[2021] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2019CV00085

BETWEEN	**ARNALDO A BROWN**	**APPELLANT**
AND	**HARVEST TABERNACLE LIMITED**	**1ST RESPONDENT**
AND	**COLIN JACKSON**	**2nd RESPONDENT**

Leonard Green instructed by Chen, Green and Co for the appellant

Jalil Dabdoub instructed by Dabdoub, Dabdoub & Co for the 1st respondent

Georgia Hamilton instructed by Georgia Hamilton and Co for the 2nd respondent

26 January, 1 February and 13 July 2021

McDONALD-BISHOP JA

[1] I have had the privilege of reading, in draft, the judgment of my sister, Simmons JA. I agree with her reasoning and conclusion with nothing useful to add.

SIMMONS JA

[2] On 26 July 2019, having heard the application of the appellant (the 2nd defendant in the court below), to set aside the default judgment entered against him, Batts J, found that the defence had no real prospect of success and made the following orders:

> "[32] … The application to set judgment aside is refused. Costs will go to [Harvest] to be taxed or agreed."

[3] On 9 August 2019, the appellant aggrieved by this outcome filed a notice of appeal challenging certain findings of fact and law.

Background

[4] On 12 March 2012, the respondents entered into an agreement for the sale of two parcels of land registered at Volume 1125 Folio 272 and Volume 1437 Folio 13 of the Register Book of Titles ('the properties'). The appellant, who is an attorney-at-law, was retained by the 2nd respondent, Colin Jackson, the registered proprietor of the properties and chief executive officer of Caribbean Consumers Limited, and had carriage of sale. Harvest Tabernacle Limited, the 1st respondent ('Harvest') is a company duly incorporated under the laws of Jamaica and is a congregation of members of a church.

[5] The purchase price for the properties was $36,000,000.00 and payable in accordance with clause five of the agreement as set out below:

> "(a) A deposit of **Two Million Five Hundred Thousand** (**$2,500,000.00**) **Dollars** payable to the Vendor's Attorney upon signing which is hereby acknowledged.
>
> (b) A further payment of **One Million** (**$1,000,000.00**) **Dollars** within thirty (30) days of the signing hereof.
>
> (c) A further payment of **One Million** (**$1,000,000.00**) **Dollars** within sixty (60) days of the signing hereof.
>
> (e) A further payment of **Two Million Seven Hundred Thousand** (**$2,700,000.00**) **Dollars** within ninety (90) days of the signing hereof.
>
> (f) Balance of **Twenty Million Eight Hundred Thousand** (**$28,800,000.00**) is subject to a Vendor's [mortgage] as set out in special condition [7]. " (As set out in the original)

[6] Special condition 7 of the agreement stated that the agreement was subject to a vendor's mortgage by which, Harvest was required to make monthly payments of $458,000.00 on or before the 11th of each month to the 2nd respondent or his account, commencing upon the purchaser's entry into possession of the property.

[7] Clause 7 of the agreement stipulated that the sale was to be completed within 13 years of the date of the said agreement, on payment in full of the balance of the purchase price and costs of transfer by Harvest in exchange for the duplicate certificates of title for the properties.

[8] There is some dispute surrounding the sums paid by Harvest towards the purchase price. However, some payments were made and Harvest was let into possession.

[9] At the time when the parties entered into the agreement, the property was subject to mortgage no 1663417, dated 18 August 2010, in favour of National Commercial Bank Jamaica Limited ('NCB') to secure the sum of $24,000,000.00 with interest. There is some dispute as to whether Harvest, which was legally represented, was aware of the said mortgage. The mortgage fell into arrears and NCB exercised its powers of sale.

[10] As a result, on 9 March 2018, Harvest filed a claim against the appellant and the 2nd respondent seeking damages for breach of contract and damages for unjust enrichment, and also as against the appellant: (a) an accounting of all the monies paid by Harvest to the appellant and (b) damages for negligence.

[11] It was alleged by Harvest at paragraph 24 of its particulars of claim that it had made payments pursuant to the agreement in the sum of $14,510,000.00 towards the purchase of the properties as set out below:

> "Sum paid directly to the [2nd respondent]
> $8,800,000.00
>
> Sum paid directly to the [appellant]:
> $3,040,000.00
>
> Sums paid directly to the NCB
> $2,670,000.00
>
> **Total sums paid on account purchase price $14,510,000.00**"
>
> (Emphasis as set out in the original)

[12] The appellant who was served with the claim form and particulars of claim failed, refused or neglected to file an acknowledgement of service within 14 days of service. Consequently, Harvest filed a request for a default judgment, which was entered on 6 April 2018 against the appellant.

