly sustained by the appellant.

[11] On 16 June 2009, the attorneys representing the appellant filed an affidavit of service which stated that the 1st respondent had been served with the claim form and particulars of claim on 17 April 2009 between the hours of 6:00 am and 7:00 am at 6 Corawina Avenue, Kingston 20 in the parish of Saint Andrew. The affidavit of service was deposed by Tanika Simpson, the assistant bailiff of the Resident Magistrate's Court for the parish of Saint Andrew, who indicated that the documents were handed to the 1st respondent personally, and although the 1st respondent was not known to her prior to the date of service, the 1st respondent admitted that he was the person named in the documents and accepted the same. As regards the 2nd respondent, Karen Cross deposed in an affidavit that acting in her capacity as legal clerk employed to the firm of attorneys representing the appellant, she, on 4 March 2008 (in error as it should have stated 2009), sent the claim form and particulars of claim, notice to defendant, and acknowledgment of service of claim form, by registered post to the offices of the 2nd respondent, which had not been returned. The certificate of posting of a registered article to the 2nd respondent at 14 Lancaster Road, Kingston 10, its registered address,

bearing registration no. 2881, with a note indicating that the registration fee had been paid, and with the date stamp of that office on the face of the certificate, was attached to the affidavit of service.

[12] No acknowledgment of service or defence having been filed on behalf of the respondents, (save an acknowledgment of service on behalf of the 3rd respondent), an affidavit of search was filed on 16 June 2009, deposed by Donna Griffin, another legal clerk at the law firm representing the appellant, indicating that she had searched the common law suit book since the date of the filing of the originating documents in the suit, and that the respondents had not filed any response to the action. As a consequence, the request for judgment was filed on 25 June 2009, on the basis of non compliance by the respondents in failing to file the acknowledgment of service and/or defence, within the time required by the CPR. An attested copy of the judgment in default of acknowledgment of service and defence was filed on 20 November 2009, duly signed by the deputy registrar and entered in the judgment book bearing no 746 folio 257. Notice of assessment was filed on 17 March 2010 and a date for service inserted therein for 4 May 2010. A notice of intention to tender in evidence hearsay statements made in a document, was filed on 16 April 2010, which listed and attached the medical reports which were attached to the particulars of claim, and receipts and invoices pertaining to expenses referable to treatment that the appellant had received.

[13] On 27 April 2010 two affidavits of service were filed, deposed by Karen Cross on the previous day, indicating that the 1st and 2nd respondents had been served by sending on 19 April 2010 by registered post, the following documents: (i) judgment in

default of acknowledgment of service and defence, (ii) request for default judgment, (iii) notice of assessment of damages, and (iv) notice of intention to tender hearsay evidence. The registered slips indicating that the documents had been so served (as the date stamp of the office was impressed thereon) were attached to the respective affidavits, bearing registration no 015582 in respect of the 2nd respondent, and 015583 in respect of the 1st respondent. The documents were registered to the 1st respondent at 6 Corawina Avenue, Kingston 20, and to the 2nd respondent at its registered office. Miss Cross deposed that none of the documents had been returned.

[14] The assessment having been heard and determined on 5 May 2010, by P Williams J, it was adjudged that the 1st and 2nd respondents should pay to the appellant: (i) general damages assessed in the sum of $1,000,000.00 for pain and suffering with interest at from 4 March 2009 to 5 May 2010, (ii) special damages assessed in the sum of $30,362.58 with interest at 3% from 19 November 2007 to 5 May 2010, and (iii) costs in the sum of J$40,000.00.

