[2017] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 55/2016

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**DENRY CUMMINGS**	**APPELLANT**
AND	**HEART INSTITUTE OF THE CARIBBEAN LIMITED**	**RESPONDENT**

Written submissions filed by Leroy Equiano for the appellant

20 October 2017

PROCEDURAL APPEAL

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

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of my learned sister, Sinclair-Haynes JA. I agree with her reasoning and conclusion and there is nothing I could usefully add.

SINCLAIR-HAYNES JA

[2] This is an appeal against Sykes J's order made on the 10 December 2015, refusing Mr Denry Cumming's (the appellant) application to set aside a default judgment entered on 10 December 2015 against him, for the sums of US$37,935.25 and JA$24,000.00 with interest on the said sums. Judgment in default of acknowledgment of service had been entered in favour of the Heart Institute of the Caribbean Limited (HIC), the respondent, against the appellant for breach of a purported contractual arrangement between the appellant and HIC for HIC to perform heart surgery on the appellant. The appellant is adamant that he is not indebted to HIC because he had no contractual arrangement with HIC to perform the surgery and he was never served with their claim.

Background

[3] The judgment in default of acknowledgement of service was entered against the appellant on 23 September 2014. The appellant filed a notice of application for court orders on 21 July 2015 requesting that the default judgment be set aside and that he be permitted to file his defence within seven days of his application. The grounds on which the application was sought are stated hereunder:

> "1. A condition in Rule 12.5 of the Civil Procedure Rules, 2002 (CPR) was not satisfied and so the Judgement [sic] in Default of Acknowledgement of Service was obtained irregularly;
>
> 2. Alternatively the Applicant makes this application pursuant to Rules 10.3(9), 12(10)(3); 13.3 of the Civil Procedure Rules;

3. The Applicant has an arguable and meritorious Defence and has a real prospect of successfully defending the claim;

4. This application is being made by the Defendant as soon as is reasonably practicable after finding out that Judgment has been entered;

5. The Defendant has a good explanation for the failure to file an Acknowledgment of Service and Defence within the stipulated time;

6. The Judgment was obtained without a determination of the merits of the Claim."

[4] The application was supported by three affidavits: an affidavit in support sworn to on 5 July 2015 with the proposed defence attached; a supplemental affidavit sworn to on 13 November 2015 and a further supplemental affidavit sworn to on 9 December 2015 in response to the affidavit of Shelly-Ann Stevenson, filed by HIC in response to the appellant's two earlier affidavits.

[5] In his first affidavit sworn to on 5 July 2015, the appellant deponed, *inter alia,* that on 25 June 2015 a process server whom he did not know before attended his office and served him with a judgment summons and an affidavit in support in respect of the instant matter. He was stunned by the assertions contained in that affidavit as he was never served with any claim in the matter and he was not indebted to HIC. At that juncture all he had ever received from HIC was a letter dated 24 July 2014 signed by Ms Doreen Darien, the company administrator of HIC, which was left on his bed whilst he was admitted to the Medical Associates Hospital.

[6] He immediately retained the law firm of Nelson Brown Guy and Francis who presented him with documents and affidavits which had been filed in the Supreme Court Registry. His attention was drawn to a claim form, particulars of claim and a judgment in default of acknowledgement of service. He had never seen those documents before.

[7] He read the affidavit of service of Andrew Scott which was filed on 19 September 2014, by HIC, in which Mr Scott deponed that on 8 September 2014 at 1:40 p.m. he (Mr Scott) served him with the documents. He strenuously denied ever having been served with any document either by Mr Scott or anyone. It is his evidence that he could not remember where he was on 8 September 2014, the date it was alleged he was served, however, in September 2014, he was still recovering from heart surgery which was performed on 25 July 2014 and his doctor had placed him on three months' restricted bed rest.

[8] On the rare occasions on which he went to his office, he would remain there for about an hour in the mornings to deal with administrative matters. In November 2014, he resumed fulltime work. His evidence was that had he seen the documents he would have taken all steps to defend the claim because he is not indebted to HIC.

