[2016] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 129/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE WILLIAMS JA (AG)

BETWEEN	**BRIAN WIGGAN**	**APPELLANT**
AND	**AJAS LIMITED**	**RESPONDENT**

Written submissions filed by Ms Rachael Dibbs for the appellant

Written submissions filed by Seyon Hanson for the respondent

10 June 2016

PROCEDURAL APPEAL

(Considered by the Court on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

BROOKS JA

[1] This is a procedural appeal arising from the decision of Master Carolyn Tie (as she then was) to set aside a judgment in default of defence, which Mr Brian Wiggan had entered against his former employer AJAS Limited (AJAS). Mr Wiggan is aggrieved by Master Tie's ruling. He asserts that she generally failed to properly apply the requirements for the exercise, and particularly failed to appreciate that AJAS' proposed

defence has no real prospect of success. Mr Wiggan has asked this court to set aside the decision of the learned Master and to restore the judgment in his favour.

Background

[2] Mr Wiggan had sued AJAS to recover monies that he said were due to him as a result of AJAS having made his post redundant. Mr Wiggan asserts that he commenced employment with AJAS in or around January 1972 by way of an oral agreement as a cargo agent. He became a member of the union representing AJAS' employees. In 1977 he entered into a formal contract of employment as a supervisor in the company. He accepted the promotion to his first managerial appointment in 1982. It is his assertion that despite having to relinquish membership in the union, it was orally agreed with AJAS that he would retain the benefits to which unionised staff were entitled.

[3] AJAS underwent a change in its ownership and upper level management structure in or about June 2013. Mr Wiggan's employment relationship was terminated by way of redundancy on or about 31 August 2013. The redundancy payments made to him and at least one other management level employee, Mr Paul Collins, were made at the statutory minimum, rather than at the higher rate, which had been contracted for unionised employees.

[4] Mr Wiggan disputed the payment. The dispute was not resolved despite attempted reconciliation by the Ministry of Labour. Mr Wiggan therefore filed the claim in the Supreme Court against AJAS, which has spawned this appeal. Citing breach of

contract, he claimed that AJAS failed to pay redundancy for the entire period for which he had been employed and failed to pay the full entitlement pursuant to the terms of the oral contract. Mr Wiggan also sought to obtain orders compelling AJAS to fulfil certain other obligations relating to what he said were benefits, to which he was entitled, even after termination of his employment. These included continuing his medical scheme as well as his transportation and travel benefits.

[5] AJAS maintained that it was not obliged to pay any rate above the statutory rate for redundancy. It asserted that there was no contract which obliged it to pay an enhanced rate or to accord former management staff benefits to which unionised staff was entitled by virtue of the process of collective bargaining. AJAS seeks to resist the claim on these bases, but failed to file its statement of defence within the stipulated time.

[6] A chronology of how the claim proceeded through the Supreme Court will assist the understanding of the analysis.

Chronology of events

i. Claim Form and Particulars of Claim was filed on 31 December 2014 and served on AJAS on 2 January 2015;

ii. AJAS filed and served an acknowledgement of service on 12 January 2015 and indicated its intention to file a defence. No defence was filed;

iii. Mr Wiggan's request for default judgment and a separate application for judgment in default of defence were filed 25 February 2015. His affidavit in support of the latter application was filed 26 February 2015;

iv. AJAS' application for extension of time to file defence was filed 22 May 2015. It was supported by an affidavit of Mr Barry Byrne, AJAS' managing director;

v. Another application for court orders for extension of time to file defence was filed on 26 May 2016. It was apparently intended to supersede the earlier application;

vi. Judgment in default of defence was entered on 26 May 2015;

vii. An application for court orders was filed on 1 July 2015 to set aside default judgment and to stay the enforcement of the default judgment. It was

supported by an affidavit of another director of AJAS, Mr Edward Bond;

viii. The latter application, as well as an application by AJAS for extension of time in which to file a defence to a claim brought by Mr Collins against it on similar grounds, were heard together by Master Tie;

ix. On 18 December 2015 the learned Master granted the applications to set aside the default judgment in Mr Wiggan's case and to extend time to file the defence in both cases; leave to appeal was also granted.

