[2021] JMCA Civ 53

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE BROWN-BECKFORD JA (AG)

SUPREME COURT CIVIL APPEAL NO 78/2017

APPLICATION NO COA 2021APP00020

BETWEEN	**AMECO CARIBBEAN INC**	**APPELLANT**
AND	**SEYMOUR FERGUSON**	**RESPONDENT**

Jerome Spencer and Mrs Suzanne Risden Foster instructed by Hart Muirhead & Fatta for the applicant

Ms Gillian Burgess for the respondent

17 June and 17 December 2021

BROOKS P

[1] I have had the privilege of reading, in draft, the comprehensive and compelling judgment of my learned sister, Edwards JA. I entirely agree with her reasoning and conclusion and there is nothing that I can usefully add.

EDWARDS JA

Introduction

[1] Ameco Caribbean Inc ('the appellant') appeals against the decision of Stamp J ('the learned judge') made on 27 July 2017, refusing its application to set aside a default judgment entered against it for failure to file an acknowledgment of service. This default judgment was entered with respect to a claim brought by Mr Seymour

Ferguson ('the respondent') on 15 December 2011 against the appellant (then known as Ameco Caribbean Limited), for damages in respect of loss and injuries he sustained following a motor vehicle accident on 3 February 2010, in the parish of Hanover. The accident involved a collision between the respondent's motorcycle and an Isuzu motor truck owned by and registered to the appellant. It was alleged that the driver of the vehicle at the material time, Mr Keeble Dixon, who was named as the 2nd defendant, was a servant or agent of the appellant. It does not appear that Mr Dixon was ever served with any originating documents in this matter.

[2] There is now no dispute that the claim form and particulars of claim were duly served on the appellant's registered office. Those documents were sent by registered post on 17 January 2012, and collected by the appellant's bearer on 25 January 2012. The appellant, however, for reasons which it later advanced, filed no acknowledgment of service and, as a consequence, the default judgment was entered against it on 7 December 2012. The appellant, subsequently, applied to set aside the default judgment on 6 October 2014. On this occasion, which was the appellant's first application to set aside the default judgment, it also sought an extension of time within which to file its defence. It argued then that the judgment should be set aside as of right, since at the time the request for judgment was made, it had not been served with a duly filed copy of the particulars of claim (the document served did not bear the Supreme Court seal). The appellant had also asserted that it had a real prospect of successfully defending the claim, that the failure to file acknowledgment of service and defence was due to an unintentional administrative error, and that the application to set aside had been made as soon as reasonably practicable. The application was heard on 6 November 2014 by Batts J, who gave his decision orally, on 13 November 2014, and his written reasons on 14 November 2014 (reported at **Seymour Ferguson v Ameco Caribbean Inc and Keeble Dixon** [2014] JMSC Civ 233). The gravamen of Batts J's refusal to set aside the default judgment was that the appellant had not provided sufficient evidence for him to assess whether the application was filed as soon as was reasonably practicable. Batts J's decision was not appealed.

[3] The application to set aside having failed before Batts J, the matter proceeded in the usual way to assessment of damages. However, on the 15 May 2017, the day before the assessment of damages hearing, the appellant filed a second application to set aside the default judgment. The assessment of damages hearing was adjourned for that application to be heard.

[4] This second application was based mainly on the grounds that the appellant had a real prospect of defending the claim since, at the material time; the relevant vehicle was leased to Caribbean Broilers Limited who used the vehicle for its own exclusive purposes; the appellant had retained no control over the vehicle; the 2nd defendant driver was at no time a servant or agent of the appellant; and that the appellant was, therefore, not liable for the driver's acts and omissions. These assertions had been made in the previous application to Batts J, but without any evidence to support them.

[5] This second application was also supported by the affidavit evidence of Ms Novelette Appleby, administrative assistant to the company's 'country manager'. In her affidavit, Ms Appleby exhibited a copy of the lease agreement between the appellant and Caribbean Broilers and averred that, by the terms of the lease, Caribbean Broilers was responsible for insuring the vehicles leased and indemnifying the appellant for all claims arising from its use of the vehicles. She also averred that the reason for the failure to file acknowledgment of service or defence was due to "a mixture of inadvertence and administrative oversights". She admitted that the company had verified through its attorneys that the letter containing the claim form and particulars of claim had been collected on its behalf but claimed that the letter was misfiled so that there was no record of it being received.

[6] Ms Appleby further stated that the company only became aware of the existence of the claim on 2 May 2014, when it received a faxed copy of a notice of change of attorney from attorneys Nigel Jones & Company. The appellant, she said, forwarded that notice to Caribbean Broilers that same day, but did not file an acknowledgment of service or defence within the prescribed time because, at that time, it had no record of

being served with the claim. Following enquiries, the appellant's attorneys received confirmation on 8 August 2014 from the Post and Telecoms Department that the company's bearer had collected the relevant documents on 25 January 2012.

[7] Ms Appleby also averred that the appellant had no record of the default judgment and did not become aware of its existence until around the last week of July 2014. She said that the appellant's attorney had advised that an application to set aside the judgment would not be made until after 16 September 2014, which was the start of the new term. The first application, however, was not filed until 6 October 2014. A copy of the draft defence was exhibited to the affidavit, asserting the same matters deponed to by Ms Appleby in respect of the lease of the vehicle by Caribbean Broilers.

[8] At the date of filing of the second application, any possible cause of action the respondent might have had against Caribbean Broilers had by then become statute barred for over a year and three months, six years having passed since the date of the accident.

[9] The learned judge dismissed the second application on 27 July 2017 but granted the appellant leave to appeal. Notice and grounds of appeal were filed by the appellant on 28 July 2017. It is that refusal by the learned judge to set aside the default judgment, on the appellant's second application, which is now being appealed before this court.

The decision of Stamp J on the appellant's second application

[10] The learned judge agreed with the finding and reasoning of Batts J, and found that that the appellant had established that it had a defence with a real prospect of success. At paragraph 8 of his written decision, the learned judge found that the fleet services agreement and rental history documents between the appellant and Caribbean Broilers attached to Ms Appleby's affidavit in support of the application (documents which had not been produced before Batts J), strongly supported the defence that the appellant "was not in physical possession of or had any control over the motor truck at

the material time, that Caribbean Broilers Limited was exclusively using the motor truck for its operations and was responsible for insuring it and indemnifying the applicant from all claims arising from its use". He also noted that the documents strongly supported the assertion that the 2nd defendant driver was not an employee or agent of the appellant, but of Caribbean Broilers. At paragraph [9] of his decision, the learned judge found accordingly, that the appellant would have "a very strong if not overwhelming case" if the documentary evidence were to be validated. In respect of the other criteria under rule 13.3, the learned judge accepted that there was a good explanation for the failure to file an acknowledgment of service.