[9] He read Mr Jason Taylor's affidavit of service which was filed on 23 January 2015 in which Mr Taylor stated that Mr Sevawn Grant, a sales clerk at his, the appellant's business collected the judgment in default. The affidavit did not state the date of the alleged service. A supplemental affidavit of service of Mr Taylor, dated 20 April 2015,

however, stated that Mr Grant was served on 16 January, 2015. Upon reading that affidavit in his attorney's office, he immediately telephoned his office and enquired of Mr Grant about the said document. Mr Grant however informed him that he had no recollection of receiving the document.

[10] It was his initial evidence that he did not file an acknowledgement of service and/or defence in the matter because he was not served with the documents. He further averred that he was advised that he has a good and arguable defence with a real prospect of success. It was also his evidence that should the court accede to his requests, HIC was unlikely to suffer prejudice. Attached to this affidavit was his proposed defence.

[11] In his supplementary affidavit sworn to 13 November 2015, the appellant sought to clarify his initial evidence concerning the filing of an acknowledgement of service on his behalf. He deponed that he was shown an acknowledgement of service dated 7 October 2014 and filed 9 October 2015 by the attorneys-at-law, Kinghorn and Kinghorn, on his behalf. He said, however, that he did not retain their services. His evidence was that on a day that he was "extremely down medically" he received a telephone call from his office about legal documents which were taken there. He instructed the employee to engage an attorney to peruse the document because of his inability to attend to the matter. His investigations revealed that one of his employees had taken the documents to Kinghorn and Kinghorn.

[12] In the month of August 2014, he was preoccupied with his health issues. His visits to the office whenever his health allowed was for an hour or two to sign cheques and to check on lodgements.

[13] In November 2014, he resumed full-time work at his office. There was no mention of the documents. On 25 June 2015 he received the judgment summons and supporting affidavit which was the first document he received.

The learned judge's decision

[14] There are no written reasons from the learned judge for his decision, however, counsel for the appellant, at paragraph 7 of the appellant's written submissions, indicated thus:

> "The learned judge, stated in his verbal reasons for judgment, that he accepted the affidavit evidence of the process server and HIC's representative and that he rejected the evidence of the [a]ppellant. He further stated that the [a]ppellant would not succeed with his defence as he did not believe him."

[15] The learned judge consequently made the following orders:

> "1) Application dismissed;
>
> 2) Costs of the Application to [HIC] to be agreed or taxed;
>
> 3) Leave to appeal dismissed;
>
> 4) Date to be set for Judgment Summons Application to be hearing [sic] in open court; and
>
> 5) [HIC's] Attorneys-at-Law to prepare, file and serve Orders."

[16] Being aggrieved with the learned judge's decision and orders, the appellant sought and obtained the permission of this court to appeal and has appealed the judge's decision.

The grounds of appeal

> "(a) The learned judge erred in law in arriving at his decision by finding of facts on the affidavit evidence as to which of the affiant's evidence was more credible and which he accepted as [being] the truth and rejected as being false.
>
> b) The learned judge erred in law when he rejected the affidavit evidence of the [appellant] which was in contrast to and challenged the affidavit evidence of [HIC's] representative and challenged the facts on which the [HIC] had relied.
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> c) The learned judge erred in law by failing to take into consideration that [HIC's] case was a claim for a liquidated sum for "service rendered" and that be [sic] admission and evident [sic] by [HIC's] representative in her affidavit the service was never offered. The [appellant] stated clearly in his affidavit that he paid for the services that were provided by [HIC] and that he was not indebted to [HIC]
>
> d) The learned judge erred when he failed to address the issue that if [HIC] claim was that there was a breach of a[n] oral contract as [HIC] implied by its representative's affidavit, the issue of measure of damage would have to be assess [sic] by the court to determined [sic] the damage suffered as a result of such [a] breach. There was no evidence of any provisions [sic] in a contract between the [appellant] and [HIC] that provided for a liquidated sum for compensation, if there was a breach that [HIC] was enforcing.
>
> e) The learned judge erred by failing to consider the fact that [HIC] brought no evidence to evidence [sic] to support its claim that it suffered a loss."

"2. The following findings of law/Fact are challenged:

a) That the appellant's defence was without merit.

b) That the appellant was duly served and ignored the court process.

c) That HIC's Affidavit was more credible than the [a]ffidavits of the appellant."

