IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 05707

BETWEEN	**VICTOR GAYLE**	**CLAIMANT**
AND	**JAMAICA CITRUS GROWERS**	**1ST DEFENDANT**
AND	**ANTHONY McCARTHY**	**2ND DEFENDANT**

Jacqueline Samuels-Brown and Tamara Malcolm for the Claimant /Respondent

Judith Clarke for the Defendant/Applicant

In Chambers

Heard: March 10, 2011 and April 4, 2011

Application to set aside Default Judgment regularly obtained; Rule 13.3 of the Civil Procedure Rules 2002, as amended 2006; Overriding objective; Approach taken by the Courts.

EDWARDS J (Ag.)

INTRODUCTION

1. This is an application made by the 1st defendant, Jamaica Citrus Growers, a company, to set aside a judgment regularly obtained in default of an acknowledgment of service and defence. Judgment was entered against it by the Registrar on May 12, 2009.

2. The power of the court to set aside a default judgment regularly obtained is to be found in Part 13 of the Civil Procedure Rules (2002), rule 13.3, as amended in 2006. That rule states:

> (1) The court may set aside or vary a judgment entered under part 12 if the defendant has a real prospect of successfully defending the claim.
>
> (2) In considering whether to set aside or vary a judgment under this rule the court must consider whether the defendant has:

a. Applied to the court as soon as reasonably practicable after finding out that judgment has been entered.

b. Given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.

How Has This Rule Been Interpreted by the Courts?

3. In response to this application counsel for the claimant purported to rely on the cases of **J Ishmael Robinson v Clarendon Parish Council and Anor.** HCV 02126/2004, a judgment of Mr. Justice Sykes and **Caribbean Depot Ltd. v International Seasoning & Spice ltd**. SCCA 48/2004. These are judgments interpreting rule 13.3 of the Civil Procedure Rules 2002, which was prior to the amendment to the rule in 2006. In the 2006 amendment the rule is differently worded and has been interpreted differently by the courts. It is clearly to be understood therefore, that any discourse on the approach to rule 13.3 prior to the amendment is now inapplicable and should no longer be cited.

4. The 2006 amendment is now similar in wording to the equivalent English rules (with one exception where the English rules allow the court a wider discretion to set aside for any other good reason). Therefore, but for that one exception, the approach in Jamaica is now more in line with the English approach.

5. In the case of **Merlene-Murray-Brown v Dunstan Harper and Winsome Harper,** (2010) JMCA App 1, judgment of the Court of Appeal, Phillips JA considered the nature of the discretion to set aside a default judgment under Rule 13.3 (as amended in 2006) of the CPR 2002. The learned Judge of Appeal cited the case of **Rahman v Rahman** (1999) LTL 26/11/99, for the proposition that the elements the judge had to consider under the rule were; the nature of the defence, the period of delay and any prejudice the claimant was likely to suffer if the default judgment was set aside as well as the overriding objective. In **Murray-Brown v Harper** Justice Phillips said:

> ***"The focus of the court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the claim, but the***

court must also consider the matters set out in 13.3(2) (a) and (b) of the rules".

6. In reference to the approach of the Judge at first instance, she said further that;

> ***"In my view the learned judge demonstrated that she was applying the provisions of rule 13.3 of the CPR, although it may not have been as clear as it could have been that the primary consideration is that set out in rule 13.3(1)".***

7. It is clear therefore, that in an application to set aside a judgment entered under part 12 of the CPR, in applying rule 13.3, the primary consideration is whether the defence has any real prospect of success. It is to be accepted therefore, that there is now only one ground for setting aside a judgment obtained under Part 12 and that is the ground listed in 13.3 (1) that is, whether the defendant has a real prospect of successfully defending the claim. However, in exercising the discretion whether or not to set aside the judgment regularly obtained, the court must also consider the matters set out in rule13.3 (2).

