[2013] JMSC Civ 112

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 06485

BETWEEN	WASHINGTON GRANT	CLAIMANT
A N D	NATIONAL SOLID WASTE MANAGEMENT AUTHORITY	1st DEFENDANT
AND	ATTORNEY GENERAL	2nd DEFENDANT

Mr. Jeffrey Mordecai for Claimant/Respondent
Mr. Harrington McDermott instructed by Director of State Proceedings for the Defendant/Applicant

Delivered: 31st July 2013

Application to be removed as 2ndDefendant/Application to set aside; judgment and to extend time to file Defence; whether default judgment irregularly obtained.

Coram: George, J (Ag.)

[1] This is a claim in which the claimant alleges that the 1st Defendant as employer breached his contract of employment. The Claimant was the Regional Operations Manager of the 1st Defendant's company and was employed under a contract dated June 1, 2006. The alleged breaches will be considered further below.

[2] The 2nd Defendant is sued by virtue of the Crown Proceedings Act as it is alleged by paragraph 2 of the Claim and particulars of claim that the **" 1st Defendant was at all material times a Government of Jamaica owned company…providing services to the Government of Jamaica and was at all**

material times the servant and or agent of the Government of Jamaica…"
The 2nd defendant objects to being joined as a party to the proceedings and it is this application that I will firstly address.

[3] The 2nd Defendant in its application to have itself removed as a Defendant to the claim submits the following:

(a) The National Solid Waste Management Authority (NSWMA) was established under the National Solid Waste Management Act, 2001 as a statutory body.
(b) The authority is governed by a Board of Directors appointed by the Ministry of Local Government and Environment and the day to day running of the NSWMA is managed by a team headed by an executive director.
(c) The National Solid Waste Management Act and the Interpretation Act are the relevant legislation which gives rise to the corporate status of the NSWMA.
(d) By section 3 of the National Solid Waste Management Act, the NSWA is established as a body corporate and by virtue of section 28 of the Interpretation Act this has the effect of vesting in that corporate body, the capacity to sue and to be sued in its own name.

[4]] According to the 2nd Defendant, "the whole purpose of the passing of these legislative provisions and the making of an otherwise government entity a body corporate, is to exempt the customary provisions of the Crown Proceedings Act for the Attorney General to be sued. The Authority is thereby given corporate status. In addition to suing and being sued, section 28 of the Interpretation Act indicates that such corporate status also gives the Authority the power to enter into contracts in its corporate name (and have powers to make contracts as an individual) the right to have a common seal, the right to acquire and hold real and personal property, the right to regulate its own procedure and business, the right to employ staff as is required to carry out is functions etc."

[5] It is on this basis that the 2nd Defendant further contends that "it is clear that parliament intended that where any tortuous acts are committed by the Authority or its servants/and or agents, then it is the Authority that is to be sued" and that "it is therefore improper to join the Attorney General to these proceedings by virtue of the Crown Proceedings Act".

[6] The Claimant by way of the employment contract between himself and the 1st Defendant was an independent contractor, and therefore was not acting as the servant and/or agent of the Government of Jamaica at the material time. The contract was clearly between the Claimant and the 1st Defendant and not the government of Jamaica.

[7] Therefore any claim arising out of his employment with the 1st Defendant ought properly to be brought against that body and it is improper to have joined the Attorney General."

[8] The Claimant in response to the application for the 2nd Defendant to be removed as a party to the proceedings contends the following:

(a) A letter from the 1st Defendant dated 31/10/2009, to the Claimant, asserted that the first Defendant's investigations into the claimant was led by the chief Internal Auditors in the Prime Minister's Office.
(b) That investigation caused a police investigation to be requested;
(c) It was against this background that the Claimant's contract was terminated.

[9] The First Defendant's website indicates that the first Defendant is an agency of the Ministry of Local Government, which between September 2007 and June 2011, was a part of the office of the Prime Minister.

[10] The First Defendant's Record of Directors was appointed by the Ministry of local Government, which between 2007 – June 2011, was a part of the office of the Prime Minister.

[11] The Claimant therefore argues that as the office of the Prime Minister led the investigation into the Claimant prior to dismissal and the office of the Prime Minister was the principal of both NSWMA and the Ministry of Local Government, the office of the Prime Minister would be a proper party to this suit. In these circumstances therefore, pursuant to section 13 (2) of the Crown Proceedings Act, the office of the prime Minister is a proper party to this suit.

[12] The Claimant further contends that in fact, the 2nd Defendant's assertions in paragraphs 10-13 of its written submissions supports the conclusion that the first Defendant should be sued in its own name and this the claimant has done. The gist of paragraph 10 -13 of the 2nd Defendant's submissions simply put amounts to the contention that NSWMA is a corporate body, and having been given this status by the Act which established it, is subject to section 28 of the Interpretation Act, which provides that it has power to sue in its corporate name and also liable to be sued in its corporate name.

