[2017] JMCA Civ 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 18/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN JUNE CHUNG APPELLANT

AND SHANIQUE CUNNINGHAM RESPONDENT

Written submissions filed by Winsome Marsh for the appellant

Written submissions filed by Samuels & Samuels for the respondent

31 July 2017

PROCEDURAL APPEAL

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

MORRISON P

[1] I have read in draft the judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing useful to add.

F WILLIAMS JA

[2] I too have read the draft judgment of P Williams JA and agree with her reasoning and conclusion.

P WILLIAMS JA

[3] This is an appeal against the decision of Master Rosemarie Harris (Ag) (as she then was), whereby the application of Mrs June Chung, the appellant, to set aside the default judgment entered in favour of Ms Shanique Cunningham, the respondent, was refused. The learned master also refused to extend time for the appellant to file her defence and further refused leave to appeal. The appellant received permission to appeal from this court on 19 February 2016.

Background

[4] On 22 March 2007, the respondent filed a claim against the appellant and Foo Hing and Company Limited for damages for slander, libel and malicious prosecution. The claim resulted from an incident that had occurred in the Foo Hing Supermarket, 7-11 Stenneth Street, Port Maria in the parish of Saint Mary on 15 March 2004. The appellant had accused the respondent of trying to steal a bottle of ketchup from the supermarket. The respondent was eventually arrested and charged by the police and placed before the Resident Magistrate's Court for the parish of Saint Mary (as it was then called) for the offence of simple larceny. The respondent was acquitted on 25 April 2005.

[5] The respondent commenced the suit and the appellant was served with the relevant documents on 29 March 2007. The time for filing an acknowledgment of service passed without the appellant having done so. The time for the filing of a

defence similarly passed with no action on the part of the appellant. The parties, however, engaged in discussions hoping to resolve the matter amicably.

[6] When it became apparent that there could be no amicable resolution, the attorneys-at-law then retained for the appellant, Robinson Phillips and Whitehorne, filed an acknowledgement of service and a defence on behalf of the appellant. This was done on 19 September 2008 and both documents were dated 11 September 2008. The respondent on 15 September 2008 filed a request for default judgment along with an interlocutory judgment and a notice of assessment of damages, for a date to be fixed by the court upon the entry of judgment requested.

[7] Over three years later, the respondent filed a notice of application for the acknowledgment of service and the defence of the appellant to be struck out. She also sought orders for judgment to be entered in default of filing an acknowledgment of service or alternatively in default of filing and serving the defence. This application and its accompanying affidavit in support were filed on 29 March 2012. The application was set for hearing on 8 November 2012.

[8] Two days before the matter was to be heard, Mr William McCalla, the attorney-at-law for the appellant, filed an affidavit requesting that the orders sought by the respondent be refused and that the defence of the appellant be allowed to stand. Mr McCalla asserted that it was in August 2007 that the appellant had visited him at his office and informed him that the documents had been served on her husband, who did not remember the date of service.

[9] Further, Mr McCalla asserted that his instructions were to open negotiations with the respondent's attorney to see whether the matter could be amicably resolved. At paragraph 5 of his affidavit, Mr McCalla said the following:

> "5. However when I received the Claimant's draft assessment of the amount of damages being claimed which was in excess of $10,000,000.00 my Client then instructed me to defend the matter - hence Acknowledgement of Service and Defence were filed as no Judgment had yet been entered. Further, the claimant's Attorney-at-Law accepted Service on 19th September, 2008 and also accepted service of the defence and did nothing to rectify the identity of the First Defendant and is now seeking to strike out the Defence, some three years from the date of filing the Acknowledgement of Service and Defence."

[10] The application was heard on 8 November 2012 by McDonald Bishop J (as she then was). The respondent's application to strike out the acknowledgment of service and the defence was granted. Further, the learned judge made the following order:

> "Claimant is at liberty to request judgment in default of acknowledgment of service and defence."

[11] On 22 October 2012, a request for interlocutory judgment in default of acknowledgement of service was filed on behalf of the respondent.

[12] On 4 December 2012, the appellant filed a notice of application for court orders requesting leave to file her defence along with an affidavit in support of this application. The respondent responded by way of affidavit on 20 January 2013, urging the court to decline the appellant's request.

[13] On 7 May 2013, the appellant filed an amended notice of application for court orders seeking to have the default judgment set aside and for an extension of time within which to file her defence within 14 days of the date of hearing of the application. The grounds on which the orders were being sought were as follows:

> "1. That the judgment in Default obtained by the Claimant is irregular in that there was a failure to comply with rule 8.16 of the CPR;
>
> 2. That the 2nd Defendant has a real prospect of successfully defending the claim;
>
> 3. That the granting of the Orders being sought herein will not be prejudicial to the Claimant."

[14] The appellant filed no further affidavits in support of this amended notice. She was therefore apparently relying on the affidavit filed on 4 December 2012. In that affidavit, she confirmed much of what had been asserted by Mr McCalla in his affidavit. She also gave her version of what had transpired in the supermarket on 15 March 2004, which had led to the eventual arresting and charging of the respondent. She exhibited her proposed defence.

