IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 3449

BETWEEN	**JOSEPH NANCO**	**CLAIMANT**
AND	**ANTHONY LUGG**	**1ST DEFENDANT**
AND	**B & J EQUIPMENT RENTAL LIMITED**	**2ND DEFENDANT**

IN CHAMBERS

Nigel Jones and Miss Kashina Moore instructed by Nigel Jones & Co. for the 2nd Defendant/Applicant

Mrs. Symone Mayhew instructed by Rogers, Burgher & Co. for the Claimant/ Respondent

Heard: February 28, March 12 & July 2, 2012

Default Judgment – Application to set aside judgment entered in default of defence – Prescribed notes to the defendant and form of defence not served with claim form – Acknowledgment of service filed with notice of intention to defend – No defence filed – Whether defendant submitted to jurisdiction of the Court – Whether waiver of irregularity in service of claim – Whether default judgment irregularly or regularly obtained - Conditions to be satisfied for setting aside default judgment – CPR, 8.16(1); 9.6; 12. 5; 13.2 (1) (b); 13.3; 26.9; 30.3

McDONALD-BISHOP, J

1. B & J Equipment Rental Limited, the 2nd defendant and applicant in these proceedings, seeks an order by way of Notice of Application for Court Orders that Interlocutory Judgment in Default of Defence entered against it on November 17, 2009 be set aside.

2. The grounds on which the order is being sought are set out in the following terms:

(1) A condition in rule 12.5 of the Civil Procedure Rules, 2002 ("CPR") was not satisfied and as such there was a failure to file a defence by the 2nd defendant.

(2) The 2nd defendant was not served with the Prescribed Notes to the Defendant and a Form of Defence with the claim form in accordance with CPR, 8.16(1).

(3) Alternatively, the 2nd defendant has a real prospect of successfully defending the claim.

(4) Alternatively, the 2nd defendant has a good explanation for the failure to file a defence.

(5) Alternatively, the 2nd defendant has applied to the court as soon as reasonably practicable after finding out that judgment had been entered.

BACKGROUND FACTS

[3] In or around August, 2004, Mr. Joseph Nanco, the claimant, was employed as a Cat Scraper Operator to the 2nd defendant. Mr. Anthony Lugg, the 1st defendant, was also employed to the 2nd defendant as a Cat Scraper Operator. On August 21, 2004, the 1st defendant was assigned duties to operate a bull dozer to anchor the Cat Scraper being operated by the claimant at Harmans, Manchester. During the operation, the Cat Scraper crashed resulting in bodily injuries to the claimant.

[4] In 2009, following failed negotiations, the claimant initiated proceedings against the 1st and 2nd defendants for damages for negligence and against the 2nd defendant for breach of statutory and common law duties as his employer. He alleges that he is now a paraplegic as a result of the incident.

[5] The claim form, particulars of claim along with an acknowledgment of service form were served on the 2nd defendant by registered post. The 2nd defendant, through its attorneys- at- law, Pearson & Company, subsequently filed an acknowledgment of service of the claim. On that acknowledgement of service, it was indicated that there

was an intention to defend the claim. No defence, however, was eventually filed and no request for an extension of time to do so was made.

[6] On November 17, 2009, the claimant obtained judgment in default of defence against the 2nd defendant. On August 10, 2010 Brooks, J (as he then was) awarded the claimant interim payment of six million dollars ($6,000,000) on account of damages and also ordered that the matter proceeded to hearing of assessment of damages on October 27, 2010. Mr. Anthony Pearson of Pearson & Company appeared for the 2nd defendant at that hearing.

[7] On November 12, 2010, damages were assessed and final judgment entered for the claimant. Mr. Pearson was present for the 2nd defendant at the assessment hearing where judgment was reserved but was absent when the final judgment was entered. The record reveals, however, that the final judgment was mailed to the 2nd defendant by registered post and on January 20, 2011, an order for seizure and sale was made. On January 25, 2011, the bailiff for the Corporate Area executed the order for seizure and sale on the 2nd defendant. It is the action of the bailiff that had spurred the 2nd defendant into action to seek to set aside the default judgment and for permission to defend the claim.

The evidence in support of the application

[8] The main evidence in support of the application to set aside the judgment comes from Miss Tricia Bennett, the 2nd defendant's managing director. In so far as is immediately relevant, she stated the following: On or around July 16, 2009, the 2nd defendant was served only with a claim form, a notice to the defendant, an acknowledgment of service form and particulars of claim. Upon receiving these documents, she immediately contacted the 2nd defendant's attorneys-at-law, Pearson & Company, and sent all the documents served on her for Mr. Anthony Pearson to represent the company in the matter.

[9] Mr**.** Pearson had already been involved in the matter from the stage of negotiations and had previously been sent a letter by the claimant's attorneys-at-law

relating to a claim by the claimant. The 2nd defendant had also sent a letter to the claimant's attorneys advising them to deal with Mr. Pearson in relation to the matter and that all relevant information had been forwarded to him. Mr. Pearson was aware at all material times that the 2nd defendant intended to challenge any claim filed by the claimant and an investigators report dated March 9, 2005 was provided setting out the defence in the matter, among other things. The instruction of the 2nd defendant, at all times, was to defend the claim in the light of the investigators findings.

[10] The 2nd defendant was repeatedly assured by Mr. Pearson that the matter was being dealt with and that it would have had its day in court. The company was not aware of the court's procedural requirements apart from the duty to acknowledge service (which was included in the limited information in the documents served in July, 2009), that a judgment had been entered in the matter, or of the fact that there were hearings in the matter.