[15] The amended notice of application for court orders was filed on 1 September 2010, requesting that the warrant of levy be stayed until the said application could be heard, that the judgment in default of defence be set aside, that the assessment of damages be deemed a nullity, and that the respondents be permitted 21 days to file their defence to the claim. There was an alternative claim in respect of the notice of assessment asking that it be set aside instead of declaring the same a nullity. The grounds of the application were that the respondents had a real prospect of successfully defending the claim, that the 2nd respondent had applied as soon as reasonably

practicable after finding out that judgment had been entered and had a good explanation for the failure to file a defence. Essentially the respondents were relying on rules 13.3(1) (2)(a) and (2)(b) to ground their application. They also relied, in the alternative, on rule 39.6(1) and (3)(a) and (b), indicating that, once a judgment had been given in their absence, they could apply to have it set aside if they had a good reason for failing to attend the trial, and that some other judgment may have been given had they been present. The 2nd respondent also relied on the fact that the claim against it was made vicariously, and the proceedings had been conducted without it having any knowledge of them, to its prejudice, and without any ventilation of the merits.

[16] The application was supported by two affidavits: one deposed by the 1st respondent, and the other by Jason McKay, the managing director of the 2nd respondent. The 1st respondent testified that he had been in an altercation with the appellant. He said that he, as a security guard, had been assigned by the 2nd respondent to conduct sentry duties at the Kentucky Fried Chicken establishment in Half Way Tree. Whilst thus engaged, he had, on 19 November 2007, observed the appellant in what appeared to be an argument with a female customer when standing in the line waiting to be served. He observed the parties exit the premises, but based on certain information he had received, he thought it prudent to walk the female off the premises onto the road. While doing so, he observed the appellant attempting to re-enter the building, but as he was still arguing, the 1st respondent stood at the door and refused him entry. The appellant, he said, went to his car in the car park, removed an object

there from, and approached him using threatening words. He later discerned, he deposed, that the object in the appellant's possession, which was swung at him, was a knife. As the appellant continued to swing the knife at him, he continued to walk backwards. He then raised his hand, he said, in lawful self defence and struck the appellant with the baton, once at first, but when the appellant continued to approach him, he struck him two more times, and then made good his escape to the rear of the premises, where he safely locked himself away.

[17] It was based on the above that the 1st respondent was of the view that he had a real prospect of successfully defending the claim. He also deposed the fact that although he had received the originating documents in the claim on 17 April 2009, he had assumed that the documents related to the criminal proceedings which had been ongoing, at the Resident Magistrate's Court at Half Way Tree, and in respect of which he had been attending on diverse dates, namely 15 June, 6 July, 12 August, 2 September, and 12 November 2009, without any legal representation. The matter had ultimately been determined when a "no order" was made on the last of those dates in November 2009. That, he indicated, was his good explanation for failing to file a defence to the claim in time.

[18] With regard to the hearing of the assessment of damages, he said that the perfected judgment and the notice of the hearing of the assessment had been served together and had only been served on him by registered post on 7 April 2010. He said that he had only been made aware of these documents after the date of the assessment as he had been informed by his attorneys that the deemed date of service

was 21 days after posting, so he would only have been aware of the assessment date in law, and in procedure, on 9 May 2010, that is, subsequent to the scheduled assessment, on 5 May 2010, which made the orders made at the assessment he deposed, irregular. He said that he had applied to the court as soon as reasonably practicable after finding out that the judgment had been entered against him. He relied on the court exercising its discretion, using the overriding objective, to set things right.

[19] Mr Jason McKay, on behalf of the 2nd respondent, deposed that the company's attorneys had informed him of the filing of the claim form and particulars of claim and the orders which had been made against the company at the hearing of the assessment of damages. He specifically referred to the fact that he had been told that the originating documents had been dispatched to the company's offices, "for the purposes of effecting service of same on 4 March 2009". It was his contention that neither he nor his staff, and in particular his office manager, Miss Michele Granum, had received the claim form or the particulars of claim on 4 March 2009 or within 21 days thereafter. He stated that if any member of staff had had knowledge of the documents they would have brought them to his attention.

