[2022] JMCA Civ 6

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2019CV00126

BETWEEN	**JULIE RIETTIE ATHERTON**	**APPELLANT**
AND	**GREGORY MAYNE**	**RESPONDENT**

Written submissions filed by Nigel Jones & Company for the appellant

Written submissions filed by John G Graham & Co for the respondent

4 February 2022

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

STRAW JA

Introduction

[1] This appeal is concerned with whether Henry-McKenzie J (Ag), as she then was, ('the learned judge') was correct in refusing Mrs Julie Riettie Atherton's ('the appellant') application to set aside a default judgment entered against her on 17 June 2011 for failure to file an acknowledgment of service.

[2] It is necessary to set out a brief history of the proceedings, which are somewhat unusual. At its core, however, this matter simply stems from a loan made by one neighbour to another and brings to mind the famous Shakespearean quote: "neither a borrower nor a lender be, for loan oft loses both itself and friend, and borrowing dulls the edge of husbandry".

History of the proceedings

[3] Mr Gregory Mayne ('the respondent') filed a claim form and particulars of claim on 16 February 2011. The claim was for the recovery of US$130,000.00 (plus interest), which was a loan made by the respondent to the appellant on 21 August 2009. According to the affidavit of service, filed 3 June 2011, the appellant was personally served at her home on 23 March 2011 by a process server, Mr Kenton Aiken ('Mr Aiken'). In his supplemental affidavit of service, filed on 22 November 2012, Mr Aiken stated that he knew the appellant's husband ('Mr Atherton') personally for two years prior to this date. He expounded in his *viva voce* evidence that he knew Mr Atherton because he had served him in another matter prior to this date. He saw Mr Atherton and told him that he had documents to serve on the appellant. Mr Aiken's evidence was that Mr Atherton called the appellant and she identified herself as Julie Riettie Atherton; and that he then served the documents on her.

[4] On 17 June 2011, the respondent filed a request for default judgment. This was on the basis that the appellant had not filed an acknowledgment of service. It is noted that the default judgment was signed by the deputy registrar of the Supreme Court on 23 November 2012.

[5] In February 2012, the appellant was contacted by a debt collection agency that was employed by the respondent and, in April 2012, an agreement was reached between the appellant and the said agency.

[6] On 23 January 2013, the respondent filed an *ex-parte* application for a provisional charging order. The order was made on 1 February 2013. This document was not exhibited before this court, but this information was contained in the written submissions of counsel for the respondent and was not challenged by the appellant. An application for the final charging order was heard by George J on 15 July 2014. It is noted that the appellant was present at that hearing and was unrepresented. By consent, a final charging order over the appellant's property was made on that date.

What followed was an amended application for sale of land filed 10 October 2014, and a judgment summons filed 14 April 2016.

[7] On 15 June 2016, an acknowledgment of service was filed on behalf of the appellant by counsel, Mrs Pauline Brown-Rose ('Mrs Brown-Rose'). In this acknowledgment of service, it was stated that the appellant received the claim form and that it was received on "28/2/11", that is, 28 February 2011. It will be recalled that Mr Aiken stated that he served the appellant on 23 March 2011. Curiously, the appellant indicated that she intended to defend the claim and admitted no part of the claim.

[8] The application for the sale of land and judgment summons was heard by Tie J (Ag), as she then was, on 11 and 18 July, and 12 August 2016. A written judgment was delivered on 24 November 2016 ([2016] JMSC Civ 132). It is critical to point out that in the hearing before Tie J (Ag), the appellant was represented by counsel, Mrs Brown-Rose. In addition, the appellant's husband was listed as an intervener and was represented by counsel, Mrs Kerry-Ann Sewell. There is no indication that the orders of Tie J (Ag), which are based on the default judgment obtained by the respondent, are being appealed. Ultimately, the application for sale of land was refused, but the application for judgment summons was granted.

[9] For clarity and ease of understanding, it is useful to extract portions of the judgment of Tie J (Ag):

> "The background
>
> [1] Gregory Mayne obtained judgment against the [appellant] on June 17, 2011 in the sum of US$178,904.09 and J$24,000 arising from her failure to repay a loan. **Payments have been made but the parties are disagreed as to the amount now outstanding.** The claimant asserts that the sum of $211,503.70 remains owing with interest whilst the defendant insists that she is currently indebted in the sum of US$194,354.06.

[2] The claimant has made two applications in a bid to satisfy this judgment. The first is for sale of property ... which is owned jointly by the defendant and her husband.

[3] In the event that the application for sale is unsuccessful, an application for judgment summons was also filed."

"[10] **The [appellant] asserts that her failure to satisfy the judgment has not been intentional but instead was due to a number of personal and economic challenges. She is however willing to make monthly payments to settle the debt**."

"[56] I was also mindful that the applicant had been deprived of the fruits of his judgment and has experienced hardship as a result ..."

"[65] The judgment debtor proposes a monthly payment of US$5000 between August 2016 until January 2017 and thereafter US$10,000 per month until the debt is settled."

"[67] Her evidence as regards her past business ventures was unreliable...She came across as less than forthright and at time disingenuous..."

"[69] The judgment in issue was entered on June 17, 2011. **The judgment debtor asserts that she has paid a total of US$36,113.29 since the judgment.** She indicates that the judgment creditor is her neighbour and she would often deliver cheques to his home. There has been no evidence to support this bald assertion, which is denied by the judgment creditor..."

"[71] **She admitted under cross examination that she had promised to satisfy the judgment** by September 30, 2014, even though, according to her, she did not know the outstanding amount. This suggests either dishonestly or confidence that she had access to funds sufficient to cover the debt. A letter dated October 24, 2014, over the hand of her then attorney advised Mr. Mayne that she would discharge her obligations in full within six months.