[11] However, although the learned judge accepted authoritatively that a defence with a real prospect of success was the paramount consideration in determining the application, he refused the application to set aside the default judgment. The learned judge's refusal to set aside the default judgment was on three main bases. He found firstly, that there was no explanation for the delay of two and a half years between the time of the refusal of the first application and the filing of the application that was before him, which he described as "remarkably inordinate". Secondly, he found that the second application was not made "as soon as reasonably practicable" as required by rule 13.3(2)(a) of the Civil Procedure Rules ('CPR') and that there was no explanation for this. Thirdly, he found that the respondent would suffer grave prejudice if the judgment were to be set aside at that late stage

[12] Having considered **Rohan Smith v Elroy Hector Pessoa and another** [2014] JMCA App 25, **Flexnon Limited v Constantine Michell and others** [2015] JMCA App 55, **Evans v Bartlam** [1937] 2 ALL ER 646 and **Blossom Edwards v Rhonda Bedward** [2015] JMSC Civ 74, the learned judge declined to accept the restrictive interpretation placed on the reasoning in **Evans v Bartlam** in cases such as **Blossom Edwards v Rhonda Bedward**. At paragraph [30] of his decision, the learned judge found that "the extreme tardiness of a defendant without any or any good explanation for it, or the lack of due diligence or insincerity in providing an explanation may, in

appropriate circumstances, justly motivate a court's refusal to set aside". In that regard, the learned judge considered that the 2nd application contained essentially the same information as the first, so little more was required for the appellant to renew its application to set aside the judgment. Therefore, he said, the prolonged delay cried out even more for an explanation. The appellant had provided none. The learned judge weighed the merits of the defence against the prejudice to be caused to the respondent if the judgment was to be set aside, being that, at that stage, the cause of action against Caribbean Broilers would have been statute barred and the respondent would have been left without a remedy. Consequently, he found that the circumstances of the case were such that "it would be wholly unjust, unfair and in contravention of the overriding objective to set aside the default judgment so late in the proceedings".

The appeal

[13] The appellant filed and argued eight grounds of appeal as follows:

(a) "The learned judge came to his decision on an erroneous premise that delay is only excusable if supported by a good explanation.

(b) The learned judge erred in his finding that no good reason was provided for "the delay" in filing the first application to set aside default judgment on 6 October 2014.

(c) The learned judge erroneously placed weight and/or undue weight on the explanation of the time for filing the first application instead of the explanation for not entering an Acknowledgment of Service.

(d) The learned judge gave excessive weight to the issue of delay.

(e) The learned judge failed to consider the alacrity and diligence with which the Appellant acted after learning of the existence of this claim.

(f) The learned judge failed to consider the Appellant's reasons for not filing an Acknowledgment of Service within time.

(g) The learned judge failed to give sufficient weight to the strength of the Appellant's intended defence.

(h) The learned judge erred in finding that there must be an explanation for the delay in making the Appellant's second application."

[14] On 28 January 2021, the respondent filed a notice of application to strike out the appeal on grounds that the appellant had taken no steps in the matter since 29 November 2017; that the appeal was the result of the respondent's second attempt to set aside the default judgment; that the proposed defence denies vicarious liability and not the respondent's injuries; and that the unreasonable delay in hearing 'this claim' breached the respondent's right to a fair trial within a reasonable time.

[15] That application was heard and refused by a panel of this court on 14 June 2020.

The issues arising in the appeal

[16] The parties argued their submissions by grouping the grounds into three categories: the reasons for the delay (grounds a – c), the weight given to the delay (grounds d – g), and whether there is any need for an explanation for the delay in making the appellant's second application (ground h). I, however, find that the grounds can be more conveniently addressed as follows:

i. Whether the learned judge erred in his determination of what factors were relevant to the setting aside of the default judgment and placed too much weight on the issue of delay (grounds (a), (b), (c), (e), (f) and (h));

ii. Whether the learned judge wrongly exercised his discretion in the circumstances of the case in failing to give sufficient weight to the strength of the defence whilst giving too much weight to the issue of delay (grounds (d) and (g).

[17] The decision of the learned judge involved the exercise of his discretion. It is well settled that this Court will not interfere with the exercise of the discretion of a judge unless his decision was based on a misunderstanding of the law or evidence or was the result of the drawing of such inferences shown to be demonstrably wrong, or, where the judge's decision is "so aberrant that no judge regardful of his duty to act judicially could have reached it" (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 at paragraphs [19] and [20], and **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 at page 1046).

Issue 1: Whether the learned judge erred in his consideration of what factors were relevant to the setting aside of the default judgment and placed too much weight on the issue of delay (grounds (a), (b), (c), (e), (f) and (h))

The submissions

[18] Counsel for the appellant, Mr Jerome Spencer, took the position that the learned judge "did not give due and proper consideration to the relevant factors" and erred in his understanding of the law in respect of rule 13.3 of the CPR. His reasons for refusing the application, it was said, were "so aberrant that no judge regardful of his duty could have reached them".

[19] Although counsel accepted that it is the longstanding position of our courts that an explanation must be given in all cases of delay unless that delay was extremely short, he submitted that the court could not refuse an application on the sole basis that the reason for the delay was absent or inadequate. Counsel relied on the case of **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 to support the appellant's contention that even if the court finds no good explanation for the delay, it would not be prevented from excusing the delay.

[20] Counsel further submitted that the "good explanation" that is required by rule 13.3 is in respect of the failure to file an acknowledgment of service or defence. The rules, it was argued, do not require an explanation for the delay in making the application as soon as reasonably practicable, but rather, only required an assessment

as to whether the delay was reasonable. According to counsel, it is only where that delay, on its face, appears unreasonable, that the applicant must explain the delay. It was submitted, therefore, that the learned judge erred in assessing whether the appellant had a good explanation in respect of the delay in filing the application whilst at the same time failing to "address the explanation in respect of the failure to file an acknowledgment of service".

[21] Counsel argued that the learned judge erred by proceeding on the premise that delay is excusable "only if the explanation is good", and by disregarding this court's decision in **Rohan Smith** that the absence of an explanation for delay in filing a second application would not preclude the granting of the application. Despite the learned judge's finding, it was said, the appellant did in fact provide an explanation albeit it was not accepted by the court.

