[2013] JMCA Civ 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 101/2012

BETWEEN	**B & J EQUIPMENT RENTAL LIMITED**	**APPELLANT**
AND	**JOSEPH NANCO**	**RESPONDENT**

Written submissions filed by Nigel Jones & Company for the appellant

Written submissions filed by Rogers, Burgher & Company for the respondent

15 February 2013

PROCEDURAL APPEAL

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

IN CHAMBERS

MORRISON JA

Introduction

[1] The appellant was at the material time the respondent's employer. On 9 July 2009, arising out of an accident at the workplace, in which the respondent received severe personal injuries, his attorneys-at-law ('Rogers & Burgher') served the appellant with a claim form by registered post. Accompanying the claim form were particulars of claim and a form of acknowledgment of service. However, a form of defence and the prescribed notes for defendants, required to be served with a claim form by rule

8.16(1)(b) and (c) of the Civil Procedure Rules 2002 (CPR), were not served. On 30 July 2009, attorneys-at-law ('Pearson & Co') acting for the appellant filed an acknowledgment of service, indicating that the claim form and particulars of claim were received by the appellant on 16 July 2009 and that it intended to defend the claim.

[2] On 17 November 2009, no defence having been filed by the appellant, the respondent obtained judgment in default of defence against the appellant. On 10 August 2010, after a hearing at which both the appellant and the respondent were represented by counsel, an order for interim payment of $6,000,000.00 was made in the respondent's favour by Brooks J (as he then was) and an assessment of damages hearing was fixed for 27 October 2010. The appellant was again represented by counsel at the assessment and on 12 November 2010 damages were assessed and final judgment entered. On 23 November 2010 a copy of the final judgment was sent by registered post to the appellant and served on Pearson & Co. On 20 January 2011, an order for seizure and sale was made and on 25 January 2011, the bailiff for the Corporate Area executed the order on the appellant.

[3] By notice of application filed on 15 February 2011, the appellant sought an order setting aside the judgment in default and this application was in due course heard and refused by the order of McDonald-Bishop J made on 2 July 2011. This is an appeal, with leave of the judge, against this decision. It raises important issues as to (i) the effect of (a) a failure to comply with rule 8.16(1) and (b) the filing of an acknowledgment of service; and (ii) whether the conditions for setting aside judgment in default laid down in Part 13 of the CPR were satisfied.

The application to set aside the default judgment

[4] The application was made on the following grounds:

i. A condition of rule 12.5 was not satisfied and as such there was a failure to file a defence on the part of the appellant (rule 13.2(1)(a)).

ii. The appellant was not served with either the prescribed notes for defendants or a draft defence with the claim form (rule 8.16(1)).

iii. Alternatively, the appellant has a real prospect of successfully defending the claim.

iv. Alternatively, the appellant has a good explanation for failing to file a defence within time.

v. Alternatively, the appellant applied to the court as soon as reasonably practicable after finding out that judgment had been entered against it.

[5] The application was supported by two affidavits sworn to by Ms Tricia Bennett, a director of the appellant company, on 28 January 2011 and 14 February 2011. An affidavit in support of the application (sworn to on 11 February 2011) was also provided by Mr Jason Jones, an attorney-at-law attached to the firm of attorneys-at-law who now represent the appellant. In her first affidavit, Ms Bennett stated that, before action was filed, the appellant was notified of an intended claim by a letter dated 18 February 2009

from Rogers & Burgher, written on behalf of the respondent. Writing on behalf of the appellant, Ms Bennett responded to that letter on 4 March 2009, advising Rogers & Burgher that "all queries in regards to this matter can be forwarded to our lawyer, Mr Anthony Pearson". Under cover of a letter of that same date, Ms Bennett also wrote to Pearson & Co, for Mr Pearson's attention, submitting "all correspondence as instructed by you". On or about 16 July 2009, the appellant was served with a claim form with a notice to the defendant, an acknowledgment of service form and particulars of claim, all of which were sent to Pearson & Co "to represent us in this matter". Pearson & Co were always aware, Ms Bennett stated, that the appellant intended to contest the respondent's claim and the appellant was repeatedly assured by Mr Pearson that "the matter was being dealt with and that we would have our day in court".

[6] Ms Bennett stated that the appellant was not aware of the court's procedural requirements, "apart from the duty to acknowledge service which was the limited information contained in the documents with which we were served in July 2009". Further, the appellant was not aware that there were any hearings in the matter and first knew that a judgment had been entered against it when the bailiff visited its offices in Clarendon to execute the order for seizure and sale on 25 January 2011. After a meeting with Mr Pearson that same day (at which Mr Pearson "insisted that the document the Bailiff had was a Claim Form and not a Judgment"), contact was made with the appellant's current attorneys-at-law the following day and the matter was handed over to them, with instructions to "take immediate action to protect our interest".

[7] Ms Bennett exhibited to her first affidavit a copy of an investigator's report dated 9 March 2005, which concluded, after detailed consideration of the circumstances of the accident in which the respondent received his injuries, that the appellant did not breach its duty to the respondent, who "was the author of his own misfortune". Attached to the report were statements taken from the respondent and his co-worker, Mr Alphanso Lugg, who was also sued jointly with the appellant. The investigator's report, Ms Bennett said, "sets out amongst other things, or [sic] defence in this matter". She exhibited to her second affidavit a copy of the proposed defence, which denied negligence and alleged contributory negligence on the part of the respondent. Attached to the proposed defence was a copy of the investigator's report dated 9 March 2005, which, it was again stated, "sets out the basis of our defence".

[8] In his affidavit, Mr Jones produced the results of a search of the Supreme Court file on the matter, which, as the learned judge summarised it (at para. [13] of her judgment), "revealed that the prescribed notes for the defendant and the form of defence did not accompany the claim form as required by the rules".

The judge's decision

[9] In a thoughtful reserved judgment (***Joseph Nanco v Anthony Lugg & B & J Equipment Rental Ltd*** [2012] JMSC CIVIL 81), McDonald-Bishop J considered, firstly, whether the judgment was irregular, as a result of the failure of the respondent to serve the documents required by rule 8.16(1) to be served with the claim form. Considering this failure to have been "an irregularity in service" (para. [40]), which

could be waived, the learned judge concluded that the irregularity had been waived by the appellant in this case, by acknowledging service, indicating its intention to defend and actively participating in other aspects of the proceedings, without any application disputing jurisdiction under rule 9.6. In coming to this conclusion, she distinguished the decision of this court in ***Dorothy Vendryes v Richard Keane and Karene Keane*** [2011] JMCA Civ 15, in which it had been decided that a failure to comply with the mandatory requirements of rule 8.16(1) was fatal to a judgment entered in default of acknowledgment of service. The learned judge observed (at para. [22]) that the default in the instant case, in which acknowledgment of service had been filed, "was, therefore, not in relation to service but in relation to the failure to file a defence", thus rendering further consideration of the issue of service unnecessary.

