[2021] JMCA Civ 42

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00047

BETWEEN	**ANDREW FLETCHER (In representative capacity, Estate Margaret Fletcher)**	**APPELLANT**
AND	**DEVINE DESTINY COMPANY LIMITED**	**RESPONDENT**

Written submissions filed by Nunes, Scholefield, Deleon & Co for the appellant

8 October 2021

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 sister Foster-Pusey JA and I agree with her reasoning and conclusion and have nothing useful to add.

FOSTER-PUSEY JA

Background

[2] This is a procedural appeal brought by the appellant, Andrew Fletcher, challenging the decision of Master Mott Tulloch-Reid (as she was then) ('the Master') who, on 18 February 2020, set aside a default judgment entered against the respondent on the basis that the claim form, particulars of claim, notes to the defendant, prescribed notes,

acknowledgment of service and form of defence ('originating documents') had not been served on the respondent.

[3] The respondent is a limited liability company, with its registered office located at Summerset Road, West End, Negril in the parish of Westmoreland. It operates the Devine Destiny Hotel, situated at the same address.

[4] Ms Margaret Fletcher (now deceased) was a guest at the respondent's hotel, and claimed that, on or about 26 September 2003, she fell while descending a flight of stairs in the hotel's reception area. She initiated proceedings in the Supreme Court for damages, alleging that the accident occurred due to the respondent's negligence, breach of contract or breach of the Occupiers' Liability Act. The appellant, Ms Fletcher's son, acts in a representative capacity for her estate.

[5] The appellant, in his grounds of appeal, has raised a number of issues arising from the decision of the Master. However, the central issue to be determined in this appeal is whether the originating documents, which were sent to the respondent by registered post addressed to its registered office, were served on the respondent.

Proceedings in the court below

[6] An outline of the history of the matter is necessary so that the lengthy time over which this matter has been pending can be appreciated.

[7] On 18 December 2008, Ms Fletcher filed a claim against the respondent in the Supreme Court. Ms Fletcher, a resident of the United States of America on vacation in Jamaica, averred that, while staying as a paying guest at the respondent's hotel, on or about 26 September 2003, she sustained injuries while descending stairs in the reception area of the respondent's hotel. Consequently, she sought damages for injuries sustained, losses suffered and expenses incurred.

[8] In light of the issues which arise for determination, it is important to examine the steps which the appellant, through his attorneys-at-law, took to serve the originating

documents on the respondent. The appellant's attorneys-at-law, having conducted a search at the Companies Office of Jamaica, ascertained the address of the respondent's registered office, which was situated at Summerset Road, West End, Negril in the parish of Westmoreland. On 6 January 2009, by letter dated 31 December 2008, the appellant's attorneys-at-law, in an envelope bearing the firm's name and address on the outside, sent the claim form, particulars of claim and supporting documents by registered mail #1579 directed to the address of the respondent's registered office.

[9] The letter was not returned to the appellant's attorneys-at-law. The respondent did not file an acknowledgment of service or defence. On 8 July 2009, the appellant's attorneys-at-law requested judgment in default of acknowledgment of service and defence. At the time when the appellant's attorneys-at-law requested judgment, they were not aware that the respondent had not collected the letter, or that the Negril Post Office had, on 15 April 2009, sent the letter to the Return Letter Branch on the basis that the letter did not have a return address. The letter has never been returned to the appellant's attorneys-at-law.

[10] Although a copy of the default judgment does not appear in the record of appeal, there is no dispute that the default judgment was granted. On 10 March 2010, a sealed copy of the default judgment was sent to the respondent under cover of letter dated 9 March 2010, and by letter dated 1 April 2010, the appellant served the respondent with notice of the assessment of damages to be held on 1 June 2010 (see affidavit of Catherine Minto filed on 20 February 2020 in which a history of the matter is provided).

[11] The assessment of damages hearing scheduled for 1 June 2010 was adjourned to 27 September 2010, because Ms Fletcher heeded warnings issued by the British Government to its citizens that they should avoid travelling to Jamaica due to the civil unrest in downtown Kingston arising from the Tivoli Uprising. The respondent was also absent from the hearing. On 11 June 2010, a sealed copy of the notice of adjourned hearing was sent to the respondent by mail.

[12] On 27 September 2010, Jennifer Reid appeared for the respondent, and the court was advised that the respondent's attorney-at-law was not able to attend the hearing. The matter was again adjourned to 29 November 2010.

[13] On 26 November 2010, the respondent sent to the appellant by fax, an unfiled notice of application for court orders seeking to set aside the default judgment. The application was supported by an affidavit sworn on 26 November 2010 by Clifton Lloyd Reid and Jennifer Reid, two of the respondent's directors and shareholders. The content of the application and the affidavit in support will be outlined further on in this judgment.

