IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
SUIT NO C.L. 2002/E – 037

BETWEEN	**JANET EDWARDS**	**CLAIMANT**
AND	**JAMAICA BEVERAGES LIMITED**	**DEFENDANT**

IN CHAMBERS
Kerry-Ann Sewell and Michelle Reid instructed by Nunes Scholefied DeLeon and Company for the claimant

Lord Anthony Gifford Q.C. and Noëlle-Nicole Walker instructed by Hart Muirhead and Fatta for the defendant

APPLICATION TO SET ASIDE JUDGMENT AND STRIKE OUT CLAIM - REAL PROSPECT OF SUCCESS – WHETHER CLAIM PLEADED SUFFICENTLY - BARE DENIAL DEFENCE – PART 9, RULES 10.5, 13.3, 25.1 (b), (c), 26.1 (2) (c), (k) OF CIVIL PROCEDURE RULES

April 13 and 27, 2007 and March 18,19 and 23, 2010

SYKES J

1. This application began before me April 13, 2007. It is now being concluded. I must confess that I am partly to blame for this long hiatus because I had encouraged the parties to see if the matter could be settled. That has not happened. I should have kept a firmer grip on the case than I did and for that I apologise to the litigants for having this matter outstanding for so long.

2. There are two applications before me. The first is an application by Jamaica Beverages Limited ('JBL') to set aside a default judgment entered against it on February 10, 2004. The second, also by JBL, if the first succeeds, is an application to strike out the claim on the basis that Miss Janet Edwards does not have a reasonable prospect of success in her claim.

The claim

3. The claim made by Miss Edwards arose out of an incident at her place of work at the Factories Complex, Glendevon in the parish of St. James on April 27, 2000, when, regrettably she was shot in the neck by gunmen during the course of criminal activity at JBL's premises.

4. Miss Edwards filed a writ of summons on October 2, 2002 supported by a statement of claim filed October 7, 2002. In the statement of claim, Miss Edwards alleges that JBL is liable to her for breach of contract and in negligence. In relation to the breach of contract Miss Edwards alleges that it was an implied or express term of the contract that JBL would:

    a. take reasonable precautions for her safety;

    b. take steps not to expose her to the risk of damage or injury which it knew or which was reasonably foreseeable in all the circumstances;

    c. take reasonable care that the place and circumstances under which she worked was safe;

    d. provide and maintain a safe system of work;

    e. provide adequate security for all staff members including Miss Edwards;

    f. provide adequate plant and equipment.

5. Miss Edwards pleads that while she was at work on April 27, 2000, gunmen entered JBL's business located at the Factories Complex in Glendevon with the intention of committing a robbery. It was during this activity that she was shot. She particularises the breach of contract and negligence as follows: JBL

    a. failed to take any or any adequate precaution for the safety of the claimant whilst she was engaged in her work;

b. exposed the claimant to the risk of injury which JBL knew or ought to have known and which was reasonably foreseeable;

c. caused or permitted the claimant to work various hours of the night when it was manifestly unsafe to do so;

d. caused or permitted the clamant to work in a dangerous place;

e. failed to provide the claimant with a safe place of work and/or keep it safe from intruders;

f. failed to provide adequate security and thus exposed the claimant to foreseeable risks;

g. failed to have any or any adequate regard to the claimant's safety;

h. exposed the claimant to unnecessary risk of injury of which JBL ought to have known;

i. failed to heed the claimant's repeated warnings of the need to have adequate security for the protection of staff members in particular at nights;

j. failed in all the circumstances to take reasonable care for the safety of the claimant.

6. Learned Queen's Counsel submitted that based on the authorities these particulars of claim, failed to bring home the precise breach of duty complained of as distinct from the scope of the duty. The claim as pleaded, said Lord Gifford, does not disclose any reasonable prospect of success. All this meant that the claimant did not have a reasonable prospect of success because the lack of specificity in this type of unusual claim was fatal to the claimant's case. I shall return to this later in the judgment.

The procedural history

7. As already noted, the writ and statement of claim were filed in October 2002. The language of the originating documents tells us that the litigation began under the old rules, known as the Civil Procedure Code ('CPC'). JBL was served but failed to file an appearance, under the old rules. Indeed, JBL did not file an acknowledgment of service under the new rules, the Civil Procedure Rules ('CPR') until March 17, 2010.