HIC's statement of case in the Supreme Court

[17] HIC, by way of claim form and particulars of claim, instituted proceedings against the appellant on 2 September 2014 for the sum of US$37,746.00 with interest at the rate of 3% for medical services rendered. Its particulars of claim included a claim for interest pursuant to the Law Reform (Miscellaneous Provisions) Act amounting to US$111.96 and continuing.

[18] HIC averred in its particulars of claim that after consultation with Dr Joel Brooks, the applicant was diagnosed with acute myocardial infarction and a coronary angiogram was performed on the appellant. After a comprehensive interview and physical examination he was diagnosed as suffering from a genetic cardiovascular disease associated with high risk of sudden death.

[19] Consequently an urgent implantable cardioverter defibrillator (ICD) procedure and treatment was recommended by Dr Brooks. The applicant entered into an oral agreement for the implantation of the ICD and was admitted to the Medical Associates Hospital that day.

[20] Dr Brooks visited the applicant on several occasions while he was admitted to the said hospital and informed him about the purchase of the device and accessories to perform the procedure. He also informed him that a specialist would be flown into the island specifically to perform the procedure.

[21] The appellant was informed that the cost of the procedure was JA$4,479,744.00. The applicant agreed to pay same. His insurance was submitted for pre-approval for the ICD implantation and associated costs.

[22] An eligibility check however revealed that his insurer would only cover JA$500,000.00. After discussions with Ms Stevenson, the appellant told her that he would make a series of payments to cover the sum. He told Ms Stevenson that he intended to deposit the sum of JA$500,000.00 on 23 July 2014 and he would also provide them with a Sagicor Investment cheque for the sum of JA$1,000,000.00. A further sum of JA$400,000.00 would be paid from his credit card and he requested a payment plan whereby the balance of JA$2,000,000.00 would be paid in two instalments. He paid the sum of JA$500,000.00 by way of cheque pursuant to the arrangement.

[23] On 24 July 2014, the appellant was reminded by Ms Stevenson about his appointment and he informed her that the procedure would be done by another doctor. Ms Darien visited the appellant and informed him that HIC had incurred tremendous costs preparing for the procedure. The appellant, however, told her that the procedure was too expensive.

[24] Ms Darien informed him that the HIC would absorb some of the medical costs and perform the procedure at a cost of JA$2,000,000.00 instead. The HIC would also provide him with free pacemaker interrogation plus free HIC membership for one year after the procedure and free ECG. Ms Kyhian Keene, the appellant's next of kin, however later informed Ms Darien, that he would not do the procedure.

[25] Consequent on the tremendous cost incurred by HIC and the appellant's failure to honour his obligations, despite of formal demands, HIC instituted proceedings against him.

The appellant's response

[26] The appellant's response to HIC's claim is set out in his affidavits and the exhibited draft defence. He denies being indebted to the HIC or that there was any consensus between the parties to perform the surgery. In respect of his attendance at the HIC's office on the 22 July 2014; his consultation with Dr Brooks and the diagnosis, the parties are ad idem. The appellant's evidence is that an echo-cardiogram was performed. Consequent on the results of that test, Dr Brooks informed him that he was at "death's door".

[27] The parties' versions as to what transpired thereafter however, sharply diverged. According to the appellant, before he was able to fully grasp what was happening, he was led into a room and given intravenous drips. He was informed by Dr Brooks that in order for his heart to function properly, it was necessary to implant an ICD or a defibrillator to assist his heart.

[28] He enquired about the cost of the surgery and was informed by Dr Brooks that he was unable to say, but that someone from the billing department would come to inform him. He was however removed from the respondent's premises in an ambulance and no one attended to informed him of the cost. He made no agreement with the HIC or its representative for the surgery. Neither did he know the cost which would have determined whether he would agree to undergo the surgery.

[29] On that day, he paid HIC the sum of JA$24,000.00 for doctor's consultation and for the echocardiogram. Whilst being taken in an elevator to the ambulance he also paid the sum of JA$7,000.00 for the use of the ambulance. He was admitted to the Medical Associates Hospital. Before his admittance, he paid the required JA$100,000.00 which was a prerequisite on the understanding that he would receive a final bill upon his discharge. That final bill was received and immediately settled.

[30] On the day he was admitted, he was informed by way of telephone from a representative of HIC that they had scheduled the surgery for 24 July 2014, and enquired whether health insurance would pay for the surgery or if he proposed to pay by credit card or by cash. He again enquired about the costs but was told he would be given a final figure at which point in time someone would attend the hospital to speak with him.

