[2025] JMCA App 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE D FRASER JA

APPLICATION NO COA2022APP00224

BETWEEN	**WINSTON ANTHONY CHARLES**	**APPLICANT**
AND	**DOREEN ELIZABETH DIETRICH**	**1st RESPONDENT**
AND	**CLINTON RAUL DIETRICH**	**2nd RESPONDENT**

Mr Winston Anthony Charles in person

Miss Stephanie Stone instructed by JNW Taylor & Associates for the respondents

20, 23 March 2023 and 5 December 2025

Civil practice and procedure – Default judgment – Judgment regularly obtained – Judgment entered in default of defence on counterclaim – Judgment set aside on 2nd application – Whether learned judge wrongly exercised discretion to set aside judgment – Whether party in default entitled to make 2nd application to set aside – Rules 8, 12, 13.3 and Part 18 of the Civil Procedure Rules, 2002

Civil practice and procedure – Application for extension of time – Application for leave to appeal – Rules 1.7(2)(b) and 1.8(7) of the Court of Appeal Rules

F WILLIAMS JA

[1] I have read, in draft, the reasons for judgment of Edwards JA, and they accord with my own reasons for concurring with the order made by this court as reflected in paras. [3] and [4] herein.

EDWARDS JA

Introduction

[2] This matter came to us as an amended notice of application for permission to appeal and for an extension of time within which to appeal, filed on 2 November 2022. Winston Anthony Charles ('the applicant') sought the following orders:

> "1. An Order that the [applicant] be granted leave to Appeal the Order of Honourable Justice (Ms.) T. Hutchinson, dated January 24, 2020.
>
> 2. An order that this Honourable Courts [sic] grants an extension of time to the [applicant] to file his Appeal against the 1st and 2nd [respondents].
>
> 3. That the costs of this Application be costs in the Claim.
>
> 4. The Court grants any further or other orders that it deems fit to make in the circumstances…"

[3] On 20 March 2023, we heard the applications and made the following orders:

> "1. The applicant's applications for permission to appeal against the orders of Hutchinson J dated 24 January 2020, and for an extension of time to file the said appeal are refused.
>
> 2. The issue of costs is reserved."

[4] On 23 March 2023, after hearing submissions on costs, the court made the following costs order:

> "Costs of the application to the respondents in the sum of $100,000.00."

[5] At the time, we promised to give brief reasons for the orders given on the applications, and with apologies for the delay, we do so now.

Background

[6] The orders of Hutchinson J (Ag) (as she then was) ('the learned judge'), that the applicant sought to appeal, are as follows:

> "(1) The [default judgment] entered on the 29th of September 2014 is set aside pursuant to rule 13.3(1).
>
> (2) The [applicant] is granted leave to file and serve a defence within 14 days of this order.
>
> (3) The date for assessment of damages is accordingly vacated.
>
> (4) No order made as to cost.
>
> (5) Applicant's attorney to prepare, file and serve order herein."

[7] The history of this matter, which culminated in the making of these orders, dates back as far as 2011. We managed to piece together a chronology of the matter from the various affidavits and documents filed before us in these proceedings.

[8] The applicant was once the registered owner of a house situated in the Long Mountain Country Club, which is a gated community in Saint Andrew, manned by paid security personnel. The applicant had acquired this home with the assistance of a mortgage from Victoria Mutual Building Society ('VMBS'). The applicant defaulted on his mortgage agreement in 2009, and, sometime in 2010, VMBS sought to exercise its power of sale contained in the mortgage agreement. To that end, the property was sold to Doreen and Clinton Dietrich ('the respondents'), who became its registered owners on 5 September 2011. The respondents were given letters of possession on 7 October 2011, but not vacant possession, as the applicant remained in the premises. Despite several notices to the applicant to vacate the property, he refused to do so, even though he had, by letter dated 26 October 2011, from his then attorney-at-law, agreed to vacate the premises within three months. In the meantime, the applicant, who was

displeased with the circumstances under which VMBS had exercised its power of sale, filed a claim in the Supreme Court of Judicature of Jamaica against the entity.

[9] After several unsuccessful attempts to have the applicant vacate the property, the respondents gained physical possession of the property with the assistance of a bailiff and evicted the applicant. However, the applicant regained possession by removing the new locks the respondents had placed on the doors and re-entering the premises on 13 March 2012.

[10] The respondents took the matter to the Supreme Court on 15 March 2012, filing a fixed date claim form (claim no 2012HCV01500) against the management of Long Mountain Country Club Ltd and Milex Security Services Ltd (the firm in charge of security at the Long Mountain Country Club at the relevant time), for declarations of ownership and the right to exercise all rights of ownership of the Long Mountain Country Club property. On the said 15 March 2012, the respondents filed a notice of application for court orders with supporting affidavit, seeking an injunction against the same defendants, to restrain them from permitting the applicant to enter or remain in the property. That application was amended on 16 March 2012.

[11] The respondents also filed, on 16 March 2012, a claim form and particulars of claim against the former defendants, as well as the applicant, for compensation for loss of use of land and injunctions.