[10] Secondly, as regards the question whether the default judgment should be set aside as a matter of discretion pursuant to rule 13.3, McDonald-Bishop J found that, on the material placed before her, the appellant had not demonstrated by way of affidavit evidence in appropriate form that (i) the application to set aside had been made promptly; (ii) it had a realistic prospect of successfully defending the action at trial; and (iii) there was a good explanation for the failure to file a defence within time. Accordingly, she concluded, the application should be dismissed, with costs to the respondent to be agreed or taxed.

The grounds of appeal and the submissions

[11] The appellant challenges the judge's decision on the following grounds:

"(i) The learned judge failed to correctly apply the principles of law enunciated in the judgment of the Jamaican Court of Appeal decision of **Dorothy Vendryes v Dr. Richard Keane and Karane** [sic] **Keane**

(ii) The learned judge failed to [sic] incorrectly determined that a mandatory requirement of the Civil Procedure Rule [sic] could be waived.

(iii) The learned judge incorrectly treated the issue of non-service of the relevant documents as a procedural irregularity.

(iv) The learned judge incorrectly stated that documents exhibited to an affidavit are not to be treated as part of the evidence contained in the affidavit.

(v) The learned judge applied a higher threshold in relation to the evidence in an affidavit than that required in an interlocutory proceeding by examining whether the evidence would be acceptable at trial.

(vi) The learned judge incorrectly found that the 2nd Defendant did not apply to set aside the judgment promptly

(vii) The learned judge incorrectly found that the 2nd Defendant had no good explanation for not filing its defence."

[12] In its written submissions in support of these grounds, the appellant's primary complaint on ground (i) was that the judge misread and misapplied ***Vendryes*** and as a result failed to appreciate that the effect of the respondent's non-compliance with rule 8.16(1) was that the claim form in the instant case was a nullity. In the light of this, it was accordingly immaterial that an acknowledgment of service was filed on behalf of the appellant. As regards grounds (ii) and (iii), ***Vendryes*** also rendered invalid the judge's reliance on English authorities that suggest that a defendant can waive service of a claim form and particulars of claim, since these authorities are premised upon the existence of a valid claim. The claim form in the instant case was a nullity and could

not be revived by any subsequent process (***Keith Anthony Silvera v Owen McFadden et al***, Claim No 2001 CLS 129, judgment delivered 9 November 2010). On grounds (iv), (v), (vi) and (vii), the submission was that the appellant satisfied the requirements of rule 13.3, in that (i) there was sufficient evidence, upon which the judge was entitled to act in interlocutory proceedings, to show that the appellant had a real prospect of successfully defending the claim (***European Partners in Capital (Epic) Holdings Bv v Goddard & Smith (A Firm)*** (1992) WL 895708, ***Mark Brown v Attorney General of Jamaica and Det Cons Wayne Wellington***, Suit No C.L. 2000/B-011, judgment delivered April 2001); (ii) the application was made promptly, but even if the court were to find that it was not made promptly, the default judgment could still be set aside if there was a real prospect of successfully defending the claim (***George Stephenson v Dalvester Smith***, Claim No 2004 HCV 00990, judgment delivered 11 April 2006, ***Sasha-Gaye Saunders v Michael Green et al***, Claim No 2005 HCV 2868, judgment delivered 27 February 2007); and (iii) the appellant provided a good explanation for its failure to file its defence within time (***Merlene Murray-Brown v Dunstan Harper & Winsome Harper*** [2010] JMCA App 1).

[13] The respondent submitted that there was no merit in the appeal and that it should be dismissed with costs. On ground (i), it was submitted that the learned judge had been correct to distinguish ***Vendryes***, pointing out that, because that case involved a judgment in default of acknowledgment of service, "the issue of service of the claim form was therefore of paramount importance and the first issue for consideration for [sic] the court". In the instant case, in which an acknowledgment of

service was filed, the court's concern was with the question of a defence, since service had already been acknowledged. Further, the appellant not having made an application to challenge the jurisdiction of the court pursuant to rule 9.6, it waived any irregularity in service and submitted to the jurisdiction of the court (***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2007] EWCA Civ 1203, [2008] 1 WLR 806). On grounds (ii) and (iii), the respondent's submission was that non-compliance with rule 8.16(1) was an irregularity only and did not invalidate the service of the claim form in a case where the defendant acknowledged receipt of it (***Gniezno: Owners of the Motor Vessel Popo Owners of Steamship or Vessel Gniezno*** [1967] 2 All ER 738). On grounds (iv), (v) and (vi), the respondent supported the learned judge's judgment, on the basis of the reasons given by her. Reliance was placed on the well known decision of the Court of Appeal of Trinidad & Tobago in ***Ramkissoon v Olds Discount Company (TCC) Ltd*** (1961) 4 WIR 73, the decision of Wolfe J (as he then was) in ***Century National Bank v Sinclair*** (1992) 29 JLR 21 and the recent decision of this court in ***Attorney General of Jamaica v John McKay*** [2012] JMCA App 2. On ground G, the respondent submitted that the judge had been correct in her finding that no reasonable explanation had been proffered for the appellant's failure to file its defence and supported her conclusion that this was a case in which the appellant was the person who had to suffer for the failings of its counsel in providing it with timely representation in its defence. Finally, the respondent's submissions concluded with a reminder that this court ought not readily to interfere with McDonald-Bishop J's exercise of the undoubted discretion which was granted to her under the CPR.

[14] In a brief reply, the appellant sought to distinguish both ***Hoddinott*** and ***The Gniezno***, on the basis that the claims in those cases were valid claims, but ***Vendryes*** established that the claim form in the instant case was a nullity, and McDonald-Bishop J ought to have followed the decision of this court. If the claim form was indeed a nullity, then rule 9.6 would not apply, as the claim form would in that case be "incurably bad" (per Denning LJ, in ***Sheldon v Brown Bayley's Steelworks Ltd and Another*** [1953] 2 All ER 894).

