[2022] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

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

SUPREME COURT CIVIL APPEAL NO COA2020CV00008

BETWEEN	**CHRISTOPHER OGUNSALU**	**APPELLANT**
AND	**KEITH GARDNER**	**RESPONDENT**

Written submissions filed by Paris & Co for the appellant

Written submissions filed by Hugh Wildman & Company for the respondent

25 March 2022

PROCEDURAL APPEAL

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

STRAW JA

[1] I have read, in draft, the judgment of my brother D Fraser JA. I agree with his reasoning and conclusion and have nothing to add.

D FRASER JA

[2] Dr Christopher Ogunsalu, the appellant, seeks to appeal the order of T Hutchinson J (Ag), (as she then was), made on 24 January 2020, whereby the learned judge refused to set aside the default judgment against him granted to Mr Keith Gardener, the

respondent, on 26 October 2018, in relation to a claim for defamation. The learned judge also refused the application of the appellant for an extension of time to file his defence.

Background

[3] Mr Gardener is the Director of Security at certain campuses at the University of the West Indies ('the University') in Jamaica. Mr Gardener is also a retired member of the Jamaica Constabulary Force, having served for 40 years. At the time of his retirement, he was an Assistant Commissioner of Police. On 14 May 2018, Mr Gardener filed a defamation claim against Dr Ogunsalu, a lecturer at the University's Mona campus. The circumstances giving rise to that claim were that, on 8 May 2018, Dr Ogunsalu, sent emails to Mr Gardener and copied numerous senior level employees of the University ('the recipients'). Mr Gardener alleged that the emails contained defamatory statements which injured his reputation and caused him to suffer loss, damage and expenses. He sought damages for the injury to his reputation as well as an injunction to prevent Dr Ogunsalu or his servants and/or agents from publishing any further defamatory content relating to him, among other reliefs.

[4] Dr Ogunsalu filed his acknowledgment of service, however, he did not file a defence to Mr Gardener's claim. Consequently, Mr Gardener applied for judgment in default of defence against Dr Ogunsalu. The hearing for the default judgment was held on 26 October 2018, in the absence of Dr Ogunsalu. Mr Gardener was successful in his application. It was stipulated that damages were to be later assessed.

[5] Dr Ogunsalu became aware of the default judgment on 30 October 2018. On 22 January 2019, he applied to set it aside and for an extension of time to file his defence. In his proposed defence, he avers that he misunderstood his attorneys' instructions that he had to formalise their retainer before the defence could be filed on his behalf and was of the mistaken belief that one would have been filed. He states that the error was unintentional and when he became aware of this mistake, he instructed his attorneys so that a defence could be filed on his behalf. He also indicates that he filed the application

to set aside the default judgment as soon as reasonably possible. He asserts that he has a real prospect of successfully defending the claim.

[6] Dr Ogunsalu's proposed defence outlines that the email was but one of a number of other emails directed to Mr Gardener, who was the University's head of security. The proposed defence also states that the recipients were interested in the University's security and were aware of the incidents complained of. Additionally, Dr Ogunsalu insists that the words contained in the email, when considered in the entire context, were understood by the small group of recipients, as just vulgar abuse; and there was nothing to suggest that the words were defamatory. He maintained that his conduct of sending the email stood in stark contrast to the publication, by Mr Gardener, of the claim in the media.

[7] The learned judge heard the application to set aside the default judgment on 26 November 2019. On 24 January 2020, she refused the application to extend time to file the defence, directed that the matter should proceed to assessment and granted Mr Gardener costs of the application. She, however, granted leave to appeal her order refusing the application to extend time.