[20] Mr McKay gave evidence that the 2nd respondent, being a security company licensed to store explosives, ammunition and other potentially lethal weapons, had strict regulations in respect of items and or personnel entering the premises at any given time. He set out the security system employed by the company for its protection. He said:

> "... [The] premises is bordered by a perimeter fencing over 10 feet in height and there is no letter box or other receptacle attached to the premises to facilitate the delivery of posted items.
>
> 9. That for posted items and or registered post slips to be delivered to the 2nd Defendant's premises by a postman or other agent of the postal services said person would have to alert guard room as to his/her presence on the outside by pressing a buzzer attached to the front. That having so pressed the buzzer he/she would be permitted entry where he/she would then be required to stop at the guard room which is situated, on the inside, at the gate. That full details including the person's name, purpose of entry, and disclosure of any items in his/her person for delivery and a search would also be conduct before the individual is permitted to proceed any further.
>
> 10. That subsequent to the procedure outlined at paragraph 9 the person would then be directed to the reception desk for further processing. That at the reception desk again the person's name, purpose of visit, and item for delivery would be ascertained and a relevant entry logged, in Log Books provided for same, after which the office manager - Michelle Granum would be advised and the item passed to her for further action."

[21] Mr MacKay deposed that the procedure outlined above precluded persons from easy access to the premises. He stated that having made exhaustive checks, inquiries and inspection, through perusal of the log books, discussions with the guards, members of staff, and the office manager, they had all confirmed that the documents allegedly served on the company had never been received at all. It was his belief therefore, that the documents had not reached the offices of the 2nd respondent.

[22] The affidavit in response filed on behalf of the appellant was sworn to by Mr Nelton Forsythe, one of the attorneys representing the appellant. He deposed that the

respondents had been properly served and exhibited to his affidavit, the affidavits of service referred to herein, and where applicable the registered postal slips attached thereto. He stated that the respondents had had ample time to file their defences, and had only been moved to action when the Supreme Court's bailiff had attended on the offices of the 2nd respondent to execute the order for the seizure and sale of goods on 24 August 2010, in order to satisfy the judgment obtained against the respondents.

[23] On the basis of that evidence, E Brown J (Ag) made the orders as set out in paragraph [3] herein. I have not to date, however, seen any reasons from the learned judge. My only comment with regard to the absence of reasons from the judge who heard the application is that it is the obligation of a judge hearing a matter to provide reasons for his decision and, notwithstanding the onerous burden that may be, a failure to carry out that obligation undermines the whole system of the administration of justice.

The appeal

[24] The main issue in this appeal is whether the respondents were properly served the relevant proceedings, and if not, the legal consequences thereof, and if they had been, whether the orders made by the learned trial judge indicate that he had exercised his discretion properly in the light of the evidence submitted and the proper construction of the CPR.

Submissions

[25] Counsel for the appellant challenged the alleged findings of the trial judge that there was inadequate and/or insufficient proof of service of the claim form and particulars of claim on the 2nd respondent; and the 2nd respondent had a real prospect of succeeding in its defence of the claim, had applied to the court as soon as reasonably practicable after finding out that judgment had been entered and had given a good explanation for the delay.

[26] It was the appellant's contention that there was no issue in relation to the service of the pleadings effected on the 1st respondent, as he had admitted receipt of them. The real issue, he submitted, related to the 2nd respondent which was claiming that it had never received the documents at all. However, counsel referred to the affidavits of service set out herein, and pointed out that there was no evidence that the mail remained unclaimed or had been returned to the sender. The 2nd respondent, he submitted, also had not challenged the validity of the mail being sent by registered post; the company merely made what he described as the "bald blanket denial" that the documents had never been received, which the learned judge, he said, appeared to have accepted, "without more". He submitted that that finding had to be flawed as it was contrary to rules 5.7(a) and 5.11(1) and (2) of the CPR, which state clearly the means by which a limited liability company can be properly served, which includes sending the documents to the company's registered office by registered post and filing the required affidavit proving service. Counsel referred to **Robinson v Clarendon**

Parish Council & Citibank HCV 2126/2004, delivered 4 October 2005, in support of this submission.

