[2015] JMCA App 44

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 138/2012

APPLICATION NOS 56 AND 57/2014

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE MANGATAL JA (AG)

BETWEEN	**PETER HARGITAY**	**APPLICANT**
AND	**RICCO GARTMANN**	**RESPONDENT**

Ian Wilkinson QC and Mrs Shawn Wilkinson instructed by Wilkinson & Co for the applicant

Stephen Shelton QC and Mrs Maliaca Wong instructed by Myers, Fletcher & Gordon for the respondent

27, 28, 29, 30 May, 19 December 2014 and 18 December 2015

PANTON P

[1] There are several apparently unresolved important issues of fact in this case. That situation accounted for our decision handed down on 19 December 2014. My learned sister, Phillips JA, has ably demonstrated these issues in her reasons for judgment. I am in agreement with her reasoning and have nothing to add.

PHILLIPS JA

Introduction

[2] Before the court were two notices of application for court orders both dated 3 January 2014 and filed on 4 April 2014. The first, application no 56/2014, was to discharge the orders of Brooks JA contained in a judgment delivered on 18 December 2012, in which he refused an application for stay of execution of the judgment or order of Daye J pending the hearing of the appeal. The second, application no 57/2014, is for a stay of execution of the orders of Daye J contained in his judgment delivered on 5 December 2013 in which he refused an application by the applicant to set aside a default judgment. He ordered as follows:

> "1. The Application of the Defendant for leave to file Defence out of time is refused;
>
> 2. The Application of the Defendant to Set Aside the Default Judgment is refused;
>
> 3. Judgment in Default of Defence is varied to reflect the principal sum of CHF 1,164,000.00 as at December 31, 1991 per Statement of Account dated November 7, 2001.
>
> 4. Interest to be assessed in accordance with the Statement of Account dated November 7, 2001.
>
> 5. Assessment of Interest set for **June 5, 2014** at **10:00 am**;
>
> 6. Leave to appeal granted;
>
> 7. Fifty percent (50%) costs to the Claimant to be agreed or Taxed;
>
> 8. Application for stay of this Order refused."

The orders sought in respect of Brooks JA's judgment are as follows:

"1. That the Judgment and Orders made by Brooks, JA sitting as the single judge, on the 10th and 18th days of December, 2012 dismissing the Applicant's application for a stay of execution of the oral Judgment by Daye, J made on the 26th October, 2012 be discharged or set aside.

2. That there be a stay of execution of the said Judgment and Orders made by Brooks, JA, sitting as the single judge, on the 10th and 18th days of December, 2012 pending an inter parties [sic] hearing of this application and pending the hearing of the instant appeal.

3. That, if necessary, the time for making this application be enlarged or extended.

4. That there be liberty to apply.

5. There be such further and other relief as may be just; and

6. Costs to be costs in the appeal."

The applicant also sought the following orders against Daye J's judgment:

"1. That there be a stay of execution of the Judgment in Default of the Judgment and Orders by Mr. Justice Daye dated the 5th day of December, 2013 and the 6th day of December, 2013, respectively, pending an inter partes hearing of this application and/or pending the hearing of the instant appeal to set aside the said Judgment or Orders.

2. That there be a stay of execution of the Judgment in Default of Defence … and the Judgment and Orders by Mr. Justice Daye dated the 5th day of December, 2013, and the 6th day of December, 2013, respectively, pending an inter partes hearing of this application and/or pending the hearing of the instant appeal to set aside the said Judgment or Orders.

3. Further, or alternatively, an Order restraining the Respondent directly and/or his servants or agents from registering, or taking any steps to have registered the Judgment in Default… and the Judgment and Orders by

Mr. Justice Daye dated the 5th day of December, 2013 and the 6th day of December, 2013, respectively, pending an inter partes hearing of this application and/or pending the hearing of the instant appeal to set aside the said Judgment or Orders.

4. Further, or alternatively, an Order restraining the Respondent directly and/or his servants or agents from registering, or taking any steps to have registered, in any jurisdiction overseas, in particular the United Kingdom and Switzerland, the Judgment in Default of Defence…and the Judgment and Orders of Mr. Justice Daye…pending an inter partes hearing of this application and/or pending the hearing of the instant appeal to set aside the said Judgment or Orders.

5. That, if necessary, the time for making this application be enlarged or extended.

6. That there be liberty to apply…"

[3] On 19 December 2014, we gave our decision in which we granted both applications and ordered as follows:

Application No 56/2014

"1. Application granted.

2. The judgment and orders made by Brooks JA sitting as the single judge of appeal on 18 December 2012, dismissing the applicant's application for stay of execution of the oral judgment of Daye J made on 26 October 2012 is hereby discharged.

3. The appeal is to be listed as soon as possible.

4. Costs to be costs in the appeal."

Application No 57/2014

"1. Application granted.

2. That there be a stay of execution of the judgment in default of defence dated 17 November 2004, filed in the Supreme Court on 18 November 2004, perfected on 23 June 2008 and amended after being refiled in the Supreme Court on 10 November 2011 and the orders of Daye J dated 5 and 6 December 2013 refusing to set aside the default judgment pending the hearing of the appeal – SCCA No 138/2012.

3. That the respondent is restrained either directly or through his servants and or agents from registering or taking any steps to have the default judgment registered in any jurisdiction overseas, in particular the United Kingdom and Switzerland, pending the hearing of the appeal – SCCA No 138/2012 to set aside the orders of Daye J.

4. Costs to be costs in the appeal."

We promised to provide our reasons for the decision and this is a fulfilment of that promise.

Background to the applications

[4] Peter Hargitay (the applicant) and Ricco Gartmann (the respondent) are both Swiss citizens and former business associates. It appears that the parties communicated with each other in the German language. In or about 1990, they entered into a loan agreement in Switzerland whereby the respondent agreed to lend money to the applicant. Subsequently, the applicant had problems servicing the loan and consequently the relationship between the parties deteriorated.

[5] The respondent sought to rely on letters dated 10 March 1992 and 10 June 1999, which were originally in the German language, as admission of the debt. The letters in their entirety read:

Letter dated 10 March 1992:

"Acknowledgement of Debt
Mr. Péter-J Hargitay, c/o Hargitay and Partners Ltd, Zollikerstrasse 58, 8702 Zollikon

Herewith acknowledges to owe to

Mr Rico Gartman, Lützelseehöh, 8634 Hombrechtikon

the amount of

US$700'000.- (US Dollar seven houndred [sic] thousand)

This amount will be due on December 31, 1991. Furthermore, the profit sharing agreed upon as well as the interest payments of 10 percent as of December 31, 1991 will be added.

Zurich, March 10, 1992 signature:
[signature]

_____
Péter-J Hargitay"

Letter dated 10 June 1999:

"Mr Ricco Gartmann
Luetzelsee 12
8634 Hombrechtikon

Basel, June 10, 1999

Debts

Dear Ricco

As of 31.12.1991 there existed a debt in your favour in the amount of CHF 1'164'00.--. This amount was then only used to buy back the shares in the Hargitay Group Holding AG, Zug, from the IPT AG, Baden, a subsidiary of BBC.

According to your accounting I paid back the amount of totally CHF 509'125'95 between 31.12.1991 and 21.7.1994. Thus, as of

21.7.1994 there would have been a capital balance of CHF 654'874.05 to be booked as remainder of debt.

During 31.12.1991 and 30.6.1999 interests in the total amount of CHF 1'540'693.80 were accumulated despite of my repayments mentioned above. This increases the balance calculated by your accounting to CHF 2'049'919.75 as of today.

In summary, this means that the actual capital debt amounts to totally CHF 654'874.05; the accumulated interest payments you charged me at a rate of 10 percent per annum amount to CHF 1'540'693.80.

With respect to the above period of 7.5 years these amounts tally with an accumulated interest growth of 235 percent, i.e. an average interest rate of 31.33 percent p.a.

Because of reasons which are known to you in detail I was not able to make further payments in the above mentioned matter between 1995 and 1999.

Since beginning of 1999 things are back to normal so that I will soon be able to dispose of liquid funds again.

I am pleased to confirm to you that I will start to make further repayments as soon as possible.

As far as the capital interests and the compound interests are concerned you have told me, that "a solution will be found". I herewith formally ask you to

a) freeze the interest as of today's date (moratorium of interest); and

b) cancel the accumulated interests partially after I will have again started to pay back the capital in instalments, if this seems possible for you.

I like to thank you indeed for your continuing support.