[12] Brown J (as he then was) heard the application for injunction *ex parte* and, on 19 March 2012, made orders granting interim injunctions barring the applicant from entering or remaining in the property, and restraining Long Mountain Country Club Ltd and Milex Security Services Ltd from permitting the applicant to enter or remain on the property. He also set the matter for *inter partes* hearing on 4 April 2012 and ordered that the fixed date claim form be treated as if it had begun by claim form. On the strength of those interim orders, the applicant had been barred by the defendants from

entering the premises, and his belongings were removed and placed in a commercial storage facility, at the respondents' expense.

[13] On 22 March 2012, the applicant filed a notice of application for court orders in claim 2012HCV01500, with supporting affidavit and an affidavit of urgency, to set aside the interim injunctions granted by Brown J, having been barred from entering the property on 20 March 2012. The applicant's application to discharge the *ex parte* injunctions came before George J on 23 March 2012, at which time she discharged them and ordered that the applicant's property that had been removed from the home be returned pending final determination of the matter. George J adjourned the matter for *inter partes* hearing on 4 April 2012.

[14] On 28 March 2012, the respondents filed a notice of application for court orders against Long Mountain Country Club Ltd and Milex Security Services Ltd for, *inter alia*, a declaration that the applicant was estopped from claiming an interest in the property, as well as for recovery of possession and mesne profits.

[15] On 4 April 2012, the *inter partes* hearing for the injunctions came before Anderson J, who adjourned the matter to 11 April 2012. The matter filed on 28 March 2012, which was also before him, was adjourned to that date as well.

[16] On 10 April 2012, a notice of application for court orders was again filed by the respondents for injunctions against the applicant, Long Mountain Country Club Ltd and Milex Security Services Ltd. A claim form was also filed by the respondents on 16 April 2012, for trespass, damages and injunctions.

[17] On 11 April 2012, Campbell J made orders for interim injunctions against the applicant and his co-defendants. When the *inter partes* hearing of the respondents' application for injunctions, as well as their notice of application for summary judgment, came before the court, on 25 July 2012, the interim injunctions granted by Campbell J, which were further extended by D Fraser J (as he then was) on 21 May 2012, were again extended to 19 February 2013. There was also an order that the applicant was

to collect his belongings from storage by 31 August 2012. The applicant failed to comply.

[18] The application for summary judgment made by the respondents and the *inter partes* hearing of their application for injunctions came before King J, on 11 October 2013, in claim 2012HCV01500. King J adjourned the application for summary judgment to 27 March 2014. However, he discharged the interim injunctions granted by Campbell J.

[19] In September of 2013, the applicant filed a defence and counterclaim to the respondent's claim, which was served on counsel for the respondents on 25 September 2013 (that defence and counterclaim was not amongst the papers filed in this court). However, the respondents discontinued their claim against the applicant and the other co-defendants, without filing a defence to the applicant's counterclaim. Notice of discontinuance in claim 2012HCV01500, dated 30 September 2013, was filed on 2 October 2013.

[20] The result of the respondents' failure to file a defence to the applicant's counterclaim was that, on 29 September 2014, Sykes J (as he then was) entered judgment in default of defence on the applicant's counterclaim and set the matter for hearing to assess damages. On 11 December 2014, the respondents filed a notice of application to set aside the default judgment, which was supported by an affidavit of the 1st respondent.

[21] The application was heard in February and March of 2018 by Wiltshire J (Ag) (as she then was) who, on 12 March 2018, refused the application, with costs to the applicant. Leave to appeal was refused.

[22] On 16 April 2018, the respondents filed a notice of application for court orders, which was amended on 28 June 2018, renewing their application to set aside the default judgment, for a stay of any process arising from the default judgment, and for leave to file a defence to the counterclaim. That was the application heard by the learned judge,

on 13 January 2020, and on which she delivered the decision on 24 January 2020, that is the subject of this application.

The learned judge's reasons for granting the orders on the application

[23] The learned judge gave an oral decision to the amended application, which she subsequently reduced to writing.

[24] The learned judge firstly determined whether the respondents had satisfied the legal requirements for permission to be granted for a second application to be made. She considered and accepted the principles from the relevant cases that a second application can be made to set aside a default judgment, provided the information being relied on is new and relevant to the issues before the court. In that regard, she considered the cases of **Rohan Smith v Elroy Hector Pessoa and Anor** [2014] JMCA App 25, **June Chung v Shanique Cunningham** [2017] JMCA Civ 22, and **Gordon and Anor v Vickers and Anor** (1990) 27 JLR 60 (CA) to be of useful guidance.

[25] The learned judge considered the proceedings leading up to the entry of the default judgment and rejected the notion that the issues raised before her had been raised before Sykes J when he made the order for default judgment to be entered. The learned judge indicated her careful review of the previous application to set aside the default judgment and the affidavits in support of it. She accepted that there were some similarities between the information contained in those documents and the ones before her. The learned judge, however, identified marked differences in the areas of expansion contained in the affidavits of Mikhail Williams, filed 9 May 2019, in support of the second application, as well as in the draft defence.

[26] Of note, the learned judge considered the respondents' current assertion that the counterclaim had no discernible cause of action, and having examined the counterclaim, she found that it contained bare assertions that the applicant's property had been removed from the house by the unlawful actions of the respondents' agent, resulting in the loss of $55,000,000.00. The learned judge found that the cause of action

in the counterclaim had only been made clear in the applicant's affidavit, filed 13 February 2018 (also not in the documents before this court), in which he asserted that the items removed by the respondents had been damaged, went missing, or were sold by the respondents' agents. The learned judge found that the defences put forward by the respondents in the new application to those new assertions raised by the applicant, called into question liability and whether the appellant had acted to his own detriment. She found these issues on the renewed application to be new and relevant, and emphasised that the law only required that the "new" material be such as had not been placed before the previous court.