[27] Counsel submitted that if rule 13.2 of the CPR did not apply, which was the situation in the instant case, then it was incumbent on the respondents to satisfy the court that all three conditions set out in rule 13.3 of the CPR had been met, which they had failed to do. Counsel referred to **Thomas v Whitfield Bakery & Pastries Ltd** HCV 1151/2003, delivered 15 June 2006 where, he said, Sykes J had "traced the development of the new rule and its effect on litigants", and submitted further that Sykes J had concluded that by the promulgation of the new rules the civil justice system had been reformed and the new rules were, "intended to foster a new culture which has greater regard for time and resources, the court's as well as other litigants". Under the new rules, counsel submitted, the provisions are required to be construed more strictly. Counsel relying on the above judgment of Sykes J, stated that there was therefore "nothing unjust about enforcing a judgment properly obtained against a defendant who has been properly served and had no difficulty filing a defence but failed to do so". Counsel submitted that the respondents had also failed to demonstrate that their defence had a real chance of success, and he referred to cases in this court, namely: **Jamaica Beverages Limited v Janet Edwards** [2010] JMCA App 11 and **Rahul Singh et al v Kingston Telecom Limited et al** SCCA No 48/2006 delivered 10 July 2009.

[28] Counsel relied on the dictum of Morrison JA in **Attorney General v John McKay** [2012] JMCA App 2 for the principles relating to the approach taken by this

court when reviewing the exercise of the discretion of the judge in the court below. Counsel also seemed to have appreciated, with reference to the judgment of Morrison JA, although it was not clear, that under rule 13.3 of the CPR, it is no longer required that all three conditions be met to set aside a judgment. He concluded that the respondents had waited over six months since receipt of the judgment, and over one and a half years since service of the claim to make the application. He submitted that since the judgment had not been irregularly entered, the judge had failed to consider the relevant factors when he had made the orders, which ought therefore to be set aside.

[29] Counsel for the respondents submitted that the learned judge had not erred in making the orders that he did. The 1st respondent had admitted that he had received the originating documents but he had explained in his affidavit the reason he had not acted on the documents and filed a defence. It was, counsel submitted, a matter for the exercise of the court's discretion as to whether that was sufficient to satisfy the rules. With regard to the 2nd respondent, counsel also submitted that although the documents had been sent by registered post, the company, through its officers, had also by affidavit evidence explained that the 2nd respondent had not received them. In any event, counsel submitted, even if the court had accepted that there had been service of the documents, it was still necessary, pursuant to the principles disclosed in the House of Lords' case of **Evans v Bartlam** [1937] AC 473, for the court to decide whether a satisfactory affidavit of merit had been placed before the court for it to

exercise its discretion whether to set aside the judgment. To support this submission, he referred to and relied on the following statement of the House:

> "...unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

[30] Counsel submitted that on perusal of the submissions of counsel for the appellant, and also on the position taken by the appellant below, it was clear that counsel had proceeded under the misguided understanding that at the hearing of the application before E Brown J the rules had not been amended. However they had been in September 2006, and therefore had to be differently construed. The provisions in rule 13.3 were no longer to be read conjunctively as was the situation previously and he relied on **Hyman v Mathews and Anor**. Under the amended rule, the respondents, it was submitted, were required to demonstrate that they had a real prospect of successfully defending the claim, and in considering that, the court must examine the matters set out in the rule. He referred to the evidence in the affidavit of the 1st respondent, where he deposed that he acted in lawful self-defence at the material time, and in pursuit of the execution of his duties to preserve order and also to protect customers in the restaurant. It was, he submitted, while performing those duties and in an attempt to prevent the appellant from harming a female customer, that the appellant threatened the 1st respondent with a knife. This, counsel submitted, was far more credible than a wanton attack on the appellant, which was the appellant's case.

The learned judge could therefore have been satisfied, in the exercise of his discretion, that there was a real prospect of the 1st respondent successfully defending the claim.

[31] Counsel further submitted that the fact that the 2nd respondent's liability arose vicariously, as the 1st respondent was an employee deployed by it to protect the premises where the incident occurred, the question of a real chance of successfully defending the suit would be evident.

[32] With regard to the failure of the judge to properly consider the prejudice caused to the appellant, counsel submitted that it was reasonable for the court to have concluded that any prejudice suffered could have been satisfied with an order for costs. Additionally, had the appellant proceeded with the case instead of pursuing an appeal of the order of E Brown J, the case could have been disposed of several months ago, would then have been settled on its merits, and justice would have been served.