8. The case of **Murray-Brown v Harper** also discussed the meaning of "real prospect of success". The court referred to paragraphs 20.13 and 20.14 in the Blackstone's Civil Practice, 2005 as well as the case of **International Finance v Utexafrica sprl** (2001) CLC 1361, where it was spelt out that in order for there to be a determination that there is a real prospect of success, the prospects must be better than merely arguable. See also **ED&F Man Liquid Products v Patel & ANR** (2003) C.P. Rep. 51; EWCA Civil 472, (2003) CPLR 384. It is generally agreed that the real prospect of success test is the same as that which is applicable to summary judgments.
9. How is a court to determine whether a defendant has a real prospect of success as against a mere arguable case? Certainly the court must look at the claim as well as the draft defence. Whilst the court will not embark on a mini-trial it must conduct some analysis, some evaluation of what is placed before it for consideration. To borrow the words of Mr. Justice Sykes in **Sasha-Gaye Saunders v Michael Green and ors**, Claim No. 2005 HCV 2868, delivered March 1, 2007 (unreported) paragraph 22, this makes "good sense and good logic".

10. Although the primary consideration is the prospect of success, the factors in rule 13.3 (2) are not redundant. The rule states that the court must consider them and the question remains that having considered them what is to be done about them. Sykes J took the view in the case of **Sasha-Gaye Saunders'**, at paragraph 24, that, in the absence of some explanation for the failure to file a defence or

acknowledgment of service, the prospect of succeeding in having the judgment set aside should diminish. Also if the delay is quite gross then that ought to have a negative impact on successfully setting aside the judgment.

11. This approach means that a defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the court considers the factors in 13.3 (2) against his favour and in going on to consider the overriding objective and any likely prejudice to the accused it comes to the conclusion that the judgment ought not to be set aside. See also the case of **Salfraz Hussain v Birmingham City Council, Coral George Coulson, Governors of Small Heath Grant Maintained School** (2005) EWCA Civ 1570 (delivered February 25, 2005) for a discussion on the approach the court ought to take in the case of multiple defendants.

12. It is therefore not impossible for a defendant to have a good defence on the merits i.e. one with a real prospect of success but find himself in the unenviable position of having the court refuse to set aside a judgment entered in default under part 12.

13. A good illustration of how this may occur is to be found in the case of **Clarke v Hinds** (2004) Civil Appeal No 20 (2003) (unreported) Court of Appeal of Barbados, delivered June 4, 2004. In that case it was held (at paragraph 18) that a delay of five years in seeking to set aside a default judgment regularly obtained was excessive. The appellate court took the view that irrespective of the merits, delay could be a decisive factor if it seriously prejudices the claimant or third party rights.

14. The judges of appeal were applying the principles laid down in the Privy Council ruling in **Dipcon Engineering Services Ltd. v Bowen** (2004) No. 79 of 2002 delivered April 1, 2004 an appeal from the Court of Appeal of Grenada. In that case Lord Brown referring to dicta in the case of **Evans v Bartlam** (1937) AC 473, said this:

> ***"(28)...Of course, the merits of the proposed defence are of importance. Often perhaps of decisive importance upon any application to set aside a default judgment. But it should not be thought that it is only the merits of the proposed defence which are important. The defendants' explanation as to how a regular default judgment came to be entered against them...will also be material. That is not to say that there must necessarily be a reasonable explanation for this....Important, too, will be any delay in applying to set aside the default judgment and any explanation for this also."***

15. The Board referred to part 13 rule 13.3 (2) of the English rules and while recognizing that the rules were inapplicable to Grenada it took the view that the particular considerations under the rules were clearly of importance to the case under consideration. The court went on to hold the view, at paragraph 33 of the judgment that the judge at first instance had properly considered other factors besides the merits of the case in refusing to set aside the judgment. In this case the delay was four and a half years.