[8] By way of notice of appeal filed 30 January 2020, Dr Ogunsalu appealed the learned judge's decision and filed the following grounds of appeal:

> "a. The learned judge erred in finding that the words complained of at paragraph 10 (ii) of the Particulars of Claim could not be said to be vulgar abuse and as such the proposed defence has no real prospect of success. In so finding she failed to consider that the words should not be considered in isolation but having regard to the entire publication as well as the circumstances of the publication and the likely inferences to be drawn from same by the persons to whom the publication was made. The learned judge failed to address her mind to the limited nature of the publication and the special knowledge that the audience had as to the fact and circumstances surrounding the said publication. All recipients of the email [were] persons who due to their position held at [the] University of the West

Indies, Mona Campus would be aware of the security issues at the University and have an interest in the said security issues.

b. The learned judge erred in finding that [Dr Ogunsalu] did not have a good explanation for failing to file his defence in time and thus had not [satisfied] [r]ule 13.3 of the CPR in that the explanation offered by [Dr Ogunsalu] was a reasonable one. Further, or in the alternative, the learned judge failed to address her mind to the fact that the absence of a good reason for failing to file a defence is not in [and] of itself fatal to an application to set aside a default judgment."

[9] In passing, it is observed that these grounds offend rule 2.2(5)(a) of the Court of Appeal Rules ('CAR'), which provides that grounds of appeal are to be set out concisely.

The issues

[10] The issues arising from the grounds may be summarised as follows:

1. Whether the learned judge erred in finding that the words complained of (at paragraph 10(ii) of the particulars of claim) were not vulgar abuse and as such the proposed defence has no real prospect of success;

2. Whether the learned judge erred in finding that the applicant did not have a good explanation for the failure to file the defence in time; and

3. Even if the finding at 2 was correct, did the learned judge fail to consider that the absence of a good reason for the failure to file the defence was not automatically fatal to the application to set aside the default judgment.

The overarching principle

[11] The law is well settled that an appellate court must not lightly interfere with a first instance judge's exercise of discretion. On appeal, a judge's exercise of discretion cannot be interfered with, merely because members of the appellate court would have exercised their discretion differently, had they been in the position of the lower court. Therefore, it is only if it is determined that the learned judge was palpably wrong in her assessment of the law, the facts or aspects of mixed law and facts, that this court will disturb her finding (see **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042, approved and applied in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1).

Issue 1 (Ground a): Whether the learned judge erred in finding that the words complained of (at paragraph 10(ii) of the particulars of claim) were not vulgar abuse and as such the proposed defence has no real prospect of success.

[12] At paragraph 10(ii) of the particulars of claim, Mr Gardener extracted the following words from one of Dr Ogunsalu's emails. The extract reads:

> "ii Yes Justice is blind, that is why a blatant, cold blooded murder [sic] can be set free by the Jury to now be mingling and toying with an academic community of which I am part of its builders."

[13] Mr Gardener, at sub-paragraphs 11 a) and d) of the particulars of claim, complain that those words, in their natural and ordinary meaning, meant that he was a cold blooded murderer who the jury freed and that he was not fit and proper to be connected with the University. The chapeau of paragraph 11 and sub-paragraphs a) and d) outline that:

> "11. The words in their natural and ordinary meaning in relation to [Mr Gardener] meant and were understood to mean:
>
> a) That [Mr Gardener] is a cold blooded murderer who was freed by a jury;
>
> …

d) [Mr Gardener] is not a ***fit and proper*** person to be associated with the University of the West Indies." (Italics and emphasis as in original)

[14] The learned judge ruled that those words at paragraph 10(ii) of the particulars of claim are not vulgar abuse. The learned judge reasoned that the words clearly meant that Dr Ogunsalu was suggesting that Mr Gardener unjustifiably killed his wife and the ordinary reasonable reader would have interpreted the words as Mr Gardener did at paragraphs 11 a) and d). The learned judge also found that what was in the public domain was that Mr Gardener was charged with murder and the jury acquitted him; but that was not Dr Ogunsalu's narrative. Instead, the judge determined, that when the emails are considered in their totality, Dr Ogunsalu's statements suggested the meaning that Mr Gardener ascribed to them. The learned judge therefore concluded that Dr Ogunsalu's defence does not have a reasonable prospect of success.