[11] The default judgment entered against the 2nd defendant was discovered when the bailiff visited its office on January 25, 2011 and marked items for seizure and sale. It was then that it came to the attention of Miss Bennett that a judgment had been entered in the claim and that the bailiff was executing an order for seizure and sale. Mr. Pearson was contacted immediately and a meeting scheduled for the same day where he insisted that the document the bailiff had was a claim form and not a judgment. She was later advised that the matter had actually gone as far as assessment of damages.

[12] The 2nd defendant's business has been tremendously affected by the recession since December 2008 as it relies entirely on the bauxite industry which has suffered tremendously since the global meltdown. The 2nd defendant is not in a financial position at this time to replace the items marked for seizure and the effect of seizure and sale would ruin the company. She has been advised by the 2nd defendant's attorney-at- law that it has a defence with real prospect of succeeding, a draft of which is exhibited to her affidavit.

[13] The 2nd defendant also relies on the affidavit evidence of Jason Jones, an associate in the offices of the 2nd defendant's attorneys-at-law in these proceedings. His evidence is to the effect that a search of the records of the court revealed that the prescribed notes for the defendant and the form of defence did not accompany the claim form as required by the rules. The purpose of his evidence is to confirm that the 2nd defendant was not served with the documents claimed by the 2nd defendant to have been omitted from service.

The claimant's response

[14] The claimant has strongly resisted the application and through his affidavit evidence and of that of counsel, Mr. Pierre Rogers, he seeks to show, among other things, that the 2nd defendant knew of the judgment and the procedural requirements because it was served at all points throughout by service on its attorneys-at-law as well as by service by registered post to its registered office. Furthermore, that the requirement for the 2nd defendant to file a defence would have been brought to its attention by the notice to defendant that was served with the claim form. He also produced evidence to make the suggestion that the 2nd defendant's averment of financial ruin ought not to be accepted as true. In the end, the case for the claimant is that there is no proper basis, in fact or in law, on which the application to set aside should be granted.

DISCUSSION AND FINDINGS

Whether the judgment is irregular

[15] The first ground proffered by the 2nd defendant, as a basis for the judgment to be set aside, is that the judgment is irregular due to non-compliance with rule 12.5. By way of reminder rule 12 .5 provides, in part:

> 12.5 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 acknowledgment 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 or ordered by the court has expired;
(d) that defendant has not-
(i) filed a defence within time to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under rule 22.2(6));
(ii) …
(iii) …
(e) there is no pending application for an extension of time to file the defence.

[16] Mr. Jones' contention, on behalf of the 2nd defendant, is that the 2nd defendant was not served in accordance with CPR 8.16 (1). He contended that the claimant had failed to serve with the claim form, the prescribed notes for the defendant (form 1A or 2A) and a form of defence (form 5). This failure rendered bad the service of the claim form and so the judgment is an irregularity.

[17] Rule 8.16 (1) states, in so far as is immediately relevant:

> *"8.16 (1) When a claim form is served on a defendant, it must be accompanied by –*
> *(a) a form of acknowledgment of service (form 3 or 4);*
> *(b) a form of defence (form 5);*
> *(c) the prescribed notes for the defendants (form 1A or 2A);*
> *(d)…*
> *(e)…"*

[18] Mr. Jones, relied on the judgment of the Court of Appeal in Dorothy **Vendryes v Dr Richard Keane and Karene Keane** [2011] JMCA Civ. 15 in support of his contention that the judgment is irregular. In that case, the claimant had only served the claim form and particulars of claim on the defendant. The other documents required to be served by rule 8.16 (1) were not served. Upon the failure of the defendant to file an acknowledgment of service, the claimant proceeded to request judgment in default of acknowledgment of service which was entered. At first instance, Sykes, J ruled that the

judgment was irregularly obtained due to non-compliance with CPR 8.16 (1) and as such, it had to be set aside as of right. His decision was upheld on appeal.

[19] Harris, J.A., in delivering the judgment on behalf of the Court of Appeal, stated:

> "[12] Rule 8.16 (1) expressly specifies that, at the time of service, the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word "must" as used in the context of the rule is absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2 the default judgment **must** be set aside (emphasis added).

[20] Mr. Jones, in the light of this dictum, maintained that the word *'must',* used in the rule makes service of the documents specified therein mandatory. The failure to serve the two forms in this case, he argued, rendered the service of the claim form bad and so the judgment is irregular. Accordingly, the judgment ought to be set aside.

[21] The undisputed evidence put forward by the 2nd defendant does show that the two documents in question did not accompany the claim form as required by rule 8.16 (1). Mrs. Mayhew, however, in resisting the argument of Mr. Jones that this is ground on which to set aside the judgment in this case made the following submissions which for convenience have been paraphrased.

[22] The **Vendryes** decision is clearly distinguishable. Firstly, in **Vendryes** the judgment was in default of acknowledgement of service. In this case an acknowledgment of service was filed by the 2nd defendant's former attorney, in which it was clearly stated that there was an intention to defend the claim. The default was, therefore, not in relation to service but in relation to the failure to file a defence. Accordingly, the court ought not to be concerned about the issue of service of the claim form because by filing the acknowledgement of service, the 2nd defendant acknowledged that he had received the claim form and particulars of claim.