Discussion and analysis

Service

[33] There is no doubt, and the 1st respondent has admitted, that there was proper service on him of the claim form and the particulars of claim. Rule 5.3 of the CPR states:

> "A claim form is served personally on an individual by handing it to or leaving it with the person to be served."

In the affidavit of the assistant bailiff of the Resident Magistrate's Court service was said to have been effected in that way on the 1st respondent on 17 April 2009. On 25

June 2009, therefore, when the request for the default judgment was made and judgment entered, the time limited by the CPR for the filing of the acknowledgment of service, which is 14 days from the service of the claim form (rule 9.3(1)), and for the filing of the defence, which is 42 days from the service of the claim form (rule 10.3(1)), had both passed. On the face of it therefore, the judgment would have been regularly entered and the 1st respondent was obliged, as soon as possible subsequent to the entry and service of the judgment, if he wished to defend the claim, to file an application pursuant to rule 13.3 of the CPR to set aside the judgment. The application to set aside the default judgment was filed on 1 September 2010, four months later, as the judgment would have been deemed to have been served on 11 May 2010.

[34] Service of the claim form and the accompanying documents on the 2nd respondent was not effected personally. It was effected on 4 March 2009 by registered post to the 2nd respondent's registered offices. Section 387 of the Companies Act states clearly and succinctly that

> "A document may be served on a company by leaving it at or sending it by post to the registered office of the company."

Rule 5.7 (a) of the CPR states:

> "Service on a limited company may be effected -
>
> (a) by sending the claim form by telex, FAX, prepaid registered post, courier delivery or cable addressed to the registered office of the company."

In this case, as indicated, service was effected by prepaid registered posting, and pursuant to rule 5.11(1) of the CPR, service by registered post is proved by an affidavit of service by the person responsible for posting the claim form to the person to be served, exhibiting a copy of the claim form and stating the date and time of posting and the address to which the claim form was sent. In this case the claim form was referred to in the affidavit but it was not attached. Although the date of posting was given, and the postal slip was attached to the affidavit, the time of posting and the address of the intended recipient were not stated. The rules in respect of service on a limited liability company appeared to have been substantially complied with, and the 2nd respondent did not take issue with any technical aspect of alleged non-compliance with the CPR.

[35] The documents having been served by pre-paid registered post, in certain instances, the provisions of the CPR in relation to deemed date of service in those circumstances are applicable. There are two rules in the CPR which deal with "**Deemed date of service**", namely rules 5.19 and 6.6, which, for clarity, are set out in their entirety below.

> "5.19 (1) A claim form that has been served within the jurisdiction by pre-paid registered post is deemed to be served, unless the contrary is shown, on the day shown in the table in rule 6.6.
>
> (2) Where an acknowledgment of service is filed, whether or not the claim form has been duly served, the claimant may treat-
>
> (a) the date of filing the acknowledgment of service; or

(b) (if earlier) the date shown on the acknowledgment of service for receipt of the claim form, as the date of service.

(3) A claimant may file evidence on affidavit to prove that service was in fact effected on a date earlier than the date on which it is deemed to be effected."

"6.6 (1) A document which is served within the jurisdiction in accordance with these Rules shall be deemed to be served on the day shown in the following table-

Method of Service	**Deemed date of service**
Post	21 days after posting.
Registered Post	21 days after the date indicated on the Post Office receipt.
Courier Delivery	3 business days after the date indicated on the courier receipt.
Leaving document at a permitted address	the business day after leaving the document
FAX	(a) if it is transmitted on a business day before 4pm: the day of transmission; or (b) in any other case, the business day after the day of transmission.
Other electronic method	the business day after Transmission.

(2) Any document served after 4 p.m. on a business day or at any time on a Day other than a business day is treated as having been served on the next business day.

(3) In this rule **"business day"** means any day other than -

(i) a Saturday, Sunday or Public Holiday; or
(ii) any other day on which the registry is closed."