[72] Her evidence did not impress the court as true. It is evident that she either has or has had means by which to satisfy the debt. Her very contention that she earns no

> income but proposes to pay the sum of US$5,000 per month for the period August 2016 to January 2017 and thereafter the monthly sum of US$10,000, suggests that she has not been candid to the court." (Emphasis added)

[10] Following the order of Tie J (Ag) that the appellant pays US$100,000.00 by 28 February 2017, with the balance to be paid on or before 31 July 2017, the appellant's next step appeared to be to retain new counsel, Messrs Nigel Jones & Company. This took place in January 2018, and swiftly thereafter, the notice of application to set aside the default judgment was filed on 18 January 2018. The grounds on which this application was sought are as follows:

> "a. The [appellant] was not served with the commencement documents being the Claim Form, Notice to Defendant, Acknowledgment of Service Claim Form, Prescribed Notes for Defendant, Defence, Counterclaim, Application to pay by instalments and Particulars of Claim as alleged by the Claimant;
>
> b. Alternatively and in any event, the [appellant] has a real prospect of successfully defending the claim as the Promissory Note on which the [respondent] relies is unenforceable and the [appellant] says there is no agreement between her and the [respondent];
>
> c. The [appellant] has applied to the court as soon as is reasonably practicable after finding out that Judgment has been entered; and
>
> d. The [appellant] has a good explanation for not having filed an Acknowledgment of Service/Appearance."

[11] As stated earlier, it was the learned judge's refusal of this application that forms the basis of the present appeal. This court has the benefit of the learned judge's reasons for judgment delivered on 19 December 2019 ([2019] JMSC Civ 266), as well as the notes of evidence.

The findings of the learned judge

[12] The learned judge distilled the issues before her into two general issues: (1) whether the default judgment against the defendant (now appellant) was to be set aside as of right; and (2) whether she had a reasonable prospect of successfully defending the claim (see paragraph [23]).

[13] Ultimately, the learned judge found that the appellant was properly served with the originating documents and that, in any event, she did not have a reasonable prospect of successfully defending the claim.

[14] The learned judge remarked that she had the opportunity of hearing from Mr Aiken and the appellant herself and that she was more impressed with the demeanour of Mr Aiken. She found that the appellant was less than forthright and her evidence was not compelling. The learned judge was unconvinced that the appellant's previous attorney-at-law went on a frolic of her own and, without instructions, filed the acknowledgment of service (see paragraphs [31] and [33]).

[15] On the second issue, the learned judge found that while the promissory note was flawed, it was not fatal (to the proof of the claim) as the appellant did not deny that she signed the document (see paragraph [44]). On the issue of promptness, the delay of three to four years was considered inordinate and could not be deemed to have been made as soon as reasonably practicable (see paragraph [46]). The learned judge agreed with the respondent that the appellant had several opportunities to contest service and that she effectually submitted to the court's jurisdiction on more than one occasion. Her actions would have been indicative of a waiver of service as she found that the principles from **Warshaw v Drew** [1990] UKPC 22 applied to the circumstances of the case (see paragraphs [47] and [48]).

The grounds of appeal

[16] By way of notice of appeal, filed 23 December 2019, the appellant's grounds of appeal are:

"(1) The Honourable Judge erred when she accepted the evidence of the Process Server Mr. Kenton Aiken in the face of contemporaneous documentary evidence, being the [appellant's] passport which demonstrated that the [appellant] was not in the jurisdiction;

(2) The Honourable Judge erred when she found that the Acknowledgment of Service filed by the [appellant's] previous Attorney-at-Law was to be accepted at face value in circumstances where this Acknowledgment of Service would not have been before the Registrar when the Registrar was considering the question of service.

(3) The Honourable Judge erred when she determined that the [appellant's] defence had no real prospect and the issues raised could be determined without a trial.

(4) The Honourable Judge erred when she failed to find that the Appellant had a good reason for failing to file the Acknowledgment of Service and had applied as soon as reasonably practicable."

[17] Further, the appellant is challenging two findings of law and four findings of fact. They are as follows:

"(a) **Findings of Law**

(1) The [appellant] could waive the question of service after judgment had been entered;

(2) The flaws raised with the Promissory Note are not fatal to the [respondent's] claim

(b) **Findings of Fact**

(1) The [appellant's] passport did not provide cogent evidence that the [appellant] was not in the jurisdiction;

(2) She was constrained to accept the Acknowledgement of Service filed by the [appellant's] previous Attorney-at-Law at face value;

(3) The Honourable Judge erred in finding that the Process Server was convincing and compelling in circumstances where the Process Server could not indicate and describe

> the [appellant's] precise place of residence at which he served her.
>
> (4) The [appellant's] defence that she received no loan from the [respondent] in 2009 and only received a loan from Spur-Tree Investment Limited in 2002"

The relevant principles

[18] This is an appeal from the exercise of the learned judge's discretion. The bases on which this court will interfere with the discretion of a judge are well-settled. This court will only disturb such a decision, if it finds that the judge has erred on a point of law, misinterpreted or misapplied factual evidence, which is demonstrably wrong, or has made a decision that no judge mindful of his or her judicial duty, would have made (see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, and the concise statement of V Harris JA at paragraph [23] of **Richard Burgher v Earl Martin** [2021] JMCA Civ 35).

