[2025] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2023CV00011

BETWEEN	**KURT DUNKLEY**	**APPELLANT**
AND	**DWIGHT LEVY**	**RESPONDENT**

Written submissions filed by Kerry-Ann Sewell for the appellant

Written submissions filed by Knight, Junor & Samuels for the respondent

28 November 2025

Civil practice and procedure – Default Judgment – Application to set aside default judgment – Negligence claim – Motor vehicle collision –– Whether the appellant satisfied the threshold test for the setting aside of default judgment – Defence with a real prospect of success – Whether application made to the court as soon as reasonably practicable – Whether good explanation for delay in filing acknowledgement of service and defence – Whether prejudice in setting aside default judgment outweighs real prospect of success of the defence – Civil Procedure Rules, (2002), rules 13.2(a) and (b) and 13.3(1).

PROCEDURAL APPEAL

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

STRAW JA

[1] I have read, in draft, the judgment of G Fraser JA (Ag). I agree with her reasoning and conclusion and have nothing further to add.

D FRASER JA

[2] I, too, have read the draft judgment of G Fraser JA (Ag) and agree with her reasoning and conclusion.

G FRASER JA (AG)

Introduction

[3] This is a procedural appeal arising from the decision of Jarrett J (Ag) (as she then was) ('the learned judge') wherein she refused to grant an application made by Mr Kurt Dunkley ('the appellant'), to set aside a default judgment entered against him on 4 January 2021. The appellant has filed this appeal, challenging the decision contained in the written judgment, **Dwight Levy v Kurt Dunkley** (unreported), Supreme Court of Jamaica, Claim No SU2020CV03713, judgment delivered on 26 July 2022.

[4] The learned judge ruled that the appellant failed to satisfy rule 13.2(a) and (b) of the Civil Procedure Rules, 2002 ('CPR'). Further, the learned judge ruled that the prejudice to Mr Dwight Levy ('the respondent') outweighed the fact that the appellant had a defence with a real prospect of success.

[5] On 13 January 2023, T Shelly-Hutchinson J granted the appellant's application for leave to appeal the decision of the learned judge and a stay of proceedings pending the outcome of the appeal.

Background

[6] The background to the appeal stems from a negligence claim initiated by the respondent on 30 September 2020. The respondent asserted that he sustained injuries and loss due to a motor vehicle collision that occurred on Villa Road in Mandeville on 3 August 2017. In his statement of case, he averred that while travelling along DeCarteret Road and entering the intersection with Villa Road, the appellant, who was driving along that road, collided with his vehicle. The respondent in his claim alleged that he suffered personal injuries and loss of earnings.

[7] The appellant failed to file an acknowledgement of service or a defence within the prescribed time of 14 and 42 days, respectively. Consequently, the respondent applied for, and was granted, a default judgment against him.

[8] Belatedly, on 18 February 2021, the appellant filed an acknowledgement of service, indicating an intention to defend the claim. Subsequently, on 15 March 2021, he applied to set aside the default judgment. However, this application was refused by the master in chambers on the basis that it was premature, as the default judgment had not yet been entered at the time the matter came before her. Thereafter, on 21 March 2022, the appellant filed an amended notice of application, supported by an affidavit. He also filed a supplemental affidavit on 3 June 2022, which included his proposed defence, and it was stamped as filed on 8 April 2021. In the amended notice of application, the appellant sought an extension of time within which to file his defence and an order permitting the said defence to stand.

[9] In his affidavit, the appellant asserted that he has a good defence with a real prospect of success and challenged the respondent's assertion that he was responsible for the accident. He contended by his version of the events that he had been travelling along Villa Road, which he described as a major road that intersected with DeCarteret Road, a minor road. As he approached the intersection, the respondent's motor vehicle suddenly emerged from DeCarteret Road and made a right turn across the path of his motor vehicle. He stated that he sounded his horn and swerved in an attempt to avoid a collision, but was unsuccessful. The appellant alleged that the respondent was responsible for the accident.

[10] In his proposed defence, the appellant stated that he became aware of the default judgment on 23 December 2020. At the time of the collision, he was insured with Autosmart Insurance through Orion Insurance Brokers Limited ('brokers'). His brokers usually handled all communication with Autosmart. He claimed that he attempted to contact his brokers by telephone in early January but was unable to reach them. It was not until February 2021 that he notified his brokers that he had been served with the

claim documents. On 19 February 2021, attorney-at-law Mrs Kerry-Ann Sewell contacted and informed him that Autosmart Insurance had retained her to defend the claim.

The learned judge's ruling

[11] In refusing the application to set aside the default judgment, the learned judge examined the application in accordance with rules 13.3(2)(a) and (b) of the CPR. She found that the appellant had failed to act as soon as reasonably practicable to set aside the default judgment. The learned judge stated that "…I also cannot ignore his explanations for not filing an acknowledgement of service and defence on time. I find them highly unsatisfactory".

[12] She took into account the respondent's evidence regarding the nature of his injuries and the resulting financial hardship. She found that allowing the application to proceed would result in additional delay for him. Although the learned judge acknowledged the potential prejudice to the appellant, she found that it was substantially outweighed by the prejudice the respondent would suffer if the default judgment were set aside.

[13] Nonetheless, she considered the circumstances surrounding the accident, noting that it was undisputed that the appellant had been travelling on a major road and therefore had the right of way. She acknowledged that the parties advanced conflicting accounts of how the collision occurred, both of which could be plausible. Although the learned judge determined that the appellant's defence disclosed a real prospect of success, she, however, refused his application.

The appeal

[14] In his notice and grounds of appeal, filed pursuant to rule 2.14(b) of the Court of Appeal Rules 2002 ('CAR'), the appellant seeks to have the default judgment entered against him set aside, along with all consequential actions arising therefrom. He further

requests that his defence, filed on 8 April 2021, be permitted to stand. The appellant relies on the following grounds of appeal:

> "I. That the learned judge erred when she found that the Defendant had not presented a good reason for permitting the matter to go by way of default.
>
> II. That the learned judge erred when she found that the Defendant's delay in filing the application to set aside the default judgment was inordinate.
>
> III. That the Learned Judge erred in finding that there must be an explanation for the delay in making the application.
>
> IV. That the learned judge misguided herself on the issue of prejudice and its application in setting aside default judgment.
>
> V. That [sic] learned judge erred when she failed to give sufficient weight to the fact that the Defendant had a defence with a real prospect of success."

Issues

[15] The issues arising from the grounds of appeal may be summarised as follows:

1. Whether the learned judge erred in finding that the prejudice caused by the delay in applying to set aside outweighed the appellant's real prospect of success?