The submissions

Counsel for the applicant

[15] Counsel for Dr Ogunsalu contended that the words complained of were a subset of the emails sent between Dr Ogunsalu and Mr Gardener and copied to the recipients. Counsel posited that those recipients were also interested in the University's security and the emails outlined security issues at the University. One such issue, of which the recipients were already aware, involved Dr Ogunsalu's son. Learned counsel urged the court to consider that the words complained of were vulgar abuse and the recipients accepted it as such. Counsel argued that while the learned judge accepted other statements in the email as vulgar abuse, she wrongly isolated the words complained of and found that they did not constitute vulgar abuse.

[16] Learned counsel advanced that the statements must all be construed in their entirety, which required assessment at a trial, through the vehicle of cross examination. Learned counsel contended that if the words were considered in their entirety, it would become apparent they were all vulgar abuse, and therefore not defamatory. Counsel

relied on **Shawna Hawthorne v Fiona Ross** [2016] JMCA Civ 50 at paragraphs [22] - [24] and an extract from Winfield and Jolowicz on Tort, 18th edition at pages 587-588.

Counsel for the respondent

[17] Learned counsel for Mr Gardener submitted that, for Dr Ogunsalu to succeed in his application to set aside the default judgment, his affidavit of merit and draft defence must demonstrate that he has a real prospect of successfully defending the claim. Dr Ogunsalu was therefore required to show that his defence has merit (**Evans v Bartlam** [1937] AC 473) or, put another way, a real, not a fanciful prospect of success (**Flexnon Limited v Constantine Michell and others** [2015] JMCA App 55). Learned counsel maintained that, Dr Ogunsalu's position that the words complained of amounted to vulgar abuse is implausible.

[18] Counsel contended that the learned judge highlighted that one of the categories for words to be considered defamatory, is, if they impute a crime punishable by imprisonment or corporal punishment. Learned counsel advanced that the words complained of, when viewed in their entirety, did just that, as, referring to Mr Gardener being acquitted of murdering his wife, they suggested that he was a "cold blooded murderer who was freed by a jury". As murder is an offence, punishable by imprisonment, the imputation in the email would, in the eyes of the ordinary man, negatively impact Mr Gardener's reputation.

[19] Learned counsel relied on the case of **Rubber Improvement Ltd and Another v Daily Telegraph Ltd; Rubber Improvement Ltd v Associated Newspapers Ltd** [1964] AC 234 (on appeal from **Lewis v Daily Telegraph Ltd**) to determine how to categorise words complained of. At page 259, Lord Reid observed that ordinary men and women range from being unusually suspicious to unusually naïve and one must take the most damaging meaning that people in the middle of this range, would ascribe to the words. Learned counsel argued that? Dr Ogunsalu failed to prove that the recipients, as ordinary men and women, considered that the words were not defamatory. They would,

he contended, understand them to mean he is "a cold blooded murder[er]" who was not convicted because justice is blind.

[20] Counsel disputed Dr Ogunsalu's assertions that the emails related to security concerns at the University, since, the email did not refer to security issues. Instead, counsel submitted that the words complained of defamed Mr Gardener, and there is no real prospect of successfully defending the claim.

Discussion and analysis

[21] The threshold to determine whether a court should set aside or vary a regularly obtained default judgment is set out at rule 13.3 of the Civil Procedure Rules ('CPR'). This rule provides that:

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

[22] The application to set aside default judgment is to be supported by an affidavit of merit, which should exhibit a draft defence (see rule 13.4(2) and (3) of the CPR). This court must consider whether the defendant has a real prospect of successfully defending the claim. In order to do so, the court relies on the oft-cited guidance from **Swain v Hillman and Another** [2001] 1 All ER 91, that the defence must demonstrate a real prospect of successfully defending the claim and not merely a fanciful one. This means the defence must be more than just merely arguable (see paragraph [15] of **Flexnon**

Limited v Constantine Michell and others). In making this determination, the court must not engage in a mini trial.