[22] Finally, counsel complained that the learned judge placed too much emphasis on the prejudice caused to the respondent if the default judgement was set aside. Counsel submitted that the issue of prejudice should not weigh so heavily against the appellant. This, he said, was because it was the respondent's own dilatory conduct in pursuing the default judgment and having damages assessed, even though he was placed on notice that he had sued the wrong party, which was responsible for a possible claim against Caribbean Broilers being statute barred.

[23] Ms Gillian Burgess, on behalf of the respondent, submitted that the learned judge had a full grasp of the relevant rules, authorities and issues before him, and in the light of the overriding objective of the CPR, correctly balanced the interests of allowing a claim to be decided on its merits, as against that of having a claim decided justly and expeditiously. In that regard, it was submitted, the learned judge properly exercised his discretion to refuse the application.

[24] It was submitted that the learned judge did not find that the delay was only excusable if supported by a good explanation, but rather, based on the case of

Flexnon Limited, that the circumstances were such that the delay outweighed the other factors, particularly the merits of the defence. Counsel argued that the learned judge's decision was correct and ought not to be disturbed.

Discussion on issue 1

[25] There is no question that the default judgment was regularly entered. A party wishing to set aside such judgment must meet the requirements of rule 13.3 of the CPR, which provides as follows:

> "13.3 (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 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."

[26] It is also undisputed that an applicant may apply more than once under rule 13.3 to have a default judgment set aside, once new material is being placed before the court that was not before on the previous application (see **Rohan Smith**, a case similarly involving a second application to set aside a default judgment, at paragraph [34]). This court has also found, in **Rohan Smith** (at paragraph [37]), that the same considerations that apply to a first application, apply to subsequent applications.

[27] In this case the appellant complained that the learned judge erred in placing emphasis on the explanation for the delay in filing the first application when rule 13.3

does not require one, as well as in finding that there ought to have been an explanation for the delay in making the second application. It also complained that the learned judge did not give due consideration to its explanation for failing to file an acknowledgment of service or that it applied to the court as soon as reasonably practicable after finding out about the default judgment.

[28] Under the heading "EXPLANATION OF THE FAILURE TO FILE ACKNOWLEDGMENT AND DELAY IN MAKING THE FIRST APPLICATION", at paragraphs [12] to [14], the learned judge considered firstly the explanation given by the appellant for not having filed an acknowledgment of service. He considered the explanation given by Ms Appleby in her affidavit, that the relevant officers of the appellant were unaware of the claim until 2 May 2014. The reason she gave for the appellant being ignorant of the existence of the claim was a mixture of inadvertence and administrative oversight which resulted in the claim not being recorded in the appellant's logbook or brought to the attention of the relevant officers of the appellant. It was not until a faxed copy of a notice of change of attorney was sent to the appellant, that it became aware of the claim. Upon receipt of that notice, the appellant contacted Caribbean Broilers and forwarded the notice to them by fax.

[29] As regards the default judgment, the learned judge's account (at paragraph 14) of Ms Appleby's affidavit evidence may be summarised as follows:

i) the appellant became aware of the judgment in the last week of July 2014;

ii) an investigation conducted by the appellant's then attorney-at-law confirmed service of the claim in late August of 2014;

iii) a decision was made to apply to set aside the judgment at the start of the new term in September 2014; and

iv) the application was not made until 6 October 2014.

[30] The learned judge at paragraph [38] of his decision, considered the explanation given by Ms Appleby for failing to file the acknowledgment of service and held that it was a good explanation. Although administrative oversight and mere inadvertence has been held not to be a good explanation in other cases, I would not fault the learned judge for holding otherwise in this case. It is, therefore, not true to say that the learned judge did not consider the appellant's reasons for not filing the acknowledgment of service on time or failed to place weight on the explanation for that failing. In my view, the learned judge generously did so.

[31] With regard to the question of whether the application to set aside was made as soon as was reasonably practicable after finding out about the default judgment, the learned judge considered that question at paragraph [39] of his decision. He made it plain that he did not consider that 6 October 2014 was as soon as reasonably practicable to file the application after finding out about the judgment in late July 2014. He found the delay of two months and two weeks unduly long, although not "exceptionally so". He considered Ms Appleby's explanation that the time was spent assessing whether the appellant was properly served as it would "inform how the application to set aside was grounded". However, the learned judge considered that by that time the judgment had been entered for more than two and a half years, and that the appellant ought to have moved with urgency and diligence.

[32] The learned judge indicated that he could see no reason which prevented the appellant from moving speedily. Furthermore, the learned judge found that having had confirmation of service from August, and having decided to wait until the new term, which he indicated began 16 September 2014, there was no explanation why the appellant further delayed in filing the application until 6 October 2014. The learned judge, at paragraph [41], found this failure to treat the matter with any urgency, after becoming aware of the claim and the judgment to be a factor for his consideration, albeit not a decisive one.

[33] It is, therefore, not true to say the learned judge did not consider the reason for the failure to file acknowledgment of service, the delay in filing the first application to set aside the default judgment and whether there was an explanation for the delay. The learned judge did consider all three issues and though he accepted the explanation for failing to file the acknowledgment of service, he found that the appellant did not act as soon as reasonably practicable to apply to set aside the default judgment after it came to its attention. He found also that no reason was given as to why it failed to act promptly.

[34] I also do not agree with the complaint that the judge erred in finding that no reason was given for the failure to act as soon as reasonably practicable. Counsel did not point to any reason that was given which was overlooked by the learned judge. It, therefore, means that there was no reason given and the learned judge was correct to so find. If the substratum of the complaint is that the learned judge erred in considering, as a relevant factor, the issue of the delay in applying to set aside the judgment after finding out about it, then I believe that the appellant is not on firm ground. Once the learned trial judge determined that the application was not made as soon as reasonably practicable after finding out about the judgment, then he was duty bound to consider why this was so and take account of any explanation proffered for the lapse.

[35] Phillips JA, in **Rohan Smith**, stated that, although rule 13.3(2) does not require an applicant to provide an explanation for the delay, an applicant who has failed to apply to set aside "as soon as is reasonably practicable" after finding out about a default judgment obtained against him should give an explanation for failing to do so (see paragraph [39]). Defendants would do well to remember that.