[13] In essence, the claimant's position is that "Paragraphs 10 -13 of the Defendant submissions are agreed but it is submitted that the submissions therein do not support the conclusion arrived at in paragraph 18 that there is no basis to join the Attorney General to these proceedings."

[14] So the Claimant is in fact saying that section 3 of the National Solid Waste Management Act and Section 28 of the Interpretation Act, when read together, does provide for the national Solid Waste Management Authority, being a Corporate body, to be sued in its own name, and this they have done by making them the 1st Defendant in these proceedings. Nevertheless, the Attorney General is a proper party to the proceedings by virtue of the involvement of the Prime Minister's office and that the said office of the Prime Minister is the principal of both the National Solid Waste Management Authority (NSWMA) and the Ministry of Local Government.

Analysis

[15] There is no dispute that the National Solid Waste management Authority was set up as a statutory body by the National Solid Waste Management Act. There is also no dispute that section 3 of the said Act, gives this statutory body corporate status as it establishes it as a body corporate. Similarly, it is not contested that section 28 of the Interpretation Act, gives further effect to section 3 of the National Solid Waste Management Act by providing that:

[16] '… where an act passed after the 1st April 1968, contains words establishing, or providing for the establishment of, a body corporate and applying this section to that body, those words shall operate

(a) to rest in that body when established (a) the power to sue in its corporate name

(b) to make that body liable to be sued in its corporate name…"

[17] It is also agreed that these two provisions, in effect allows for the NWSA to be sued in its own name. The NWSA have been so sued and are party to these proceedings by virtue of being named and sued as 1st Defendants.

[18] The remaining contention therefore, is that by virtue of this, the Attorney General ought not to have been sued as 2nd Defendants in the proceedings as the substance of the claim is one between the Claimant and the 1st Defendant. In these circumstances, it is argued by the 2nd Defendant that the Crown Proceedings Act, by virtue of which they were joined as Defendant is inapplicable.

[19] It is my view that the 2nd Defendant is misguided as to the basis on which they have been joined as party to these proceedings. This basis is outlined in the claim and particulars of claim filed 10/12/2009.

The Claim and Particulars

[20] Paragraph 2 of the Claim and Particulars of Claim states that "The First Defendant was at all material times a Government of Jamaica owned company,

incorporated under the laws of Jamaica providing services to the Government of Jamaica and was at all material times the servant and/ or agent of the Government of Jamaica in respect of whom the second Defendant is sued by virtue of the crown Proceedings Act ".

[21] Paragraph 4 further contends that "During the period November 2, 2007 to December 11, 2001, the First Defendant , as the servant and (or agent of the second Defendant, injured the Claimant's reputation and exposed him to public humiliation and suspicion of illegal activities culminating in the termination of the Claimant's employment and the Claimant being adversely affected in the job market for the foreseeable future".

[22] The Claim and particulars clearly alleges that the 1st Defendant was acting as the servant or agent of the 2nd Defendant. This raises the principle of vicarious liability, whether it be via the Crown Proceedings Act or at common law. The 1st defendant as a body corporate legally can stand in the same shoes as if it were a non- government organization. The attorney General may be sued in respect of a non government organization with body corporate status, acting as a servant or agent of any of the government departments/ministries or agencies as its Principal.

[23] It is my view that whether the principle of vicarious liability arises and or whether the Crown Proceedings Act is engaged will depend on the evidence. I do not accept that because the 1st defendant is a body corporate, the Attorney General can never be joined as a Defendant, in circumstances where the body corporate is also being sued in its own name. This must turn on the facts.

[24] Paragraph 4 of the claim and particulars of claim states that " During the period November 2, 2007 to December 11, 2007, the First Defendant as the servant and or agent of the second defendant, injured the Claimant's reputation and exposed him to public humiliation and suspicion of illegal activities

culminating in the termination of the Claimant's employment and the Claimant being adversely affected in the job market for the foreseeable future".

[25] Statements of case are the formal documents by which the parties are required to concisely set out the facts on which they intend to rely. The most important function of statements of case is to enable the court and the parties to identify and define the issues in dispute. On the face of it, it appears that the claim as framed supports the joining of the 2nd defendant in these proceedings.
[26] However, there is no specific allegations as to the "Prime Minister's office" and its connection to the case. The Claimant's submission seems to be saying that the Attorney General was sued by virtue of the involvement of the Prime Minister's office, yet this is not specifically pleaded, nor particularised. It is important that this is addressed forthwith.