The learned Master's ruling

[7] In considering the application to set aside the default judgment, the learned Master considered the provisions of Civil Procedure Rule (CPR) 13.3(1) and 13.3(2) in arriving at her decision. In assessing whether AJAS had a 'reasonable prospect of success', Master Tie relied on the well-known and oft-cited authority of **Swain v Hillman and another** [2001] 1 All ER 91. She further observed that since the authorities established that there must be a real prospect of success, as opposed to an arguable case, the court was also required to consider and analyse the merits of the proposed defence using the guidelines outlined by McDonald-Bishop J (Ag) (as she then was) in **Marcia Jarrett v South East Regional Health Authority and others**

(Claim no 2006HCV00816), judgment delivered 3 November 2006. In the end, she found that the merit of the proposed defence must be of paramount consideration.

[8] Master Tie found that the delay in filing the defence was "not inordinate" and the explanation proffered for the delay was "palatable". She considered AJAS' explanation for the delay as being attributed to the process of having to gather information dating as far back as 1977 which is the commencement date of Mr Wiggan's contract of employment.

[9] In relation to the prospect of success, having examined the various affidavits in support, she formed the view that "there are triable issues which ought to be ventilated" and that the "issue of credibility is a live one which clearly is the purview of a trial judge". In light of this, she granted the application to set aside the default judgment and gave AJAS 14 days to file and serve its defence.

The grounds of appeal

[10] Mr Wiggan filed the following grounds of appeal:

> "a) The learned Master erred as a matter of fact and law in coming to her decision to set aside Judgment in favour of [Mr Wiggan], by failing to utilize the criteria set out by CPR 13.3 to guide her decision making.
>
> b) …
>
> The master failed to appreciate that [AJAS] is relying on its contract of sale to abrogate the entitlements of [Mr Wiggan] – who was not privy to the contract, which is not a defence with a real prospect of success, there is no privity of contract with [Mr Wiggan] and the contract of sale of shares of [AJAS].

c) The learned Master failed to appreciate that a good explanation for a delay in filing a defence was not the same as applying to set aside the judgment as soon as reasonably practicable after finding out that judgment had been entered.

d) The learned master erred as a matter of fact and/or law in failing to appreciate the criteria contained in the Rule 10.5 (supra) that the draft defence must have a real prospect of success were the matter to go to trial but also that the draft defence must contain reasons for resisting allegations…and that the draft defence …did not comply with CPR Rule 10.5(5)…

e) The learned Master failed to apply the overriding objective in interpreting parts 10 and 13 in setting aside the Judgment.

f) The Master erred as a matter of law in finding that [AJAS] had a good reason for failing to file its defence within the time prescribed by the Rules and ought to be relieved from sanctions, in doing so the Master failed to appreciate that [Mr Wiggan's] claim was no surprise to [AJAS], as [Mr Wiggan] had engaged [AJAS] and its legal representative in conciliatory discussions facilitated by the Ministry of Labour as permitted by law prior to filing his claim.

g) The learner [sic] Master erred by failing to appreciate that judicial notice can be made of Ministry of Labour discussions.

h) The Master erred by failing to find no defence was provided for the breach of contract claim, having accepted that there was an offer from [AJAS] to be made redundant, and acceptance by [Mr Wiggan], based on the consideration provided by the Human Resource Manager of [AJAS] (admitted by [AJAS] at paragraph 17 and 22), and [Mr Wiggan's] own knowledge of his contract of employment.

i) The [M]aster failed to find that there was no defence presented in the draft defence with a real prospect of successfully defending the claim that [Mr Wiggan] would have detrimentally relied on the communication

of the HR Manager of his enhanced redundancy figures.

j) The [M]aster erred in setting aside Judgment in favour of [Mr Wiggan] by failing to apply the criteria in Rule 13.3 which is cumulative, as [AJAS] failed to provide a defence with a real prospect of success, and no good reason for the delay in filing a defence.

…"

The law

[11] Rule 13.3 of the CPR requires a party who is applying to set aside a default judgment, to show that it has a real prospect of successfully defending the claim. Rule 13.3 states:

> "(1) The court may set aside or vary a judgement 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 is reasonably practicable after finding out that judgment has been entered.
>
> (b) given a good explanation for the failure to file an acknowledgement 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."

[12] The application must be supported by evidence on affidavit and the affidavit must exhibit a draft of the proposed defence (rule 13.4(2) and (3)). The substantive test for setting aside a default judgment is, therefore, whether the defendant has a real

prospect of successfully defending the claim. See **Swain v Hillman and another** [2001] 1 All ER 91.