Yours,

[signature]
Peter J. Hargitay"

[6] By a specially endorsed writ of summons dated 31 January 2002, the respondent commenced an action in the Supreme Court against the applicant to recover the sum of 2,623,924.65 Swiss francs as the debt due and owing to him as at 31 December 2001. The respondent filed an order for substituted service on the offices of the applicant's attorneys-at-law on 18 November 2002. On 24 February 2003, the applicant challenged the jurisdiction of the court on the basis of nationality by filing a summons to dismiss the action for want of jurisdiction. Straw J made an order on 16 December 2003, dismissing the summons. The applicant then filed, on 6 February 2004, a notice of application for courts orders, with supporting affidavit, seeking leave of the court to extend time within which to appeal against the dismissal. This application was not pursued.

[7] On 10 November 2004, the applicant made an application for court orders to file his defence out of time. This application was supported by an affidavit which exhibited a draft defence. In it, the applicant denied owing the sum claimed or any sum at all. The respondent, on 18 November 2004 filed judgment in default of defence in the following terms:

> "The Defendant PETER HARGITAY having not entered a defence, IT IS HEREBY ADJUDGED that the Claimant do recover:-
>
> (i) The total sum of 3,066,487.23 Swiss Francs.
>
> (ii) Court fees and attorneys fixed costs in the sum of JA$21,464.72.
>
> (iii) Interest on the total sum of 3,066,487.23 Swiss Francs from the date of Judgment to payment at the statutory rate of 6% per annum or $504.08 per day from the date of judgment to payment.

(iv) Interest on court fees and attorneys fixed costs of JA$21,464.72 at the statutory rate of 6% per annum or $3.53 per day from the date of judgment to payment."

This was followed by an amended notice of application filed by the applicant, on 3 February 2005, to file defence out of time. This application was adjourned for hearing on 30 September 2005.

Order of Harris J

[8] When the matter came before H Harris J (as she then was) on 30 September 2005, the applicant made an application to dismiss the claim on the ground that it was statute barred. The learned trial judge on 25 October 2005 ordered that the respondent's claim be struck out stating that the claim would have been statute barred from the date on which the action commenced. She also said that the documents, on which the respondent sought to place reliance as an acknowledgement of the debt, had been translated into the English language but the translation had not been authenticated and so the court ought not to take cognizance of them. Harris J also made a consequential order dismissing the applicant's application for extension of time to file defence out of time. She made no mention of any submissions in her judgment in respect of this application and did not give any reasons for dismissing the same. There was no appeal against this second order regarding the extension of time to file defence out of time.

[9] Being dissatisfied, the respondent, on 24 January 2006, filed an amended notice and grounds of appeal challenging the order of Harris J. The Court of Appeal, having

heard the appeal on 6 and 7 March 2007, ordered on 15 March 2007 that the appeal be allowed, the order of the court below be set aside with costs to be agreed or taxed, both in the Court of Appeal and the court below, to the respondent. The claim was essentially restored. The Court of Appeal did not make any specific ruling in the order with regard to the applicant's application for leave to file defence out of time, which had been dismissed by the learned trial judge, neither was there a counter appeal against the said order.

Cooke JA's decision

[10] Cooke JA, who delivered the leading judgment of the court, found that the learned trial judge was correct in holding that the respondent's action was brought beyond the limitation period. However, he said the Limitation of Actions Act (the Act) does not provide for an absolute bar against the initiation of a suit after the expiry of six years from the date when the cause of action for a debt arose. If there is an acknowledgment by the debtor, he said, time begins to run afresh from such acknowledgment. He observed that the respondent urged the court below to say that there was evidence of an acknowledgment, by the applicant, of the debt claimed. Harris J, he said, had dealt with the effort of the respondent, in that regard, by stating that:

> "The [respondent] sought to rely on letters dated March 10, 1992 and June 10, 1999 as well as the statement of accounts as proof of the acknowledgment of the debt. These documents are written in German. Purported English translations of only the letters were exhibited.
>
> In my view, the [respondent] is obliged to place before the court documents, which the court could deem authentic, in

> support of allegations made by him. When it is desired to rely on a document in foreign language the usual course is to obtain a translation of such document by a qualified translator and exhibit the translated document together with an affidavit or a certificate of the translator verifying the translation. This was not done by the [respondent].

Further, she said:

> "…Those documents on which the [respondent] seeks to place reliance, as the acknowledgment of the debt, have not been authenticated. This court, therefore, ought not to take cognizance of them…

And then, later in the judgment she stated:

> "Although a statute barred debt may be revived by the debtor's acknowledgment, such acknowledgment must not only be clear and unequivocal but it must be pleaded."

[11] It was Cooke JA's view that at that stage of the proceedings in the court below the respondent had done enough to show that if the matter proceeded to trial he was possessed of potential evidence of substance which would demonstrate that the Act was inapplicable. He then found that Harris J was in error in holding that at that stage, it was necessary for the respondent to have exhibited a translation of such documents supported by an affidavit or a certificate of the translator verifying the translation. This evidential requirement, he found, was pertinent to the trial of the action. He opined that if the applicant had raised the prohibition provided by the Act in its defence, which did not exist, the respondent would have countered that there was acknowledgment of the debt based on documents which he held which would then be for the trial court to determine their admissibility.

[12] The learned judge of appeal observed that in the judgment of Harris J, no mention had been made of the Civil Procedure Rules, 2002 and stated that reference must be made to those rules as it pertains to striking out of a statement of case. This action, he said, is a draconian order. Such an order, while compelling in suitable circumstances, should be informed by caution lest litigants are deprived of access to the "judgment seat". His view was that this drastic step of striking out a statement of case should only be considered when such statement of case can be categorized as entirely hopeless.

[13] In addressing the view held by Harris J that the acknowledgment "must be pleaded" in the statement of claim, Cooke JA stated that it does not appear that the learned trial judge had given any or sufficient impact to the words "or reply" in the passage quoted, by her, from Bullen and Leake's Precedents of Pleadings, 11th edition, page 884, in her judgment, which reads as follows: "The facts as to acknowledgment or part payment should be expressly pleaded in the statement of claim or reply". He stated that the respondent could not have pleaded acknowledgment in a reply as there was nothing to reply to (the defence having not been filed). Cooke JA also said that "[e]n passant it is to be observed than [sic] in the draft defence (para. 3), the issue of the respondent's claim being statute barred [was] not pleaded". After quoting in full a passage from the judgment of Lawton J in **Busch v Stevens** [1962] 1 All ER 412; 416 which was quoted, in part, by the learned trial judge in her judgment, Cooke JA found that it was not imperative that the acknowledgment "must be pleaded" in the statement

of claim and that failure to so do would result in fatal consequences. The statement of claim, he said, therefore, should not have been struck out on that basis.

[14] The finding of Harris J in support of her order striking out the claim that "the sum [the applicant] admitted owing is less than that claimed" was an erroneous one said Cooke JA. It was his view that that finding was not by itself conclusive of the issue of whether or not the letter was evidence of acknowledgment of the debt claimed. An examination, he said, of any rival positions as to accounting would, if it arose, be done at the trial. It is noteworthy that all three judges who heard the appeal ruled that the letter of 10 June 1999 ought to have been considered by Harris J. They all made the point that the applicant had not denied the contents of the letter or stated that the translation from German language to English was inaccurate. They all also stated that the issue of whether the letter of 10 June 1999 could be construed as an acknowledgement of the debt was a matter for the trial judge. The appeal was allowed.

[15] The respondent on 23 June 2008 perfected the default judgment filed on 18 November 2004 and served a copy on the applicant's attorneys-at-law on 3 July 2008. Later that month, on 31 July 2008, the applicant filed a notice of application for court orders with supporting affidavit which sought, in part, the following orders:

1. That the judgment in default of defence dated 17 November 2004 and filed on 18 November 2004 and served on him via his attorneys-at-law, Ian G Wilkinson & Company on 3 July 2008, be set aside pursuant to part 13 of the Civil Procedure Rules, 2002.

2. That the defendant be granted leave to file a defence to the instant action within 14 days of the hearing of this application.