[36] Even if counsel for the appellant is correct that an explanation is only required where the delay appears unreasonable, it is clear that the learned judge found that the delay between the end of July and 6 October 2014, in the circumstances of this case, was, indeed, unreasonable on the face of it and, therefore, called for an explanation.

[37] The assertion by the appellant that it acted with "alacrity and diligence" after learning of the existence of the claim is not borne out by the evidence. It learnt of the existence of the claim in July 2014, two and a half years after it was filed. It spent the entire month of August making enquiries about service, failed to file anything in September, and still then only filed its application to set aside the default judgment on 6 October 2014. This has to be considered in the context of the fact that the appellant's only defence was that the vehicle involved in the crash, which it owned, was leased to Caribbean Broilers, information known only to it and Caribbean Broilers. As the learned judge noted in his judgment, very little more was required of the appellant to put it in a position to act timeously.

[38] Counsel for the appellant also complained that the learned judge erred in finding that there ought to be an explanation for the delay in the making of the second application. This is an issue that has already been settled, in my respectful view. Phillips JA in **Rohan Smith** stated, at paragraph [37], that the considerations in rule 13.3(2) are equally applicable to subsequent applications. She also opined that an additional factor to be considered in subsequent applications is the length of time between the dismissal of the first application and the filing of the subsequent application. This, she reasoned, was in keeping with the overriding objective of dealing with cases expeditiously and fairly. It is clear to me that in considering the length of time between the applications, regard would have to be had to any explanation given or not given for any delay. The learned judge correctly relied on this decision.

[39] The approach of the learned judge to the second application to set aside the judgment cannot be faulted. The application before the learned judge was made two and a half years after the first application was dismissed by Batts J. The learned judge found that there was no explanation for this delay in the grounds filed with the application but found that Ms Appleby had attempted to provide one in her affidavit. At paragraph [15] he noted the explanation to be that:

> "*34. Mr. Simpson [sic] confirmed that he received a copy of the Court's judgment on the 3rd April, 2017.*
>
> *35. He advised, and I verily believe, that our initial application was refused because Ameco failed to sufficiently establish its intended defence. We there after provided Mr. Stimpson with further instructions to make this application."*

[40] The learned judge then considered the date of the oral delivery of the Judgment of Batts J (13 November 2014) and the date of delivery of the written reasons (14 November 2014), and further considered the minute of order signed by Batts J on 13 November 2014 which reflected the fact that the appellant was represented by counsel Mr Stimpson and Mr Halliburton on that occasion. The learned judge opined, therefore, that counsel for the appellant would have been aware of the reasons for the refusal of the first application as early as 13 November 2014, and certainly as late as 14 November 2017. The learned judge also considered paragraph 33 of Ms Appleby's affidavit which gave further insight into the appellant's knowledge as to why the first application was refused. She said;

> *"33. It is my understanding that the application was refused on that occasion because the sequence of events and the timeliness [sic] involved were not fully set out before the Court to allow the Court to assess whether we acted swiftly in bringing our application to set aside before the Court, or, or, [sic] whether we were dilatory in our response, having learnt about the judgment hanging over our heads."*

[41] The learned judge noted that during this period of inaction, the claim had become statute barred and the respondent had taken steps to enforce the judgment. As said earlier, the learned judge went on to find that there was no explanation for this "remarkably inordinate" delay. He found the delay to be a material consideration that he was duty bound to take account of. He cannot be faulted for so finding. At no point did the learned judge say there "must" be an explanation for that delay. He found there was none given when the circumstances of this particular case clearly required one. For

my part I would think that there ought to be an explanation for such a long delay between applications, so that the court could determine whether it was reasonable in all the circumstances.

[42] Counsel for the appellant relied, in the court below, and before this court, on the statement made by Phillips JA in **Rohan Smith** that "the absence of an explanation for the delay in filing the second application would not have operated as a bar to prevent [the learned judge] from exercising her discretion to grant the application" (see paragraph [44]). However, Phillips JA was speaking in the context of the circumstances of the case which presented itself to her. Every case has to be determined on its own factual circumstances. That decision does not assist the appellant, as that finding was made in the context of a delay of over one year which could not fairly be attributed to the respondent/applicant, and the delay of four months that could be attributed to him, could not be deemed as inordinately long, in the light of the history of the matter.

[43] Even though, as noted above, Phillips JA considered that the primary consideration was whether there was a defence with a realistic prospect of success, the way in which she considered the other factors demonstrates her acknowledgment that those factors, may in an appropriate case, notwithstanding the prospects of the defence, militate against the setting aside of a default judgment. It is also apparent that Phillips JA was not saying that an explanation was not required (which would have been contrary to what she said at paragraph [39]), but that it was still open to the judge, notwithstanding the absence of an explanation, to exercise his discretion to grant relief if he or she saw fit in the circumstances.

[44] In the instant case, the learned judge considered that the delay between applications was over two and a half years. He found that, in those circumstances, it behoved the appellant to provide an explanation for that delay. This, it was in his discretion to find.

[45] Before concluding on these grounds, it is useful to recap the learned judge's approach. The learned judge found that he was not minded to "set aside a default judgment in these circumstances where the delay [was] inordinate and there [was]no explanation for it". However, he did not stop there. Even though no explanation was given for the delay, the learned judge considered whether there could be one on the face of the record and found that the only difference between the first and the second application was the provision of the documents to substantiate the defence of a lease agreement with Caribbean Broilers, and the additional information in the affidavit in support as to the explanation for the first delay. He found that to be a small requirement which should not have prevented the application being renewed with alacrity. It was in that context that the learned judge found that an explanation for this inordinate delay was required. Bearing in mind that the application was filed a day before the assessment of damages and well after the statute of limitation had expired, I agree with the learned judge that, in that context, the delay was inordinate and cried out for an explanation.

[46] These grounds have no merit.

Issue 2: Whether the learned judge wrongly exercised his discretion in the circumstances of the case in failing to give weight to the strength of the defence whilst giving too much weight to the issue of delay. (grounds (d) and (g))

The submissions

[47] Mr Spencer submitted, on behalf of the appellant, that because the primary consideration in respect of an application under rule 13.3 of the CPR is whether the appellant has a real prospect of successfully defending the claim, once such a defence exists, the other factors, though requiring consideration, cannot be decisive. Counsel complained that the learned judge erred in giving excessive weight to the issue of delay and went against the weight of authority in failing to give paramountcy to the strength of the appellant's defence. Counsel sanguinely suggested that no matter the delay or

the prejudice to a claimant, as long as the defendant has a defence with a reasonable prospect of success, the default judgment must be set aside.