[13] On 12 February 2019, the appellant filed an amended acknowledgement of service. The appellant was served with the default judgment on 21 March 2019. On 10 April 2019 a notice of application was filed on his behalf in which the following orders were sought:

> "1. A Declaration that the document served on the [appellant] on March 21st 2019 titled 'Judgement for Damages to be Assessed' is irregular.
>
> 2. …
>
> 3. The Default Judgement entered against entered the [appellant] and entered into binder no. 771 folio no 168 [be] set aside.
>
> 4. That the [appellant] be given 14 days to file a Defence.
>
> 5. Alternatively, that Judgement entered against the [appellant] be stayed until such time as the General Legal Council shall come to its conclusion on the Professional Conduct of the [appellant].
>
> 6. That Costs to be cost in the Claim.
>
> 7. Such further orders as this honourable court shall deem fit."

[14] This application was supported by the following affidavit evidence: affidavit of Arnaldo Brown filed on 10 April 2019, supplemental affidavit of Arnaldo Brown filed on 29 May 2019, affidavit of Sylvan Edwards filed on 17 June 2019 and a third affidavit of Arnaldo Brown filed on 19 June 2019.

[15] Harvest relied on the following evidence: affidavit in response filed by Boswell Raymond and the second affidavit of Boswell Raymond filed on 20 May and 12 June 2019, respectively.

[16] The appellant's draft defence and counterclaim were annexed to the affidavit of Arnaldo Brown filed on 10 April 2019. In his draft defence, the appellant stated that the initial deposit was never paid by Harvest. He also denied that the sum of $3,040,000.00 had been paid to him by Harvest and asserted that any money paid to him by Harvest was paid over to the 2nd respondent in accordance with the terms of the agreement. In the circumstances, it was posited by the appellant that he had no duty to account to Harvest.

[17] The appellant also asserted by way of a counterclaim that a cheque in the sum of $1,800,000.00 that had been received by him from Harvest in favour of Caribbean Consumers Limited was dishonoured. A cheque in the sum of $700,000.00 was subsequently paid to the appellant as a replacement for the dishonoured cheque, leaving a deficit of $1,100,000.00. The appellant's counterclaim is set out below:

> "28. For funds in the amount of One Million One Hundred Thousand Dollars ($1,100,000.00) due and owing to the [appellant] by [Harvest] whom provided the [appellant] with a cheque eventually marked refer to drawer."

Proceedings before the learned judge

[18] In his consideration of the appellant's application, Batts J conducted a detailed analysis of the affidavit evidence relied on by the parties. The learned judge found that the judgment was not irregularly entered. As such, the appellant was not entitled to have it set aside as of right under rule 13.2 of the Civil Procedure Rules, 2002 ('CPR'). He indicated that it fell to be considered under rule 13.3 of the CPR and that the primary question was whether the defence had a real prospect of success. If the answer was in the affirmative, the next question would be whether the appellant applied for the judgment to be set aside "as soon as reasonably practicable" and provided "a good explanation" for his failure to file a defence within the stipulated time.

[19] The learned judge found that the defence had no real prospect of success. He stated that the draft defence amounted to a denial of liability and did not "condescend to the level of detail one would have expected of an attorney at law who took his obligations

seriously". He also stated that it was clear from the affidavit evidence and the material that was placed before the General Legal Council that the appellant "neither paid the money to the mortgagee nor took any, or reasonable, steps to ensure that the money was paid to the mortgagee". Batts J then proceeded to consider whether the appellant owed a duty of care to [Harvest] as he was of the view that, "… the other assertions by the [appellant] these rise or fall on the question whether the fact, that Harvest had its own attorney at law, relieves the [appellant] of any duty of care". He found as follows at paragraphs [22] and [23]:

> "[22] …the circumstances of the case before me are such that a duty ought to be imposed. The [appellant] knew that [Harvest] was purchasing property from the 1st Defendant. He knew that the property was subject to a mortgage. He knew also that the purchase price was paid by instalments which exactly matched the monthly mortgage obligation of his client, the 1st Defendant. He knew that the property would not be registered in [Harvest's] name until the mortgage was discharged. He therefore knew that if the instalment payments delivered to him were not applied to the mortgage, as contemplated by the parties, the mortgagee might foreclose or exercise power of sale. It means that, as regards the sums paid to him, he accepted the responsibility to see they were applied in the manner intended. He therefore had a duty to take reasonable steps to ensure they were applied in the manner contemplated by the agreement. The reasonable foreseeability of injury to [Harvest], if these payments were not applied in the manner contemplated, created a duty of care.
>
> [23] This is not a case of [a] negligent response to a requisition or of failure to verify his client's identity as in the cases cited. The [appellant], as custodian of money paid to him, which he knew was for a particular purpose, had a duty to ensure it was applied in the appropriate manner, or take reasonable steps in that regard. The [appellant] cannot escape that responsibility by saying that, on his client's instructions, he did something else with

> the money. Were he to do so, he would at minimum, have a duty to advise [Harvest] and possibly withdraw as the attorney acting in the matter. It does not appear that he took any step to ensure that his client, the 1st Defendant, paid the mortgagee. In short he was complicit, by act or omission, in his client's intentional breach of contract. The subsequent exercise of a power of sale was, in whole or in part, a consequence of the [appellant's] breach of his duty of care. It seems, on the facts of the case before me, that it is "fair just and reasonable' to impose a duty of care."

[20] Where the claim for an account was concerned, he found that the appellant had a duty to account to Harvest for the sums received by him as its instalment payments were for the paying off of the mortgage owed by the 2nd respondent and as such, were "imbued with a trust". He stated at paragraph [24]:

> "[24] … Therefore the liability to account, for money paid to him, cannot be denied by the [appellant]."

[21] Batts J also found that, in the event that Harvest's assertion that it was unaware of the existence of the mortgage at the time of contract was accepted, the payments which were to be made over 13 years were on account of the purchase price and were, therefore, imbued with a trust until completion and that:

> "[25] [i]f the purpose, being completion of sale, failed then the money has to be accounted for as on a resulting trust. In this case there could only be completion if the mortgage was discharged. Hence, whether [Harvest] was aware or not, the 1st and 2nd Defendants had a duty to apply the instalment payments received towards the discharge of the mortgage."

He continued at paragraph [26]:

> "[26] Liability, to account as trustees for money paid for a particular purpose that has failed, is well established… The underlying equitable principles remain. In the matter before me the purchase money, to be paid over 13 years and to be applied to discharge the mortgage prior to completion in the 13th year, is imbued with a trust. The [appellant], it seems to

> me, will have no answer when called upon to account...There is no real prospect of the [appellant] being granted relief given the fact that he took no step to ensure the money was used for the purpose it was paid to him. He was also well aware of the dire consequences for [Harvest] if, the mortgage went into arrears and the mortgagee either foreclosed or, as indeed transpired, exercised power of sale."

[22] Having concluded that the appellant's defence had no real prospect of success, the learned judge indicated that the reason for the delay need not be explored. However, in the interest of completeness, he did so. In addressing the issue of whether the appellant had provided a good explanation for his delay in filing an acknowledgement of service and defence, the learned judge found that the delay was due to the negligence of his attorneys-at-law. He noted at paragraph [9] of the judgment that the appellant's attorneys-at-law in their explanation for the delay had stated that:

> "The documents were placed on the same file that was opened for the documents that contained all the papers issued with respect to the complaint against the attorney before the General Legal Council and were never separated and was not dealt with the urgency that was required."

[23] The learned judge went on to note at paragraph [14] of the judgment:

> "[14] It is apparent that the [appellant]'s explanation, for his delay in entering an acknowledgement of service, has to do with his own attorney's negligence. They, rather belatedly in the proceedings, admitted that the Claim Form and Particulars of Claim were wrongly placed on their file for the disciplinary proceedings. Due to oversight neither an acknowledgement nor a defence was filed. This evidence also demonstrates that there has been a want of candour. The failure to provide instructions could not account, for the failure to file a defence, given the detailed instructions the [appellant] had already provided to his attorneys with respect to the

> disciplinary proceedings. The question will therefore arise whether the attorney's negligence is a sufficient explanation for delay."

[24] He found that there was a good explanation for the appellant's failure to file an acknowledgement of service as well as a defence within the time stipulated in the CPR.