[14] The matter came up again for the assessment of damages hearing on 29 November 2010, however, it did not go on. It was adjourned to 20 May 2011 at which time it was further adjourned, pending the fixture and determination of the respondent's application to set aside the default judgment. On 30 September 2011, the application to set aside the default judgment came up for hearing before Rattray J but was adjourned to 28 March 2012.

[15] As a result of Ms Fletcher's death on 3 January 2012, the proceedings were automatically stayed. On 29 May 2012, the appellant obtained a grant of probate in the United Kingdom in respect of his mother's estate. He then made an application in the Supreme Court to be appointed as administrator ad litem of his mother's estate for the purposes of carrying on the proceedings, as well as to be substituted as claimant in the proceedings. On 26 March 2013, Batts J granted the application. On 21 June 2013, the appellant filed an amended claim form and particulars of claim to reflect his appointment as administrator ad litem and substitution as claimant in the proceedings. He served the papers on the respondent, who, in response, on 10 July 2013, filed an acknowledgment of service.

[16] By letter dated 7 January 2014, counsel for the appellant reminded the respondent's attorneys-at-law that judgment had already been entered against their client, and steps would have to be taken to set it aside.

[17] The relisted assessment of damages hearing was scheduled to be heard on 12 May 2016. On 8 April 2016, the respondent filed a notice of application to relist the application to set aside the judgment entered in default and to stay assessment of damages. At the assessment of damages hearing, counsel for the respondent applied for an adjournment. The assessment judge, Lindo J, refused counsel's request, and the assessment of damages hearing proceeded. Counsel for the respondent actively participated in the hearing by cross-examining the appellant and, on 19 May 2016, filed written submissions addressing the quantum of damages. At the end of the hearing, the assessment judge reserved her decision.

[18] By letter dated 8 May 2019, the appellant, in a letter to the Registrar of the Supreme Court, referred to the assessment of damages, which had been conducted by Lindo J on 12 May 2016, and asked the Registrar to remind the judge that the judgment was still outstanding.

[19] On 14 August 2019, a notice of adjourned hearing issued by the Registrar indicated that the application to set aside default judgment that was not heard on 12 May 2016 (the day of the assessment of damages hearing), due to the unavailability of a judge, was set for hearing on 30 October 2019. However, it was not until 9 January 2020 that the application was heard.

[20] At this point, I will highlight the essential features of the notice of application and the affidavit filed to support it. It is important to note the basis on which the application was made, and the contents of the affidavit in support. The sole ground on which the respondent challenged the default judgment in the notice of application was that:

> "1) In keeping with Rule 13.2 of the Civil Procedure Rules 2002 [the respondent] were [sic] never served or received any notice of the proceedings that were filed by [the appellant] as required by rule 12.4 of the Civil Procedure Rules - 2002."

[21] In the affidavit supporting the application, Clifton Lloyd Reid and Jennifer Reid deposed that the matter was never brought to their attention until two weeks before 27

September 2010, when they received a parcel delivered by courier service, containing a notice for an assessment of damages hearing. They made checks at the post office in Negril to ascertain why they had not received the documents which the appellant said its attorneys-at-law had sent by registered mail. They exhibited two letters (exhibits "DD1" and "DD2"), which they received from Mrs Veronica James-Brown, acting post mistress of the Negril Post Office. In letter dated 24 November 2010, the post mistress wrote:

> "This serves to certify that registered article #1579 addressed to Devine Destiny Co. Ltd., came to the above mentioned Post Office on the 9th of January 2009.
>
> **Due to the fact that it was not collected and with no return address it was sent to Return Letter Branch on April 15, 2009.** …" (Emphasis supplied)

Registered article #1579 was the letter in which the originating documents were sent to the respondent.

In addition, in letter dated 25 November 2010, Mrs James-Brown wrote:

> "This is to certify that registered article #9326 came to Negril P.O. on the 15th of March 2010.
>
> Same was not collected and was returned to Nunes Schofield [sic] Deleon & Company, Kingston 10 on June 9, 2010. …"

As a comment, it is not clear from the record of appeal what documents were sent in registered article #9326.

[22] The respondent's representatives deposed that there was a company called Divine Tours, also operating in Negril, which often received its mail and vice versa. They deposed that they did not intend to ignore or disrespect the court by failing to file an acknowledgement of service or a defence. They failed to do so, because they were not aware of the claim at all. At paragraph 7 of their affidavit they however went on to state:

> "THAT we believe we have a good defense [sic] to this matter and same in draft is exhibited herewith and

> marked 'DD3' for identity. This defence we believe has a real likelihood or prospect of success."

[23] Importantly, the respondent's representatives did not, in the body of the affidavit, address the circumstances surrounding the incident which led to the claim. Exhibit "DD3" was the respondent's proposed defence. In the draft defence, among other things, the respondent denied all averments in the particulars of claim and stated that its premises were safe, it had never received a complaint about its physical plant, and no one had been injured as a result of any defect on the property.