Discussion and analysis

Grounds (i), (ii) and (iii)

[15] These grounds call for, in the first place, detailed consideration of this court's decision in ***Vendryes***, which was primarily concerned with the meaning and effect of rule 8.16(1) of the CPR. So far as is relevant for present purposes, the rule provides as follows:

> "When a claim form is served on a defendant, it must be accompanied by –
>
> (a) a form of acknowledgment of service (form 3 or 4);
> (b) a form of defence (form 5);
> (c) the prescribed notes for defendants (form 1A or 2A);"

[16] In ***Vendryes***, the respondents brought a claim against the appellant for specific performance of a contract for the sale of land and damages for its breach. The appellant was served with the claim form and the particulars of claim, but the

prescribed notes for defendants (form 1A), the form of acknowledgment of service (form 3) and the form of defence (form 5) were not served on her. On 18 October 2007, the appellant having failed to file an acknowledgment of service, the respondents filed a request for judgment in default of acknowledgment of service. On 29 October 2007, the respondents filed an amended claim form and particulars of claim, but these were not served on the appellant. On 26 November 2007, the appellant was served with a copy of the judgment in default of acknowledgment of service.

[17] The appellant applied for an order setting aside the judgment on the ground that it was wrongly entered, due to the respondents' failure to comply with rule 8.16(1) of the CPR. Sykes J concluded that rule 8.16(1) imported a mandatory requirement to serve the documents referred to in it and, that not having been done, the judgment was irregularly entered and therefore had to be set aside. However, having done this, the learned judge then proceeded to hear further submissions, conduct a case management conference and enter summary judgment against the appellant, on the ground that she did not have any real prospect of successfully defending the claim (see rule 15.2(b)). In so doing, he considered that a judge had the power at any stage of the proceedings to exercise case management powers and to award summary judgment.

[18] On appeal, this court agreed with Sykes J on the rule 8.16(1) point, Harris JA saying this (at para. [12]):

> "Rule 8.16(1) expressly specifies that, at the time of service, the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word 'must', as used in the context of the rule is absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside. The learned judge was correct in so doing."

[19] However, it was held that, having set aside the default judgment, the learned judge had fallen into error by conducting a case management conference and granting summary judgment in favour of the respondents. I shall have to come back to the basis of the judge's conclusion on this point in greater detail.

[20] Rule 13.2 deals with the cases in which the court must set aside a judgment in default entered for failure to file either an acknowledgment of service or defence, in accordance with the conditions governing the entry of default judgments laid down in rules 12.4 and 12.5 respectively. In ***Vendryes***, the relevant rule was 12.4, which provides that the registry must at the request of the claimant enter judgment against the defendant for failure to file an acknowledgment of service, provided that certain conditions are satisfied. The conditions that were relevant in that context were that (a) the claimant proves service of the claim form and particulars of claim on the defendant; (b) the period for filing acknowledgment of service has elapsed; and (c) the defendant has not filed an acknowledgment of service or a defence to the claim. In ***Vendryes***, rule 8.16(1) not having been complied with, the respondents were unable to prove

service of the claim form and the particulars of claim in accordance with the rules and were not therefore entitled to the entry of default judgment in their favour.

[21] The question that arises, therefore, is whether the instant case is covered by the decision in ***Vendryes***, as the appellant submits that it is. The appellant having filed an acknowledgment of service, rule 12.4 did not apply and the conditions laid down in rule 12.5 were the ones which had to be satisfied before judgment in default of defence could be entered against it. The relevant conditions are as follows:

> "12.5 The registry must enter judgment at the request of the claimant against a defendant for failure to defend if –
>
> (a) the claimant proves service of the claim form and particulars of claim on that defendant; **or**
>
> (b) an acknowledgment of service has been filed by the defendant against whom judgment is sought; and
>
> (c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;" [Emphasis supplied]

[22] It seems to me to be clear from the disjunctive 'or' between sub-paragraphs (a) and (b) of this rule, that, upon a request for judgment in default of defence, the claimant is not required to prove service of the claim form and the particulars of claim on the defendant in cases in which an acknowledgment of service has been filed. Accordingly, the appellant having filed an acknowledgment of service and the period for the filing of its defence having expired, the respondent had satisfied the conditions in rule 12.5 and was therefore entitled to judgment in default of defence, without

reference to the question of service. As McDonald-Bishop J put it in her admirable judgment (at para. [22]), "the court ought not to be concerned about the issue of service of the claim form because by filing the acknowledgement of service, the 2nd defendant acknowledged that [it] had received the claim form and particulars of claim".

[23] In my view, the language of the rules themselves appears to compel this conclusion. However, it also seems to me that if, as the authorities predating the CPR held to be the case, non-service of a writ could be waived by the defendant's entry of an appearance, it should follow, subject to rule 9.6, the effect of which I will consider in a moment (see para. [24] below), that the filing of an acknowledgment of service, which must be taken as meaning what it says, would necessarily have the same effect. Brandon J (as he then was) observed in ***The Gniezno*** (at page 428) that the essential point is "that the requirements in the rules relating to service are requirements made for the protection or benefit of the defendant, and that because of that, if the defendant wishes to waive any of those requirements, he can do so". Thus, he considered, a defendant was in principle entitled to waive the requirement of service, not only during the currency of a writ, but also after it expired, it already having been established by the Court of Appeal in ***Sheldon v Brown Bayley's Steelworks Ltd***, to which I was also referred by the appellant in its reply, that "a writ which has expired is not a nullity; it is only invalid for the purpose of service by the plaintiff on the defendant" (page 427). (See also ***Warshaw and Others v Drew*** (1990) 38 WIR 221, 227, a case on appeal from this court, to which McDonald-Bishop J also referred, in which the Board considered it to be "well established that it is open to a defendant in

an action to enter an appearance in it voluntarily, even though the writ in it has not been served on him, and that by doing so he waives such service".)

[24] McDonald-Bishop J also accepted the respondent's submission that the appellant, by filing an acknowledgment of service and not raising the matter of the respondent's non-compliance with rule 8.16(1) as a preliminary issue by way of challenge to the court's jurisdiction under rule 9.6, waived the irregularity and submitted unconditionally to the jurisdiction of the court. Rule 9.6(1) provides that a defendant who "(a) disputes the court's jurisdiction to try the claim; or (b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect". Such a defendant must first file an acknowledgment of service before making the application (rule 9.6(2)) and the application must be made within the period for filing a defence (rule 9.6(3)), supported by evidence on affidavit (rule 9.6(4)). A defendant who files an acknowledgment of service and does not make an application under this rule "is treated as having accepted that the court has jurisdiction to try the claim" (rule 9.6(5)).