[19] The appellant is challenging a number of the learned judge's findings of fact, and as such, it is appropriate to set out the applicable principles, which were stated by Lord Hodge in **Paymaster (Jamaica) Limited and another v Grace Kennedy Remittance Services Limited** [2017] UKPC 40, at paragraph 29:

> "The Board is mindful of the constraints on an appellate court when called upon to review the findings of fact of the judge at first instance who has heard and seen the witnesses give oral evidence in court. In *Thomas v Thomas* [1947] AC 484 the House of Lords and more recently in *McGraddie v McGraddie* [2013] 1 WLR 2477 and *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600; 2014 SC (UKSC) 203 the United Kingdom Supreme Court have given guidance on the circumstances in which an appellate court may interfere with the findings of fact by a trial judge. In *Thomas v Thomas*, 487-488 Lord Thankerton stated:
>
> > '[T]he principle … may be stated thus: I. Where a question of fact has been tried by a judge without a

> jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakeably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then be at large for the appellate court.'

In *Henderson* (para 67) Lord Reed stated:

> 'in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.'

> The Board itself has recently given similar guidance in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21; [2014] 4 All ER 418, paras 11-17 and in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11; [2016] 1 BCLC 26, paras 4-8."

[20] Both parties are agreed in respect of these principles and have each relied on **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7, wherein Brooks JA (as he then was) restated the principles at paragraph [9]. Although this restatement reflects much of what has been previously set out from **Paymaster**, it bears repeating:

"[9] …Smith JA set out the principles that should guide an appellate court in considering findings of fact by the court at first instance. The other members of the panel agreed with the principles which he set out at pages 21-23 of his judgment:

'...The authorities seem to establish the following principles:

> 1. The approach which an appellate court must adopt when dealing with an appeal where the issues involved findings of fact based on the oral evidence of witnesses is not in doubt. The appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was "plainly wrong". - See **Watt v Thomas** (supra), **Industrial Chemical Company (Jamaica) Limited** (supra); **Clifton Carnegie v Ivy Foster** SCCA No. 133/98 delivered December 20, 1999 among others.
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> 2. In **Chin v Chin** [Privy Council Appeal No. 61/1999 delivered 12 February 2001] para. 14 their Lordships advised that an appellate court, in exercising its function of review, can 'within well recognized parameters, correct factual findings made below. But, where the necessary factual findings have not been made below and the material on which to make these findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact finding exercise. It should remit the case for a rehearing below.'
>
> 3. In an appeal where the issues involve findings of primary facts based mainly on documentary evidence the trial judge will have little if any advantage over the appellate court. Accordingly, the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with the finding of the trial judge- See Rule 1. 16(4)
>
> 4. Where the issues on appeal involve findings of primary facts based partly on the view the trial judge formed of the oral evidence and partly on an analysis of documents, the approach of the appellate court will depend upon the extent to which the trial judge has an advantage over the appellate court. The greater

> the advantage of the trial judge the more reluctant the appellate court should be to interfere.
>
> 5. Where the trial judge's acceptance of the evidence of A over the contrasted evidence of B is due to inferences from other conclusions reached by the judge rather than from an unfavourable view of B's veracity, an appellate court may examine the grounds of these other conclusions and the inferences drawn from them. If the appellate court is convinced that these inferences are erroneous and that the rejection of B's evidence was due to an error, it may interfere with the trial judge's decision – See Viscount Simon's speech in **Watt v Thomas** (supra).' "

[21] Accordingly, these principles will be applied in resolving the issues raised.

The issues

[22] In my view, the grounds of appeal can conveniently be condensed into two main issues. These are:

> 1. Was the learned judge correct to determine that the appellant had been served with the claim form and particulars of claim and that there was no basis to conclude that the default judgment ought to be set aside as of right (grounds 1 and 2).
>
> 2. Did the learned judge correctly determine that the appellant had no real prospect of successfully defending the claim (grounds 3 and 4).

Issue one - Was the learned judge correct to determine that the appellant had been served with the claim form and particulars of claim and that there was no basis to conclude that the default judgment ought to be set aside as of right (grounds 1 and 2)

Submissions on behalf of the appellant on ground 1

[23] Since the appellant was seeking to set aside a default judgment entered on the basis that no acknowledgment of service was filed, it was submitted that the issue of service was very relevant.

[24] Reference was made to rules 12.4 and 13.2 of the Civil Procedure Rules, 2002 ('CPR'). In particular, rule 13.2(1)(a) which provides that the court must set aside a wrongly entered default judgment where any of the conditions in rule 12.4 were not satisfied; one of these conditions being proof of service of the claim form and particulars of claim on the defendant (rule 12.4(a)). It was pointed out that the learned judge was referred to a case in which there was a similar consideration, **Cheseina Brooks (an infant suing by her next friend Wilbert Brooks) v Davern Rumble** [2017] JMSC Civ 34, paragraphs [37] and [38].

[25] Reference was also made to the affidavit of the appellant, where she refuted Mr Aiken's affidavit evidence that he served her on 23 March 2011 at 1:15 pm at 12 Norbury Drive, Kingston 8. She denied this and countered that she was not in the island as she landed in Miami on 9 March 2011 and did not return to Jamaica until 17 April 2011. In support of her evidence, the appellant exhibited a copy of her passport. It was contended that this was not simply a matter of determining credibility, as the appellant placed documentary evidence before the court. It was pointed out that she was not questioned about her passport, and the learned judge did not indicate why she rejected the passport evidence.

[26] It was submitted that the learned judge erred in the following respects:

(i) by not providing reasons for her conclusion that the appellant's passport did not amount to cogent evidence. In this regard, reliance was placed on the dictum of Foster-Pusey JA at paragraphs [42] to [46], [52] and [59] in **Leighton Samuels v Leroy Hugh Daley** [2019] JMCA Civ 24.