[27] The learned judge considered the affidavits of Mr Williams, filed 13 February 2019 (not in the bundle of documents filed in this court) and 9 May 2019, and whether there was an affidavit of merit before the court, taking into account the cases of **Sheneka Kennedy v New World Realtors Limited** [2017] JMSC Civ 175, **Camelia McBean v The Attorney General for Jamaica** [2019] JMSC Civ 243 and **Ramkissoon v Olds Discount Co (TCC) Ltd** (1961) 4 WIR 73. She distinguished the case of **Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited** [2012] JMSC Civ 81 and found Mr Williams' affidavit compliant with rules 30.3(2)(b)(i) and (ii) of the Civil Procedure Rules ('CPR'), which permit hearsay evidence in an affidavit once certain requirements have been met. She, therefore, found that there was an affidavit of merit.

[28] The learned judge then considered the principles pertinent to setting aside a default judgment regularly obtained as set out in the cases of **Swain v Hillman and another** [2001] 1 All ER 91, **Blossom Edwards v Rhonda Bedward** [2015] JMSC Civ 74, and **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy** (unreported), Supreme Court, Jamaica, Claim No 2008HCV05707, judgment delivered 4 April 2011. She considered that the determining factor was whether the respondents had a real prospect of success in defending the counterclaim. In that regard, she found that the applicant was raising in his affidavit filed 13 February 2018, issues that had not

been raised previously, neither in his defence to the original claim by the respondents nor in his counterclaim. It was only from this affidavit, that the respondents had been able to discern possible causes of action on the counterclaim as being in negligence, detinue, and conversion. The defences raised in response to those possible causes of action, the learned judge found, had a real prospect of success.

[29] The learned judge considered the principles set out in the cases on detinue in this jurisdiction, including **Carol Campbell v The Transport Authority of Jamaica** [2016] JMSC Civ 148, **Amy Bogle v The Transport Authority; Amy Bogle v Lloyd Bowen and Ors** [2015] JMSC Civ 258 and **Gary Baldwin v Dave Quest** [2017] JMSC Civ 133. She found guidance in **Amy Bogle v The Transport Authority** which relied on **George and Branday Ltd v Lee** (1964) 7 WIR 275.

[30] The learned judge also considered the requirements in law to prove conversion, again relying on **Amy Bogle v The Transport Authority**. She found that the applicant had made no demand for the items detained, nor was there any evidence of the respondents' refusal to hand them over, as required for detinue. The learned judge noted that it was on the respondents' application that the applicant had been ordered to collect his items from storage, and that this conduct was not consistent with the requisite intention for conversion. On the facts, therefore, she found that the respondents had a real prospect of successfully defending the claims of detinue and conversion.

[31] Further, she found that no particulars of negligence had been pleaded in the counterclaim in relation to that cause of action and that, in such a case, the respondents could properly rely on rule 8.9A of the CPR as a defence with a real prospect of success.

[32] In the case of the defence of abandonment, the learned judge found, on a balance of probabilities, that this too had a real prospect of success. In doing so, the learned judge took account of the affidavit evidence of Ms Wilson for the respondents in which she averred that keys to the storage locker had been handed over to the

applicant's partner and his daughter, and the applicant's partner had changed the locks. Thereafter, it was asserted, the attorneys for the respondents retained no keys to the locker and had no access to its contents.

[33] Finally, the learned judge went on to consider whether the application had been made promptly. In doing so, she identified 13 March 2018 (the initial date of the refusal to set aside the default judgment), 16 April 2018 (the renewed date of the application), and 28 June 2018 (the date of the amended application), as the important dates for consideration. She considered that there had been numerous adjournments in the matter, but noted that after the ruling on 13 March 2018, most of those adjournments had been due to the applicant changing his attorneys.

[34] In considering the time between the initial ruling and the renewed application the learned judge considered the authorities of **Standard Bank plc and another v Agrinvest International Inc and others** [2010] EWCA Civ 1400 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1. She found that the periods of 33 days between the initial refusal and the renewed application, and three months and 15 days (105 days) between the initial refusal and the amended application were not inordinately long. She also found that, taking into consideration the overriding objective, and the fact that there was a reasonable prospect of success, the application ought not to fail because of this delay.

[35] The learned judge did not consider the delay between the entry of the default judgment and the filing of the first application to set aside the default judgment. No permission to appeal the refusal of the first application was sought in the court below.

The appeal

[36] On 7 February 2020, the applicant's then attorney filed a notice of appeal with grounds of appeal without the requisite permission and, not surprisingly, the respondents filed an application dated 12 March 2020, to strike out that notice of

appeal. That notice of appeal was subsequently withdrawn by the applicant's then attorney.

[37] On 4 May 2021, the applicant filed, in the court below, notice of application for court orders for leave to appeal and an extension of time within which to seek permission to file an appeal against the orders of the learned judge. That application was refused on 13 October 2022.