2. Whether the learned judge erred in determining that the application to set aside was not made as soon as reasonably practicable?

3. Whether the learned judge erred in concluding that the appellant did not provide a good explanation for his failure to file an acknowledgement of service and defence within the required time?

Appellant's submissions

[16] Counsel, Ms Kerry-Ann Sewell ('Ms Sewell'), on behalf of the appellant, in written submissions, stated that it is well established that the primary consideration for a court when determining whether to set aside a default judgment is whether the applicant has a defence with a real prospect of success. Once this is established, the court must then assess whether the applicant acted promptly and whether any delay has been explained. However, the absence of a good explanation is not determinative; it is merely a factor to be considered (see **Rohan Smith v Elroy Hector Pessoa and Nickeisha Misty Samuels** [2014] JMCA App 25 ('**Rohan Smith**')).

[17] Ms Sewell also submitted that various authorities have highlighted that, where a good defence exists, an application to set aside should only be refused in circumstances where the delay is so gross or egregious that it causes substantial prejudice to the claimant or to third-party rights. This position, counsel argued, was supported by the decision of **Ameco Caribbean Inc v Seymour Ferguson** [2021] JMCA Civ 53 ('**Ameco Caribbean**'), which she submitted dealt extensively with the issue of delay. It was her submission that although the appellant in that case had a good defence, the court refused to set aside the default judgment due to excessive delay and the resulting prejudice to the claimant. Edwards JA affirmed that dilatory conduct and resulting prejudice may justify refusal of relief, notwithstanding the existence of a meritorious defence.

[18] In further submissions Ms Sewell highlighted that the approach in **Ameco Caribbean**, can be contrasted with that in **Russell Holdings Limited v L&W Enterprises Inc and ADS Global Limited** [2016] JMCA Civ 39 ('**Russell Holdings**'), where, despite a one-year delay and no explanation, the court found that the delay was "inordinate but not decisive" in light of the absence of prejudice to the claimant. The appeal was allowed because the prejudice to the appellant, if not allowed to defend the claim, outweighed any inconvenience to the respondent.

[19] Ms Sewell acknowledged that, in the present case, although the appellant delayed 3.6 months before applying to set aside the judgment, that delay did not unduly prejudice

the respondent. At the time of the application, the respondent had not yet filed the required medical reports, in breach of rule 8.11(3) of the CPR. The reports were filed some months later, after the court had already ruled. Therefore, the respondent was in no position to meaningfully advance his case during the period of delay. Additionally, any prejudice could have been addressed by a costs order, and the respondent would not have been deprived of any available remedies had the judgment been set aside.

[20] Ms Sewell submitted that, with respect to the continuing issue of delay, the courts have granted relief even where no reasonable explanation for the delay was offered, once a good defence was established. Counsel referred to the decision of **Blossom Edwards v Rhonda Bedward** [2015] JMSC Civ 74, where Sykes J (as he then was) cited **Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc** [1986] 2 Lloyd's Rep 221 ('**Alpine Bulk**'), which cautioned that moral judgments about a party's behaviour should not determine whether a default judgment is set aside. The focus should be on the justice of the case between the parties, rather than punishing them for procedural failings.

[21] Ms Sewell contended that the learned judge appeared to be influenced by her view of the appellant's casual approach to the court's process, describing his explanation as lacking credibility and displaying a casual lack of regard for the court's processes. However, it was submitted that this view was not a reasonable approach, or one sufficient to justify the refusal of the application in light of the appellant's real prospect of success on the merits. The learned judge should have instead focused on the overall justice of the case, and allowed the matter to proceed to trial.

[22] In her closing submission, Ms Sewell argued that, moreover, in refusing the application, the learned judge relied heavily on the respondent's affidavit evidence detailing the injuries and financial hardships suffered. She, therefore, placed undue emphasis on this evidence and failed to adequately consider the prejudice that would be sustained by the appellant if required to satisfy a judgment in respect of a claim for which he had a good defence.

[23] Further, counsel contended that the learned judge appeared to have "in her deliberations of prejudice factored in the time prior to the claim being commenced". In that, the learned judge took into account irrelevant matters such as hardships allegedly experienced by the respondent before the claim was initiated, and concluded that the respondent's prejudice outweighed the appellant's. Such consideration, Ms Sewell submitted, was contrary to decided cases such as **Thorn PLC v McDonald** [1999] CPLR 660, CA. It was submitted that this was a misstep, as the learned judge gave undue weight to the respondent's account, considering that the respondent had provided no corroborative documents or evidence to support his averment that he was unable to work and had to borrow money to support himself and his family because of his injury occasioned by the collision. In so doing, the appellant complained that the learned judge failed to balance the prejudice to both parties fairly. The decision was therefore flawed in law and principle.

Respondent's submissions

[24] It was submitted by counsel, on behalf of the respondent, that an appellate court will not lightly interfere with the exercise of a judge's discretion unless it can be shown that the judge was plainly wrong. The established principle is that appellate interference is warranted only where the discretion was exercised on a misunderstanding of the law or facts, or where the decision is so aberrant that no judge, properly directing themselves, could have arrived at it. In this regard, counsel relied on the dicta of Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 ('**John MacKay**') and of Phillips JA in **Consetta Edwards and others v Joan May Black Valentine and others** [2012] JMCA Civ 61.

[25] Counsel submitted that the issues of promptness and whether a good explanation was provided were questions of fact and, as such, must be determined on the evidence presented. The learned judge did not fall into error when she found that the appellant had failed to present a good reason for not applying to the set aside judgment as soon

as practicable. Counsel maintained that the learned judge's factual findings were plainly sustainable by the evidence she had before her.

[26] Counsel additionally argued that the learned judge was correct in concluding that the delay was excessive. According to counsel, the issue of delay should be assessed in the context of the case. The learned judge thoroughly reviewed the evidence and determined that the appellant had not offered a satisfactory explanation for the delay in seeking to set aside the default judgment.

[27] On the issue of delay, it was submitted that the learned judge correctly found that the appellant delayed 109 days (approximately 16 weeks) from the date of service of the default judgment to the date of applying to set it aside. In the absence of a cogent explanation for this delay, the learned judge was entitled to find that the application was not made as soon as reasonably practicable. The authorities, including **Ameco Caribbean**, are clear that the issue of promptness is context-specific and must be guided by the evidence.

[28] It was, therefore, submitted that the appeal has no merit, since the learned judge did not err in law or misapprehend the facts. The assessment of the explanation for the delay and the finding that the delay was inordinate were within the proper scope of the learned judge's discretion. The record clearly supported the learned judge's findings.