[24] In response, the appellant, on 19 September 2011, filed an affidavit of Rena Sealy-Simpson, legal assistant at Nunes, Scholefield, DeLeon & Co ('the firm'). Mrs Sealy-Simpson deposed that she was advised on 14 October 2010 by Martin Grant, a representative of the Central Sorting Office on South Camp Road, Kingston, that of the five letters which the firm sent to the respondent, only the second letter was returned to their firm. The last three letters, which contained two sets of the appellant's notice to tender at the assessment, notice of assessment date and notice of adjourned hearing of the assessment date, were still in the postal system as "uncollected". However, these were subsequently returned to the firm.

[25] In relation to the first letter, which contained the originating documents, Mrs Sealy-Simpson was informed that it could not be located in the post office after searches were made. She pointed out that, to date, that letter had not been returned to the firm, and highlighted the fact that the address of the firm was clearly displayed on all envelopes. Mrs Sealy-Simpson also deposed that during her discussions with the post office representative, she was informed that it was a standard practice for recipients of registered letters to refuse to collect documents after the registered slips were delivered to them, if they were able to identify the sending company through friends at the post office.

[26] At the end of the hearing, the Master reserved her decision. On 18 February 2020, she made the following orders:

"1. The Default Judgment entered in Judgment Binder No. 748 Folio 241 on April 2, 2010 in favour of [the appellant] is set aside.

2. [The appellant] is to serve the Claim Form and Particulars of Claim on [the respondent's] Attorneys-at-Law, Dionne N. S. Meyler and Associates on or before **February 28, 2020**.

3. [The respondent] is to file and serve its Defence on or before **March 16, 2020**.

4. The parties are to attend Mediation on or before **May 15, 2020**.

5. Should mediation be unsuccessful, the parties are to attend Case Management Conference on **June 1, 2020** at 11:00 am for one (1) hour.

6. Each party is to bear its own costs in the Application and the Cost thrown away.

7. That [the appellant's] Attorney-at-Law [sic] are to file and serve the Formal Order

8. Leave to Appeal refused.

9. Stay of Proceedings refused." (Emphasis as in the original)

The appeal

Application seeking leave to appeal and a stay of proceedings

[27] The appellant sought leave to appeal the Master's decision and a stay of proceedings. On 22 June 2020, this court heard the application and made the following orders:

"1. Leave to Appeal is granted to [the appellant], to appeal the Order made by the Master Tulloch Reid on the 18th day of February 2020 setting aside the Judgment in Default of Acknowledgement of Service and Defence which was entered in [the appellant's] favour against [the respondent].

2. There be a stay of proceedings in the Supreme Court pending the determination of these proceedings.

3. [The appellant] is to file and serve Notice of Appeal on or before **July 6, 2020.**

4. Costs of the Application be costs in the Appeal." (Emphasis in the original)

Grounds of appeal

[28] On 6 July 2020, the appellant filed the notice and grounds of appeal challenging the decision of the Master. The following are the grounds of appeal:

"a. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she found that the Judgment in Default of Acknowledgement of Service and Defence was irregular, after accepting the evidence and finding that:

(i) [The appellant] had served the proper party with the Claim Form, Particulars of Claim and supporting documents;

(ii) [The appellant] had effected service of the initiating proceedings at the proper address, being the registered address of [the respondent] company;

(iii) [The appellant] had effected service by a method expressly permitted by the Civil Procedure Rules and Companies Act;

b. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she failed to consider or to have any regard for the decision of Ace Betting Co. Ltd v Horse Racing Promotions Ltd. S.C.C.A 70 and 71 of 1990 which was cited and which

establishes when a Judgment in Default would be considered irregular.

c. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she failed to consider or to have any regard to the authorities which established that the failure on the part of [the respondent] to 'collect' or 'claim' correspondence which had been duly sent to [the respondent] at its registered address, did not render the judgment irregular.

d. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she failed to consider or to have any regard to the authorities which established that failure on the part of [the respondent] to 'collect' or 'claim' correspondence which had been duly sent to [the respondent] at its registered address, rendered the judgment regular, and [the respondent] was required to satisfy the Court that it has a real prospect of success.

e. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she proceeded to set aside the Default Judgment, having found that [the respondent] failed to file an Affidavit of Merits.

f. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she failed to have any regard to [the respondent's] inordinate delay in pursuing its application to set aside Judgment, and the obvious prejudice which would have been caused to [the appellant]. Instead, the learned judge [sic] found that Pursuant to Part 1 of the Civil Procedure Rules, [the appellant] was under a duty 'to liaise with the Court' to have [the respondent's] application to set aside judgment re-listed.

g. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she found that pursuant to Part 1 of the Civil Procedure Rules, [the appellant] ought not to have taken steps to pursue or prosecute his claim (while the application to set aside was extant) although several years had passed without any activity on the part of [the respondent].

h. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she failed to Order [the respondent] to pay [the appellant] his Costs thrown away.

i. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she found that [the respondent] had not waived the alleged irregularity in service, when [the respondent] took active part in the Assessment of Damages, by cross-examining [the appellant] and filing written submissions.

j. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she found that she had the power to extend the validity of the Claim Form, twelve years after it had expired.

k. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she directed [the appellant] to serve [the appellant] [sic] with the Claim Form and Particulars of Claim at this stage of the proceedings."