[25] In ***Hoddinott***, which the judge applied on this point, the claimants made a without notice application (as they were entitled to do) on 13 September 2006 to extend the time for service of a claim form, which was about to expire, to 22 November 2006. On 13 September the application was granted in the terms sought and on the following day the claimants' solicitor wrote to the defendant notifying it that the claim form had been issued and enclosing a copy "for information purposes only". On 2

October, the defendant issued an application to set aside the without notice order extending time, on the ground that the claimants did not have a good reason for obtaining such an order, and this application was set for hearing on 21 December. In the interim, on 21 November, the claim form and particulars of claim were served on the defendant and on 28 November the defendant's solicitors filed an acknowledgment of service. The form contained three boxes. They ticked the box which indicated "I intend to defend all of this claim", but they did not tick the box which indicated "I intend to contest jurisdiction". The judge set aside the order extending time, and one of the issues for the Court of Appeal was whether CPR 11, which is in terms virtually identical to rule 9.6, was engaged in these circumstances.

[26] It was contended in argument on appeal that CPR 11 had no application in this context, as no question of jurisdiction arose in the matter. 'Jurisdiction' as used in the rules had the meaning attributed to it in CPR 2.3 (which is the equivalent of rule 2.4: "unless the context otherwise requires, Jamaica and any part of the territorial waters of Jamaica"). Writing for a strong court (Sir Anthony Clarke MR, Dyson and Jacob LJJ), Dyson LJ (as he then was) said this (at paras 22-23):

> "22. In our judgment, CPR 11 is engaged in the present context. The definition of 'jurisdiction' is not exhaustive. The word 'jurisdiction' is used in two different senses in the CPR. One meaning is territorial jurisdiction. This is the sense in which the word is used in the definition in CPR 2.3 and in the provisions which govern service of the claim form out of the jurisdiction…
>
> 23. But in CPR 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim. There may be a number of reasons

> why it is said that a court has no jurisdiction to try a claim (CPR 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim (CPR 11(I)(b)). Even if Mr Exall is right in submitting that the court *has* jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court *should not exercise* its jurisdiction to do so in such circumstances. In our judgment CPR 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure…It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim."

[27] The form of acknowledgment of service of a claim form prescribed in form 3 of the CPR provides, as does the equivalent in the CPR for England and Wales, for an indication whether the defendant intends to defend the claim, but it does not provide for an indication whether it is intended to contest the jurisdiction of the court. I do not consider this difference to be sufficient to make the reasoning in ***Hoddinott*** any less applicable to the interpretation of rule 9.6 of the CPR generally, and it seems to me that McDonald-Bishop J cannot be faulted for regarding that decision (at para. [53]) as "a good and persuasive guide in dealing with the applicability of rule 9.6 to the present case". I would therefore regard the fact that the appellant made no application to the court to dispute the court's jurisdiction to try the respondent's claim within the time limited by rule 9.6 as an additional obstacle to its attempt at this late stage to challenge jurisdiction on the ground of non-compliance with rule 8.16(1).

[28] However, the appellant submits, none of this is of any moment in the instant case. The respondent's non-compliance with rule 8.16(1) rendered the claim form a

nullity, incapable of revival by waiver or any subsequent process and, as Denning LJ observed of the writ in ***Sheldon v Brown Bayley's Steelworks Ltd*** (at page 896), "if it was a nullity, then it could not be waived at all…[i]t was not only bad, it was incurably bad". McDonald-Bishop J herself made the same point in her judgment, when she pointed out (at para. [39]), that "[i]t is well established in the law of civil practice and procedure that while an irregularity can be waived, a nullity cannot be".

[29] In support of its contention that the claim form was a nullity, the appellant relies firstly on the decision of Brooks J at first instance in ***Silvera v McFadden et al***. This was one of the several decisions spawned by the transitional provisions of the CPR (Part 73), which were designed to bridge the gap between cases filed under the former Judicature (Civil Procedure Code) Act ('the CPC') ('old proceedings') and the introduction of the CPR, which came into effect on 1 January 2003. Under those provisions, claimants in certain old proceedings were required to apply for a case management conference to be fixed under the CPR by 31 December 2003, failing which the claim would be struck out automatically (rule 73.3(8)), subject to a right to apply for its restoration no later than 1 April 2004 (rule 73.4(3) and (4)). The procedural history of the case was unusual, in that, the validity of the writ of summons and statement of claim filed (on 24 August 2001) under the CPC had already expired (on 24 August 2002) by the time the CPR came into effect. No step was taken in the matter until 22 March 2005, when an application was filed seeking an extension of time to apply to renew the writ and for renewal of the writ. On 16 November 2005, the learned Master duly made an order accordingly and the writ was renewed for six months and

additional time allowed for service, which was effected on 30 November 2005. On 14 December 2005, an acknowledgment of service was filed by one of the defendants and on 27 April 2009 that defendant applied for a declaration that the writ had been automatically struck out, pursuant to rule 73.3(8).

[30] Brooks J considered, on the authority of ***Sheldon v Brown Bayley's Steelworks Ltd*** (para. [23] above), that the writ, although expired, was not a nullity and therefore constituted 'old proceedings' for the purposes of transition to the CPR. An application for a case management conference to be fixed was accordingly required and, none having been made, the claim was automatically struck out as of 31 December 2003. Thereafter, no application having been made to restore the proceedings, there were no proceedings in respect of which the Master could have made an order extending time for renewal of the writ, and her order was therefore a nullity. Thus, the learned judge said (at page 7 of the judgment), "There was nothing which she could properly renew and nothing which any subsequent process could revive."

[31] I do not think that this case assists the appellant. Brooks J accepted that an expired writ under the old rules was not a nullity; indeed, this was the cornerstone of his reasoning in the case. It was a commonplace of civil procedure that such a writ, even after expiry, could in a proper case be renewed. So what the learned judge found to be a nullity was the order of the Master purporting to renew a writ which had been struck out by operation of the transitional provisions in the CPR and the reason no

subsequent process could revive the writ was that no application had been made to do so under rule 73.4(3).