8. Not having heard from or seen a response from JBL, Miss Edwards, as she was entitled to do which, filed an interlocutory judgment in default of appearance dated November 12, 2002. What should have happened after the filing of this document is that the Registrar upon being satisfied that everything was in order, enter judgment for Miss Edwards. This did not happen. Miss Edwards made Herculean efforts to have the judgment perfected but to no avail. She was eventually told that she would have to file a request for judgment under the CPR which had come into force on January 1, 2003. This explains why Miss Edwards filed a request for judgment on February 10, 2004. The judgment was granted on that date and perfected.

9. However, while Miss Edwards was attempting to persuade the Registrar to act, JBL, on December 6, 2002, three weeks after Miss Edwards filed her interlocutory judgment, filed an application for a summons to strike out writ and statement of claim. At the time of filing this application JBL had not entered an appearance. There is no evidence that this application was served on Miss Edwards. This application was never heard. No date was ever set for hearing.

10. By January 1, 2003, the CPR took over from the old, very old, too old, arthritic and rheumatoid CPC, Jamaica's equivalent of the equally decrepit Rules of the Supreme Court ('RSC'). On January 9, 2003, JBL filed an application asking for the same relief that it had asked for in its December 6, 2002 application. This new application was served on Miss Edwards on January 31, 2003. The date for hearing was set for February 11, 2010. It should be noted that this application was made after Miss Edwards had applied for interlocutory judgment under the

CPC but before she applied for judgment under the CPR in February 2004. Miss Noëlle-Nicole Walker, who appeared without learned Queen's Counsel for JBL April 13, 2007, submitted that the February 10, 2004 judgment was irregularly entered because there was an outstanding striking out application. More will be said on this later.

11. Before going on with the procedural history, it is important to see if there is any explanation for JBL's inaction between the writ and statement of claim being served and its application to strike out. Mr. Conrad George, by affidavit dated March 17, 2010 provides some explanation. He states that the writ and statement of claim arrived at JBL's offices but were not forwarded to its counsel 'due to a regrettable oversight on the part of the employees' of JBL. The documents arrived at JBL's legal advisers on December 3, 2002, hence the December 6 striking out application. However, by December 3, Miss Edwards had already applied for judgment in default of appearance. As stated earlier, no appearance was entered and neither was the first striking out application served on Miss Edwards.

12. JBL's January 31, 2003 application which came on for hearing on February 11, 2003, was adjourned without a date. It was never heard. JBL filed another application on August 9, 2004, asking for (a) judgment to be set aside (because Miss Edwards had by then, on her second application secured judgment) and (b) striking out the claim. No date was ever set for this application. It was never heard. A year later, on August 16, 2005, JBL filed another application asking for the same relief it had applied for the year before. This application was not heard. No date was set for its hearing.

13. Two years later on April 2, 2007, JBL filed a fourth application seeking the same remedies it had sought in the application of August 9, 2004 and August 16, 2005. It is this April 2007 application that commenced before me on April 13, 2007. In all three applications filed by JBL after the CPR came into force, JBL had not filed any acknowledgment of service, which in my view is an indispensable precondition to making any application of any kind to the court.

The setting aside application

14. Miss Walker, relying on the case of ***St. Kitts Nevis Anguilla National Bank Ltd v Caribbean 6/49 Ltd*** [2003] E.C.S.J. No 63 Civil Appeal No. 6 of 2002, had submitted, way back in April 2007, that the judgment entered in February 2004 for Miss Edwards was irregularly obtained and therefore ought to be set aside as of right. The submission was that an application to strike out filed before a request for judgment acts as an automatic stay of any application to enter judgment. The factual foundation for this submission, according to Miss Walker, is this. She submitted that because Miss Edwards' first application for default judgment (November 12, 2002) was not granted this meant that there was no judgment in place when the various striking out applications were filed. Therefore when the striking out application was made such an application prevented or barred automatically any possibility of entering judgment unless and until the striking out application was heard and determined in favour of Miss Edwards.