16. Although Part 13, rule 13 .3 is not applicable to those jurisdiction it is my view that their approach is consistent with the approach taken by our own courts. Therefore, in exercising the discretion whether to set aside a default judgment regularly obtained (which is a thing of value to the claimant) the Jamaican courts will primarily consider whether the defendant has a real prospect of success; if not then I guess that would be the end of the matter. If there is a good defence on the merits with a real prospect of success, the court will then consider the other factors such as the delay in filing and the reason advanced therefore, as well as the period of time it took for the defendant to apply to set the matter aside.

17. Either one or both of those factors may operate to shift the pendulum if the actions or inaction of the defendant is so egregious as to result in an injustice to the claimant or any third party rights. It is this approach which I will take to the 1st defendant's application.

Background to the Defendants' Application

18. On January 15, 2005 the claimant Victor Gayle was working on the roof of a building situated on the 1st defendant's premises and whilst changing zincs on the said roof, a section broke open and the claimant fell to the ground. He suffered injury, loss and damage. In Claim form filed December 1, 2008, he claimed to recover damages for negligence, breach of contract, breach of occupier's liability and breach of employer's liability against the 1st defendant and for breach of employer's liability, negligence and breach of contract against the 2nd defendant. The cause of action is also averred in the alternative. The Particulars of Claim is also phrased, in terms of the averment of the basis of the liability of the 1st and 2nd defendant, in the alternative.

19. The Claim form and Particulars of Claim were served on the 1st defendant by registered mail at their registered offices on December 12, 2008. Time for filing an acknowledgment of service and a defence having passed, judgment was entered against the 1st defendant at the request of the claimant on May 12, 2009. Similarly the 2nd defendant having been served personally on June 11, 2009, a judgment was

entered against him on the 28th July 2009, he having failed to file acknowledgment of service and a defence. There was evidence of service of all the relevant documents.

20. The 1st defendant was served with the default judgment by registered post at its registered offices, on November 20, 2009. The requisite affidavit evidencing service was filed. The matter was set down for assessment on May 7, 2010. Again the 1st defendant was served with the notice for assessment of damages by the attorney for the claimant. On May 7, 2010 the 1st defendant indicated its intention to apply to set aside the judgment. The matter was adjourned for the 29th July, 2010. On the 29th July 2010 the matter was again adjourned to 29th September 2010. An acknowledgment of service was filed on behalf of the 1st defendant on July 28, 2010.

21. An affidavit given by Mr. John Thompson, director and chairman of the 1st defendant, exhibiting a draft defence, was also filed July 28, 2010 along with an application to set aside the judgment obtained against the 1st defendant.

The Defence

22. The application to set aside was supported by the affidavit of Mr. John Thompson to which the draft defence was exhibited. In the draft defence it was denied that the 2nd defendant was an employee of the 1st defendant, instead, it was averred that he was at all material times an independent contractor. It also denied that the claimant was an employee of the 1st defendant. The defence also averred that if the claimant suffered the alleged damage or loss (which was not admitted) it was wholly due to the faulty execution of the repairs by the claimant and the 2nd defendant who was the independent contractor.

23. The 1st defendant averred that it acted reasonably in entrusting the said work to the 2nd defendant and that it took all reasonable steps to satisfy itself and was in fact satisfied, that the 2nd defendant was competent to carry out the said work. There was also a defence of contributory negligence.

24. The affiant is an attorney-at-law and a director and chairman of the 1st defendant company. The affidavit is said to be based on his personal knowledge in his capacity as director and chairman and from the 1st defendant's official records as well as information received from its employees.

25. The gravamen of the affidavit is that the claimant was not an employee of the 1st defendant. The 2nd defendant was also not an employee of the 1st defendant but was in fact an independent contractor. The affidavit also alleged that the 1st defendant provided a safe system of work for all persons at the premises.

26. The affidavit of John Thompson indicated that there was a previous claim filed by the claimant in Claim No. HCV 3978/2008 which was later withdrawn. The evidence of Mr. Thompson is that it was withdrawn after it was pointed out to the claimant's attorney that he was not an employee of the 1st defendant.