[16] After several adjournments of the hearing of the application to set aside the default judgment, the respondent on 10 November 2011 re-filed the 2004 default judgment without notifying or serving a copy on the applicant. The following year, on 18 January 2012, the respondent filed an application in England seeking permission to register, in England, the default judgment which was filed on 18 November 2004 and re-filed in November 2011. Although not re-served, the application was heard, in England, and on 20 January 2012, Master Leslie made the following order:

> "1. that judgment of the Supreme Court of Judicature of Jamaica filed on 18 November 2004 and perfected on 23 June 2008, in which it was ordered that Ricco Gartmann, whose address for service in c/o Salans LLP, Millennium Bridge House, 2 Lambeth Hill, London EC4V 4AJ, the judgment creditor, recover against Peter Hargitay, whose address for service is 48A Upper Brook Street, London W1K 2BP, the judgment debtor, the sum of:
>
> (a) CHF 3,066,487.23 (Swiss francs)
>
> (b) court fees and attorney's fixed costs in the sum of JA$21,464.72 (Jamaican dollars);
>
> (c) interest on the total sum of CHF3,066,487.23 at the statutory rate of 12% per annum from 18 November 2004 to 21 June 2006 (a total for that period of CHF585,741.01) and at the statutory rate of 3% per annum, or CHF252.04 per day, from 22 June 2006 to payment; and
>
> (d) interest on court fees and attorney's fixed costs of JA$21,464.72 at the statutory rate of 12% per annum from 18 November 2004 to 21 June 2006 (a total for

that period of JA$4,100.05) an at the statutory rate of 6% per annum, or JA$3.53 per day, from 22 June 2006 to payment

for debt and costs, be registered as a judgment in the Queen's Bench Division of the High Court of Justice under the Administration of Justice Act 1920.

2. The judgment debtor has permission to apply to set aside the registration within 21 days after service on him notice of registration, under rule 74.6 of the Civil Procedure Rules, if he has grounds for doing so and execution on the judgment will not issue until:

   (a) after the expiration of that period;

   (b) after the expiration of any extension of that period granted by the court; or

   (c) where an application is made to set aside the registration, the application has been disposed of.

3. The costs of this application be summarily assessed in the sum of £1,500.00 and be added to the judgment.

[17] The applicant was served with Master Leslie's order on 24 April 2012 and on 1 May 2012 filed a "re-listed" notice of application for court orders to set aside the default judgment pursuant to part 13 of the Civil Procedure Rules, 2002. On 3 May 2012, D O McIntosh J, upon an ex-parte application, granted to the applicant a stay of execution of the judgment in default, pending the hearing of the application to set aside the said judgment. The formal order was filed on 7 May 2012. The learned judge in Chambers ordered that the applicant's application to set aside the default judgment was to be heard on 23 July 2012 at 2:00 pm for two hours.

[18] The applicant again, on 12 May 2012, filed notice of application for court orders to set aside the default judgment and to file defence out of time. While awaiting the date (23 July 2012) for the hearing of the applicant's application to set aside the default judgment, the respondent, on 19 June 2012, filed a notice of application for court orders, with supporting affidavit, to set aside the order for stay of execution granted by D O McIntosh J on 3 May 2012. The grounds on which the respondent sought to set aside the order were as follows:

> "1. That the Order made on May 3, 2012 to stay the execution of the default judgment was obtained without notice of the application to the Claimant.
>
> 2. The application for stay filed on April 30, 2012 [sic] was in relation to a judgment obtained in June 2008 and served on the defendant in July 2008.
>
> 3. The evidence in support of the application did not accurately represent the material facts.
>
> 4. The application to stay the judgment has only been made at this stage to attempt to stop enforcement of the judgment registered in England where the Defendant now has assets having apparently removed his assets from the jurisdiction of this Court.
>
> 5. The stay is another attempt by the Defendant to delay and deprive the Claimant of his due debt.
>
> 6. That the justice of the case requires that the stay be discharged."

[19] In July 2012, the applicant's application to set aside the default judgment and to file defence out of time was argued before Daye J. The learned trial judge reserved his judgment and on 26 October 2012, he delivered an oral judgment refusing the application to set aside the judgment, but ordered that it should be varied. On 9

November 2012, the applicant filed notice and grounds of appeal against the oral judgment of Daye J. At the time of filing, there was not yet a formal order in respect of Daye J's decision. The details of the order appealed were as follows:

> "(a) the Judgment in Default of Defence (dated the 17th day of November, 2004 and filed on the 18th day of November, 2004; signed on the 23rd day of June, 2008 and amended after being re-filed on the 10th November, 2011) is varied to reflect the principal sum that the Defendant acknowledged as owing.
>
> (b) the issue of any interest payable on the said principal sum is to be determined after an assessment in open court.
>
> (c) The Defendant's application for a stay of execution pending appeal is refused.
>
> (d) One-half costs of this application awarded to the Claimant…"

The following reliefs were sought:

> "i. That the appeal be allowed and the Order made by Mr. Justice Daye on the 26th October, 2012 (particularly relating to varying the Default Judgment; ruling that interest on the relevant principal sum be assessed and awarding one-half costs to the Claimant) be set aside.
>
> ii. That this Honourable Court allows the Appellant's application to set aside the Judgment in Default of Defence and set aside the said Judgment in Default of Defence.
>
> iii. That this Honourable Court allows the Appellant's application to file a Defence out of time and grants the Appellant fourteen (14) days from the Judgment of this Honourable Court to file his said Defence.
>
> iv. That the Costs of this appeal, of the applications by the Appellant to set aside the Judgment in Default of Defence and to file defence out of time and all other interlocutory applications after the decision of the Court of Appeal on the 15th March, 2007 be awarded to the Appellant."

The appeal

[20] The applicant, on 9 November 2012 filed notice and grounds of appeal, which were later amended after the delivery of Daye J's written judgment, summarised as follows:

1. Daye J erred in law in failing to rule that no default judgment should have been entered while the appellant's application was pending and that the said judgment is irregular and should be set aside *ex debito justitiae*.
2. The learned judge erred in law in failing to grant the relief sought by the appellant to set aside the judgment in default of defence and for leave to file defence out of time.
3. The learned judge erred in law in failing to appreciate that the appellant had preferred good reasons for the delay in filing his defence out of time.
4. The learned judge failed to appreciate the effect of the ruling of the Court of Appeal with respect to the orders made by Harris J when she struck out the claim.
5. The learned judge failed to appreciate that the Court of Appeal did not rule that the case was not statute barred but that the respondent had a chance to meet any limitation defence by pleading acknowledgement of debt in the reply to defence.
6. The learned judge failed to appreciate that the Court of Appeal did not rule that there was an acknowledgement of the alleged

debt by the appellant but that there was material which provided some basis on which the respondent could make the plea in a reply to be determined at trial and in light of this should not have proceeded to obtain a default judgment until the various matters were determined by the Supreme Court.

7. The learned judge failed to consider the appellant's affidavit in support of his proposed defence and the various challenges to the claim including the repayment of 1,000,000.00 Swiss Francs to the respondent.
8. The learned judge erred in failing to appreciate that the proposed defence has a reasonable prospect of success for, inter alia, there are crucial inconsistencies with respect to the sum allegedly owing, there was no evidence justifying the charging of interest and no basis upon which the respondent was entitled to charge compound interest.
9. The learned judge erred in varying the default judgment by reducing the sum without basis or justification and not stating in his oral or written reasons that the revised principal sum was 1,164,000.00 Swiss Francs (but which was stated in the formal order), when he should really have set it aside totally.

[20] The applicant also filed, in the Court of Appeal, on 13 and 26 November 2012, respectively, notices of application for court orders for stay of execution of the oral

judgment or order of Daye J refusing the application to set aside the default judgment, pending the hearing of the applications and/or the appeal. Both applications sought the same reliefs. One of the reliefs sought in the applications was that there be a stay of execution, in Jamaica and overseas, of the default judgment pending an inter partes hearing of the applications and/or the hearing of the appeal. The respondent strenuously opposed the applications.

[21] Brooks JA, on 10 December 2012, heard the applicant's applications and on 18 December 2012, before the written reasons of Daye J had been delivered, gave a written judgment refusing the said applications essentially stating, inter alia, that he was not convinced that the applicant would be able to satisfy this court on appeal that Daye J was wrong in refusing to set aside the judgment and that the applicant had no real prospect of success on appeal.

[22] In deciding whether the appeal had any merit, the learned judge considered two issues, namely; whether the judgment in default was properly entered and secondly, whether there was any merit in the limitation point. It was Brooks JA's view that where this court makes an order reversing the decision of the court below, unless the order further specifies that the application in question is to be re-heard or is otherwise restored, the judgment of this court finalises that application. For that submission, he relied on the judgment of Barwick CJ in **Bailey v Marinoff** [1971] HCA 49; (1971) 125 CLR 529 at 530. He found that there was no application to extend time, in place, when the default judgment was entered on 23 June 2008. Harris J's dismissal of the application to extend time remained undisturbed. The entry of the judgment in default

of defence, he said, would, therefore, not have breached rule 12.5(e) of the CPR, as contended by the applicant, and would have been regularly and properly entered.