[13] In arriving at a decision on the setting aside of a judgment regularly obtained, the guidelines outlined in **Marcia Jarrett v SERHA** are useful. They require an assessment of the nature of the quality of the defence, the period of delay between the judgment and the application to set it aside, the reasons for the [respondent's] failure to comply with the provisions of the rules as to the filing of a defence and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside.

[14] It must be borne in mind that the above assessment is to be done in the context of the overarching legal consideration that this court will not lightly set aside a decision made by a judge at first instance in exercise of a discretion given to that judge. That principle was enunciated in **Hadmor Productions Ltd and Others v Hamilton and Another** [1983] 1 AC 191 and has been accepted by this court in a number of its decisions, including **Trade Board Limited and another v Daniel Robinson** [2013] JMCA Civ 46.

Analysis

[15] The grounds of appeal will be addressed in the context of the following headings:

a. The promptness with which the application to set aside was made

b. The explanation for the failure to file a defence

c. The prospects of success of the defence

[16] The main issue to be decided in this appeal is whether the learned master erred in exercising her discretion to set aside the judgment in default and to enlarge the time for filing the defence. As there is no dispute in relation to the regularity of the default judgment, each sub issue will be examined in turn and will address the grounds of appeal simultaneously.

a. The promptness with which the application to set aside was made

[17] There appears to be no issue of delay by AJAS in making its application to set aside the default judgment. AJAS was served with the default judgment on 29 June 2015. Three days later, on 1 July 2015, it applied to have the judgment set aside. In light of this, AJAS acted promptly in applying to set aside the default judgment.

b. The explanation for the failure to file a defence

[18] On 22 May 2016, when the first application was filed to extend the time to file the defence, the defence would have been almost three months out of time. The learned Master found that the delay was not inordinate and accepted the explanation from AJAS that the reason for the failure to file the defence was that AJAS was gathering information, given that the commencement of Mr Wiggan's employment was in 1977 and given the fact of the various changes that the company had undergone. In her judgment, Master Tie indicated that the objection by Mr Wiggan's counsel to the

application was more geared towards the merits rather than to the aspect of delay in filing the defence.

[19] In this court, however, counsel for Mr Wiggan submitted that AJAS' explanation for that delay was not credible, as by the time it had been served with the claim it had already had all the information that it needed in order to file a defence. That was demonstrated by its involvement in the dispute resolution attempts at the Ministry of Labour. Learned counsel further submitted that contents of the draft defence exhibited were similar to the contents of the letter dated 7 January 2014 that AJAS' then attorneys-at-law had written to Mr Wiggan's then attorneys-at-law (pages 41-45 of the record of appeal).

[20] Learned counsel for Mr Wiggan went further to state that the draft defence contained no assertions from any of the persons that AJAS reportedly had to "track down" to get information. For all these reasons Mr Wiggan says that AJAS has proffered no good reason for failing to file a defence within the prescribed time.

[21] Whereas it is true that a perusal of the draft defence shows AJAS' position to be very similar to that indicated in its letter dated 23 January 2014, Mr Wiggan cannot dispute that AJAS was making the attempts that it asserts that it made. Mr Byrne hinted in an affidavit filed on 21 October 2015 that there was a category of former employees, on whom the new owners were not comfortable relying. It is also true that AJAS could have filed a defence in compliance with the rules, based on the material that it did have at the time, and, if needs be it could have filed an amended defence to supplement or

correct the position there stated. The learned Master cannot, however, be said to have been wrong in finding that the delay was not unduly long or that the explanation was "palatable".

[22] The authorities, however, have illustrated that the absence of a good reason is not by itself fatal to an application to set aside default judgment. Therefore, the court is required to look at all the circumstances of the case. See **Trade Board Limited v Daniel Robinson** at paragraph 16. AJAS' prospects of successfully defending the claim will now be considered.

c. The prospects of success of the defence

[23] The learned Master, in assessing the prospect of success of the defence, reviewed the claim and the various affidavits submitted on behalf of the defendant. She highlighted the respective stances of the parties, and concluded that it was "clear from an analysis of the matter in its entirety that there are triable issues which ought to be ventilated". She was also of the view that "the issue of credibility is a live one which clearly is the purview of the trial judge".

[24] Counsel for Mr Wiggan submitted that AJAS, in its draft defence did not answer the claim for enhanced redundancy and has provided nothing to say that Mr Wiggan is only entitled to the statutory minimum. In summary, Mr Wiggan submitted that the defence did not meet the threshold of CPR Part 10 as it contained "bare denials" and cited certain paragraphs as examples where no reasons are given for resisting the allegations.