[29] In light of these grounds, the appellant has sought the following:

"(a) An order setting aside the Orders which were made by Master Mott Tulloch-Reid on February 18, 2020.

(b) An Order permitting the learned judge on Assessment (Her Ladyship Mrs. Justice A. Lindo), to deliver her Judgment and awards on the Assessment of Damages which was conducted on May 12, 2016.

(c) Costs here and in the court below to the Appellant to be taxed if not agreed.

(d) Such further and/or other relief as this Honourable Court deems just."

Issues raised by the grounds of appeal

[30] The issues raised in the grounds of appeal are:

(i) Whether the Master erred when she found that there was no proof that the originating documents had been

served on the respondent and as a consequence the judgment was irregular; (Grounds a, b, c and d)

(ii) Whether the Master erred in setting aside the default judgment in the absence of an affidavit of merit; (Ground e)

(iii) Whether the Master erred in failing to have regard to the respondent's inordinate delay in applying to set aside the default judgment; (Ground f)

(iv) Whether the Master erred in finding that the appellant should not have prosecuted the claim while the application to set aside the default judgment was pending; (Ground g)

(v) Whether the Master erred in failing to order the respondent to pay the appellant's costs thrown away; (Ground h)

(vi) Whether the Master erred in failing to find that the respondent had waived the alleged irregularity in service when it took active part in the assessment of damages hearing; (Ground i) and

(vii) Whether the Master erred in the circumstances of the case when she extended the validity of the claim form and ordered the appellant to serve the respondent afresh. (Grounds j and k).

[31] While the appellant has raised the above issues in the grounds of appeal, it is clear that, depending on the outcome of certain questions, some of the issues will not have to be addressed. In my view, the critical issue to be determined is whether the respondent

was served with the originating documents, as this would determine whether the default judgment that was entered was regular or irregular. The outcome of that question would impact the steps which the respondent was required to pursue in order to set aside the default judgment.

Submissions

[32] The appellant filed written submissions. However, although, according to the court's records, the respondent acknowledged receipt of the record and the appellant's submissions in the matter, it has not filed submissions in the appeal.

Appellant's submissions

[33] Counsel for the appellant, in her written submissions, narrowed the issues arising in the appeal and focused on these three main points:

> "(i) The learned Master failed to appreciate, or properly consider, ***the distinction between a regular and an irregular judgment***. Given the facts in this matter, the judgment entered against the Respondent was a ***regular one***. And, ought only to have been set aside, if the Respondent had satisfied the requirements to set aside a regular judgment.
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> (ii) The Respondent ***failed to satisfy the requirements to set aside a regular judgment***. The learned Master found that there was no Affidavit of Merits before the Court, and also, that there was a significant delay on the part of the Respondent pursuing the application to set aside. Therefore, the application to set aside ought to have been refused and costs awarded to the Appellant.
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> (iii) Alternatively, the learned Master erred when she found that the Respondent had not waived the alleged irregularity in service, when the Respondent took active part in the Assessment of Damages, by cross-examining the Appellant and filing written submissions." (Emphasis as in the original)

Grounds a, b, c and d - Regular versus irregular judgment

[34] The gravamen of counsel's contention was that the Master erred in failing to properly consider the difference between a regular and irregularly obtained judgment. Counsel highlighted that the sole basis on which the respondent sought to set aside the default judgment was that it had not been served with the originating documents. The respondent was therefore contending that the default judgment entered was irregular.

[35] Counsel referred to section 387 of the Companies Act which stipulates that service of a document on a company may be done by leaving it at, or sending it by post, to the registered office of the company. Counsel also referred to rule 5.7(a) of the Civil Procedure Rules (CPR) which provides that service on a limited liability company may be effected by sending the claim form by telex, fax, prepaid registered post, courier delivery or cable addressed to the registered office of the company.

[36] Counsel argued that the claim form was:

(a) addressed to the correct party;

(b) sent to the respondent's registered address pursuant to the Companies Act;

(c) not returned to the appellant prior to the entry of the judgment or at all; and

(d) not collected by the respondent through no fault of the appellant.

