[2019] JMCA App 30

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 198/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN NORRIS NEMBHARD APPLICANT

AND THE ASSETS RECOVERY AGENCY RESPONDENT

Hugh Wildman, Demetrie Adams and Miss Faith Gordon instructed by Demetrie Adams for the applicant

Miss Alethia Whyte for the respondent

30 September and 20 December 2019

PHILLIPS JA

[1] I have read in draft the reasons for judgment of my sister McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

[2] These proceedings concern an application for permission to appeal, brought by Mr Norris Nembhard ("the applicant"), from the order of Laing J that was made in the Supreme Court on 17 August 2018. By that order, the learned judge refused to set aside a judgment in default of defence entered against the applicant on 10 August

2016. The applicant also sought, by this application, an order for stay of execution of the judgment, pending the hearing of the appeal.

[3] On 30 September 2019, after a consideration of the application and the submissions of counsel on both sides, we refused the application and ordered costs to the respondent to be agreed or taxed. We promised then to reduce the reasons for our decision to writing. This is in fulfilment of that promise.

Background

[4] On 5 October 2011, the Assets Recovery Agency ("the respondent") filed a claim form and particulars of claim against the applicant, seeking among other things, a civil recovery order pursuant to section 57 of the Proceeds of Crime Act ("the POCA") as well as a restraint order pursuant to sections 32 and 33 of the POCA, in relation to real property and motor vehicles owned by the applicant.

[5] At the time the claim was filed, the applicant was incarcerated in the United States of America. This, notwithstanding, the parties are in agreement that the applicant was personally served with the claim form, particulars of claim and supporting documents and that, through his then attorney-at-law, he filed an acknowledgment of service on 4 November 2011, indicating his intention to defend the claim.

[6] The matter was subsequently before the court below on several occasions in respect of various applications for restraint orders. However, no defence was filed by the applicant to the claim. By letter of 9 March 2016, the respondent notified the applicant's then attorney-at-law of its intention to apply for default judgment within

seven days of the date of the letter, unless the applicant filed and served his defence. In response, on 11 March 2016, the applicant's then attorney-at-law wrote to the respondent, requesting a 30 day extension of time within which to file his defence. This letter was not responded to. However, no steps were taken by the respondent during that time to obtain default judgment against the applicant.

[7] On 22 April 2016, the applicant's then attorney-at-law wrote to the respondent advising that she no longer represented him and that another attorney-at-law would be filing a notice of change of attorney. This was subsequently followed by an email from her on 1 June 2016, by which she informed the respondent that her retainer had come to an end. To this email was attached an unfiled copy of the application to formally remove her name from the record as the applicant's attorney-at-law along with her affidavit in support.

[8] On 2 June 2016, the respondent filed, among other things, a without notice application for court orders requesting that judgment be entered against the applicant, he having failed to file his defence. This application was heard by Palmer J, who, on 10 August 2016, granted default judgment and a civil recovery order in relation to five properties and 11 motor vehicles belonging to the applicant, pursuant to section 58(2) and (3) of the POCA.

[9] On 26 September 2016, the applicant applied to set aside the judgment and also sought leave for an extension of time to file his defence. The grounds proffered by him in support of that application, were, among other things, that he had a real prospect of

successfully defending the claim; he had been incarcerated in the United States of America until November 2015; and that he had made the application as soon as he became aware that a default judgment had been entered against him.

[10] This application was heard and refused by Laing J on 17 August 2018. This court was not provided with written reasons for the learned judge's decision.

[11] On 7 March 2019, Wolfe-Reece J (Ag) (as she then was) refused the applicant's application for leave to appeal the decision of Laing J. She also refused the application for a stay of execution of the judgment pending the appeal. The court is also not privy to the reasons for this decision.

The application for permission to appeal

[12] The applicant has renewed the application for permission to appeal before this court. He contended that permission should be granted on the basis that the proposed grounds of appeal had a real chance of succeeding. These proposed grounds were detailed by him, as follows:

> "a. Pursuant to **Rule 1.8** of the **Court of Appeal Rules,** as amended;
>
> b. Pursuant to **Section 11(1)(f)** of the **Judicature (Appellate Jurisdiction) Act** stipulates that leave is required to appeal against an interlocutory judgment or order;
>
> c. That leave was sought and refused in the Supreme Court of Judicature on March 7, 2019 by the Honourable Mrs. Justice Simone Wolfe-Reece (Ag.)(as she then was).