[32] But the appellant relies even more heavily on ***Vendryes*** itself, in which Harris JA twice characterised the claim form as a nullity (paras [27] and [34]). In considering the significance of this, context is, of course, all important. The two issues in ***Vendryes***, it will be recalled, were whether Sykes J was correct (i) to set aside the default judgment by reason of the non-compliance with rule 8.16(1) in serving the claim form; and (ii) having set aside the judgment, to proceed to exercise his case management powers by ordering summary judgment against the defendant on the ground that she did not have a defence with a real prospect of success. On the first issue, in respect of which the court agreed with the judge, no question arose as to the validity of the claim form itself and the only matter for consideration was the legal effect of the respondent's failure to serve all the documents required by rule 8.16(1) to be served with the claim form. This is clear from para. [12] of Harris JA's judgment, in which she stated that the failure to comply with rule 8.16(1) "clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside".

[33] The second issue calls for consideration in somewhat greater detail. As I have already pointed out (see para. [16] above), the claim form and particulars of claim were amended, but the amended documents were not served on the appellant. Before entering summary judgment, Sykes J had rehearsed the allegations contained in the original claim form, but, as Harris JA put it (at para. [24]), "…he ignored the fact that

the amended claim form and amended particulars of claim were the effective pleadings before him". Among the grounds of appeal filed by the appellant in ***Vendryes*** were these:

> "(a) That the Learned Judge erred as a matter of law, in that, he failed to apply and/or misapplied the correct principles of law and the proper considerations relevant to the effects of an amendment on the statement of case as originally filed (see **Warner v Sampson (1959) 1 All ER 120)**;
>
> (b) That the learned Judge failed to appreciate that there was no or no valid claim before the Court owing to the Respondent/Claimant's failure to serve the amended Claim Form filed on the 29th October 2007 on the Appellant/Defendant (see **CPR 8.14**)." (Emphases in the original)

[34] In support of these grounds, counsel for the appellant made the following submission (as summarised in the judgment of Harris JA, at para. [17]):

> "…the judgment in default is a nullity, as, at the time of the entry of the judgment, the original claim had ceased to exist. The original claim…being not in existence would no longer define the issues between the parties to be resolved at a trial and as a consequence, it could not have properly formed the foundation upon which a default judgment could have been entered. The amended claim related back to the date of the filing of the original claim…"

[35] ***Warner v Sampson and Another*** [1959] 1 All ER 120 was cited in support of this submission. In that case, Ormerod LJ observed (at page 128) that, once a pleading is amended, "it takes its place on the record as a part of the pleadings, setting out the issues upon which the action will be tried". Harris JA referred to this case in her judgment in ***Vendryes*** (at para. [26]), setting out in full the passage from the

judgment of Ormerod LJ from which I have quoted in the previous sentence (attributing it in error to Hodson LJ), before saying this (at para. [27]):

> "The claim form upon which the learned judge proceeded lacked validity, in that it was not in compliance with rule 8.16(1). It would have been a nullity and ought not to have been acted upon. The averments in the amended claim form and the particulars of claim related back to the date of the filing of the original claim. They raised issues which had not been pleaded in the original claim and most importantly they were not served on the appellant. These pleadings, not having been served, the learned judge would not have been in a position to have conducted a case management conference or even to have considered the efficacy of the proposed defence and counter claim."

(Also para. [34], where the learned judge repeated that, "The claim form was a nullity.")

[36] Taken in the context which I have attempted to describe, it seems plain that what Harris JA was responding to, and accepting, in this passage, was the appellant's submission that Sykes J erred in proceeding to case management and an assessment of whether there was a defence with a real prospect of success on the basis of the claim form and particulars of claim as originally filed, they having subsequently been amended. As Hodson LJ said in ***Warner v Sampson*** (at page 129) "[o]nce pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried". It is in this sense, it seems to me, that, as Harris JA said, the original claim form "lacked validity". It is true that the learned judge went on to link the invalidity of the claim form in explicit terms to its non-compliance with rule 8.16(1), but I cannot, naturally with the greatest of respect, regard this as

anything but a mistaken reference, since there is nothing in rule 8.16(1) which speaks to the conditions of validity of a claim form.

[37] Indeed, it is difficult to see why, as a matter of principle, it should follow from a failure to comply with rule 8.16(1), which has to do with what documents are to be served with a claim form, that a claim form served without the accompanying documents should itself be a nullity. While the purported service in such a case would obviously be irregular, as Sykes J and this court found in ***Vendryes***, I would have thought that the validity of the claim form itself would depend on other factors, such as whether it was in accordance with Part 8 of the CPR, which governs how to start proceedings. It is equally difficult to see why a claimant, who has failed to effect proper service of a claim form because of non-compliance with rule 8.16(1), should not be able to take the necessary steps to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule.

[38] Accordingly, given that the validity of the claim form as such was not an issue before the court in ***Vendryes***, I can only regard the statements that the claim form served in breach of rule 8.16(1) was a nullity as *obiter*, and not part of the court's reason for its decision in that case. In my view, there is therefore no basis to conclude in the instant case that the claim form is a nullity because it was not served with all the documents required to accompany it by rule 8.16(1).

[39] I would therefore conclude that McDonald-Bishop J was entirely correct to distinguish ***Vendryes***, primarily on the basis that, in that case, an acknowledgment of

service had not been entered on behalf of the defendant/appellant. In that circumstance, as a precondition to the issuing of judgment in default of acknowledgment of service, it was necessary for the claimant to prove, pursuant to rule 12.4(a), service of the claim form and particulars of claim on the defendant. In the instant case, the appellant having filed an acknowledgment of service, rule 12.5 makes it clear that, on a request for judgment in default of defence, proof of service is not required. Further, and in any event, even if I am wrong in this construction of rule 12.5, the filing of an acknowledgment of service by the appellant, without an application, pursuant to rule 9.6, to dispute the court's jurisdiction, constituted a waiver of the requirement of service of the claim form, which remained a valid claim form, notwithstanding the previous non-compliance with rule 8.16(1).

[40] In my view, therefore, it cannot be said that the judgment in default in this case was wrongly entered, and McDonald-Bishop J was entirely correct in her conclusion that the appellant was not entitled to have the judgment in default set aside as of right, pursuant to rule 13.2. These grounds must accordingly fail.

The remaining grounds

[41] The remaining grounds engage rule 13.3, which permits the court, in the exercise of its discretion, to set aside aside a judgment in default once certain conditions have been satisfied. It is well to bear in mind at the outset of this aspect of the discussion, it seems to me, the well-known rule that this court will only interfere with the exercise of a discretion by a judge on an interlocutory application where it is

shown that the judge's decision was based on a misunderstanding of the law or the evidence, or on an inference that 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 reasonable judge regardful of his duty to act judicially could have reached it" (***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042, 1046, per Lord Diplock; and see also ***Attorney General v McKay*** [2012] JMCA App 2, paras [19] and [20]). This court will therefore ordinarily defer to the judge's exercise of her decision, unless it can be shown to have been plainly wrong.