[27] Nevertheless, it is my view that there is not a wrongful joinder of the 2nd defendant and that the vagueness of the pleadings does not leave it totally bereft of material to support the 2nd defendant being a party to these proceedings. This is especially so, in circumstances where the 1st Defendant appears to be an agency of the Ministry of local government and its directors appointed by the same body.

The 1st Defendant's Notice of Application/ Setting Aside Default Judgment on the basis of non-service and or it being entered whilst application to extend time was pending

[28] The Claimant sues the 1st and 2nd Defendants to recover damages for breach of an employment contract, wrongful dismissal and injury to reputation.

[29] Pursuant to a request for default judgment filed by the claimant on 31/5/2013,a default judgment was entered on 24/12/10 against the 1st Defendant for failing to file its defence. Prior to this an application was filed on 14/7/2013, on its behalf, for an extension of time in filing the defence. The matter was set

for 1st hearing on the 22nd November 2010 and neither the applicant nor its representative attended; thereby causing, the learned master to strike out the application on the said date.

[30] It was subsequent to this that Default Judgment was entered. However, prior to this an application was again made on the 24th November 2010, for an extension of time to file defence. This application was set to be heard on the 21st February 2011. It appears that the Default Judgment was entered by the registrar, whilst the application to extend time was pending before the court. The application to set aside default judgment was filed on 21st January 2011. Although this was last in time, the court believes that it will be prudent to consider it firstly as its outcome might impact on the other application.

[31] The 1st Defendant contends that the Default Judgment should be set aside as it was irregularly entered. They cite two reasons for this assertion.

(i) The Claim Form and Particulars of Claim were never served on the 1st defendant; and
(ii) The judgment was entered while there was a pending application for extension of time to file the defence that was before the court.

Claim and Particulars of Claim not served on 1st Defendant

[32] The Claim Form and Particulars were sent to the 1st Defendant by way of registered post, but these were returned 3 months later to the Claimant's attorney at law as they were not collected. This is not in dispute and counsel for the claimant deponed to this fact at paragraphs 10 and 11 of his affidavit filed 19/4/2011. It is therefore established on the evidence before the court that the 1st Defendant did not receive the said documents by way of service on them by the Claimant.

[33] The deeming service provisions of the Civil Procedure Rules, gives rise to a presumption of service, where a claim form has been served within the jurisdiction by prepaid registered post. It deems service 21 days after the date of posting. As with almost all, if not all, presumptions, it is rebuttable by evidence showing otherwise – Rule 5.19 CPR 2002.

[34] It must be noted that the claim was filed 10/12/09. At the time for request for Default Judgment, which was 31/5/2010, the Claimant would have known that this claim form had not been served, as it was some 3 months after posting, that there was a 'return' indicating that it had not been collected. The Claim Form was sent by post 16th December 2009. (see JSM1 and JSM 2 of affidavit of Jeffrey Mordecai filed 19th April 2011).

[35] However, it must also be noted that an acknowledgement of service had been filed on behalf of the 1st defendant by the Director of State Proceedings (DSP). As such on the face of it, the Claimant would, in my view, be entitled to come to the conclusion that the 1st Defendant had waived the issue of service and had succumbed to the jurisdiction of the Court. This is particularly so, when the affidavit evidence indicates that the particulars of claim and claim form were also served on the 2nd Defendant and that the Director of State Proceedings acted on behalf of the 1st and 2nd Defendants.

[36] In addition the 1st Defendant's legal officer and attorneys from the DSP were present at a hearing on 17th June 2010 for an application to enter judgment against the 2nd Defendant. There was no indication that the 1st Defendant had any issue with the DSP having filed an acknowledgement of service on its behalf and no attempt was made to raise an issue as to any non-service.

[37] It was therefore clearly reasonable for the Claimant to conclude that

(1) the claim form and particulars served on the 2nd Defendant had

been accepted by the 1st Defendant as good service upon it or that it had waived its right to service; and or

(2) the acknowledgement of service by the 1st Defendant indicated, just what it said "acknowledgement of service", that service had been effected or waived and that the 1st Defendant was not contesting the issue of service.

[38] This would therefore, take the matter to the next stage in the proceedings, which is the filing of the defence. It is not in dispute that the 1st Defendant had not filed a defence. As service had been acknowledged, upon his request for Default judgment, the Claimant was not required to prove service, only that a defence had not been filed. Therefore, although the contrary is shown, that is that the service by registered post was not effected, the action of filing an acknowledgement of service supersedes this and in effect amounts to a waiver or a subjection to the jurisdiction of the Court.