[23] Brooks JA stated that there is no serious dispute that when the claim was filed, no payment against the alleged debt had been made for over six years. The essence of the dispute concerning the operation of the provisions of the Act, is whether there had been an acknowledgment of the debt within six years prior to the filing of the claim. This issue turns on the letter of 10 June 1999. The learned judge reiterated that he was not convinced that the applicant would be able to satisfy this court on appeal that Daye J was wrong in refusing to set aside the judgment and found that portions of the letter seemed to be an acknowledgment of a capital figure which he stated was 654,874.05 Swiss Francs. The applicant, he said, had not denied the contents of the letter. Brooks JA therefore ruled that there was no real prospect of success on appeal. In the event that he was wrong on the issue that the application to extend time was no longer before the court, the applicant, he said, had not placed any information before him that convinced him that payment of the principal sum would stifle the appeal or cause him irremediable harm. In applying the principles set out in **Hammond Suddard Solictors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, Brooks JA found that there would be a greater risk of injustice to the respondent if the stay were to be granted than to the applicant if it were to be refused and accordingly refused the stay.

[24] On 5 December 2013, almost a year after the delivery of the judgment of Brooks JA, Daye J delivered his written reasons for his judgment for his order of 26 October

2012. The formal order was perfected on 6 December 2013. In arriving at his decision not to set aside the default judgment, the learned trial judge articulated his view that there was some technical ground upon which the applicant could reasonably have believed that the default judgment had been irregularly obtained in November 2004 as, inter alia, there was an application to file his defence out of time before the court prior to the judgment, which had not yet been heard. Also, the applicant, at the conclusion of the Court of Appeal's decision may have expected the Supreme Court to have given some direction in respect of his application which had been dismissed by Harris J but which order had been set aside by this court. The applicant, however, he said had taken no steps to rectify or clarify his position, and so, in the end, his application remained dismissed. The learned trial judge found that there would have been no defence in place when the respondent perfected and later re-filed the default judgment in 2008 and 2011 and in those circumstances therefore it would not have been irregular and liable to be set aside as of right under rule 13(2)(b) of the CPR.

[25] The learned trial judge further stated that he did not accept that either the correction or the insertion of a date and the deletion of the interest clause on the 2004 default judgment in 2008 nor the calculation of the debt in United States currency as opposed to Swiss currency rendered the default judgment irregularly obtained under rule 13(2)(b). The applicant's main protest, he stated, was with respect to the interest rate applied to the loan which led the court to consider the power conferred on it under rule 13.3(3) of the CPR to vary the default judgment of 2004 removing the interest

which was applied to the debt and directing that the rate and quantum of interest was to be assessed.

[26] After stating the reasons which emerged from the applicant's affidavit in support of the application to set aside the default judgment served on him in 2008, the learned trial judge declared that he was not convinced that a litigant could rely on his own pre-trial action as an explanation for delay when he had not used the opportunity at the pre-trial stage to pursue his defence before the court in time. The applicant proffered no good reason, said the learned trial judge, which could be reasonably entertained by a court, for omitting to take the necessary steps which were vital to his defence.

[27] The learned trial judge found that the 1999 letter from the applicant confirmed that he owed a debt to the respondent; that payments were made; confirmed an interest rate of 10% per annum and that the applicant promised to commence repayment and requested a concession of the interest charges. He further found that the letter of 10 March 1992 expressly acknowledged a debt owed to the respondent by the applicant which was quoted as US$700,000.00. In dealing with the issue of whether these letters that were translated from German to English were admissible evidence, he found, relying on **Saifi** [2001] 4 All ER 168, that a translation from a foreign language to English which was not certified may be admissible. In the face of these "documents of acknowledgement and admission" however, the applicant had denied, in his draft defence, owing any debt to which the learned trial judge said that "[t]here is no real prospect that the [applicant's] denial will succeed as credible in the face of these admissions". The applicant has not satisfied the first requirement under

rule 13.3(a) that his defence had a real prospect of success to enable the court to exercise its discretion to set aside the default judgment. A bare denial is not sufficient to give a defence a real prospect of success. The learned trial judge also found that the issue that the respondent had not pleaded acknowledgement of the debt was *res judicata* as that had already been determined by the Court of Appeal. In the end, he stated that to the extent that, on behalf of the applicant there was a "protest to the charging of interest and at an excessive rate" it was the court's view that the default judgment should be varied to remove the amount calculated as interest on the sum first claimed in the writ of summons.

[28] Aggrieved by the decisions of Brooks JA (18 December 2012) and Daye J (5 December 2013), the applicant on 4 April 2014 filed two notices of application for court orders to discharge the judgment and orders of Brooks JA and for a stay of execution of the judgment and orders of Daye J. The grounds on which the applications were based are set out below.

Grounds for the applications

[29] The grounds on which the applicant sought the orders, in paragraph [2], to discharge Brooks JA's judgment are as follows:

> "1. that the application is being made to the Full Court pursuant to the Civil Procedure Rules 2002 (CPR) and the inherent jurisdiction of this Honourable Court;
>
> 2. Brooks, JA erred in dismissing the Appellant's application for stay of execution of the oral Judgment or Orders made by Daye, J on the 26th October, 2012 for the following reasons:
>
> (a) Daye, J had said that the Default Judgment, first filed

in 2004, apparently perfected in 2008 and amended in 2011, against the Appellant for CHF 3,066,487.23 which the Appellant had sought to have set aside, should be varied but did not state a figure for the new, varied sum to be included;

(b) The effect of the said Judgment or Orders by Brooks, JA was to preserve the Default Judgment in its original form and for its original sum although Daye, J had clearly varied the sum;

(c) Brooks, JA should have reserved his ruling until Daye, J provided the written reasons for his October 26, 2012 Judgment thereby providing crucial information or material on which Brooks, JA could have come to an informed, fair and justifiable decision;

(d) During his oral judgment, Daye, J had said that the Appellant had clearly protested against the interest being imposed by the Respondent in relation to the alleged debt and set this issue to be resolved at an assessment for which no date had been set when the matter came back before Brooks, JA;

(e) Brooks, JA erred in not considering sufficiently, or at all, the effect of the issue regarding the interest on the Default Judgment particularly when the Respondent was compounding the interest and there was no evidence that there was any agreement between the Appellant and the Respondent that any interest should be charged, especially compound interest;

(f) The issue of the Respondent compounding the interest was also of tremendous importance having regard to its effect on the balance, if any, owing by the Appellant to the Respondent. This issue was not explored by Brooks, JA sufficiently or at all;

(g) the Respondent's Attorney-at-law, Myers Fletcher & Gordon, had conceded during the hearing before Brooks, JA on the 4th December, 2012 that based on the outstanding matters from Daye, J's oral Judgment, including confirmation of the new, varied principal sum and the assessment of the interest on

the new, varied principal sum in the Default Judgment, the Respondent could not proceed with any enforcement of the default Judgment;

(h) Brooks, JA erred in proceeding to dismiss the Appellant's application in spite of the said concession by the Respondent's said attorneys-at-law;

(i) Brooks, JA stated (**at paragraph 26 of his written Judgment**):'…Mr Hargitay has not said why he cannot pay the sum of 654,874.05 Swiss Francs, which seems to be the figure that has, allegedly, been acknowledged by him as being the capital sum owed'.

Having appreciated this point and the difference in this figure and the sums claimed by the Respondent as being acknowledged by the Appellant, Brooks, JA should have acknowledged that there was a dispute and hence a triable issue which gave some merit to the Appellant's proposed defence. In these circumstances, Brooks, JA should not have dismissed the Appellant's application; and

(j) Brooks, JA was wrong in usurping the function of the Full Court to hear the appeal by exceeding his jurisdiction, effectively hearing the appeal and ruling that 'there is no real prospect of success on appeal' (**paragraph 22 of his judgment**) without considering, sufficiently or at all, the relevant matters, especially the merits of the various points raised in the Appellant's proposed defence.

3. The Appellant did not make this application earlier because the Appellant's Attorneys-at-law advised him to wait until Daye, J provided the written reasons for his said oral Judgment as this material was crucial in order to support the instant application and highlight the mistakes made by Brooks, JA.

4. Daye, J did not deliver the written reasons for his oral judgment until the 5th December, 2013.

5. The Appellant has filed an appeal against the Oral Judgment made by Mr. Justice Daye on the 26th October, 2016 [sic],

his written Judgment delivered on the 5th December, 2013 and the formal Order signed by him on the 6th December, 2013.