Grounds (iv) and (v)

[42] These grounds concern the sufficiency of the affidavit evidence proffered on behalf of the appellant in support of the application to set aside the default judgment. McDonald-Bishop J considered (at para. [73]) that Ms Bennett's first affidavit was "deficient", in that it was not a proper affidavit of merit. The learned judge was particularly concerned (at para. [68]) that Ms Bennett was unable to set out any facts in her affidavit, "whether in her personal knowledge or from information and belief with source indicated that could be evidence of the defence being relied on".

[43] The best known source of the requirement of an affidavit of merit on an application to set aside a judgment in default is ***Evans v Bartlam*** [1937] AC 473, to which McDonald-Bishop J made specific reference. In that case, Lord Atkin said (at page 480) that one of the rules laid down by the courts for guidance in exercising the discretion to set aside a regularly obtained judgment in default is that "there must be

an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence".

[44] In ***Ramkissoon v Olds Discount Co (TCC) Ltd*** (1961) 4 WIR 73, the application to set aside the judgment in default was supported by an affidavit sworn to by the defendant's solicitor, to which was attached a defence signed by counsel. The Supreme Court of Trinidad & Tobago (Appellate Jurisdiction) dismissed an appeal from the order of the judge in chambers dismissing the application, in part on the ground that no merit had been shown by the defendant. McShine CJ (Ag) pointed out (at page 75) that the solicitor's affidavit "does not purport to testify to the facts set out in the defence, nor does he swear of his personal knowledge as to the matters going to constitute the excuse for the failure, and so this does not amount to an affidavit stating facts showing a substantial ground of defence". The learned judge went on to say, further, "[s]ince the facts related in the statement of defence have not been sworn to by anyone, consequently there was not, in our view, any affidavit of merit before the judge nor before us".

[45] ***Ramkissoon*** was distinguished by Roy Anderson J in his judgment in ***Mark Brown v Attorney General of Jamaica and Det Cons Wayne Wellington***. That was a case in which the affidavit in support of an application to set aside an interlocutory judgment in default of defence was sworn to by an attorney-at-law in the Attorney General's Chambers. The deponent stated that she had been "informed by the Second-named Defendant and do verily believe that the first-named defendant has a

good defence to this action", and exhibited a copy of the proposed defence, which, it was said, had been drafted "upon the instructions contained [in the file]". The deponent also stated that she had been informed and verily believed that the second-named defendant's actions "were reasonable and justified" in the circumstances, for reasons which were set out in the affidavit. In all the circumstances, and despite ***Evans v Bartlam*** and ***Ramkissoon***, both of which were cited to him, the learned judge considered that this was a sufficient affidavit of merit.

[46] I am bound to confess, naturally with the greatest of respect, that the basis of this decision is not entirely clear to me. The learned judge appears to have considered that (i)***Ramkissoon*** was distinguishable, in that, in that case, "there was one defendant and the affiant was his solicitor", while, in the case before him, the Attorney General was also a party, so "[t]his was not a case of an affidavit by one's solicitor, but of a defendant, in relation to an application to set aside a default judgment against him" (page 8); (ii) hearsay evidence is admissible in interlocutory proceedings; and (iii) the requirement of an affidavit of merit can be departed from "in no doubt rare but appropriate cases" (per Lord Atkin, in ***Evans v Bartlam***, at page 480). As regards (i), the person who one would have expected to speak to the merits of the case in ***Mark Brown v Attorney General of Jamaica and Det Cons Wayne Wellington*** must surely have been the second-named defendant, and not the Attorney General, whose liability, if any, would have been purely vicarious; as regards (ii) even if hearsay evidence is acceptable in interlocutory proceedings, the person applying to set aside a default judgment must generally produce an affidavit, whether based on personal

knowledge or information and belief, from someone who can swear positively to the facts upon which the defendant intends to rely; and finally, as regards (iii) there does not appear to have been any evidence in the case to suggest that there were any exceptional circumstances justifying departure from the well established rule requiring an affidavit of merit in these circumstances. I would therefore be inclined to treat ***Mark Brown v Attorney General of Jamaica and Det Cons Wayne Wellington***, which is in any event not binding on me, as a case decided on its own special facts.

[47] In the instant case, rule 13.3(1) required the appellant to show "a real prospect of successfully defending the claim". In my judgment in ***Attorney General v McKay*** (with which the other members of the court agreed), after referring to the ***Evans v Bartlam*** requirement that the affidavit of merit should be sufficient to demonstrate a "prima facie defence", I observed as follows (at para. [23]):

> "The language in the CPR is obviously stronger, with the result that, as Mr Stuart Sime puts it in 'A Practical Approach to Civil Procedure' (10th edn, para. 12.35), 'the written evidence in support of the application to set aside will have to address [the relevant] factors, and in particular the alleged defence on the merits'."

[48] The appellant relies on ***European Partners in Capital (Epic) Holdings Bv v Goddard & Smith (A Firm)***, which was a case in which the Court of Appeal of England and Wales allowed an appeal from an order granting summary judgment and granted the defendants leave to defend. The dispute between the parties had to do with the correctness of a valuation report on property for mortgage purposes, prepared

by the defendants, a firm of surveyors and valuers, at the request of the plaintiffs, who were prospective lenders on the security of the property. After the defendants' report was received, the plaintiffs instructed Chestertons, another firm of valuers, to inspect the property with a view to commenting on the report and Chestertons in due course produced a report of its own disagreeing with the defendants' report. Chestertons' report provided the basis for the plaintiffs' action against the defendants for professional negligence. On the plaintiffs' application for summary judgment, no issue was taken as to the sufficiency of the affidavit by a solicitor on behalf of the defendants, to which was exhibited a draft of the defence that it was intended to serve if leave to defend were given. In the draft defence, it was indicated that the defendants, who contended that they were not negligent, proposed to stand by the valuation which they had originally prepared and to deny that the property was at the material time valued as suggested by Chestertons.

[49] "The critical question", as Scott LJ characterised it, was therefore, whether the defendants had shown a triable issue on the issue of professional negligence. In deciding that they had, the learned judge said this (at page 3 of the transcript of the judgment):

> "If it has been made clear, as the combination of [the solicitor's] affidavit and the draft defence exhibited thereto did in my opinion make clear, that the defendants propose to stand by and contend for the competence of, let alone the correctness of, their expression of professional opinion, it would be a very unusual case in which it would be right to deny them the opportunity of so doing at trial, at which they, or the author of the valuation report, could be cross-

> examined as to its competence and correctness and at which they could challenge the correctness of the views expressed in the rival valuation report relied on by the plaintiffs."