[15] In the defence, the appellant denied the existence of any legal entity known as 'Foo Hing and Company Limited'. She admitted that, on the day in question, something happened in the supermarket and went on to recount her version of the incident. She asserted that she made a report to a police officer who was then outside the store and subsequently called the police at Port Maria Police Station. She admitted making the report that the respondent had taken a bottle of Grace Tomato Ketchup from the shelf,

placed same in her handbag and was about to leave the store without paying for same. She ended this brief statement of the facts on which she was relying to dispute the claim with the following:

> "7. In view of the foregoing this Defendant says that the Claimant is not entitled to the relief claimed in the Particulars of Claim or to any relief."

[16] The appellant's amended application was heard by Master Lindo, as she then was, and on 22 October 2013 she made the following orders:

> "1. That the Defendant's application is refused.
>
> 2. Costs are awarded to claimant to be taxed if not agreed.
>
> 3. Leave to appeal is refused."

[17] The appellant sought and obtained advice from new attorneys-at-law and on 21 July 2014, there was a notice of change of attorney filed by the attorneys-at-law now on record. On 24 July 2014 the appellant filed a new application for court orders seeking inter alia:

> "1. The Default Judgment as requested against the Second-named Defendant herein not be perfected and be set aside;
>
> 2. The time for filing the Second-named Defendant's Defence be extended to 14 days from the date hereof."

[18] This application was accompanied by an affidavit from the appellant with substantially more detail and information than had been outlined in her previous affidavit. The proposed defence exhibited with this affidavit, also set out in detail, facts on which the defendant was relying. Further, this proposed defence was now compliant with rule 69.3 of the Civil Procedure Rule ('CPR'), which sets out what is required in a defendant's statement of case in defamation claims.

[19] The appellant's attorneys-at-law were served on 10 April 2015 with the default judgment, now perfected and dated 22 October 2012, the date it was requested. Subsequent to the close of submissions on the application for leave to appeal before this court, the appellant's attorneys-at-law obtained a copy of the formal entry of the default judgment. This document bore the date 10 July 2014 below the signature of the deputy registrar and above the judgment binder No 761 and folio 471.

[20] On 28 April 2015, Master Harris (Ag) commenced hearing the appellant's second application and the hearing continued on 20 May 2015. On 28 July 2015, the learned master gave her decision and made the following orders, inter alia:

> "1. Application to set aside Default judgment regularly entered is refused;
>
> 2. Application for an extension of time to file Defence out of time is refused;
>
> 3. Cost of application to the claimant to be agreed or taxed. "

[21] As already indicated, the appellant promptly applied to this court for leave to appeal which was granted on 19 February 2016.

Whether this appeal is a procedural appeal

[22] A resolution of this question becomes necessary since in the submissions made on behalf of the respondent, challenge has been taken as to whether this is the proper method for disposing of this appeal. It is deemed best to consider this question as a preliminary matter before embarking on the appeal itself, if necessary.

[23] It was submitted that the definition of a procedural appeal, which is contained in rule 1.1(8) of the Court of Appeal Rules 2002 ("CAR"), "unambiguously provides that any decision which involves a substantive issue is excluded from coming within the definition of a procedural appeal". It was contended that a refusal to set aside the judgment on liability, however obtained, relates to a substantive issue and thus an appeal from that decision is not a procedural appeal. This is so because the result of the appeal on the substantive issue of liability will be that either the judgment is set aside or it is confirmed by a refusal to set it aside. Reference was made to the cases of **Lunnun v Singh and others** (1999) unreported 1 July, England CA; **Pugh v Cantor Fitzgerald International** [2001] EWCA Civ 307 (unreported) England CA and from this court, **Annissia Marshall v North East Regional Health Authority (Saint Ann's Bay Hospital) and the Attorney General** [2015] JMCA Civ 56 and **Flexnon Limited v Constantine Mitchell and Anor** [2015] JMCA App 55. It was also noted that **Lunnun v Singh** and **Pugh v Cantor Fitzgerald International** were both

approved by the Privy Council in **Dipcon Engineering Services Ltd v Bowen and another** [2004] UKPC 18.

[24] It was submitted that the decision that the appellant is seeking to appeal is the refusal of the learned master to set aside a regular judgment in favour of the respondent on the substantive issue of liability by virtue of the provisions of rule 13.3 of the CPR. It was therefore contended that this is not properly to be disposed of as a procedural appeal.

[25] In response, counsel for the appellant submitted that the respondent's submissions in relation to the nature of the appeal are completely without merit simply because, while a default judgment does determine liability, it is not on substantive merit, but only based on a default in procedure. Further, it was submitted, because the decision is not one on merit, a defendant is allowed to apply to set it aside if she has a defence on the merits.

Discussion and analysis

[26] A procedural appeal, as defined by rule 1.1(8) of the CAR, is one that does not directly decide the substantive issue in a claim, and the rules go on to provide certain matters which are regarded as exceptions. It is not contended that this matter be considered amongst the exceptions.

[27] Given the main thrust of the submissions made on behalf of the appellant in this regard, it is best to bear in mind the fact that the entering of a default judgment is, in

the majority of cases, an administrative process without any real determination of the claim. While the default judgment remains unchallenged or where challenges to it have not been successfully made, it is to be properly considered final on the issues of liability as far as a claimant can then move to have his damages assessed, and the issue of liability cannot then be raised.

[28] The principle which underlies the jurisdiction for setting aside a default judgment has been long established as pronounced in the case of **Evans v Bartlam** [1937] AC 473. Lord Atkin at page 480 stated:

> "The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its cohesive power where that has been obtained only by a failure to follow any of the rules of procedure."

[29] A careful reading and appreciation of the cases on which counsel for the respondent relies, shows that these authorities are not in fact supportive of the position being urged.