The grounds of appeal

[25] The appellant has relied on 13 grounds of appeal. For completeness they are reproduced below:

> " a. The Learned Judge erroneously and wrongly embarked upon a mini trial when he identified and dealt with issues and matters that were not relevant or necessary for him to consider in order to properly exercise the discretion conferred upon him pursuant to Part 13 of the Civil Procedure Rules (CPR).
>
> b. In conducting the mini trial, the Learned Judge wrongly made findings of fact concerning issues in dispute that ought properly to be dealt with at trial and in making those findings and coming to those conclusions the Judge wrongly and unfairly deprived the Appellant an opportunity to defend himself from the allegation made against him for negligence and breach of contract.
>
> c. The claim made by [Harvest] is for damages which they assert was caused by the conduct of the Appellant and the 2nd Respondent and the Learned Judge did not or did not adequately address the issue of causation in concluding that the damage and loss was caused by the Appellant's conduct.
>
> d. The Learned Judge in identifying that [Harvest] was making a claim for the [appellant and 2nd respondent] to account for monies paid (see. para. 4 of the Reasons for Judgment) failed in any way to give consideration to the probability or possibility that an accounting may lead to a conclusion that the cause for the foreclosure was not due to the conduct or any act carried out by the Appellant. The need for a proper accounting supports the conclusion that the Appellant has a good defence.

e. The Learned Judge wrongly and unfairly makes [sic] a distinction between the type of Affidavit and draft defence filed by the Appellant's Attorney-at-Law and any other applicant making a similar application. The effect of this finding is to place a different and greater burden on the Appellant when there is no legal basis for that conclusion. The Trial Judge condemns the Appellant for not filing a detailed Affidavit and draft Defence on the basis that the documents '…do not condescend [sic] to the level of detail that one would have expected from an Attorney-at-Law who took his obligation seriously' (see para. 19 of the Reasons for Judgment).

f. The learned trial judge wrongly and unfairly concluded that the dishonoured cheque issued by [Harvest] had or could have no bearing on the issue as to whether it was the conduct of [Harvest] that caused the foreclosure proceedings (see p. 20 of the Reasons for Judgment).

g. In commenting as he did that: 'An attorney at law is part of a noble profession. The practice of law is reliant on certain standards and ethics and rules of conduct. Practice would become impossible if an attorney's word, for example, could not be trusted.'

The learned trial judge demonstrates that he has failed to focus and concentrate on the relevant issues as to whether the applicant [sic] has a good Defence and in general he has complied with the rules set out under Part 13.2 and 13.3 of the CPR.

h. The Learned Judge wrongly made a finding that the Appellant held funds in the capacity of a trustee in respect of monies paid to him by the [1st respondent] for the specific purpose to pay to the vendor pursuant to the terms of an agreement for sale. Such payment the Judge found were to be paid 'to the vendor or to the account provided by the vendor.'

i. The Learned Judge wrongly and erroneously concluded that the Appellant/[appellant] displayed a 'lack of candour' on the basis that the instructions given to prepare a Defence to [the] disciplinary proceedings would have been adequate to defend the claim against the Appellant/2nd

Defendant for breach of contract, unjust enrichment and/or negligence.

j. In dealing with the primary consideration/issue as to whether the Appellant/2nd Defendant has a Defence on the merits with a real prospect of success, the Learned Trial Judge, apart from embarking on a mini-trial, wrongly, erroneously and unfairly relied on Affidavits filed in the pending disciplinary proceedings to arrive at a conclusion that the Appellant/2nd Defendant had no defence to the Claim for breach of contract, unjust enrichment and/or negligence.

k. During the course of the application it was brought to the attention of the Learned Judge that [Harvest] has entered an appearance in the Claim and the Claim will be proceeding to trial. The Learned judge failed to take that fact into account when he declined to allow the application to set aside the default judgment in the interest of justice in keeping with the overriding objectives since there could be no possible prejudice to [Harvest] when a trial on the issue is pending.

l. Having found the Appellant/2nd Defendant's '**Draft Defence'** amounts to a denial of liability as all Defences properly ought to do, the Learned Judge wrongly, unfairly and anecdotally concluded that the Defence was a 'bare denial' when he found that the Appellant/2nd Defendant had a duty to demonstrate in his draft Defence that he 'took his obligation seriously.' By doing so the Judge wrongly and unlawfully and without any legal basis, imposed a greater duty on an Attorney than on the ordinary duty to demonstrate a Defence on the merits with a real prospect of success.