6. It is in the interests of justice for the Court to grant the instant application because the Appellant would suffer irremediable damage if the Respondent were to be allowed to enforce the said Judgments and Orders.

7. It is in the interests of justice for the Court to grant the instant application because Brooks, JA's pronouncement on the prospect of success of the instant appeal would, arguably, stand if unchallenged.

8. there is no risk of injustice to the Respondent if the instant application is granted;

9. there is a real risk of injustice to the Appellant if the instant application is refused and the Respondent is allowed to enforce the said Judgments and the Orders prior to the hearing of this application and the hearing of the appeal.

10. the appeal pending has merit and Appellant has a reasonable prospect of success on appeal having regard, inter alia, to the matters raised in the original Notice and Grounds of Appeal filed herein and the Amended Notice and Grounds of Appeal exhibited to the Appellants' Affidavit in support of his application for stay of execution filed herein, the hearing of which is also pending.

11. The said Judgments by Daye, J and the formal Order signed by him and dated the 6th December 2013, especially regarding the variation of the Default Judgment sum to CHF 1,164,000 highlight the mistake made by Brooks, JA in not granting the stay of execution regarding the Default Judgment that was for the sum of 3,066,487.23."

[30] The applicant filed 19 grounds on which he sought to stay execution of Daye J's judgment. The more salient grounds are summarized thus:

1. the applicant conducts business overseas including the United Kingdom and if the judgment and orders are

registered and bankruptcy proceedings pursued as threatened by the respondent, the applicant will suffer irremediable harm including damage to his reputation, loss of business and financial loss;

2. the applicant does not have the sum of 1,164,000.00 Swiss Francs or the alternative sum of 654,874.05 Swiss Francs mentioned by Brooks JA in his written judgment to pay to the respondent or to pay into court;

3. it is in the interests of justice for the court to grant the instant application because doing so would not result in any real risk of injustice to the respondent;

4. the appeal has merit and the applicant has a reasonable prospect of success on appeal having regard to the matters raised in the original and amended notice and grounds of appeal as well as, inter alia, on the following bases:

    (a) the applicant applied to the court as soon as was reasonably practicable;

    (b) the applicant offered a good explanation to the court for his failure to file his defence within the time specified by the CPR;

5. the judgment in default of defence entered in the Supreme Court is irregular and should be set aside *ex debito justitiae;*

6. the learned trial judge erred in varying the default judgment by reducing the sum stated when he should have set it aside in totality; and

7. Daye J did not rule or state in his oral judgment or in the written reasons that the revised principal sum for the default judgment would be 1,164,000.00 Swiss Francs and failed to give any adequate explanation as to how he arrived at the revised sum.

The submissions

The applicant's applications to discharge the order of Brooks JA and to stay execution of the orders of Daye J

[31] Mr Wilkinson QC, on behalf of the applicant, submitted that this application was made pursuant to the provisions of the Court of Appeal Rules, 2002 (CAR), in particular rule 2.11(2) which provides for the variation or discharge, by the court, of any order made by a single judge. Learned Queen's Counsel said that the court's power to set aside the decision of a single judge is provided by rule 2.11(2) and the circumstances under which it is exercised have been explored in a number of instructive cases from this court. Reference was made to the cases **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9; **Enoch Karl Blythe v Paget**

DeFreitas and Ors - SCCA No 43/2008, App No 84/2009 delivered 18 December 2009 and **Elita Flickenger v David Preble and Xtabi Resort Limited** [2013] JMCA App 13.

[32] In his submissions, Mr Wilkinson said that Brooks JA erred in dismissing the applicant's application for a stay of execution of the oral judgment or orders of Daye J as:

(a) the original claim filed was for 2,623,942.65 Swiss Francs but no particulars of claim had been filed showing how that sum was calculated;

(b) Daye J ruled that the default judgment for 3,066,487.23 Swiss Francs which the applicant had sought to have set aside, should be varied, but he did not state a figure for the new, varied sum;

(c) Daye J in delivering his oral judgment failed to take into consideration, evidence of significant payments made by the applicants; a similar error was made by Brooks JA;

(d) the effect of the judgment of Brooks JA was to preserve the default judgment in its original form;

(e) Brooks JA should have reserved his judgment until after Daye J's written reasons had been delivered so that crucial information on which Brooks JA could have come to an

informed, fair and justifiable decision, would have been provided;

(f) Daye J had set the issue of interest to be resolved at an assessment however, no date had been set for the hearing of the assessment when the matter came before Brooks JA;

(g) Brooks JA erred in not considering sufficiently the effect of the issue of interest on the default judgment particularly when the interest had been compounded by the respondent without evidence of an agreement that interest ought to have been charged, especially compound interest; and

(h) the respondent's attorneys-at-law had conceded during the hearing before Brooks JA that they were unable to proceed with any enforcement of the default judgment due to lack of confirmation of the varied sum and the assessment of the interest of the new sum, and that Brooks JA erred in dismissing the applicant's application in spite of the said concession.

[33] Counsel commented that Brooks JA in his written judgment stated that "Mr Hargitay has not said why he cannot pay the sum of 654,874.05 Swiss Francs, which seems to be the figure that has, allegedly, been acknowledged by him as being the capital sum owed" and submitted that having appreciated that point and the difference in this figure and the sums claimed by the respondent as being acknowledged by the applicant, Brooks JA should have appreciated that there was a dispute and hence a

triable issue which gave some merit to the proposed defence and in the circumstances should not have dismissed the application.

[34] Counsel further submitted that Brooks JA was wrong in usurping the function of the full court to hear the appeal by exceeding his jurisdiction and ruling at paragraph [22] of his judgment that "there is no real prospect of success on appeal" without considering sufficiently or at all the relevant matters, especially the merits of the various points raised in the applicant's proposed defence. In support of this submission, counsel cited, **William Clarke v The Bank of Nova Scotia Jamaica Limited**, in which, he said, it was decided that a single judge cannot hear and decide a procedural appeal. It was further submitted that there is no risk of injustice to the respondent if the instant application were to be granted. However, learned counsel submitted, there is a real risk of injustice to the applicant if the application were to be refused and the respondent is allowed to enforce the default judgment prior to the hearing of the appeal.

[35] In the end, counsel argued that the pending appeal has merit and the applicant has a reasonable prospect of success having regard to, inter alia, the matters raised in the original and the amended notice and grounds of appeal filed. The orders made in the judgment of Daye J, in particular the variation of the default judgment sum to 1,164,000 Swiss Francs, counsel submitted, highlight the mistake made by Brooks JA in refusing to grant the stay of execution in respect of the default judgment for the sum of 3,066,487.23 Swiss Francs. In the circumstances, the applicant asked that the application be granted with costs awarded to him or alternatively, be in the appeal.

The respondent's response to the applications to discharge the order of Brooks JA and to stay execution of the orders of Daye J

[36] In response, Mr Shelton QC submitted that there can be no challenge that Brooks JA applied the correct principles of law in refusing the stay. He argued that no explanation for the delay in making these applications had been provided, in that, the applicant stated in his affidavit sworn to on 3 January 2014 that he had decided to await the written reasons of Daye J (5 December 2013) before applying to the full court challenging the decision of Brooks JA (18 December 2012) yet it took him over four months (4 April 2014) from the date of the decision of Daye J before making the applications, for which no explanation has been provided, which, in effect, amounts to a rehearing of his earlier applications for a stay of the decision of Daye J. Based on this inexplicable delay in making the applications, learned counsel submitted, this court ought to refuse to consider the applications.

[37] In any event, counsel further submitted, the applications must fail as the appeal lacks merit, which was also so found by Brooks JA. Further, he said, many of the issues that the applicant sought to raise on the appeal have already been determined by this court in a previous appeal. Counsel argued that the applicant's amended grounds of appeal all lack merit as no new ground of appeal has been raised since that determination by Brooks JA. Counsel further argued that the applicant had ample opportunity to file his defence but chose not to and that all the efforts to avoid answering the respondent's claim failed. He submitted that it was against that background that Daye J, in considering the written acknowledgments of the debt by the applicant, payments made by the applicant, the numerous failed procedural steps

taken by the applicant since being served with the claim, the numerous versions of proposed defences, the fact that the applicant only belatedly denied the debt and sought to introduce new material, and the fact that the applicant has failed to state the amount he admitted then as owing or the rate of interest applicable to his proposed defence, found that the applicant's proposed defence lacked bona fides and merit. Counsel submitted further that although Brooks JA did not have before him the written reasons of Daye J or the length of time to consider the documents and arguments as Daye J did, he independently found that the appeal lacked merit on the same inescapable and indefeasible basis that the applicant had not been able to defeat the written acknowledgements of the debt.