[23] Additionally, the rule provides that if this court considers to set aside or vary the default judgment, it must examine: i) the length of the delay between the time the applicant became aware of the judgment and the filing of the application to set it aside, as well as ii) the reason for failing to comply with the rules, which in this case is the failure to file the defence within time. The matter must be considered through the lens of the overriding objective and, therefore, this court must also have regard to any prejudice a claimant may suffer if the default judgment is set aside (see paragraph [16] of **Flexnon Limited v Constantine Michell and others** and paragraph [13] of **Brian Wiggan v AJAS Limited** [2016] JMCA Civ 32). All these ingredients are essential, but, the two most important are whether the defence has a real prospect of success (see paragraph [15] of **Flexnon Limited v Constantine Michell and others**) and ensuring that justice is done (see Stuart Sime's A Practical Approach to Civil Procedure, 15th edition at page 159).

[24] Phillips JA in **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, at paragraph [23], put the rule this way:

> "… In September 2006, the rule was amended and there are no longer cumulative provisions which would permit a 'knock-out blow' if one of the criteria is not met. The focus of the court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the claim, but the court must also consider the matters set out in 13.3 (2) (a) & (b) of the rules."

[25] Of course the need for consideration of the matters set out in rule 13.3(2)(a) and (b) only arises, if the court finds that the defendant has a real prospect of successfully defending the claim (see **Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited** [2016] JMCA Civ 39 at para [83]).

[26] Dr Ogunsalu's defence is that the learned judge erred in not appreciating that the words complained of were vulgar abuse, having regard to the context of the publication. A statement is considered to be defamatory if it causes harm or is likely to cause harm to a person's reputation. Lord Nicholls in **Bonnick v Morris and others** [2002] UKPC 31, outlined the guiding principles to be applied when one seeks to determine whether a statement is defamatory. He stated at paragraph 9:

> "…As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarised by Sir Thomas Bingham MR in *Skuse v Granada Television Ltd* [1996] EMLR 278, 285-287. In short, the court should give the article **the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the [newspaper], reading the article once**. The ordinary, reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant..." (Italics as in original, emphasis supplied)

[27] There are, of course, exceptions to the tort of defamation, where, notwithstanding the fact that the statement is defamatory, it will not be actionable. One such exception is vulgar abuse. In **Shawna Hawthorne v Fiona Ross**, Ms Hawthorne was accused of defamation based on words uttered during an argument. Her defence was vulgar abuse. This court, in resolving whether Ms Hawthorne could properly rely on vulgar abuse, examined the nature of the defence. At paragraphs [22] to [24], F Williams JA, writing for the court, stated:

> "[22] In relation to the subject matter of vulgar abuse, I have had regard to Atkin's Court Forms, volume 15, at paragraph 50, in which it is stated that:
>
> > 'Notionally defamatory words or statements will not be actionable if the particular circumstances in which they were published mean that they would not have been

> understood as anything other than vulgar abuse…'

[23] In a footnote accompanying the above statement the view was expressed that:

> 'It is doubtful whether vulgar abuse would now be treated as a free-standing defence as opposed to a ground for striking out the claimant's meaning (either on the footing that the claim did not surmount the threshold of serious harm required by the Defamation Act 2013 s 1, or was otherwise an abuse of process).'

[24] Further, Halsbury's Laws of England (2012), volume 32, paragraph 549 states that:

> 'A person may use strong language of another, which if taken literally would be defamatory, but if it is obvious to the reasonable viewer or reader, from the tone and context, that the words are not intended literally but merely as insults, then the natural and ordinary meaning conveyed will not be a defamatory one. This principle is sometimes called the 'defence of mere vulgar abuse' but in fact it is a doctrine of interpretation going to exclude liability…
>
> Whether words make a definite charge of misconduct, or are merely abusive or sarcastic, depends on all the circumstances of the case."