[30] In **Lunnun v Singh**, the claimant sought relief against the defendants in respect of an alleged leakage of water and sewage from a sewer forming part of the defendant's premises, on to adjoining premises belonging to the claimant. No notice of intention to defend the claim was given by the defendants and the claimant entered judgment in default for damages to be assessed. No application to set aside the default judgment was made.

[31] At the hearing to assess damages, the defendant sought to challenge the amount of damages claimed, on the ground that some part of the damage suffered by the claimant was attributable to some source other than the defendant's sewer. The judge ruled that by virtue of the interlocutory judgment, the defendants could not, at the assessment of damages, dispute the source of the water that caused the damage.

[32] On appeal, the court identified the question to be answered, as, whether it was open to the defendants, notwithstanding the default judgment, to raise at the damages hearing, the issue of whether water damage from another source was responsible for the damage to the claimant's basement. In answering the question, Jonathan Parker J stated:

> "The default judgment is conclusive on the issue of the liability of the defendants as pleaded in the Statement of Claim...
>
> In my judgment, the underlying principle is that on an assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a judgment following a full hearing on the facts or a default judgment."

[33] In making his comments, while agreeing that the appeal should be allowed, Peter Gibson LJ commented:

> "It is not in dispute that when judgment in default is entered for damages to be assessed the question of liability is thereby determined and cannot be challenged while the unappealed judgment still stands."

[34] In the other authority relied on from the English Court of Appeal, **Pugh v Cantor Fitzgerald International**, the court considered the observation made in **Lunnun v Singh** regarding the issue of what matters may be raised on an assessment of damages which is undertaken after there has been a judgment on liability. The court accepted that the observations settled the question and reflected the true principles on the issue.

[35] The Privy Council in **Dipcon Engineering Services Ltd v Bowen and another** referred to the two decisions of the English Court of Appeal while rehearsing the submissions that they had heard. In that matter, the appellant, Dipcon Engineering Services Ltd, had challenged the decision of the Court of Appeal of Grenada setting aside orders made in the lower court refusing to set aside a regular default judgment obtained by them, and the subsequent assessment which had taken place.

[36] In delivering the decision of the Board, Lord Brown of Eaton-under-Heywood had this to say at paragraph [24]:

> "Whilst *Saudi Eagle* is clear authority, if authority were needed, for the proposition than an application to set aside a default judgment can be made (and, if refused, can then be appealed) notwithstanding that final judgment has subsequently been entered, it is certainly not authority for saying that on an appeal against an assessment of damages a previous default judgment can be set aside without any such application ever having been made or, as here, that a previous refusal to set aside the default judgment can be challenged without that refusal itself being appealed."

[37] These authorities, to my mind, re-enforce the fact that a default judgment may be considered conclusive of the issue of liability in so far as that issue cannot then be raised in any assessment or other hearing flowing from the interlocutory judgment. It can however be challenged and set aside, such that a full hearing on the facts can be held, any time prior to the assessment hearing. The decision of a court as to whether or not to set aside a default judgment cannot be regarded as a decision that directly decides the merits of a claim. The appeal against such a decision properly is a procedural appeal as defined in rule 1.1(8) of the CAR. The preliminary point raised by the respondent is without merit and cannot succeed.

The appeal

[38] The appellant filed notice and grounds of appeal in the following terms:

> "(A) THE DETAILS OF THE ORDER APPEALED ARE:
>
> (a) Permission requested to set aside the Default Judgment entered against the 2nd Defendant is refused.
>
> (b) Permission requested for an extension of time within which the 2nd Defendant to file [sic] her Defence is refused.
>
> (c) Costs of the application to the Claimant/Respondent to be taxed if not agreed.
>
> (d) Leave to appeal is refused.
>
> (e) Claimant/Respondent's Attorney-at-Law to prepare, file and serve this order.

(B) THE FOLLOWING FINDINGS OF FACT AND LAW ARE CHALLENGED

FINDINGS OF FACT

1. The learned master found as a fact that "In the instant application, the cultural practices of the 2nd Defendant/Applicant were stated as being this new relevant material.

2. The Learned Master made findings of fact regarding delays on the part of the 2nd Defendant/Applicant based on a finding of fact that the Claimant/Respondent "has a Default Judgment from 2012."

FINDINGS OF LAW

1. The learned master found that the application to set aside was not filed as soon as was reasonably practicable after the 2nd Defendant/Applicant knew of the default judgment.

2. The learned master found the 2nd Defendant/Applicant has not acted promptly and the explanation given for failure to file the acknowledgement of service and defence is not a good reason bearing in mind the particular facts of the case.

