JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 216/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	CLETA ANNE KOSKOLOS	APPLICANT
AND	URBAN DEVELOPMENT CORPORATION LIMITED	1st RESPONDENT
AND	ST ANN DEVELOPMENT COMPANY LIMITED	2nd RESPONDENT

Glenroy Mellish instructed by Mellish & Rushton for the applicant

David Johnson instructed by Samuda & Johnson for the respondents

19 March and 5 June 2015

PHILLIPS JA

[1] This application was heard on 19 March 2015, when we refused the applicant's application for permission to appeal against the decision of the learned Master Harris (Ag), delivered on 9 December 2014, in which she granted the respondents' application, to set aside the default judgment, entered on 28 April 2014, allowed the acknowledgment of service filed on 13 May 2014 to stand, and gave the respondents time to file and serve their defence within seven days of the date of judgment. We

ordered costs to the respondent and promised to put our reasons in writing. This is a fulfillment of that promise.

Background

[2] The claim was commenced by the applicant, on 10 April 2014, to recover damages against the respondents for negligence and or breach of contract and or duty of care pursuant to the Occupiers' Liability Act arising out of an accident which occurred on 11 April 2008, when the applicant fell while climbing the Dunn's River Falls, suffering injury and loss.

[3] The respondents were served with the claim form and particulars of claim on 10 April 2014. The acknowledgement of service was however not filed by the respondents until 13 May 2014. Counsel for the respondents, on that same day, also filed a notice of application seeking an order that the acknowledgment of service, filed on 13 May 2014 be allowed to stand, and that permission be granted to file defence out of time. The applicant had, previously on 28 April 2014, made a request for default judgment. Thus, subsequently, when the respondents became aware of the applicant's request for default judgment, they filed an amended notice of application for court orders and an affidavit in support exhibiting a draft defence, on 27 May 2014 and 16 July 2014 respectively, to set aside the default judgment entered against them.

[4] The accompanying affidavit, by Yana Samuels, attorney-at-law, in support of the respondents' notice of application to set aside default judgment, was sworn to on 16 July 2014. The relevant sections, for the purposes of this application, are set out below.

"11. I am informed by Mr. Oliver one of the tour leaders at the Dunns River Falls and Park on April 11, 2008 and verily believe that the accident which is the subject of these proceedings occurred in the following circumstances:

a. A group of visitors including the Claimant, arrived at the Dunn's River Falls and Park on April 11, 2008 for the purpose of climbing the Falls;

b. The employees of the 2nd defendant who were assigned as Tour Leaders for the group informed the group of the dangers associated with climbing the Falls and the manner in which the climb would be undertaken.

c. Having been advised of the potential dangers of the climb some members of the group chose not to undertake the climb while the remaining members including the Claimant, decided to assume the risk of climbing the Falls.

12. There was prominent signage displayed at the Dunn's River Falls and Park, including at the beach level where visitor's [sic] commenced climbing the falls providing a clear "Warning" to visitors in the following terms; "Warning you climb the falls at your own risk".

13. The Defendants therefore contend that the oral warning given to the Claimant by the tour leaders coupled with the prominent warning signage located at the park was sufficient in the circumstances to enable the Claimant to be reasonably safe in using the park and waterfalls.

14. Further or in the alternative, the Defendants contend that with full knowledge of the risk of injury or damage to herself by the very nature of the activity which she embarked upon and having been advised orally and by prominent signage of the risk of climbing the Falls, the Claimant voluntarily consented to accept such risk and to waive any claim in respect of any injury or damage that may be occasioned to her by

reason of the inherent dangers associated with climbing the Falls.

15. I verily believe that the circumstances of the incident outlined in paragraph 10-15 hereof indicate that the Defendants have a real prospect of successfully defending the claim. Exhibited hereto marked **"YRS-2"** is a copy of the Defence in draft which the Defendants proposed to file and rely on in these proceedings.

16. The Defendants failure to file their Acknowledgment of Service to this claim within the prescribed time was unintentional for the reasons previously outlined herein."

[5] The draft defence exhibited to the affidavit in support of the notice of application to set aside default judgment contained all the paragraphs from the affidavit set out above, in addition to denying the claims of the applicant. The draft defence further provided, inter alia, that:

"9. The Defendants further state that there are several exits at various points of the Falls that the Claimant could have used to discontinue her climb if she chose to do so but the Claimant failed to make use of the said exits and continued with the climb.

10. The Defendants admit paragraph 7 of the Particulars of Claim and say that they fulfilled their respective duties to the Claimant."