[25] Counsel for Mr Wiggan argued that AJAS' denials are without merit, as evidenced in its response that consultations were only recently done in response to the filing of the claim. Further, counsel submitted that AJAS did not deny Mr Wiggan's assertion that the statutory minimum was paid as a result of claims by AJAS that the strictures of the contract of sale of the shares of AJAS confined them to do so. That contract, counsel for Mr Wiggan submitted, could not affect the pre-existing contractual obligations that AJAS owed to Mr Wiggan, and hence that defence must fail as there is no privity of contract between the employees of AJAS and the vendors of the shares.

[26] AJAS, in its submissions, relied extensively on the provisions of the Employment (Termination and Redundancy Payments) Act (ETRPA) in justifying the approach it took in relation to the payments it made to Mr Wiggan for pay in lieu of notice and for redundancy. It contended that Mr Wiggan's claims for compensation under those headings are in excess of the provisions of the ETRPA and the associated regulations, and therefore it has a real prospect of defending the claim.

[27] It asserted that Mr Wiggan had presented no evidence of the 'alleged custom and practice' on which he based his claim for redundancy in excess of the statutory provision of the ETRPA. Further, Mr Wiggan, being a member of the managerial staff, was not entitled to the benefits of a unionized worker and in any event, his claim for entitlements extended beyond that of a unionized worker without any supporting documentation. AJAS denied that its defence was one of 'bare denials'.

[28] An analysis of the defence indicates that it is indeed substantive in nature, the main pillar being that the appellant was only entitled to the statutory minimum as stipulated by the ETRPA and the regulations. It is the position of AJAS in its defence, that Mr Wiggan has not provided any evidence of the "custom and practice" of the redundancy compensation practices of AJAS to justify his claim for enhanced redundancy benefits. However, there was an affidavit from Carole Fox, a former personnel manager and general manager of AJAS, which was prayed in support of Mr Wiggan's claim. The learned Master noted this at paragraph [13] of her judgment:

> "[13] As regards the claim of Wiggan, it was noted that there is no documentation to support his contention that he relinquished union membership but retained the benefits attached thereto. In fact, he makes no reference to any specific individual with whom this arrangement was brokered. [Mr Wiggan's] contention however was supported by the affidavit of Carole Fox, the previous personnel manager of the defendant company."

[29] Conversely however, the letter exhibited by AJAS to its proposed defence, although it refers to the concept of redundancy, does not support Mr Wiggan's position. Firstly it indicates that Mr Wiggan is only entitled to redundancy from 1977 and not 1972; the year from which he seems to have calculated his claim for payment. Secondly, the letter does not mention that the redundancy would be paid at any preferential rate, or indeed, any specific rate.

[30] There was no documentary indication to support Ms Fox's assertion of an arrangement which allowed a deviation from the statutory position of the ETRPA.

[31] Based on an analysis of the defence, it is difficult to agree with Mr Wiggan's stance that the defence consists of 'bare denials'. While there are instances of denials, without explanation, of aspects of the particulars of claim, the defence as filed does consist of more than bare denials and therefore the prospect of success of the defence is left to be evaluated.

[32] The learned Master, having reviewed the affidavits submitted on behalf of AJAS, observed at paragraph [16] that:

> "[16] ...Whilst there are flaws as regards some aspects of the affidavit evidence as well as flaws on the defence as filed as regards strict compliance with the CPR, even having disregarded those offending aspects, I find that there is sufficient presented to indicate that there is a defence with reasonable prospect of success. Or to state conversely, it is not manifestly clear that the claimant would succeed at a trial."

[33] Further, at paragraph [17] she said:

> "[17] I am of the view that it is clear from an analysis of the matter in its entirety that there are triable issues which ought to be ventilated. I am of the view that the issue of credibility is a live one which clearly is the purview of a trial judge. It is not appropriate to embark on a mini trial to make a determination of issues of credibility at this stage."

[34] At this stage, it would seem as if the learned Master was correct in her conclusion about the defence as filed. As an example, Mr Wiggan's letter of engagement, dated 17 June 1977, would impliedly belie Mr Wiggan's claim to be entitled to "Redundancy at a rate of 41 years * 4 weeks = 164 [weeks]" as he set out

in paragraph 11. v. e. of his statement of claim. AJAS would be entitled to argue that he is, at best, only entitled to 36 years.