[28] The learned editors of Stair Memorial Encyclopaedia, volume 15 at paragraph 548, note that vulgar abuse is a defence to defamation, because the words used are not factual and were not meant to be taken seriously and for that reason, they cannot injure a person's reputation. The editors said:

> "It is a defence to an action for defamation that the words used amount to no more than vulgar abuse. This is so because words falling into this category have no real meaning or are

> incapable of expressing a fact. It is different if an innuendo can be drawn. Another reason why vulgar abuse is not actionable is that it will not, generally, be regarded as having been meant seriously and is, therefore, akin to statements made [in anger]. It may be this reason why satirical television and radio programmes which lampoon public figures do not thereby commit defamation: they are not taken to be serious accusations, but expressions of wit, satire or sarcasm, and are therefore incapable of injuring reputation."

[29] The editors, in an update, caution, however, that an allegation that the defamatory statement was a joke may not be a complete defence.

[30] Additionally, Professor Kodilinye, in his text, Commonwealth Caribbean Tort Law, 5th edition, page 244, states that the words complained of must be viewed in their context and will not be actionable if they were only vulgar abuse. Vulgar abuse being words spoken in heat or anger and that is what the audience understood them to mean. He said:

> "The words used by the defendant must be looked at in the context in which they were spoken, in order to determine what was actually imputed. Thus, words which, taken by themselves, would be defamatory, might not be so when taken together with other words spoken by the defendant, or when considered in the light of the circumstances in which they were uttered…Nor will spoken words be actionable at all if they constitute mere vulgar abuse. Words will amount to vulgar abuse and not slander if:
>
> (a) They were words of heat and anger; and
>
> (b) They were so understood by persons who were present when they were uttered.
>
> Thus, disparaging or insulting words spoken at the height of a violent quarrel may be vulgar abuse and not actionable, but the same words spoken 'in cold blood' may amount to slander."

[31] Professor Kodilinye speaks of the defence in relation to slander, however, in Atkin's Court Forms, volume 16, paragraph 51, which is a later volume than this court cited in

Shawna Hawthorne v Fiona Ross, it is said that the defence was once only limited to slander but the modern approach is to consider it more broadly:

> "… It has previously been said that the 'defence' of vulgar abuse is only available in actions of slander (on the basis that written words are more likely to be taken seriously), but there is no sound rationale for limiting the principle in this manner. **The better modern approach is that vulgar abuse is one illustration of the wider principle that a claim for defamation will fail where the claimant is unable to show that the words complained of, considered in their proper context, would reasonably be understood to be defamatory of him**." (Emphasis supplied)

[32] The authors of Winfield and Jolowicz on Tort, 18th edition at pages 587-588, paragraph 12-17, note that the defendant will have the burden of proving that the audience understood the words in a non-defamatory sense. They also express similar sentiments that usually written words cannot be protected by the cloak of vulgar abuse but submit that it should not be an absolute rule and suggest as an example, words which may be written on a board during a dispute between a lecturer and his class. They made the point in this way:

> "**iii. Abuse.** It is commonly said that mere vulgar spoken abuse is not defamation nor indeed any other tort but this needs some explanation. Spoken words which are prima facie defamatory are not actionable if it is clear that they were uttered merely as general vituperation and were so understood by those who heard them and the same applies to words spoken in jest, but the defendant takes the risk on the understanding of his hearers and the burden of proof that they understood them in a non-defamatory sense is on him. This makes the manner and context in which the words were spoken very important, e.g. whether they are used deliberately in cold blood or brawled out at the height of a violent quarrel. It is generally said that written words cannot be protected as abuse because the defendant had time for reflection before he wrote and his readers may know nothing of any dispute or other circumstances which caused him to write as he did – no doubt this is generally true but it is hard

> to see why there should be any absolute rule…" (Bold as in original)

[33] In summary, the authorities indicate that a defendant will be protected by the cloak of vulgar abuse when words are used in heat and anger, and, from the entire tone and context in which the words are used, the audience would have appreciated that they were intended to be insults, rather than taken in their literal and ordinary meaning.