d. That the [respondent] commenced the matter by way of Claim Form and Particulars of Claim, rather than by Fixed Date Claim Form pursuant to **Rule 8.1(4)(d)** of the **Civil Procedure Rules (CPR)** where the [respondent] seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact;

e. That the [applicant] has a real prospect of successfully arguing the Appeal, in that:-

i. The Learned Judge erred as a matter of law and/or fact in finding that the [applicant] has no real prospect of successfully defending the claim;

ii. The Learned Judge erred in misapplying **Section 2** of **the Proceeds of Crime Act (POCA)**, in that, the alleged criminal conduct was before May 2007 and the Act has no retroactive effect;

iii. The Learned Judge [erred] as a matter of law and/or fact when he failed to take into consideration that the delay in filing a Defence was as a result of the inability of the Attorney-at-Law to get instructions from his client while incarcerated in the United States of America;

iv. The Learned Judge [erred] as a matter of law and/or fact in failing to take into consideration that the failure in filing a Defence was not solely attributable to the [applicant] who had discharged all his obligations as a client, but to his Attorney-at-Law;

v. The Learned Judge misapplied the principles with respect to setting aside a default judgment;

vi. The Learned Judge failed to take into consideration that there was a claim (**Claim No. 2010 HCV 03828 - Norris Nembhard (by his agent Claudia Nembhard) v Attorney General of Jamaica**) filed earlier in

time, which is still left to be heard, for the return of some of the assets which were subject in this instant claim which were contended to be unlawfully seized by the agents of the State; and

vii. The Learned Judge erred in failing to stay the ruling of the Notice of Application for Court Order filed on the 26th day of September 2016 until (**Claim No. 2010 HCV 03828 - Norris Nembhard (by his agent Claudia Nembhard) v Attorney General of Jamaica**) was heard.

f. That the Appeal has a real chance of success;

g. It would be fair and just for the disposal of this matter; and

h. Pursuant to the overriding objective of the Court of Appeal Rules as amended." (Emphasis as in original)

[13] An affidavit sworn to on 30 August 2018, was filed by the applicant in support of his application for permission to appeal. In this affidavit, he sought the leave of the court to refer to, and rely on, his affidavit and further affidavit, which were filed in the court below in support of his application to set aside the default judgment. These affidavits chronicled the history of the claim before the Supreme Court, and, more or less, encompassed the proposed grounds of appeal. The applicant also deponed to the following:

i. The failure to file his defence was not intentional. His then attorney-at-law had applied to remove her name from the record due to her inability to get full instructions from him.

ii. Despite his then attorney-at-law filing an application to remove her name from the record of appeal on 2 June 2016, he was subsequently informed that she had entered an appearance on his behalf on 9 September 2016, which obviated the need for the hearing.

iii. The failure to file a defence within the required time was not solely attributable to him. He was relying significantly on his then attorney-at-law, who participated in several interim restraint applications, but failed to file a defence. He should not, therefore, be made to suffer as a consequence of the error of his then attorney-at-law.

iv. Upon becoming aware that default judgment had been entered, on 26 September 2019, he instructed his attorney-at-law at that time, to apply for it to be set aside.

v. The "criminal conduct" which formed the basis of the respondent's claim occurred in or around the year 2004, three years prior to the implementation of the POCA, in 2007. The learned judge would have, therefore, misapplied section 2(1) of the POCA, as it had no retrospective effect.

vi. He had contractual arrangements spanning upwards of 30 years with several legitimate businesses along with several other viable contracts from which he was able to acquire real estate. The motor

vehicles he owned, "were the fruits of [his] labour as a result of the multiplicity of contracts [he] was engaged in". The court was asked to juxtapose these facts against the respondent's pleadings which failed to disclose, "any fact or information that [his] assets were acquired as a result of any 'criminal lifestyle'".

[14] From the filed grounds and evidence submitted by the applicant, the central question that arose for the consideration of this court, was whether the applicant had a real prospect of success in satisfying this court that Laing J erred in refusing to set aside the judgment which had been entered in default of defence. In resolving this question of the prospect of success, four subsidiary issues arose for consideration; they were:

i) whether the respondent, in commencing the claim by way of a claim form as opposed to a fixed date claim form, proceeded in an incorrect manner;

ii) whether the learned judge failed to take into account that the unlawful conduct alleged against the applicant was criminal conduct which had occurred prior to 30 May 2007, and, in so doing, misapplied section 2(1) of the POCA;

iii) whether the applicant gave a good reason for the delay in filing his defence; and

iv) whether the learned judge should have stayed the application to set aside the judgment until the determination of an earlier claim.