[38] It is Daye J's view of the facts and his exercise of discretion that this court is being asked to review, counsel submitted, as the application does not challenge the law on which the learned trial judge relied or his application of the relevant law and authorities – **ED & F Man Liquid Products Ltd v Patel & ANR** [2003] EWCA Civ 472. It was also submitted that there is no finding of the learned trial judge which is not supported by the evidence he had before him and therefore, this court is not at liberty to substitute its own exercise of discretion. For this submission counsel relied on **Charles Osenton & Co v Johnston** [1941] 2 All ER 245. Likewise, it was submitted, Brooks JA applied the correct principles, which included a consideration of the merit of the appeal and the consequences to each party, in the exercise of his discretion whether or not to have granted the stay. Reference was made to **Combi (Singapore) PTE Limited v Ramnath Sriram and Sun Limited FC** [1999] All ER

(D), **Hammond Suddard Solicitors v Agrichem International Holdings Limited** [2001] EWCA Civ 2065 and **Cable & Wireless Jamaica Limited (T/A LIME) v Digicel (Jamaica) Limited** SCCA No 148/2009, Application No 196/2009 judgment delivered 16 December 2009. Counsel also argued that for the applicant, having rushed to the court for a stay which went before Brooks JA, to now complain that that decision ought to have been delayed until after the delivery of Daye J's judgment shows a lack of regard for the court.

[39] Addressing the issue of irremediable harm, learned counsel submitted that the applicant failed to satisfy Brooks JA in respect of the likely harm he would have suffered consequent on the refusal of the stay and now sought to cure that defect by including new material in his affidavits in support of the applications now before the court, all of which, he submitted, ought to be struck out. It was counsel's submission that the applicant cannot now seek to give fresh evidence which was not before the learned judge bearing in mind that the lack of evidence was one of the reasons for his ruling and, in any event, the information did not just arise but was well within the applicant's knowledge from the time he first presented his application for a stay. Counsel pointed out that this is the third attempt of the applicant to obtain a stay of the default judgment which just adds to the numerous steps taken to deprive the respondent of the sums owed. In the circumstances, counsel asked that the applications and the appeal be dismissed with costs to the respondent to be taxed and paid immediately and that the court order that the applicant be restrained from making

any further such applications in relation to the issues which have already been adjudicated on and or which are otherwise bound to fail.

Applicant's response

[40] In response to the cases relied on by the respondent both in oral and written submissions, Mr Wilkinson, in his speaking notes on behalf of the applicant, submitted that the facts in **ED & F v Patel** are quite distinguishable from those in the instant case as there is no evidence of lack of credibility or 'dishonesty' on the part of the applicant contrary to what had been alleged by the respondent in that case although he had not provided any examples. Reference to the applicant filing several different defences, he argued, does not prove 'dishonesty or a lack of credibility'. The applicant, he argued, merely sought to provide more detailed defences upon the applicant unearthing more documentary proof. Further, there is no evidence, counsel submitted, that the applicant has changed what was said in one defence in another later defence. In any event, he said, it is well settled that a litigant is entitled to amend his statement of case at any time up to trial and, in some instances, during the trial itself. The points made in relation to **ED & F v Patel** also applied to **Osenton v Johnston**, counsel submitted.

[41] Counsel submitted that the legal principles enunciated by the respondent in reliance on **Combi (Singapore) v Ramnath Sriram, Hammond Suddard v Agrichem and Cable & Wireless v Digicel** in relation to the application for stay of execution of judgment are correct and therefore applicable.

The Issues

[42] Cognizant that there is an appeal pending in this matter, I do not propose to delve too deeply or set out in any great detail the assessment of the arguments posited but will give my conclusions, as necessary, in the context of the governing principles for discharging an order and for an application for a stay of execution, to the particular facts related to the application before this court.

[43] There were two main issues for consideration:

1. Whether there was sufficient basis to discharge the order of Brooks JA with regard to (i) the presence of triable issues; (ii) variations as to the capital sum owed; and (iii) the application for an extension of time to file a defence.
2. Whether there was sufficient basis upon which a stay of execution of Daye J's judgment could have been granted pending appeal with regard to: (i) whether there was a real prospect of success on appeal and (ii) whether there was a greater risk of injustice to either party without the stay.

Issue 1: Discharging the order of Brooks JA

- **The basis for discharging an order of a single judge**

[44] Rule 2.11(2) of CAR recognises that "any order made by a single judge may be varied or discharged by the court". While these rules do not provide any guidance as to

the factors to be considered when varying or discharging such an order, there nonetheless, have been several such orders made by this court.

[45] This court has accepted and applied the principles in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 where my learned brother Morrison JA (as he then was) on behalf of the court at paragraph [20] stated:

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

[46] In **Elita Flickenger v David Preble & Xtabi Resort Limited** Lawrence-Beswick JA (Ag) (as she then was) in setting aside the order of a judge of this court, cited Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** at paragraph [22] of the judgment, and stated that the court must consider whether:

> "…the judge's exercise of his discretion was based on a mis-understanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it."

[47] In **John Ledgister et al v Jamaica Redevelopment Foundation Inc** [2013] JMCA App 10, I said at paragraph [33] that:

> "...I recognise that generally when an application is made to this court to vary or discharge an order made by a single judge of appeal, the matter is not viewed as an application, but instead as a review by the court, and the test to be applied ought to be one wherein the court assesses whether the single judge was wrong in law or in principle or had misconceived the facts..."

[48] It therefore follows that to discharge or vary the order of Brooks JA, it must be demonstrated that he misunderstood or misapplied the law or misconceived the facts and therefore can be shown to be 'demonstrably wrong'. In my view there are a few matters which pose serious cause for concern.

- **The necessity of a trial**

[49] In SCCA No 116/2005, referred to previously, Cooke JA, Harrison JA and McCalla JA (as she then was) all noted that there were issues which ought to be determined at trial. This may be gleaned from the following statements:

1. Cooke JA at paragraph 11 said:

> "...This is not 'a very clear case'. What I understand the appellant to be saying is that if this case proceeded to trial he is possessed of potential evidence of substance which will demonstrate that the Limitation Act is inapplicable. It is my view that at this stage of the proceedings he had done enough. The court below was in error in holding that at this stage it was necessary for the appellant to have exhibited:
>
> > 'a translation of such document together with an affidavit or a certificate of the translator for verifying the translation.'

> This evidential requirement is pertinent to the trial of the action. If the respondent had raised the prohibition provided by the Limitation Act in its defence (which as of now does not exist) the appellant would have countered that there was acknowledgement of the debt based on documents which he held. It would then be for the trial court to determine the admissibility of those documents to construe those documents and ultimately to determine if there was indeed an acknowledgement within the meaning of the law."

2. Harrison JA was also of the view that there were issues which could only be determined in a trial. At paragraph 25 of his judgment, he said:

> "It is my view that a Judge in Chambers would not be acting justly if he or she were to summarily strike out a claim because a translated letter which the claimant relies upon has not been authenticated or certified. Once the documents in foreign language have been exhibited but the learned judge finds that there was no authentication of the English translation and that statements of account were not translated, issues of fact would be raised which required a determination of them by oral evidence before a trial judge…"

At paragraph 26, he said:

> "It is further my view therefore that if an application to strike out a matter which is claimed to be statute barred, involves serious arguments as to whether or not there is an acknowledgment of a debt by a debtor, a judge hearing the application to strike out should, as a general rule, decline to proceed with arguments unless he not only harbours doubts about the soundness of the pleading and documentation but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for the trial or the burden of the trial itself."

3. McCalla JA at paragraph 12 of her judgment said:

> "...The learned judge refused the appellant's oral application for amendment of his claim on the basis that an amendment to include the acknowledgment of debt would have deprived the respondent of a defence under the Statute of Limitation....
>
> The acknowledgement of debt could therefore have been pleaded in a reply. If the documents were admissible at trial and found to be authentic the statutory defence could not avail the respondent. I am in agreement with Mr. Shelton that the learned judge was in error in not taking cognizance of the documents on which the appellant sought to place reliance, in support of his claim.
>
> The appellant had exhibited to his affidavit a written document with an English translation, which he deponed was an acknowledgement of the debt which he said the respondent owed. There is no evidence of any other debt owed by the respondent to the appellant. The documents on which he relied in respect of his claim had been sent to the respondent from December, 2003 and no issue had been taken by him in respect of their authenticity. The respondent was therefore well aware of the case he had to meet and had filed no defence."