[34] It is, therefore, of critical importance to assess the context within which the words complained of in this matter were used. Dr Ogunsalu was responding to a prompt report which Mr Gardener sent, in his capacity as Director of Campus Security, relating to an incident that occurred on the University's campus. He then raised concern about the absence of a report on an issue that happened a year earlier involving his son. Mr Gardener responded in a manner Dr Ogunsalu did not take kindly to, which led to him replying with the words complained of. Those written words, taken in the entire context of the email are obviously abusive language, which according to Dr Ogunsalu was a "heated exchange". However, it cannot be said that they were used at the "height of a quarrel", since Dr Ogunsalu had time to reflect on the words before he sent the email. Further, there was no evidence that the recipients, in fact, understood the words complained of to be just vulgar abuse, particularly in the light of the fact that Mr Gardener was, indeed, tried for murder, but was acquitted by the jury.

[35] Dr Ogunsalu's argument that the learned judge did not comment on the fact that the publication was to a closed group of persons who were aware of the circumstances and were interested in the University's security is erroneous. It is correct that the learned judge did not discuss that the publication was to a small group but that is of no moment. The recipients were aware of the incident involving his son. But, as the learned judge rightly said, the words complained of did not relate to the security issues at the University. Instead, the words were directed at Mr Gardener "mingling and toying with [the University's] academic community".

[36] In the present case, therefore, the learned judge cannot be faulted for her conclusion that the words complained of were defamatory. The learned judge found that those words implied that Mr Gardener unjustly killed his wife and that is the meaning the ordinary reasonable reader would attribute to those words. The learned judge also found that the context in which the words complained of were used, they were intended to convey that he unjustifiably killed his wife. Further, the learned judge noted that Dr Ogunsalu failed to present evidence to prove, that that was not the interpretation the recipients ascribed to it, but rather they only considered it vulgar abuse. Accordingly, Dr Ogunsalu does not have a real prospect of successfully defending the claim. This ground, therefore, fails.

Issue 2 (Ground b): Whether the learned judge erred in finding that the applicant did not have a good explanation for the failure to file the defence in time

Issue 3 (Ground b): Even if the finding at 2 was correct, did the learned judge fail to consider that the absence of a good reason for the failure to file the defence was not automatically fatal to the application to set aside the default judgment

[37] Rule 13.3(2) of the CPR provides that the court must consider a) whether the defendant applied to set aside the default judgment promptly and b) whether there is a good reason for the delay. Concerning this requirement, in the case of **Flexnon Limited v Constantine Michell and others**, McDonald-Bishop JA stated at paragraphs [27] and [28]:

> "[27] It is clear from rule 13.3(2)(a) and (b) that it is incumbent on the court to consider whether the application to set aside was made as soon as was reasonably practicable after finding out that judgment had been entered and that a good explanation is given for the failure to file an acknowledgement of service and or a defence as the case may be. So the duty of a judge in considering whether to set aside a regularly obtained judgment does not automatically end at a finding that there is a defence with a real prospect of success. Issues of delay and an explanation for failure to

> comply with the rules of court as to time lines must be weighed in the equation.
>
> [28] While it is accepted that the primary consideration is whether there is a real prospect of the defence succeeding, that is not the sole consideration and neither is it determinative of the question whether a default judgment should be set aside. The relevant conditions specified in rule 13.3(2) must be considered and such weight accorded to each as a judge would deem fit in the circumstances of each case, whilst bearing in mind the need to give effect to the overriding objective."

[38] From what was stated by McDonald-Bishop JA in paragraph [28] it follows as a matter of inexorable logic, that it is only if an applicant successfully clears the hurdle of rule 13.3(1) of the CPR, that is, "there is a real prospect of the defence succeeding", that the factors under rule 13.3(2) come into play. That logic was explicitly embraced by Edwards JA (Ag), (as she then was), in **Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited** cited earlier, where she stated at paragraph [83] that:

> "If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the **end of the matter**." (Emphasis supplied)

[39] As the court has upheld the learned judge's conclusion that Dr Ogunsalu does not have a real prospect of successfully defending the claim, the result is that he cannot succeed in this application. The court does not provide a lifeline to defendants in cases where their defences are without merit.