[23] Furthermore, the 2nd defendant cannot now challenge the service of the claim form on the basis of the absence of the prescribed notes and form of defence because by filing the acknowledgement of service, without filing an application pursuant to CPR 9.6, and asking the court not to exercise jurisdiction in the matter, the 2nd defendant would have waived any irregularity in service by submitting to the jurisdiction of the court. CPR 9.6 sets out the procedure that a defendant should follow where he wishes to challenge jurisdiction of the court. The rule provides that the party must first file an acknowledgement of service and make an application within the time for filing a defence.

[24] Rule 9.6(5), then, provides:

> A defendant who -
> (a) files an acknowledgment of service; and
> (b) does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim.

[25] Mrs. Mayhew pointed out that the term '*jurisdiction'* in the context of the rule, has been explained by the English Court of Appeal in **Hoddinott v Persimmon Homes (Wessex) Ltd** [2008] 1 WLR 806**.** There the Court ruled that the term *"jurisdiction"* in the English CPR Rule 11 (which is in *pari materia* with our rule 9.6) *does* not only denote *'territorial jurisdiction'* which is one sense in which the term is usually used and which it means in the CPR. The meaning of the word is not exhaustive. In rule 11.5 (UK) (same as our rule 9.6) the word is also used in reference to the court's power or authority to try a claim. A breach of the rule of procedure, therefore, provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim.

[26] Mrs. Mayhew drew support from this decision to contend that the 2nd defendant, having filed an acknowledgement of service of the claim form and not filing an application to challenge the jurisdiction of the court or to ask the court not to exercise jurisdiction in the matter due to irregular service, has waived its right to challenge any defect or irregularity in the service of the claim form. In her words, *"the 2nd defendant*

clearly waived the requirement to be served with the prescribed notes and form of defence and cannot now raise this after having submitted to the court's jurisdiction."

[27] Learned counsel for the claimant also noted that it must be recalled that the 2nd defendant's counsel at the time, Mr. Pearson, did not only file an acknowledgement of service of the claim form but he took other steps in the proceedings such as participating in the hearing of the application for an interim payment and attending the hearing of assessment of damages on behalf of the 2nd defendant. Therefore, for the 2nd defendant to now contend that the service is irregular, at a time when the limitation period has expired and after years of leading the claimant to believe that no issue was being taken with the service of the claim form, would render an injustice to the claimant.

[28] She maintained that at the date of the request for judgment, the time for filing the defence had elapsed, no defence had been filed and there was no pending application for an extension of time within which to file one. In view of the foregoing, therefore, it is submitted that the judgment was regularly obtained and, therefore, in order for the judgment to be set aside, the 2nd defendant must satisfy the requirements of rule 13.3.

[29] I have duly considered the entire submissions made by both counsel on the question as to whether the judgment was irregularly obtained. It is clear on a reading of rule 12.5 that there is no express requirement that for default judgment to be entered there must be proof of service of any of the documents specified in rule 8.16 (1). The only documents mentioned expressly are the claim form and particulars of claim.

[30] Similarly, rule 13.2 that allows for judgment in default of defence to be set aside as of right has made no reference to the documents specified in rule. 8.16 (1) by saying failure to serve such documents would render the default judgment obtained irregular. Similarly, rule 8.16 (1) that provides for the mandatory service of these documents has not specify the consequences for failure to comply with that rule. So when one considers all the operable rules, there is nothing to say explicitly that failure to serve the documents specified in rule 8.16 (1) would affect a default judgment entered on the basis of a claim served without them.

[31] It should be noted within this context, however, that rule 26.9 applies where the consequence of failure to comply with, *inter alia,* a rule has not been specified. Rule 26. 9 (2) then provides, among other things, that failure to comply with a rule does not invalidate any step taken in the proceedings, *"unless the court so orders"*. It means that the effect on the proceedings of the claimant's failure to comply with rule 8.16(1) does not, without more, invalidate the proceedings. Whether it should do so is, ultimately, a question for the court to determine in the circumstances of the case.

[32] It is for this reason that the decision of the Court of Appeal in **Vendryes** is of materiality in the consideration of the case at hand. The Court of Appeal has, in effect, provided a sanction for non-compliance with rule 8.16 (1) and that is the setting aside of a default judgment in circumstances where such documents were not served with the claim form. The Court of Appeal had taken the step to pronounce that the breach of the rules had invalidated the judgment obtained. It is this stance of the Court of Appeal that has provided Mr. Jones with the strength to argue, as he has done, that the default judgment entered in this case is irregular and as such ought to be set aside as of right.

[33] It goes without saying, of course, that I am bound by the decision of the Court of Appeal and I do accept that it is binding on me. So on that basis, I am bound to conclude that there has been a failure on the part of the claimant to comply with the mandatory rules as to the documents that should be served with the claim form on a defendant. The decision should, in the ordinary course of things, lead me to conclude that the claimant having failed to serve the requisite documents had not effected proper service on the defendant and so the judgment obtained in default is irregular and ought to be set aside.

[34] However, given that rule 26.9 provides that a breach of a rule does not, in all cases, invalidate any step taken in the proceedings unless the court so orders, it means that it is incumbent on me to pay regard to the specific facts of the case at bar before determining the effect the breach should have on the proceedings. So, before concluding that the judgment should be set aside on the authority of **Vendryes**, as Mr. Jones contended, I have seen it fit to give due regard to the arguments put forward by

Mrs. Mayhew that even if there was an irregularity in service, the defendant had waived that irregularity.