15. As far as the authority relied on by Miss Walker is concerned I would say that there are three fundamental points of distinction which leads to a non-application of the decision to the facts before me. First, in that case, the striking out application was made within the time to file a defence which means that the application was not late and neither had the time within which to file a defence passed. In the case before me JBL not only failed to enter an appearance in accordance with the then rules but also filed the striking out application out of time for filing an appearance or defence. In these circumstances, Miss Edwards was entitled to apply for judgment in default of appearance. Second, the application to strike out in the ***St. Kitts Nevis*** case was in fact first in time to the application for summary judgment. It was the omission by the registry to deal with Miss Edwards' first application promptly that enabled JBL to file its application. As Mrs. Sewell pointed out in her written submissions, the Court of Appeal of Jamaica decided, under the CPC, when a default judgment is sought, the entry of such a judgment is an administrative act and the judgment is effective from the date of filing regardless of how long after the filing judgment is actually entered (***Worker's Savings and Loan Bank Limited v McKenzie*** (1996) 33 JLR 440). Had the registry acted promptly, Miss Edwards would have had her judgment, effective

November 12 2002, well before the application to strike out was made. This is a classic example of what the American's call the relation back principle, where a later act (the actual entry of judgment) relates back to an earlier act (the filing of the judgment) and the later act is treated as if it took place at the earlier time though it was not actually done until the later time. No argument has been made to me to suggest that there was anything faulty about Miss Edwards' application for default judgment in November 2002. Therefore, if one is going to use the first in time argument then Miss Edwards' application was first in time and ought properly to have been dealt with promptly which, had that been the case, would defeat the submission now being advanced by Miss Walker. The third point is that the defendant in the ***St. Kitts Nevis*** case had filed an acknowledgment of service.

16. My position on the ***St. Kitts Nevis*** case is supported by one of the learned Justices of Appeal who heard the case. Georges JA (Ag) said that an application under Part 9.7 of the CPR (identical to Part 9 of the Jamaica CPR), 'made within the period for filing a Defence, operates as a stay of the proceedings until the application is heard and determined' (para 2).

17. In the case at bar, at no time did the defendant enter an appearance under the old rules and neither did it file an acknowledgment of service under CPR as required by Part 9, until March 17, 2010. The significance and importance of the acknowledgment of service cannot be overstated. Rule 9.2 (1) states that any defendant who wishes to dispute the claim or the courts jurisdiction **must** file an acknowledgment of service. Indeed rule 9.1 goes even further and specifically prescribes that in any enactment under which an appearance could be entered, the defendant **must** file an acknowledgment of service. There is no escape from this requirement. Must means what it says. It is difficult to see what other word the drafters to the CPR could use to indicate that something is mandatory. The drafters did not use the word 'shall'. I am aware that the Jamaican Court of Appeal has decided (under Part 73 of the CPR) that '**must**' is not mandatory (see ***Norma McNaughty v Wright and others*** S.C.C.A. No. 20 of 2005 delivered May 25, 2005). As discussed

by Tania Mott in her article *When is 'Must' Mandatory*, (2009 Oct), 34 WILJ 211, the word 'must' normally means that the act to be done is imperative and does not admit of any discretion. Indeed, the learned author went on to cite a number of cases which indicate that 'must' means just that. Smith JA who delivered the judgment of the Court of Appeal did not identify any policy, linguistic or contextual considerations that would reduce 'must' to 'may' in the context of Part 73 of the CPR. I am not of the view that ***McNaughty*** is of general application through out the CPR. If that were the case, then it would mean that the drafters were engaged in a vain and hopeless exercise when in some contexts they used 'must' and in others, 'may'. It would be an absolutely remarkable thing if a rules committee comprising, the Chief Justice of the Jamaica, the President of the Court of Appeal, the Senior Puisne Judge, the Solicitor General of Jamaica, the Director of State Proceedings in the Attorney General's department, Dr. the Honourable Lloyd Barnett OJ (with over forty years at the bar), Hilary Phillips QC (with over twenty five years at the bar, former President of the Jamaican Bar Association and now a Justice of Appeal), Senator the Honourable Dorothy Lightbourne QC (with more than two decades at the bar and presently Attorney General of Jamaica and Minister of Justice), Messieurs Leo Williams and Charles Piper (both experienced members of the civil bar with more than two decades of practice) used 'must' when they meant 'may', or at worse, meant that 'must' did not carry with it a mandatory connotation. It would seem to me that ***McNaughty*** must (and I mean must, not may) be restricted to the specific circumstances of that case and cannot be used to say that in the rest of the CPR a similar approach can be taken. Therefore in rule 9.2 (1) 'must' is imperative and obligatory. I see no linguistic, policy or contextual considerations that would lead me to say that 'must' in Part 9 is anything other than mandatory.