3. The learned master found there was no sufficient explanation for the delay.

4. The learned master found that the material presented by the 2nd Defendant/Applicant was irrelevant.

(C) THE GROUNDS OF APPEAL ARE:

1. The Learned Judge in Chambers, erred in failing to address properly or at all, the issue as to whether the proposed Defence had no reasonable prospect of success and operating on the presumption that it had none despite the many triable issues raised therein; the

strength of the merits of the pleaded defence; and the fatal flaws in the Claimant/Defendant's own causes of action;

2. The Learned Judge erred in addressing the issue of delay as a priority issue and then finding that the 2nd Defendant/Appellant had failed to file her application to set aside as soon as was reasonably practicable after learning about the entry of Judgment in light of her unchallenged evidence that she was advised by previous Counsel that there was nothing she could do; the illness of her late husband, and the prompt way in which the matter was treated by herself and her son after her husband's death;

3. The Learned Judge in Chambers erred in finding that there was no sufficient explanation of the delay when, in addition to the many other challenges she itemized, the 2nd Defendant/Appellant relied on the inadvertence of her previous Attorney-at-Law which was unchallenged and which this Honourable Court has held to be sufficient explanation;

4. The Learned Judge in Chambers erred in finding that the material presented by the 2nd Defendant/Appellant was new but irrelevant when the material directly addressed the issues at hand; was unchallenged and the 2nd Defendant/Appellant was frank and open with the court;

5. The Learned Trial Judge erred in finding that the sole "new" material about which relevance needed to be decided was the cultural challenges faced by the 2nd Defendant/Appellant and by apparently dismissing these challenges as relevant when they were unchallenged by any contrary evidence and clearly affected the 2nd Defendant/Appellant's behaviour. There were many other 'new' materials placed before the Learned Master including the illness of her late

husband [sic] ....the inadvertence of previous Counsel, and the advice she received from previous counsel;

6. The Learned Judge in Chambers failed to take into account that the evidence by the 2nd Defendant/Appellant was unchallenged as the Claimant/Respondent filed no Affidavit in reply;

7. In assessing the issue of delay, the Learned Judge failed to take into account that the 2nd Defendant/Appellant's previous Attorneys-at-Law had taken steps, albeit out of time without consent, to place an Acknowledgement of Service and Defence on the Record; that the Parties had been in without prejudice settlement talks which had broken down; and that the request for Default Judgment had been filed in 2012 but the Judgment had not been "entered" in accordance with Civil Procedure Rule 13.3 until July 10, 2014.
In this regard, the learned trial [sic] judge failed to take into account the reasons why the first Acknowledgement of Service was struck out and the unchallenged evidence by the 2nd Defendant/Appellant as to the issue of service which was not in legal dispute;

8. The learned judge erred in law in taking the draconian step of barring the 2nd Defendant/Appellant from disputing the Claimant/Respondent's Claim in light of the strong Defence proposed; the lack of real prejudice to the Claimant/ Respondent should the matter be tried; and the Claimant/Respondent's own delays in prosecuting the Claim;

9. The decision of the Learned Judge in Chambers is contrary to the overriding objective and failed to deliver justice on both sides.

C THE ORDER SOUGHT:

1. 2nd Defendant/Appellant seeks an order setting aside the Order of the Learned Master Ag;

2. The Interlocutory Judgment entered against the 2nd Defendant/Appellant be set aside;

3. The 2nd Defendant be granted an extension of time within which to file her Defence to 14 days from the date of this Order;

4. Costs of this Appeal to be the 2nd Defendant/ Appellant's to be taxed if not agreed;

5. Such further or other relief as may be just."

[39] The respondent filed a counter-notice of appeal in the following terms:

"Take notice that the Respondent (being the Claimant in the court below) will contend that the decision of Master Harris (Ag) should be affirmed on the following grounds:

1. (a) That by virtue of the true construction of the provisions of Rule 13.3. of the Civil Procedure Rules 2002 as amended and taking into account the overriding objective of the New Rules (CPR 2002) a second application to set aside a regularly entered default judgment is not permitted, consequently the second application to set aside Default Judgement entered on the 22nd day of October 2012 is null and void.

(b) Further that the Defendant/Appellant has failed to prove to the requisite standard that she has a real chance/prospect of successfully defending the claim.

(c) And in any event, the Learned Master exercised her discretion properly in deciding

that said application was not filed as soon as was practicable.

2. An order that the Appeal be dismissed with Costs and that Costs of the counter notice be awarded to the Respondent."

Was a second application to set aside the default judgment permitted?

[40] The respondent in her counter-notice of appeal raised an issue which I think it prudent to consider first. There is a challenge as to whether the appellant, having failed in her first application to have the default judgment set aside, should be permitted to make a second application.

[41] Counsel for the respondent, in his written submissions stated that the CPR no longer allow second applications to be made in relation to applications to set aside judgments under part 13.3. Further, it was submitted that these rules heralded in new changes and in the circumstances, have made redundant, second applications to set aside judgments entered in default. In support of this submission, counsel referred to authorities where the courts have highlighted the need for parties to adhere to the time lines set out by the court and the relevant rules, so that cases are dealt with expeditiously and promptly. He referred to this court, decisions in **Flexnon Limited v Constantine Michell and others** and **Price Waterhouse (A Firm) v HDX 9000 Inc** [2016] JMCA Civ 18 and the decision of the Privy Council in **Attorney General v Keron Matthews** [2011] UKPC 38.

[42] Counsel submitted that in the circumstances "as soon as reasonable practicable", in rule 13.3(2)(a), speaks to only one application being allowed and this would relate to the first application which was filed in May 2013. The decision of that application and more importantly the decision of McDonald Bishop J had substantially determined the claim in counsel's view and thus he submitted there was no scope for the defendant making a second application. Counsel contended that the first decision, refusing the application, remained without being appealed and thus this court had no jurisdiction to hear the instant appeal.

[43] Counsel made two further submissions that can well be viewed as flowing from this one. He contended that the second application can be viewed as an abuse of process and the issue of *res judicata* is patently applicable to the facts of this case. Counsel submitted that the appellant was seeking to retry a matter that was decided from 22 October 2013. Further, he submitted that the appellant's acknowledgement of service had been struck out by McDonald-Bishop J and so the appellant was barred from proceeding with her case. Counsel contended that the striking out was a sanction imposed by the court and in the circumstances, the proper course was to apply for relief from sanction as provided in rule 26.8 of the CPR.