[48] The fact that the appellant has a defence with a real prospect of success, counsel submitted, was not given the primacy it deserved by the learned judge but was given brief and "wholly insufficient" consideration. Counsel relied on the first instance decision of Sykes J (as he then was) in **Blossom Edwards v Rhonda Bedward**, and Phillips JA in **Rohan Smith** at paragraph [39], in support of this contention that a good defence, takes precedence over all other factors.

[49] Ms Burgess, for the respondent, submitted that it was not the rule that a good defence guarantees the setting aside of a default judgment. She pointed to the fact that the delay in this case was measured in years, not weeks or months, and was extraordinary. Counsel submitted that the learned judge, in a carefully reasoned judgment applied the proper principles and was guided by the overriding objective. She contended that the appellant had failed to show that the learned judge misunderstood the law or the facts, or applied them incorrectly. Counsel relied on the cases of **Flexnon Limited** and the **Attorney General of Jamaica v John McKay**.

Discussions on issue 2

[50] Whether the applicant has a real prospect of successfully defending the claim has always been considered, authoritatively, to be the primary consideration in applications of this nature (see for instance the cases of **Flexnon Limited** at paragraphs [15] and [19] and **Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited** [2016] JMCA Civ 39 at paragraph [81]). However, a close examination of the authorities and the approach taken by the courts at all levels, on a case by case basis, do not support the appellant's contentions that regardless of any other factor, a default judgment must be set aside once there is a defence to the claim, with a real prospect of success.

[51] It is clear from the learned judge's reasoning that it is not true to say he gave brief and insufficient consideration to the appellant's defence. The learned judge gave due regard to the paramountcy of the appellant's "overwhelming" defence when he examined the evidence in relation to the prospects of the appellant's draft defence and found that there was no doubt that the appellant had established a real prospect of successfully defending the claim. Having done so he opined that the appellant had a "very strong if not overwhelming case", and that the proposed defence appeared to be "strong and cogent" (see paragraphs [8], [9] and [47] of his judgment). It is, therefore, incorrect for the appellant to say that the learned judge gave the prospects of the appellant's defence "brief and wholly insufficient consideration".

[52] The question that arises then, and on which this case largely turns, is whether the learned judge, having found that the appellant's defence had a real prospect of success, was entitled to exercise his discretion to not set aside the default judgment on the basis that that factor was outweighed by the inordinate delay in filing the second application, the lack of an explanation for the delay, as well as the prejudice to be caused to the respondent consequent on that delay.

[53] The authorities indicate that the factors in rule 13.3 must be considered in light of the overriding objective to deal with cases justly, and that inexcusable dilatory conduct and overwhelming prejudice to the respondent to be occasioned therefrom, are reasons to refuse relief to an applicant, notwithstanding the existence of a defence with a real prospect of success.

[54] There is no doubt that the starting point in applications of this nature is that the court, in the interests of justice, and as far as is possible, must seek to have matters decided on their merits. The following principle outlined by the House of Lords in **Evans v Bartlam**, at page 650, has long since been used to guide applications to set aside default judgments in our jurisdiction:

> "…[U]nless 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 been obtained only by a failure to follow any of the rules of procedure."

[55] However, even pre-CPR cases show that the court has been willing to refuse to set aside a regularly obtained default judgment because of delay, even where there exists a good defence. I will start by looking at the case of **Clarke v Hinds et al** (unreported), Court of Appeal, Barbados, Civil Appeal No 20 of 2003, judgment delivered 4 June 2004, which is one such pre-CPR decision involving the inherent jurisdiction of the court to dismiss an action for inordinate and inexcusable delay. This was a case arising out of a motor vehicle accident that took place in 1987, in which the appellant was injured. The appellant filed a writ in July 1992 and obtained judgment in default of defence in May 1993. Damages were assessed with costs being awarded to the appellant. There was a delay between 1993 and 1998, but in March 1998, the appellant issued a levy on property of the 2nd respondent. It was not until shortly thereafter that both respondents filed summonses to set aside the default judgment, the 2nd respondent in May 1993, and the 1st respondent in June of 1998. A stay of the execution of the levy was granted until 9 June 1998, the date the 1st respondent's summons was to be heard. However, the summonses were not heard. The appellant applied to have them dismissed for want of prosecution in September 2001. This summons was set for hearing on the 18 December 2001, but on the day before, the 2nd respondent applied to set aside or stay "all process on execution". In July 2003 all four summonses were heard together, and the court ruled in favour of the respondents, setting aside the default judgment. The reason given by the judge for setting aside the default judgment was that the respondents had a defence on the merits, the 1st respondent had raised grave doubts as to proper service on him, and it would cause grave injustice if they were not heard. He also found that the application to set aside had been made promptly by both respondents, and that there was no evidence suggesting that the delay in adjudicating the summonses to set aside was attributable to the respondents. This decision was appealed.

[56] The Court of Appeal of Barbados determined that the application to dismiss the summonses for want of prosecution ought to have been heard first and granted for reason of delay. The court also noted that the summonses to set aside the default judgment were made on the basis that they were irregularly obtained, however, the evidence was that acknowledgment of service had been filed on behalf of both respondents. Therefore, the default judgment had been regularly obtained. The Court of Appeal disagreed with the judge that either respondents had a good defence. The first respondent admittedly drove a defective vehicle and did so negligently, and the second respondent was the registered owner of that vehicle, who retained ownership but gave up control of the vehicle to the first respondent. On the issue of delay, the Court of Appeal said this, at paragraph 18, under the heading "**DELAY**";

> "**Although in most cases the primary consideration in exercising the discretion is whether the defendant has a case with a real prospect of success, we are of the view that there will be cases in which, irrespective of the merits, it will be a correct exercise of the discretion not to set aside a default judgment because of delay and the lapse of time between the judgment and the order setting it aside. This is such a case. Delay could be decisive, if it seriously prejudices the plaintiff or third party rights have arisen in the intervening period.** Harley v Samson [1914] 30 T.L.R. 450 was a case in which the defendant had a good defence but the default judgment was nevertheless not set aside because of delay of one year during which the judgment debt had been assigned. Delay may also be such that it is proper to infer that there can no longer be a fair trial, especially where the resolution of the dispute depends on the memories of witnesses who are going to give oral evidence of an event that happened in a moment of time, such as is the case in most accident litigation: Griffiths, L.J. in Eagil Trust Co. Ltd. v. Piggott Brown [1985] 3 ALL E.R. 119 at 123 CA." (Emphasis added)

[57] The court considered the issue of unfairness and prejudice to the respondent in refusing to set aside the judgment. It found that setting aside a regularly obtained judgment was not automatic. It said (at paragraph 25) that "there must reach a point when, because of delay, even a defendant with a meritorious defence is precluded from

defending...". The court also considered that the delay would have resulted in the appellant being unable to sue anyone else, if the second respondent were to go to trial and prove he was the wrong party, because the limitation period had already expired. Delay, therefore, it said, ought to have been a material factor in resolving the applications.