[15] To arrive at the conclusion contended by the applicant that permission to appeal was justified, the court was entitled to form a provisional view of the chance of success of the proposed grounds, in accordance with the requirement of rule 1.8(7) of the Court of Appeal Rules, 2002 ("the CAR"). Having considered the proposed grounds, the court concluded, contrary to the applicant's contention, and in keeping with the respondent's, that none of the proposed grounds of appeal was likely to succeed on appeal. These are my reasons for joining in that conclusion.

Issue (i)

Whether the respondent, in commencing the claim by way of a claim form as opposed to a fixed date claim form, proceeded in an incorrect manner

[16] Counsel Mr Hugh Wildman, on behalf of the applicant, argued that the Civil Procedure Rules, 2002 ("the CPR") mandate the circumstances within which a claim must be commenced by way of a claim form as opposed to a fixed date claim form. According to counsel, claim forms are to be used in circumstances where there are disputed facts and, fixed date claim forms, where the question to be settled by the court is unlikely to involve a substantial dispute of fact.

[17] Mr Wildman submitted that the primary issue that arose for the court's consideration on the claim was whether the provisions of the POCA were applicable to deprive the applicant of his real property and motor vehicles in question. This, he said, essentially raised questions of law for the court's determination and did not involve any

factual dispute as it was not in issue that the applicant was the owner of the various real property and motor vehicles at the time they were acquired. Therefore, the respondent would have acted in error when it commenced the claim using an incorrect method.

[18] The commencement of the claim by an incorrect method, Mr Wildman argued, is far-reaching in its consequential effect on the applicant for the following reasons:

i) the respondent was able to invoke a proceeding under Part 12 of the CPR, which allowed them to apply for judgment in default of defence, a recourse which would not have been available had the proceeding been commenced by way of a fixed date claim form; and

ii) the applicant was seriously prejudiced as he was met with the strictures governing the setting aside of a default judgment.

[19] Counsel Miss Alethia Whyte, on behalf of the respondent, asked this court to disregard the arguments raised by the applicant as these issues had not been canvassed in the court below and were being raised for the first time before this court. This, notwithstanding, Miss Whyte asked the court to note that whilst the POCA does not make provision for how civil recovery claims are to be initiated, the Proceeds of Crime Regulations, 2007 ("the Regulations") provide guidance in this regard. Regulation 5, she argued, envisions that a civil recovery claim would be initiated by way of a claim

form and particulars of claim. No reference is made to claims being commenced by way of a fixed date claim form with supporting affidavit.

[20] Counsel further noted that the applicant's contention that civil recovery claims are unlikely to involve disputes of fact is unmeritorious. She argued that civil recovery claims often require a court to determine whether: (i) the property in question is recoverable property within the meaning of section 58(1) of the POCA; and (ii) the property in question was obtained through unlawful conduct.

Analysis and findings on issue (i)

[21] There is no denial on the part of Mr Wildman that the argument concerning improper commencement of the proceedings was never raised before the Supreme Court, and so, was not a point relied on by the court below in coming to its decision. He, however, submitted that he was entitled to raise the point because it is a matter of law. Mr Wildman was not correct. He failed to have regard to rule 1.16(2) and (3) of the CAR, which provides that:

> "(2) At the hearing of the appeal no party may rely on a matter not contained in that party's notice of appeal or counter-notice unless-
>
> (a) it was relied on by the court below; or
> (b) the court gives permission.
>
> (3) However -
> (a) the court is not confined to the grounds set out in the notice of appeal or counter-notice, but
> (b) may not make its decision on any ground not set out in the notice of appeal or counter-notice unless the other parties to the appeal have had sufficient opportunity to contest such ground."

[22] In that rule, no distinction is made between a point of law or fact being involved in the ground of appeal. Be that as it may, given Mr Wildman's forceful insistence that the wrong procedure was employed to commence the civil recovery proceedings, we formed the view that it would be of tremendous value to the development of the procedural law governing the enforcement of the POCA, that this issue be settled by the court. Having considered the circumstances, we concluded that there was no prejudice that could have been caused to the respondent, who had the opportunity to respond in a detailed written submission. We decided, therefore, to consider the argument.