[38] On 27 October 2022, the applicant filed notice of appeal and four draft grounds of appeal in this court, challenging the orders of the learned judge. On 2 November 2022, an amended application for leave to appeal was filed with two draft amended grounds, as follows:

> "1. The Learned Judge erred when she set aside the Default Judgment of the Counter-Claimant/Applicant, and granted the 1st and 2nd Counter-Defendant/Respondent [sic] fourteen (14) days within which to file their Defence.
>
> 2. There were manifest irregularities as it relates to this Claim that it is in the interest of Justice for the Court of Appeal to make a pronouncement on these irregularities."

The applicant also sought an extension of time within which to file his appeal.

The role of this court in an application of this nature

[39] This court will only set aside the exercise of the discretion of a judge in the court below in limited cases. These include where the discretion was exercised based on a misunderstanding of the law or evidence, on an inference that certain facts did or did not exist, or where the decision was one that was so aberrant no judge regardful of his duty could have reached it. The function of this court in such cases is initially one of review, and the court ought not to interfere with the discretion of a judge only because it would not have exercised its discretion in the same way. It is only where this court is of the view that the judge's discretion was wrongly exercised and must be set aside will it be entitled to exercise its own discretion (see **The Attorney General of Jamaica v**

John Mackay and **Hadmor Productions Ltd and others v Hamilton and others** ('**Hadmor**') [1982] 1 All ER 1042 at page 1046).

[40] In that regard, in **Hadmor**, Lord Diplock stated the following at page 1046:

> "On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

These principles have been consistently relied on by this court and will be applied in this case.

Discussion

Ground 1 - The Learned Judge erred when she set aside the Default Judgment of the Counter-Claimant/Applicant, and granted the 1st and 2nd Counter-Defendant/Respondent [sic] fourteen (14) days within which to file their Defence

A. *Applicant's submissions*

[41] The essence of the applicant's complaint was that the learned judge fell into error when she set aside the default judgment and gave the respondents time in which to file a defence to his counterclaim. The first limb of his complaint was that a previous application having been made and refused by another judge of concurrent jurisdiction, the learned judge was unlawfully acting as an appellate court in overruling that decision. The applicant contended that the renewed application to set aside the default judgment was an abuse of the process of the court, as the application was similar to the first one that was heard and refused by Wiltshire J (Ag), and the respondents ought to have appealed that decision if they were dissatisfied with it. The applicant relied on the cases of **Gordon and Anor v Vickers and Anor** and **Christopher Ogunsalu v Keith Gardner** [2022] JMCA Civ 12. He also relied on rule 13.3 of the CPR.

[42] The second limb of the applicant's complaint had to do with how the learned judge dealt with the issue of delay. The applicant submitted that the learned judge was wrong to find that the respondents had brought their application in time, since the first application was refused by Wiltshire J (Ag) on 13 March 2018, and the renewed application was not filed until 16 April 2018. The applicant contended that the respondents' failure to file a defence in time was an indication that they had had no intention to defend the counterclaim.

[43] The applicant argued that Wiltshire J (Ag) had refused the first application for two main reasons, which, he said, the learned judge failed to consider. The first, he said, was the inordinate delay by the respondents in filing their defence, they having waited 15 months after the counterclaim had been filed. The second, he said, was their delay in filing the application to set aside the default judgment which was done three

months after the default judgment had been obtained. He bemoaned the fact that the learned judge "did not even mention" the issue of those delays in her oral judgment, and that she fell into error when she found that the renewed application to set aside the default judgment, which was before her, was also not tardy. He argued that a second application filed timeously could not cure the initial delay.

[44] Furthermore, it was submitted that, in dealing with the first application, Wiltshire J (Ag) had also considered that the respondents had chosen to file a notice of discontinuance to end their claim instead of filing a defence to the counterclaim. The applicant contended that these actions by the respondents was an indication that they had had no intention to defend the counterclaim.

B. *Respondents' submissions*

[45] Ms Stone, on behalf of the respondents, submitted that the applicant's application should be refused because it had no real prospect of success, there was undue delay in filing the application, and that the application for permission to appeal and for an extension of time made in the court below had been refused. She argued that the refusal of permission in the court below was proper as the applicant had no real prospect of success with the appeal. Counsel relied on **Garbage Disposal & Sanitations Systems Limited v Noel Green and Others** [2017] JMCA App 2 for the proposition that since there was no prospect of success in the appeal, an extension of time should not be granted.

[46] Counsel relied on the cases of **Rohan Smith v Elroy Pessoa, June Chung v Shanique Cunningham** and **Gordon and Anor v Vickers and Anor**, which she said clarified the position on subsequent applications to set aside a default judgment. She submitted that a subsequent application in the court below was allowed on the basis that the latter application raised new material which was not previously before the court. Counsel argued that this hurdle was assessed by the learned judge who examined the evidence contained in the affidavits of Mikhail Williams in support of the application and

determined that the respondents had crossed that hurdle since they had raised new and relevant information that furnished grounds for her to revisit the application.

[47] Counsel also argued that the applicant did not put forward any reason why he was contending that the learned judge had erred in the exercise of her discretion and none is set out in the affidavits filed by the applicant. Counsel argued that the applicant only relied on the fact that the learned judge ruled on a subsequent application, which counsel submitted, she was lawfully allowed to do.