[36] On perusal of the above, pursuant to rule 5.19 of the CPR, the claim form with accompanying documents is deemed to have been served on the day shown in the table in rule 6.6 of the CPR, unless the contrary is shown. As disclosed, rule 6.6(1) (which addresses other documents) indicates that a document served within the jurisdiction in accordance with the rules, shall be deemed to be served on the day shown in the table set out, depending on the method of service used. If, as in this case, the method of service used is registered post, the deemed date of service, as stated in the rules is 21 days after the date indicated on the post office receipt. In the instant case, the deemed date of service would therefore be 26 March 2009. The 2nd respondent has attempted to show that there was no service on the company at all. The words in rule 5.19, "unless the contrary is shown", do suggest that the server or the recipient can attempt to show to the court, once in conformity with the rules, when actual receipt of the documents occurred. In respect of the claimant, evidence can be produced to show that the claim form was in fact sent earlier than the date on which service was deemed to have been effected, thereby dispelling the fiction of deemed service on any other day, and, in my view, in respect of the instant case, that service

may not have been effected at all. The presumption of the deemed date of service is therefore, in my opinion, in relation to this rule, rebuttable.

[37] The case of **Godwin v Swindon Borough Council** [2002] 1 WLR 997 is instructive as the wording of rule 6.7(1) of the UK CPR is similar to rule 6.6 of our CPR, in that, the words "unless the contrary is shown" are omitted, and the reasoning is therefore relevant to the extent that one is dealing with the service of other documents. The facts of that case were that the claimant who had sustained a back injury while employed to the defendant sued the defendant just before the expiry of the three year limitation period claiming damages. The claim form ought to have been served within four months of its issue. The time for service was extended twice, latterly to 8 September 2000. The claimant served the claim form and particulars of claim by first class post on 7 September 2000, and the defendant received them on 8 September 2000, but pursuant to rule 6.7(1), the deemed date of service, if the method of service used was first class post, was on the second day after posting, which would have been 9 September 2000. The district judge struck out the claim, but it was later reinstated by the judge, and the defendant appealed. The Court of Appeal allowed the appeal. The court held that what the deemed date of service meant, and the importance of it was that, once the document for service was not given to be put literally in the hands of the person to be served on a particular day, then it was in the interest of the parties to have a deemed date of service, which is certain and not subject to challenge on actual grounds, particularly where service was being attempted at the very end of any available period. The court found that the deemed date of service, was in the

circumstances, and in the interpretation of that rule, not rebuttable by evidence. In fact, the court found that the documents had been posted too late to have been deemed to have been served in time and the fact that they had arrived earlier than the deemed date was of no help to the claimant.

[38] However, the court was not completely ad idem on the route to its final decision, and it was the opinion of Pill LJ that the deeming provision was not conclusive for all purposes. In fact he stated:

> "A defendant may apply to set aside a judgment if he has not received the claim form notwithstanding that it is deemed to have been served on him if posted by first class post. Under rule 6.7(1), the documents are treated as having been served on a particular day, even if in fact they were not, but under rule 13.3(1)(b) the court is entitled to override the fiction and consider the facts."

[39] The court ultimately held by a majority that the presumption of service was not rebuttable, but as also stated by May LJ the rules did contain provisions to deal with the circumstances where a defendant was not, and could prove that he was not, served with the claim form before judgment was entered against him. In his opinion, if that were the case, the defendant may apply to set aside the judgment under rule 13.3 (1) (b) of the UK rules on the basis of "some other good reason", not as an absolute right, but he would not have to depend on showing that he had a real prospect of successfully defending the claim. He stated:

> "The court therefore has sufficient power to do justice in these cases and will, no doubt, normally exercise this discretion in favour of a defendant who establishes that he

> had no knowledge of the claim before judgment in default was entered unless it is pointless to do so."

[40] On any interpretation of rule 5.19 of the CPR, as indicated previously, the presumption of service is clearly rebuttable by evidence. This evidence may be adduced on behalf of either the claimant or the defendant, to show that the service of the claim form did not take place on the deemed day of service set out in rule 6.6 or at all.