[31] The appellant denies having had several conversations with Dr Brooks whilst admitted to the hospital and he denies that he was informed about the purchase of any device and accessories to perform the operation. He stringently denies having been

informed that a specialist would have been flown in to perform the procedure. He is also adamant that during his consultation with Dr Brooks he was never told by Dr Brooks that he (Dr Brooks) would perform the surgery or that someone from overseas would come to programme the device.

[32] The appellant said he was told by Ms Darien, the respondent's representative who visited him in the hospital, that the cost of the surgery was JA$4,500,000.00. He did not agree to pay that sum. He was "immediately blown away by the amount of money" because he knew he was unable to pay that amount which would have left him "in financial ruin".

[33] Ms Darien proposed a payment plan of JA$500,000.00 monthly to which he did not agree because it was unaffordable. An hour after his refusal she returned and told him that her boss would perform the operation for JA$2,000,000.00", writing off the cost of JA$2,500,000.00 of the initial cost quoted.

[34] The drastic reduction in the cost evoked his suspicion and he consequently sought a second opinion. He was referred to Dr Roger Irving who visited him in the hospital that night (on 23 July 2014) and offered to perform the surgery for a total cost of JA$1,500,000.00 to JA$1,600,000.00, which he immediately accepted. The surgery was scheduled for 25 July 2014.

[35] He denied ever having spoken to a Shelly-Ann Stevenson but admitted to speaking to one of HIC's agents over the phone. At the hospital he spoke with Ms Darien. During their first conversation, she inquired how he intended to finance

payment of the JA$4,500,000.00 because the check which was made with his insurer revealed that they would only cover JA$500,000.00. He denied that his insurer Sagicor provided approval for HIC to perform the operation.

[36] It was also his evidence that Dr Brooks enquired about his finances and how he would pay. He told Dr Brooks that there was JA$500.000.00 on his credit card which was available, he had JA$1,100,000.00 on investments with Sagicor and he would be able to find another JA$500,000.00.

[37] The appellant also denies that there was any agreed payment plan. It is his evidence that the cheque in the sum of JA$500,000.00 which was drawn on his business account was neither authorized nor signed by him. As soon as he realized that it was deposited, he immediately caused a stop order to be placed on the said cheque.

[38] His evidence is that after the conversation with Ms Darien on 23 July 2014, Dr Brooks visited him in the hospital and he informed Dr Brooks that Dr Irving would perform the procedure because their cost was too high. He later saw a letter by his bed, signed by Ms Darien and dated 24 July 2014, in which HIC was insisting that the appellant allow them to perform the procedure. The letter also stated that the appellant would be liable for the costs incurred if he refused.

[39] It was his further evidence that he was, at that juncture, experiencing severe stress because the following morning had been scheduled for the surgery which he considered to be major. Consequently, the letter was put aside because he knew he had no agreement with the HIC and was not indebted to them.

Submissions

[40] HIC has not provided the court with any submissions. On behalf of the appellant, counsel, Mr Leroy Equiano, submits that the overriding objective is to ensure that cases are dealt with justly. In dealing justly with matters the court will not allow some judgments to stand. For that proposition he relies on Rattray P's statement in **C Braxton Moncure v Doris Delisser** (1997) 34 JLR 42, a decision of this court prior to the advent of the CPR. At page 425, the learned president said:

> "The court will not allow a default judgement to stand if there is a genuine desire of the defendant to contest the claim supported by the existence of some material upon which that defence can be founded."

[41] It is counsel's submission that the appellant acted as soon as was reasonably practicable after he received the judgment summons. The learned judge, he submits, erred in refusing to set aside the default judgment.

[42] He argued that in any event the learned judge's acceptance that service was regular was not the end of the matter. He was required to consider the merits of the application.

[43] For that submission he relied on the statement of the House of Lords in **Evans v Bartlam** [1937] AC 473, and Phillips JA's statement in **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1. He specifically drew the court's attention to paragraph [23] where the learned judge opined:

> "The focus of the court now in the exercise of its discretion is to assess whether the Appellant has a real prospect of successfully defending the claim, but the court must also consider the matters set out in 13.3(2)(a) and (b) of the rules."