[29] Counsel argued that the learned judge also properly directed herself on the issue of prejudice, recognising its significance in the context of the overriding objective. Counsel relied on para. [24] of the judgment where the learned judge weighed the respective prejudices to both parties and concluded, on the evidence before her, that the prejudice to the respondent was substantial and outweighed that of the appellant.

[30] The prejudice distilled from the respondent's affidavit evidence, particularly from the affidavit of urgency filed by Dwight Levy in March 2021, clearly outlines the extent of the injuries suffered, the impact on his livelihood, and the hardship faced due to the delay in the matter proceeding to final determination. The learned judge considered this

evidence in her analysis and was entitled to place significant weight upon it in assessing prejudice.

[31] It was argued that even where a defendant has a good defence, the court retains the discretion to refuse to set aside a default judgment if other relevant factors militate against granting the application. Counsel placed reliance on **Russell Holdings** and submitted that this principle was reaffirmed, wherein the court noted that the existence of a meritorious defence does not render delay or prejudice irrelevant.

[32] Although the learned judge accepted that the appellant had a defence with a real prospect of success, she proceeded to consider the other relevant factors under rule 13.3(2) and the overriding objective. Having found against the appellant on both promptness and explanation, and having identified compelling evidence of prejudice to the respondent, the learned judge concluded that the discretion should not be exercised in the appellant's favour. This conclusion was reasonable, lawful, and supported by the evidence.

[33] The discretion exercised by the learned judge was clearly within the parameters laid down by the Court of Appeal in **John MacKay** and other binding authorities. No basis has been established for appellate interference with that discretion.

Law and Discussion

Overarching principles for consideration

[34] In this appeal, the appellant invites the court to overturn the learned judge's exercise of discretion under rule 13.3(1) of the CPR, by which she refused an application to set aside a default judgment. It is, however, essential to approach this assessment within the well-established judicial framework, which dictates that, in reviewing an exercise of judicial discretion, the appellate court proceeds with a restrained and principled approach. It is not the function of the appellate court to substitute its own view merely because it might have reached a different conclusion on the same facts. Instead, the appellate court will only intervene if it is demonstrated that a judge misdirected herself

in law, took into account irrelevant considerations, failed to take into account relevant ones, or otherwise erred in principle. Additionally, intervention may be justified where the decision is so plainly wrong that it must be regarded as having exceeded the generous ambit within which reasonable disagreement is possible. This standard of review reflects the deference owed to the first instance judge's discretion, particularly in procedural matters, where the judge is best placed to assess the overall justice of the case and balance the competing considerations before the court.

[35] This principle, firmly articulated in **Hadmor Productions Ltd and Others v Hamilton and Another** [1982] 1 All ER 1042, has been consistently applied by this court in a line of authorities, including **John MacKay**, cited by the respondent. In that case, Morrison JA (as he then was) observed at para. [20]:

> "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 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'."

[36] Accordingly, the appellant bears the burden of demonstrating to this court that the learned judge erred in one of the ways outlined above. Errors that would justify appellate interference with the exercise of her discretion.

[37] An application in the Supreme Court to set aside a default judgment engages the court's discretion under rule 13.3(1) of the CPR, which prescribes the conditions that must be satisfied before such discretion may be exercised appropriately. Phillips JA in **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, para. [23], expressed the position as follows:

> "[23] In September 2006, the rule was amended and there are no longer cumulative provisions which would permit 'a knockout blow' if one of the criteria is not met. The focus of

> the court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the claim, but the court must also consider the matters set out in 13.3 [2] [a] & [b] of the rules."

The applicant must accordingly demonstrate: (i) a good explanation for the failure to file an acknowledgement of service or defence within the prescribed time; (ii) that the application to set aside was made promptly upon learning of the judgment; and (iii) that there is a real prospect of successfully defending the claim. Even where these criteria are met, the court must also consider all the circumstances of the case, including issues of prejudice, delay, and the overriding objective of dealing with cases justly and expeditiously.

[38] Failure to satisfy any one of the criteria in rule 13.3(1) may well prove fatal to the application. The burden accordingly rests squarely on the applicant to present credible and sufficient evidence to the court demonstrating compliance with each requirement. In assessing whether that burden has been discharged, a court must exercise its discretion judicially, taking into account the entire context of the proceedings, the merit or substance of the proposed defence, the reasons for the default and the promptness of the response. In determining whether to set aside the default judgment, courts of first instance are guided by principles espoused in case law, such as **Flexnon Limited v Constantine Michell and Others** [2015] JMCA App 55 ('**Flexnon Limited**'), which emphasises the importance of examining the conditions set out in rule 13.3. While the court retains a residual discretion to prevent injustice, that discretion is not to be exercised to excuse inattention, laxity, or disregard for the rules of procedure.

[39] The application must be supported by affidavit evidence, which should include a draft of the proposed defence, in accordance with rule 13.4(2) and (3). It is settled law that the phrase "real prospect of successfully defending the claim" means that the defence must have a realistic (rather than a fanciful) chance of success, as established in **Swain v Hillman and another** [2001] 1 All ER 91.

Whether the learned judge erred in finding that the prejudice caused by the delay in applying to set aside outweighed the appellant's real prospect of success? (Issue 1)

[40] Upon careful review of the judgment, it would be accurate to assert that the learned judge correctly identified and considered the relevant legal principles governing an application to set aside a default judgment. The judgment clearly reflects an awareness of the applicable criteria, including those outlined in rule 13.3(1) and (2) of the CPR.

[41] In evaluating the likelihood of the defence succeeding, the learned judge examined the claim along with the various affidavits submitted on the appellant's behalf. She outlined the respective positions taken by both parties and made the following observation at para. [19] of her judgment:

> "… I do not agree with Mr Stewart's submission that this defence is contradictory and illogical. It is undisputed that the defendant was on a major road. It meant that he had the right of way. He says the claimant entered the main road from a minor road and made a right turn 'across his path'. I understand this to mean that in turning right unto Villa Road at the time he did, the claimant entered Villa Road and positioned his vehicle in front of the defendant's path. It may have been inelegantly stated in his affidavit, but I do not find it contradictory. What is also undisputed is that after that manoeuvre, there was a collision involving both vehicles….Both accounts cannot at the same time be true, but each account is plausible. The claimant could have negligently entered the main road when it was unsafe to do so and collided with the defendant who had the right of way and was proceeding along the Villa Road. On the other hand, the defendant could have been speeding and collided with the claimant who had safely completed the right turn unto Villa Road."