18. I am supported in this conclusion by the entire Part 9 which sets out in quite a comprehensive manner what the defendant must do if he intends to take certain points. Part 9 was intended to replace all the learning under the CPC about conditional appearances and the like. It is written in language that was intended to be like a monorail. There is no room to turn around. The litigant must go along the track laid down by Part 9. The filing of an acknowledgment of service does not

preclude a challenge to the jurisdiction of the court in both senses of the word, that is to say, (a) jurisdiction to mean that the court does not have the legal authority to hear the claim or (b) the court has the legal authority but should not exercise it in the particular case. This is made clear by rule 9.5.

19. Rule 9.6 requires that a defendant who wishes to say that the court should not exercise any jurisdiction that it has must make an application under rule 9.6 (1) and before any such application can be made, the defendant must file an acknowledgment of service (rule 9.6 (2)). Further, any application under rule 9.6 (1) must be made within the time to file a defence. There was and is no application before me to enlarge time – an application that is permissible under rule 26.1 (2) (c) of the CPR.

20. Mrs. Sewell submits that it is not enough merely to desire to take part in the proceedings. Once the CPR came into affect, JBL ought to have brought itself within the rules. This, Mrs. Sewell submitted, JBL has failed to do on two counts. First, she said, when JBL began its submissions in 2007 without filing any appearance, conditional or otherwise under the CPC, or an acknowledgment of service under the CPR the court ought not have entertained them. Second, even now, although JBL has filed an acknowledgment of service it did so out of time and has not sought to extend time to comply with the mandatory requirement of the rule. What she meant, I believe, is that since JBL was asking the court not exercise its jurisdiction in its very first application to enter judgment and in subsequent applications to set aside judgment, it had to have in place an acknowledgment of service filed within the time to file defence, failing which it ought to have applied to enlarge time. Third, Mrs. Sewell submitted that despite the fact that JBL has been an active participant since January 2003 (since the December 2002 application was never served on Mrs. Edwards), the plain fact is that the application to strike out was filed out of time to file a defence under the old rules and the new, therefore the ***St. Kitts Nevis*** case is of no assistance for reasons already pointed out. The inevitable conclusion Mrs. Sewell came to was that Miss Edwards had obtained the judgment regularly because the application to strike out was made out of time and therefore could not

have operated as an automatic bar to a request for judgment as suggested by the ***St. Kitts Nevis*** case and in any event, the application for judgment was first in time. In effect, Mrs. Sewell has turned JBL's arguments back on it, that is to say, because JBL's entry into this litigation was irregular and in breach of the rules, it did not have any locus standi and so was not in a position to launch a legitimate challenge to Miss Edwards' application for judgment and therefore there was nothing to bar her from getting her judgment in February 2004. Mrs. Sewell submitted that since Miss Edwards' judgment was regularly obtained then any setting aside of the judgment must be under the discretionary power of the court.

21. I agree with Mrs. Sewell. Miss Walker had submitted, and Lord Gifford Q.C. who now appears with Miss Walker adopted, that filing of the striking out in December 2002 barred the entry of judgment in default. Also it was submitted that the refiling of the application in January 2003 acted to bar any application for judgment in default of acknowledgment of service. For reasons already given, Part 9 is mandatory and until JBL brought itself on the right side of Part 9 it cannot contend that the judgment was irregularly entered. What this means is that when this matter commenced before me in April 2007, JBL ought to have been heard because they were not properly before the court. The acknowledgment of service has now been filed and to that extent there is compliance with Part 9. I conclude that the judgment was regularly obtained and cannot be set aside except under the discretionary power of the court.

22. I now turn to the discretionary power to set aside a judgment regularly obtained. Rule 13.3 now gives pride of place to the strength of the defence. Rule 13.3 (1) permits the court to set aside a judgment if there is a real prospect of successfully defending the claim. The other two considerations in the rule while important are not as significant as they were under the pre-amendment version of the rule.

23. Lord Gifford developed a subtle submission on the discretionary power to set aside judgment. He submitted that a claim of this nature is unusual because in the normal course of things a person is not liable

to a defendant for the tortious actions of a third party where there is no duty to control or restrict that conduct or action of the third party. If this is so generally, then it is even more so when the third party is a criminal who is unknown to the defendant. One could hardly contend that a defendant has an obligation to control criminals. For this proposition learned Queen's Counsel relied on ***Dorset Yacht Company v Home Office*** [1970] AC 1004 and ***Modbury Triangle Shopping Centre v Anzil*** 205 CLR 254.