[44] In the written submissions made in response, counsel for the appellant noted that the right to make a second application to set aside a judgment on new facts has been settled law since **Gordon v Vickers** (1990) 27 JLR 60, and has been revisited and confirmed by this court in **Rohan Smith v Elroy Hector Pessoa and Nickeisha Misty Samuels** [2014] JMCA App 25. Counsel submitted that the submissions made

relative to the issues of abuse of process and of *res judicata* were misconceived and without merit. He noted that the acknowledgment of service was struck out for being filed late without consent, which did not preclude the appellant from seeking an extension of time or from applying to set aside the default judgment. Counsel submitted that, in any event, *res judicata* applies to decisions on the merits at trial, which the application to set aside the default judgment clearly was not.

Discussion and Analysis

[45] This court in **Rohan Smith v Pessoa and Samuels** did consider the position in respect of repeated applications with regard to setting aside default judgments entered regularly. Phillips JA at paragraphs [34] and [35] stated:

> "[34] The law relative to whether more than one application to set aside a default judgment may be entertained by the court has been settled for some time now with some clarity in **Vickers** and **Trevor McMillan and Others v Richard Khouri** SCCA No 111/2002, delivered 29 July 2003. There is no doubt that a court will entertain an application to set aside a default judgment made subsequent to the dismissal of another application to set aside...
>
> It is my view, therefore, 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 was based on material that was not placed before the court at the hearing of the previous application.

> [35] Although **Vickers** was decided applying the Civil Procedure Code, and the wording of the relevant provision is not identical to rule 13.3 of the CPR, I have no difficulty in concluding that these principles apply equally to the latter provisions. In fact, the issue was put beyond doubt by Harrison P (Ag), as he then was, in **McMillan**. In that case, default judgment was entered on 25 October 2001 and an application to set it aside was dismissed on 7 January 2002. A second application was made to set aside the judgment, which was dismissed on the ground that a second appliction was the wrong procedure and that an appeal against the earlier dismissal should have been filed. In holding that there was new material relied on in the second application, upon which the court would exercise its discretion, Harrison P (Ag) stated:
>
> > '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** (1990) 27 JLR 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], WLR 550).'"

[46] The position so clearly enunciated in the decision from this court remains unchanged. The appellant was permitted to make the second application provided that new material, which was relevant, was presented for the court's consideration.

[47] The first application to set aside the default judgment was supported by an affidavit from the appellant that contained 10 paragraphs. In it, she denied personal

service, stating that the relevant document had been left with her husband. She asserted that the attorneys-at-law she then instructed were requested to negotiate a settlement and subsequently further instructions were given to them to take whatever steps were necessary to defend the matter. She also briefly outlined what she alleged happened on the day she was accused to have defamed the respondent.

[48] The second application was supported by an affidavit which was twice as long as the first. In the submissions made on her behalf to this court, counsel noted that this second application "provided the court with extensive new and relevant material including: the cultural issues that prevented the [2nd defendant/appellant] from having conduct of her own defence; the unfortunate lapses by her previous attorneys resulting in her finding herself in this position; and the new and relevant defences raised including that she did not commence the prosecution, the failure of which now forms the basis of this suit and her contention that the claimant's particulars of claim themselves do not raise any cause of action against the 2nd defendant/appellant nor do they disclose any reasonable ground for bringing the action and ought to be struck out". This observation is an accurate, succinct description of what is in fact contained in the second application.

[49] There was new relevant material in the second application. This second application was therefore properly before the learned master and the submission made by counsel for the respondent that it was null and void is wholly without merit.

[50] In any event, the master dealt with this matter appropriately by reviewing and considering authorities related to this issue and properly concluded that the appellant could make a second application. She however went on to find that the new material was not relevant. This conclusion seemed to have been reached solely on the finding that the cultural practices were stated as being the new relevant matter. The master failed to consider the other matters raised including, significantly, the failures on behalf of the appellant's previous attorneys-at-law.

[51] One other submission made on behalf of the respondent that I think needs to be considered is the question of whether the order made by McDonald-Bishop J was a sanction which meant that the appellant was barred from proceeding with her application until she had obtained relief from sanction.

[52] The question of what is a sanction was addressed by the Privy Council in the **Attorney General v Universal Projects Limited** [2011] UKPC 37. Lord Dysor, in delivering the judgment of the Board, stated at paragraph [13]:

> "The word 'sanction' is an ordinary word. It has no special or technical meaning in rule 26.7. Dictionary definitions of 'sanction' include 'the specific penalty enacted in order to enforce obedience to a law'. That is precisely what the term attached to the grant of an extension of time was. In the language of rule 26.6(1) it was the consequence of the failure to comply with the court order. It is artificial to say that the sanction was the permission to enter judgment."

[53] In the instant case, a procedurally incorrect step was taken when the attorneys-at-law filed an acknowledgment of service and defence for the appellant outside of the time prescribed by the rules. The striking out of those documents was the step necessary to set the matter right. Permission to the respondent to proceed to request the default judgment may not have even been necessary but certainly this order of the court was not imposing a sanction. In the circumstances, this submission made on behalf of the respondent was misguided and without merit.