m. The Learned Judge failed to give any consideration as to what impact or effect [Harvest's] s act of issuing a cheque for the deposit that was dishonoured could have had on the issue of the validity of the contract for the sale of the property and he unfairly commented that the Appellant/2nd Defendant could pursue the Claim for the dishonoured cheque 'as a separate cause of action under the Bills of Exchange Act' is dismissive and imbalanced." (Emphasis as set out in the original)

Application to adduce fresh evidence

[26] Prior to the hearing of this appeal, the appellant had filed an application in this court, on 25 October 2019, seeking to adduce as fresh evidence: (i) the 2nd respondent's defence filed on 30 July 2019 and (ii) Harvest's reply and defence to counterclaim filed on 30 August 2019. This evidence was not available to the learned judge at the time of hearing the appellant's application to set aside the default judgment. On 29 January 2020, the application was granted (by a differently constituted court), for the purpose of resolving the issues arising on the appeal.

[27] The 2nd respondent in his defence stated that at the time when the parties entered into the agreement, he and Harvest entered into an oral agreement for the lease of the properties. Where the schedule of payment is concerned, it was averred that Harvest failed to make the payments in the manner and time agreed and as such breached the agreement. The 2nd respondent also stated that Harvest was informed that there was a mortgage on the properties. Whilst it was agreed that certain payments were made by Harvest, a part of those sums were on account of the lease agreement. Consequently, the deposit was not paid as agreed and Harvest, although let into possession, was a "mere lessee".

[28] Importantly, the 2nd respondent admitted that the sum of $3,040,000.00 was paid by Harvest to the appellant and that sum was paid over to him (see paragraphs 22 and 23 of the 2nd respondent's defence). It is to be noted that clause 7 of the agreement stated that the mortgage instalments were to be paid to the vendor. This aspect of the fresh evidence may very well have certain implications in respect of the claim for an account by the appellant, in respect of which, the learned judge said he had no prospect of success.

[29] It was asserted by the 2nd respondent that he "serviced his mortgage account with NCB as best as reasonably possible but that his efforts to do so effectively were persistently frustrated by [Harvest] who failed and/or refused to abide by the terms of their agreement".

[30] The 2nd respondent counterclaimed for the rents due or, in the alternative, mesne profits.

[31] Harvest in its reply and defence to the counterclaim, denied that the parties had entered into a lease agreement. It also denied any knowledge of the NCB mortgage. It was asserted that the deposit of $2,500,000.00 and a further payment of $3,850,000.00 was paid. It was also stated that the vendor's mortgage was serviced at all times and that it was the 2nd respondent's negligence which caused the NCB mortgage to go into arrears and ultimately led to NCB's exercise of its power of sale.

[32] The issues were therefore joined between the parties.

The appeal

[33] The appellant identified the issues arising on appeal to be as follows:

> "1. Whether the Learned Judge misdirected himself when he stated, as a fact, that 'The Payments made by [Harvest] were not used to service the mortgage which remained undischarged'?
>
> 2. Whether the Learned Judge, in coming to his conclusion, embarked upon a mini trial and made findings of fact and law which ought properly to be dealt with at a trial? (Grounds a and b)
>
> 3. Whether the Learned Judge, in coming to his conclusions on the Appellant's Defence, failed to give any or any reasonable consideration to the issue of causation? (Grounds c, f and m)
>
> 4. Whether the Learned Judge wrongly concluded that the Appellant was a trustee of funds paid by [Harvest] to the 2nd Respondent and had a duty to account to [Harvest]? (Grounds d and h)
>
> 5. Whether the Learned Judge in commenting on the Appellant's status as an Attorney acted unfairly in coming to his conclusion? (Grounds e, g, k and l)

6. Whether the Appellant's Defence has a real prospect of success? (Grounds i, l and j)"

[34] These issues were extensively addressed by both counsel and we thank them for their industry. However, during the course of the hearing, the court raised the issue of whether a default judgment could be entered by the registrar where the claim form includes a claim for damages as well as an account. The issue was raised by this court in accordance with rule 1.16(3) of the Court of Appeal Rules (CAR), which states that:

> "(a) …the court is not confined to the grounds set out in the notice of appeal or counter-notice, but
>
> (b) may not make its decision on any ground not set out in the notice of appeal or counter-notice unless the other parties to the appeal have had sufficient opportunity to contest such ground."