[41] In the instant case the 2nd respondent deposed that due to the dangerous nature of the items stored on the company's premises because of the nature of the work undertaken by it, the premises were very secure and difficult to access. He also said that there are cumbersome systems and procedures in place in order for persons to gain entry to the premises, and for specific reporting in respect of those who do. He said that detailed and comprehensive searches had not produced any registered slips or any accompanying documentation. He concluded that the factual situation was that the original documents had not been served on the 2nd respondent. The question for us, in my view is: was that evidence enough to dispel the "legal fiction" of the presumption of deemed service? The 2nd respondent is saying we cannot find the documents, "there is no record of receipt of them." The appellant is saying, "I have produced the registered slip and served in accordance with the rules." If a mere denial was enough would it not be very easy for every defendant, who had failed to respond to due process in the time allotted, especially when the validity of the claim form had expired, and the limitation period had passed, to deny receipt of the claim form? There was no evidence from the postal service to suggest, or in support of, any inadvertent or negligent foul-up in the

department of registered postal services, to explain the non- delivery of the claim form; the claimant had done all that was required of him under the rules, and the claim form and accompanying documents had not been returned unclaimed. It seems to me that the evidence submitted may not have crossed the threshold necessary to rebut the deemed service date presumed in the CPR, and I would find that the default judgment against the 2nd respondent was regularly entered. But whether I am right or wrong on this, that is not the end of the matter.

[42] The evidence placed before the court by the 2nd respondent indicating that it had not received the proceedings at all, in my opinion could only relate to the application to set aside the judgment, and it would be a matter for the court, to determine, based on how it viewed all the evidence before it and the applicable provisions of the CPR, in the exercise of its discretion, whether an order should be granted in the 2nd respondent's favour. There is still, however, the question of the service of the perfected judgment and the application for the assessment of damages which must be considered in order to determine this appeal.

[43] The claim was for an unspecified sum of money, and therefore the default judgment was a judgment for payment of an amount to be decided by the court (rule 12.10(1)(b)). The matter then had to proceed to a hearing for the assessment of damages. In this case, as mentioned herein, the notices for the hearing of the assessment in respect of both respondents were dispatched by registered post, along with the request for judgment, the judgment, and the notices to tender hearsay evidence. The posting was done on 19 April 2010. The affidavits of service showed that

the documents had been sent to the correct addresses for service of the respondents. As a consequence, pursuant to the above discussion all documents sent were deemed to have been served 21 days thereafter, on 11 May 2010 (rules 6.1, 6.2, 6.3, and 6.6 of the CPR, and not rule 5.19 which deals with deemed date of service of the claim form). There is no provision, in rule 6.6, once the method of service has been selected, to avoid being subject to the deemed date of service set out in the rule. There are no words inviting evidence for the contrary to be shown. The presumption of service is therefore not readily rebuttable. As indicated earlier, the assessment of damages was heard and the formal judgment given, on 5 May 2010, and thereafter entered in the judgment book on 5 May 2010. This would have been four clear days before the notice for the hearing was served. The assessment would therefore be a nullity, and the respondents would be entitled to set aside the service of the same *ex debito justitiae.* There is therefore no need to deal with the issues which were raised tangentially with regard to rule 39.6 of the CPR. Whilst I am of the view that the assessment is a trial (see **Leroy Mills v Lawson and Skyers** (1990) 27 JLR 196), and the respondents, had they been properly served with the notice of the assessment, would have had to apply under rule 39.6 to set aside the judgment, that would have required the application to have been filed within 14 days of service of the judgment, and that having not been done, the determination of the matter may have been different.