Counsel also relied on Lord Woolf's statement in **Swain v Hillman** [2001] 1 All ER 91 that:

> "... the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way to be disposed of summarily."

[44] He postulated that the judge treated the hearing as a trial by determining on affidavit evidence which witness was more credible. He pointed out that the learned judge ignored the fact that on HIC's own case, the claim was for monies owed for a service which was never provided. He submitted that the judge failed to consider HIC's failure to provide proof that it suffered loss or incurred any expense, whereas the appellant's evidence was that he paid for all the services he received from HIC.

[45] He submitted that the conflicting accounts and assertions by the parties made it plain that there were substantial points in dispute. A trial would therefore have been the best way of determining whether there was an agreement to render the service claimed and whether those services were rendered.

[46] Counsel submitted that the appellant strenuously refutes, HIC's claim that:

I) the HIC rendered service to him;

II) he did not pay for such service; or

III) that there was an agreement for HIC to render such service.

[47] He argued that the respondent provided no proof of financial loss. Figures were thrown at the court without any evidence that they were incurred on the appellant's instruction. Nor is there evidence that the appellant was treated and thereby incurred these costs.

[48] Counsel posited that there was no contract between the parties for HIC to incur such high costs. Prior to incurring such expense the reasonable expectation of the appellant would be that the respondent would have provided him with a document stating:

1) the basis for the work to be performed;
2) the costs; and
3) the rights and obligation of the parties.

[49] Counsel pointed out that there was no retainer or consent agreement signed for such an expensive and medically intrusive procedure with them.

[50] He contended that the appellant was informed that the procedure was necessary but that the negotiations did not fructify because the appellant had made it plain that he lacked the means to do the procedure. Counsel postulates that HIC's employee, Ms. Darien was informed by the appellant that he would not do the procedure.

[51] Counsel pointed out that the claim was for services which were never rendered. He highlighted the disparity between the sum of JA$4,500,000.00 and the amount of JA$2,000,000.00 that HIC was willing to accept and submitted that it demonstrates the spurious nature of the respondent's allegations. He submitted that the burden rested on

the respondent to prove the allegations on a balance of probabilities which it has failed to do.

[52] It is also his contention that there were substantial issues which would have been best determined by a trial. There are serious issues of fact which could not be resolved without cross examination of the parties. Further, he submits, the issues are varied and the court would have had to decide:

i. whether the respondent provided the service;

ii. whether there was a contract of service between the parties;

iii. Whether the respondent made an offer to the appellant which was accepted;

iv. Whether the acceptance was conditional on his ability to pay; and

vi. If there was a contract which was breached, the damages the respondent suffered and how the damages would be measured.

Analysis

[53] It is settled law that an appellate court will not lightly interfere with the exercise of a trial judge's discretion unless the judge is plainly wrong. Lord Diplock's oft-cited statement in **Hadmor Productions Limited v Hamilton** [1983] 1 AC 191, at 220 is a helpful reminder:

> "Upon an appeal from the judge's grant or refusal of an interlocutory injunction **the function of an appellate court … is not to exercise an independent discretion of its own**. **It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court**

> **would have exercised the discretion differently**. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. **Since reasons given by judges for granting or refusing … may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction 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.** It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own." (Emphasis added)

[54] The issue therefore is whether the learned judge, in refusing to set aside the said default judgment, was demonstrably wrong. It was the initial contention of the appellant that the documents (claim form, particulars of claim) were not brought to his attention. Rule 12.5 of the Civil Procedure Rules (CPR) speaks to the conditions which the respondent must satisfy before default judgment can be entered. Rule 12.5(a) requires the claimant to prove "service of the claim form and particulars" on the defendant.

[55] The appellant's application to set aside the default judgment was predicated on rule 13.2 and 13.3. Rule 13.2 of the CPR mandates the setting aside of a default judgment which has been wrongly entered. Rule 13.2 reads:

> "(1) the court must set aside a judgment entered under Part 12 if judgment was wrongly entered because –
>
> (a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;
>
> (b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or
>
> (c) the whole of the claim was satisfied before the judgment was entered ..."