The issues in the appeal

[54] The appellant is seeking to have this court set aside the decision of the learned master I in exercise of her discretion pursuant to rule 13.3 of the CPR, which provides:

> "13.3 (1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.
>
> (2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
>
> (a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered;
>
> (b) given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be."

[55] The basis on which this court will disturb a decision in which the court below was exercising its discretion is well settled. The factors for consideration, as gleaned from

the dictum of Lord Diplock in **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042 at page 1046, have been endorsed and applied by this court in several cases. In the **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, Morrison JA, as he then was, at paragraph [20], had this to say:

> "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."

[56] Thus, I find that the issues raised in this appeal can be best dealt with by considering, firstly, whether the master erred in her treatment of the question of whether the proposed defence had no reasonable prospect of success. Then there needs to be a determination of whether the master also erred in her consideration of whether the appellant had failed to satisfy the discretionary criteria set out in rule 13.3 (2)(a) and (b) of the CPR.

Reasonable prospect of success

The submissions

[57] Counsel for the appellant, in the written submissions, stated that the learned master cited the correct rule of the CPR but failed to address properly, or at all, the priority issue raised by the rule, namely, whether the proposed defence had a reasonable prospect of success. Further, counsel submitted that the master seemed to

have made contradictory findings concerning whether or not a second application for setting aside the default judgment was permissible and failed to address the vital issue of the proposed defence's prospect of success.

[58] In response, counsel for the respondent considered the draft defence and concluded that it had no reasonable prospect of success. The submissions made were notably silent as to whether or not the learned master had appropriately dealt with the issue.

The treatment by the master

[59] In her reasons for judgment, the learned master identified at paragraph [12] the main questions she had to answer as follows:

> "Firstly, can another application to set aside the default judgment be requested and entertained?
>
> Secondly, what is the law that the court needs to be cognisant of? Should the claimant's default judgment be set aside?"

[60] The learned master then conducted a careful review of some of the authorities which addressed these questions, commencing with **Gordon v Vickers**. She then concluded at paragraph [19]:

> "So, it seems that the Applicant can make this application and can do so if there is fresh evidence that is relevant. The defining factor seems to be whether this new material is relevant. In the instant application, the cultural practices of the defendant were stated as being this new relevant material. The Applicant in an affidavit deponed that it was the practice in her Chinese culture to leave such matters of

> legal documentation up to the males in the family and she was not fully seised or notified of the matter."

[61] The learned master did not find those arguments of the appellant compelling and at paragraph [22] stated:

> "In this renewed application the applicant, has used the opportunity to fashion another defence. That being the case the Applicant has attempted to show that she has a reasonable prospect of success in defending the claim."

[62] This was the only reference made to the defence in her reasons for judgment by the master.

Discussion and analysis

[63] It is well settled that the 'gateway' for the grant of the application to set aside the regularly obtained default judgment is whether the defence proposed has a real prospect of success. The question for the court was whether there was a realistic, as opposed to, a fanciful prospect of success. The appellant had attached her draft defence which was recognised by the master only as the fashioning of another defence. The master did not consider in any way the merits of the defence and therefore there was no finding as to whether the proposed defence had satisfied the test.

[64] The appellant had raised in the proposed defence, the issue of whether the words alleged to have been used by her were in fact defamatory. She noted that the respondent had failed to plead any defamatory meaning of the alleged words. Further,

she noted that the respondent had alleged that the words complained of, were published maliciously, but no particulars in support of the allegation of malice were pleaded as required by rule 69.2 of the CPR.

[65] The appellant further challenged the malicious prosecution claim by asserting that the respondent was charged by the police and she attended the trial thereafter as a witness only. Significantly also, the appellant challenged the circumstances in which the incident in the supermarket unfolded as asserted by the claimant. This meant that there were issues of fact which would have to be resolved.

[66] The appellant admitted using certain words to the police as set out in the particulars of claim, but asserted that:

> "(a) The words were true in substance and in fact;
>
> (b) the words were spoken on an occasion of qualified privilege;
>
> (c) the words were fair comment on a matter of public interest."

[67] These are all matters which the master was obliged to have considered in determining whether the appellant had a real prospect of successfully defending the claim. The issues raised in the proposed defence were such that it could not be said that the appellant had an unrealistic prospect of success.

[68] In the circumstances, the master did in fact err in failing to address at all the issue of whether the proposed defence had any reasonable prospect of success.

The Delay

The Submissions

[69] Counsel for the appellant submitted that the master's almost single-minded focus on the issue of delay is contrary to law and to rule 13.3 of the CPR. Further, it was submitted, if the priority issue (reasonable prospect of success) is decided in the appellant's favour, then the question of delay ought not to prevent the setting aside of the default judgment unless it is egregious or has caused or is likely to cause prejudice that cannot be cured by way of an order as to costs.

[70] Counsel further submitted that the learned master exposed a misunderstanding of the explanation for the delay when she dismissed the appellant's cultural challenges on the basis that others suffer cultural challenges. Counsel pointed to other factors which the master seemed not to have taken into consideration, namely: the inadvertence of previous counsel and the appellant's unchallenged evidence about her need to attend to her husband's grave illness. Counsel contended that this was not a defendant who had done nothing. There was unchallenged evidence that the parties were in negotiations pending a settlement of the matter and it was the failure of the previous attorneys-at-law to acknowledge service during the negotiations that caused the initial delay. Further, counsel contended that the appellant's intent to defend was clear.