[58] The Court of Appeal in **Clarke v Hinds** applied the case of **Dipcon Engineering Services Limited v Gregory Bowen and The Attorney General of Grenada** [2004] UKPC 18. In the latter case, Dipcon had obtained judgment in default of defence against the Government of Grenada on a claim for special damages for breach of agreement. The writs were issued by Dipcon in January and July of 1996, and statement of claim with particulars was served on 23 July 1996. On 12 November 1996, the court ordered the Government to file a defence within 21 days, failing which Dipcon could apply to enter judgment in its favour. No defence was filed, judgment was entered in Dipcon's favour, and hearing date for the assessment of damages was set. The hearing date was adjourned on request of the government, and then two days before the next hearing date, the Government applied to set aside the judgment. The assessment was again adjourned and heard together with the application to set aside on the next occasion. The application to set aside was dismissed and leave to appeal refused. The Government filed an appeal, notwithstanding leave had never been obtained. Damages were, however, subsequently assessed. The Government then appealed the decision of the assessment judge, challenging also the refusal to set aside the judgment. The Court of Appeal acceded and set aside the default judgment. There was never any explanation offered for the failure to file a defence. In overruling the Court of Appeal and upholding the decision of the judge of first instance to refuse to set aside the default judgment obtained, the Board said this at paragraph 28:

> "Of course, the merits of the proposed defence are of importance, often perhaps of decisive importance upon any application to set aside a default judgment. But it should not be thought that it is *only* the merits of the proposed defence which are important. The

> defendants' explanation as to how a regular default judgment came to be entered against them…will also be material."

[59] After indicating that a reasonable explanation is not always necessary and that there is no rule that the court must be satisfied that one exists, the Board referred to **Evans v Bartlam** where Lord Atkin indicated that an explanation for allowing a judgment to be entered is one of the matters the court will have regard to. The Board, at paragraph 30, said:

> "Important too will be any delay in applying to set aside the default judgment and any explanation for this also."

[60] They continued, at paragraph 33, with reference to the judgment of the Court of Appeal:

> "Paragraph (17) of Satrohan Singh JA's judgment…infers that Alleyne J could only properly have dismissed the setting-aside application had he concluded that the Government's proposed defence on the merits was 'hopeless'. If that was, indeed, the Court of Appeal's view, the Board think it wrong. As already indicated, Alleyne J had properly to consider other factors besides the merits of the defence and, on the facts of the present case, it would not have been right to set aside this judgment after four and a half years unless the proposed defence were substantially more convincing than merely not 'hopeless'."

[61] The Board then thought it worth noting that, although not applicable, rule 13.3(2) of the English Civil Procedure Rules required that consideration should be given to whether the person seeking to set aside the judgment had promptly made that application.

[62] The advent of the CPR ushered in a new approach in seeking to achieve justice between parties, which entails dealing with cases more expeditiously, saving time and expense, and ensuring that parties are on an equal footing (see rule 1.1). Rule 1.2 of the CPR stipulates that the court "must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules". Recognition

of this approach was given by Sykes J (as he then was) in **Sasha-Gaye Saunders v Green** (unreported), Supreme Court, Jamaica, Claim No 2005 HCV 2868, judgment delivered 27 February 2007, shortly after the amendment to rule 13.3 of the CPR to its present form. Speaking to what he described as a greater relaxation of the rules, Sykes J accepted that the paramount ground in the amended rule 13.3 was the real prospect of successfully defending the claim, but he went on to state, at paragraph 24 of his judgment, that;

> "I should also point out that rule 13.3(2) says that the court must consider the factor set out in that paragraph. This would suggest that in the absence of some explanation for the failure for the failure to file the acknowledgment of service or the defence, the prospect of successfully setting aside a properly obtained judgment should diminish some what [sic]. Similarly, if the application is quite late, then that would have a negative impact of successfully setting aside the judgment. This approach is consistent with recognising that a claimant who has properly secured judgment has something of great value. This value in Jamaica is enhanced by the certain knowledge that a successful application to set aside [sic] judgment translates into a twenty four month to forty eight month wait for the trial to take place. In that time the claimant bears the risk of losing witnesses and evidence might not be available at the date of trial…"

[63] The first instance decision of **Blossom Edwards**, which was relied on by the appellant, also acknowledged that approach, notwithstanding the fact that he seemed to bemoan the apparent leniency in this approach. This is evident in his dictum (at paragraph [24]) that "it is not easy to see how the factors listed at rule 13.3 (2) even if decided against the defendant can deny the application except on grounds such as loss of evidence or witnesses, that is to say, matters that affect the ability of the claimant to prosecute his claim effectively".

[64] Whilst it is not necessary for me to make any pronouncement on this restrictive view of the rules, in this case, certainly, it is clear that if one were to adopt that dictum, and apply it to this case, the appellant's tardiness does, in fact, affect the ability of the respondent to prosecute his claim.

[65] This court in **Russell Holdings**, at paragraph [129], taking a similar approach, noted that the principle in **Evans v Bartlam** must be balanced against the rules of the CPR, including the overriding objective. The court opined that the decision to set aside a default judgment ought to entail a balancing exercise of the court's coercive powers against the need for matters to be heard on their merits in keeping with the overriding objective.

[66] **Russell Holdings** was a case in which the appellant company appealed the decision of the lower court to refuse and strike out its application to set aside default judgment entered against it. Having found that the appellant had a defence with a real prospect of success, this court went on to assess the explanation for not filing an acknowledgment of service, the one-year delay in filing the application to set aside the default judgment, the lack of explanation for the delay in filing the application, and "whether there was any compelling likelihood of prejudice to the respondents if the judgment were to be set aside".