[56] Rule 12.4 of the CPR lists the conditions which the respondent must satisfy before judgment can be entered for failure to file acknowledgment of service. Rule 12.4(a) reads:

> "The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if -
>
> (a) the claimant proves service of the claim form and particulars of claim on that defendant;"

[57] Rule 12.5 requires the respondent to prove service of the claim form and particulars of claim on the appellant before the registry can enter judgment against a defendant for failure to defend.

[58] The judge seems to have accepted the affidavit evidence of the process server as it relates to the issue of service on the appellant. However, the credibility of the parties as to whether or not the appellant was personally served with the claim form and particulars of claim was the central issue which could not have been resolved on affidavit evidence alone. There was no cross-examination of the process server who purported to have served the appellant and of the appellant who was contending that he was not served. Cross-examination is usually desirable in cases where there are disputed facts and was certainly necessary in this case to ferret out the truth in light of the appellant's denial that he was personally served.

[59] With there being no cross-examination on the issue joined between the parties on the affidavit evidence regarding service of the requisite documents, it is difficult to conclude that the learned judge would have been in a proper position to assess the respective credibility of the parties (see **Chin v Chin** [2001] UKPC 7). It is therefore unfair for a court to make an adverse finding solely on the strength of affidavit evidence.

[60] The learned judge could not have been properly assisted and was not in a good position to make factual findings on the critical issue of service in the absence of cross-examination.

[61] It is also noted, that although the appellant has denied having been personally served, the acknowledgment of service filed by Kinghorn & Kinghorn on 9 October 2014, purportedly for and on his behalf, indicates that the claim form and particulars of

claim were received on 29 September 2014. This date of service stated in the acknowledgment of service would be inconsistent with that stated by HIC's process server as to the date of service. This was a crucial conflict in the evidence before the learned judge, concerning the issue of service that required consideration and resolution.

[62] There is nothing on the record to show that this was considered by the learned judge. A resolution of that conflict was necessary because, if the date in the acknowledgment of service were to be accepted as being true and correct, then the acknowledgment of service would have been filed within the time prescribed by the CPR and so the default judgment would have had to be set aside as of right. The resolution of the inconsistency between HIC's evidence of the date of service and the date of service contained in the acknowledgment of service purportedly filed on the appellant's behalf could only have been achieved by cross-examination of the affiants.

[63] The learned judge therefore failed to take into account some relevant considerations that were critical to the resolution of the questions whether the appellant was, in fact, served and/or when he was served. Even if it could be properly argued that the filing of an acknowledgment of service has rendered the question whether the appellant was served redundant, it did not resolve the issue of when service was effected for the purpose of determining whether there was failure on his part to file an acknowledgment of service in the time limited to do so, which was the pre-requisite for the entry of the default judgment.

[64] Furthermore, even if the affiants had been cross-examined and the learned judge found that the acknowledgement of service was filed outside of the specified time, as would have been his prerogative, that would not have been the end of the matter as the judge would then have been required to consider whether the default judgment ought to be set aside, taking into account the factors set out in rule 13.3 of the CPR.

[65] Rule 13.3 of the CPR deals specifically with the setting aside of default judgments that have been regularly obtained. It provides:

> "(1) The court may set aside or vary a judgement [sic] entered under Part 12 if the defendant **has a real prospect of successfully defending the claim**.
>
> (2) In considering whether to set aside or vary a judgment under this rule, **the court must conside**r whether the defendant has:
>
> (a) applied to the court as soon as it reasonably practicable after finding out that judgment has been entered.
>
> (b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.
>
> (3) Where this rule gives the court power to set aside a judgment, the court may instead vary it." (Emphasis added)

The appellant's prospect of success

[66] The foremost consideration, in determining whether to set aside a default judgment is the appellant's prospect of success. As Lord Woolf stated in **Swain v**

Hillman the defendant must have "a realistic" as opposed to a "fanciful prospect of succeeding" on his defence. This court's position was plainly statement by Phillips JA In **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** thus:

> "... 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 appellant 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."

[67] By way of his affidavit evidence and proposed defence, the appellant has trenchantly denied that there was any agreement between HIC and him to perform the operation. His evidence on the critical issues is the diametrical opposite of the respondent's. For example: whether he saw Dr Brooks on several occasions after he was admitted to the hospital; whether he was informed about the purchase of the device and accessories to do the procedure and whether the person would be coming from overseas to programme the device.