(ii) in preferring the evidence of Mr Aiken to the appellant's passport. The learned judge's evaluation of the evidence was flawed since it was the appellant who was required to establish that she was not served (on a balance of probabilities), and she provided

documentary evidence which supported her contention and contradicted Mr Aiken's evidence.

[27] Additionally, it was submitted that what the learned judge was required to do to resolve the issue of service was not simply to assess the demeanour of the witnesses under cross-examination but to make an assessment of the entire evidence. The correct approach would have been for the learned judge to assess the statements made by the parties having regard to the contemporaneous documents available and presented. Reliance was placed on the case of **ED & F Man Liquid Products Ltd v Patel and another** [2003] EWCA Civ 472.

[28] It was recognised that **ED & F Man** dealt with a summary judgment application, where a mini trial was not to be conducted and where the court would not have the benefit of cross-examination. Nonetheless, it was submitted that the principle regarding the weight to be placed on oral evidence, as opposed to contemporaneous evidence, equally applied where the issue of service was being determined. Reference was made to paragraph 10 of the judgment of Potter LJ, wherein it was expressed that courts do not have to accept without analysis things said by parties in their statements. Potter LJ also observed that in some cases, it might be clear that there is no real substance in factual assertions made, particularly if they are contradicted by contemporary documents.

[29] A decision of this court was also cited as an example of the kind of proof a defendant can produce to support the position that they were not served (see **Linton Watson v Gilon Sewell et al** [2013] JMCA Civ 10, paragraph [41]).

[30] In conclusion, it was submitted that the appellant could have provided no stronger evidence than a copy of her passport showing she was out of the country. This clearly disputed that she had been served, and as such, the learned judge was palpably wrong in accepting the evidence of Mr Aiken over the documentary evidence contained in the passport.

[31] So confident in the strength of this ground, counsel submitted that the court ought to allow the appeal and set aside the decision of the learned judge on this ground alone.

Submissions on behalf of the respondent on ground 1

[32] With regard to the competing evidence of Mr Aiken and the appellant, counsel for the respondent submitted that there was extensive cross-examination of the affiants and that the learned judge had the benefit of seeing, hearing and assessing them.

[33] Specifically, Mr Aiken's evidence was that he served the claim form and particulars of claim on the appellant. He knew Mr Atherton about two years prior to effecting service, as he thought that he served him before in another matter. Mr Aiken's evidence was that he told Mr Atherton that he was there to serve the appellant and that he called a lady who identified herself, and he served her. Counsel contended that Mr Atherton has maintained a continuous presence in this litigation; he attended court and at no point did he deny that he called someone who identified herself as the appellant. There was no suggestion from him that Mr Aiken was not telling the truth.

[34] It was further submitted that the appellant had knowledge of the proceedings prior to the entry of judgment, which was signed by the registrar on 23 November 2012. In reviewing the appellant's evidence, counsel pointed out that she stated under cross-examination that she became aware of the judgment in February 2012 but did not seek help as she did not know that she needed help. She stated that in April 2012, she entered into an agreement with the debt collectors and made payments; that she made payments on account of the debt and as a result of their visit. Consequently, it was argued that at the time that the default judgment was entered/signed, the proceedings had been brought to the attention of the appellant and that she had taken active steps in trying to settle her indebtedness.

[35] When confronted with a letter dated 24 October 2014, written by counsel, Mr Vincent Chen, to Mr John Graham (the respondent's counsel in relation to settling the

debt), the appellant stated that she was not Mr Chen's client. She said that she was not saying that he was not acting on her behalf, but explained that he was not formally her attorney-at-law but her father's. She also stated that she asked Mr Chen to assist her with settling the matter but provided him with no materials.

[36] Ultimately, the learned judge did not accept the appellant as a witness of truth but accepted Mr Aiken as such. Accordingly, it was contended that the learned judge, who had the benefit of observing the witnesses, was correct to make the findings of fact that she did.

[37] In conclusion, it was posited that based on the evidence that was before the learned judge, it could not be said that she was plainly wrong in finding that Mr Aiken was a witness of truth and that the appellant was duly served.

Submissions on behalf of the appellant on ground 2

[38] The primary submission under this ground was that the acknowledgment of service was filed on 15 June 2016, after the default judgment was entered on 17 June 2011. Therefore, this acknowledgment of service could not be used to support a conclusion that the service was effected as the respondent maintained, bearing in mind that the appellant produced her passport. It was contended that the relevant consideration for the learned judge, on the application to set aside the default judgment, was whether rule 12.4 of the CPR was satisfied when the registrar entered judgment. The finding that the acknowledgment of service was to be accepted at face value suggests that the learned judge gave too much weight to it and too little weight to the passport, and the learned judge erred in placing reliance on the acknowledgment of service filed in 2016.

[39] Further, it was submitted that an explanation had been offered by the appellant in relation to the acknowledgment of service. Namely, that she had not seen the acknowledgment of service filed by her previous attorneys-at-law prior to being shown by her current attorneys-at-law. She also stated that she did not tell her previous

attorneys-at-law that she was served, and she does not know why an acknowledgement of service was filed on her behalf, her instructions being that she was not served. The appellant further stated that she did not know the basis on which her previous attorneys-at-law inserted the date of service and that her best guess would be that Mrs Brown-Rose used the date that Mr Aiken stated in his affidavit of service.

[40] On the point of waiver, it was submitted that the appellant could not waive service after the default judgment was entered; the default judgment entered was a nullity and must be set aside. In support of this point, substantial reliance was placed on **Craig v Kanssen** [1943] KB 256, which was approved in **Re Pritchard (deceased)** [1963] 1 All ER 873. The essence of this contention is that if proceedings were not served on the appellant, they are a nullity, and cannot be validated by any subsequent act, by a waiver or taking some step in the action. Accordingly, the appellant was entitled, as of right, to have the proceedings set aside. Reference was also made to **Strachan v Gleaner Co Ltd and another** [2005] UKPC 33, paragraphs 25 to 27.