[48] Overall, it was submitted that the learned judge properly considered all the relevant issues, facts, and applicable law in dealing with the application to set aside the default judgment, and that the applicant acted with undue and inordinate delay in filing his application for leave to appeal, given that the application for leave filed in the court below was not filed until one year, three months and 10 days after the date of the order.

C. *Reply*

[49] The applicant contended that he was unable to respond to the cases cited by counsel as he had not been served with them but maintained his stance that the learned judge erred because in any application to set aside, the court must consider delay and the reason for delay. The court offered the applicant time and the opportunity to examine the cases relied on by the respondents, but the applicant declined the offer. The court nevertheless explained the principles expounded in the cases on which counsel for the respondents relied. These were principles which, as the court pointed out to him, were well known and often cited in these courts.

D. *Analysis and disposal of ground 1*

(1) Was the learned judge correct to find that a second application could be made?

[50] The applicant complained strenuously about the learned judge's right to hear the second application to set aside the default judgment.

[51] Rule 1.8(7) of the Court of Appeal Rules ('CAR') provides that, generally, leave to appeal will only be granted where the appeal will have a real chance of success. Although the applicant did not set this out as a ground of appeal, he did, in his submissions on ground 1 make copious complaints in this regard. He challenged the correctness of the orders of the learned judge who he said, erroneously acted as a court of appeal against the orders of Wiltshire J (Ag) who was a judge of concurrent jurisdiction. He also implied that he had a real prospect of success in the appeal in this regard.

[52] This issue was settled by this court in **Rohan Smith v Elroy Pessoa**. In that case, the court considered three main issues as follows:

a) Whether a defendant against whom a default judgment had been entered may make repeated applications to set aside that default judgment subsequent to a dismissal of the first application;

b) if so, whether the material to be relied on in the subsequent application had to be fresh in the sense that the material must be such that it could not have been obtained with reasonable diligence at the time of the first application; and

c) whether the factors in rule 13.3(2) apply equally to a second application to set aside as they did to the first application.

[53] This court considered that the question as to whether a second application was permissible had been settled since the judgment in the case of **Gordon and Anor v Vickers and Anor**. In the case of **Vickers**, the only rider to that discretionary power was that the court would not be powerless to stop an abuse of its process and a defendant would not be allowed to make repeated applications to set aside the default judgment, without adducing new relevant facts. This court found that

> "repeated applications to set aside a default judgment will be entertained by the court regardless of whether the first application was heard on its merits. Further, the applications need not be confined to evidence that could not have been obtained with reasonable diligence at the time when the first application was being made; what is required is that the evidence is new in that it is based on material that was not placed before the court at the hearing of the previous application." (see para. [34])

[54] The court relied on the judgment of Harrison P (Ag) (as he then was) in **Trevor McMillan & Others v Richard Khouri** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 111/2002, judgment delivered 29 July 2003, where he said, at pages 7 and 8:

> "A second and subsequent application may be made to the same or another judge of the Supreme Court to set aside such a judgment as long as the applicant can put forward new relevant material for consideration (***Gordon et al v. Vickers et al*** (1990) 27 J.L.R 60). Facts may be regarded as new material, although through inadvertence or lack of knowledge such facts were not placed before the court on the first occasion provided they are relevant (See also ***Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies et al*** [1971] 1 W.L.R. 550 [sic])."

[55] **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd and Another** [1991] 1 WLR 550 is a judgment of the Privy Council in which it was held that a judge had the jurisdiction to set aside a stay ordered by another judge of concurrent jurisdiction, based on new material before him.

[56] The court in **Rohan Smith v Elroy Pessoa** also found that that rule 13.3(2) is equally applicable to the second application. These were factors to be considered and by themselves were not determinative of the issue.

[57] The learned judge ably considered the authorities and properly applied them to the case before her. She found as a matter of fact that there was new material before her on which the respondents could properly rely, which had not been before the judge

who granted the default judgment nor the judge who refused to set it aside in the first application. We saw no reason to disagree with her assessment of the matter and found no basis upon which to disturb the exercise of her discretion in that regard.

(2) Did the learned judge err with regard to the issue of delay?

(a) *The rules*

[58] Part 18 of the CPR deals with ancillary claims, including counterclaims. A counterclaim is to be treated as if it were a claim for the purposes of the rules, unless otherwise provided. Where the ancillary claim is a counterclaim by a defendant against a claimant, the claimant is not required to file an acknowledgment of service (see rule 18.2 (6)). A counterclaim must be filed with the defence to the original claim otherwise permission is required, pursuant to rule 18.5(1). The procedure is provided for in rule 18.5(4). The applicant's counterclaim appears to have been filed with his defence, albeit late. This was not a point taken by the respondents in the court below.

[59] Rule 18.7 of the CPR provides for a defendant to continue his counterclaim even if the claim is stayed, discontinued or dismissed. Therefore, when the respondents discontinued their claim, the applicant was entitled to continue his counterclaim. The respondents, having failed to file a defence to the counterclaim within time, became liable to having a default judgment entered against them.

[60] Rule 18.2 (5)(b) provides that rule 12 dealing with default judgments applies to counterclaims.

[61] In this case, rule 12.5(c) would apply. That rule provides, as far as is relevant, that:

> "The registry must enter judgment at the request of the claimant against a defendant for failure to defend if:
>
> …
>
> (c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired."