[68] There are other critical issues which required cross-examination of the parties in the absence of a written agreement, such as: when was it the appellant was informed about the cost of the operation. The appellant's evidence is that he was first informed about the cost on 23 July by Ms Darien who told him that it would cost JA$4,5000,000.00 and he informed her that he was unable to afford the cost of the operation. Other disputed issues, for example, which also can only be properly resolved by cross-examination of the parties, are whether the appellant was visited by Dr Brooks

on 24 July 2015 and whether he had informed Dr Brooks that he would not do the surgery because of the cost.

[69] As it relates to the person who was to be flown in to assist with the procedure it is yet unclear what type of assistance this person would provide. At paragraph 3 of the particulars of claim the respondent averred that:

> "... Dr Brooks saw the Defendant several times after his admission and kept him fully informed about the purchase of the device and accessories to do the procedure, and that a specialist was being flown into the island specifically to perform the said procedure ..."

[70] Dr Brooks in the incident report stated that:

> "... From the day of admission I saw Mr Cummings several times in follow up at the hospital and kept him fully informed of the process. He was aware that HIC had purchased the ICD device and accessories specifically for him and that personnel from St Jude was arriving in Jamaica specifically for performing his procedure on Thursday, July 24, 2014 at 12p.m."

Whilst Ms Stevenson in her affidavit states that:

> "...Dr Brooks brought the defendant to the billing department indicating to me that [the ICD] procedure needed to be done. I informed the defendant of the cost of the procedure, which was ... $4,479,744.00 and informed him that the device would be purchased overseas and **a special technician would be coming from the United States with the device**. I accordingly asked our Company Administrator at the time, Ms Dorren [sic] Darien, to make the necessary arrangements for the **technical expert to be flown in from the USA to assist with the procedure** ..." (Emphasis added)

[71] The appellant, however, denied that there was any agreement between HIC or its billing clerk and him to honour any financial obligation. He denied being told that a

technical expert was being brought from the USA. The appellant's evidence was that he had been informed that a technical expert from the USA would not have been necessary.

[72] In the absence of a signed agreement between the parties, it cannot be properly found, without cross-examination of the affiants, that an agreement between an expert overseas and the HIC was concluded after the doctor had discussions with the patient, especially in relation to a procedure that is so costly. HIC, in order to recover any damages in connection with this specialist would be required to prove the loss it suffered, if any, as a result of the alleged breach of contract by the appellant. These are issues that warrant investigation and proof at a trial and so it cannot be said that the appellant has no defence with a real prospect of success.

[73] Significantly, both sides agree that there were negotiations during which HIC agreed to reduce the initial cost. The appellant was specific that it was reduced to JA$2,000,000.00. Ms Stevenson in her affidavit said that HIC had indicated that it was willing to 'absorb' some of the cost and this was communicated to the appellant by Ms Darien.

[74] In light of Ms Stevenson's evidence, it cannot be rejected in the absence of cross-examination, that the discussion regarding cost was not had in the billing department as asserted by the appellant. The cost of the operation would be one of the most important, if not the most important, term of the contract for the provision of such costly medical services. The dispute and uncertainty surrounding this term could

not be resolved without cross examination of the parties. In addition, a vital observation is that HIC has claimed the initial cost and not the reduced cost which, it is asserted, was later agreed.

[75] Of significance is HIC's willingness to accept the substantially lower sum of JA$2,000,000.00 instead of the approximately JA$4,500,000.00 it initially quoted.

[76] The determination of this matter depends on a finding as to the credibility of the parties. Apart from the assertions of the HIC as to the costs incurred, the court was bereft of any documentary evidence which could have contradicted the appellant's assertions or which could have allowed a summary disposal of the matter.

[77] Cross-examination of the witnesses would certainly be necessary to ferret out the truth in light of the conflicting versions as to what transpired. It cannot, therefore, be asserted that the appellant's prospect of defending the claim is fanciful solely on the basis of affidavit evidence. In my view, on the evidence which was presented to the court, there exists a real prospect of the appellant succeeding at a trial of the matter.

[78] In any event and despite HIC's assertion as to a reduced cost of the surgery, judgment had been entered for the United States dollars equivalent of the initial sum of JA$4,500,000.00 and not the reduced sum of JA$2,000,000.00. On this basis alone, the appellant would have a real prospect of successfully defending the claim because HIC may have a difficulty proving that it is entitled to the sum for which judgment was entered. The judgment sum is unsupportable on the evidence and this constitutes a proper basis, in itself, for the judgment to be set aside.