[35] Mr. Jones, in response to Mrs. Mayhew on this point of waiver, has argued that the failure to file these documents renders the claim invalid. According to him, there were no valid documents before the court which could properly invoke the court's jurisdiction. As such, the claim form was defective and invalid and would have to be served in the manner contemplated by the CPR and the Court of Appeal before the matter can proceed. Simply put, he said, the filing of an acknowledgment of service could not cure a defective claim.

[36] In considering Mr. Jones' submission, I must state that I have accepted, as Sykes, J and the Court of Appeal did in **Vendryes,** that the additional documents required to be served with the claim form are, indeed, essential as they serve a useful purpose in assisting a defendant to comprehend the applicable procedures and to take steps in the proceedings. The question, though, is how should the failure to serve such documents with the claim form be treated in the circumstances of this case.

[37] As already noted, rule 8.16(1) that makes provision for the inclusion of such documents in service of the claim on the defendant is silent as to the consequences that should flow for non- compliance. A perusal of the CPR does show provisions where consequences are set out for failure to comply with certain rules. I have noted, in particular, that it would seem to be that where the rules intend that the validity of the claim itself should be affected, that is expressly stipulated. A look at rule 8.4 (1), for instance, would serve to demonstrate this. That rule stipulates, without question, that the claim form *"ceases to be valid"* if it is not served within 12 months of the date it was issued. The notice to the defendant that is attached to the claim form and which was served on the 2nd defendant itself stated this too in no uncertain terms.

[38] There is nothing by statute, rules, practice direction or case law to say that failure to serve any such documents automatically affects the validity of the claim itself. In fact, there is nothing in the judgment of the Court of Appeal in **Vendryes** that would serve to

lend support to such an argument. Therefore, I cannot agree with the view expressed by Mr. Jones, that the proceedings commenced by the claim form would not be valid due to non-service of the documents in issue, without more. I take the failure on the part of the claimant to serve such documents as requested by rule 8.16 (1) as an irregularity in service.

[39] I have taken time to consider this point as to the validity of the claim raised by Mr. Jones because the distinction between an irregularity and a nullity is, of course, a crucial one to bear in mind in considering the merits of the submissions made on behalf of the claimant that the 2nd defendant had waived the irregularity in service. It is well established in the law of civil practice and procedure that while an irregularity can be waived, a nullity cannot be: **Garrett v Hooper** 1 Dowl. 28; **Roberts v Spurr** 3 East, 155 and as re-affirmed in **the Gniezno; Owners of the Motor Vessel Popi v Owners of Steamship or Vessel Gniezno** [1967] 2 All ER 738.

[40] It stands to reason, therefore, that in the circumstances of this case where I have viewed the non-service of the relevant documents as an irregularity in service, it means that the question of waiver on the part of the 2nd defendant arises as a live issue in the case. The immediate question that now arises for contemplation is whether the 2nd defendant had waived the irregularity. Mrs. Mayhew's reason for saying that there had been waiver on the part of the 2nd defendant is two- fold. Firstly, she contended that counsel, acting on the 2nd defendant's behalf, had filed an acknowledgment of service indicating an intention to defend the claim and had raised no protest to the court exercising jurisdiction over the claim in the light of the improper service. Secondly, that counsel on behalf of the 2nd defendant participated in other aspects of the claim by joining issue with the claimant on the application for interim payment and by being present at the hearing of assessment of damages without raising any objection as to improper service.

[41] In **Warshaw and Others v Drew** (1990) 38 WIR 221, the Privy Council, examined the issue as to the effect of a defendant entering appearance in proceedings in which he had not been served with the writ of summons. Their Lordships stated:

> "It is well established that it is open to a defendant in an action to enter an appearance in it voluntarily, even though the writ in it has not been served on him, and that by doing so he waives such service. Modern authority for this proposition is to be found in *Pike v. Michael Nairn & Co. Ltd* [1960] Ch. 553 that was a case of proceedings begun by originating summons which was not served on the respondent."

[42] Their Lordships then referred to the dictum of Cross, J in **Pike v Michael Nairn & Co**. in which it was stated:

> "The service of the process of the court is made necessary in the interests of the defendants so that orders may not be made behind his back. A defendant, therefore, has always been able to waive the necessity of service and to enter an appearance to the writ as soon as he hears that it has been issued against him, although it has not been served on him."

[43] Their Lordships then opined:

> "It appears to their Lordships that, if a defendant in an action who has not been served with the writ in it can waive such service by voluntarily entering an appearance, it must follow that he can also waive such service by voluntarily taking an even more advanced step in the action than entering an appearance such as issuing and prosecuting a summons for an order dismissing the action for want of prosecution….
>
> ***The justice of this is obvious: a defendant cannot be allowed to take an active part in an action and at the same time to assert that he has never been served with the process by which the action is brought*.** (E*mphasis added.)"*

[44] As far as I see it, the advent of the CPR has done nothing to modify or abrogate this profound principle of law as to waiver of an irregularity in service of an originating process. I am, therefore, guided by the words of Their Lordships that a defendant, by entering an appearance in an action (which would be tantamount to acknowledgment of service under the new procedural regime) without protest and/or by taking active part in

the proceedings, ought not to be allowed to assert that he was never served with the process by which the claim was brought.

[45] Turning now to the issue at hand with all this in mind, I will commence with the observation that only two documents were not served on the defendant - the prescribed notes and the form of defence. The most important documents which go to the very heart of the proceedings had been served, those are, the claim form and the particulars of claim. These documents would be the ones that would inform the defendant of the case it had to answer. What I have observed from the available case law is that even in circumstances where such core documents (as important as they are) might not have been served, a defendant can still waive the irregularity of non-service by appearance and/or participation in the proceedings. It follows then, with even greater force, that there can be a waiver of the non-service on the defendants of less critical documents albeit that they are important. This leads me to conclude, on the strength of strong judicial authority, that there can be waiver on the part of the 2nd defendant of the irregularity that arises from the non- service of the documents in question in this case.