[71] Counsel submitted that the delays by the respondent were egregious and far worse in effect than any delay on the part of the appellant. It was noted that the respondent did not apply to strike out the appellant's acknowledgment of service or

defence until almost four years after they had been filed and the judgment in default was not requested until almost five years after the claim was filed. Further, counsel noted that no further step seem to have been taken by the respondent as it appears the judgment in default was not actually entered until 10 July 2014.

[72] It is noted that much of the submissions made on behalf of the respondent was concerned with the issues already dealt with in this judgment.

[73] In response to the issue of the delay, counsel for the respondent noted that the appellant's second application to set aside the default judgment was made 10 months after the first application had been refused. Counsel submitted that the appellant's application was not within time, had not been made promptly and was in breach of the overriding objective. Counsel noted that the delay was severely prejudicial to the respondent who had been prevented from perfecting her judgment for upwards of seven years. Counsel contended that the appellant had ample time to look after her affairs and from the outset, had attorneys-at-law acting on her behalf and who attended and participated in all aspects of this claim.

The treatment by the master

[74] The master considered a decision from this court as approving the approach to assessing such applications as this one before her. She noted that in **Fiesta Jamaica Limited v Nation Water Commission** [2010] JMCA Civ 4, Harris JA had approved the judgment of Lightman J in the case of **Commissioner of Customs and Excise v**

Eastwood Care Homes (Ilkeston) Ltd and Ors [2001] EWHC Ch 456, as to the criteria to be followed in an application for extension of time.

[75] The master then set out what can be regarded as the primary reasons for coming to the decision she did in the following terms:

> "[26] The courts have been imbued with judicial discretion to decide whether to set aside a default judgment. Decided cases repeatedly state that a default judgment obtained regularly is a thing of value and the courts will not lightly deprive a litigant of that judgment without good reason. Moore-Bick, J. puts it this way when he stated in **International Finance Corporation v Utexafrica** S.P.R.L. 2001 EWHC 508
>
> > 'A person who holds a regular judgment even a default judgment has something of value and in order to avoid injustice, he should not be deprived of it without good reason.'
>
> [27] The Claimant served the initiating documents on the 22nd day of March 2007. She has a Default Judgment from 2012. The previous application was determined on the 22nd day of October 2013. The instant application was not filed until some nine months later. The court finds that the Applicant has not acted promptly and the explanation given for the failure to file the acknowledgment of service and Defence is not a good reason bearing in mind the particular facts of this case.
>
> [28] Delay is always inimical to the administration of justice. The applicant was represented initially by counsel who was her duly appointed representative. The case was in the hands of the first attorney for a period of approximately seven years before the Applicant resiled from her instructions and retained another attorney.

[29] Time limits are meant to be observed by the relevant parties to prevent delays and costs. Further the court has to balance the rights of the parties and view the prejudice that may be occasioned to any party in the action bearing in mind that the achievement of justice is what is desirable. The claimant in this action would be greatly prejudiced and costs would hardly act as an appropriate salve.

[30] In **Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Co** SCCA No 18/2001 delivered on 11 March 2002, Panton JA stated:

> 'For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedures. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction.'

[30] The Court in its deliberations must further the overriding objective of dealing with cases justly with expedition and fairness and ensuring as far as is practicable that the parties are on an equal footing and are not prejudiced by their financial position. The court is also mandated to save expense."

Discussion and analysis

[76] The master was correct in identifying the need for litigants to adhere to timelines so as to avoid delays and ensuing injustices. She, however, to my mind, focussed too

much on this issue and, as already been noted, this resulted in her failure to consider the defence and to determine its prospect of success.

[77] In the authority she quoted and relied on, this court demonstrated the importance of a consideration of the merits of a proposed defence and this was unfortunately not appreciated by the master. In **Fiesta Jamaica v National Water Commission** this court was concerned with an appeal against an order of the lower court in which the judge had refused an application for leave to file defence out of time and consequently granted summary judgment to the respondent. Harris JA, in delivering the judgment of this court, noted the principle governing the proper approach in determining whether leave ought to be granted for an extension of time as summarized by Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors**. She went on to state:

> "The question arising is whether the affidavit supporting the application contained material which was sufficiently meritorious to have warranted the order sought. The learned judge would be constrained to pay special attention to the material relied upon by the appellant not only to satisfy himself that the appellant had given good reasons for its failure to have filed its defence in the time prescribed by Rule 10.3(1) of the Civil Procedure Rules (C.P.R.) but also that the proposed defence had merit."

[78] In the instant case, the primary consideration was whether the appellant had a real prospect of successfully defending the claim. The master, in focusing on the question of the delay, also seemed to have merged the questions of whether the appellant had applied to the court as soon as was reasonably practicable after finding

out that the judgment was entered and that of whether there had been a good explanation for the failure to file the acknowledgment of service.

[79] In considering the first issue, it seems to me the master was obligated to have considered, more closely, the relevant chronology of events. On 8 November 2012 when McDonald-Bishop J, ordered that the acknowledgement of service and defence which had been filed on 19 September 2008, be struck out. She also ordered that the respondent was at liberty to request judgment in default. A request was in fact made on 22 October 2012.

[80] On 4 December 2012, the appellant filed a notice of application for court orders requesting the court grant her leave to file her defence, along with her supporting affidavit. Significantly, the appellant made no mention of being aware of the request for default judgment and certainly there was no indication the default judgment had been entered up to this time.