[42] In para. [20] of her judgment, the learned judge adopted the reasoning of Sykes J in **Blossom Edwards v Rhonda Bedward**, concluding that:

> "…the defendant's account cannot be defeated at this stage. There are disputed facts which need to be resolved. The fact

> that the defendant did not file a further affidavit disputing the claimant's account is not fatal to his application. Even if he had done so, there would still be the question of where the truth lies. I am not at this stage to conduct a mini trial. The place for the resolution of these factual disputes is at a trial, where all the evidence is in, and the parties subjected to cross examination. I therefore find that the defence has a real prospect of success. This however is not the end of the matter. I must now consider whether the defendant has applied to set aside the default judgment as soon as reasonable practicable and, whether he has provided a good explanation for failing to file his defence on time…."

[43] Based on the learned judge's analysis and the reasoning adopted from **Blossom Edwards v Rhonda Bedward**, it is logical to conclude that the appellant had advanced a defence on the merits which is not fanciful, but instead conveys a realistic prospect of success. This satisfies the requirement under rule 13.3(1)(a) of the CPR, which stipulates that a defendant seeking to set aside a regularly obtained default judgment must demonstrate that there is a genuine defence worthy of adjudication. The learned judge correctly recognised that the presence of contested facts, particularly where credibility is in issue, necessitated a full trial where both parties could present their evidence and be subjected to cross-examination, to determine the cogency of either case. As such, the primary and most substantive criterion for setting aside a default judgment, namely, the existence of a viable defence, had been met. This paved the way for the learned judge to consider the remaining limbs of the test, including whether the application was made as soon as reasonably practicable and whether a good explanation had been offered for the delay in filing the defence.

[44] However, the core complaint appeared to lie not in any omission of the relevant considerations by the learned judge, but rather in the manner in which those factors were weighed. Specifically, the appellant contended that the learned judge, having correctly found that the appellant had met the threshold under rule 13.3(1) by demonstrating a defence with a realistic prospect of success, did not afford that finding sufficient weight. Instead, she is said to have disproportionately emphasised the secondary factors listed

under rule 13.3(2)(a) and (b), namely, the timing of the application and the explanation for the default. It is argued that this approach elevated procedural considerations above the substantive merit of the defence, in a manner inconsistent with established judicial guidance which treats the existence of a viable defence as the primary factor (see **Rohan Smith** para. [39] and **Russell Holdings** at para. [81]). Additionally, Mrs Sewell submitted that the learned judge failed to give adequate consideration to the issue of potential prejudice to the appellant arising from the refusal to set aside the default judgment.

[45] With respect to the requirements under rule 13.3(2), McDonald-Bishop JA (as she then was), in **Flexnon Limited**, offered important guidance at paras. [27] and [28]:

> "[27] It is clear from Rule 13.3(2)(a) and (b) that the court must consider whether the application to set aside was made promptly upon discovering the entry of judgment, and whether a credible explanation has been given for the failure to comply with the prescribed timelines for filing an acknowledgment of service or a defence. **The judge's duty in deciding whether to set aside a regularly obtained judgment does not end upon a finding that the proposed defence has a real prospect of success. The issues of delay and the reasons for non-compliance with the procedural rules must also be taken into account.**
>
> [28] **While it is accepted that the principal consideration is whether the defendant has a real prospect of successfully defending the claim, that factor is neither the sole consideration nor determinative of whether the default judgment ought to be set aside. The court is required to consider the additional criteria set out in Rule 13.3(2) and to assign appropriate weight to each, depending on the circumstances of the case—always bearing in mind the importance of giving effect to the overriding objective.**" (Emphasis added)

[46] The clarification provided in para. [28] of **Flexnon** supports a logical sequence in the application of rule 13.3. That is, the court must first be satisfied that the applicant has met the threshold under rule 13.3(1) by establishing a real prospect of successfully

defending the claim. Only once that foundational requirement is met does it become necessary to consider the additional, albeit secondary, factors under rule 13.3(2)(a) and (b), namely, whether the application was made promptly and whether there is a credible explanation for the procedural default.

[47] This court articulated the importance of considering the merits of a proposed defence in the case of **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 at para. [16], where H Harris JA affirmed the correct approach as follows:

> "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**." (Emphasis added)

[48] Although the learned judge expressly found that the appellant had met the primary requirement under rule 13.3(1), concluding on the evidence that he had a real prospect of successfully defending the claim, she nonetheless refused to set aside the default judgment. This was done on the basis that the appellant had not applied as soon as reasonably practicable after becoming aware of the judgment. Furthermore, she concluded that no satisfactory explanation had been provided for the delay in filing the acknowledgement of service or defence. Her decision thus turned on the appellant's failure to meet the additional considerations under rule 13.3(2), rather than any deficiency in the substantive merits of the defence.

[49] The abovementioned authorities confirm that the primary and most significant consideration in an application to set aside a default judgment is whether the defendant has a real prospect of successfully defending the claim. These decisions also establish that such an application may succeed even where there is no compelling explanation for the default, and even where there has been an inordinate delay. Neither the absence of

a good explanation nor the failure to act timeously is, in and of itself, an automatic bar to relief. In the old English authority of **Evans v Bartlam** [1937] AC 473, Lord Atkin cautioned against treating the discretion as punitive and enunciated at page 480 that:

> "…unless and until the Court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow the rules of procedures."

[50] The authorities are supportive of the position that once a defendant demonstrates a real prospect of success, the court should refuse relief only where the delay is so gross or egregious, or the prejudice so compelling, that justice demands that the judgment stand. Nonetheless, while the existence of a viable defence is the principal consideration, it is not the only factor to be weighed, and neither is it determinative of the question whether a default judgment should be set aside (see **Ameco Caribbean** at para. [53]). As reflected in rule 13.3(2), the court must also assess whether the application was made as soon as reasonably practicable and whether the applicant has provided a credible explanation for the procedural default.

[51] In **Russell Holdings** at para. [129], relying on the authority of **Evans v Bartlam** [1937] 1 AC 473 at page 650, this court stated:

> "…it was suggested that a court considering whether to exercise its discretion to set aside a default judgment should weigh the use of its coercive powers against the need for the court to hear cases on the merits and pronounce judgment. This is a balancing exercise which must take place against the background of the overriding objective."

[52] The weight to be assigned to these considerations is a matter of judicial discretion, to be exercised in accordance with the circumstances of each case and with reference to the overriding objective of ensuring justice is done. It is further a part of the learned judge's duty to address her mind to the question of prejudice in arriving at the appropriate decision.