[44] The default judgment, however, remained extant having been served by a method accepted by the rules and deemed to be served within 21 days of posting, namely 11 May 2010. I do not think that in October 2010 when the judgment was

given by E Brown J, setting aside the default judgment, there could have been any confusion as to the applicable rules in the CPR relative to an application to set aside or vary a default judgment, and the relevant criteria in relation thereto. At the time of the entry of the judgment and at the time of the hearing to set aside the judgment, rule 13.3 of the CPR had been amended as of 18 September 2006. The rule as it stood previously, as enunciated with great clarity in the comprehensive and detailed judgment of Sykes J in **Thomas v Whitfield Bakery & Pastries Ltd** and later confirmed and endorsed by this court in **Hyman v Matthews and Anor**, was not crafted in the same way as it is now. The earlier format empowered the court to set aside the default judgment only if the applicant satisfied the following criteria set out therein, namely, that the defendant: (i) had applied to the court as soon as reasonably practicable after finding out that judgment had been entered; (ii) had given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be; and (iii) had a real prospect of successfully defending the claim. All three criteria were required to be met cumulatively, and failure to provide satisfactory information and sufficient evidence to persuade the court in respect of all criteria would result in the application being dismissed. Those were the days when the provisions in the CPR were described as being capable of having the effect of a "knock out blow".

[45] In the new regime, the applicant is required to show that he has a real prospect of successfully defending the claim, and the court is required when dealing with the application to consider the criteria mentioned above at (i) and (ii). Those were the relevant provisions which would have been before the learned judge, and it would have

been within that legal framework that he would have exercised his discretion and determined the issues joined between the parties on the application. The question which arises for consideration therefore is whether on the true interpretation of rule 13.3 of the CPR, which has been clarified in several cases in this court, the decision of the judge can be faulted.

[46] The application to set aside the judgment was filed on 1 September 2010, four months after the deemed date of service of the judgment. The affidavit of the 1st respondent attempted to explain the delay on his part. He stated that he was unaware of the difference between the civil and the criminal jurisdictions of the courts. He had attended the Resident Magistrate's Court on several occasions dealing with the same matter at the instance of the appellant until the same had been disposed of, and he had been unrepresented in that court. He was of the view that the documents personally served on him related to the same matter, and he had been ably protecting his interests in that court, and seemed to expect that situation to continue generally. He also set out how the incident, the subject of the claim, had occurred from his perspective. He claimed that he had struck the appellant three times in lawful self defence as the appellant had continued approaching him threateningly with a knife in hand. Save as set out in the pleadings, there is no other information in respect of the appellant's version of the event. There was therefore no evidence before the learned judge challenging the position taken by the 1st respondent. It would not therefore be unreasonable for the learned judge to have found that the 1st respondent had a reasonable prospect of successfully defending the claim. In relation to the question of

whether the 1st respondent had applied to the court within a reasonable time since being aware of the judgment entered against him, four months since the service of the judgment do not seem to be an inordinately long period of time. That issue was resolved in his favour. Additionally, the time which had passed since service of the claim form and entry of the judgment had been explained.

[47] The 2nd respondent is being sued as being vicariously responsible for the acts of its servant and or agent, the 1st respondent, and so its position on liability will depend on the evidence of the 1st respondent which has been set out. Additionally, although the 2nd respondent was deemed to have been served, the company could rely on the stance it had taken consistently, that it had actually not been served, in an attempt to persuade the court that, once the legal fiction had been removed for these purposes, then in the interests of justice, and on the basis of fairness, in the exercise of the discretion of the court, the judgment ought to be set aside, and the 2nd respondent in all the circumstances, should be permitted to put its defence before the court. In any event, since liability depends on the acts of the servant and or agent, prudent practice would suggest that the principal should participate in the litigation.

[48] Although as indicated, there were no reasons for judgment provided from the court below, bearing in mind my own reasoning on the matter, it could be that the learned judge on the facts set out herein took a similar approach, given his decision. I cannot therefore say that he acted on wrong principles of law or irrelevant considerations or that he was plainly wrong. (**Hadmor Productions Ltd v Hamilton** [1983] 1 AC 191 and **Re Jokai Tea Holdings Ltd** [1993] 1 All ER 630).

[49] I would therefore dismiss the appeal, affirm the judgment of the learned judge and direct that the respondents file their respective defences within 21 days of the date hereof. The matter should then proceed with expedition to case management.

PANTON P

ORDER

Appeal dismissed. Judgment of the court below affirmed. The 1st and 2nd respondents to file their respective defences within 21 days of the date hereof. Costs to the 1st and 2nd respondents to be agreed or taxed.