JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 71/2015

BEFORE: **THE HON MR JUSTICE MORRISON P**
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**TAMRAT MASON**	**APPELLANT**
AND	**SHARON HEADLEY**	**RESPONDENT**

Carlton Williams instructed by Williams, McKoy & Palmer for the appellant

Charles Piper QC and Miss Petal Brown instructed by Charles E Piper & Associates for the respondent

6 June and 17 June 2016

ORAL JUDGMENT

PHILLIPS JA

[1] This is an appeal against an order made by Sykes J on 5 June 2015 refusing to set aside a judgment that was entered against the appellant in default of filing an acknowledgment of service.

Background

[2] In or about April 2007, the respondent advanced US$100,000.00 as directed by the appellant for an investment with interest. A total of US$50,000.00 was paid to the respondent comprising US$30,000.00 interest and US$20,000.00 as part payment of

the principal sum. Sometime in 2008, the respondent called upon the appellant for repayment of the principal sum with interest. The appellant failed to repay the sums requested and so on 5 February 2014, the respondent filed a claim form and particulars of claim seeking to recover US$80,000.00, which represents the balance of the principal owed; interest at 40% per annum on the outstanding principal sum from 31 January 2008 to 31 January 2014; attorney's fixed costs on commencement of action and court fees totalling $29,252,881.10.

[3] Service was effected on the appellant on 18 February 2014. On 11 March 2014, a request for judgment in default of acknowledgment of service was filed. On that said date judgment in default was entered in the sum of $29,632,335.20 and was served on the appellant on 29 May 2014.

[4] On 24 April 2014, the appellant filed an acknowledgment of service and a defence. On 6 June 2014, the appellant filed a notice of application to set aside the default judgment that had been entered against him. The appellant also filed an affidavit in support on 6 June 2014 in which he contended that:

(i) the claim form and particulars of claim had been improperly and irregularly served on him as it was effected in the precincts of the Resident Magistrate's Court at Sutton Street in the parish of Kingston;

(ii) the defence and acknowledgment of service had been filed late because he was unable to fulfil his financial

obligations to his attorney and he was out of the jurisdiction between 28 February 2014 and 25 May 2014 for reasons beyond his control; and

(iii) he had a good and arguable defence to the claim in that the money was paid by the respondent, as he directed, with the intention that it was to be invested by a third party and he was never personally liable to the respondent; and in any event, he had fully compensated the respondent, as particularised in the defence filed.

[5] The defence exhibited to the appellant's affidavit, was certified and signed by his attorney-at-law Mr Carlton Williams because the appellant was overseas. The defence had been filed on 24 April 2016. The particulars were stated in paragraph 8 to be, that the appellant had not intended to create a legal relationship with the respondent, nonetheless the appellant had absorbed the respondent's loss of principal within the 20% calculated and accepted risk of investment. In any event, he stated that the respondent had been compensated far in excess of any amount owed by Nicroja Ltd, the third party company in which the sum was to have been invested, as the respondent had the use and occupation of his apartment at US$500.00 per month and the use of his BMW motor car, for six years; and he had undertaken the cost of repairs to the BMW motor car as a result of an accident in which the respondent was involved.

[6] The respondent filed an affidavit on 26 November 2014, in response to the appellant's application to set aside the default judgment. She deponed that she had paid US$100,000.00, as directed by the appellant, to four different institutions in the sums of US$25,000.00, US$15,000.00, US$30,000.00 and US$30,000.00 respectively to be invested at rates of interest between 10%-14% per month and the appellant was required to pay the principal and interest on demand. She further deponed that there had been no agreement between the appellant and herself that any sum would be deducted from the sums owed to her by virtue of her occupation of the premises at 7 Graham Heights or the possession of the BMW motor car. She deponed that the appellant allowed her to occupy the premises until the sums due to her were repaid by him with interest. She attached a letter dated 23 August 2013, addressed to the appellant wherein her attorney stated that the appellant, by email, indicated that the respondent's occupation of the premises was a tenancy, and yet he had disconnected the electricity and the water in an effort to dispossess her, in violation of section 27 of the Rent Restriction Act. She denied knowledge that her money had been invested in Nicroja Ltd.

[7] Mr Nicholas Rainford filed an affidavit on 26 November 2014, in response to the appellant's application to set aside the default judgment, in which he deponed that he had served the appellant on Sutton Street before he entered the precincts of the Resident Magistrate's Court.