[37] Counsel submitted that the appellant had satisfied all procedural requirements for the entry of the default judgment. Counsel highlighted that, in the evidence relied on by the respondent, the post office made it clear that the package with the claim form was not collected by the respondent. She emphasized that at the time when the appellant's attorneys-at-law requested entry of the default judgment, the firm had not received any notice or intimation that the originating documents had not been effectively served through registered post.

[38] Therefore, a regular judgment was entered and could only have been set aside on the filing of an affidavit of merit. In support of this submission counsel relied on the case of **A C E Betting Co Ltd v Horseracing Promotions Ltd and Summit Betting Co Ltd v Horseracing Promotions Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 70 & 71/1990, judgment delivered 17 December 1990.

Grounds e and h- Absence of an affidavit of merit and the Master's ruling on costs

[39] Counsel submitted that the Master arrived at the inescapable conclusion that the respondent had not placed an affidavit of merits before the court. Counsel relied on the cases of **Evans v Bartlam** [1937] AC 473 and **The Attorney General of Jamaica v John McKay** [2012] JMCA App 1 which state that it is not sufficient to simply exhibit a draft defence, but the details and facts/evidence being relied on to show that there is a real prospect of success must be outlined in the affidavit. Counsel pointed out that the representatives of the respondent did not refer to any facts surrounding the incident in the affidavit to which they swore in support of the application. In addition, the respondent had not stated in its application to set aside the default judgment that it had a real prospect of success in defending the claim.

[40] On the issue of costs, counsel argued that costs should follow the event. Therefore, the appellant ought to have been awarded costs as there was no good reason for doing otherwise.

Discussion

[41] A judge or a master is vested with the discretionary power to set aside a default judgment. Therefore, I am mindful that, in reviewing the Master's decision, I must be cautious. The case of **Juici Beef Limited (Trading as Juici Patties) v Yenneke Kidd** [2021] JMCA Civ 29 is instructive. Straw JA, in dealing with the standard of review of the exercise of the learned master's discretion in that case, outlined at paragraph [27]:

> "It is convenient to indicate at the outset that regard was had to the well-settled principle that **this court must defer to the exercise of discretion by a judge (or master) and**

> **must not interfere with it merely on the ground that the members of this court would have exercised the discretion differently**. As such, this court will only set aside the exercise of a discretion by a judge (or master) where it was **(i) based on a misunderstanding of the law or evidence; (ii) based on an inference which can be shown to be demonstrably wrong; or (iii) so aberrant that no judge regardful of his duty to act judicially, could have reached it** (see **Hadmor Productions Ltd and others v Hamilton and another** [1982] 1 All ER 1042, 1046 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 at paragraphs [19] and [20])." (Emphasis supplied)

[42] It is important to refer to the relevant provisions of the CPR concerning service on a limited liability company, service by registered post and the deemed date of service. Rule 5.7 provides that service on a limited company may be effected by prepaid registered post addressed to the registered office of the company or in any other way allowed by an enactment. Section 387 of the Companies Act also provides that a document may be served on a company by sending it by post to the registered office of the company.

[43] Rule 5.11 of the CPR provides that in order to prove service by registered post, the person responsible for posting the claim form to the person to be served must provide an affidavit exhibiting the claim form and state the date and time of posting and the address to which it was sent.

[44] Rule 5.19 of the CPR provides for a deemed date of service when a claim form has been served within the jurisdiction by prepaid registered post, unless the contrary is shown. The claim form is deemed to have been served 21 days after the date shown on the receipt from the post office.

[45] The rules governing the entry of a default judgment and setting it aside are also relevant. Rule 12.4 of the CPR provides in part:

> "**Conditions to be satisfied - judgment for failure to file acknowledgment of service**

12.4 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;

(b) the period for filing an acknowledgment of service under rule 9.3 has expired;

(c) that defendant has not filed –

(i) an acknowledgment of service; or

(ii) a defence to the claim or any part of it;"

[46] Rule 13.2(1) of the CPR provides:

"**Cases where court must set aside default judgment**

13.2 (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 judgment was entered.

(2) The court may set aside judgment under this rule on or without an application."

[47] Rule 13.3 of the CPR provides, among other things, that the court may set aside a judgment if the defendant has a real prospect of successfully defending the claim, while rule 13.4 provides that the application must be supported by evidence on affidavit and the affidavit "must exhibit a draft of the proposed defence'".