27. The affidavit of Khaska Hemans, attorney for the claimant, in response to Mr. Thompson's affidavit however, suggests that the first claim was withdrawn for procedural reasons. The affidavit also indicated that the claimant was led to believe that the 1st defendant was willing to settle this case, based on indications made to them by its representative whilst in the precinct of the court.

28. According to Mr. Hemans, pursuant to that belief the claimant's attorneys wrote to the 1st defendant requesting details of the settlement sum. There was no response to any of the correspondence from the claimant's attorneys. Copies of the said 'without prejudice' correspondence were attached to the affidavit of Mr. Hemans.

29. Miss Clarke asked the court not to attach any weight to this correspondence as there was uncertainty as to whether any offer to settle had in fact been made and there was no response from the 1st defendant to any correspondence sent on behalf of the claimant. She also asked the court to take note of the fact that they were in fact "without prejudice" correspondence.

Does the 1st Defendant have A Real Prospect of Success?

30. In Blackstone's Civil Procedure 2004 paragraph 34.13 the learned editors in reference to summary judgment applications argued that a defendant could seek to show a defence with a real prospect of success by setting up arguments involving:

    a. a substantive defence eg., *volenti non fit injuria*, frustration, illegality etc.;
    b. a point of law destroying the claimant's cause of action;
    c. a denial of facts supporting the claimant's cause of action; or
    d. further facts answering the claimant's cause of action, eg. an exclusion clause, or that the defendant was an agent rather than a principal.

31. On an application to set aside therefore, the principles having been accepted as the same as in summary proceedings, a good defence may be one of law, one of fact or one comprising a mixture of facts and law.

32. On the other hand a defence may be weak or fanciful where it is without substance and is contradicted by documentary evidence or any other material on which it is based. There may also be very little prospect of success if the defence consist

purely of bare denials and or admissions. See **Broderick v Centaur Tipping Services (2006) LTL** (decided August 22, 2006 cited in Stuart Sime's, "A Practical Approach To Civil Procedure", 12th edition at p.302, para.21.22. The question for the court is whether, on the evidence presented, it was impossible to say that the defendant had no real prospect of success.

33. In the instant case, Miss Clarke on behalf of the 1st defendant, cited the case of **Marsha Jarrett v South East Regional Health Authority and others** Claim No. 2006 HCV 00816 delivered November 3, 2006, judgment of Mrs. McDonald-Bishop (unreported). That case underscored the principle that the primary test for setting aside a default judgment regularly obtained was whether the defendant had a real prospect of successfully defending the claim.

34. Miss Clarke pointed out that the averment that the claimant and the 2nd defendant were independent contractors was a full defence to vicarious liability. She urged that based on the draft defence and the affidavit evidence the 1st defendant company had shown that they had a good defence and a reasonable prospect of success.

35. In response, Ms. Samuels-Brown questioned the qualification of Mr. Thompson to give an affidavit in this matter as the matters were not within his personal knowledge and he had not given the source of his information. In light of that she pointed out that his affidavit was pure hearsay. She was therefore challenging whether the affidavit was in fact an affidavit of merit on which the court could rely.

36. This submission could not be sustained however, as Miss Clarke pointed out that paragraph 2 of the affidavit indicated the source of information to be his personal knowledge, official records and information given to him by the 1st defendant's employees.

37. An affidavit of merit is usually required except in rare and very exceptional circumstances and is usually made by one who can speak positively to the facts. However, it has been established in a long line of cases that in interlocutory proceedings, such as this application is, an affidavit of merit may contain information from sources so disclosed. I am satisfied that the impugned paragraphs adequately identify the sources of the information and belief.

38. Ms. Samuels-Brown also submitted that the 1st defendant's case, as set out in its draft defence, is not sufficiently compelling to suggest a real likelihood of successfully defending the claim. She pointed out firstly, that the thrust of the defence was that the claimant was a sub-contractor. She noted however, that as

well as the tort of employer's liability, the claimant had also pleaded the tort of occupier's liability and breach of contract. She submitted that the claim under occupier's liability was inescapable and that the 1st defendant had not sought to defend it in the draft defence.