[8] This application was heard by Sykes J on 1 June 2015. In transcribed notes of the learned judge's reasons for judgment agreed by the parties, the learned judge after examining the application, the grounds upon which it was made and the submissions of the attorneys-at-law for both parties, found that when one examines the documents attached to the claim form such as the notice to the defendant; the prescribed notes for defendants; the "warning" stated on the acknowledgment of service; and the defence, it was clear that the appellant, who is a literate businessman, could have simply filled in the blanks on the acknowledgment of service without the help of an attorney-at-law, and filed the same in time. The learned judge also found that the defence was not intended to be completed by an attorney-at-law.

[9] The learned judge accepted that the appellant's affidavit ought to have set out what the respondent's defence was and, in keeping with the principles enunciated in **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2 and **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, placed no reliance on the appellant's defence since it was filed out of time and the appellant had not applied for an extension of time to file the same. The learned judge said that the appellant's contention that he travelled abroad for "reasons beyond his control" had failed to provide the court with proper information which could assist it in making a determination as to whether to exercise its discretion to set aside the default judgment.

[10] The learned judge questioned whether the appellant was indeed impecunious since he had incurred travel costs to the United States and had managed to sustain himself there for two months and no evidence had been adduced that his trip had been sponsored by anyone.

[11] In the light of the above, on 5 June 2015, the learned judge refused the application to set aside the default judgment with costs to the respondent to be taxed if not agreed. He granted leave to appeal.

The appeal

[12] The appellant filed a notice of appeal on 15 June 2015, in which he sought to challenge Sykes J's refusal to set aside the default judgment entered against him. He urged this court to allow the appeal, set aside the default judgment entered against him and award costs, on the following grounds:

(a) The learned trial judge erred when he found as a fact that the appellant's affidavit was not one of merit; that the defendant did not require the services of an attorney-at-law to file his acknowledgment of service and defence; and that the appellant's impecuniosity was inconsistent with his stated travel abroad for two months.

(b) That there was sufficient material before the learned judge on which he could properly have found that the appellant had a real prospect of successfully

defending the claim having regard to the fact that the appellant's affidavit stated that moneys had been paid by the respondent, with the intention it was to be invested by a third party and that the appellant was not personally liable to the respondent at any time or at all, and in any event, the respondent had been fully compensated by the appellant as particularized in the defence filed.

(c) That the learned trial judge fell into error by failing to consider the merits of the defence which were particularised in detail in the defence exhibited to the affidavit, which defence had been expressly referred to by the appellant in the said affidavit.

The appellant's submissions

[13] In support of grounds (a) and (b), Mr Williams, relying on **Evans v Bartlam** [1937] 2 All ER 646, **The Jamaica Record Limited and others v Western Storage Limited** (1990) 27 JLR 55 and **Arnold Marshall and another v Contemporary Homes Ltd** (1990) 27 JLR 17, submitted that even without the appellant's document of defence having been filed or referred to, there was overwhelming evidence before the court of "a prima facie defence" and the appellant had a good prospect of successfully defending the claim. He contended that the tenancy agreement referred to by the appellant was accepted by the respondent in the letter of demand dated 23 August

2012, attached to her affidavit filed 26 November 2014, where the respondent's attorney-at-law had stated the respondent had been informed that her occupation of the premises at 7 Graham Heights was a tenancy at the rental of US$500.00 per month, which sum was being deducted from the amount which was due and owing to her, and that the respondent's attorney-at-law had threatened to take action against the appellant under section 27 of the Rent Restriction Act. Moreover, it was the appellant's defence that the sums given to him by the respondent were so advanced with the intention that they were to be invested by a third party, and so he had never been personally liable to the respondent for the repayment of those sums, and in any event, the respondent had been fully compensated by the occupation of his premises at a reduced rent, and with the possession and use of his BMW motor car for six years.

[14] Counsel also argued that the learned judge erred in his findings of facts. The first error was his finding that there was no application before the court for an extension of time since the notice of application filed 6 June 2014 sought an order for the acknowledgment of service and the defence filed 24 April 2014 to be allowed to stand.

[15] The second factual error counsel identified was the finding that the appellant could have filed the acknowledgment of service and defence himself. Counsel asserted that such a finding gave no consideration to the appellant's constitutional right to legal representation and so there was nothing unusual or unreasonable about his decision to await the advice of counsel before responding to the claim. Additionally, counsel argued

there are issues which may arise on the matter of the filing of an acknowledgement of service which may affect one's rights, and legal advice may therefore be helpful prior to the filing of the same.