[53] In addressing the issue of prejudice, the learned judge, at para. [24] of her judgment, articulated the need to carefully balance the competing interests of the parties. She emphasised that this balancing exercise must be undertaken within the framework of the overriding objective of the CPR, which is to ensure that justice is done between the parties. The learned judge noted the respondent's evidence of severe prejudice if the default judgment were to be set aside. She recounted the serious and life-altering injuries he sustained in the accident, including the total loss of his eyesight, as well as the profound financial hardship that had resulted. The respondent explained that he and his family were forced to borrow funds to cover the costs of medical treatment, surgeries, and ongoing medication. The learned judge observed that any further delay caused by setting aside the judgment would exacerbate the respondent's difficulties.

[54] While acknowledging that the appellant had not presented specific evidence of prejudice, the learned judge recognised that the appellant could suffer prejudice if denied the opportunity to defend the claim, as this would render him liable for assessed damages. Nevertheless, the learned judge concluded that the prejudice to the respondent, in light of the seriousness of his injuries and the lapse of time since the accident, at that time being five years, far outweighed any prejudice the appellant might face. She further noted that a trial on the merits might not take place for several years, thereby compounding the respondent's disadvantage. On this basis, the learned judge found that the respondent's prejudice was substantial and outweighed that of the appellant.

Whether the learned judge misdirected herself on the issue of prejudice

[55] The issue of prejudice arises at the third stage of the rule 13.3 analysis. Although prejudice is not expressly listed in rule 13.3(2), it is a relevant discretionary factor that must be considered under the overriding objective in part 1 of the CPR, that is, to deal with cases justly, including ensuring that parties are on an equal footing and that cases are dealt with expeditiously and fairly (see **Attorney General v Roshane Dixon and Attorney General v Sheldon Dockery** [2013] JMCA Civ 23; **Charmin Blake**

(Administratrix of The Estate Claimant of Ernest Blake, Deceased) v Alcoa Minerals of Jamaica Inc [2010] JMCA Civ 31, per Phillips JA as to what is meant by overriding objectives and when such are applicable).

[56] The learned judge's reasoning, as summarised in para. [19] of her judgment, placed substantial emphasis on the respondent' personal circumstances, the catastrophic injuries sustained, the financial hardship, and the extended lapse of time since the accident, in concluding that to set aside the default judgment would "exacerbate" his suffering and disadvantage. In so doing, the learned judge appeared to equate prejudice with sympathy for the respondent's plight, rather than with forensic disadvantage caused by delay.

[57] In those circumstances, the appellant's challenge to the learned judge's conclusion, contending that the learned judge erred by attributing disproportionate weight to the respondent's evidence of prejudice, merits consideration. The appellant pointed out that at the time of the hearing, the respondent had not yet filed his medical reports, in breach of rule 8.11(3) of the CPR. Accordingly, at the time of the application to set aside, the respondent was arguably not in a position to fully advance his claim or properly assess damages. Thus, the setting aside of the default judgment in the circumstances should not have been considered significantly prejudicial to him.

[58] In assessing an application to set aside a default judgment, the trial judge is obliged to consider not only the defendant's explanation for his default and the merits of the proposed defence, but also the prejudice that may be occasioned to the claimant were the judgment to be set aside. Prejudice in the context of rule 13.3 means a demonstrable disadvantage to the respondent's ability to fairly prosecute or prove the claim as a result of the delay. That prejudice is not confined to the mere fact of delay or the inconvenience that flows from having to re-litigate a matter previously determined. Rather, the court must direct its attention to the forensic disadvantage that the claimant may suffer as a result of the lapse of time, that is, the extent to which the delay has impaired the claimant's ability to fairly prosecute the claim if it were to proceed to trial.

[59] Such forensic prejudice may manifest in various ways. It may arise where, because of the passage of time, witnesses' recollections have faded or witnesses are no longer available; where documentary evidence has been misplaced or destroyed; or where the factual matrix has so materially changed that the claimant can no longer prove the case as initially pleaded. It may also occur where third-party rights have intervened, or where the claimant has acted in reliance on the subsisting judgment and would now face practical or financial detriment if the matter were reopened. The central inquiry, therefore, is whether the delay has created a real impairment of the claimant's forensic position, such that setting aside the judgment would place the claimant at a substantial disadvantage in the presentation or proof of the claim. Mere inconvenience, the prospect of further cost, or a general desire for finality are insufficient. The prejudice contemplated is that which strikes at the fairness or efficacy of the claimant's case.

[60] This approach is consistent with the line of authorities in Jamaica and other jurisdictions. Such precedents appear to emphasise that prejudice to the claimant is a material consideration in the court's exercise of discretion to set aside a default judgment. In **Russell Holdings**, the Court of Appeal reaffirmed that even where a defendant shows a real prospect of success, the court may properly refuse relief if the likely prejudice to the claimant is so substantial as to outweigh that consideration. Conversely, in **June Chung v Shanique Cunningham** [2016] JMCA App 5, the absence of any demonstrated hardship or impairment to the claimant's position was treated as a factor favouring the grant of the application. These decisions illustrate that the court's concern is not with delay in the abstract, but with the concrete disadvantage that the claimant may face in re-litigating the matter, whether by loss of evidence, alteration of circumstances, or the erosion of the value of a judgment long relied upon. These decisions illustrate that the court's concern is not with delay in the abstract, but with the concrete disadvantage that the claimant may face in re-litigating the matter, whether by loss of evidence, alteration of circumstances, or the erosion of the value of a judgment long relied upon.

[61] Upon examination of this issue, while I recognise that a default judgment is a thing of value which the court should be loath to remove from a claimant's grasp without good reason, I was unable to identify a specific forensic hardship that the respondent would actually encounter if the judgment were to be set aside. The claim would still exist and could proceed to a finding on the merits of the case, and costs could be ordered to compensate for this loss or delay.

[62] In the present case, the learned judge correctly acknowledged that there was no specific evidence of prejudice to the appellant but that he could suffer prejudice if deprived of the opportunity to defend the claim on a trial on the merits of the case. However, having made that balanced observation, she then weighed the respondent's personal hardship arising from his injuries and financial distress as determinative of the prejudice analysis. She, therefore, determined that those circumstances amounted to prejudice within the meaning of rule 13.3 sufficient to defeat an otherwise meritorious defence. In effect, she appears to have converted sympathy for the respondent into a decisive legal factor.

[63] That approach constitutes, with respect, a misdirection in principle. The purpose of the prejudice inquiry is not to assess which party is more deserving of sympathy, but to determine whether the delay in setting aside would impair the fairness or integrity of the trial process. The respondent's physical condition, tragic as it may be, pre-dated the application and was not caused or aggravated by the appellant's procedural delay. There was no finding that witnesses had become unavailable, that documentary evidence had been lost, or that the respondent's ability to prove his case was diminished by the lapse of 109 days.