39. Ms. Samuels-Brown reminded the court that the burden of showing a real prospect of success rests on the 1st defendant. She further pointed out that the averments in the affidavit of John Thompson and the draft defence only set out a possible basis on which the 1st defendant could resist the claim but are insufficient to show a real prospect of success. It was her view that the applicant had failed to discharge its burden.

40. Miss Clarke asserted that evidence meant material facts on which a party would rely if the defence is allowed to be developed. She suggested that the defence filed was to be read in totality. She said there was no admission that the claimant was even lawfully on the premises and therefore the claimant is put to proof. She claimed that paragraph 10-12 of the draft defence was all that was required of the 1st defendant in defence of the claim.

41. In my view it is clear that the 1st defendant has exhibited a good defence on the question of employer's liability. In the same tone if the claimant was not an employee then there would also be a good defence to any claim under the claim for breach of contract as there would be no contract between the claimant and the 1st defendant. The thorny issue facing the 1st defendant, as recognized by Ms. Samuels-Brown, is the action based on occupier's liability. Ms. Samuel-Brown argued that there was no defence to that claim. Miss Clarke countered that the draft defence goes well beyond occupation.

42. Paragraph 8 of Mr. Thompson's affidavit indicated that the claimant was employed to the 2nd defendant who was at all material times an independent contractor to the 1st defendant. In paragraph 9 he went further to state that at all material time the 1st defendant took reasonable steps to and did provide a safe system of work for any person carrying out work at the premises.

43. In the draft defence at paragraph 10 the 1st defendant averred that the alleged damage and/or injury (which was not admitted) was wholly due to the faulty execution of the work of repair by the claimant and the 2nd defendant who was an independent contractor, whom it satisfied itself was competent to carry out the works. In paragraph 11 it also stated that if the claimant suffered any damage or injury it was entirely caused by him or he contributed to it.

44. In my view this is sufficient to answer the claim for occupier's liability. The claimant is asserting that he was doing work on the 1st defendant's premises and whilst working on a roof, a section of it broke open and he fell through to the floor. Certainly any consideration of a claim in occupier's liability would of necessity have to consider the nature of the occupation. Paragraph 6 of the Particulars of Claim filed December 1 2008 indicated that the claimant was instructed by the 2nd defendant to change old zinc on the roof of a building on the 1st defendants property. This paragraph was not admitted by the applicant who repeated that the 2nd defendant was an independent contractor. Paragraph 7 indicated that the claimant fell whilst carrying out the instructions of the 2nd defendant. The defence of the 1st defendant is that this paragraph was not admitted.

45. Paragraph 10 of the claimant's Particulars of Claim averred that the fall was due to the negligence and/or breach of statutory duty under section 3 of the Occupier's Liability Act and /or breach of contract or breach of employer's duty of care by the 1st defendant their servant and/or agent. This was not admitted by the 1st defendant.

46. The question would arise at trial as to whether the claimant was an invitee even if he was not their employee. If he was an invitee, the 1st defendant, as invitors, would owe a duty to exercise due care for the safety of their invitee. In Jamaica liability is governed by the Occupiers Liability Act. Under this Act an occupier of premises owes the same common duty of care to all lawful visitors. This duty of care is expressed in section 3 of the Act.

47. The duty under the Act is a duty to take such care as in all the circumstances of the case is reasonable to see that the invitee will be reasonably safe in using the premises for the purposes for which he was invited or permitted by the occupier to be there. The burden of proving permission rest on the claimant.

48. Under the Act an occupier is entitled to expect that a person, in the exercise of his calling, will appreciate and guard against special risks ordinarily incidental to that calling. With respect to that, the occupier is entitled to assume that a skilled, professional worker doing a job on the premises, such as a carpenter, electrician or window cleaner etc, will exercise sufficient care for his own safety when carrying out his work and will guard against the dangers normally associated with work of that kind.