[16] The final factual finding challenged by the appellant related to what the learned judge perceived was an inconsistency with, as he said, the appellant's claim that he was impecunious and yet he had spent two months in the United States without indicating whether he had a sponsor. Counsel argued that the appellant's affidavit addressed his impecuniosity at the material time, and not to a general state of impecuniosity, and counsel submitted further that in paragraph 4 of his affidavit, the appellant had stated that, at the material time, his impecuniosity was caused when the bank had taken some time to clear funds which had been lodged to his United States dollar account. Counsel argued that reference to his travel abroad and financial challenges were meant to explain the delay in filing the acknowledgement of service and defence which time, counsel submitted, was not an inordinately long period.

[17] On ground (c), counsel argued that the learned judge erred in not assessing the merits of the defence, since the appellant's defence had been exhibited to the appellant's affidavit, and part 13.3 of the Civil Procedure Rules, 2002 (CPR) required the court to examine whether the proposed defence had a real prospect of success. Counsel cited **Blossom Edwards v Rhonda Bedward** [2015] JMSC Civ 74 and **Evans v Bartlam** to show that in deciding whether to set aside a default judgment, regard must be had to whether the defence has a real prospect of success. Counsel submitted

that based on the foregoing, the appellant's defence had a real prospect of success. The court should therefore set aside the default judgment with costs to the appellant.

The respondent's submissions

[18] Mr Piper QC submitted that the learned judge had properly exercised his discretion pursuant to rule 13.3 of the CPR and in accordance with the principles outlined in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, endorsed by this court in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 2, the discretion ought not to be disturbed.

[19] Queen's Counsel submitted that pursuant to rule 13.3(2) of the CPR, in assessing an application to set aside a default judgment, the court should have regard to whether that application was made as soon as reasonably practicable after finding out that judgment was entered and whether there is a good explanation for the delay in filing the acknowledgment of service and the defence. Queen's Counsel submitted that the delay in fling the application to set aside the default judgement was inordinate and there were no good explanations for delay having regard to the appellant being a literate businessman, the fact that he had been able to finance himself in the United States for two months, and the fact that he had failed to indicate to the court the reasons for his stay abroad. In these circumstances, Queen's Counsel contended that the learned judge was correct in rejecting those explanations for delay.

[20] Mr Piper argued that the learned judge's assessment of the prospects of success of the appellant's defence was correct since the appellant had attempted to make

payments to the respondent; he provided no evidence to support his assertion that the money advanced to him by the respondent had been given to a third party; and in paragraph 10b of his affidavit filed 6 June 2014, he had admitted liability by asserting that the respondent had been fully compensated. Moreover, Queen's Counsel argued referring to **Ramkissoon v Olds Discount Co (TCC) Ltd** (1961) 4 WIR 73, no reliance could be placed on the appellant's affidavit, in the instant matter, since in **Ramkissoon v Olds Discount Co (TCC) Ltd**, the court had held that an affidavit sworn to by an attorney, in similar circumstances could not be relied on to state facts on which the application to set aside the default judgment may be based, as he had no personal knowledge of the matter. Queen's Counsel therefore submitted that in the instant case, where the facts were contained in a draft defence signed by the appellant's attorney-at-law and exhibited to the appellant's affidavit, the learned judge was correct to not place any reliance on the defence.

[21] Mr Piper submitted further that in the light of **The Attorney General of Jamaica v John Mackay, B & J Equipment Rental Limited v Joseph Nanco** and **Dipcon Engineering Services Limited v Gregory Bowen and The Attorney General of Grenada** [2004] UKPC 18, the approach has always been that with inexplicable delays, and in the absence of a defence with a real prospect of success, the application to set aside a default judgment ought not to succeed. Queen's Counsel therefore urged this court to refuse the appellant's request to set aside the default judgment and award costs to the respondent.

Discussion and analysis

[22] In the instant case, the appellant sought to set aside a default judgment that had been entered against him. The procedure for doing so is set out in part 13 of the CPR. Where a default judgment has been regularly entered, rules 13.3(1) and (2) of the CPR provide that:

> "(1) The court may set aside or vary a judgement 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 acknowledgement of service or a defence, as the case may be."

[23] In making a determination as to whether or not to interfere with a learned judge's exercise of discretion to refuse to set aside the default judgment, regard must be had to the principles stated by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** which have been applied by this court in numerous cases such as **The Attorney General v John Mackay**. In applying the principles gleaned from these cases, this court can only interfere with the learned judge's exercise of his discretion if it can be shown that he misconceived the facts; misapplied the law or there was a change in the circumstances of the case sufficient to show that his exercise of discretion was plainly wrong.