[35] Accordingly, the hearing was adjourned for counsel to provide written submissions in respect of that issue on or before 29 January 2021. The appellant's and Harvest's submissions were filed on 2 February and 29 January 2021, respectively. The resolution of this issue, in my view, is integral to the disposal of this appeal and as such will be addressed at this juncture.

Appellant's submissions

[36] It was submitted that the default judgment was irregularly entered as the claim being one for a breach of contract, unjust enrichment and an account, ought to have been dealt with under rule 12.10(4) of the CPR, which requires an application to the court. Reference was made to **Mary Chandler v Patrick Marzouca** [2016] JMSC Civ 3 and **Naetyn Development Company Limited v Kirk Holbrooke** [2017] JMCC Comm 11, in support of this submission.

The 1st respondent's submissions

[37] It was submitted that the default judgment was not irregularly entered as it was for damages to be assessed and did not relate to the claim for an account. That claim, it was submitted, is still pending before the court.

[38] It was also submitted that the claim for an account was properly brought as rule 8.3 of the CPR states that a single claim form may be used to dispose of all claims that can be conveniently disposed of in the same proceedings. Reference was made to rules 12.10(4) and (5) of the CPR which were stated to have been "inserted in the rules in order to ensure that the power to enter a default judgment on a claim which includes a 'blended claim' (which if made on its own ought to have been made by way of a fixed date claim form), is reserved to the court, who must be satisfied by way of affidavit evidence".

[39] Reliance was placed on the case of **Flexnon Limited v Constantine Mitchell and others** [2015] JMCA App 55 ('**Flexnon Limited**'), in which this court did not disturb the decision of Laing J, who had refused to set aside a default judgment in respect of a claim for damages and an accounting for sums due. Counsel stated that in that case an application had been made for a judgment on the entire claim, whereas in the instant case, Harvest had only applied for damages to be assessed.

[40] It was submitted that the claim for an account could only be addressed in accordance with rules 12.10(4) and (5) of the CPR. In the circumstances, the default judgment for damages to be assessed is not irregular and ought to be allowed to stand.

Analysis

[41] This appeal arises from the exercise of the discretion of the learned judge. In order for the appellant to succeed, he will need to demonstrate that the learned judge in the exercise of his discretion erred on a point of law, his interpretation of the facts or made a decision that no judge "regardful of his duty to act judicially could have reached" (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 ('**Mackay'**), in which Morrison JA (as he then was) summarized the principles in **Hadmor Productions v Hamilton** [1982] 1 All ER 1042 at 1046). Morrison JA at paragraph [20] in **Mackay** stated:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the

> ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision "is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[42] As stated previously, the claim against the appellant is for damages for breach of contract, unjust enrichment, negligence and an accounting of all monies paid to him pursuant to the agreement. There is no dispute that the claims brought against the appellant, with the exception of that for an accounting, are to be brought by way of a claim form. Part 41 of the CPR deals with claims for an account or "other relief which requires the taking of an account". Rule 41.1(2) states that such claims are to be made using a fixed date claim form.

[43] However, rule 8.3 of the CPR permits the use of a single claim form to make two or more claims. It states:

> "A claimant may use a single claim form to include all, or any, other claims which can be conveniently disposed of in the same proceedings."

[44] Adherence to the above rule would be in keeping with the furtherance of the overriding objective to deal with cases justly as it would save both time and expense.

[45] In this matter, it has been alleged that the appellant misappropriated monies paid to him as stakeholder on account of the purchase price for the properties and also failed to use the monies paid to him in a manner that would protect Harvest's interests. As stated in paragraph [11] above, it is alleged that the sum of $3,040,000.00 was paid to the appellant. The appellant at paragraph 17 of his proposed defence denied receiving that sum from Harvest. This is in contrast with paragraph 23 of the 2nd respondent's defence (in which it is averred that this sum was paid over to him by the appellant). This is, therefore, a triable issue.

[46] Part 12 of the CPR deals with the entry of default judgments. The entry of a default judgment, as was stated by P Williams JA (Ag) (as she then was) in **Frank I Lee Distributors Ltd v Mullings & Company (A Firm)**, [2016] JMCA Civ 9 at paragraph [37], is an administrative procedure. The learned judge of appeal stated:

> "[37] The entering of the default judgment is regarded as a purely administrative procedure. The attitude of the courts has always been not to easily deprive a party of the right to having their matter heard and thus the need for the court to have the power to set aside judgments entered without a full consideration of the merits of the claim."