[23] Rule 8.1(4) of the CPR sets out the six circumstances in which a fixed date claim form should be used. They are: (a) mortgage claims; (b) claims for possession of land; (c) hire purchase claims; (d) where the court's decision is sought on a question which is unlikely to involve a substantial dispute of fact; (e) if a fixed date claim form is required by a rule or practice direction; and (f) where an enactment requires proceedings to commence by petition, originating summons or motion.

[24] Mr Wildman's submission was that the claim involved only a question of law, and so, would not have involved a substantial dispute of fact. He was, therefore, relying on rule 8.1(4)(d) for his proposition. This submission was not accepted. The allegation of acquisition of property by criminal or unlawful conduct is not a question which is ***unlikely*** to lead to a substantial dispute of fact. This case is a prime example of one in which the question for the court's decision was one that would have involved a substantial dispute of fact. Furthermore, as Miss Whyte noted, regulation 5 of the

Regulations envisions that a civil recovery claim would be initiated by way of a claim form and particulars of claim. No reference is made to claims being commenced by way of a fixed date claim form (or by petition, originating summons or notice of motion, which were methods of commencement under the previous procedural regime).

[25] When the relevant provisions were considered, it became evident that this case does not fall within any of the situations provided for by the CPR for the use of a fixed date claim form. Also, the legislative regime of the POCA has made no such prescription. The applicant was bound to fail on this issue on appeal.

Issue (ii)

Whether the learned judge failed to take into account that the unlawful conduct alleged against the applicant was criminal conduct which had occurred prior to 30 May 2007, and, in so doing, misapplied section 2(1) of the POCA

[26] Mr Wildman submitted that section 2(1) of the POCA is "forward-thinking" in its application; in that, the provisions of this section clearly demonstrate that the POCA was not intended to have retrospective effect.

[27] Counsel, therefore, noted that the assets which were the subject matter of the respondent's claim in the Supreme Court were all acquired prior to 30 May 2007, the date on which the POCA was promulgated. In the light of this, Mr Wildman argued, that the assets could not have formed the subject of an application for confiscation by the respondent under the POCA. The claim, he said, was, therefore, a nullity as it was in breach of section 2(1) of the POCA which bars any claim alleging criminal conduct that had occurred prior to the passing of the Act. The respondent, he further contended,

had proceeded on this "illegal claim" and it was, "this illegality that resulted in [Palmer J] entering the default judgment against the applicant".

[28] In advancing his argument, that the POCA expressly had no retrospective effect, Mr Wildman placed reliance on the Privy Council's opinions in **Assets Recovery Agency (Ex-parte) (Jamaica)** [2015] UKPC 1. He also argued on the strength of the opinion of the Privy Council in **McLaughlin v Governor of Cayman Islands** and **Leymon Strachan v The Gleaner Company and another** [2005] UKPC 33, that the claim was void, from the beginning, and so, the judgment of Palmer J ought to be set aside as a nullity by this court.

[29] Miss Whyte, in response, again highlighted that the applicant had failed to raise this issue that the claim was commenced in breach of section 2(1) of the POCA before the learned judge. The arguments that were pursued on the applicant's behalf before the learned judge, she said, centred around the assertion that the POCA was unconstitutional as it infringed the applicant's right of possession and enjoyment of property. To say, therefore, that the learned judge misapplied section 2(1) of the POCA, Miss Whyte submitted, was "not correct and [was] wholly unfair".

[30] Relying on the decision in **Flexnon Limited v Constantine Michell and others** [2015] JMCA App 55, Miss Whyte further argued that the applicant's contention that the claim was a nullity should have been made on appeal against the default judgment itself, which had been entered by Palmer J.

[31] Miss Whyte commended to the court the issues, which she said, should be considered with respect to the setting aside of a default judgment. They are as set out in rule 13.3 of the CPR. The primary question, she noted, was whether the applicant had a real prospect of successfully defending the claim. This principle, counsel argued, was correctly applied by the learned judge and he concluded that there was no such defence on the merits. Miss Whyte contended that when one examines the affidavit of the applicant, it failed to disclose any prospect of him successfully defending the claim, as he failed to demonstrate whether the assets in dispute where obtained legitimately. Simply stating in an affidavit that he obtained earnings from various contracts, without submitting proof of these contracts, she argued, could not satisfy the obligation of proving the legitimate means by which the assets were obtained.