24. In ***Dorset***, the Home Office was said to have had responsibility, through its employees, to control the actions of the Borstal boys and so may be liable by way of vicarious responsibility for the failure of its employees to control the actions of the boys. ***Modbury*** made the same point. Gleeson CJ stated that a person is not usually under a 'duty to take reasonable care to protect the other from the criminal behaviour of third parties, random and unpredictable as such behaviour may be' because there is a 'general rule that there is no duty to prevent a third party from harming another is based in part upon a more fundamental principle, which is that the common law does not ordinarily impose liability for omissions' (page 265).

25. This led Lord Gifford to conclude that Miss Edwards' pleaded case was insufficient because it was too general and non specific. It did not point specifically to any particular omission which amounted to a breach of any duty owed to her. This being so, the pleaded case against JBL has no real prospect of success because no specific breach was pointed out. This anaemic claim coupled with a strong denial in the defence meant that JBL has a real prospect of successfully defending the claim and so the judgment should be set aside. To put it in the analogical language of mathematics – a weak claim plus a strong denial equals real prospect of success.

26. Queen's Counsel relied on the United States Supreme Court decision of ***Lillie v Thompson*** (1947) 332 US 459. In that case the Supreme Court reversed the Sixth Circuit of the Court of Appeals and held that the pleadings raised a sufficient case against the defendant. I shall extract a passage from the judgment of the court that

summarised the claimant's case in order to demonstrate the point made by Lord Gifford. At pages 460 – 461 the court said:

> *Respondent required her, a 22 year old telegraph operator, to work alone between 11:30 p.m. and 7:30 a.m. in a one-room frame building situated in an isolated part of respondent's railroad yards in Memphis. Though respondent had reason to know the yards were frequented by dangerous characters, he failed to exercise reasonable care to light the building and its surroundings or to guard or patrol it in any way. Petitioner's duties were to receive and deliver messages to men operating trains in the yard. In order for the trainmen to get the messages it was necessary for them to come to the building at irregular intervals throughout the night, and it was petitioner's duty to admit them when they knocked. Because there were no windows in the building's single door or on the side of the building in which the door was located, petitioner could identify persons seeking entrance only by unlocking and opening the door. About 1:30 a.m. on the night of her injury petitioner responded to a knock, thinking that some of respondent's trainmen were seeking admission. She opened the door, and before she could close it a man entered and beat her with a large piece of iron, seriously and permanently injuring her.*

27. Lord Gifford's point was that one sees detailed allegations in the ***Lillie*** case which he said were necessary because claims of this nature are very unusual and so Miss Edwards ought not to use general allegations but set out more detailed allegations so that the precise nature of the duty owed and breach of duty can be understood. Merely to say that there was failure to have any or any adequate regard for the claimant's safety, exposing the claimant to unnecessary risk of injury of which they ought to have known and failing to heed the claimant's repeated warnings of the need to have adequate security for the protection of staff members in particular at nights is insufficient.

28. Lord Gifford submitted that the contrast between ***Lillie*** and the instant case is striking. In ***Lillie***, the claimant alleged that room in which she was attacked had no window or door so that she could see any person approaching the building. Also, the room was located at an isolated location of the property and that the defendant knew that the property was frequented by dangerous men. It was also alleged that the defendant failed to have the area properly lit and guarded. By contrast, Miss Edwards has not alleged anything like this. She has not alleged that where she was shot was in an unguarded area or a poorly lit area. She has not indicated the number or content of the warnings. She has not said in what way JBL has failed to have any regard to the claimant's safety or in what way it has exposed the claimant to unnecessary risk of injury.

29. Lord Gifford also submitted that light of Miss Edwards' pleading JBL could not be any more specific that it was in its draft defence. The core of the defence, he submitted was that JBL owed no duty of care to Miss Edwards and it was not reasonably foreseeable that criminals would enter the property. This core defence is said to be stated in the affidavit of Mr. Paul Shoucair dated August 16, 2005 (para. 14) and in the draft defence (para. 4).