[47] Rules 12.10(1) and (2) deal with the entry of default judgments on "a claim for a specified sum of money" and "a claim for an unspecified sum of money", respectively. In the former case, the judgment shall be for the sum claimed or, where a part has been paid, the amount certified as being owed. In the latter case, the judgment shall be for "the payment of an amount to be decided by the court".

[48] Rules 12.10(4) and (5) of the CPR deal with claims for "some other remedy". They state as follows:

> "(4) **Default judgment where the claim is for some other remedy shall be in such form as the court** considers the claimant to be entitled to on the particulars of claim.
>
> (5) **An application for the court to determine the terms of the judgment** under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 (service of application where order made on application made without notice) does not apply." (Emphasis added)

It is noted that the emphasised portions of the above rules refer to the "court" whereas rules 12.4 and 12.5 refer to the entry of a default judgment by the "registry". It is clear that the entry of a default judgment, pursuant to rules 12.10(4) and (5) of the CPR, is subject to judicial determination.

[49] Those rules are somewhat similar to rule 12.4(2) of Civil Procedure, 2002, volume 1 (UK) ('the White Book'), in that they require the making of an application to the court where a claim is brought for some "other remedy" solely or in addition to one for either a liquidated or unliquidated sum. Rule 12.4(2) states:

> "(2) The claimant must make an application in accordance with Part 23 if he wishes to obtain a default judgment –
>
> (a) On a claim which consists of or includes a claim for any other remedy; or
>
> (b) …."

[50] Part 23 of the White Book deals with applications for court orders. A claimant does, however, have the option of proceeding without making an application if he abandons the claim for the other remedy. This is dealt with in rule 12.4(3) of the White Book, which states:

> "(3) Where a claimant –
>
> (a) claims any other remedy in his claim form in addition to those specified in paragraph (1); but
>
> (b) abandons that claim in his request for judgment, he may still obtain a default judgment by filing a request under paragraph (1)."

The explanatory notes at page 284 of the White Book state:

> "**Scope of r. 12.4(3)**
>
> **12.4.6** Rule 12.4 distinguishes between those cases where a default judgment is obtained by filing a request and those where an application is required. If the case does not fall within r. 12.4(1) then an application in accordance with Part 23 is

required in order to obtain a default judgment under r. 12.4(2)…

Scope of r. 12.4(3)

12.4.7 Only claims within r. 12.4(1) are susceptible to default judgment by request. If an additional remedy is claimed, the claimant can obtain default judgment if that remedy is abandoned in the request for default judgment. It has long been the practice to allow this."

[51] Harvest has argued that since the default judgment is for damages to be assessed, the claim for an account is still live and subject to adjudication. Respectfully, counsel appears to have put the cart before the horse. The determination of whether the proper procedure has been used to obtain a default judgment is dependent on the nature of the claim. The fact that the claim for an account was not included in the request for judgment is not the determining factor. The claim for an account, in my view, falls within the category of "other [remedies]" and is therefore subject to rules 12.10(4) and (5) of the CPR (see **Chandler v Marzouca** at paragraph [22]). In any event, the learned judge treated with the issue of the appellant giving an account in considering the application to set aside the default judgment. He apparently did not treat that aspect of the claim as pending.

[52] The case of **Flexnon Limited** is of no assistance to the 1st respondent. In that case, the respondent sought damages and also an account in respect of sums due to it from the appellant. A default judgment was entered by George J for damages to be assessed and for an account. The appellant sought to set aside that judgment but its application was refused by Laing J. The appellant appealed against the order of Laing J and by way of new grounds, argued that the judgment of George J was irregular. The court refused to accept those submissions as they were not part of the grounds that were raised in the application before Laing J. There was therefore no determination in that case of the issue of whether a default judgment could be entered in respect of a claim for damages as well as an account. In any event, the judgment was not entered by way

of an administrative action as the application for default judgment was considered and granted by George J.

[53] In light of the provisions of rules 12.10(4) and (5) of the CPR, Harvest would have been required to make an application under Part 11 of the CPR for a judgment in default of acknowledgement of service to be entered by the court in respect of the entire claim. Although there is no equivalent rule in the CPR to rule 12.4(3)(b) of the White Book, logically, a request for judgment under rule 12.4 of the CPR could not be granted unless the claim for "other relief", in this case for an account, was abandoned. (In accordance with rule 13.7 of the CPR such claims are restored if the judgment is set aside). In the circumstances, the registrar had no jurisdiction to enter the default judgment, and as such, it was a nullity.