[62] A default judgment can be set aside under rule 13. Rule 13.3(1) (the applicable rule for setting aside default judgments regularly obtained) provides that the court may set aside or vary a default judgment if a defendant has a real prospect of successfully defending the claim. Rule 13.3(2) further provides as follows:

> "In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
>
> (a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.
>
> (b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be."

[63] Rule 13.5 requires that, as a general rule, the condition that the defendant files and serves a defence by a specified time must be imposed as part of the order to set aside the default judgment.

(b) *The case law*

[64] In an application to set aside a default judgment under rule 13.3, the cases demonstrate that the primary considerations are whether there is a defence with a real (not a fanciful) prospect of success, and that justice should be done (see **Thorn PLC v MacDonald and another** (1999) CPLR 660, which applied **Finnegan v Parkside Health Authority** [1998] 1 All ER 595). Whilst failure to provide a good explanation for delay is a factor to be considered, it is not always a reason to refuse to set aside a judgment. Any possible prejudice to the claimant is also a factor. In **Dipcon Engineering Services Ltd v Bowen and Another** [2004] UKPC18, the Privy Council explained that even though the merits of the defence are not only important but are often of decisive importance, any explanation regarding the reasons for the failure to file a defence, as well as the delay and any explanation for the delay were also material. The Privy Council cited with approval the principles and rationale for setting aside a regularly obtained default judgment established by Lord Atkin in **Evans v Bartlam**

[1937] AC 473, and accepted that there was no rule that the court had to be satisfied that a reasonable explanation had to exist (see para. 28).

[65] In considering whether there is a real prospect of success, it is essential that the defendant has an affidavit which discloses a defence on the merits (see **Fred Smith v George Reeves** (1995) 32 JLR 346 (CA) at page 348). Whereas the court ought not to conduct a mini trial, the court will not just accept any assertion made by the applicant (see **ED & F Man Liquid Products Ltd v Patel and another** [2003] All ER (D) 75). See also **C Braxton Moncure v Doris Cahusac Delisser** (1997) 34 JLR 423 CA and **The Jamaica Record Limited and Ors v Western Storage Limited** (1990) 27 JLR 55 (CA), where it was held that an in-house attorney's affidavit was sufficient to be treated as an affidavit of merit.

(c) *The applications in the court below*

[66] By notice of application for court orders, filed 16 April 2018, and an amended notice of application for court orders, filed 28 June 2018, the respondents renewed their application to set aside the default judgment, on grounds which may be summarized as follows:

(i) The respondents have a real prospect of successfully defending the claim;

(ii) the appellant's cause of action is unclear and not discernible from the counterclaim as there are no pleadings particularising the nature of the claim;

(iii) the claim for losses of over $55,500,000.00 is not particularised;

(iv) the claim for mental anguish is not particularised or supported by medical evidence;

(v) there is a claim for mental anguish on behalf of family members who are not parties to the claim, thus depriving the respondents of a fair trial;

(vi) the appellant did not plead or provide evidence of any form of demand for the return of his allegedly missing chattels which the respondents failed to return;

(vii) the respondents intend to raise the defences of abandonment, authority of law, consent, acquiescence, non-existence and/or lack of value, privilege, illegality on the part of the appellant squatter/trespasser, and waiver; and

(viii) even if the said chattels are proven to have existed, they were under the custody, care and control of a third party.

[67] In her affidavit, filed 11 December 2014 in support of the first application to set aside the default judgment, which was before the learned judge in the second application, the 1st respondent alleged that the respondents had intended to defend the counterclaim but had sought information regarding the items removed from the property from the removal company and had not yet received it. It was for that reason the defence had not been filed in time. The 1st respondent claimed that the respondents had a good defence and exhibited a draft defence to the affidavit. That application was refused by Wiltshire J (Ag). On the applicant's account, the primary reason for that refusal was the delay.

[68] The second application was supported by the affidavits of the 1st respondent, attorney-at-law Mr Williams, and Ms Wilson, along with the draft defence (only the first affidavit was in the bundles before this court, and we found reference to the latter two in the learned judge's judgment).

(d) *The learned judge's treatment of the issue of delay on the second application*

[69] It is true that the learned judge, in her reasons for judgment, did not mention the delay in filing the first application to set aside the default judgment nor the respondents' explanation for failing to file the defence in time. It is unclear whether these issues were raised before her. However, consideration of the delay in applying to set aside the default judgment and any explanation for failing to file the defence in time, is a requirement in the rules. The learned judge made no mention of these facts, concentrating instead on the 33 days between the initial refusal of the first application and the renewed application and the three months and 15 days it took for the amended application to be filed, which she found was not inordinately long. She also did not consider the explanation for the failure to file the defence to the counterclaim contained in the affidavit of the 1st respondent. This court in **Rohan Smith v Elroy Pessoa** made it clear that the factors in rule 13.3 apply equally to the second application as they do to the first. The learned judge, therefore, ought to have considered whether the application to set aside the default judgment was made as soon as was reasonably practicable after finding out that the default judgment had been entered. She also ought to have considered whether there was a good explanation for the failure to file a defence to the counterclaim in time.