[40] Accordingly, the learned judge's assessment of the case could properly have ended when she found that the defence did not have a real prospect of success. However, in deference to the other findings made by the learned judge, the grounds of appeal and the submissions advanced, the court will also briefly consider the factors under rule 13.3(2), which, where there is a meritorious defence, are relevant to the court's determination of whether it should exercise its discretion to set aside a default judgment.

Was the application made promptly?

[41] Before examining the two issues raised under ground b, it should be noted that in relation to the requirement under rule 13.3(2)(a) that an applicant should act promptly, the learned judge found that Dr Ogunsalu applied to set aside the default judgment as soon as was reasonably practicable. Accordingly, Dr Ogunsalu did not file any ground in relation to. nor make any complaint about that finding which was in his favour.

[42] Without a counter-notice of appeal being filed pursuant to rule 2.3 of the CAR, to alert the appellant to a challenge to the learned judge's finding on this point, submissions were advanced on behalf of the respondent in opposition to it. That surreptitious challenge will not be permitted. In any event, we find that in light of the relevant law and extant facts, the conclusion of the learned judge is eminently supportable and could not have been successfully impugned.

Was there a good reason for the delay?

[43] The learned judge determined that Dr Ogunsalu did not provide a good explanation for failing to file his defence.

[44] Learned counsel for Dr Ogunsalu submitted that Dr Ogunsalu's explanation for failing to file the defence within time has merit. Counsel cited Dr Ogunsalu's affidavit in support of his application to set aside the default judgment, in which he stated that he misinterpreted the instructions of his attorneys-at-law, regarding the need to settle the required retainer before a defence could be filed on his behalf.

[45] Learned counsel for Mr Gardener argued that the explanation proferred is without merit as Dr Ogunsalu only seeks to blame his attorneys and has advanced a reason which is unmeritorious and contradictory. It is contradictory, counsel submitted, because having failed to formalise a retainer and give instructions for the defence, how could he assert that he thought enough had been done for a defence to be prepared on his behalf?

[46] Learned counsel also highlighted that, obviously, Dr Ogunsalu did not liaise with his counsel to confirm that a defence had been prepared on his behalf. Counsel added that it is difficult to accept that a man of Dr Ogunsalu's standing misunderstood his attorneys' instructions. Counsel disputed Dr Ogunsalu's assertion that he gave his attorneys the relevant instructions within reasonable time, since the application was filed three months after Dr Ogunsalu became aware of the default judgment and he should have provided a reason for this delay.

[47] Counsel further advanced that this is not a case where the court should exercise its discretion to set aside the default judgment. To do so, counsel maintained, would be contrary to the overriding objective and the principles outlined in **Standard Bank PLC & Another v Agrinvest International Inc & Other** [2010] EWCA Civ 1400, which provides that it is desirable that justice must be done between the parties "on the merits".

[48] Accordingly, counsel maintained that the learned judge properly refused Dr Ogunsalu's application to set aside the default judgment and the appeal ought to be dismissed.

Discussion & Analysis

[49] Dr Ogunsalu's explanation for his failure to file the defence within time is contained in paragraphs 4 – 6 of his affidavit in support of his application to set aside the default judgment, filed 22 January 2019, as follows:

> "4. That my Attorneys had indicated to me that I should [formalise] their retainer and give instructions for a Defence [.] [H]owever I misunderstood those instructions as I did not appreciate that I should have attended their office to give those instructions and [formalise] my retainer before a Defence could be prepared and filed. I mistakenly believed that sufficient had been done to enable a Defence to be prepared and filed.
>
> 5. That on or around the 30th October 2018 I learned from a newspaper article that [Mr Gardener] had gotten 'default judgment' against me on the claim on the 26th October

2018. I immediately got in touch with my Attorneys who then advised me that no Defence had been filed on my behalf as I had not given the required instructions. Upon realising this error I immediately gave the necessary instructions needed to file this application.