[39] At paragraph 27 of the 1st Defendant's submissions, counsel asserts that "The Director of State Proceedings is the Attorney at law who represents the Attorney General. Apart from this role, the Director of State Proceedings can be retained by statutory bodies and government companies to act on their behalf in a normal attorney client relationship. To do so however, the Director of State Proceedings can be retained like any other attorney at law in order to obtain the actual authority to act on behalf of such a body. Moreover no general retainer exists and therefore a different retainer is required for each matter."

[40] It is therefore the 1st Defendant's contention that the Director of State Proceedings had not yet been retained and therefore the acknowledgement of service filed on their behalf by the Director of State Proceedings was done in error.

[41] The Affidavit of Garcia Kelly filed July 14, 2010 and a letter annexed , "GK1" gives a useful insight into the workings of the Attorney General's chambers, and its attorneys, the Director of State Proceedings, in dealing with claims against statutory bodies, including the 1st Defendant. This letter addressed to the 1st Defendant indicated that the claim form and particulars were received and a copy was attached to the said letter. Paragraph 2 is instructive and states "kindly cause an investigation to be carried out and forward to our office to complete instructions regarding the captioned on or before February 19, 2010".

[42] It is my view that the Director of State Proceedings is somewhat disingenuous when it asserts in its submissions that 'the acknowledgement of service was filed in error on behalf of the 1st Defendant as at all material time, the 1st Defendant had not yet retained the Director of State Proceedings and that letters to the 1st Defendant seeking instructions do not amount to a retainer. What was being done was a request for the 1st Defendant to instruct the Director of State Proceedings to Act on its behalf."

[43] The evidence clearly shows that there was no issue as to retainer. It is the usual practice for the DSP to act for these bodies and upon receiving the claim and particulars, it did as it usually does, it started the machinery for representation. The letter clearly speaks to getting instructions as to the truth or otherwise of the claim and not as to whether they are or would be "retained".

[47] A further letter of May 19, 2010, to the 1st Defendant ("GK 2"), is also instructive. It was a follow up letter, seeking a response to the request for instruction, (these instructions being the outcome of investigations which they had been directed to undertake in the letter of February 2, 2010), advising that the Claimants' attorney at law had indicated an intention to apply for default judgment.

[48] The final paragraph clearly indicates that the DSP were acting on behalf of the 1st Defendant in the usual customary way – It states, "we are imploring you to respond immediately so that we can prepare a defence and seek the leave of the court to file it out of time". The information was required for preparation of the Defence and not to confirm retainer. The course of correspondence clearly shows that there was no requirement to request or confirm a retainer. It was a given that the DSP would act on its behalf and so they did.

[49] This said affidavit, states that the explanation given to the court at the hearing of June 17, 2010" for failure of the 2nd Defendant to file its defence in time accounts for the 1st Defendant's failure to file its defence in time". What were these reasons?

[50] At paragraph 7, he states that the reasons given was that "the delay in filing a defence was due to the fact that the position of legal counsel at the National Solid Waste Management Authority had been vacant for a number of months and in these circumstances **we were experiencing difficulty obtaining the requisite instructions to file a defence.** The court was also informed that the position was only recently occupied prior to the hearing of the Claimant's application.

[51] In other words, the difficulty in getting instructions for the 2nd Defendant was the same difficulty in relation to getting instructions to file a defence for the 1st Defendants. In fact, Mr. Kelly at paragraph 10 continues this. " The instructions required have now been received and having reviewed them, I do verily believe that the 1st Defendant has a real prospect of successfully defending this claim". Herein lies the admission that the instructions sought were not as to whether they were retained or not, but one in relation to the allegations, for the purpose of putting forward and filing the 1st Defendant's Defence.

[52] It is usual for a Default Judgment to be set aside where the court is satisfied that the Defendant had not been served with a claim form and particulars, as in these circumstances, where the Default Judgment is deemed to have been irregularly obtained. However, in circumstances where an acknowledgement of service has been filed, and there is no application disputing jurisdiction, nor does the acknowledgment of service indicates this, the issue of non-service is deemed to have been waived and the 1st defendant would have subjected himself to the jurisdiction of the court.

[53] However, of course if the Defendant could show that indeed there had been a genuine error and the attorney's so filing had no instructions to file on their behalf, then there would on the face of it, be no waiver of service and no subjection to the jurisdiction of the court.

[54] However, in the circumstances of this case, I do not accept that the Director of State Proceedings had no authority to act on behalf of the 1st Defendant. It is my view that they proceeded as they normally would do, and the issue as to whether they were "retain" at the time of filing an acknowledgement of service has only now come about because, a default judgment has been entered and the easier way of setting this aside, is to show that it was irregularly obtained.