[54] Although the appeal could be determined on the basis stated above, I, nevertheless, had regard to the grounds of appeal argued by the appellant. I form the view that the appeal should be allowed on the basis of grounds a and b (see paragraph [25] above) and so there was no need to proceed to consider the remaining grounds. Grounds a and b challenge the approach taken by Batts J in the exercise of his discretion. In a nutshell, the appellant has asserted that the learned judge fell into error when he made certain findings of fact in his determination of whether the appellant's defence had a real prospect of success. Those grounds assert that he embarked upon a mini trial and in so doing, deprived the appellant of the opportunity to defend himself. Counsel for the appellant submitted that there were many issues which ought properly to be resolved at a trial. He is correct.

[55] Whilst the court in its consideration of whether a default judgment ought to be set aside is required to conduct an evaluation of the material before it, care must be exercised so as not to embark on a "mini trial" (see **Russell Holdings Limited v L & W Enterprises Inc and another** [2016] JMCA Civ 39 ('**Russell Holdings**,') **ED&F Man Liquid Products Ltd v Patel & Anor** [2003] CPLR 384 and **Swain v Hillman and another** [2001] 1 All ER 91 ('**Swain**')).

[56] The above principle was underscored in **Swain** by Lord Woolf MR who at page 95 stated:

> "Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions…."

The court in **Swain** was considering an application for summary judgment. However, it is settled that the test of whether a defence has a real prospect of success where an application is made to set aside a judgment is the same as that which is to be applied in the consideration of an application for summary judgment (see **Russell Holdings** at paragraph [86] and **International Finance v Utexafrica sprl** [2001] All ER (D) 101).

[57] In his consideration of the application, Batts J made several findings of fact and arrived at conclusions that were determinative of the claim in its entirety. He erred in that regard. This court, on the authority of **Russell Holdings**, would be entitled to consider the material, which was available to him as well as the fresh evidence adduced on the appeal. That material clearly reveals that there are issues, which ought to be determined by a trial court. It cannot be said that the appellant does not have a realistic or reasonable prospect of success.

[58] In my view, the appellant was entitled to an order setting aside the default judgment for all the reasons which I have sought to explain. Therefore, Batts J erred when he refused the appellant's application for the default judgment to be set aside and for an extension of time to file his defence.

[59] Where the issue of costs in the court below is concerned, I am of the view that the award of costs to Harvest should stand. This is so, because although the judgment is a nullity, the appellant would have had to make an application for an extension of time in which to file and serve his defence, in any event. The appellant received the claim form

and particulars of claim "sometime in 2018". His amended acknowledgment of service was filed on 12 February 2019 and the application to set aside the default judgment and for extension of time in which to file a defence on 10 April 2019. Therefore, although I am of the view that the default judgment ought to be set aside and the appellant given time to file and serve his defence, Harvest would not have incurred the costs associated with the said application but for the appellant's failure to comply with 9.3(1) of the CPR (the time within which an acknowledgment of service is to be filed). In the circumstances, Harvest is entitled to the costs of the application in the court below.

[60] The appellant, being the successful party on the appeal would be entitled to the costs of the appeal in keeping with the general rule that costs follows the event (see rule 64.6(1) of the CPR).

[61] I would therefore allow the appeal and make the following consequential orders: The order of Batts J made on 26 July 2019 refusing the application to set aside the default judgment entered on 7 May 2018 is set aside; the default judgment entered on 7 May 2018 is set aside; the appellant's amended acknowledgment of service filed on 12 February 2019 is allowed to stand; the appellant is permitted to file and serve his defence and counterclaim within 14 days of this order; and costs to Harvest in the proceedings below. I would also order costs of the appeal to the appellant, to be taxed, if not agreed.

V HARRIS JA

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

McDONALD-BISHOP JA

ORDER

1. The appeal is allowed.

2. The order made by Batts J on 26 July 2019 refusing the appellant's application to set aside the default judgment entered on 7 May 2018, is set aside.

3. The order awarding costs to Harvest in the court below is affirmed.

4. The appellant's amended acknowledgment of service filed on 12 February 2019 is allowed to stand.

5. The default judgment entered on 7 May 2018 in claim no 2018CD00144 is set aside.

6. The appellant is permitted to file and serve his defence and counterclaim within 14 days of the date of this order.

7. Costs of the appeal to the appellant to be agreed or taxed.