Analysis and findings on issue (ii)

[32] Again, it was observed that the applicant had changed his case mid-stream between Laing J's consideration of his application to set aside the default judgment and the application for permission to appeal. The court must set its face against such conduct in proceedings, which is markedly unfair, not only to the learned judge, but to the respondent who had to face an entirely new case after the proceedings had been determined in the court below. It is hoped that this is not becoming settled practice on the part of counsel appearing for the applicant.

[33] The court is by no means condoning the bad practice that has emanated in the presentation of the applicant's case in these proceedings. However, given that this is an application for permission to appeal and in the light of the preparation of the

respondent to meet this new challenge, without any obvious prejudice to it, the court had examined this issue in order to settle, once and for all, the controversy ignited by Mr Wildman. This, it is hoped, will bring certainty to this aspect of the POCA regime.

[34] The respondent had instituted proceedings for a civil recovery order pursuant to section 57 of the POCA. Section 56 which speaks to the general purpose of this Part IV of the POCA, in so far as is immediately relevant to these proceedings, reads in subsection 1(a):

> "56. – (1) This Part has effect for the purposes of-
>
> (a) enabling the enforcing authority to recover, in civil proceedings before the Court, property which is, or represents, property obtained through unlawful conduct;"

[35] Then, in subsection (3), it continues:

> "(3) The Court mentioned in subsection (1)(a)... shall decide on a balance of probabilities whether it is proved that –
>
> (a) any matters alleged to constitute unlawful conduct have occurred; or
>
> (b) any person intended to use any cash in unlawful conduct."

[36] Following this, section 57 provides that the enforcing authority may take proceedings in the Court against any person who it believes holds recoverable property.

[37] At the core of the civil recovery regime is property which is, or which represents, property obtained through unlawful conduct. Of special note, unlawful conduct is defined in the POCA at section 55(1) in these terms:

"'unlawful conduct' means-

(a) conduct that occurs in, and is unlawful under the criminal law of, Jamaica; or

(b) conduct that-

(i) occurs in a country outside of Jamaica and is unlawful under the criminal law of that country; and

(ii) if it occurred in Jamaica would be unlawful under the criminal law of Jamaica." (My Emphasis)

[38] Miss Whyte was correct in her submissions that the only criteria to be satisfied for a civil recovery order is that the predicate or antecedent conduct being relied on by the respondent occurred in Jamaica and is unlawful under the criminal law of Jamaica or, if it occurred outside of Jamaica, would be unlawful under the criminal law of that country.

[39] Mr Wildman's argument that the statute does not have retrospective effect so as to cover the alleged unlawful conduct being relied on, is grounded in the provisions of section 2(1) of the POCA. In his view, criminal conduct is required as a basis for the civil recovery order. According to Mr Wildman, for the conduct to be unlawful, it must contravene the criminal law of Jamaica, or if it occurred outside Jamaica, would constitute an offence if the conduct occurred in Jamaica, and so, would be criminal conduct within the meaning of section 2(1).

[40] The POCA, in speaking to criminal conduct, provides a closed and unequivocal definition. It states:

> "2-(1) In this Act -
>
> **'criminal conduct'** ***means*** conduct occurring on or after the 30th May, 2007, being conduct which-
>
> (a) constitutes an offence in Jamaica;
>
> (b) occurs outside of Jamaica and would constitute such an offence if the conduct occurred in Jamaica;" (My emphasis)

[41] Not only is Parliament obviously deliberate in speaking to 'criminal conduct' as distinct from 'unlawful conduct', it has also defined both concepts in separate and discrete provisions. It also went even further to make specific provisions concerning the limitation of actions under Part IV of the POCA, in relation to unlawful conduct.

[42] It should be noted that section 55(3) of the POCA states that in deciding whether property is recoverable, "including any time before the appointed day [30 May 2007], it shall be deemed that [Part IV] was in force at that and any other relevant time". This means, in effect, that the court in determining whether property was obtained through unlawful conduct is to act on the assumption that the POCA was, in fact, in force at the time of the acquisition of the property in question.

[43] The court endorses the reasoning of Sykes J (as he then was) in **The Assets Recovery Agency v Adrian Fogo and others** [2014] JMSC Civ 10, at paragraphs [35] to [36] (relied on by the respondent), where, in speaking of section 55(3) of the POCA, he stated that:

> "[35] The practical result of this is that property acquired before POCA was passed can be seized through civil recovery proceedings if it can be shown that it was obtained

through unlawful conduct. The limitation period is twenty years from the time of acquisition. This stands in sharp contrast to section 2 (10) which provides in [sic] that nothing in the sections that assist in conviction-based recovery of property applies to 'conduct occurring, offences committed or property transferred or obtained, before the appointed day.'