[6] On 24 November 2014, the learned Master Harris (Ag) heard the amended notice of application for court orders filed by the respondents and on 9 December 2014, granted the application which was sought and set aside the default judgment on the ground that the draft defence exhibited to the affidavit accompanying the notice of

application, revealed a real prospect of success. The respondents then filed the defence on 12 December 2014. The applicant sought permission from Master Harris to appeal the decision but permission was refused.

[7] On 19 December 2014, the applicant filed in this court, notice of application for permission to appeal the decision of Master Harris (Ag) on the grounds that:

i. permission to appeal is required;

ii. permission was refused by the court below; and

iii. the applicant has a real prospect of success on this appeal.

Applicant's submissions

[8] Counsel for the applicant submitted that permission to appeal should be granted based on the proposed grounds of appeal set out in the notice of application for permission to appeal. Counsel submitted that these grounds of appeal demonstrate a real chance of the applicant succeeding on the appeal and thus satisfied rule 1.8(9) of the Court of Appeal Rules, 2 002 (CAR) which provides the condition upon which permission to appeal will be given in civil cases. The grounds on which the applicant is desirous of appealing the decision of Master Harris (Ag) can be summarized as follows:

a. The learned master erred in rejecting the applicant's submission that the proposed defence was a bare denial.

b. The learned master erred in accepting that the defence of *volenti non fit injuria* was available in that there was no evidence before her that the applicant had full knowledge of the breaches which were alleged and outlined in paragraph 8 of the particulars of claim.

c. The learned master erred in accepting that the defence of *volenti non fit injuria* was available in that there was no evidence or facts from which it could be inferred that the applicant had waived her right to a legal claim.

[9] Counsel for the applicant relied on **Janet Edwards v Jamaica Beverages Limited** Suit No CL 2002/E-037, delivered on 23 March 2010, which was upheld on appeal, to submit that the respondents' draft defence which was exhibited in the affidavit of Yana Samuels dated 16 July 2014, was a bare denial and that it did not amount to a defence with a real prospect of success. The applicant sought to distinguish a defence which is a bare denial, from a defence with a real prospect of success by citing Sykes J at paragraph 40 when he stated in part:

> "What JBL [Jamaica Beverages Limited] ought to have done in its draft defence was to either deny that it had any warnings or if it had any warnings, state the steps it took. Miss Edwards also pleaded that JBL had her working at nights when it was unsafe. She pleaded that the place was dangerous and lacked proper security. All this, Miss Edwards pleaded, amounted to a lack of regard for her safety. JBL ought to have refuted these allegations, if it could, and put forward a contrary version, if it had one, or at the very least say why it does not admit the allegations. This is what rule 10.5 demands..."

[10] The applicant's counsel further submitted that the said affidavit of Yana Samuels was an insufficient affidavit of merit to satisfy the requirements under the Civil Procedure Rules (CPR) for setting aside a default judgment. In this regard, counsel argued that Master Harris (Ag) misunderstood the weight to be placed on the draft defence, had erroneously placed too much reliance on it, and had ignored the necessity for, and the contents required, in an affidavit of merit. The applicant relying on

Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited [2012] JMSC Civ 81, submitted that the affidavit was not detailed and failed to set out with particularity the facts on which the defence was to be based.

[11] It was also submitted on behalf of the applicant that the explanation posited by the respondents for the failure to defend the claim within the prescribed time was not a good reason, and thus failed to satisfy rule 13 .3 (2) (b) of the CPR.

[12] Additionally, counsel for the applicant submitted that the learned Master was wrong to have found that the defence of 'the assumption of risk' had been made out. He argued that the respondents had not outlined the elements necessary to support such a defence in the affidavit in support of the notice of application to set aside the default judgment, and thus had failed to demonstrate that the applicant had freely and voluntarily, with full knowledge of the nature and extent of the risk, impliedly agreed to incur it. Counsel relied on the Privy Council decision **Noe Letang v The Ottawa Electric Railway Company** in support of that submission.

Respondent's submissions

[13] Counsel for the respondents submitted that permission to appeal should be refused, since to grant permission to appeal the decision of the learned Master Harris (Ag) would be manifestly wrong in law, and would prejudice the 1st respondent, as the purpose of the appeal was to deny the 1st respondent an opportunity to put forward its defence. The grounds put forward by counsel, on which permission to appeal the orders of the learned master should be refused, were that:

"a. The Applicant has failed to demonstrate that the ruling of the Master was manifestly wrong in law;

b. The affidavit of Yana R Samuels filed on June 16 2014 and the draft defence accompanying same fulfilled the requirements of Rule 10.5 and Rule 30.3 of the Supreme Court of Jamaica Civil Procedure Rules 2002 ("the Civil Procedure Rules") and provided more than a bare denial of the allegations in the Applicant's Particulars of Claim; and

c. The Respondents have a real prospect of succeeding in their defence of the claim."