30. I shall set the draft defence out in full. It reads:

> *1. The defendant makes no admission to paragraph 1 of the statement of claim.*
>
> *2. The defendant admits paragraph 2 of the statement of claim as being applicable at the material time and states further that it carries on the business of merchants and distributors and it now has its registered offices at 5 Henderson Avenue, Naggo Head in the parish of St. Catherine.*
>
> *3. The defendant makes no admissions to paragraph 3 of the statement of claim.*

4. Save and except that the defendant admits that on the 27th April 2000 two (2) men wearing masks and armed with guns entered the Factories Complex Jamaica ("FCJ") in Glendevon, Salt Spring, Montego Bay in the parish of St. James and shot both a security guard and the claimant, the defendant denies paragraph 4 of the statement of claim and the particulars of negligence and/or breach of contract contained therein.

5. The defendant makes no admissions to the claimant's injuries, treatment and/or disabilities in paragraph 5 of the statement of claim and denies that any injuries, treatment or disabilities experienced by the claimant, if any, were due to any fault or breach by the defendant.

6. The defendant makes no admissions to paragraph 6 of the statement of claim and the particulars of treatment contained therein.

7. The defendant makes no admissions to paragraph 7 of the statement of claim and the particulars of disability contained therein.

8. Paragraph 8 of the statement of claim is not admitted and the defendant puts the claimant to strict proof of the particulars of special damages submitted therein.

9. Save that which is specifically admitted or not admitted, all the allegations in the statement of claim are denied as though set out individually and traversed seriatim.

10. In the circumstances the defendant denies that the claimant is entitled to have the reliefs claimed or any relief for the reasons alleged or at all.

31. Mrs. Sewell submitted, which I accept, that the draft defence exhibited consists of denials. It does not set out any affirmative case for JBL. On the vital issue of meeting the particulars of breach of contract and negligence alleged by Miss Edwards, JBL pleads that masked gunmen invaded their company, shot a security guard and Miss Edwards but then pleads that 'the defendant denies paragraph 4 of the statement of claim and the particulars of negligence and/or breach of contract contained there in.'

32. Mrs. Sewell submitted that this method of pleading runs afoul of the CPR. I couldn't agree more. According to Part 10 of the CPR, it is no longer possible to have a series of bare denials. Rules 10.5 (1) says that the defendant must set out all facts on which it relies to dispute the claim. Rule 10.5 (3) says that the defendant '**must** [that word again] say which (if any) of the allegations in the claim form or particulars are admitted; which (if any) are denied; and which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove' (my emphasis).

33. Rule 10.5 (4) specifically states that where the defendant denies any of the allegations in the claim form or particulars of claim the defendant '**must** state the reason for doing so; and if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version **must** be set out in the defence' (my emphasis).

34. Rule 10.5 (5) specifically states that where a defendant does not admit an allegation or does not admit the allegation and does not put forward a different version of events, 'the defendant **must** state the reasons for resisting the allegation' (my emphasis). Neutrality is not a viable option under the CPR.

35. The only admissions in the draft defence relate to fact of Miss Edwards being shot and the registered office being at Marcus Garvey Drive. No reason is given for the denials or non-admission.

36. It is obvious that the whole of rule 10.5 has relegated to the dust bin of legal history the phenomenon known as a bare denial that bedeviled civil litigation in times past. Rule 10.5 is replete with the word '**must**'.

37. From JBL's draft defence it is obvious that there is no compliance with rule 10.5. Not only is there non-compliance with the rule but there is no indication in the draft defence of what the defence is. Simply to deny the particulars of claim is not a proper defence under the new rules. It follows that there is no material in the defence before for me to assess in order to determine whether the defence has a real prospect of success. I am unable to see how bare denials can be regarded as a defence with a real prospect of success in the face of allegations of failing to heed warnings regarding safety; failing to provide adequate security and exposing the claimant to unnecessary risk. In other words, Miss Edwards is alleging that JBL knew that the property was unsafe because they were warned about it several times in the past and failed to take steps to address the matter. It is this omission to act that is the basis of liability. Liability is not based on failing to control criminal behaviour.

38. What facts are being relied on by JBL in support of its defence to dispute the claim? What reason does JBL have for not admitting the claim? What is the contrary version being advance by JBL? I therefore conclude that there is no basis of fact calling upon me to exercise my discretion in favour of setting aside the judgment regularly obtained by Miss Edwards.

39. As far as I can see the nature of Miss Edwards case was plain. Further to this, it is my view that there is no rule of law or practice requiring the claimant to give the details suggested by Lord Gifford in claims of this nature as there is when fraud is being pleaded. In ***Lillie*** the crucial pleading was that the defendant knew the place was unsafe. Here too Miss Edwards has pleaded that JBL knew the place was unsafe.