[48] In **Frank I Lee Distributors Ltd v Mullings & Company (A Firm) and Mullings & Company (A Firm) v Frank I Lee Distributors Ltd** [2016] JMCA Civ 9, P Williams JA (Ag) (as she was then) said:

> "[54] … A defendant who has not been served with a claim form has the unfettered right to have judgment entered against him set aside. That is not only captured in the relevant provisions of the CPR but is part and parcel of the rules of natural justice … The overriding consideration in matters such as these remains that as expressed by **Strachan v Gleaner Company Limited and Another** by Lord Millett at paragraph 21:-
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> > '… A default judgment is one which has not been decided on the merits. The Courts have jealously guarded their power to set aside judgments where there has been no determination on the merits, even to the extent of refusing to lay down any rigid rules to govern the exercise of their discretion: see **Evans v Bartlam** [1937] AC 473 where Lord Atkin (discussing the provisions of English rules in substantially the same terms as Section 258) said at p 480:
> >
> > > 'The principle obviously is 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 only been obtained by a failure to follow any of the rules of procedure.'"

[49] Was the respondent served with the originating documents in the claim? This is a central issue which must be determined in order to resolve this matter. The appellant has asserted that the respondent was served with the originating documents by registered post at its registered office as permitted by section 387 of the Companies Act and rule 5.7(a) of the CPR. Further, that the address of the firm was clearly displayed on all envelopes containing the relevant court documents. Conversely, the respondent has

asserted that it never received the originating documents and that, after making inquiries at the post office, it was informed that the registered letter in which the originating documents were sent, was returned to the Return Letter Branch as it was not collected, and there was no return address on the envelope.

[50] I note that there was no issue in relation to the accuracy of the address to which the registered letter was sent.

[51] There is no doubt that the Master was aware of the main issue before her. At paragraph 4 of her oral judgment, she stated that she had to determine whether the respondent was served, and if she found that it had not been not served, she would have to set aside the default judgment as of right pursuant to rule 13.2 of the CPR.

[52] The Master, in analysing the evidence before her, noted that the acting post mistress, in the letter dated 24 November 2010, acknowledged that registered article #1579, addressed to the respondent, had arrived at the Negril Post Office on 9 January 2009, but was not collected and was sent to the Return Letter Branch on 15 April 2009. She considered the evidence of Mrs Rena Sealy-Simpson, legal assistant employed at the firm, who deposed that the registered letter sent as registered article #1579 with the claim form and particulars of claim, had not been returned to the firm and checks made at the Central Sorting Office revealed that the letter containing those documents could not be found.

[53] At paragraph 9 of her reasons, the Master examined rule 13.2. She noted that, generally, a document is deemed to be served after 21 days when sent by registered post. She went on to state, however, that if the document is returned, it is deemed not to be served even if the respondent had an opportunity to collect same. She concluded that, in light of the evidence, she had no proof that the originating documents were served on the respondent, especially in light of the letter from the acting post mistress in which it was indicated that the documents were uncollected.

[54] Having thoroughly examined the Master's approach in dealing with this issue, I agree with counsel for the appellant that she misunderstood the applicable law. Counsel for the appellant correctly relied on **A C E Betting Co Ltd v Horseracing Promotions Ltd and Summit Betting Co Ltd v Horseracing Promotions Ltd**, this court's leading authority on the issue of service of originating documents by registered mail on a company at its registered office. **A C E Betting Co Ltd v Horseracing Promotions Ltd and Summit Betting Co Ltd v Horseracing Promotions Ltd** was a consolidated appeal and the question arose as to whether the writs of summonses had been properly served by registered mail on the two companies involved. Service of the writ of summons was effected by registered mail on A C E Betting Company Limited. The letter, which was correctly addressed to the registered office of the company, was sent on 17 May 1990. No appearance was entered and judgment in default was entered on 11 June 1990. The company applied to set aside the default judgment and relied on an affidavit from the secretary of the company, who stated that the writ was received on 14 June 1990, three days after judgment had been entered. The company entered appearance on 15 June 1990. The judge at first instance concluded that service had been properly effected on the appellant. The company appealed.

[55] The court considered differing positions which had been taken on the issue by the English Court of Appeal in **Thomas Bishop Ltd v Helmville Ltd** [1972] 2 WLR 149 and **Saga of Bond Street Ltd v Avalon Promotions Ltd** (1972) 2 All ER 545, and noted that the conflicting views had been resolved. Forte JA (as he then was) wrote, at page 13 of the judgment:

> "These two conflicting views were however considered and resolved in the case of **A/S Cathrineholm v Norequipment Trading Ltd** [1972] 2 W.L.R. 1242 at 1247. After reviewing both cases Lord Denning M.R. stated:
>
> > 'Returning now to the two decisions, I prefer **Saga of Bond Street Ltd v. Avalon Promotions Ltd to Thomas Bishop Ltd v. Helmville Ltd** …

> **Accordingly when the plaintiff sends a copy of the writ by prepaid post to the registered office of the company, and it is not returned and he has no intimation that it has not been delivered it is deemed to have been served on the company and to have been served on the day on which it would ordinarily be delivered. If no appearance is entered in due time, the plaintiff is acting quite regularly in signing judgment. If the defendant should seek to set it aside, he ought to explain the circumstances and go on to show that he has merits, that is, that there is a triable issue**.'
>
> In my view, the conclusions, in the **Cathrineholm case,** and in the **Saga Bond Street case,** are correct and are applicable to the case under review. **I am therefore of the opinion that the learned judge was correct in finding that the writ was regularly served there having been no intimation at the time of judgment that the writ had not been effectively served through Registered Mail.** In the event, I would conclude that the writ having been regularly served, the appellant is not entitled to have the judgment set aside ex debito justitiae, and therefore would be compelled to show it has merit."