[55] I do not believe that the DSP had not been properly retained. The course of conduct indicates that the DSP assumes representation for the 1st Defendant in issues of litigation. If it is that this retainer was to cease, or that there was to be a departure there from, I would expect that this would be clearly indicated to the DSP. In fact if the DSP was retained on a case by case basis, they should have in their possession documents to support this and these they have not produced. It would be surprising that a retainer could be on a "case by case" basis and there is no paper work, indicating, when it is that they are

retained. For the reasons given, I have declined to set aside the default judgment for non-service.

The Judgment was entered while there was a pending application for extension of time file the defence that was before the court.

[56] In Workers Savings & Loan Bank Ltd v Winston McKenzie and Benrose Co & Bentley Rose, the court considered the former rules in relation to the date of a default judgment. The Judicature Civil Procedure Law, code 451 provides that :

> **"In all cases not within the last preceding section, the entry of judgment shall be dated as of the day on which the application is made to the Registrar to enter the same and the judgment shall take effect from that date."**

[57] It was held that the Default Judgment had been duty filed and therefore leave could not be sought for extension of time to file defence – i.e. leave to file defence cannot be granted when judgment in default of defence was already filed.

[58] So once papers filed for a judgment in default of defence, notwithstanding the fact the Registrar had not formally entered the judgment, the application being brought by a Defendant who is in default of defence should be an application to set aside judgment. At this time an application for leave to file the defence out of time should not be entertained.

[59] **Tiffany Chen Sue v G.B. James Heavy Equipment v Gladstone James Suit No Cl C122 of 1999 Heard 26 Nov to December 2001** endorses this position and decided that by virtue of section 451 of the Judicature (Civil Procedure ode) have (and endorsed by Workers Savings & Loan Banks Ltd v Winston McKenzie and Ors SCCA 2/96 and 3/96 delivered December 3, 1996

the entry of judgment would be dated as of the day on which the application is made to the Registrar to enter the same and the judgment would take effect from that date.

[60] It is my view, the Workers Savings and Loan Bank and Tiffany Chen Sue's cases (ibid) are distinguishable from the one before this court. Unfortunately, the 1st Defendant did not submit nor cite legal authorities in respect of this aspect of the application. He also did not assist with a consideration of the Workers and Loan Bank case cited by the Claimant, nor sought in any way to distinguish it from the one before the court. Consequently, the Court was unassisted in this regard.

[61] Firstly in relation to obtaining a default judgment against a party as a result of that party's failure to file a defence, section 247 of the Judicature (Civil procedure Code) Law states:

> **"247. If the plaintiff's Claim is, as against any Defendant, for unliquidated damages only, and that Defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may enter interlocutory judgment against him for damages be assessed and costs, and proceed with the action against the other Defendants if any."**

[62] Whereas by Rule 12.5 of the current rules (the CPR) – speaks of the Registry "entering" judgment. In fact 12.4 (conditions to be satisfied – judgment for failure to file acknowledgement of service and 12.5 (conditions to be satisfied- judgment for failure to defend) provide for the registry to "enter" judgment at the request of the Claimant if certain conditions are satisfied.

[63] Additionally code 451, specifically declare that "451…the entry of judgment shall be dated as if the on day which the application is made to the Registrar to enter the same, and the judgment shall take effect from that date".

There is no such specific provision in the CPR.

[64] In my view the Workers Savings and Loan Bank case applies to applications under the old regime. It is a case which supports the proposition of section 451 of the former rules, that a Claimant who files all the required and correct documents for a default judgment would, without more, have default judgment entered by the Registrar and this would take effect from the date of filing.

[65] In the case of **Issa v Jamaica Observer Ltd.** HCV 0765/2005 Sykes J said at paragraph 108 **" The issue is whether the Registrar could have properly entered judgment at the time she did when there was in fact an application to extend time within which to file a defence. The answer is that the Registrar ought not to have entered judgment because this application was pending. This is what makes the judgment irregular and must be set aside.**

[66] It is to be noted that in the Issa case, the procedural history indicates (i) on April 6, 2005 an acknowledgement of service was filed by all Defendants (ii) No defence was filed and the Claimant applied for judgment in default of defence on May 10, 2005 (iii) by application dated June 16, 2005 by an application was made for the Default Judgment against 1st Defendant to be set aside and that the Defendants be granted permission to file and serve their defence within 14 days of the date of the order.

[67] Although the application to enter default judgment was made on June 16, 2005, Sykes J was of the view that the application to set aside default judgment by the first Defendant was a misapprehension "because a judgment was not entered against any defendant until much later, namely, October 19, 2005." It therefore follows that for Sykes J, the filing of the application for judgment and

the date of entry of judgment are too distinct and separate things. One is not necessarily the same as the other. In other words the default judgment is not entered upon an application being made, but upon when it was actually entered. Prior to this it is pending, and any application to extend time before it is actually entered is captured within the ambit of Rule 12.5 (e) of the CPR.