[81] On 13 January 2013, the respondent filed her affidavit in response to that of the appellant, wherein she indicated that the request for default judgment and interlocutory judgment in default of acknowledgement of service had first been filed on 15 September 2008 and re-filed on 22 October 2012, upon the request of the registrar. There was no mention of whether the judgment had been entered up to this time.

[82] The appellant had outlined in the affidavit accompanying the second application, that the attorneys-at-law, who were initially retained, had advised her that the only recourse after her defence had been struck out was to contest a future assessment of

damages. She also explained that it was after a few months had passed with no further event that she had discussed the matter with her son and a new attorney-at-law was retained. She said it was only after this new attorney-at-law had obtained the files in the matter that she was advised of the real reason her defence, filed late, had been struck out. It is noted that the appellant did not indicate finding out that the default judgment had actually been entered up to this point.

[83] It is significant to note that one of the orders sought by the appellant, in her second application filed 25 July 2014 to have the default judgment set aside, was:

> "The Default Judgment requested against the second-named Defendant herein not be perfected and be set aside."

Further, one of the grounds on which the orders were being sought was:

> "In all the circumstances, this application has been made as soon as reasonable practicable after learning that such an application was permissible and necessary."

It is apparent that, up to then, the appellant had not in fact found out whether the default judgment had actually been entered and perfected.

[84] There was in fact no response to this second application and thus the master had no material before her challenging the assertions of the appellant. There was accordingly no evidence to suggest when the appellant would have found out that the default judgment had been entered. The issue is further complicated by the fact that the copy of the interlocutory judgment exhibited to this court bears a date of 10 July

2014. This would suggest that at least up to the time the first application to set it aside had been made, the judgment had not yet been entered.

[85] The second application to set aside the default judgment was apparently not made upon the appellant finding out that it had been entered. The master as she then was, indentified for consideration, the length of time between the dismissal of the first and the subsequent application. In the circumstances, this approach cannot be considered unreasonable. The second application had been filed some nine months after the first dismissal. The master found that the appellant had not acted promptly but did not demonstrate any consideration of why it was filed at that time.

[86] Although the rule does not specifically call for an explanation as to why the application was filed at the time it was, there is implicit within the need to determine if the application was made as soon as reasonably practicable, a need to consider the reason for any delay. In the instant case, the appellant outlined the circumstances which caused her to have to change representation and then pursue the second application.

[87] The master seemed to have recognized the fact of the change of attorneys-at-law without acknowledging the impact it would have had in the apparent delay in making the second application. The master observed that "the case was in the hands of the first attorney for a period of approximately seven years before the [applicant] resiled from her instructions and retained another attorney". The master(Ag) failed to have demonstrated an appreciation of the fact that this resiling from her instructions

was what caused the appellant to embark on what amounted to the correct course. The failure of her former attorneys-at-law was clearly such that it should have been factored into a consideration of whether the 2nd application was brought as soon as reasonably practicable.

[88] The master recognised and discussed the explanation of the cultural practices of the appellant when she was considering whether it amounted to new and relevant material. She found that the arguments advanced on the issue were not compelling. Indeed, it seemed that at that point she was not satisfied that there was any new relevant material to permit a second application being entertained.

[89] It is noted that after the master considered the question of whether a second application could be made, she then went on to identify rule 13.3 as the operative rule for the application before her. She then went on to deal with the matter in the manner outlined above. She did not demonstrably consider any of the unchallenged material the applicant had presented explaining the delay in applying to set aside the default judgment.

[90] Further, the learned master did not demonstrate how she resolved the other discretionary consideration of whether there had been a good explanation for failure to file either the acknowledgement of service or the defence. In this regard the appellant had asserted that she had thought her legal position would have been maintained while her attorneys-at-law tried to settle the matter. She later learnt that the pertinent documents had not been filed until after the settlement discussions had failed.

[91] The role of her previous attorneys-at-law became a pertinent matter for the master have considered. She did make mention of the "unfortunate lapses of the [appellant's] previous attorneys" when she reviewed the submissions that had been made. She failed to show any appreciation of whether this could have provided an explanation for the failure to file the relevant documents in a timely manner.

[92] This court in **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, commented on the question of whether inadvertence of counsel can amount to a good explanation for failing to file a defence within the stipulated time. Phillips JA stated at paragraph [30]:

> "The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys' errors made inadvertently, which the court must review. In the interests of justice and based on the overriding objective, the peculiar facts of a peculiar case, and depending on the question of possible prejudice or not as the case may be to any party the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended. (See the **St Margaret Insurance** case.)."

[93] In any event, the master did not make it clear why the explanation given by the appellant had caused her to conclude that "the explanation given for failure to file the acknowledgement of service and defence is not a good reason bearing in mind the particular facts of this case".

Conclusion

[94] In the circumstances, I find that the master failed to apply the principles for the proper exercise of the discretion under rule 13.3 of the CPR. Accordingly, I would allow the appeal and make the following orders:

1. The appeal is allowed.

2. The order of Master Harris (Ag) made on 28 July 2015 is set aside.

3. The default judgment entered against the appellant June Chung on 14 July 2014 filed on 22 October 2012 is set aside.

4. The costs of the application in the Supreme Court to the respondent to be taxed, if not agreed.

5. The appellant is permitted to file and serve its defence within 14 days of the date of this judgment.

6. A case management conference is to be fixed at the earliest possible time.

7. Costs of the appeal to the appellant to be taxed, if not agreed.

MORRISON P

ORDER

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