[56] Forte JA then considered the circumstances surrounding service of the writ on Summit Betting Company Limited. In that case, service of the writ was also effected through registered mail, however, the address written on the registered slip was "Northside Street" instead of "Northside Drive". The company argued that service of the writ was irregular and it was entitled to have the judgment set aside *ex debito justitiae.* The judge at first instance found that, since he could not infer that the postal clerk made an error in preparing the registered slip, the service of the writ was irregular. At the hearing of the appeal, however, by consent of both counsel, the envelope which was sent by registered mail was produced, showing that it had been correctly addressed. It had

been returned to the respondent's attorneys-at-law marked 'unclaimed' subsequent to the entry of the default judgment.

[57] At page 14 of the judgment, Forte JA stated:

> "Had this evidence been available to the learned judge, it is fair to say that he would not have come to the conclusion that the service of the writ was irregular. In my opinion the respondent company acted in accordance with the provisions of section 370 of the Companies Act in effecting service of the writ, and accordingly the service was regular. **Consequently, not having received any intimation that the writ remained "unclaimed" prior to the entering of the judgment, and no appearance having been entered, the Judgment in Default was regularly entered and therefore cannot be set aside ex debito justitiae.** The appellants would therefore have to show merit i.e. that there is a triable issue." (Emphasis supplied).

[58] In the case at bar, the letter to the respondent was sent to the correct address of its registered office. The letter arrived at the post office, but was not collected. Since the letter was posted on 6 January 2009, it was deemed to have been served 21 days afterwards. When the appellant's attorneys-at-law requested default judgment on 8 July 2009, the time when the respondent should have filed an acknowledgment of service and a defence, had long passed. The firm, prior to the entry of default judgment, did not receive any intimation that the registered letter sent to the respondent remained unclaimed. The letter from the Negril Post Office was useful, as it showed that the letter had arrived at the post office, but was not collected by the respondent. The evidence from the firm is that the letter was not returned to it. Consequently, no appearance having been entered and no defence filed, the judgment in default was regularly entered. In applying to set aside the judgment the respondent was therefore required to show, by way of an affidavit of merit, that there was a triable issue.

[59] In **Linton Watson v Gilon Sewell and Others** [2013] JMCA Civ 10, the 2nd respondent, a company, at first instance, had successfully applied to set aside a default judgment. One of the points raised in its affidavit was that it had not been served. In the

judgment of the court, the appellant having challenged the decision of the judge at first instance, Phillips JA made comments on the question as to whether the 2nd respondent had received documents sent to it by registered mail. Mr Jason McKay, who gave evidence on behalf of the 2nd respondent in that case, contended that he was only made aware that the originating documents were served on his company, and deemed to be served, on 4 March 2009, when he attended the assessment of damages hearing. He stated that neither he nor his staff, and in particular his office manager, had received the claim form or the particulars of claim. Mr McKay stated that after making exhaustive checks, inquiries and inspection, thorough perusal of the log books, discussions with the guards, members of staff, and the office manager, it was confirmed that the documents were not received.

[60] The appellant, on the other hand, deposed that the respondent was properly served and exhibited the registered postal slip. He posited that the company only sprang into action after the Supreme Court's Bailiff came to execute the order for the seizure and sale of goods in order to satisfy the judgment.

[61] In addressing the issue of service, Phillips JA had this to say:

> "[41] In the instant case the 2nd respondent deposed that due to the dangerous nature of the items stored on the company's premises because of the nature of the work undertaken by it, the premises were very secure and difficult to access. He also said that there are cumbersome systems and procedures in place in order for persons to gain entry to the premises, and for specific reporting in respect of those who do. He said that detailed and comprehensive searches had not produced any registered slips or any accompanying documentation. He concluded that the factual situation was that the original documents had not been served on the 2nd respondent. **The question for us, in my view is: was that evidence enough to dispel the "legal fiction" of the presumption of deemed service?** The 2nd respondent is saying we cannot find the documents, "there is no record of receipt of them." The appellant is saying, "I have produced the registered slip and served in accordance with the rules." If a mere denial was enough would it not be very easy for every defendant, who had failed to respond to due process in the time allotted,