[64] Further, the learned judge's conclusion that a trial on the merits "may not take place for several years" introduced speculation rather than evidence. The possible future pace of court proceedings is not prejudice attributable to the appellant's conduct; it is an institutional reality that affects both parties equally.

[65] By allowing those humanitarian considerations to outweigh the appellant's real prospect of success, the learned judge impermissibly allowed emotional prejudice to eclipse forensic fairness. In **Alpine Bulk**, the English Court of Appeal warned that the discretion to set aside default judgments must not be exercised as a reward or punishment, but as an instrument of justice. That principle has been consistently echoed in our courts (see **Blossom Edwards v Rhonda Bedward**).

[66] It appears to me that the authorities, both in Jamaica and in comparable Commonwealth jurisdictions, draw a clear distinction between prejudice arising from delay in litigation and the claimant's pre-existing hardship or suffering resulting from the underlying events. The former is relevant; the latter, though deserving of compassion, is not a proper basis to deny a litigant his day in court. Amongst the principles enunciated by the English Court of Appeal in **Thorn PLC v McDonald** was that any pre-action delay is irrelevant. Furthermore, a court's focus must remain on the procedural fairness of the litigation process, not the relative equities of the parties' personal situations. Accordingly, while the learned judge was entitled to take into account the lapse of time and any case-related disadvantage to the respondent, she misdirected herself by (i) treating non-forensic hardship as legal prejudice, and (ii) using it as a decisive factor to outweigh a conceded real prospect of success. This error vitiates the exercise of her discretion.

[67] The proper approach, consistent with **Rohan Smith** and **Russell Holdings**, would have been to recognise that the respondent's suffering, though compelling, did not constitute prejudice within the meaning of rule 13.3. In the absence of concrete forensic prejudice, and in light of the judge's own finding that the appellant had a good defence, the interests of justice required that the default judgment be set aside and the matter proceed to trial. The mere emotional or financial burden of awaiting the outcome of litigation, while unfortunate, is not the kind of prejudice that ordinarily outweighs the right to a fair trial on the merits. Prejudice must, therefore, be concrete and case-related, not speculative or based on sympathy.

[68] For these reasons, this court finds that the learned judge misdirected herself on the issue of prejudice by conflating the respondent's unfortunate personal circumstances with procedural disadvantage, and by failing to assess whether the 109-day delay had materially affected the respondent's ability to prosecute his claim. Her finding that prejudice to the respondent outweighed that to the appellant cannot stand. Accordingly, the discretion exercised on that basis was plainly wrong and ought to be set aside.

[69] Having regard to the foregoing, I am persuaded that, in respect of the issue of prejudice, although the respondent will inevitably face a delay in the trial and resolution of his claim, any prejudice occasioned by this delay should not outweigh the overarching interests of justice. Furthermore, if the respondent proves successful at trial on the issues, the imposition of costs and interest in his favour would go a long way in defraying such expenses. The fundamental principle guiding the court's discretion in such matters is the importance of ensuring that claims are adjudicated on their substantive merits, with all relevant evidence placed before the court. This ensures a fair and comprehensive determination, preventing injustice that may arise from allowing default judgments to stand where a defence with real prospects exists. I, therefore, find that the appellant succeeds on this issue arising from his grounds of appeal.

Whether the learned judge erred in determining that the application to set aside was not made as soon as reasonably practicable? (Issue 2)

[70] Rule 13.3(2) of the CPR requires the court, in determining whether to exercise its discretion to set aside a default judgment, to consider two key factors:

> (a) whether the appellant applied to set aside the judgment as soon as was reasonably practicable after learning of its entry; and
>
> (b) whether a good explanation has been provided for the failure to file either an acknowledgement of service or a defence.

These factors are not meant to be applied systematically but must be weighed in light of the broader context of the case and in accordance with the overriding objective of dealing with cases justly.

[71] The learned judge reviewed the affidavits of both parties. The appellant's affidavit referenced the proposed defence and offered an account intended to explain the delay. However, the respondent's affidavit raised concerns about the credibility of that explanation, particularly regarding the appellant's timeline for when he allegedly became aware of the claim. The factual dispute in this case required scrutiny, particularly in light of the principle that mere delay, while relevant, is not necessarily determinative where a defence with real prospects exists.

[72] To assess whether the application was made as soon as reasonably practicable, a detailed examination of the chronology of relevant events is necessary. A holistic view must be taken of when (i) the appellant was served, (ii) the default judgment was entered and served, and (iii) efforts were made to remedy the default. Notably, the court must distinguish between mere delay and inordinate or prejudicial delay. It is not the mere passage of time that is decisive, but the context in which the delay occurred and whether it has caused unfairness to the opposing party.

[73] The procedural history, as disclosed in the record, is critical to assessing the appellant's application. It reveals that the claim form and accompanying documents were served on the appellant on 3 November 2020, as evidenced by the affidavit of service sworn by Everett Mullings and filed on 10 November 2020, thereby initiating the time for acknowledgement of service and filing of the defence under the CPR. Notwithstanding the appellant's assertion that he only became aware of the claim on 23 December 2020, there was no timely acknowledgement of service until 18 February 2021, approximately three months and 15 days following service, nor did he file a defence within the prescribed period of 42 days. Default judgment was subsequently entered on 4 January 2021 and served on the appellant's attorney-at-law on 2 December 2021. However, the appellant took no further steps until 21 March 2022, when an amended application to set aside the

default judgment was filed, some 109 days after service of the default judgment. These dates provide the relevant temporal context for assessing the issues of delay, explanation and the appellant's conduct throughout the proceedings.

[74] With respect to the 109-day delay, the applicable case law affirms that, where an applicant demonstrated the existence of a meritorious defence, an application to set aside default judgment ought not to be refused unless the delay is so inordinate as to occasion prejudice or injustice to the claimant. Notwithstanding this principle, the learned judge determined that the appellant failed to act with the requisite promptitude upon becoming aware of the entry of the default judgment, and further concluded that no cogent or satisfactory explanation had been advanced for the failure to file an acknowledgement of service or a defence within the prescribed time.