[50] I would distinguish ***European Partners in Capital (Epic) Holdings Bv v Goddard & Smith (A Firm)*** on at least two bases. In the first place, it is a case concerned with whether the defendants ought to have been given leave to defend on an application for summary judgment, and not with an application to set aside judgment in default, to which, as the cases indicate, special rules requiring an affidavit of merit have always applied. But secondly, and perhaps of greater significance, the draft defence provided by the solicitor's affidavit indicated clearly that the defendants intended to rely at trial on the correctness of the very valuation report which was the subject of the action: in this circumstance no further affidavit of merit could have been expected and it is perhaps for this reason that no issue appears to have been taken as to the solicitor's affidavit.

[51] The question is therefore whether Ms Bennett's affidavit sufficed as an affidavit of merit in the circumstances of this case. It will be recalled that, in her first affidavit, Ms Bennett did not purport to speak either from her personal knowledge or from information or belief. Rather, what she did was to exhibit a copy of an investigator's report, the conclusion of which was that the respondent was "the author of his own misfortune" (see para. [7] above). She also exhibited to her second affidavit a copy of the proposed defence, which denied negligence and alleged contributory negligence, and to which was again attached a copy of the investigator's report. This report, which was addressed to the appellant's liability insurers, was the work of a professional

investigator and bore a date over six months after the accident in which the respondent was injured. McDonald-Bishop J's comments on the report (at paras [70] – [72]) merit full quotation:

> "[70] Mr Jones went a bit further to say that the 2nd defendant is, particularly, relying on an investigators [sic] report (exhibited) together with statements attached thereto for its defence. According to him, at this point the court is assisted by the facts set out therein. The investigator's opinion, he said, is an indication of the evidence which will be available to the court whether as expert evidence or otherwise at a later stage in the proceeding. I have observed a few things concerning the report that would militate against it as showing a defence on the merit [sic]. The first thing noted is that the facts contained therein have not been attested to on oath. It is not included in any affidavit evidence.
>
> [71] Secondly, the report of the investigator is not an expert report and there is nothing to indicate, at this stage, the reasonable likelihood of it being so admitted. It means, any opinion expressed by the investigator in that report would, *prima facie*, be inadmissible.
>
> [72] Thirdly, apart from the fact that the report contains non-expert opinion, the investigator's report as to the circumstances giving rise to the claim is, at best, hearsay. So, even if the investigator is called, his evidence would substantially be hearsay and as such, there is a high probability (almost a virtual certainty) that such evidence could be ruled inadmissible or of [sic] being of little weight. Given the state of uncertainty that attends on the admissibility of the contents of this report and any potential evidence that would be based on it, the proposed report is, to me, a tenuous basis on which the defendant could seek to ground an arguable defence, much more one with a real prospect of success."

[52] In my view, these comments on the report cannot be faulted. There can be no doubt, it seems to me, that, unless the investigator's evidence were to be admitted as

expert evidence, the report could not stand as evidence of the facts of the accident on 21 August 2004. There was, as the learned judge observed, "nothing to indicate...the reasonable likelihood of it being so admitted", since it spoke to matters, not within the personal knowledge of the investigator, which would require to be proved by admissible evidence at the trial. The investigator's report was therefore, in a word, hearsay. Since the judge was obliged to assess whether the evidence upon which the appellant proposed to rely in defending the action at trial showed "a real prospect" of success, it seems to me that a consideration of the admissibility of the proposed evidence was clearly relevant. On the material placed before the judge, I cannot say that her conclusion that a real prospect of success had not been shown by the appellant was in any way aberrant. I would therefore conclude that grounds (iv) and (v) must also fail.

Grounds (vi) and (vii)

[53] These grounds relate to the considerations in rule 13.3(2), that is, (a) whether the appellant applied to the court "as soon as reasonably practicable" after finding out that judgment in default of defence had been entered; and (b) whether a good explanation was given for the failure to file a defence.

[54] As regards the first issue, the evidence was, as will be recalled, that a copy of the final judgment was sent to the appellant by registered post on 23 November 2010. Pearson & Co were also served with a copy. However, Ms Bennett said, it was not until 25 January 2011, as a result of the bailiff's visit, that the appellant became aware that judgment in default of defence had been entered against it. The application to set

aside the judgment was filed three weeks later (on 15 February 2011). However, as I have already indicated, interlocutory judgment in default of defence had been entered the previous year (17 November 2009). Mr Pearson would have been aware of this from at latest 10 August 2010, when, after a hearing at which he appeared for the appellant, an order for interim payment of $6,000,000.00 to the respondent was made by Brooks J and the assessment of damages was fixed for 27 October 2010, when the appellant was again represented by Mr Pearson.

[55] On the basis of this evidence, McDonald-Bishop J concluded as follows (at para. [81]):

> "I find in all the circumstances, given the steps taken by the claimant to notify the 2nd defendant itself of the judgment and the role of counsel in the matter, who at all times actively participated for and on behalf of the 2nd defendant in the proceedings after the default judgment was entered, that there had been failure on the part of the 2nd defendant to set aside the judgment as soon as was reasonably practicable after finding out that it had been entered. This is another factor that is taken into account as one militating against setting aside of the judgment."

[56] In ***George Stephenson v Dalvester Smith***, Brooks J observed (at pages 3 - 4) that rule 13.3(1)(a) (the predecessor to rule 13.3(2)(a)), called for "an explanation from the applicant or someone on the applicant's behalf, as to what was, or was not done, in respect of making the application". The appellant submitted that this requirement was satisfied in the instant case by Ms Bennett's affidavit, which showed that, once it was made aware of the default judgment on 25 January 2011, the

appellant immediately retained new counsel, who filed the application to set aside on 15 February 2011. However, the problem with this evidence, it seems to me, is that it provides no explanation whatsoever for the absence of an application to set aside the judgment during the period of at least five months when Mr Pearson, having become aware of the default judgment, did nothing to attempt to set it aside, but instead participated on the appellant's behalf in the interim payment hearing and the subsequent assessment of damages.