> especially when the validity of the claim form had expired, and the limitation period had passed, to deny receipt of the claim form? There was no evidence from the postal service to suggest, or in support of, any inadvertent or negligent foul-up in the department of registered postal services, to explain the non-delivery of the claim form; **the claimant had done all that was required of him under the rules, and the claim form and accompanying documents had not been returned unclaimed. It seems to me that the evidence submitted may not have crossed the threshold necessary to rebut the deemed service date presumed in the CPR, and I would find that the default judgment against the 2nd respondent was regularly entered.** But whether I am right or wrong on this, that is not the end of the matter." (Emphasis supplied)

[62] It is significant, however, that the 2nd respondent **in Linton Watson** had applied to set aside the default judgment in question on the basis that it had a real prospect of successfully defending the claim, it had applied as soon as reasonably practicable after finding out that judgment had been entered, and had a good explanation for the failure to file a defence (see paragraph 15 of the judgment). In the end, the court found that the 1st and 2nd respondents had a reasonable prospect of successfully defending the claim. In light of the nature of the application before the court in that matter, it is quite understandable that no reference was made to **A C E Betting Co Ltd v Horseracing Promotions Ltd and Summit Betting Co Ltd v Horseracing Promotions Ltd** as it does not appear that the respondent had sought to set aside the default judgment on the basis that it was irregular.

[63] Returning to the matter at hand, the Master erred in her understanding of the relevant law. The default judgment which was entered was regular, and so the respondent, in order to set aside the judgment, had to show that it had a reasonable prospect of defending the claim by way of an affidavit of merit.

[64] The Master found that the respondent's affidavit before her had no merit and did not satisfy the requirements of CPR 13.3. At paragraph 8 of the Master's oral judgment which was reduced to writing, she noted:

> "[The respondent] application does not ask for the default judgment to be set aside under 13.3 but the Affidavit in support raises the issue at paragraph 7 by saying that it has a defence with a real likelihood or prospect of success. I need not go any further on this as it is clear from the case law that if a party is to rely on this aspect of the rule and invite the Court to exercise its discretion, it must not only exhibit a draft defence, but it must also have an affidavit of merit (see the case of **Feista Jamaica Ltd. v National Water Commission** [2010] JMCA Civ 4). The Affidavit before me, has no merit and [the respondent] fails in this respect. The Affidavit does not satisfy the requirements of CPR 13.3 which says that in addition to showing it has a real prospect of success, an explanation is to be given for its failure to file the Acknowledgement of Service and Defence and also that it applied as soon as reasonably practicable after finding out a defence had been entered against it. For these reasons [the respondent] cannot succeed under Part 13.3."

Counsel for the appellant submitted that the Master was correct in this regard. I agree. In **The Attorney General of Jamaica v John Mackay** Morrison JA (as he was then), highlighted that the written evidence in support of the application will have to address the relevant factors in CPR 13.3 and the alleged defence on the merits. This is separate from the requirement to exhibit a draft of the proposed defence, which is required by rule 13.4(3). Since the judgment was regularly obtained, and the respondent did not provide an affidavit of merit, it could not have been successful in setting aside the default judgment. The Master acknowledged this in her reasons. In light of the above analysis and findings, grounds a, b, c and d succeed, and it is unnecessary to rule on ground of appeal (e).

[65] In light of the fact that the Master erred in her decision when she set aside the default judgment, the appellant ought to have its costs in this appeal and in the court below. Ground of appeal (h) therefore succeeds.

[66] As a result of the outcome of these issues, it is not necessary to consider the other matters which the appellant raised in its grounds of appeal. In addition, the assessment of damages hearing stands, and Lindo J may deliver her judgment in the matter.

Conclusion

[67] I therefore propose the following orders:

1) The appeal is allowed.
2) The orders made by Master Mott Tulloch-Reid on 18 February 2020 are set aside and substituted therefor is an order that the respondent's notice of application for court orders dated 26 November 2010 to set aside default judgment entered on 8 July 2009, is refused.
3) The stay of proceedings in the Supreme Court is removed.
4) The assessment of damages hearing held on 12 May 2016 is valid and Lindo J may deliver her judgment and awards arising from the hearing.
5) Costs in the appeal and in the court below to the appellant to be agreed or taxed.

DUNBAR-GREEN JA (AG)

[68] I too have read, in draft, the judgment of my sister Foster-Pusey JA and I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

ORDER

1) The appeal is allowed.
2) The orders made by Master Mott Tulloch-Reid on 18 February 2020 are set aside and substituted therefor is an order that the respondent's notice of application for court orders dated 26

November 2010 to set aside default judgment entered on 8 July 2009, is refused.

3) The stay of proceedings in the Supreme Court is removed.
4) The assessment of damages hearing held on 12 May 2016 is valid and Lindo J may deliver her judgment and awards arising from the hearing.
5) Costs in the appeal and in the court below to the appellant to be agreed or taxed.