[75] This calls to mind the admonition expressed by the Court of Appeal of Barbados in **Clarke v Hinds et al** (unreported), Court of Appeal, Barbados, Civil Appeal No 20 of 2003, judgment delivered 4 June 2004, which Edwards JA adopted and quoted, in **Ameco Caribbean** at para. [57], that 'there must reach a point when, because of delay, even a defendant with a meritorious defence is precluded from defending…'. While I agree that the appellant's conduct cannot be described as exemplary and that he failed to file his application as soon as reasonably practicable, I am not persuaded that the delay was so unreasonable or inordinate as to justify denying the appellant's application to set aside the default judgment entered. In the case of **Russell Holdings**, the delay was approximately one year, and, although the Court of Appeal found that time frame to be inordinate, it was nonetheless deemed not to be determinative. In **Rohan Smith**, Phillips JA at para. [44] of her judgment enunciated that "[i]n my view, a period of four or five months, even in light of the history of the matter as I have outlined above, ought not to be regarded as inordinately long". In the instant case, the 109-day delay following service of the default judgment, though regrettable, must be assessed in context.

[76] In response to the appellant's contention that the learned judge failed to attribute sufficient weight to his efforts to defend the claim, it is important to note that the learned

judge did acknowledge the procedural steps taken by the appellant's attempts in February and March 2021. Specifically, the appellant had filed an initial application to set aside the default judgment on 15 March 2021, albeit one which was not heard due to being deemed "premature", and the subsequent amendment filed on 21 March 2022. The "premature" application nonetheless represented an apparent attempt by the appellant to participate in the litigation process and preserve his right to be heard from an earlier date. Despite an acknowledgement of this chronology by the learned judge, it is evident that the learned judge did not consider this earlier effort as material to the evaluation of whether he acted as soon as reasonably practicable, nor to the question as to the sufficiency of the explanation proffered.

[77] At para. [21] of the judgment, the learned judge remarked:

> "[21] …The amended application to set aside the default judgment was filed on March 21, 2022. What is before me is the amended notice of application and not the earlier premature application filed on March 21, 2021. At the time of March 21, 2021 application, there was no default judgment and therefore any analysis of the defendant's promptitude for purposes of CPR 13.3(2)(a) can only properly be made after the judgment came into being…."

[78] While the learned judge was technically correct in noting that the earlier application preceded the entry of judgment and, therefore, could not constitute an application to set aside, it is arguable that, in exercising her discretion and applying the overriding objective, she could have taken a more liberal view of the appellant's efforts. The filing of the premature application still serves as relevant contextual evidence of the appellant's intention to contest the claim. It should not have been entirely disregarded in evaluating the appellant's overall conduct.

[79] In my view, the steps taken by the appellant in early 2021, though procedurally premature, demonstrated a genuine effort to engage with the proceedings, undertaken within a relatively short window, of approximately three months following service of the claim and well in advance of the entry of default judgment (which occurred approximately

eight months and 22 days later). The amended application filed on 21 March 2022, although filed 109 days after service of the default judgment, must be viewed against this backdrop. While the learned judge confined her assessment strictly to the post-judgment period for purposes of rule 13.3(2), there was a legitimate basis to consider, albeit in a limited or contextual manner, the appellant's prior engagement with the proceedings.

[80] Moreover, even in the absence of an expanded analysis of the full procedural history, the 109-day delay between the service of the default judgment and the amended application to set it aside does not rise to the level of inexcusable or egregious delay. The courts have repeatedly held that delay, though relevant, is not automatically fatal where the applicant has demonstrated an arguable defence and there is no evidence of irreparable prejudice to the opposing party. The appellant's cumulative actions, viewed objectively, reflect an honest, if imperfect, effort to bring his application before the court within a timeframe that cannot reasonably be regarded as egregious. There is no indication that the respondent suffered tangible prejudice as a result of this period of delay, as he was not in a position to proceed with assessing damages. In these circumstances, while it was proper for the learned judge to take the issue of delay into account, the weight attributed to the 109-day delay appears disproportionate, especially when measured against the overriding goal of ensuring that disputes are resolved on their merits rather than on procedural technicalities. The learned judge's error, therefore, lies not in considering the delay but in allowing it to eclipse the broader and more compelling considerations, including the merits of the defence and the absence of demonstrable prejudice.

Whether the learned judge erred in concluding that the appellant did not provide a good explanation for his failure to file an acknowledgement of service and defence within the required time? (Issue 3)

[81] Implicit within the need to determine if the application was made as soon as reasonably practicable is the necessity of examining the reasons for any delay. While rule 13.3(2)(a) and (b) are conceptually distinct, there is an inevitable overlap in practice, as

the court must understand why an application was not made promptly to determine whether the delay is excusable. The explanation for the delay, therefore, becomes a contextual element of the inquiry into the timeliness of the application.

[82] This court has observed in several decisions that there is no requirement expressed in rule 13.3(2) for an explanation to be given for the delay (see for example **Russell Holdings** at para. [117] and **Rohan Smith** at para. [39]). One, however, is expected where a litigant seeks relief against a default judgment made against him. As such, the explanation must be credible and not amount to intentional disregard of the rules. The rule does not require proof of an insurmountable obstacle. In this regard, paras. 6 – 10 of the appellant's affidavit, filed on 21 March 2022, is relevant as it sets out his account of the circumstances surrounding the delay and is detailed as follows:

> "6. That I became aware that the claim herein was made against me on December 23, 2020, when I received documents from a process bearer. That I used the services of Orion Insurance Brokers Limited to obtain my insurance from Autosmart Insurance (Autosmart). Any contact with Autosmart is usually made through my insurance brokers.
>
> 7. That I received the documents from the process server right in the middle of the Christmas holiday and I was very busy with work and other personal matters. I tried to contact Orion Insurance Brokers in early January, I had difficulty contacting them by telephone, Each time I called I was unable to get through to the office as their telephone lines were always busy.
>
> 8. That I am a licensed bailiff and I work with another bailiff who operates out of Kingston. His name is Rohan Gordon, he is responsible for repossessing motor vehicles across the island for a financial institution based in Kingston. In January 2021, I was very busy with my work repossessing motor vehicles. I usually leave my home at around 5 a.m. and returned late in the evening. Sometimes I did not return home until the next day. During all this, I forgot about the claim documents and did not remember about them until early February 2021

> 9. That I advised my insurance brokers that I had been served with documents for the claim herein via telephone on February 5, 2021 and was assured by the personnel at Orion that General Accident Insurance Company/Auto Smart Insurance would handle the situation.
>
> 10. That on February 19, 2021, I received a telephone call from Mrs. Kerry-Ann Sewell Attorney-At-Law who advised me that she was retained by General Accident Insurance Company/AutoSmart Insurance Company to defend me in this matter."