49. Where injury to the invitee is caused by the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier will not be liable if; (a) he acted reasonably in entrusting the

work to the contractor and (b) he took reasonable steps to satisfy himself that the contractor was competent. The Act also provides for the further defences of contributory negligence and *volenti non fit injuria*.

50. The duty under the Act is slightly different than that provided by the common law where at common law an invitor must use reasonable care to prevent damage from an unusual danger of which he knows or ought to know. What is reasonable care must depend on the circumstances of each particular case. It is settled law that an invitor may discharge its duty of care to the invitee by employing qualified, competent and reputable experts or qualified, competent contractors.

51. In my view the statement of case for the 1st defendant is one capable of being supplemented by evidence at trial and shows a real prospect of success. See **Royal Brompton Hospital NHS Trust v Hammond** (2002) 1 WLR 1397.

The Timing

52. Although I have determined that there is a good defence on the merits, I also have to consider whether the defendant acted with promptness. The default judgment was entered against them on May 12, 2009. It was served on them on November 20, 2009. The case went to assessment of damages May 7, 2010. At the assessment hearing the 1st defendant indicated its intention to apply to set aside the judgment. The hearing was adjourned to July 29, 2010. Notice of the adjourned hearing was served. On July 28, 2010, the 1st defendant filed an acknowledgment of service and a draft defence, along with the application to set aside the default judgment supported by affidavit evidence.

53. There is therefore a delay of more than a year. This was not prompt. Ms. Samuels-Brown argued that it was not prompt. The attorney pointed out that months passed between the entry of judgment and the hearing for assessment of damages but it was only when the matter came before the judge for the hearing that the 1st defendant indicated its intention.

54. She pointed out that more than a year elapsed before the application to set aside was made, the parties being aware of the matter and doing nothing about it. She insisted that the 1st defendant was not able to say they acted promptly. She said the purpose of exhibiting the letters was to show that the 1st defendant had ample time during the interval to file the application. Miss Clarke all but admitted that the 1st defendant did not act promptly but attributed this to the fact that it is a company.

55. I find that the 1st defendant is guilty of tardiness as there was indeed an inordinate and unexplained delay in applying to set aside the judgment.

Explanation for the Failure to File in Time

56. Having found there is a good defence but that the defendant had not acted promptly, I must also look at any explanation furnished for the failure to file acknowledgment of service and a defence in the time allotted by the rules.

57. The chronology given by Ms. Samuels-Brown in her written submissions, which were not challenged by the 1st defendant, showed that the 1st defendant having been served by way of registered post, the deemed date of service was January 19, 2009. The due date for the 1st defendant to file acknowledgment of service was February 3, 2009. The due date for filing a defence, according to Ms. Samuels-Brown, would then be March 3, 2009.

58. The affidavit of John Thompson outlined the 1st defendant's explanation for the failure to file. The affiant indicated that upon receipt of the claim it was passed to the company's insurers. It was expected that the insurers would take the necessary steps including retaining counsel to defend. This was not the first time the claim was passed to the insurers as the previous claim which had later been withdrawn had also been passed to the insurers for the company.

59. Mr. Thompson went on to indicate that upon receipt of the judgment and on further inquiries it was revealed that the lead insurers was Dyoll insurance, which had gone into receivership. Nothing had been done to defend the claim on the 1st defendant's behalf.

60. Miss Clarke reiterated that the company assumed that the insurers would advance its case. She took the view that as the 1st defendant was an institutional client this explanation was reasonable. She requested that if the court did not find the explanation to be a good one, it should consider dicta in the case of **Marcia Jarrett,** at paragraph 65, in which was also cited the case of **Thorn plc v McDonald** (1999) CPLR 660. In that case the learned trial judge held that the absence of a good explanation did not in and of itself dispose of the matter. She noted that in **Thorn plc** the UK Court of Appeal stated that any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account but is not always a reason to refuse to set aside the judgment.