[14] The respondents used as their starting point the judgment of the English Court of Appeal in **Re Jokai Tea Holdings Limited** [1989] 3 All ER 631, and submitted that the court should refrain from intervening and substituting its own decision unless the learned master had misdirected herself with regard to the principles to be applied in the exercise of her discretion. The respondents' counsel further submitted that the learned master, on hearing the amended notice of application to set aside the default judgment had applied the correct principle, that being, whether there was 'a real prospect of successfully defending the claim'.

[15] In support of this submission, the respondents relied on **Dave Blair v Hugh C Hyman & Co (A Firm) and Hugh C Hyman** Claim No 2005 HCV 2297, delivered on 16 May 2008, where Brooks J (as he then was), accepted as the working definition of 'a real prospect of success', a quote from the Civil Procedure 2003 (The White Book) at paragraph 24.2.3, which stated that:

"... it is sufficient for the (defendant) to show some "prospect", i.e. some chance of success. That prospect must

> be real, i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word "real" means that the (defendant) has to have a case which is better than merely arguable... The (defendant) is not required to show that his case will probably succeed at trial."

[16] On this basis the respondents submitted that the said affidavit of Yana Samuels provided sufficient evidence for the learned master to conclude that the defence being advanced on their behalf revealed a defence which had a reasonable prospect of success and was in line with rules 10.5 and rule 30.3 of the CPR which provide a guideline for the required content of the affidavit.

[17] Relying also on the Supreme Court decision of **Janet Edwards v Jamaica Beverages Limited**, the respondents submitted that rule 10.5 of the CPR should be interpreted to mean that where the defendant denies the particulars of negligence as pleaded and provides a substantive alternative version of events, from which the reasons for denying the said particulars can be deduced, that was sufficient.

[18] Counsel for the respondents submitted that the affidavit of Yana Samuels clearly stated that the tour guide informed the group, of which the applicant was a part, of the dangers of climbing the falls and the manner in which the climb was to be undertaken. Having been advised of the potential dangers, some of the members of the group decided not to undertake the climb. However, the applicant freely and voluntarily with full knowledge of the risks associated, decided that she wished to climb the falls under the conditions outlined, and thus accepted the risk of injury. On this ground, counsel

submitted that it was reasonable for the learned master to have found that the defence of *volenti non fit injuria* arose for consideration.

Analysis

[19] Rule 1.8(9) of the CAR provides that:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

Thus, this court ought only to grant permission to appeal the decision of the learned master where the applicant can show that she has a real chance of succeeding on the appeal. To show that, the applicant must demonstrate that the learned master erred in the principles which she had applied, and that she was wrong when she exercised her discretion and concluded that the respondents had a real prospect of successfully defending the claim, and set aside the default judgment entered on 28 April 2014.

[20] Rules 1 2.1 and 12.2 of the CPR allow judgments to be entered against a defendant for failure to defend, either by filing acknowledgment of service, giving notice of intention to defend or by filing a defence in accordance with part 10 of the CPR. Rule 13.3 of the CPR provides the conditions which govern the setting aside of a default judgment. Rule 13.3 states that:

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

(a) applied to the court as soon as is 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."

[21] However, rule 13.3(1) is discretionary in nature and Morrison JA, in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, endorsed the well known principle that this court will only intervene to set aside the exercise of the discretion of the judge of the lower court in certain circumstances. Morrison JA referred to the oft cited judgment of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, 1046 where he stated that:

> "[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently."

Morrison JA then went further to outline the circumstances which would warrant the appellate court's interference. He stated at paragraph [20] of the judgment that:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

As a consequence, unless the learned master had misdirected herself with regard to the applicable principles or had taken irrelevant matters into consideration or failed to consider relevant matters, the court will not intervene to set aside that decision.

[22] Additionally, it is a fundamental principle of the civil law, as stated by Lord Atkin in **Evans v Bartlam** (1937) AC 473, 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."