[68] Rule 12.5 governs the conditions that must be satisfied before the judgment for failure to defend can be entered. It states as follows:

> **The Registry must enter judgment at the request of the Claimant against a defendant for failure to defend if**
>
> (a) **the Claimant proves service of the Claim form and particulars of claim on the defendant; or**
>
> **(b) an acknowledgement of service has been filed by the defendant against whom judgment is sought and**
>
> **(c) The period for filing a defence and any extension agreed by the parties ordered by the court has expired**
>
> **(d) ……**
>
> **(e) there is no pending application for an extension of time to file the defence**

[69] I do find that there is some merit in this aspect of the 1st Defendants application. The 1st Defendant contends that "Rule 12.5 of the Civil Procedure Rules states that the registry must enter judgment where there is no pending application for an extension of time to file the defence. The converse is therefore true. i.e. where there is a pending application to file a defence out of time, then the default judgment cannot be entered and if entered is invalid.

[70] I agree with Counsel for the first defendant that Rule 10.3 (9) provides that the defendant may apply for an order extending the time for filing a defence. It does not say that the application cannot be made after a request for judgment has been filed. Moreover, nowhere in the Rules does it state that a Judge cannot

grant an application for extension of time after a request for judgment has been filed. Rule 24 (c) states that the court may extend or shorten the time for compliance with any rule, practice direction, under a direction of the court, even if the application for an extension is made after the "time for compliance has passed".

[71] There was indeed a pending application before the court for an extension of time to file the defence. In these circumstances, no default judgment ought to have been entered prior to the determination of the application; and makes any such entry irregular. Accordingly, the Default Judgment was irregularly obtained.

[72] The Default Judgment is accordingly set aside under 13.2 (1) (b), without a need to consider the application under rule 13.3 and therefore without a consideration of the merits of the defence and or whether it has a reasonable prospect of success.

[73] There are two applications before the court. The first application was for an extension of time to file the defence. This application in my view, would be automatically revived or due for the court's consideration, if it is held, as I have found, that the judgment entered in default was irregular and therefore in the circumstances of this case, should be set aside.

[74] In these circumstances the application for extension of time to file defence is properly before the court for consideration.

The Application for Extension of time to file defence

[75] On November 26, 2010, the Director of State Proceedings, pursuant to CPR rule 10.3(9), filed its 2nd application, requesting that the 1st Defendant be given an extension of time to file its' defence.

The Delay

[76] The Claim Form and Particulars of Claim were served on the Director of State Proceedings on the 16th of December 2009. An Acknowledgement of Service was filed on behalf of both Defendants on January 19, 2010.

[77] Instructions were sought from the 1st Defendant by a letter of 2nd February 2010. The Defence is required to be filed within 42 days of service. This would require filing of the defence by around the 30th January 2010. Yet no effort was made to even seek instructions until January 19, 2010.

[78] Having received no response a second request was not sent again until May 19, 2010. This is some 3 ½ months after the 1st request and some 4 months after the time to file the defence had expired.

[79] This chronology shows that the tardiness of the 1st Defendant's attorney, compounded the history of delay. The 1st Defendant's failure to respond with any promptness has clearly extended the delay and aggravated the 1st Defendant's already precarious position. Fortunately, for the 1st Defendant, case law has reminded judges time and time again that the issue of delay is only one of the factors to consider in matters of this nature.

[80] In the Uk case of **Commissioner of Customs and Excise v Eastwood case Homes Ltd. & Ors – [All England Official Transcripts (1997 – 2008) (delivered 18/1/2000)** Lightman J at paragraphs 8 and 9 had this to say.

[81] **"The position however, it seems to me, has been fundamentally changed, in this regard as it had in so many areas, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rule is now set out in Part 1, namely to enable the court to deal with cases justly and there are set out there after a series of factors which are to be borne in mind in construing the rules and exercising any power given by the rules. It seems to me that it is no longer**

sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criteria of justice and in applying that criterion there are a number of other factors (some specified in the rules and some not) which must be taken into account, In particular, regard must be given, firstly, to the length of the delay; thirdly the prejudice occasioned by the delay to the other party; fourthly the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly the importance of compliance with time limits, bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties.

[82] **I am in no ways setting out all the relevant factors, but all the factors I have set out appear to me to be relevant and require to be taken into account in deciding what justice requires in the particular application. I should add that the existence of this broad approach, which decides the case by reference to justice, is not to be treated as a passport to the parties to ignore time limits because, as I say, one of the important features in deciding what justice requires is to bear in mind that time limits are there to be observed and that justice requires us to bear in mind that time limits are there to be observed and that justice may be seriously defeated if there is any laxity in that regard."**

Explanation for the Delay in Filing a Defence

[83] The first defendant relies on affidavits of Garcia Kelly, Herrington Mcdermott and Charlene Atkinson in support of its application. Having received the claim and particulars of claim since 16/12/09, it was not until 2/2/10 that instructions were sought from the first defendant. The history is reiterated here for the purpose of the consideration of this aspect of the application.