[36] On the face of it there is express statutory authorisation for the retrospective imposition of a civil penalty to facts and circumstances that occurred before POCA was enacted or came into force."

[44] Time limits with respect to commencing proceedings for a civil recovery order are encapsulated in section 71. That section reads:

"71.- (1) The time limits established by the Limitation of Actions Act shall not apply to any proceedings under any of the foregoing provisions of this Part.

(2) Proceedings under any of the foregoing provisions of this Part shall not be brought after the expiration of the period of twenty years from the date on which the Agency's cause of action accrued.

(3) For the purposes of this section -

(a) proceedings are brought when -

(i) a claim form is issued; or

(ii) an application is made for an interim receiving order,

whichever first occurs;

(b) the Agency's cause of action accrues in respect of recoverable property -

(i) in the case of proceedings for a recovery order in respect of property obtained through unlawful conduct, when the property is so obtained;

> (ii) in the case of proceedings for a recovery order in respect of any other recoverable property, when the property obtained through unlawful conduct which it represents is so obtained."

[45] The definition of 'criminal conduct' in section 2(1), relied on by the applicant, has no bearing on the civil recovery regime, provided by Part IV of the POCA. The respondent's cause of action would have accrued at the time the property alleged to have been obtained through unlawful conduct, was acquired. This could have been prior to the passing of the POCA. The applicant cannot successfully rely on section 2(1) of the POCA to escape the tentacles of the civil recovery regime invoked by the respondent.

[46] Sections 55(3) and 71 of the POCA provided a complete answer to the applicant's principal contention, on a matter of substantive law, in his proposed grounds of appeal. None of the authorities relied on by Mr Wildman availed the applicant. In fact, the Privy Council in **Assets Recovery Agency (Ex-parte)(Jamaica)** laid down no rule that 'criminal conduct', as defined in section 2(1), is applicable to civil recovery under Part IV. Their Lordships were careful to point out at paragraph 4(ii) of the judgment that its decision had nothing to do with civil recovery.

[47] For the foregoing reasons, I could discern no merit in this proposed ground of appeal that the POCA does not have retrospective effect to cover unlawful conduct that predated 30 May 2007, thereby rendering the claim and the judgment entered on it, nullities.

[48] The applicant would have an uphill task, at the hearing of the appeal, if permission were granted, to convince this court that Laing J erred in not finding that he had a real prospect of successfully defending the claim.

Issue (iii)

Whether the applicant gave a good reason for the delay in filing his defence

[49] The argument advanced by the applicant as to the reasons for the delay in filing the defence was two-fold. Firstly, he contended that the attorney-at-law who previously had conduct of his matter had difficulties obtaining instructions from him while he was incarcerated in the United States of America. Secondly, he contended that the failure to file the defence was not solely attributable to him because he had fully discharged his obligations as a client, but his previous attorney-at-law had acted in error in not filing his defence. He should not be made to suffer as a consequence of this, he maintained.

[50] Miss Whyte challenged the explanation given by the applicant for having failed to file his defence within the required time. She argued that the reasons proffered were contradictory. Counsel contended that, on the one hand, the applicant stated that he had satisfied his obligations to his then attorney-at-law but she had failed to file the defence, and, on the other hand, stated that he was unable to instruct the attorney-at-law to file a defence because he was incarcerated in the United States of America.

[51] Miss Whyte asked the court to note that there was, in fact, an extraordinary delay in the applicant filing his defence. The claim form and particulars of claim had been served on the applicant on 27 October 2011, default judgment was entered on 10

August 2016, almost five years later. Five years' delay, counsel contended, was nothing short of exceptional. The applicant would have, therefore, been required to give strong and convincing explanation of the reasons for the delay. No such explanation had been provided to the learned judge, she submitted.

Analysis and findings on issue (iii)

[52] Miss Whyte's submissions were accepted. It was for the learned judge to determine whether a good explanation for the failure to file a defence was advanced by the applicant. Although there was no reason for the decision from Laing J for the scrutiny of this court, it was clear from the material placed before this court, which would have been before the learned judge, that there was no good explanation given by the applicant for his failure to file a defence for five years. The internal inconsistency in his explanation would have affected its credibility and acceptability. If the learned judge had so concluded, he would have been correct and there would have been no basis for this court to disturb his finding. If he had found otherwise, and, therefore, in favour of the applicant, he would have been unjustifiably generous.