[35] There is, however another issue. It is noted that a major part of AJAS' defence is that the statutory provision concerning redundancy calculations, and any issues arising from it, should be determined at a trial. This brings into the analysis, the authorities submitted by Mr Wiggan and AJAS on this point.

[36] Counsel for Mr Wiggan relied on the authority of **Holiday Inn Jamaica Incorporation v Ava Chambers** SCCA No 23/2007 (judgment delivered 18 December 2008), where this court dismissed an appeal from the decision of Sykes J, in the court below, that Ms Chambers' union benefits were preserved upon being promoted to a non-unionized position. The court emphasized that where managerial positions and benefits are in issue, all such matters are not generally captured in a single written document.

[37] The case, that bore similar facts to the instant case, were that Ms Chambers, who was a member of the union, on being offered a promotion to a managerial position, had discussions with three members of the appellant's management team who assured her that she would retain her entitlements attached to being a member of the union upon relinquishing membership in the union. As a result of the oral agreement between them, she relinquished membership in the union and accepted the promotion. Evidence was also led that it was the practice of the appellant to calculate and make

redundancy payments to managerial staff at the rate applicable to unionized staff, as recent as the year before Ms Chambers' termination.

[38] The appellants denied the existence of such an agreement and contended that if there was such an agreement, it was illegal and unenforceable. Only the former aspect is relevant for these purposes.

[39] The issues that arose were whether there was any such agreement and, if there was one, whether the respondent was entitled to the claim for enhanced redundancy payment in keeping with the formula for unionized staff. Sykes J found for the respondent on both issues. He ruled that the appellant was "not able to provide direct evidence to contradict" Ms Chambers on the point of the assurances that had been made to her. He found that the circumstantial evidence of general practice in industrial relations, adduced by the appellant, was "not compelling to displace" Ms Chambers' evidence and, therefore, the pleaded denial of the existence of the alleged agreement fell away completely.

[40] It would be correct to say that that aspect of the case turned on the credibility of the witnesses. This court had no difficulty in accepting Sykes J's assessment of that issue and his finding in Ms Chambers' favour thereon.

[41] AJAS relied on the authority of **Quinn et al v Calder Industrial Materials Ltd** [1996] IRLR 126, to address the issue of whether they were in breach of the appellant's contract of employment by the non-payment of the "enhanced redundancy" and other

benefits. The appellants in **Quinn v Calder** were dismissed from their employment by the respondents on grounds of redundancy. They were dissatisfied with the level of redundancy payments made to them. They claimed that although there was no reference to enhanced redundancy payments in their individual terms and conditions of employment, their entitlement to the enhanced payments had been imported by implication through custom and practice. They sought to be paid at the enhanced rate.

[42] The Employment Appeal Tribunal ruled that they were not entitled to payment at that rate. It held that it could not be inferred from all the circumstances that the enhanced redundancy payments had become a binding part of the employees' contracts. The basis of the decision was that the terms had not been incorporated in any agreement, or communicated to the employees by management. The tribunal emphasized that although there had been previous settlements at the enhanced rate, a decision had been made on each occasion so to do. It held that there was no basis for finding that payment on enhanced terms had been established, by custom and practice, as part of the contract. There was also no evidence that any employee commenced employment with the expectation that those terms would be applied.

[43] The tribunal, in determining whether the policy adopted by management had become a term of the employee's contract on the grounds that it was an established custom and practice, relied on the factors referred to by Browne-Wilkinson J in **Duke v Reliance Systems** [1982] IRLR 347. They are:

(i) Whether the policy has been drawn to the attention of the employees by management or has been followed without exception for a substantial period; this has to be taken into account along with all the other circumstances of the case to determine if it is sufficient to support the inference that the policy has achieved the status of a contractual term; and

(ii) Whether the circumstances in which the communication was made or became known support the inference that the employers intended to become contractually bound by it.

[44] As in the case of **Holiday Inn v Ava Chambers**, **Quinn v Calder** was decided on findings of fact. The principles extracted from **Duke v Reliance Systems** also refer to findings that a tribunal of fact must make.

[45] At this stage of the present case, AJAS is required to show that it has a real prospect of success. Based on the authority of **Quinn v Calder** and **Holiday Inn v Ava Chambers**, it would seem that it should produce some material to rebut Mr Wiggan's assertion that it was following an "enhanced redundancy" policy for such a substantial period, that it became a term of the contract. It may be said that it is being asked to prove a negative, but that is the position in which it has placed itself by disregarding the provisions of the CPR concerning the deadline in which to have filed its defence.