[24] In our view, based on the grounds of appeal advanced and the arguments filed in support of and in opposition to this appeal, there are two issues which require determination:

1. Whether the appellant's defence had a real prospect of success.
2. Whether the appellant's explanation for a delay in filing the acknowledgement of service and defence was acceptable.

Issue 1: Whether the appellant's defence had a real prospect of success.

[25] This court, in reliance on **Swain v Hillman and another** [2001] 1 All ER 91, has accepted that the term "real prospect of success" means that the prospects of success must be "realistic" as opposed to "fanciful". In this matter, it appears that the learned judge gave no consideration to the appellant's defence because he stated it had been filed out of time and no application for an extension of time to file the same had been made. In our view, once the request for default judgment had been filed, an application for an extension of time to file the defence could not have availed the appellant.

[26] Additionally, the learned judge placed no reliance on the appellant's defence attached to his affidavit, since it had been signed by his attorney and the affidavit of merit in support of an application to set aside the default judgment should be sworn by someone who can speak definitively to the facts on which the defendant intends to rely. He accepted the submission of counsel for the respondent that the affidavit sworn to by

the appellant did not contain the contents set out in the defence signed by the appellant's attorney. He referred to **Ramkissoon v Olds Discount Co (TCC) Ltd**, where as indicated the court held that a solicitor's affidavit did not amount to an affidavit of merit because the attorney could not speak definitively to the facts.

[27] However, in the instant case, the appellant did depone that he had a good and reasonable defence to the claim since, as stated, the money had been advanced by the respondent at his direction with the intention that it was to be invested by a third party so he could not be held personally liable to the respondent. In any event, the appellant maintained that the respondent had been fully compensated for the sums she claimed were owed to her through her occupation and use of his premises and motor car. The learned judge did not make an assessment as to whether the appellant had a good defence and so a question arises as to whether the learned judge's failure to make such an assessment was plainly wrong.

[28] Rule 13.4(2) and (3) provides that an application to set aside a default judgment must be supported by affidavit evidence and must exhibit a draft of the proposed defence. This reference to a proposed defence means that there is no requirement for the defence to be properly filed before it can be considered. The draft defence in the instant case, was signed by the appellant's attorney-at-law Mr Williams because at the material time the appellant was overseas, and in any event it was exhibited as a draft defence to the appellant's affidavit. In **Ramkissoon v Olds Discount Co (TCC) Ltd**, the court could not have relied on the affidavits submitted as it was not sworn to by

anyone who could speak positively to the facts. In the instant case, while the defence itself was not signed by the appellant, he nonetheless endorsed its contents when he exhibited it to his affidavit and specifically referred to the facts being particularised therein, and additionally he was someone with personal knowledge of the facts to which he had referred. He would therefore have testified and endorsed the contents contained in the defence and it could therefore be said that the defence was a statement of the facts on which he intended to rely. There is no question that this was not the best approach and a better format would have been to include all the information in the affidavit itself. However, in the circumstances, the learned judge was not precluded from analysing the affidavit and the draft defence in assessing whether the appellant's defence had a realistic prospect of success and was wrong in failing to do so.

[29] The appellant in his defence contended that when the respondent advanced US$100,000.00, it was indeed as an investment, and the respondent had been willing to assume the 20% risk, and knew there would be no guarantees. The appellant further deponed that the money was advanced to be invested by a third party, Nicroja Ltd, and he was not therefore personally liable to the respondent. The appellant stated that at the time when the respondent decided to call the principal sum, she would have terminated her investment with Nicroja Ltd and she had received a total of US$50,000.00. The respondent stated in her claim form and affidavit that the money had been advanced to the appellant as an investment with interest. However, she denied being aware of any company called Nicroja Ltd and stated that she was unaware of any agreement existing between the appellant and that company, but she deponed

that she had given the sums to be invested to four different institutions and not directly to the appellant, although at his direction. In our view, these facts to which the appellant deponed may have a positive effect on the prospects of success of his defence, since the respondent herself had raised the issue of the sums being advanced as an investment, and if the 20% risk is accepted, that may impact the amount of principal and interest alleged to be owed, which may reduce any personal liability to her.