[67] This court, relying on **Thorn Plc v MacDonald and another** (1999) CPLR 660, found that, in respect of the explanation for failing to file an acknowledgment of service or defence, the failure to give a good explanation for the delay was not decisive, but only a factor to be taken into account. This court, however, noted that the principle that the court is loathed to shut out a deserving litigant due to inadvertence or oversight by his attorney could be overridden if the same was such as to amount to gross negligence (paragraph [127]). In that regard, the court found that although the appellant in **Russell Holdings** did not apply to set aside the default judgment as soon as reasonably practicable, the error made by the appellant's attorney could not be deemed as grossly negligent.

[68] In **Russell Holdings**, however, this court went further and stated unequivocally, at paragraph [83], that:

> "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 acknowledgment 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."

[69] This, in my view, is the approach which the learned judge took. Indeed, if that approach was not correct, one could well ask what then would be the purpose of the requirement that a court "must" consider those factors listed in section 13.3(2)?

[70] It is important to note that, in **Russell Holdings** at paragraph [128], it was also determined that there was "no evidence of undue prejudice to the respondent which would outweigh the possible prejudice to the appellant if the matter [was] not determined on the merits".

[71] **Flexnon Limited** was a case involving an application for leave to appeal the refusal of the judge at first instance to set aside a default judgment entered against the applicant. In that case, the claim form with supporting documents were served on the applicant company on 27 September 2010, and no acknowledgment of service or defence having been filed, default judgment was entered against it on 28 February 2012. An order was also made that required an accounting to be done by the applicant and for damages to be assessed. These orders were served on the applicant on 12 March 2012. The applicant failed to comply with the order to account, and the respondents applied for the enforcement of the accounting order. On 17 April 2013, time was extended to allow the applicants to provide the accounting and liberty was granted to the respondents to institute contempt proceedings if the applicants failed to comply. At these proceedings, the applicant was represented by counsel. However, the

applicant did nothing until 1 October 2014, when it filed an application to set aside the default judgment, some two years after it had been entered. This application was heard and refused on the basis that the draft defence contained no realistic prospect of success, but the judge said that even if it did have one, he was not minded to grant relief due to the dilatory and "flippant" conduct of the applicant in dealing with the matter.

[72] As one of its grounds, the applicant, in that case, argued, similarly to the appellant in this case, that the learned judge placed too much emphasis on the delay rather than on whether the applicant had had a defence with a realistic prospect of success, which ought to be the primary consideration. In finding that the judge, in that case, did not err in placing undue weight on the applicant's delay, this court considered the following, at paragraphs [27] and [28]:

> "[27] It is clear from rule 13.3(2)(a) and (b) that it is incumbent on the court to consider whether the application to set aside was made as soon as was reasonably practicable after finding out that judgment had been entered and that a good explanation is given for the failure to file an acknowledgement of service and or a defence as the case may be. So **the duty of a judge in considering whether to set aside a regularly obtained judgment does not automatically end at a finding that there is a defence with a real prospect of success**. Issues of delay and an explanation for failure to comply with the rules of court as to time lines must be weighed in the equation.
>
> [28] While it is accepted that the primary consideration is whether there is a real prospect of the defence succeeding, that is not the sole consideration and neither is it determinative of the question whether a default judgment should be set aside. The relevant conditions specified in rule 13.3(2) must be considered and such weight accorded to each as a judge would deem fit in the circumstances of each case, whilst bearing in mind the need to give effect to the overriding objective." (Emphasis added)

[73] The court relied on the authorities of **Standard Bank PLC & Another v Agrinvest International Inc & Others** [2010] EWCA Civ 1400 and **Peter Haddad v Donald Silvera** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal

No 31/2003 and Motion No 1/2007, judgment delivered 31 July 2007, to reiterate the point that in the post CPR era, having regard to the purpose and intent of the overriding objective, and the culture of delay in our jurisdiction, the issue of delay must be a factor to be considered in the balance. The court in **Flexnon Limited** put it this way, at paragraph [32]:

> "In our jurisdiction, where there is an embedded and crippling culture of delay, significant weight must be accorded to the issue of delay, whenever it arises as a material consideration on any application. The application to set aside a regularly obtained default judgment is one such type of application where the consideration of delay should figure prominently."

[74] The court concluded the issue by finding that, having regard to the inexcusable delay and scant regard for the rules shown by the applicant, the judge could not be faulted for "taking a robust stance in the protection of the rules and of the authority of the court in making its orders". That robust approach, this court found, was warranted on the facts, and would properly have outweighed the merits of the defence had there been any (paragraph [37]).

[75] **Standard Bank PLC** was a case decided under the English rules which are admittedly different from our CPR rule 13.3 and which some persons think are decidedly more favourable to the tardy litigant. In that rule the prospect of success is paramount, however, the court has to have regard to the question of whether the application to set aside the default judgment was made promptly. Under that rule too, no other factor is specifically identified and the court, in **Standard Bank plc**, opined that this suggests that promptness now carries greater weight. On the issue of promptness, it was said at paragraph 23 that:

> "It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one. **However, promptness will always be a factor of considerable significance, as the judge recognised**

in para 27 of his judgment, and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the Defendant might succeed at trial." (Emphasis added)

[76] Finally, **Attorney General of Jamaica v John Mackay** was also a case involving the refusal of a judge to set aside a default judgment. In that case, the appellant delayed three months in making the application to set aside the judgment and the affidavit of merit had been sworn to by counsel. This court on an application for permission to appeal the judge's refusal, held that the applicant had no real chance of successfully appealing the judge's decision. It held that the applicant had failed to satisfy any of the criteria set out in rule 13.3. There had been no explanation for the delay presented to the judge, there was no explanation for failing to file a defence in time (it was 16 months late), and there was no proper affidavit of merit. The applicant had therefore, failed to show that the judge had acted on any wrong principle of law.

[77] That case, of course, is distinguishable on the basis that in the instant case, the appellant did have an affidavit of merit showing a defence with a prospect of success and did provide a reason, which the learned judge accepted, for failing to file acknowledgment of service.

[78] It is clear, therefore, that on great authority, both pre and post CPR, delay is a significant factor to be weighed in the balance in the circumstances of a particular case. The statement by Phillips JA in **Rohan Smith** (at paragraph [39]) that delay was merely a factor to be borne in mind and ought not by itself to be determinative of the application, on which the appellant relies, is a correct statement of the principled approach the court should take in determining the application to set aside. It is true that delay by itself, is not a determinative factor. It is a factor to be considered and weighed in the balance with all the other relevant factors in the case. Reliance on this, however, does not assist this particular appellant in the circumstances of this case.