[46] It has not produced any material to show that it has ever departed from the position of making redundancy payments on an enhanced basis, or that special

circumstances attended any such previous payment. This is so despite three affidavits having been filed on its behalf. Based on the foregoing, AJAS' prospect for successfully defending this aspect of Mr Wiggan's claim does not seem to be higher than being "fanciful", to borrow a term from **Swain v Hillman**.

[47] In addition to the issue of the prospects of success, it is also necessary, following the guidance from **Marcia Jarrett v SERHA**, to examine the case in a wider context. The issue of prejudice and the overriding objective are among these.

d. The issue of prejudice

[48] On the issue of prejudice, learned counsel for Mr Wiggan submitted that he was prejudiced by AJAS' delay in making the payment that it did and he would be further prejudiced by the delay involved in waiting for a trial for which the defence, which is unmeritorious, is bound to fail.

[49] AJAS, on the other hand, submitted that Mr Wiggan has suffered no prejudice upon the default judgment being set aside. Further, it argued, based on rule 13.7 of the CPR, certain parts of his claim, which could have been deemed abandoned by virtue of the entry of the default judgment, would be restored.

[50] Mr Wiggan prosecuted his claim in accordance with the CPR. AJAS, on the other hand, failed to file its defence to the claim, within the stipulated time, resulting in the application to set aside Mr Wiggan's judgment and the proceedings before this court. Prior to this, Mr Wiggan also sought the intervention of the Ministry of Labour and was

unsuccessful in his endeavours to resolve his claim. Mr Wiggan is, therefore, likely to suffer prejudice in terms of the delay in having his claim resolved. Those are, however, matters that may be compensated for by orders of costs and the application of interest on any judgment which he receives.

e. The overriding objective

[51] On the other hand, it would be wrong to retain a judgment against AJAS which, on the face of it, is based on an incorrect calculation. These factors must be considered as part of the overriding objective.

f. Another factor to be considered

[52] There is, still, one other factor to be considered. Mr Paul Collins' claim is set to be tried in the Supreme Court. The issues appear to be very similar to that raised by Mr Wiggan. The issue of credibility concerning the rate at which redundancy payments have been and are to be made, will be a live issue in that case. The possibility of an inconsistent result therefore arises. The learned Master considered both cases together in her judgment. She stressed the importance of the issue of credibility in each of the claims. In her discretion the cases should both be tried to settle that issue. That was not an unreasonable decision in the circumstances.

[53] Based on all these factors, the decision of the learned Master ought not to be disturbed.

Evidence point

[54] There was a disagreement between counsel for the parties concerning this court being provided with two affidavits that had been filed in the Mr Collins' claim. The court took the view that it was permissible to refer to the affidavits as both claims were heard together by the learned Master and the affidavits would have helped to inform her decision in the claims.

Summary and conclusion

[55] Mr Wiggan's contention in his grounds of appeal, that the learned Master did not apply the provisions of rule 13.3 of the CPR, in considering the application to set aside the default judgment, cannot be supported. Master Tie took into account the provisions of the rule and all the evidence presented in arriving at her decision.

[56] The learned Master's reasoning in respect of the reason for failing to file the defence in the specified time and the promptness with which the application to set aside the judgement were made, was consistent with a proper exercise of her discretion in the circumstances. There is one aspect of Mr Wiggan's judgment which requires that it be set aside. It is that he has claimed redundancy for 41 years, when the documentation seems to suggest that he is only entitled to a calculation based on 36 years. AJAS is entitled to be allowed to resist the claim on that basis. The prospect of success of the defence, insofar as the rate at which Mr Wiggan was entitled to be paid redundancy, will require the credibility of the witnesses to be assessed. The authorities of **Holiday Inn v Ava Chambers** and **Quinn v Calder** suggest that the learned Master was correct in arriving at that conclusion.

[57] Taking into account all the factors, on the one hand, the delay in filing the defence, the likely prejudice to Mr Wiggan and the difficulties with one aspect of the proposed defence, and on the other hand, the explanation for the delay, the ostensible difficulty with the judgment, the live issue which can only be settled by a trial judge deciding whom and what to believe and the likely prejudice to AJAS, the appeal should be dismissed and the order of Master Tie affirmed with costs to AJAS.

SINCLAIR-HAYNES JA

[58] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

P WILLIAMS JA (AG)

[59] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

a. Appeal dismissed.

b. Costs to the respondent to be taxed if not agreed.