6. That the failure to put my Attorney in a position to file a Defence on my behalf was not deliberate or a disregard for the rules of the Court and I have applied as soon as is reasonably practicable after learning of the Order made in my absence."

[50] The learned judge disagreed with counsel for Dr Ogunsalu who had submitted that the explanation was and should be accepted by the court as "a fair one". The learned judge noted that the situation was worse than that which occurred in **Joseph Nanco v Anthony Lugg and B & J Equipment Rental Ltd** [2012] JMSC Civ 81, where the defendant had instructed his attorney-at-law concerning his intention to defend the matter but the attorney-at-law had failed to file the relevant documents. She noted his explanation of his misunderstanding that a physical visit to the Chambers was necessary was far from reasonable, as there was no indication he had sought to comply with the instructions of his attorney-at-law by telephone or otherwise.

[51] The analysis of the learned judge cannot be faulted. With respect, the explanation outlined does not provide a good reason for Dr Ogunsalu's failure to comply with the rules. This is not a case where Dr Ogunsalu is claiming incompetence of counsel. It is difficult to accept that a man of Dr Ogunsalu's education and stature, misunderstood the instructions of his attorneys-at-law that he should formalise their retainer and instruct them before a defence would have been filed on his behalf.

[52] Further, Dr Ogunsalu did not provide evidence that he contacted his attorneys-at-law, by any means, prior to becoming aware of the default judgment against him, to ensure that the defence was filed. Had he done so, he would have been made aware that the defence had not been filed. Then, he would have been reminded of what he needed to do, so that a defence could have been filed on his behalf, as his attorneys did when he eventually contacted them. Accordingly, there is no basis for disturbing the learned

judge's finding that Dr Ogunsalu failed to supply a good explanation for not filing his defence within time.

Whether the absence of a good reason for non-compliance was fatal to the application

[53] It is accepted, as advanced by counsel for Dr Ogunsalu, that the absence of a good reason for delay, by itself, will not always be fatal to an application to set aside a default judgment (see **Trade Board Limited and Another v Daniel Robinson** [2013] JMCA Civ 46 at paragraph [16]). However, this not being a case where the proposed defence has a reasonable prospect of success, this consideration would be futile as a free standing ground.

[54] Further it is clear that, as found by the learned judge, Mr Gardener has complied with the requirements and has a default judgment regularly entered in his favour. He would, therefore, be prejudiced if the default judgment was set aside in the face of a defence with no merit coupled with the absence of a good explanation for Mr Ogunsalu's failure to file his defence within time.

[55] Accordingly, no arguments advanced hereunder could form a basis to disturb the learned judge's exercise of her discretion. Consequently, the justice of the case mandates that the appeal must be dismissed.

Conclusion

[56] Dr Ogunsalu has failed to demonstrate that the words complained of amounted to vulgar abuse. Accordingly, he was unsuccessful in his quest to convince this court that he has a defence with a real prospect of success. Although Dr Ogunsalu's application to set aside the default judgment was made within reasonable time, he has not provided a good explanation for his failure to file the defence within time. This failure, in addition to his unmeritorious defence, resulted in the inevitable conclusion that the learned judge correctly exercised her discretion in refusing Dr Ogunsalu's application to set aside the default judgment and extend time for him to file a defence.

[57] Accordingly, the appeal should be dismissed and the decision of the learned judge affirmed with costs awarded to Mr Gardener.

G FRASER JA (AG)

[58] I too have read, in draft, the judgment of D Fraser JA and agree with his reasoning and conclusion.

STRAW JA

ORDER

1. Appeal dismissed.

2. The order of T Hutchinson J (Ag) made on 24 January 2020 is affirmed.

3. Costs to the respondent to be agreed or taxed.