[53] The applicant was not in a position to persuade this court that he had a good explanation for his failure to file his defence after five years. The proposed ground of appeal, advancing this contention, had no real chance of success.

[54] It is clear beyond question that the applicant would have failed to satisfy Laing J that the default judgment entered against him should have been set aside. Once he had failed to establish that he had a real prospect of successfully defending the claim,

against the background of such an inordinate delay on his part to file his defence, he would have failed to surmount two crucial hurdles for the setting aside of the judgment. It should be noted that this is a case in which the default judgment was granted by a judge who would have examined the claim and particulars of claim to see whether the respondent was entitled to the order it was seeking. It was not an order which was made merely by an administrative act of the registry, as in the case of default judgments on a claim for a specified sum of money. There was, therefore, judicial scrutiny and assessment of the claim on which the order was ultimately made. Apart from an assertion made before this court (and not in the court below) that section 2(1) applies to render the claim and judgment nullities, which has been rejected, nothing was presented before this court that would have led it to the view that the applicant had demonstrably established a case with a real prospect of success at the time the matter was considered by Laing J. The evidence he had presented in support of his application was not at all convincing.

[55] There would be no merit in any prospective appeal on the ground that Laing J erred in refusing to set aside the default judgment because the applicant had a defence with a realistic prospect of success and a good explanantion for his failure to file his defence.

Issue (iv)

Whether the learned judge should have stayed the application to set aside the judgment until the determination of an earlier claim

[56] In advancing the contention that the default should have been set aside by Laing J, the applicant further contended that the learned judge should have stayed the application to set it aside in the light of a pending claim brought by the agent of the applicant against the State in relation to the same properties involved in the claim. According to the applicant, there was a previously filed claim which was pending in the Supreme Court at the time of the hearing of the application (**Norris Nembhard (by his agent Claudia Nembhard) v Attorney General of Jamaica** Claim No 2010 HCV 03828) for the return of some of the properties, which form the subject matter of the civil recovery proceedings, on the basis that they were unlawfully seized by the agents of the State. The contention in the proposed ground of appeal was that Laing J failed to take that claim into account and, consequently, he erred in law in failing to stay the hearing of the application for setting aside of the default judgment, until the determination of that claim.

[57] Miss Whyte submitted that the learned judge would have been under no obligation to consider that claim, or to stay the application to set aside the default judgment. This is because the claim was not before the learned judge for consideration and neither was he seized of any information in relation to it. Furthermore, counsel noted that a stay would have been prejudicial to the applicant himself, as this meant that the default judgment would have still been in place and the respondent could have taken steps to have the judgment enforced against him.

Analysis and findings on issue (iv)

[58] The function of the learned judge was to see whether the applicant had satisfactorily established a convincing case for the setting aside of the default judgment. According to Miss Whyte, the learned judge had no knowledge of any pending claim related to, or which could have affected, the instant claim. This was not refuted by the applicant. Therefore, the issue of another related claim to be determined was not before the learned judge, and so, it cannot fairly and properly be said that he fell in error in failing to take it into account. Furthermore, and in any event, even if he were aware of the matter, it would have been absolutely within his discretion to decide whether or not to stay the application to set aside the judgment.

[59] There is no discernible error or injustice in the learned judge's action in considering the application to set aside the default judgment. Indeed, as posited by Miss Whyte, it would have been in the applicant's best interest to have had his application to set aside the judgment determined in a timely manner. As she pointed out, the respondent could have taken steps to enforce the judgment, given that there was no stay in relation to it and none was applied for by the applicant.

Conclusion

[60] There was nothing presented by the applicant, arising from, or connected to the decision of Laing J, in refusing his application to set aside the default judgment that was entered against him, that had a real chance of success on appeal. The chance of the court disturbing the exercise of the discretion of the learned judge appeared to be more fanciful than real. Accordingly, permission to appeal was not warranted. For this

reason, I agreed with my learned sisters that the application should be refused with costs to the respondent as ordered on 30 September 2019.

EDWARDS JA

[61] I too have read, in draft, the reasons for judgment of McDonald-Bishop JA and agree with her reasoning and conclusion. There is nothing that I wish to add.