On this basis, since the grant of a default judgment is usually merely an administrative process and does not involve a trial of the substantive issues, the court will set aside such an order, even though regularly obtained, once a realistic prospect of defending the claim can be shown, and that little or no prejudice will be suffered by the party holding the default judgement. The court will also consider the exlantion for the delay in filing the acknowledgment of service and also the promptness of the application to set aside the judgment.

[23] It is of significance that the applicant did not take issue with regard to the promptness with which the respondents applied to set aside the default judgment.

[24] The default judgment was regularly entered on 28 April 2014 under rule 12.1 (1)(a) of the CPR , the respondents having failed to file an acknowledgement of service within 14 days of the date of service in accordance with part 9 of the CPR.

Consequently, the respondents would have had to demonstrate that they had satisfied the requirement of rule 13.3(1) of the CPR, and as that order is made in the exercise of the discretion of the court, they ought also to have put before the court material relevant to the matters set out in 13.3(2) of the CPR, for the consideration and determination of the court.

[25] The applicant has proposed three grounds of appeal. However, I am aware that this is an application for permission to appeal and if granted, the appeal would not yet have been argued, and if refused, the trial would have to proceed. I ought not therefore at this stage, to give my views in detail, on the merits of the case. Nonetheless, I will proceed to discuss the proposed grounds of appeal, in the order in which they were stated in the applicant's application, to determine whether the applicant has a real chance of succeeding on this appeal.

Issue one

The learned master erred in rejecting the applicant's submission, that the proposed defence was a bare denial.

[26] Rule 13.4(1) to (3) of the CPR, requires that the application to set aside the default judgment be made by persons directly affected by the judgment, and be supported by evidence on affidavit, exhibiting a draft defence, and that draft defence should conform to rule 10.5 of the CPR. Rule 10.5(1) and (2) of the CPR provides that:

> "(1) The defence must set out all the facts on which the defendant relies to dispute the claim.
>
> (2) Such statement must be as short as practicable."

It is clear therefore that the respondents are not merely required to deny the applicant's particulars of claim but to set out succinctly the facts on which the defendant intends to rely demonstrating that they have a real prospect of successfully defending the claim.

[27] In discussing the requirements and rules relating to the setting aside of a default judgment, McDonald-Bishop J [as she then was], in delivering the Supreme Court judgment of **Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited** at paragraph [66] stated that:

> "...The law is clear that the affidavit must contain the facts being relied on and that the draft defence should be exhibited."

In addition, Morrison JA, in **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2, on appeal, endorsing McDonald Bishop J, at paragraph [43], cited Lord Atkin, in **Evans v Bartlam**, who stated that before a regularly obtained judgment in default can be set aside:

> "there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence."

[28] In the draft defence which was exhibited to the affidavit of Yana Samuels, the respondents denied the applicant's particulars of claim, and put the applicant to strict proof of the same. In paragraph 4 of the draft defence which is a replica of paragraph 11 of the affidavit (as set out in paragraph [5] herein), detailed responses to the applicant's particulars of claim are stated on behalf of the respondents. It was pleaded

that the applicant was invited to participate as part of a group of visitors from well known hotels in Jamaica who came to the park specifically for the purpose of climbing the falls. They were informed of the dangers associated with the climbing of the falls and the manner in which the climb was to be undertaken. Some members of the group chose not to undertake the climb while others including the applicant decided to assume the risk of climbing the falls. It was further pleaded that there was prominent signage displayed at various parts of the park, which warned visitors that they climbed the falls at their own risk. Additionally, the draft defence also pleaded that an oral warning had been given to the applicant by the tour leader. Thus, the respondents' contention was that the sign coupled with the oral warning were sufficient in the circumstances to enable the applicant to be reasonably safe in using the park and waterfalls. They denied that any losses suffered by the applicant, which were not admitted, were as a result of any negligence and or breach of statutory duty or breach of contract on their part.

[29] In my view, the affidavit and the exhibited draft defence as highlighted above, were not a mere denial of the applicant's particulars of claim, but put forward as the respondents' defence, demonstrating the reason they should not be found liable by the court for the accident suffered by the applicant. I accept the learned master's finding that the draft defence showed some merit and together with the affidavit in support adequately demonstrated that the respondents had a real prospect of defending the claim.

[30] In considering the evidence, as set out in the affidavit of Yana Samuels, Master Harris, in applying rule 13.3(2) of the CPR, considered the explanation of the respondents for failing to file the acknowledgement of service within the required time. The failure to file and serve the acknowledgement of service within the 14 day period, after the date of service of the claim form pursuant to rule 9.3(1) of the CPR was attributed to the attorney for the respondents having not received instructions to defend the claim until 7 May 2014 (paragraph 9 of the affidavit).