[70] Having failed to consider the initial delay, it fell to this court to do so as part of our review. It was, however, our view that although the initial application to set aside was not filed as "soon as was reasonably practicable", that delay was not inordinate in the circumstances. It was roughly six weeks. Although the rules do not require an explanation for this delay, it behoves a delinquent defendant to provide one. In this case, there was no explanation for the initial six-week delay. This was not a decisive factor in the face of the respondent's real prospect of success in defending the counterclaim. We also considered whether it would have made a difference to the outcome, if the learned judge had taken that period into account, but found that, bearing in mind her treatment of the delay in the making of the second application to

set aside, which was longer than the first, it is clear that even if she had considered it, that initial delay would not have caused her to exercise her discretion in favour of the applicant.

[71] In so far as the explanation for failing to file the defence in time is concerned, this is contained in the affidavit of the 1st respondent. Her explanation was that they were awaiting information from the third-party storage owner which they did not receive. The delay in filing the defence was approximately 15 months. This explanation, therefore, could not be considered a good one. We did consider whether this fact ought to make a difference to the outcome, but bearing in mind the learned judge's treatment of the issue regarding the respondents' prospect of success in their defence, which we agreed with entirely, the absence of a good explanation for the failure to file a defence in time would not have affected the outcome.

(3) The learned judge's treatment of the respondent's prospect of success in defending the counterclaim

[72] There were no submissions from the applicant on this issue.

[73] Rule 13.3 is clear. The primary consideration for the court is whether there is a real prospect of success in defending the claim. The court may also consider any delay in applying to have the default judgment set aside, and any reason advanced for failing to file a defence, in determining whether to set aside a default judgment.

[74] The learned judge having considered the affidavits of merit before her, and having determined that, based on the applicant's discernible causes of action, the respondents did have a real prospect of successfully defending the claim, we found no basis to interfere with that finding. Furthermore, the learned judge correctly identified the proper principles applicable to the case and properly exercised her discretion in the respondents' favour. There was no basis on which this court could interfere with that proper exercise of the learned judge's discretion.

[75] The respondents discontinued their own claim. The counterclaim survived the discontinuance of the claim, and therefore, the respondents were obliged to defend it or risk having a default judgment entered against them. However, once the default judgment on the counterclaim was set aside, the respondents were entitled to proceed to defend the counterclaim. Therefore, the learned judge made no error. This ground had no prospect of success.

Ground 2 - There were manifest irregularities as it relates to this claim that it is in the interest of justice for the Court of Appeal to make a pronouncement on these irregularities.

[76] The applicant maintained that there were irregularities in the claim which the court ought to hear and determine. However, he failed to point to any irregularity which was relevant to the setting aside of the default judgment on his counterclaim. The applicant mentioned three things which he said were irregularities. The first was his complaint that he was never served with any process in the respondents' claim, and that orders on their notices of application for court orders were, therefore, made against him in a case to which he was not a party (see paras. 34-53 and 63A-64 of the applicant's affidavit).

[77] The respondents discontinued their claim against the applicant and that case is not before the court. Therefore, it was not relevant to any issue this court had to determine. It may or may not have been relevant to the success of the counterclaim depending on whatever view the trial court would have taken regarding the issues raised. Whilst we noted that the respondents sought applications for injunctions against third parties without joining the applicant who would have been affected by the orders, the applicant was able to come before the court to have those orders set aside on 23 March 2012. Also, the respondents did eventually file a claim naming the applicant as a defendant. That claim having been discontinued, the irregularities identified by the applicant and the possible existence of any other irregularities having to do with that claim, did not affect the ultimate question to be determined by this court, which was

whether the learned judge erred in exercising her discretion to set aside the default judgment on the counterclaim.

[78] The second complaint of irregularity, raised by the applicant, had to do with the order for interim injunction made by Campbell J. The applicant complained that when Campbell J granted the interim injunction against him, he had wrongly heard that application as it was not the application that had been adjourned by Anderson J for him to hear. He also complained that Campbell J made the order granting the interim injunction without setting aside George J's order. It was our view that whether this was true or not did not affect whether the respondents had a good prospect of success in defending the counterclaim. However, the applicant's contentions in this regard were not correct.

[79] On 4 April 2012, Anderson J had before him the *inter partes* hearing for injunction in the said matter heard by Brown J. Brown J had made an *ex parte* order which was subsequently set aside by George J, who retained the date of 4 April 2012 for the *inter partes* hearing. Anderson J did not hold the *inter partes* hearing. Interestingly, the applicant produced two minutes of order for the matter that was before Anderson J. One minute of order stated that the application for injunction "could not properly arise, as by April 4th, 2012, the injunctive relief that had earlier been granted ex parte, had by then already been discharged, as per Order of Ms. Justice George on March 23rd, 2012". It is unclear what this minute was intended to convey, as the discharge or expiry of an interim or *ex-parte* order does not prevent the *inter partes* hearing for relief from taking place. The second minute of order, also dated 4 April 2012, indicated that the notice of application for court orders filed 28 March 2012 for injunction was adjourned for hearing to 11 April 2012.

[80] The application of 28 March 2012 had no prayer for injunctive relief and was, in fact, a substantive claim. Campbell J could have made no order for injunctive relief on that application. It was not for interim relief. In that respect, it could not have been properly heard and determined in that form, in any event. There was no indication

whether the matter filed 28 March 2012 was before Campbell J. There was no reference to that matter in his order. It was also unclear, from the record, whether the order for injunctive relief made by Campbell J was made on the application which had been before Anderson J or the new application for injunctive relief filed on 10 April 2012. What was clear, however, was that Anderson J's comments on the minute of order regarding the discharge of the *ex-parte* injunction could not have prevented an *inter partes* hearing from being held, nor could it have prevented another judge from re-imposing an interim injunction.