At paragraph 13 of her judgment she stated:

> "In the circumstances of this case, it is my view that the appellant had raised sufficient issues on a prima facie basis for the matter to have proceeded to trial for a determination of those issues…"

[50] These statements clearly demonstrate that the court was of the view that there was indeed an arguable case that should proceed to a trial on the admissibility of the letter and also as to the interpretation relating to whether it could be construed as an acknowledgment of debt. However, instead of taking this approach, Brooks JA stated in his judgment that the letter acknowledged that a capital figure was owed, and since the contents of the letter had not been denied by the applicant, he would have no real

chance of success on appeal. This is what he stated in paragraphs [21] to [23] of the judgment:

> "[21] Again, as presently advised, I am not convinced that Mr Hargitay will be able to satisfy this court on appeal, that Daye J was wrong in refusing to set aside the judgment. The emphasised portion of the letter quoted above seems to be an acknowledgment of a capital figure, and as mentioned above, the contents of the letter have not been denied.
>
> [22] In my view, there is no real prospect of success on appeal.
>
> [23] In the event that I am wrong on that issue, I would also state that Mr Hargitay has not placed any information before me that convinces me that payment of the principal sum would stifle the appeal or cause him irremediable harm…"

[51] The conflict between the views of the full Court of Appeal that there were issues to be tried and the view of Brooks JA that the letter dated 10 June 1999 was an acknowledgment of a capital sum for which no denial was proffered by the applicant, is itself an issue upon which it may be said that Brooks JA misapplied the facts. I would also wish to state however that learned Queen's Counsel Mr Wilkinson appeared to have entirely misunderstood the ruling of the full court in **William Clarke v The Bank of Nova Scotia Jamaica Limited** with regard to procedural appeals. Brooks JA made no attempt whatsoever to rule on an appeal the decision of Daye J. The statement made by him that in his view, there was no real prospect of success on appeal, was quite within his power as a single judge of appeal when dealing with an application for a stay of execution of a judgment of a single judge of the Supreme Court.

- **Variations as to capital sum owed**

[52] There have been different statements made at different times in respect of the amounts allegedly owed by the applicant to the respondent as follows:

1. The letter dated 10 March 1992 stated that the sum owed is US$700,000.
2. The letter 10 June 1999 discloses four figures: 1,164,000, 1,540,693.80, 2,049,919.75 and 654,874.05 Swiss Francs with an amount having been stated to have been paid and not properly accounted for as there were disputes as to the rate and manner in which interest ought to have been applied.
3. The respondent filed a claim for 2,623,942.65 Swiss Francs plus interest.
4. A default judgment was entered against the applicant in the sum of 3,066,487.23 Swiss Franc plus interest.
5. Daye J refused to set aside the default judgment but varied the amount to 1,164,000.00 Swiss Francs (as the amount allegedly acknowledged as having been owed) with interest to be assessed in accordance with a statement of account dated 7 November 2001.
6. Brooks JA at paragraph [26] of his judgment stated that letter dated 10 June 1999 acknowledged the capital figure of 654,874.05 Swiss Francs as the sum that had been acknowledged by the applicant as being owed.

Brooks JA did not seem to acknowledge or attempt to explain the variations in these figures, or what the impact of the uncertainty of the sums allegedly stated to be due would have had on the default judgment and the order to set aside the same. The presence of these variations as to the sum owed proved that without a trial, the amount of the capital sum owed could not be definitively ascertained. In my view therefore, Brooks JA's conclusion defining the figure owed on the basis of the letter of 10 June 1999 alone, without a trial, would not appear to be justified on the facts before him.

- **The application for an extension of time to file a defence**

[53] In SCCA No 116/2005, the issue as to the status of the application for an extension of time to file a defence was raised by Cooke JA at paragraph 5 of his judgment where he said that "[t]here is no appeal against the second order regarding the extension of time to file defence". Neither Harrison JA nor McCalla JA commented on this issue or declared the status of the application for the extension of time to file a defence. However, both Harrison JA and McCalla JA commented that the proposed defence raised issues that should be determined at a trial. The final order itself did not specifically exclude the application for an extension of time to file a defence. It stated:

> "The appeal is allowed. The order made by the court below is set aside. Costs to the appellant to be agreed or taxed both here and in the court below."

[54] Brooks JA found that the default judgment was regularly and properly obtained because there was no order that specifically restored the application for an extension of time to file a defence. In support of this assertion he cited the cases **Bailey v Marinoff** [1971] HCA 49 and **Meehan and Others v Glazier Holdings Pty Ltd** [2002] NSWCA

22 and said that the application would not have been in place when the default judgment signed on 23 June 2008 was entered, and so Harris J's dismissal of this application remained undisturbed.

[55] However, if the effect of the order of this court setting aside the order of Harris J in its entirety without any specific reference to any particular application resulted in the order dismissing that application for extension of time to file a defence being set aside, so that the application remained extant, then any default judgment entered by the registry when that application was on the file could be viewed as contrary to rule 12.5(e) of the CPR and if so would have been irregularly entered and liable to be set aside *ex debito justitiae* pursuant to rule 13.2(b). Brooks JA's order refusing the stay of execution on the basis that the application for extension of time to file defence was not in place at the time of the entry of the judgment could therefore be an inaccurate interpretation of the rules, and a misapplication of the same to the facts.

[56] Subsequent to Brooks JA refusing the application for the stay, on 5 December 2013, Daye J gave written reasons for refusing to set aside the default judgment. It was Daye J's view that the Court of Appeal had stated that the letter of 10 June 1999 was to be construed as an acknowledgment of the debt, and had made no ruling on the applicant's application for extension of time to file a defence. He also noted that the respondent had not counter appealed against Harris J's dismissal of that application. Consequently, in Daye J's view on 10 November 2011 when the default judgment was refiled there was no defence filed to the claim, and no application for an extension of time to file a defence.

[57] It would seem that as Brooks JA refused the application for the stay, before Daye J delivered his reasons on the application to set aside the default judgment, he would not have known that Daye J had contended that the Court of Appeal had stated that the June 1999 letter represented a written acknowledgement of the debt and so this issue was, he stated, *res judicata* in circumstances where, as indicated, the Court of Appeal had not done so, but to the contrary, had stated that that was a issue matter for trial. In these circumstances, my learned brother may also not have stated that the said June 1999 letter acknowledged a specific capital sum but may have deemed that issue to be an arguable case, with a reasonable chance of success and granted the stay. I posit this view, as, in my opinion Daye J appeared to have misconstrued the conclusions of the Court of Appeal in SCCA No 116/2005 as no member of the court had concluded that the June 1999 letter was to be construed as an acknowledgement of the debt.

[58] The fact that there were indeed triable issues in terms of the interpretation to be accorded to the letter of 10 June 1999, variations in the sums stated in the letter as allegedly having been acknowledged to be due and the interpretation of the ruling of the Court of Appeal on the effect of its order in relation to the application for extension of time to file defence, it would seem that there had been several misunderstandings and/or misapplication of the facts. The fact that Daye J gave reasons after Brooks JA's order, and as the former appears to have been based on a wrong premise, this would have been a change in circumstances disclosed since Brooks JA made his order and would justify discharging the said orders made by him.

Issue 2: Stay of execution of Daye J's judgment

The principles governing an application for a stay of execution

[59] This court may exercise its power to stay the execution of a judgment pending appeal under Judicature (Appellate Jurisdiction Act), CAR and the CPR.

Rule 2.14 of CAR provides that:

> "Except so far as the court below or the court or a single judge may otherwise direct-
> (a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and
> (b) no intermediate act or proceeding is invalidated by an appeal."

Rule 2.15 of CAR states:

> "In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition -
> (a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26; and
>
> (b) power to -
> ----
> (g) make any incidental decision pending the determination of an appeal or an application for permission to appeal; and
>
> (h) make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal.
> …"

Rule 26.1(2)(e) of the CPR provides that:

> 26.1 (2) Except where these Rules provide otherwise, the court may-
> …
> (e) stay the whole or part of any proceedings generally or until a specified date or event;
> ..."

[60] In deciding whether to stay the execution of a judgment pending appeal regard must be had to the principles enunciated in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 which has been cited with approval in a number of cases before this court such as **Caribbean Cement Company Ltd v Freight Management Limited** [2013] JMCA App 29, **Scotiabank Jamaica Trust and Merchant Bank Limited v National Commercial Bank Jamaica Limited and Anor** [2013] JMCA App 5 and most recently in **Dennis Atkinson v Development Bank of Jamaica Limited** [2015] JMCA App 40. It is now settled that in deciding whether or not to grant a stay the applicant must show two things' that: (i) the appeal has a real prospect of success and (ii) there is a minimal risk of injustice to one or both parties recovering or enforcing the judgment. It is necessary therefore to assess these two factors in relation to the particular facts of this case.