40. It should be pointed out that JBL has not argued that the duty alleged by Miss Edwards is not known to law. Indeed, at this point in our legal development such an argument would be swimming against the

tide. It is now well established that an employer has a duty of care to its employees to take reasonable steps to prevent criminal activity that is reasonably foreseeable. What is significant too, as all the judges in ***Modbury*** pointed out, liability of an employer in these circumstances is easier to establish where there has been prior criminal activity in the place where the criminal act which is being relied on to ground the tort took place. However, it is important to note as well that none of the judges said that that was the only way liability could be established. This point is important because while it is true to say that Miss Edwards did not specifically plead prior criminal acts, she did indicate JBL knew or ought to have known that the risk of injury was reasonably foreseeable (para. 4 (b)) because JBL failed to heed repeated warnings of the need to have adequate security for the protection of staff particularly at nights (para. 4 (i)). Miss Edwards is saying that the specific risk that occurred was brought home to the mind of JBL repeatedly, yet JBL failed to act. It is this omission to act where there is positive duty to provide a safe place of work that gives rise to the negligence according to Miss Edwards. The pleadings are clear. What JBL ought to have done in its draft defence was to either deny that it had any warnings or if it had any warnings, state the steps it took. Miss Edwards also pleaded that JBL had her working at nights when it was unsafe. She pleaded that the place was dangerous and lacked proper security. All this, Miss Edwards pleaded, amounted to a lack of regard for her safety. JBL ought to have refuted these allegations, if it could, and put forward a contrary version, if it had one, or at the very least say why it does not admit the allegations. This is what rule 10.5 demands. It is extremely difficult for me to agree with learned Queen's Counsel that Miss Edwards' pleadings are vague and imprecise.

41. Lord Gifford relied on ***Evans v Bartlam*** [1937] All ER 646 for the proposition that 'unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow the rules of procedure' (Lord Atkin page 650D). This pronouncement is a broad and general statement. General pronouncements, regardless of the eminence of the judge (and Lord Atkin was a judge of the highest calibre) cannot override the text of

procedural rules. It is my view that where procedural rules have laid down in mandatory language what a litigant **must** do as distinct from what he **may** do, then it would make nonsense of the text of the rules if the litigant could do anything he wished secure in the knowledge that a court would say, 'Must does not mean what is says. This is a mere procedural rule and you need not comply with it.'

42. I would add a few more words about the ***Evans*** case. In that case the claimant was owed money by the defendant. There was evidence that the defendant acknowledged the debt. He was eventually sued and judgment entered against him. Even after judgment he asked for time to pay and asked that the claimant not let it be known that he was virtually a bankrupt. In order to escape from under the judgment, the defendant applied to set aside the judgment. Under the RSC there was indeed a discretion to set aside the judgment. The rule did not set out any threshold requirement to be met. To use the words of Lord Russell of Killowen in the same case, 'R.S.C. Ord. 13, r. 10, in its terms is unfettered by any conditions, and purports to confer upon the court or a judge a full power to set aside a judgment signed in default of appearance, and, if thought fit, to impose such terms, as a conditions of the setting aside, as may be just' (page 651A). [1]

43. The consequence of this analysis by Lord Russell was that he rejected the submission that the judgment can be set aside only if there was a 'serious defence to the action'. His Lordship accepted that in deciding whether to set aside a judgment a judge would undoubtedly consider whether any useful purpose would be served by setting aside the judgment and if there was no defence to the action then no useful purpose would be served by setting aside the judgment but that is not the same as saying that as a matter of law there must be established that there is a serious defence. The other Law Lords, except Lord

---

[1] The relevant rules at the time were in these terms. R.S.C. Ord 13, r 10 reads: *Where any judgment is entered pursuant to any of the preceding rules of this order, it shall be lawful for the court or a judge to set aside or vary such judgments upon such terms as may be just.*

R.S.C., Ord. 27, r. 15 states: *Any judgment by default, whether under this order or under any other of these rules, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit.*

Thankerton and Lord Roche who concurred, delivered judgments along similar lines.