[41] Counsel for the appellant contended that the default judgment was entered in circumstances where the registrar was not empowered to do so, as the claim had not been served. The authorities are clear that the entire proceedings subsequently (including the judgment) are a nullity, and there can be no waiver. The fact that steps were taken in the proceedings after the judgment was entered cannot waive the defect that there was no service. Therefore, the filing of an acknowledgment of service after the judgment and the defending of enforcement proceedings cannot amount to a waiver.

[42] A distinction was made between the instant case and a situation in which the claim was not served, but the defendant enters an acknowledgment of service and fails to file a defence, with the result being that a default judgment is entered. In such a case, non-service could be waived by an entry of an appearance. Reference was made

to the dictum of Morrison JA (as he then was) **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2, paragraphs [20], [21] and [23].

Submissions on behalf of the respondent on ground 2

[43] It was submitted that the acknowledgment of service filed by counsel, Mrs Brown-Rose, was further evidence which confirmed that the appellant was served with the claim form and particulars of claim. The appellant's contention that the acknowledgment of service was filed on her behalf, contrary to her instructions, should be rejected for three reasons. Firstly, there is no evidence from Mrs Brown-Rose that the acknowledgement of service was filed without instructions. Secondly, the administration of justice would be chaotic and impossible if a litigant could say, without more, "my attorney had no authority to do this". Thirdly, if a litigant has such a fundamental issue with her attorneys-at-law, then she should pursue her remedies against them.

[44] Counsel referred to the uncontested evidence that the appellant, in another matter, had sought to set aside a default judgment on the basis of non-service and that there was a defence with a realistic prospect of success (the loan agreement was signed by the defendant company and not the defendant in her personal capacity). Further, under cross-examination, it was acknowledged that the appellant was very familiar with the court process and procedure. During the period 2013 to 2018, she had instructed at least five different attorneys-at-law.

[45] It was contended that the appellant's actions are consistent with someone who had been duly served and was aware of the proceedings against her. Namely, the appellant (a) entered into an agreement with the debt collection agency, (b) consented to the final charging order, (c) requested that counsel, Mr Chen, make a proposal to settle the judgment, and (d) made offers to settle the judgment debt during judgment proceedings before Tie J (Ag). Accordingly, the appellant's contention that she entered into various agreements and made offers to settle without seeing any court documents should be rejected.

[46] In the circumstances, it was submitted that the findings of the learned judge should not be disturbed.

Discussion and analysis on issue one

[47] The appellant had a duty to satisfy the learned judge, on a balance of probabilities, that the respondent had not met the requirements under rule 12.4 of the CPR to have obtained the order for default judgment. The relevant portions of that rule provide:

> "The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if –
>
> (a) the claimant proves service of the claim form and particulars of claim on that defendant;
>
> (b) the period for filing an acknowledgment of service under rule 9.3 has expired;
>
> (c) the defendant has not filed –
>
> (i) an acknowledgment of service; or
>
> (ii) a defence to the claim or any part of it;..."

[48] In this case, the major issue was whether the appellant had been served personally with the claim form and particulars of claim. If she had not been served, the default judgment must be set aside as of right. The learned judge had two competing bits of evidence before her, the evidence of the process server, Mr Aiken, and the evidence of the appellant. Having denied that she had been personally served on 23 March 2011, the appellant produced a copy of her passport in support of her assertions that she had been out of the island since 9 March 2011 and did not return until 17 April 2011. The learned judge remarked in her judgment at paragraph [30] that she did not accept "that the passport constitutes sufficiently cogent evidence that the [appellant] was absent from the jurisdiction on the day in question".

[49] Attached to the appellant's affidavit, filed 13 February 2018, are copy pages of a Canadian passport with the identification of Julia Faith Riettie. These include pages with the immigration stamps indicating her admittance to the United States of America ('USA') and landing in Jamaica at various times during the year 2011. The dates for the year 2011 are as follows –

Date	**Event**
25 January 2011	Admittance to the USA
27 January 2011	Landing in Jamaica
7 February 2011	Admittance to the USA
8 February 2011	Landing in Jamaica
9 March 2011	**Admittance to the USA**
10 April 2011	**Admittance to the USA**
17 April 2011	Landing in Jamaica
19 May 2011	Admittance to the USA
20 May 2011	Landing in Jamaica
5 June 2011	Admittance to the USA
14 June 2011	Admittance to the USA
17 June 2011	Landing in Jamaica

8 August 2011	Landing in Jamaica
26 August 2011	Admittance to the USA
2 September 2011	Landing in Jamaica
29 October 2011	Admittance to the USA

[50] The relevant dates indicate that the appellant travelled on 9 March 2011, when she was admitted to the USA, then on 10 April 2011, when she was again admitted to the USA. The next date of landing in Jamaica is 17 April 2011. There is no landing date in Jamaica for March seen in the pages exhibited. The appellant furnished this as support for her contention (at paragraph 5 of her affidavit filed 13 February 2018) that she "landed in Miami on March 9, 2011, and did not return to Jamaica until April 17, 2011".

[51] However, the date of 10 April 2011 (which speaks to her admittance to the USA) creates some uncertainty. While it does not directly contradict the appellant, so as to provide cogent proof that she was in the island on the date of service (23 March 2011), it certainly does not provide any conclusive proof that she was in the USA for an unbroken period between 9 March 2011 and 17 April 2011. She clearly left the USA sometime before 10 April 2011, when she was again readmitted on that date. The possibility exists that the appellant left the USA and went to another jurisdiction (besides Jamaica), but she has not said so. Thus, the passport does not assist in the determination of this issue.