[57] Sykes J had to confront a not too dissimilar issue in ***Sasha-Gaye Saunders v Michael Green et al***. In that case, the defendant's evidence was that, upon becoming aware of the claim on 8 February 2006, he handed the papers to his insurers. Neither acknowledgment of service nor defence having been filed on his behalf within the time required by the rules, judgment was entered against him on 27 March 2006. The application to set aside the judgment was made on 6 October 2006 and in it, as the learned judge put it (at para. 10), the defendant sought "to absolve himself of any responsibility by placing all the blame on [his insurers]". Sykes J would have none of it:

> "14. Mr Hart adds that he did not know of the interlocutory judgment entered against him until October 3, 2006. According to him NEM had instructed the firm of Taylor, Deacon and James to appear for him by virtue of its subrogation rights under the contract of insurance. If I understand Mr Hart, he knows nothing, did nothing because NEM was doing everything. If this is the position then NWEM's knowledge must be his knowledge. There is no evidence that NEM did not know of the judgment in default of acknowledgment of service. I therefore conclude that Mr Hart knew of the judgment from at least the first case management conference held on August 4,

> 2006. Mr Hart was represented by counsel at the case management conference held on July 13, 2006. Mr Hart's position is that the attorney was there at the behest of NEM which was exercising its subrogation rights. [sic] The. implicit argument being that the attorney did not represent him. That is unacceptable. As far as I am concerned Mr Hart was properly represented by counsel and counsel's knowledge is his knowledge. Using August 4, 2006, as the date of knowledge, the application to set aside was made quite late. The time lapse between August 4, 2006, and October 6, 2006, is too long to be ignored. In the modern era of civil litigation where there is much emphasis on speed and efficiency, tht time lapse is inordinate. It is reflective of a culture of lassitude and sluggishness, the implacable enemies of the new ethos propounded by the new rules."

[58] However, in ***Murray-Brown v Harper & Harper*** (para. [30]), Phillips JA issued the following caveat against uncritically visiting a party with the consequences of the default of the attorney-at-law:

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

[59] It is therefore necessary in every case, it seems to me, to examine the facts with care before arriving at the conclusion that "counsel's knowledge is [the client's] knowledge". It is clear from the passage from McDonald-Bishop J's judgment set out at paragraph [55] above that the learned judge attempted to do just that, taking into account not only the role played by Mr Pearson at earlier stages of the proceedings, but

also the appellant's apparent failure to do anything about the judgment in a timely manner even after it must have become aware, having been duly served by registered post with a copy of the final judgment entered after damages were assessed. In all the circumstances, I again find myself unable to say that the learned judge, in concluding that the appellant took no steps as soon as reasonably practicable to set aside the default judgment after becoming aware of it, exercised the discretion, which was undoubtedly hers, on any incorrect basis.

[60] Rule 13.3(2)(b) speaks to the explanation given for the appellant's failure to file a defence. The learned judge noted (at para. [83]) that the primary explanation given by the appellant was that it had given instructions to its counsel and, based on his assurances, it was "labouring under the impression that all was well, so to speak". There was no evidence from Mr Pearson himself giving any explanation for the failure to file the defence in time, or at all. The judge went on to observe that "the law is replete with authorities in which the conduct of counsel has not been accepted as a good explanation for a party's failure to carry out what he is obliged to do in certain circumstances". The judge cited ***Leeson v Marsden*** and ***Glass v Surrendran*** (*sub nom* ***Collier v Williams*** [2006] 1 WLR 1945). I will not burden this already overlong judgment with any detailed consideration of these cases, since both of them involved deliberate, albeit erroneous, steps taken by the lawyers, rather than complete, and unexplained, inaction, as in the instant case.

[61] McDonald-Bishop J concluded (at para. [89]) that the reasons advanced by the appellant for not filing a defence "amounts to no good reason at all, particularly so, in the absence of any explanation forthcoming from Mr Pearson". I agree. In the absence of any explanation from Mr Pearson, it seems to me, there was in fact no explanation at all. Although Ms Bennett in her first affidavit stated, somewhat laconically, that Pearson & Co had been provided "with relevant documentation" by letter dated 4 March 2009, there is absolutely no indication of any steps taken by the appellant to follow up the matter at any time over the nearly two year period that elapsed between that date and the arrival of the bailiff in January 2011.

Conclusion

[62] In concluding that the default judgment in this case should not be set aside, MsDonald-Bishop J said this:

> "[90] Having examined all the circumstances, I find that the 2nd defendant has failed to show by acceptable evidence that it has a defence on the merits with a real prospect of success. It has failed to seek to have the judgment set aside within a reasonably practicable time after finding out that it was entered and it has no good explanation for failing to file a defence to the claim. The conduct of counsel for the 2nd defendant cannot be used so as to enure to the benefit of the 2nd defendant and to cause detriment to the claimant who has prosecuted his claim to a final judgment. If counsel failed to carry out his duties in the interest of the 2nd defendant, then there are other options available to the 2nd defendant to remedy that situation. That is a matter between the 2nd defendant and its counsel with which the case for the claimant ought not to be concerned.
>
> [91] As far as the claimant is concerned, he had done everything required of him to secure a judgment of the court following

> the entry of the 2nd defendant in the matter. The incident occurred in 2004. The judgment was actually being enforced when the effort to do was thwarted by an application for stay of execution which was granted on terms. The prejudice to the claimant. [sic] If the judgment were to be set aside in the circumstances of this case, would be overwhelming. An arguable defence is not enough to displace a judgment properly obtained, it must have a real prospect of success and that has not been sufficiently demonstrated by evidence.
>
> [92] The claimant has something of value in his hand and he ought not to be deprived of it without good and compelling reasons shown. While it is appreciated that the court must not be quick to deprive a litigant of his day in court on a point of technicality and without an assessment of the merits of the case, it is also the duty of the court to ensure that time limits are obeyed and that there are no flagrant disregard for the rules of procedure. The rules must be interpreted and applied in order to give effect to the overriding objective which involves ensuring, as far as practicable, that cases are dealt with expeditiously and fairly. To set aside this default judgment, given all the attendant circumstances of the case, would not be in keeping with the overriding objective of the CPR or in keeping with fairness, broadly speaking."

[63] Again, I agree and cannot possibly add anything to the learned judge's careful conclusion. This is a case of an egregious departure from acceptable professional standards on the part of the appellant's attorneys-at-law. While I naturally accept the note of caution sounded by my esteemed sister Phillips JA in ***Murray-Brown v Harper & Harper***, I find myself unable to discern any error in McDonald-Bishop J's approach to the exercise of her discretion in the instant case that would warrant this court's intervention. The appeal is therefore dismissed, with costs to the respondent, to be agreed or taxed.