44. The judgments of the House actually centred on whether the Court of Appeal was correct in setting aside the discretionary power exercised by the judge who had set aside the judgment. The actual merits of the defence were not canvassed. The actual text of the extant RSC did not require the defence to be considered. The rule simply conferred a discretion to set aside a default judgment but it was the courts that developed judge-made rules that there should be an affidavit of merit showing a 'prima facie' defence which should be supported by an affidavit and an explanation for allowing the matter to go to judgment (Lord Atkin at page 650B). Again the rule did not require these things. These matters did not have to be proved as a matter of law. This meant, as Lord Russell rightly pointed out, that because the terms of the discretion under the RSC were unconditional, it meant that even if the judge-made requirements were absent the court could still set aside a judgment because to hold otherwise would be 'adding a limitation which the rule does not impose' (page 651E). As Lord Atkin also said, the judge-made rule of the affidavit of merits can be departed from (page 650E). The breadth of the rule and the absence of any necessary precondition was accepted by the Jamaican Court of Appeal in ***C. Braxton Moncure v Doris Delisser*** (1997) 34 JLR 423. This is no longer the case under the CPR.

45. Given the breadth of the judge's discretion under the extant R.S.C., it is not surprising that the House reasoned in the way that it did. It held that the Court of Appeal did not demonstrate that the judge erred in principle and so there was no legal basis for that court to interfere with the trial judge's discretion. Let me now turn to the actual merits of the defence in that case. Having admitted the debt in writing, the defendant claimed that he was misinformed by the process server who told him that he had three or four weeks to enter an appearance. He thought this was true and did not enter an appearance and that was how judgment came to be entered against him. Unsurprisingly when the matter came before the Master he declined to set aside the judgment. The defendant found a benevolent

judge, Greaves-Lord J, who set aside the judgment. The Court of Appeal restored the Master's orders.

46. In effect, the defendant in ***Evans*** pleaded ignorance of the procedural rules. Lord Atkin apparently found this excuse sufficient, never mind that there was no defence to the claim. His Lordship said that there is no presumption that 'even a judge knows all the rules and orders of the Supreme Court' (page 649G), a fortiori, the same applies to a layman. The defendant in ***Evans*** is unlikely to be treated so benevolently in today's litigation environment.

47. The relevant rule in Jamaica happily states that the judgment may be set aside 'if the defendant has a real prospect of successfully defending the claim' (rule 13.3). Can it be seriously contended that in light of the text of the present rule of the CPR that the defendant in ***Evans***, who admitted in writing that he owed the money and was begging for time to pay, could possibly succeed in setting aside the judgment regularly obtained? I repeat the point made earlier that the general statement of Lord Atkin cannot control the actual text of rule 13.3 of the Jamaican CPR. The rule has, by its terms, set out a threshold condition which must be met which was absent in the R.S.C. Thus it cannot be argued as the House did in ***Evans*** that rule 13.3 does not contain any precondition. It is simply dreadful, at least to me, that a man who owed money and acknowledged the debt, ***in writing***, did not pay a penny, even when given time after judgment was entered, could have a properly obtained judgment set aside on the basis that he was mislead on the time he had to enter an appearance in circumstances where he had absolutely no defence!! Why didn't he go and find a lawyer. Even if he had entered an appearance, on what basis could he have resisted the claim?

48. The CPR represents an attempt to modernise civil litigation by emphasizing efficiency, proportionality and reduction of costs while maintaining principles of fairness. It does this by asking that the parties plead in a manner (Parts 8 and 10) which enables the court to carry out is duty to manage cases actively (rule 25.1) by identifying issues early (rule 25.1 (b)) and deciding which issues need a trial and which can be dealt with summarily (rule 25.1 (c)) or not dealt with at

all (rule 26.1 (2) (k)). The vice of the bare denial defence is that no one knows which issues are joined; which issues can be resolved summarily; which issues need a trial and which issues do not need resolution. This is the era of cards-faced-up-and-on-the-table litigation so that all can see the cards.

49. It follows from this that the JBL fails in its application to have the claim struck out.

Conclusion

50. The judgment Miss Edwards obtained was regular. Under the discretionary power of the court to set aside a regularly obtained judgment, there is no material in the draft defence suggesting that there is a real prospect of successfully defending the claim. This being so, the necessary condition for the exercise of the discretion is absent and so there is no basis for me to consider whether I should exercise my discretion. It is only when the main condition of there being a reasonable prospect of successfully defending the claim is met that a court may consider exercising its discretion. Bare denials in civil litigation have gone the way of the dinosaurs and are now found only in musty texts of a bygone age. We leave them to legal archaeologists, historians and fossil hunters. The application to strike out the claim is also dismissed. Cost to Miss Edwards to be agreed or taxed. Special costs certificated granted for two counsel.