[52] Although the learned judge gave no specific reasons for rejecting the passport as cogent evidence, it is clear that her conclusion cannot be said to be incorrect. In the final analysis, she would have been left with only the contradicting evidence of Mr Aiken

and the appellant and her duty to assess the credibility of these witnesses on the point of service. She discussed this issue at paragraph [31] of her judgment and indicated that she was more impressed with the demeanour of Mr Aiken, who indicated that he had personally served the appellant on 23 March 2011.

[53] However, the learned judge's assessment of the issue did not end with her observations concerning demeanour. There were other pieces of evidence that were used to assess the credibility of the appellant. The learned judge found, for example, that the appellant failed to convince her that her attorney-at-law, Mr Brown-Rose, acted outside the scope of her instructions when she filed the acknowledgement of service on 15 June 2016, which indicated that the appellant had received the claim form and particulars of claim on "28/2/11".

[54] It is clear that there is some unexplained error on the face of the acknowledgement of service, as it stated that service took place on "28/2/11" (that is, 28 February 2011), which predates the date of service given by Mr Aiken. There is no demonstration from the judgment that the learned judge took this error into account, but she indicated that she accepted the acknowledgment of service at face value; that the information contained therein were the instructions given by the appellant to her then attorney-at-law that she had been served. The learned judge found that the attorney-at-law had not gone off on a frolic of her own in that regard.

[55] Therefore, the other issue to be determined is whether the learned judge erred in this analysis of the evidence, as her conclusions on the point formed part of her reasoning in rejecting the appellant as a credible witness. The appellant gave evidence that she did not instruct Mrs Brown-Rose to enter an acknowledgement of service. In fact, in her affidavit, she indicated that she told Mrs Brown-Rose that she had not been served. It is indeed difficult to accept this contention, that the appellant retained an attorney-at-law to act on her behalf, with an indication that she intended to defend the claim and that the attorney made the decision to acknowledge service without instructions from the appellant on the matter. What is clear is that the

acknowledgement of service stated that service had been effected. In my opinion, I see no basis to conclude that the learned judge was incorrect in this assessment of the evidence.

[56] Further, the complaint that the acknowledgement of service would not have been considered by the registrar at the time that the default judgment was entered is of no moment. The registrar's granting of the default judgment would have been based on proof of service (which would have been supplied by an affidavit of service of Mr Aiken) and the fact (based on the court records) that no acknowledgment of service had been filed within the time required. The learned judge's acceptance of "the acknowledgment of service at face value" merely served to fortify her conclusion that the appellant's contention, four years later, that she was never served, ought to be rejected.

[57] Further, there was evidence before the learned judge that the appellant was not a novice to court proceedings and had also been assisted by counsel, Mr Chen, prior to Mrs Brown-Rose appearing on her behalf. There is no supporting evidence of protestations by her, regarding the absence of service between 2012, when she indicated she first became aware of the judgment, and 18 January 2018, when the application to set aside the default judgment was filed by her present counsel.One would expect that if she had not been served, as she is asserting, there would have been some record of this disclaimer prior to 2018.

[58] For all the above reasons, I have concluded that the learned judge cannot be faulted in her decision that the default judgment ought not to be set aside as of right pursuant to rule 12.4 of the CPR.

[59] Therefore, grounds one and two fail.

Issue two - did the learned judge correctly determine that the appellant had no real prospect of successfully defending the claim (grounds 3 and 4)

Submissions on behalf of the appellant on ground 3

[60] Counsel submitted that the starting point was rule 13.3 of the CPR, which provided that a judgment entered under part 12 may be set aside (or varied) if the defendant has a real prospect of successfully defending the claim. The relevant considerations being whether the defendant (a) applied as soon as reasonably practicable after finding out that the judgment had been entered and (b) gave a good explanation for the failure to file the acknowledgment of service (or defence).

[61] On the issue of real prospect of successfully defending the claim, reliance was placed on **Brian Wiggan v Ajas Limited** [2016] JMCA Civ 32, which in turn referred to the well-known formulation from **Swain v Hillman and another** [2001] 1 All ER 91 that is, realistic as opposed to a fanciful prospect of success.

[62] It was reiterated that the appellant's position was that she never entered into an agreement with the respondent in his personal capacity. The only agreement she had with anyone connected with the respondent was a loan she received from Spur-Tree Investment Limited. Counsel contended that the appellant's evidence raises triable issues, and the matter of credibility was live. It was submitted that it was trite that there is a difference between a shareholder and a company, and as such, it would be a question of fact for the trial judge to determine whether the appellant entered into an agreement with the respondent or his company.

[63] It was further submitted that there was no consideration for the promissory note on which the respondent relied. In the absence of consideration, it was unenforceable. Reliance was placed on **Viola Miller and another v Marilyn Stewart** [2013] JMSC Civ 138. The appellant's position is that she did not receive any money from the respondent in 2009 or at all.

[64] Counsel submitted that the issue of whether there was consideration for the promissory note was a question of fact which turned on the credibility of witnesses and available supporting documents. It was submitted that this issue should be determined by a trial judge and not have been determined based on affidavit evidence.

[65] It was also argued that the said promissory note was not stamped in accordance with the Stamp Duty Act, and the consequence was that it could not be admitted in evidence as valid or effectual in any court for the enforcement (per section 36 of the Stamp Duty Act). Reference was made to paragraphs [37] and [39] of the dictum of Phillips JA in **Garth Dyche v Juliet Richards and anor** [2014] JMCA Civ 23. Counsel pointed out that although section 50 was considered by Phillips JA, the promissory note had been stamped in that case.