Was the application to set aside made as soon was reasonably practicable?

[79] Judgment in default was entered against the appellant on 23 September 2014. The supplemental affidavit of Mr Jason Taylor stated that the default judgment was served on a Mr Sevawn Grant, an employee of the appellant, on 16 January 2015. It was the appellant's evidence, however, that he had not received the document from Mr Grant. The first time he became aware that a claim was brought against him was when the judgment summons and supporting affidavit were served on him on 25 June 2015. On the appellant's evidence, immediately upon discovering, on 25 June 2015, that judgment had been entered against him, he instructed his attorney to apply to the court for the reliefs sought. His application and affidavit in support with the draft defence were filed on 21 July 2015. If the appellant's evidence were to be accepted as true (and there has been no real challenge to this assertion) he would have filed his application within a month of finding out that judgment was entered against him. This cannot be said to have been an inordinate or inexcusable delay. The application can be said to have been made as soon as was reasonably practicable.

Has the appellant provided a good explanation for failure to file an acknowledgment of service?

[80] The default judgment was entered on 23 September 2014 on the basis that the appellant had failed to file an acknowledgment of service. The entry of judgment was consequent on the evidence of HIC's process server that the appellant was served on 8 September 2014.

[81] The appellant contended that he was not personally served with any court document except the judgment summons but that service was effected on an employee who brought it to his attention at a time when he was gravely ill. In fact, it is HIC's evidence that the appellant was suffering from a disease associated with sudden death which required immediate surgery.

[82] Not being able to deal with the documents because of his condition, the appellant gave instructions for them to be given to an attorney-at-law to be dealt with. He thereafter focused on his recovery. The acknowledgment of service was filed on his behalf by Kinghorn & Kinghorn on 9 October 2014, which states that the claim form and particulars of claim were received on 29 September 2014. It seems to me that, if the date in the acknowledgement of service is correct, in those circumstances, the appellant would have done all that was required of him. On the other hand, even if the evidence of the process server were to be accepted and the appellant was indeed served on 8 September 2014 (an issue which has not been properly resolved by the learned judge), given the status of the health of the appellant (the claim having been brought so soon after such a serious surgical procedure), he would have had a good explanation for failing to file the acknowledgment of service within the prescribed time.

[83] While it may be argued that the appellant had a duty to follow up with the attorney-at-law to whom the documents were sent, it seems understandable in the circumstances that the papers having been sent to an attorney, he would have seen it fit to concentrate on his recovery from a major surgery. One should not lose sight of

the fact that the surgery was in late July, the claim was filed on 2 September and service of the claim and particulars of claim, according to HIC, was effected on 8 September. The default judgment was obtained on 23 September, all achieved in one month and all during the period when it would be reasonably expected that the average person would still be recovering from major heart surgery.

[84] In light of the foregoing, in my view, the appellant's explanation for his failure to file his acknowledgement of service within the time specified can be accepted as a good one.

Possibility of prejudice to HIC

[85] HIC has been kept out of the fruits of its judgment and that, in and of itself, is prima facie prejudicial to HIC. The default judgment is something of value and HIC should not be deprived of it without good cause. However, the prejudice that would be caused to the appellant, if the judgment was not set aside, would be greater than the prejudice to HIC if the judgment was set aside.

Conclusion

[86] In light of the foregoing, I would allow the appeal, set aside the order of the learned judge made on 10 December 2015 and grant the consequential orders sought by the appellant in his notice of appeal.

EDWARDS JA (AG)

[87] I too have read in draft the judgment of Sinclair-Haynes JA. I agree with her reasoning and conclusion and I have nothing useful to add.

MCDONALD-BISHOP JA

ORDER

1. The appeal is allowed.

2. The order of Sykes J made on 10 December 2015 is set aside.

3. The default judgment entered against the appellant in the Supreme Court in claim 2014 HCV 4206 on 23 September 2014 is set aside.

4. The appellant is allowed 14 days from the date of this order to file his defence to the claim.

5. There shall be no order as to costs in the court below.

6. Costs of the appeal to the appellant to be agreed or taxed.