[31] On the evidence, the 1st respondent was served with the claim on 11 April 2014. The 1st respondent sent the claim to the 2nd respondent by courier on the same day it was received, for the 2nd respondent to review the claim and submit it to its insurers, Guardian General Insurance Jamaica Limited. However the 2nd respondent later convened a board meeting to appraise the claim being pursued and thereafter sent the claim back to the 1st respondent, instead of to its insurers. This reason given for the failure to file acknowledgement of service within the requisite time, alth ough not strong, does not demonstrate an intentional delay on the part of the respondents, especially since the acknowledgment of service was filed a little over two weeks out of time. It was therefore not unreasonable for the learned master to have found that the explanation for the failure to file the acknowledgment of service was not outside the ambit of rule 13.3(2) of the CPR. In my opinion, the decision of the learned master cannot be faulted.

Issue two

The learned master erred in accepting that the defence of *volenti non fit injuria* was available in that there was no evidence before her that the applicant had full knowledge of the breaches which were alleged and outlined in paragraph 8 of the particulars of claim.

Issue three

The learned master erred in accepting that the defence of *volenti non fit injuria* was available, in that there was no evidence or facts from which it could be inferred that the applicant had waived her right to a legal claim.

[32] Issues two and three are addressing the same point and as such will be considered together. Section 3(7) of the Occupier's Liability Act provides a defence of *volenti fit non injuria* to occupiers in respect of risks willingly accepted by visitors. Section 3(7) of the Occupier's Liability Act provides that:

> "The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."

[33] K Anderson J, in defining the latin term of *volenti non fit injuria* in **Anthony Martin v Eric Bucknor and Jamaica Public Service Company Limited** [2012] JMSC Civ 186, stated at paragraph [85]:

> "...That defence, as set out in the Latin maxim...essentially represents that one who consents to injury cannot be heard to complain of it thereafter... in order for the defence to be applicable, it must be sworn [sic] that not only did the Claimant have full knowledge of the risk, but that he

> consented to waiving his right of action, if such risk were to have eventralized and caused him loss and/or injury."

The defence of *volenti non fit injuria* in relation to employer and employee was stated with great clarity by Lord Watson in **Smith v Baker** [1891] AC 235, a case of some antiquity. He stated that:

> "The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his masters. When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, and appreciated or had the means of appreciating its danger. "

[34] In paragraph 11 (a) to (c) of the affidavit of Yana Samuels (paragraph [4] herein), the respondents deposed that the applicant had attended the falls; had been informed of the dangers associated with climbing the falls; that there was adequate signage indicating the danger, but the applicant decided to undertake the climb.

[35] In my view, there appears to be sufficient facts to give rise to the defence of *volenti non fit injuria* since the elements necessary to support such a defence were, as indicated, deposed to in the affidavit, and also pleaded in the proposed defence. As stated previously, the respondents had pleaded that the applicant had been told of the dangers associated with climbing the falls, had been informed of the available exits, yet with full knowledge of the risk, had voluntarily assumed the same. Whether the risk

was in fact assumed is left to implication and can only be determined at a trial of the claim.

[36] Thus, in the light of the above, I see no reason why the learned master could not have been satisfied based on the evidence presented on behalf of the respondents in the affidavit of Yana Samuels, and the facts pleaded in the draft defence attached thereto, that there was sufficient material before the court to raise triable issues on the question of whether *volenti non fit injuria* was applicable. It would then be for the court at the end of the day, to ultimately make a finding on whether it had been adequately pleaded, and whether by evidence adduced at a trial it could be shown, that the applicant had freely and voluntary agreed to climb the waterfalls with full knowledge of the nature and extent of the risks, knowing that if injury should befall her, the risk was to be hers, and not that of the respondents.

[37] In these circumstances therefore, I find that the learned master properly exercised her discretion to set aside the default judgment and to grant the respondents time to file and serve their defence. Her decision, in my opinion, cannot be faulted.

[38] For the above stated reasons, I agreed that permission to appeal should be refused and that costs be awarded to the respondents, as stated in paragraph [1] herein.

McDONALD-BISHOP JA (AG)

[39] I have read in draft the well-reasoned judgment of my learned sister, Phillips JA. Her reasons and conclusions for refusing the application for permission to appeal fully accord with my own. There is nothing I can usefully add.

SINCLAIR-HAYNES JA (AG)

[40] I too have read the draft judgment of my sister Phillips JA and agree with her reasoning and conclusion.