[46] The question now is: had the 2nd defendant waived the irregularity in service? In looking at the question of waiver, I have noted that the notice to the defendant attached to the claim form that was served on the 2nd defendant indicated in the very first line that the defendant should *"[s]ee the notes in form 1A served with this Claim Form".* This would have been in reference to the prescribed notes that were required to be served. This notation on the notice means that the defendant would have been put on notice, from the very outset, that there was a form that should have been served with the claim form with information for its attention but which was not included. The non-inclusion would mean that the claimant had failed to serve a document. I find that there was notice to the 2nd defendant on the documents duly served that at least one other form was missing.

[47] However, notwithstanding this notice, the 2nd defendant did nothing about it except to forward the documents to its attorneys- at- law for action which, essentially, was to defend the claim. Mr. Pearson, having had sight of the same documents with the

notice attached referring to the form that was not included, did nothing about that. What he did was to complete and eventually file the form of acknowledgment of service without any point taken about the omission. The acknowledgement of service was filed with the appropriate indication on the face of it that the 2nd defendant intended to defend the claim. The acknowledgement of service, with such an expressed intention, stood without any objection as to improper service. This act on the part of the 2nd defendant is tantamount to what was an unconditional appearance under the former rules of court.

[48] It is for that reason that Mrs. Mayhew argued that the 2nd defendant, by not raising the absence of the documents as a preliminary issue and by entering into the proceedings without protest, so to speak, had submitted to the jurisdiction of the court and by so doing, it had waived the irregularity. She cited **Hoddinott v Persimmon Homes** for the applicability of rule 9.6(5) in this matter which is *pari materia* to UK CPR 11(5) that was under consideration in that case. By way of reminder, rule 9.6(5) provides that a defendant who files an acknowledgment of service and who does not make an application to dispute the jurisdiction of the court within the period for filing a defence is treated as having accepted that the court has jurisdiction to try the claim.

[49] In understanding more clearly the argument of Mrs. Mayhew, I believe that an insight into the facts of **Hoddinott v Persimmon Homes** would prove useful**.** In that case, a claim form was served on the defendant but particulars of claim were not attached. The time for service of the claim form had expired and without notice to the defendant, the claimants' attorney made an application to extend time for service of the claim form. The extension was granted. The defendant, upon been served the order, issued an application to set it aside on the grounds that the claimants did not have any good reason to obtain an extension of time. This application was made before the service of the claim form and particulars of claim on the defendant. The defendant's solicitor, on the acknowledgment of service filed prior to the service of the claim form, had indicated by a tick in the relevant box on the form that the defendant intended to defend the claim. He did not, however, tick the box indicating *"I intend to contest jurisdiction*". There was thus no objection taken to the jurisdiction of the court.

[50] The claimants argued that in light of rule 11 (5) (our rule 9.6(5)) and the terms of the acknowledgment of service, it was not open to the defendant to apply to set aside the order. The defendant's counsel argued, however, that the rule was irrelevant because the claimants were not in difficulty because the court does not have jurisdiction to determine the claim but because they have failed to comply with the rules of court as to service. Counsel for the defendant argued that a defendant who seeks to argue that the claim form was served out of time is not challenging the court's jurisdiction, but is merely applying the procedural rules. The question for the court in light of such arguments was whether CPR 11 applied at all, that is to say, whether the defendant in the circumstances should have taken issue with the court exercising jurisdiction and by not doing so had submitted to the court's jurisdiction.

[51] The court disagreed with the contention of counsel for the defendant that CPR 11 did not apply. The court was prompted to point out that the meaning of *"jurisdiction"* is not confined to *"territorial jurisdiction"* but that, as used under the rule in question (11(5)), it is in reference to the court's power to try a claim or that the court should not exercise its power to try a claim. The court said it is open to a defendant to argue that where a claim form is not filed within time, as stipulated by the rules, then the court should not exercise its jurisdiction to do so in such circumstances.

[52] The court went on further to state:

> "In our judgment CPR 11(1) (b) [same as our 9.6 (1) (b)] is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely 7.5(2). It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise jurisdiction to try the claim. We would, therefore, hold that CPR 11 is engaged in the present context."

[53] I find that the principle distilled from **Hoddinott v Persimmon Homes** provides good and persuasive guide in dealing with the applicability of rule 9.6 to the present case. I adopt the line of reasoning of the UK Court of Appeal and conclude that it was

open to the defendant to challenge the jurisdiction of the court in the light of the breach of rule 8.16(1). It is the breach of that rule that would have provided the basis for the 2nd defendant to argue that the court should not exercise jurisdiction, that is to say, not to try the claim given the claimant's non-compliance with the rules as to service. So, In the light of the breach, rule 9.6 became 'engaged in such present context' (to borrow the words of the court in **Hoddinott**).

[54] There was notice to the 2nd defendant and its counsel on the face of the claim form that was served, indicating that the prescribed notes should have been included but were not. It means then that the 2nd defendant, in acknowledging service and expressing the intention to defend, ought to have indicated that it would be asking the court not to exercise its power to try the case given the breach of the rules as to service of the documents that should accompany the claim form. This is no different from asking the court not to exercise jurisdiction where the claim form had not been served or was served out of time (as in **Hoddinott**).