[66] In conclusion, it was contended that the learned judge erred when she determined that the appellant had no real prospect of success.

Submissions on behalf of the respondent on ground 3

[67] It was submitted that the learned judge properly decided that the appellant had no real prospect of successfully defending the claim, and the decision should be upheld. It was pointed out that the appellant engaged the services of Mr Chen to make several proposals for settlement of the debt and requested time to pay. She attended court and made proposals for settlement of the judgment debt by paying US$5,000.00 per month at the judgment summons proceedings. The appellant also engaged the services of counsel, Mr Richard Hemmings, to make proposals for the settlement of the judgment debt. Reference was also made to paragraph [65] of the judgment of Tie J (Ag), which showed that the appellant made proposals for settling the judgment debt.

[68] On the issue of the promissory note, it was submitted that the claim filed by the respondent was for breach of contract under which the respondent granted a loan to the appellant. The claim was not based on the promissory note, rather the promissory note was mere evidence of the loan.

[69] In relation to the point taken about the Stamp Duty Act, it was contended that section 36 must be read in conjunction with section 35. In any event, the respondent was not seeking to enforce the promissory note signed by the appellant. Therefore, the provisions of sections 35 and 36 were not applicable, and any alleged failure to comply would not affect the validity of the claim.

Submissions on behalf of the appellant on ground 4

[70] It was submitted that the appellant's evidence (supported by her passport) was that she was not served, as such, she did not file an acknowledgment of service. This constituted a good explanation.

[71] The approach of Sykes J (as he then was) in **Sasha-Gaye Saunders v Michael Green et al** (unreported) Supreme Court, Jamaica, Claim No 2005HCV 2868, judgment delivered 27 February 2007, was commended to the court. In that case, it was expressed that discretionary powers are not to be exercised to punish a party for incompetence.

[72] As to whether the appellant applied as soon as reasonably practicable, counsel contended that this was so, based on the circumstances. Her evidence was that she did not realise that the claim was not for the sum she borrowed from Spur Tree Investment Limited. It was in this context that payment would have been made. Further, she engaged her previous attorney-at-law sometime in 2016, when enforcement proceedings were ongoing, and she was advised that she should try to settle. Her previous attorney-at-law also advised that she could not set aside the default judgment because of the time that had elapsed. Also, the appellant had further explained that she was not aware, prior to retaining her current attorneys-at-law in January 2018, that she could apply to set aside the default judgment.

[73] It was acknowledged that the appellant's evidence was that she became aware of the judgment in 2011 or 2012. However, the test is whether the application was made as soon as reasonably practicable after being apprised of the entry of judgment,

which requires an explanation as to what was or was not done in respect of making the application. Reference was made to **Stephenson v Smith** (unreported) Supreme Court, Jamaica, Claim No 2004HCV009900, judgment delivered 27 February 2007.

[74] It was contended that the focus should not be on the time between when the appellant learnt of the judgment and when the application was made, but the fact that she was acting in accordance with the advice of her previous counsel.

[75] The approach in **Evans v Bartlam** [1937] AC 473, 489 was commended, namely, that the major consideration should be whether there was a defence on the merits and that this transcends any reasons given for the delay. As such, the appellant should be allowed the opportunity to have her matter adjudicated on the merits.

Submissions on behalf of the respondent on ground 4

[76] It was contended that the appellant did not apply as soon as reasonably practicable after finding out that a default judgment had been entered against her. At a minimum, the appellant filed her application to set aside more than three and a half years after first appearing before George J. During that three-and-a-half-year period, the appellant engaged the services of at least three firms of attorneys-at-law (in these proceedings) and attended court on several occasions.

[77] In the circumstances, it was submitted that the learned judge properly rejected the appellant's contention that she applied to set aside the default judgment as soon as reasonably practicable.

Discussion and analysis on issue two

[78] The learned judge's second responsibility was to determine whether the default judgment ought to be set aside as a matter of discretion. Rule 13.3 is the relevant provision of the CPR in this regard, it provides:

> "(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.
>
> (2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
>
> > (a) applied to the court as soon as is reasonably practicable after finding out that the judgment has been entered.
> >
> > (b) given 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."

[79] The learned judge concluded that, on the affidavit evidence, the appellant had no reasonable prospect in successfully defending the claim. She found that the appellant's conduct demonstrated that there had been a debt owing to the respondent insofar that she (i) had entered into negotiations to pay the debt, and (ii) had taken an active part in the relevant court proceedings.

[80] The learned judge also considered evidence relevant to two promissory notes, one which was dated 7 February 2002 ('2002 promissory note') for US$150,000.00 with an interest rate of 10% and term of 90 days, signed by the appellant and Spur Tree Investment Limited; and another dated 23 August 2009 ('2009 promissory') for US$130,000.00 at an interest rate of 25% with a term of 12 months, signed by the appellant and the respondent in his personal capacity. The appellant contended that she considered the 2009 promissory note to be further dealings relevant to the 2002 loan with the company (therefore, the respondent, in his personal capacity, would not have been a proper party to the claim). However, the learned judge found that there was no indication on the face of the 2009 promissory note that it was in relation to, or part of, the 2002 loan, and the amount, interest rate and period of repayment on each promissory note were distinct. She also found that the fact that the 2009 promissory

note was flawed (apparently it was not in accordance with the requirements of the Stamp Duty Act) was not fatal, as the appellant's signature appeared on the document and she had not denied signing the same.