[84] Having received no response from the letter sent seeking such instructions, a follow-up letter was not sent until 19/5/2010, some five months after the claim was filed and served and some three months after the first letter seeking instructions. It is quite obvious from the history that the first defendant and or its legal representative, did not deal with this matter with the due haste required to comply with the civil procedure rules.

[85] This delay was further compounded by the fact that the first defendant was without a legal officer as the post had been vacant "for a number of months" and this hindered the receiving of instructions to formulate the defence for filing. This post was filled on 23/2/10, having been vacant since October 2, 2009 and therefore as the DSP only started to seek instructions in February 2010, this should not on the face of it have any significant impact on their efforts to get instructions.

[86] It is instructive that the first defendant's attorneys-at-law indicated on July 14, 2010, that "instructions required have now been received". Therefore, in effect, the first defendant did not give instructions to their attorneys-at-law until some seven months after the filing and service of the claim. This, in my view, amounts to an inordinate delay.

[87] However, I am required to also consider the explanation given for this delay and in so doing, find that the first defendant has provided a reasonable explanation for the delay.

[88] The legal officer, Charlene Atkinson, took up the post of legal officer at which time, the time for filing the defence would already have expired. It was nevertheless some four months away from when the first application to extend time to file the defence was filed. According to Ms. Atkinson, when she assumed office, there was a backlog of matters, including matters that default judgment had already been entered to which she gave her urgent attention. She further

stated that the matter first came to her attention, 19/5/2010 by letter (previously referred to) from the Director of State Proceedings (DSP). She then took immediate steps to prepare an instruction file, which was incomplete when sent to the Director of State Proceedings on 8/6/2010.

[89] She stated that she thereafter conducted interviews and conducted other investigations – she had to await information from the fraud squad. The first defendant having provided the DSP with instructions in June 2010, the application to extend time to file the defence was filed thereafter on the 14/7/2010.

[90] In taking into account, the overriding objective, the court in considering the circumstances of this case concludes that the explanation given is only one aspect of the court's consideration and that I must consider all the circumstances of the case, the overriding principle being that justice has to be done. This approach is supported and endorsed by many authorities and is not novel. As far back as in Biguzzi v Rank Leisure plc [1999] 1 WLR 1926 – the Court of Appeal England "encouraged courts to utilize the greater powers afforded by the CPR to allow the trial of appropriate cases. That approach would allow for an extension of time in which to file a defence but applying appropriate sanctions for the failure to file within time". Per Brooks JA, paragraph 27 – **AG & Another v Brooks 2013 JMCA Civ. 16**

The Defence on the Merits

[91] A defendant may seek to show that a defence has a real prospect of success by setting up one of the following:

(**a**) **a substantive defence**
(b) a point of law destroying the claimant's cause of action
(c) denial of facts supporting the claimant's cause of action
(d) further facts answering the claimant's cause of action

McDonald-Bishop J in **Marcia Jarrett v South East Regional Health Authority & others.**

[92] It is the claimant's claim that he was wrongfully/unlawfully dismissed; that the defendant had breached the implied terms of the implied obligation of trust and confidence in his contract of employment and had also injured his reputation.

[93] A defence was exhibited to the affidavit of Charlene Atkinson filed on 21/1/2011. The claim for wrongful/unlawful dismissal is countered in the draft defence by the first defendant contending that it was an express term of the contract that it could terminate the claimant's contract of employment with three months' notice or three months' pay in lieu of notice. The termination clause of the contract exhibited does indeed disclose this.

[94] The first defendant contends that in the letter dated 11/12/2007, the claimant was informed that in accordance with the terms and conditions of his contract, specifically the termination clause, his contract would be terminated and he would be paid three months' salary in lieu of notice. This was duly paid. In these circumstances, it contends that there was no wrongful or unlawful termination as it had exercised an option available to it under the contract. It is not in dispute that the claimant was paid three months' pay in lieu of notice. It is, therefore, a question for the court at trial in construing the terms of the contract and the circumstances of the case to determine whether there is any merit in the claimant's assertion of wrongful dismissal.

Breach of Implied Obligation of Trust and Confidence

[95] An implied term in any contract of employment is that an employer must not, without reasonable and proper cause, behave in any way which is calculated to destroy or seriously damage the relationship of confidence and trust between itself and its employee – the case law seems to suggest that this implied term does not prevent an employer from exercising his express power to dismiss an

employee without cause. See Nicholas Reda + another v Flag Ltd [2002] UKPC 38.