[55] To take the analysis even further, it is duly noted that the 2nd defendant has identified as a reason for failing to file a defence the claimant's failure to serve all the requisite forms. This reason is, however, rejected as a plausible one. It is duly noted that item 6 on the acknowledgment of service form bears the following:

> *"Do you intend to defend the claim?*
> *If so you must file a Defence or Affidavit in answer within [28] days of the service of this Claim on you.*
> *See rule 10.3(1)."*

[56] A look at Rule 10.3(1), to which the form refers, would show that it sets out the rules and procedure pertaining to the period for filing of a defence. It means from this that the 2nd defendant, as well as its attorneys-at-law, would have been directed to the time within which a defence was to be filed. This was clear from the terms of the documents served on the 2nd defendant. It cannot be said then that the 2nd defendant was not given crucial information as to the next step in the proceedings even in the absence of the prescribed notes. The defendant's evidence is that all documents were sent to the attorney with instructions to defend the claim.

[57] This was a case in which, upon receipt of the claim form and other documents, the defendant placed its case in the hands of an attorney- at- law for follow up. The 2nd defendant in this case, unlike in **Vendryes**, was given the instructions in the acknowledgment of service as to the need to file a defence within a certain time. This was acted upon when the matter was forwarded to counsel for that to be done. The only thing, then, that the defendant would not have had was the form of defence.

[58] The attorney must be deemed to appreciate the importance of a defence and the way in which it could be drafted. We are not dealing here with a lay man litigant who secured no legal advice. An attorney- at- law was engaged to defend the claim and the form of acknowledgment of service, served on the 2nd defendant, made specific reference to the part of the CPR that was engaged. It was incumbent on counsel to follow those instructions and consult the CPR. Had he done that, then, further information as to the form of the defence to be filed could be gleaned (even if counsel did not know how to draft a defence). It cannot be said, with all sincerity, that failure on the part of the claimant to serve all the documents prescribed resulted in the failure on the part of the 2nd defendant to file a defence.

[59] In looking at the conduct of the 2nd defendant and/or counsel on its behalf, it is seen, on unchallenged evidence, that the 2nd defendant took an active part in the hearing for interim payment and was present at the assessment of damages. Up to then, no issue was raised about the non- service of the documents in question. The requirement that such forms be included was for the benefit of the defendants. If the 2nd defendant, having not received them, said nothing but instead proceeded to take an active and unequivocal step in the proceedings towards trial of the claim, then it must be taken to have waived the rules established for its benefit. I find that the 2nd defendant, therefore, by acknowledging service, by indicating an intention to defend and then by actively taking part in other aspects of the proceedings, without any application under rule 9.6, had waived the irregularity in service. Also, it had, for all intents and purposes, submitted to the jurisdiction of the court.

[60] Having considered all the circumstances of this case, I join with Mrs. Mayhew in saying that the issues raised in the instant matter make it distinguishable from what obtained in **Vendryes.** In **Vendryes,** the defendant had apparently done nothing to waive the irregularity, unlike in this case. Accordingly, I find that, any irregularity there was in the service of the claim on the 2nd defendant was waived and so the default judgment obtained in default of defence is not irregular. There is thus no irregularity forming a proper basis for setting aside of the default judgment in issue as of right under rule 13.2 (1).

Whether judgment should be set aside pursuant to CPR 13. 3

[61] In the light of the foregoing, I will treat the default judgment as one regularly obtained. It means the question as to whether it should be set aside is governed by rule 13.3. In fact, the 2nd defendant has presented the alternative case that if the judgment was regularly entered, the case should be set aside in accordance with rule 13.3.

[62] Rule 13.3 states, in part:

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

Is there a defence with a real prospect of success?

[63] By now, it is well known that the primary test for setting aside a default judgment regularly obtained is that the defendant must have a real prospect of successfully defending the claim rather than a fanciful one: (**Swain v Hillman and another** [2001] 1 All ER 91).

[64] In evaluating whether the test has been satisfied, there must be shown a defence on the merits to that requisite standard. In **Furnival v Brooke** (1883) it was said (and I take it as being applicable today) that where the judgment is regular the court has a discretion in the matter and the defendant, as a rule, must show by affidavit that he has a defence to the action on the merits. Stuart Sime, in his text, ***A Practical Approach to Civil Procedure*****,** 6th edition, p. 248, noted that the written evidence in support of the application to set aside will have to address, in particular, the alleged defence on the merit, the reason for not responding to the claim in time, and the explanation for any delay in making the application to set aside. This, of course, is in keeping with the pre-requisites that must be satisfied pursuant to the rules.

[65] According to Craig Osbourn, (***Civil Litigation, Legal Practice Course Guides 2005-2006,*** p.364), the defendant must file evidence to persuade the court that there are serious issues which provide a real prospect of him successfully defending the claim. The evidence filed must set out the case in sufficient detail to satisfy the test.

[66] It is with all this in mind that I have set out to examine the affidavit evidence filed in support of the application to see the substance and quality of the proposed defence. The evidence put forward in support of the application had prompted Mrs. Mayhew to argue that there is no affidavit of merit. The law is clear that the affidavit must contain the facts being relied on and that the draft defence should be exhibited. In **Evans v. Bartlam** [1937] A.C. 473, it was said that before a judgment regularly obtained could be set aside, an affidavit of merit was required and when the application is not so supported, it ought not to be granted except for some sufficient cause shown. I do note however, that Lord Atkins, at the same time, had stated that in rare but appropriate cases this requirement could be waived so as not to prevent the court from revoking its coercive powers.