61. Ms. Samuels-Brown took great exception to this explanation. So affronted was the claimant's attorney at the explanation put forward for the court's favourable consideration that she made several allegations of negligent conduct against Mr. Thompson. She asked the court to view the explanation in light of the fact that the company was represented by Mr. Thompson who was trained attorney-at-law. She said Mr. Thompson's inaction had exposed him to a possible claim of professional misconduct. She said that as an attorney he should not have "dumped" the matter on the insurer's desk and in so doing he had prejudiced the claimant. Needless to say Miss Clarke took exception to these arguments.

62. It is not clear to me in what capacity Mr. Thompson represented the company. The affidavit stated that he is an attorney-at-law and is a chairman and director of the company. It does not state clearly that he acted as an attorney for the company and In view of the conclusion I have come to I need say no more about it.

63. In deriding the explanation, the claimant's attorney took the view that the 1st defendant ought to have known that they could not rely on an indemnity from the insurance company and should be taken to know that the primary responsibility rest with them. She took the view that they could not just put the claim on the insurer's desk and assume that they would deal with it. She described it as shameful to think that they could foist the blame off on the insurers.

64. The explanation given for failing to file acknowledgement of service and defence is one that has been given time and time again in these courts. I agree with Ms. Samuels-Brown that the primary responsibility rest with the company and its officers. There was no indication from Mr. Thompson that any effort was made to follow-up on the matter once it was passed to the insurers. In fact, paragraph 7 of the affidavit shows that it was only after they were served with the judgment that contact was made with the insurers and they discovered that their lead insurance company was in receivership.

65. However, whether the defendant is a company or individual, the courts have leaned towards accepting this explanation where the defendant relies on others to defend the claim. I will not do otherwise in this case. I will only quote from the judgment of Madam Justice Phillips in **Murray-Brown v Harper** on the point. Referring to the explanation of inadvertence by attorneys in not filing on time, the Judge of Appeal had this to say;

> ***"The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorney errors made***

inadvertently, which the court must review. In the interest of justice and based on the overriding objective, the peculiar facts of a particular case and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended'.

66. Adopting this approach I will consider therefore, whether the 1st defendant's inactions have resulted in any prejudice to the claimant or any third party rights. In doing so, I recognize that any claimant from whose grasp a valuable default judgment is pried is immediately prejudiced.

Possible Prejudice to the Claimant.

67. Miss Clarke asked the court to consider whether there was any prejudice to the accused which was so fatal, so palpable or so obvious on the face of it. She asked the court to weigh any possible prejudice against the existence of a real prospect of success. She noted that any such determination must be based on whether there was any compelling evidence of prejudice to upstage a finding of fact that there was a real prospect of success.

68. She noted that the only indication of prejudice to the accused was that he was out of work and that the matter may take two years to go to trial. She said that there was no real data on which the court could find that there would be prejudice to the accused. It was her view that what was presented to the court does not show any likelihood of prejudice. She said Mr. Heman's affidavit could not be relied on to show prejudice, which she said, should come from the claimant himself. She concluded there was insufficient evidence of prejudice to upstage the finding of a real prospect of success.

69. Ms. Samuels-Brown submitted that the prejudice to the claimant is evidenced in the affidavit of Mr. Thompson. She said that the claimant had been prejudiced by the fact that he had been denied access to insurance funds because of the manner in which the case had been handled by the 1st defendant. She pointed out also that the prejudice to the accused was equally outlined in the claimant's witness statement which spoke to his injuries, the effect it has had on him and his inability to carry out his normal work. She noted that paragraph 76-78 of the claimant's witness statement supported paragraph 9 of Mr. Hemans' affidavit referring to the claimant's difficulty in finding work which he was capable of doing bearing in mind his injuries.

70. In considering the possible prejudice to the accused, I consider that damages have not yet been assessed and the claimant continues to have some employment albeit not what he is used to. Setting aside this judgment would merely postpone the question of liability until the full hearing. This I am well aware will create an inconvenience to the claimant but I am not convinced that it would unduly prejudice him. On the other hand the 1st defendant would likely suffer an injustice if the judgment is not set aside. I do not find that the possible prejudice to the claimant outweighs the need for the case to be heard on the merits.