[81] On 11 April 2012, when the matter came before Campbell J, he granted an interim injunction in the claim for an injunctive relief and set the matter for *inter partes* hearing on 21 May 2012. Campbell J properly heard the application for an injunction and granted the relief sought. There was also no requirement for him to set aside the order of George J in doing so. Furthermore, for this court to determine whether we should interfere with the learned judge's discretion to set aside the default judgment, there was no necessity to determine any issue regarding any irregularity in the orders granted by the several judges in the court below.

[82] We also noted that there was an indication, in the files, that the injunction came before King J, along with an application for summary judgment, on 11 October 2013. At that time, the application for summary judgment was adjourned to 27 March 2014, whilst the interim injunction was discharged.

[83] The third complaint concerned the treatment of his appeal by his former attorney-at-law (paras. 11-32 of the applicant's affidavit). In our view, this complaint was relevant only to the applicant's application for extension of time to file an appeal.

[84] We, therefore, found that the applicant would have had no prospect of success in this appeal as regards a challenge to any irregularity in the orders made by the judges.

Abuse of process

[85] Although there was no specific ground of appeal covering this issue, the applicant did make assertions regarding the second application being an abuse of process. The issue had also been raised, unsuccessfully before the learned judge. Whether there is an abuse of process is a question of judgment, which has only one answer, and no discretion is involved (**Aldi Stores Ltd v WSP Group plc and others** [2008] 1 WLR 748). It having been considered by the learned judge that the second application disclosed new and relevant information, there was no abuse of process in this case.

[86] The applicant had no prospect of success in any of the proposed grounds of appeal.

The applications for extension of time to file appeal and for leave to appeal

[87] The applicant also asked the court to extend his time to file an appeal as his failure to file in time was due to no fault of his own. He referred to his affidavit filed in support of his application for court orders in this court, noting that he had been misled by his former attorney-at-law. That attorney-at-law, he said, misled him into believing his appeal was being dealt with properly, as he instructed. He only later realised that this was not so. The applicant relied on rule 1.7(2) of the CAR.

[88] Regarding the application for extension of time within which to file an appeal, counsel for the respondents submitted that the case of **Garbage Disposal & Sanitations Systems Ltd v Noel Green et al** [2017] JMCA App 2, sets out the factors to be considered when determining whether to grant an extension of time to file an appeal. She argued that the overriding consideration was whether the application had any realistic prospect of success.

[89] The applicant in this case required permission to appeal by virtue of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act, as the order being challenged was made in interlocutory proceedings and is not one that falls into any of the exceptions set out in the rules. There is a time limitation of 14 days from the date of

the decision (see rule 1.8(1) and (2)). The applicant, having failed to apply for permission to appeal the interlocutory order of the learned judge within the stated time limit, needed a court order for an extension of time within which to do so. Rule 1.7(2)(b) of the CAR empowers the court to extend the time for compliance with any rule.

[90] However, having found that there was no prospect of success in any of the proposed grounds of appeal raised by the applicant, to warrant the grant of leave to appeal, there was no need for this court to go on to consider whether to grant an extension of time within which to appeal. In **John Rupert James Blackwood (Executor of the Estate of James Whittle Blackwood, Deceased) v Kingsley Lyew and anor** [2022] JMCA App 17, this court, in applying the principles applicable to these types of application as set out in cases such as **Garbage Disposal & Sanitations Systems Ltd v Noel Green et al**, said the following at paras. [26] to [28]:

> "[26] The case of **Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999, sets out the principles which are to guide the court when considering whether to grant an extension of time within which to apply for permission to appeal. These principles were considered and applied in **Clive Banton and Another v Jamaican Redevelopment Foundation Inc** [2016] JMCA App 2 and **Price Waterhouse (A Firm) v HDX 9000 Inc** [2016] JMCA Civ 18. Before a court will grant an extension of time to apply for permission to appeal, it will usually consider whether permission to appeal ought to be granted, otherwise, it would be futile to enlarge time (see **Evanscourt Estate**, at page 9). The requirements Mr Blackwood has to satisfy, in both applications, were considered in **Garbage Disposal & Sanitations Systems Ltd v Noel Green et al** [2017] JMCA App 2, which applied **Evanscourt Estate**.
>
> [27] The above cases indicate that the factors to be considered in an application for extension of time to apply for permission to appeal are: (a) the length of delay (b) the reason for delay, (c) whether there is an arguable case for

> an appeal and (d) the degree of prejudice to be caused to either party. Notwithstanding this, the overarching factor to be considered in an application for extension of time is whether is [sic] the applicant has an arguable case. For an application for permission to appeal, the question is whether Mr Blackwood has any real chance of success.
>
> [28] Taking the approach that it would indeed be futile to consider enlarging time, if the appeal really had no chance of success, consideration was given to the latter issue first."

[91] It was for these reasons that we made the orders outlined at paras. [3] and [4].

D FRASER JA

[92] I, too, have read the draft reasons for judgment of Edwards JA, and they accord with my reasons for concurring with the order of the court.