[67] It is noted that Miss Bennett who is the major affiant for the 2nd defendant has not, in any of her affidavits, set out the case for the 2nd defendant with any particularity or detail. There is nothing in evidence as to the facts on which the defendant is relying to establish its defence. What the 2nd defendant has done instead is to simply exhibit a

draft defence to the affidavit along with an investigator's report. The proposed defence must form part of the evidence presented. The facts being relied on must be stated in the affidavit and be attested to by someone who can speak to them from personal knowledge or who can speak to such matters by way of information and belief but with the source of such information and belief disclosed in the affidavit. All this must be evidence on oath. (See CPR 30.3 & 30.4)

[68] In looking at whether the evidence in this case has reached the threshold required, I have particularly observed that Miss Bennett has set out no facts in her affidavit whether in her personal knowledge or from information and belief with source indicated that could be evidence of the defence being relied on. There is no reference to the incident giving rise to the claim and how it happened. It is the draft defence that contains alleged facts which is proposed to be signed by Miss. Bennett.

[69] However, Miss Bennett does not indicate being an eye witness to the incident and there is nothing to suggest that she was present at the time. It means whatever is to be stated by her, on behalf of the 2nd defendant, by way of defence, would be hearsay. There is nothing to indicate what facts she would be able to prove from her own knowledge and what facts are based on hearsay. There is, in essence, no, *prima facie*, admissible evidence of a defence revealed on the affidavit evidence filed in support of the application. The rule in 13.4 is clear that the application to set aside must be supported by affidavit evidence and the draft defence must be exhibited. The draft defence must reflect the facts on which the defendant is seeking to rely as set out in evidence. In this case, none of the facts constituting the defence has been stated on oath as required. The affidavit is certainly not one of merit.

[70] Mr. Jones went a bit further to say that the 2nd defendant is, particularly, relying on an investigators report (exhibited) together with statements attached thereto for its defence. According to him, at this point the court is assisted by the facts set out therein. The investigator's opinion, he said, is an indication of the evidence which will be available to the court whether as expert evidence or otherwise at a later stage in the proceedings. I have observed a few things concerning the report that would militate

against it as showing a defence on the merit. The first thing noted is that the facts contained therein have not been attested to on oath. It is not included in any affidavit evidence.

[71] Secondly, the report of the investigator is not an expert report and there is nothing to indicate, at this stage, the reasonable likelihood of it being so admitted. It means, any opinion expressed by the investigator in that report would, *prima facie*, be inadmissible.

[72] Thirdly, apart from the fact that the report contains non-expert opinion, the investigator's report as to the circumstances giving rise to the claim is, at best, hearsay. So, even if the investigator is called, his evidence would substantially be hearsay and as such, there is a high probability (almost a virtual certainty) that such evidence could be ruled inadmissible or of being of little weight. Given the state of uncertainty that attends on the admissibility of the contents of this report and any potential evidence that would be based on it, the proposed report is, to me, a tenuous basis on which the defendant could seek to ground an arguable defence, much more one with a real prospect of success.

[73] Having examined, the evidence before me in support of the application, I am hard pressed to find a meritorious defence that has a realistic prospect of success. The proposed defence is not evidence of the facts constituting the defence; it is a draft defence clearly predicated on hearsay with no source of the information disclosed in the affidavit evidence. The affidavit is deficient. It is not, as Mrs. Mayhew contends, an affidavit of merit. The defendant has, therefore, failed to satisfy me that it has a real prospect of succeeding on the claim. The primary test for setting aside the judgment has not been satisfied.

Whether application made promptly

[74] The rules have also provided that in considering whether to set aside the judgment, the court must consider whether the defendant had applied to set aside the judgment as soon as was reasonably practicable after finding out that judgment was entered.

[75] This factor is a new introduction by the CPR in the regime for setting aside. The effect of such requirement has been recognised and helpfully explained in **Standard Bank PLC & Another v Agrinvest International Inc & Others** [2010] EWCA Civ 1400. It was stated:

> "22. The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one. However, promptness will always be a factor of considerable significance, as the judge recognised in paragraph 27 of his judgment and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial.

[76] I do agree that the fact that the defence might have merit does not necessarily mean that if the delay in applying to set aside the judgment has been so inordinate so as to cause injustice to the innocent claimant, it should be overlooked as a factor in refusing the relief sought. Once the court is to take into account of the time the application is made, it means the court must weigh the question of time in the balance and to determine what effect it has on the scales of justice between the parties. It would not have been made a factor had it not been the intention of the framers of the rules that some significant weight be accorded to the timing of the application to set aside.

[77] Turning to the case at hand against this background, it is seen from the agreed record of the proceedings that the default judgment was entered on November 17, 2009 and the application to set it aside was made in February, 2011. The time lapse would have been, roughly, one year and three months (fifteen months). By this time damages, had already been assessed and steps were being taken to enforce the judgment. The proceedings were well advanced towards finality of litigation.

[78] The 2nd defendant, through Ms. Bennett, is saying that it had only found out about the judgment when the bailiff sought to execute the order for seizure and sale in January 2011. It means that the 2nd defendant is contending that the application would have been made within a month or so of it finding out that judgment had been entered. I refuse, however, to accept the 2nd defendant's evidence as to the time it had come to its knowledge about the judgment.