The Overriding Objective

71. Rule 1.1 of the Civil procedure Rules 2002 states:

(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing justly with a case includes-

a. Ensuring, so far as is practicable, that the parties are on equal footing and are not prejudiced by their financial position.
b. Saving expense.
c. Dealing with it in ways which take into consideration-
    i. The amount of money involved;
    ii. The importance of the case;
    iii. The complexity of the issues; and
    iv. The financial position of each party;
d. Ensuring that it is dealt with expeditiously and fairly; and
e. Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

72. In rule 1.2 the court is mandated to seek to give effect to this overriding objective when interpreting or when exercising any of its powers under the rules.

73. The oft quoted dictum of Lord Atkins in **Evans v Bartlam** (1937) 1 AC 473 at page 650 outlines the policy underlying the court's discretion to set aside or vary a default judgment and suggests a guideline for the court when considering its draconian powers. In short, Lord Atkins suggested that a court must weigh the use of its coercive powers where there is a failure to follow any rule of procedure, against the need for the court to hear cases on the merits and pronounce judgment. This balancing exercise must take place against the background of the overriding objective.

74. The learned judge in **Marcia Jarrett** quoted from the case of **C. Braxton Moncure v Doris Delisser** (1997) 34 JLR 423, judgment of Rattray, P in the Court of Appeal and I find it sufficiently compelling to repeat it here. In that case the President of the Court of Appeal as he then was said at page 425;

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

75. Of course I am mindful of the fact that this decision was prior to the Civil Procedure Rules 2002, as amended in 2006. But I believe it is still relevant when one is considering the overriding objective.

76. Rule 1.1 is primarily concerned with ensuring that justice is done between the parties. The interpretation of any of the rules of the CPR 2002, as amended in 2006, must be consistent with this objective. The authorities all suggest that it is usually better for cases to be decided on the merits rather than be rejected due to a procedural default.

77. This approach is not to be seen as watering down the purposive intent of the rules by coddling lethargic defendants and their equally recalcitrant attorneys. However, the rules carry an overriding objective and that objective is for the courts to do justice between the parties. As such the rules ought not to be interpreted and applied in such a technical way as to give technical victories to one side or impose technical losses on another. No doubt it was the injustice of this technical position which called out for changes to be made to the CPR 2002 Part 13, rule 13.3, in 2006.

Disposal

78. Whilst I can vaguely sympathize with the explanation put forward for failing to file an acknowledgment of service and a defence in the time prescribed, it is sadly true that the defendant had not acted promptly and was in fact very tardy in applying to set aside the judgment entered against it as a result. However, the primary consideration being whether there is a defence on the merits with a real prospect of success, I find the delay is not so manifestly excessive; I take the view that this delay is not one which calls for greater emphasis in order to diminish the 1st defendant's chances of succeeding in this application.

79. There are clearly issues at stake which, in the court's view, can only fairly be determined by a full trial of the issues. At this stage the court cannot and will not pre-

judge the issues or make any determination on the questions in dispute. There is a wealth of authorities on the subject matter of the substantive claim and each case will fall to be determined on its own peculiar facts. Ultimately, it will be for the trial judge to determine the substantive issues at the trial stage.

80. I am satisfied that the draft defence annexed to the affidavit of merit satisfactorily established a real prospect of success if the matter goes to trial. Having found that the 1st defendant has a real prospect of success if the case is tried on the merits, I take the view that taking into consideration all the circumstances and against the background of the overriding objective, this is a case where the default judgment entered against it ought to be set aside.

Orders

81. Having come to the above conclusions, I make the following orders:
    1. Default judgment entered against the 1st defendant on May 12, 2009 is hereby set aside.
    2. The defendant to file and serve a defence on the claimant within 21 days of the date hereof.
    3. Case Management Conference to be fixed for a day to be set by the Registrar of the Supreme Court.
    4. Cost to the Claimant to be agreed or taxed.
    5. Leave to appeal granted.