[81] In relation to whether the appellant had provided a good explanation for the failure to file the acknowledgment of service within the prescribed period (rule 13(2)(b) of the CPR), the learned judge concluded that the appellant failed to do so. Also, she had failed to demonstrate that the application to set aside had been made promptly, as there had been a delay of three to four years (rule 13(2)(a)).

[82] At paragraph [47] of her judgment, the learned judge stated that the conduct of the appellant demonstrated that she failed to raise the issue of non-service for several years, although she had several opportunities to contest this point. She found that this amounted to a waiver of service. She relied on **Warshaw v Drew** in this regard.

[83] I see no basis for interfering with the learned judge's reasoning and findings based on the factual circumstances that were before her. The 2009 promissory note that spoke to the debt owed by the appellant was signed by her and the respondent (in his personal capacity). The terms were distinct and differed from the 2002 debt owed by the appellant to Spur Tree investments. Also, the learned judge, who had the opportunity to see and hear the appellant, was in a position to form a view of her credibility in this regard. Further, in relation to the effect of a defective promissory note, the authorities do support the conclusion reached by the learned judge. These authorities include **Garth Dyche v Juliet Richards and anor** [2014] JMCA Civ 23, wherein Phillips JA expressed the view (at paragraph [58]) that The Stamp Duty Act contemplates that a promissory note could be used in court for purposes other than its enforcement. The claim was for breach of contract in relation to the debt owing. Once there was evidence to support that the loan in 2009 had been made to the appellant and there was evidence that she had acknowledged that the sums were due to the account of the respondent, she would have no realistic prospect of successfully defending the claim. Based on her conduct in dealing with the debt since 2012 and,

specifically, in court proceedings between 2014 and 2016, the learned judge would be correct in her determination on the issue.

[84] As to whether the application to set aside had been made promptly: the appellant's evidence is that she could not recall specifically, but she became aware of the default judgment sometime in 2011 or 2012, at the very latest, she said, by February 2012, when the debt collection agency contacted her to recover the debt. Between 2014 and 2016, she attended court in relation to the settlement of the debt. She appeared before George J on 15 July 2014 and consented to a final charging order. The application to set aside the default judgment was made about four years later in 2018. Further, between 2014 and 2018, the appellant had access to counsel, who played various roles on her behalf relating to the debt owed.

[85] A letter dated 12 August 2014 was exhibited to the respondent's affidavit (filed 18 February 2018). This letter was written by the appellant and addressed to Mr Graham, counsel for the respondent. In that letter, she acknowledged previous communication from Mr Graham regarding a debt of US$178,904.09. A second letter from counsel, Mr Chen, dated 24 October 2014, which referenced the claim number in the case at bar, was also exhibited. In that letter, Mr Chen wrote to Mr Graham on behalf of the appellant, requesting time to repay the debt. Although the appellant indicated that Mr Chen was merely assisting her, there is no denial of the debt, neither is there any query as to the issue of service. On 15 June 2016, counsel Mrs Brown-Rose filed an acknowledgement of service on her behalf, indicating that she was not admitting any part of the claim. There was no indication given that service was being disputed. An application for the sale of land and judgment summons was considered by Tie J (Ag) in July and August 2016. Portions of the judgment of Tie J (Ag) (set out above at paragraph [9] above), rehearse some of the conduct of the appellant in her attempt to settle the debt. On 24 November 2016, Tie J (Ag) granted an application for judgment summons against the appellant in relation to the debt owed.

[86] The appellant's complaint that counsel Mrs Brown-Rose advised her improperly and filed the acknowledgement of service without her consent is patently incredible based on the history of the proceedings up to November 2016. Further, the delay in filing the application to set aside the default judgment, on one view of the evidence of the appellant (that she found out about it in February 2012), could be determined to amount to six years. The learned judge accepted three to four years as the period of delay, using her appearance before George J in July 2014 (when the consent order was made) as the starting point. However, even that period of three to four years could properly be deemed to be inordinate, bearing in mind the circumstances described above.

[87] Also, the learned judge, having determined that the appellant had been served with the claim form, found that there was no good explanation for her failure to file the acknowledgment of service within the prescribed time. Again, the learned judge could not be said to have erred on the facts in coming to such a conclusion.

[88] Her finding that the conduct of the appellant (that she took an active part in the proceedings) amounted to a waiver of service was not a necessary determination in order to conclude that the judgment ought not to be set aside. This finding merely provided more fodder for her ultimate conclusion that the appellant had not provided a good explanation for the failure to file the acknowledgment of service within the prescribed time. In that regard, it is not necessary for this court to consider whether the learned judge was correct on this issue in order to affirm the orders handed down. In light of the learned judge's findings in relation to the service of the claim form and the filing of the acknowledgment of service on 16 June 2016, I have no basis to conclude that the learned judge erred in her determination that the appellant had no realistic prospect of successfully defending the claim. As a result, there is no reason for this court to disturb the learned judge's findings.

[89] Grounds three and four are without merit.

Conclusion

[90] For the foregoing reasons, I would propose that the appeal be dismissed, and the orders of the learned judge be affirmed, with costs of the appeal to the respondent be agreed or taxed.

SIMMONS JA

[91] I have read in draft the judgment of my learned sister, Straw JA. I agree with her reasoning and conclusion and have nothing useful to add.

V HARRIS JA

[92] I, too, have read the draft judgment of my learned sister Straw JA. I agree with her reasoning and conclusion, and there is nothing useful that I can add.

STRAW JA

ORDER

1) The appeal is dismissed.

2) The orders of Henry-McKenzie J (Ag) made on 19 December 2019 are affirmed.

3) Costs in the appeal to the respondent, such costs to be taxed if not agreed.