[30] The appellant stated in his defence that when Nicroja Ltd defaulted on its payments, he took the decision to absorb personal liability for the respondent's loss because of their close relationship, and as the respondent had assisted him with family affairs relating to his children and his relocation to Jamaica. The appellant stated further that he allowed the respondent to occupy his premises situated at 7 Graham Heights at a rate of US$500.00 per month for six years, which was a concessionary rate since that premises was previously rented for US$800.00 per month. The appellant also stated that he allowed the respondent to use his BMW motor car during the relevant period and he assumed the costs for repairs to that motor car after the appellant had been involved in an accident in the said motor car. The appellant asserted that permitting the respondent to use and occupy his premises and to use his motor car for six years, he had fully compensated the appellant.

[31] In the letter dated 23 August 2013, attached to the respondent's affidavit filed 26 November 2014, in response to the application to set aside the default judgment,

the respondent's attorney-at-law wrote to the appellant and stated that the respondent had been allowed to occupy the premises until the sums due to her had been repaid with interest. However, he stated that subsequent to that arrangement, by email, the appellant had indicated to her that "her occupation of the said premises was a tenancy at the rental of US$500.00 per month, which sum was being deducted by [the appellant] from the amount which is due and owing to her". The letter states that the appellant had disconnected water and electricity from the premises in an effort to dispossess the appellant and deprive her of the principal and interest due to her and that these actions were in breach of section 27 of the Rent Restriction Act. In her affidavit, the respondent denied that there was any agreement that sums would be deducted from the money owed by reason of her occupation of the premises.

[32] In our view, section 27 of the Rent Restriction Act relates to a landlord and tenant situation and so a question arises as to whether there was indeed a tenancy existing between the appellant and the respondent in respect of which sums were payable monthly for rental of the premises. As a consequence, it is indeed arguable whether the respondent had been fully or partially compensated when she was allowed to possess the premises and use the motor car which would render the appellant's prospects of success realistic as opposed to fanciful.

Issue 2: Explanation for delay

[33] Counsel for the appellant submitted that the appellant had been served with the default judgment on 29 May 2014, and he made the application to set it aside on 6 June 2014. In all the circumstances, we would not say that a delay of eight days was

substantial or inordinate and in our opinion, the application was made within a reasonably practicable time after the appellant was notified that judgment in default had been entered against him.

[34] However, a question remains whether the appellant gave a good explanation for failing to file an acknowledgement of service and defence within the specified time. This court has held in **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** Motion No 12/1999, delivered 6 December 1999 and **Peter Haddad v Donald Silvera** SCCA No 31/2003, Motion No 1/2007, delivered 31 July 2007, that the absence of a good reason for delay is not a sufficient basis upon which a court may reject an application for extension of time but the court has stated that some reason for the delay must be given.

[35] The appellant had deponed in his affidavit that "for reasons beyond his control" he had left Jamaica with the intention of returning in three weeks, but his stay had been extended to eight weeks. Despite the fact that he had not given reasons for his visit or extended stay in the United States, he had given an explanation for his delay in complying with the rules. The appellant also deponed that he wished to instruct attorneys-at-law but this was not financially possible at the time because there was a delay at the bank responsible for clearing funds lodged to his US dollar account. The learned judge rejected this argument on the basis that the appellant's claim that he was not in a financial position to advise an attorney is inconsistent with his being able to sustain himself overseas for two months.

[36] In our view, there was no evidence as to how the appellant's stay overseas was funded and one could not therefore conclude that he was financially capable of retaining an attorney in the matter in the circumstances. The learned judge also indicated that the appellant being a literate businessman was capable of completing and filing his defence and acknowledgment of service himself. However, his right to legal representation of his choosing is constitutionally guaranteed and there was indeed nothing illogical about wanting to await the advice of counsel before filing documents in court which could conceivably affect his rights generally and certainly in the litigation. While we do not accept that the above contentions are necessarily good reasons, nevertheless explanations have been provided and in our view they are good and sufficient for these purposes.

Conclusion

[37] It is evident that the learned judge erred when he failed to consider whether the appellant's defence has a real prospect of success. After considering all the evidence, we find that the appellant had a defence with realistic prospects of success. Although the appellant had not provided good reasons for the court for his delay in filing his acknowledgment of service and defence, he nonetheless provided several explanations for that delay which we find to be good and sufficient. In all the circumstances and having regard to the overriding objective and the justice of the case, we make the following orders:

1. The appeal is allowed.
2. The decision of Sykes J on 5 June 2015 is set aside.

3. Judgment in default entered on 11 March 2014 is set aside.

4. Costs of the application to set aside the default judgment to the respondent.

5. Acknowledgement of service and defence filed 24 April 2014 shall stand as having been properly filed.

6. A case management conference is to be fixed at the earliest possible time.

7. Costs of the appeal to the appellant to be agreed or taxed.