- **Real prospect of success on appeal**

[61] As was pointed out in paragraph [27] herein Daye J stated that this court had held that there was indeed a written acknowledgment of the applicant's debt. Indeed, he stated that this issue was *res judicata*. I am constrained to conclude that this understanding of the ratio of the Court of Appeal decision would have influenced his reasoning and conclusions on the application before him. As indicated however, this court did not say that. The fact that the learned trial judge relied on this inaccurate premise creates a seriously arguable issue that may result in reasonable success on the applicant's appeal.

[62] Daye J at paragraph [19] of his judgment placed reliance on the letters dated 10 March 1992 and 10 June 1999 to support his finding that these letters confirmed, inter alia, that: (i) the applicant owed a debt to the respondent; (ii) payments were made on the debt; (iii) the interest rate was 10% after 1999; and (iv) a promise was made to repay the sums owed. However, in the letter of 10 June 1999, the applicant seemed to have challenged the sum owed and the calculation of interest. Additionally, the letter of 10 March 1992 speaks to a capital figure of US$700,000.00 and the letter dated 10 June 1999 speaks to various figures. Given the variations as to the alleged capital and interest owed, in his reasons for judgment, Daye J ordered a variation of the default judgment sum but did not indicate what figure should be substituted therefor, although its variation was to have been to the sum that the applicant had acknowledged as owing. In the formal judgment order (paragraph [2] herein) it was stated that the learned trial judge had varied the sum owed to 1,164,000.00 Swiss Francs as at 31 December 1991. That figure had been stated in the letter of 10 June 1999 as having been owed as at 31 December 1991 on which certain sums not necessarily agreed on had allegedly been paid, and in respect of which interest had not been properly calculated. The learned trial judge made no indication as to how this sum had been arrived at. There are other variations that arise on the case as stated in paragraph [52] herein. The fact that there are so many different statements as to the sum owed would also in my view suggest that there are arguable issues which could positively influence the applicant's chances of success on appeal.

[63] In paragraph [4] of his judgment, Daye J stated that since the Court of Appeal had not made any statement as to the status of the applicant's defence at the end of the appeal, there was still no defence filed to the claim, and there was no application to file a defence out of time as that application had been dismissed. As stated in paragraph [53], only Cooke JA in the Court of Appeal commented on the state of the application for an extension of time to file a defence, indicating that that issue was not before the court. Brooks JA held that this application had not been restored. The order from this court did not speak specifically to the status of the defence. However, the court did set aside the orders made by Harris J and as the learned trial judge did not refer to any submissions of counsel on that aspect or give any reasoning demonstrating any deliberations on the merit of the application, the dismissal of the application appeared to be entirely consequential to the striking out of the claim. As stated previously, this court could ultimately find that in setting aside Harris J's order, the order dismissing the application for an extension of time to file a defence would also have been set aside. The issue therefore of whether or not the application for extension of time to file a defence is still alive, remains an arguable issue on appeal, with a real chance of success.

[64] If on appeal, this court should accept that the application for an extension of time to file defence had been restored, it follows as indicated that the court could find that the default judgment would have been irregularly obtained, and would be subject to being set aside *ex debito justitiae*. Daye J himself in paragraph [8] of his reasons stated that "there [were] some technical grounds [sic] upon which the defendant could

reasonably [sic] believe that the default judgment was irregularly obtained in November 2004 as there was an application to file his defence out of time before the court ... which was not yet heard. Also at the end of the Court of Appeal decision the defendant may have expected the Supreme Court to give some directions [sic] about his application that was dismissed". Daye J nonetheless went on to find that because the applicant took no steps to clarify or rectify the status of the defence, the application to file a defence remained dismissed and the default judgment had been regularly obtained. In that situation, Daye J's refusal to set aside the default judgment could have been palpably wrong and once there is a possibility that the default judgment may have been wrongly entered and therefore irregular, could ultimately lead to the applicant's success on appeal.

[65] Since in Daye J's view the default judgment had been regularly obtained, in deciding whether to set it aside, he examined section 13.3 of the CPR which states that:

> "(1) The court may set aside or vary a judgement [sic] 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 acknowledgement of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."

[66] Daye J in refusing to set aside the default judgment found that the applicant had no real prospect of successfully defending the claim since the letters of 10 March 1992 and 10 June 1999 acknowledged that the applicant owed the respondent and contradicted the applicant's denial in his proposed defence that he owed the sum claimed. However, in the applicant's proposed defence attached to his affidavit filed on 13 November 2012 in support of the notice of application for a stay of execution of order delivered on 5 December 2013, he stated that:

> "1. The Defendant denies owing to the Claimant the sum claimed or any sum at all and puts the Claimant to strict proof of the alleged debt, including how and when the debt was incurred with the relevant documents, if any, being supplied in proof thereof.
> ...
> 5. The Defendant did not acknowledge the debt that is the subject matter of the instant claim.
> ...
> 10. In the original loan agreement between the Claimant and the Defendant no interest was agreed or stipulated.
> ...
> 12. The Defendant repaid to the Claimant in cash, wire transfers and with pieces of artwork a further sum in excess of One Million Swiss Francs (CHF1,000,000.00) apart from the One Million Swiss Francs (CHF1,000,000.00) paid by the Defendant on the 21st day of December, 1990."

As indicated before, issues relating to whether the sums were owed and the amount of such sums and whether the debt had been acknowledged were indeed arguable issues with reasonable chance of success. It must be recognised that if the letter of 10 June

1999 could not be construed as an acknowledgement of the debt the claim would be statute barred and unable to proceed.

[67] Daye J further found that there was inexplicable delay in making the application to set aside the default judgment. However, the default judgment had been entered against the applicant on 18 November 2004, but was perfected on 23 June 2008 and served on the applicant on 3 July 2008. An application was made to set aside the default judgment on 31 July 2008. The judgment was re-filed in 2011 but not served. The order obtained on the judgment in England on 20 January 2012 was served on 24 April 2012. The application to set aside the judgment and to file defence out of time was re-filed 1 May 2012 and served. The ex parte order of D O McIntosh J was made on 3 May 2012. The applicant again filed an application to set aside the default judgment and to file defence out of time on 12 May 2012. This was re-issued and eventually heard and determined by Daye J on 5 December 2013. In light of these various applications, there may therefore be an arguable issue as to whether or not in the circumstances of this case there is evidence that the applicant was endeavouring to have his defence placed before the court, and to have the application relative to the default judgment heard. As a consequence, the court may find that the delay was not inordinate or inexplicable, which may result in the applicant's success on appeal.

- **Risk of injustice**

[68] As stated, Daye J varied the default judgment by reducing the amount stated in the default judgment as due from the applicant as 3,066,487.23 Swiss Francs plus interest from the date of judgment to the date of payment, to 1,164,000.00 Swiss

Francs with interest, to be assessed in accordance with the statement of account dated 7 November 2001. The variation may have resulted to the applicant's benefit since it would have reduced the principal amount he would be obliged to pay. However, the applicant denied that he owed the sum claimed or any money at all and it is of significance that there are several discrepancies as to the amount that it is claimed that he allegedly owed and whether interest is to be calculated thereon and on what rate and in what manner. If the letter of 10 June 1999 is not construed by the court as an acknowledgment of debt, the alleged debt as stated herein would have been statute barred when the action was filed, and could not succeed once the Statute of Limitations was raised in the defence, for, although reliance on the statute is a procedural defence it provides a complete defence. As a consequence, the applicant may suffer grave injustice if he is forced to pay a sum that he may not have owed or no longer owed, or if he is compelled to pay a sum that is more than he actually owed, or because the action is time barred and the respondent could not succeed on it. The respondent would also suffer harm if the applicant is ordered to pay a sum that is less than he owed, and also if the applicant does not have any assets in the jurisdiction to which the judgment sum can be attached (and there does not seem to have been any evidence indicating that there are any such assets). However, in the circumstances of this case, it does appear that there is a greater risk of injustice to the applicant if the stay is not granted.

Conclusion

[69] The plethora of triable issues and the varied decisions from different judges in different courts, all raise issues which ought to be determined in the substantive appeal. On the above basis, I agreed with discharging the orders made by Brooks JA and ordering a stay of the execution of Daye J's judgment, pending appeal, as set out in paragraph [3] herein.

MANGATAL JA (AG)

[70] I too have read the draft reasons for judgment of my sister Phillips JA and agree. I have nothing to add.