[96] In reference to the implied term of the employer to not without reasonable and proper cause destroy the relationship of trust and confidence which should exist between employer and employee, their Lordships considered that:

> **"…common with other implied terms, it must yield to the express provisions of the contract as Lord Miller observed in Johnson v Unisys cannot be sensibly used to extend the relationship between its agreed duration; and their Lordships would add, it cannot sensibly be used to circumscribe an express power to dismiss without cause. This would run counter to the principle that an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification…"**

[97] Whether the termination of the claimants' contract "without any opportunity for the claimant to be informed of the concerns of the first defendant…" is a question of fact; after which finding the relevant tribunal at trial will apply the law in considering whether this does amount to a breach of implied obligation of trust and confidence and whether the first defendant was required to give "cause" for the termination.

Failure to Observe Natural Justice Principles

[98] The first defendant contends that it had no duty to hear the claimant before dismissal and cites the case of Malloch v Aberdeen Corp. [1971] 1WLR 1578. It is a matter of law, whether the first defendant as employer was bound to give a hearing to the claimant before dismissal. The Judge at trial is best placed, after hearing the evidence and his findings of facts to apply the law as it relates to natural justice principles in these circumstances.

Unfair Dismissal

[99] It is also the first defendant's contention that the particulars of breach of contract amounts in essence, to a claim for unfair dismissal and that a claim for unfair dismissal is not within the jurisdiction of the Supreme Court but for the Industrial Dispute Tribunal. It contends that the claimant's complaints consists of "the first defendant's" failure to have dismissed him for a fair reason and the failure to have acted reasonably in dismissing him – and it is for this reason that it is submitted that the claim falls within the realm of unfair dismissal" – The first defendant cites the case of Johnson v Unisys [2001] 2 AKER 801 in support of its position. Whether the claimant before me is seeking to circumvent the unfair dismissal legislation is a matter of fact to be considered by the trial Judge.

Injury to Reputation

[100] The claimant has to prove that the first defendant "reported matters to the police and wrongly alleged that the claimant was involved in these matters". Whether the allegations were wrong; whether they were based on reasonable grounds/reasonable cause, is a question of fact for the Judge at trial who will apply the law to his findings. In all, therefore, it is clear from the thrust of the defence that this is a matter that will involve complex legal issues that in dealing with this case justly, will require a trial on the merits.

Setting Aside the Default Judgment under Rule 13.3 of the CPR

[101] I have found that the default judgment was irregularly entered and in the circumstances of this case, ordered that it be set aside under rule 13.2 (b) and this was followed by a consideration of the first defendant's application for extension of time to file the defence.

[102] In the event that this position is incorrect, I have also considered the alternative application of the first defendant to set the judgment aside pursuant to Rule 13.3 of the CPR. In so doing, I am of the view that the considerations given to the application for extension of time in this case, are similar to those under Rule 13.3. In particular the prerequisite of establishing that a real prospect of

successfully defending the claim is, in my view, satisfied for the very reasons stated above.

[103] **"The cases of Evan v Bertlam (1937) 2 ALLER 646; The Saudi Eagle [1986] 2 Lloyds Rep 221 and Allen v Taylor [1992] 1 PIQR are authority for the proposition that when considering whether to set aside a default judgment the question of whether there is a defence on the merits is the dormant feature to be weighed against the applicant's explanation both for the default and for any delay, as well as against prejudice to the other party"** and further **"It is my considered view however, that matters of conflict ought properly to be resolved at the trial". D & L H. Services v Attorney General & Anos SCCA 53/98 (unreported) Harrison JA at page 13.**

[104] There are complex issues of law and fact. This, in my view, gives the first defendant a real prospect of success at trial, which can only be fully measured upon a full appreciation of the law and facts; a state which can only be reached upon hearing evidence and considering all the material put before the Court. I am not required, nor should I conduct a mini-trial and so I highlight the defence, to show the possible legal encounter at trial, giving rise to the view that the defence has a real prospect of success.

[105] In so finding, and in also finding that the application to set aside judgment was made promptly and that there was a reasonable explanation for the delay, I would in any event grant the application to set aside the default judgment under Rule 13.3 of the CPR.

Orders

1. Notice of Application of the 2nd defendant filed 14/7/2010 dismissed.
2. Costs to the claimant on 2nd defendant's Notice of Application filed.
3. Default judgment set aside.

4. Extension of time granted to the first defendant to file and serve its defence on or before 30th September 2013.

5. Costs of Application to be cost in the claim.

6. By consent matter referred to mediation.

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