[83] The learned judge carefully reviewed the appellant's evidence and, in assessing the adequacy of the explanation, provided a comprehensive and detailed analysis. At para. [23] of her judgment, she ultimately found the explanation inadequate:

> "[23] The defendant's evidence suggests that for an extended period after he was served, he was unable to reach his brokers by telephone. But he gives no details of his attempts. This evidence is less than satisfactory. Besides, why would he rely only on telephone contact? Given the importance of the court documents, which as a bailiff he ought to fully appreciate, why did he not go into the physical office of his brokers and hand the court documents to them? The notes to defendants which accompanied the claim form and the particulars of claim are written in lay man's language and they make very clear the consequences of a defendant's failure to file an acknowledgement of service and a defence within the time stipulated. To state, somewhat blithely, that he was busy; got caught up with unspecified personal obligations; forgot about the claim, and as a consequence did not get around to dealing with it on time, is not in my view a good explanation. The defendant's evidence displays a casual lack of regard for the court and its processes. I am surprised at this type of evidence coming from a bailiff. I find that the defendant's explanation for not filing an acknowledgement of service and a defence on time, is not a good one."

[84] The appellant's stated reasons are far from acceptable; whether considered individually or collectively, they do not constitute a satisfactory explanation. As a licensed bailiff, the appellant ought reasonably to have appreciated the seriousness of being served with court documents initiating court proceedings. It should have been readily

apparent to a person in his position, particularly one whose profession involves familiarity with legal processes, that the court documents were of significant importance and demanded prompt attention. However, the learned judge's characterisation of the explanation appeared to flow from a moral assessment of the appellant's conduct that eclipsed a balanced appraisal of its reasonableness. Significantly, no finding was made that the appellant's failure was wilful.

[85] In **Blossom Edwards v Rhonda Bedward** and the English authority of **Alpine Bulk**, the courts cautioned that the discretion to set aside should not be exercised on a moral basis or to punish a party for being negligent. So even though the appellant did not provide a good explanation for his failure to file an acknowledgement of service or defence on time, it is essential to underscore that the absence of a satisfactory explanation does not, in itself, preclude the granting of relief. The court's discretion under rule 13.3 is broad. Still, it must be exercised in light of all the circumstances, including whether the proposed defence is meritorious and whether irreparable prejudice would result to the other party. The question is, therefore, whether, despite the failure, justice is better served by allowing the matter to be tried.

[86] This position has been consistently affirmed in case law, as seen in the decision of **Trade Board Limited and Another v Daniel Robinson** [2013] JMCA Civ 46 at para. [16]. This court cited with approval the principle established in **Finnegan v Parkside Health Authority** [1998] 1 All ER 595, outlined in the headnote, which states:

> "…
>
> '…**the absence of a good reason for any delay was not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension, but the court was required to look at all the circumstances of the case and to recognize the overriding principle that justice had to be done.**
>
> That principle is particularly applicable where no prejudice, as a result of the delay, has been asserted or proved. The principle has been relied upon by this court in **Fiesta**

Jamaica Ltd v National Water Commission [2010] JMCA Civ 4." (Emphasis added)

[87] This principle reaffirms that procedural failings should not automatically trump the substantive merits of a case, especially where justice demands otherwise. There is no irredeemable prejudice to the respondent in this matter that cannot, in the opinion of this court, be addressed by an appropriate costs order, early case management and potentially, ordering that the appellant pay into court a specified amount of money to await the final disposal of the case (see rule 26(1) (3) and (4). While the respondent's default judgment is a significant factor, it must be balanced against the appellant's good prospect of success. This issue is, therefore, not a futile ground in itself and should succeed.

Conclusion

[88] This case again illustrates the importance of ensuring that applications to set aside default judgments are approached with careful attention to the balance between procedural discipline and substantive justice. The exercise of discretion under rule 13.3(2) of the CPR, therefore, requires a careful balancing of all pertinent factors, guided at all times by the imperative of achieving substantive justice in the circumstances of each case.

[89] Having reviewed the relevant authorities, it is evident that while procedural compliance and timeliness are significant considerations under the rule, they must be assessed within the broader context of the court's duty to give effect to the overriding objective of ensuring justice. Although delay and the absence of a satisfactory explanation are relevant and may weigh against the appellant, they are not, in themselves, determinative of the outcome. The authorities consistently underscore the importance of evaluating the merits of the proposed defence as a primary factor; a factor that appears to have been insufficiently considered in this instance.

[90] Although the explanation for the delay offered by the appellant was neither compelling nor adequate, it does not operate as a complete bar to his application,

particularly where the proposed defence has a reasonable prospect of success. In such circumstances, the absence of a reasonable explanation, while relevant, should not be treated as determinative and deserves proportionate consideration. It follows that the exercise of discretion cannot stand.

[91] In the present case, I am satisfied that the learned judge, while correctly identifying the principles governing the exercise of discretion under rule 13.3, failed to accord due and proportionate weight in the application of those relevant considerations, particularly the potential merits of the defence. She found a real prospect of success but treated delay and the appellant's inadequate explanation as determinative without identifying exceptional prejudice or injustice to the respondent. The cumulative effect of these errors is that the learned judge's exercise of discretion was founded on a misdirection in principle. The discretion was therefore not exercised in accordance with rule 13.3 or the guidance of this court.

[92] In conclusion, this court's intervention is warranted not as a substitution of its own views, but because the learned judge's decision discloses a misdirection in principle resulting in a manifest injustice, an outcome the appellate process exists to correct.

[93] Although costs generally follows the event, the courts retain a discretion in the award of costs. Accordingly, the respondent may still be awarded costs in an appeal even where the appellant succeeds, particularly where the appeal stems from the appellant's own failure to file a defence, as is the case here. It was the appellant's failure to file his defence within the stipulated time that necessitated the application, which resulted in the default judgment being entered in the first place. The subsequent application to set aside that default judgment, now the subject of this appeal, arose directly from the appellant's default.

[94] Having given due consideration to the issue of costs, I am of the view that an appropriate order in all the circumstances is that costs be awarded to the respondent.

[95] I accordingly propose that the appeal be allowed, the order of the learned judge and the default judgment set aside with costs to the respondent. The defendant should be granted an extension of time to file his defence for the matter to proceed in the court below for determination on its merits.

STRAW JA

ORDER

1. The appeal is allowed.

2. The order of Jarrett J (Ag), made on 26 July 2022, is set aside.

3. The default judgment entered against the appellant, Kurt Dunkley, on 4 January 2021, is set aside.

4. The defence filed by the appellant on 8 April 2021 is permitted to stand.

5. A case management conference is to be scheduled at the earliest possible time.

6. Costs of the application and costs thrown away in the court below to the respondent to be taxed, if not agreed.

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