[79] In the instant case, the inordinate delay, which has boldly and frankly been conceded to by counsel for the appellant, the lack of explanations, and the consequent risk of prejudice to the respondent, are circumstances which would necessarily have "featured prominently" in the learned trial judge's consideration of whether to set aside the judgment. The weight to be accorded to that delay and the concomitant prejudice caused to the respondent therefrom, had to be balanced against the weight to be accorded to the merits of the defence.

[80] The learned judge correctly identified and considered the relevant factors and in so doing took the correct approach. Having done a thorough analysis of the authorities submitted by both parties, he rightly considered the authorities which demonstrated that rule 13.3 must be interpreted and applied in keeping with the overriding objective. He recognised the paramountcy of a good defence with a real prospect of success and weighed that against the possible prejudice to the respondent.

[81] Having taken that approach, the learned judge's finding that "where grave and irremediable harm may be done to a claimant if a judgment is set aside, any inordinate delay without good and satisfactory explanation is a material factor to be considered in the exercise of the discretion to set aside, *even if* the proposed defence may seem impregnable on paper" (see paragraph [33]), cannot be faulted. This is a necessary conclusion that arises from a proper application of the overriding objective to rule 13.3. In that regard, the learned judge did not say, as asserted in the grounds of appeal, that delay is only excusable if supported by a good explanation, but rather, that the particular circumstances of the case before him called for one. Furthermore, the only way the court could be placed in a position to assess whether an applicant had applied "as soon as reasonably practicable" in the circumstances of the case, is if the applicant provides an explanation as to the circumstances it faced at the material time that may or may not have prevented it from applying sooner.

[82] The appellant's reliance on the case of **Fiesta Jamaica v National Water Commission** to say that "the Court is not prevented from excusing delay where there

is no good explanation for the delay", does not take its case any further. Not only did that case involve a different type of application which considered different criteria under the CPR, but also, it was never asserted that the learned judge did not have the discretion to excuse the delay, if the circumstances required it. The fact is that he did not believe he should exercise his discretion in that way, based on all the circumstances of the case.

[83] The prejudice the respondent stood to face if the judgment were to have been set aside is obvious. The respondent, having filed his claim within a year of the accident, and due to no fault of his own, has yet to obtain justice. At the date of the second application, seven years would have passed since the date of the accident. At this juncture, over 10 years have now passed.

[84] It is equally obvious that the appellant stood to suffer great prejudice as well, as for a litigant to be made to pay damages for a claim for which it may not be liable is highly prejudicial, and most undesirable. It was incumbent on the learned judge, therefore, to strike a balance. This is precisely what he did.

[85] The learned judge considered the submission of the appellant before him, which was repeated before this court, that the respondent had been put on notice upon the filing of the first application as to the appellant's defence that it was not the proper defendant to the claim, and ought to have taken steps to add Caribbean Broilers before the matter became statute barred. Although he agreed that the respondent had been so alerted, the learned judge considered that the appellant, at that stage, had provided no proof as to its lease agreement with Caribbean Broilers. He disagreed that the onus ought to have been on the respondent to investigate the legitimacy of those assertions, the respondent already having a judgment in his favour in hand. With that I agree.

[86] It was the appellant's responsibility, those facts being within its own knowledge, and knowing the prejudice it would face, to take the necessary steps to renew the application to set aside the judgment with alacrity. It would not have been in the

respondent's best interests, having a judgment in hand, to do what the appellant suggested he should have done, with little evidence at the time that it was not a wild goose chase, and with the result that he would have had to start his claim all over again. That being even more so, considering that the first application to set aside the judgment was refused by Batts J on 13 November 2014, and the appellant did not seek to appeal the decision or renew the application to set aside the judgment during the almost one and a half years before the matter became statute barred. The appellant waited a further year before it filed the second application, a day before the assessment of damages was slated to be conducted. During all this time the respondent would have been perfectly within his right to consider his judgment secure.

[87] Whether the appellant's dilatory conduct was as a result of a concerted effort to frustrate the respondent's claim, or just sheer negligence on the part of the appellant or its counsel, in circumstances where both parties stood to suffer prejudice, the learned judge cannot be faulted for exercising his discretion to find that the appellant ought to bear the unfortunate result of its own doing. Like the learned judge did, I consider that, of the two, the prejudice to the respondent will be greater if the judgement is set aside. The respondent did everything that was required of him and has a regularly obtained judgment against the registered owner of the motor vehicle with which he had a collision. If the judgment is set aside, the respondent, will be without a remedy. He will be denied access to the courts and to compensation for his injuries.

[88] On the other hand, the registered owners of the vehicle, the appellants, may yet have a claim against their lessees with whom they have an indemnity agreement under the lease contract. Of the two parties, the prejudice is less against the appellant. Even if the appellant has no claim against its lessee, it is the author of its own doom. It had the knowledge of its lease and indemnity agreement, which it failed to disclose until the very last minute. It failed to do what was necessary to have Caribbean Broilers joined in ancillary proceedings (for which the rules provide), or to have the judgment against it set aside and the claim itself dropped, from 2012 when it first became aware of it and

sent notice to Caribbean Broilers. In protecting Caribbean Broilers, inadvertently or otherwise, it exposed itself to judgment and has no one to blame but itself.

[89] I, therefore, find that these grounds also have no merit.

Conclusion

[90] The learned judge, in an admirable disposition of the relevant principles, correctly identified the relevant factors, judicially considered them, and took the correct approach in determining whether, in the circumstances of this case he should exercise his discretion to set aside a default judgment pursuant to rule 13.3, in the light of the overriding objective to deal with cases justly and expeditiously. Although the paramount consideration in rule 13.3 of the CPR is whether the applicant has a defence with a realistic prospect of success, in an appropriate case, and in keeping with the overriding objective, a judge may refuse relief to an applicant. This is so, notwithstanding the existence of a good defence, if there is non-compliance with the factors in rule 13.3(2), inexcusable and inordinate delay and a risk of real overwhelming prejudice to a respondent.

[91] In the instant case, there was more than sufficient evidence on which the learned judge could have exercised his discretion in the way that he did, and there is, therefore, no reason to interfere with his decision. This appeal must fail.

BROWN BECKFORD JA (AG)

[92] I too have read the draft judgment of my learned sister. I agree with her reasoning and conclusion and have nothing to add.

BROOKS P

ORDER

1. The appeal is dismissed.
2. The orders of Stamp J made on 27 July 2017 are affirmed.

3. Costs to the respondent to be agreed or taxed.