[79] The evidence of the claimant shows that following on the entry of final judgment, the judgment was mailed by registered post to the 2nd defendant on November 23rd 2010. Mr. Pearson's office was also served. Allowing 21 days for deemed service, it would mean that by mid-December or thereabouts, the 2nd defendant would have known that damages were assessed. Yet, there is no evidence that any effort was made to set the judgment aside. It was not until after the bailiff sought to execute the order for seizure and sale that effort started to be made to deal with the judgment.

[80] In addition to service on the 2nd defendant itself, the evidence also shows that by August 2010 at latest, counsel for the 2nd defendant, Mr. Pearson, would have been aware that judgment was entered against the 2nd defendant when there was a hearing of the application for interim payment. Counsel was present at that hearing and participated in it on the 2nd defendant's behalf. Furthermore, at that hearing, a date was fixed for damages to be assessed following the judgment. The record shows that Mr. Pearson was also present for the 2nd defendant at the hearing of assessment of damages. Without a doubt, counsel would have known by then that default judgment

had been entered against the 2nd defendant from November 2009. Yet, the matter proceeded to final judgment without any attempt made to set aside the judgment.

[81] I find in all the circumstances, given the steps taken by the claimant to notify the 2nd defendant itself of the judgment and the role of counsel in the matter, who at all times actively participated for and on behalf of the 2nd defendant in the proceedings after the default judgment was entered, that there had been failure on the part of the 2nd defendant to set aside the judgment as soon as was reasonably practicable after finding out that it had been entered. This is another factor that is taken into account as one militating against setting aside of the judgment.

Whether there is a good explanation for failure to file defence

[82] The next consideration I have taken into account, as I am obliged to do under rule 13.3(2) (b), is whether the 2nd defendant has a good explanation for failing to file a defence. One of the explanations proffered by the 2nd defendant is that instructions were given to counsel to defend the claim and that in further discussions with counsel, the assurance was given that it would have had its day in court. The 2nd defendant was, therefore, labouring under the impression that all was well, so to speak. At highest, the 2nd defendant's case for failure to file a defence could be viewed, in part, as one resulting from the fault of counsel acting on its behalf.

[83] There is no evidence from Mr. Pearson explaining his failure to file a defence neither is there any evidence that an affidavit was ever requested from counsel. There is usually a strong temptation in cases where the fault of counsel is the reason for non-compliance by a litigant to say that "the sins of counsel" ought not to be visited on his client. The drawback to such thinking in every case is that the "sins of counsel" of one party could then be visited on the other party to the proceedings who would have done all that he is required to do. It means, in effect, that if the 2nd defendant were to be excused, without more, based on the conduct of counsel, then there could be serious prejudice caused to the claimant that costs could not sufficiently remedy. It is, perhaps, for this reason that the law is replete with authorities in which the conduct of counsel

has not been accepted as a good explanation for a party's failure to carry out what he is obliged to do in certain circumstances.

[84] In **Hoddinott,** two cases were referred to by the Court of Appeal in dealing with the failure of claimants to serve claim forms within time due to the fault of counsel acting on their behalf. They are **Leeson v. Marsden and United Bristol Health NHS Trust** and **Glass v Surrendran** both reported at [2006] EWCA Civ. 20. In **Leeson v Marsden,** it is reported that the reason given by counsel for the claimant for not serving the claim form within the time specified by the rules was that she did not consider it to have been in her client's interest or to have been costs effective to serve proceedings until she had received a substantial response from the defendant in pre-trial protocol as to what issues were still likely to remain between the parties. The court held, however, that that was no reason at all for not serving the claim form and that "in not serving the document, the claimant's solicitor made a serious error of judgment". The court upheld the decision of the first instance judge not to extend time for service of the claim form, even though the failure to do so was the fault of counsel and not the litigant.

[85] In **Glass v. Surrendran,** the reason reportedly given by the claimant's solicitors for not serving the claim form was that they were awaiting receipt of an accountant's report. The report was received more than one month before the expiry of the four month period. The court said that there was no basis on which a "competent litigation solicitor" could have justified delaying the service of the claim form beyond the four month period. The extension of time granted by the first instance judge was set aside on appeal.

[86] These cases do demonstrate that even though the failure to comply with the rules was the fault of counsel in the matter and not the litigant himself, it made no difference. The court did not look at the fact that it was not the claimants' fault and excused the delay but instead looked at the reason advanced for the failure to comply with the rules. In looking at the case at bar against this background, I have taken into account the fact that Mr. Pearson had filed an acknowledgment of service. He indicated that there was an intention to defend the claim. After that, no defence was filed and no

application for an extension of time was made. No reason is advanced for such failure on his part. At least in the two cases cited above, an explanation came from counsel involved for failure on their part to comply with the rules which the Court of Appeal did not accept as being a sufficiently good reason, or any reason, at all, to grant relief.

[87] There is no reason from the 2nd defendant's duly appointed representative, at the time, explaining the failure to file a defence. Adopting the reasoning of the Court in **Glass v Surrendran,** I will say further that I can discern no basis on which a competent litigation lawyer could justify not filing a defence upon being instructed to do so (as the 2nd defendant is contending) and not seeking an extension of time within which to do so.

[88] As I have indicated before in my discussions at paragraphs 55 – 58 above, the fact that the prescribed notes and form of defence were not served affords no good explanation because the acknowledgement of service form that was served on the 2nd defendant and which was eventually completed and returned by counsel indicated the need to file a defence, the period within which to do so and the part of the CPR dealing with the filing of a defence. The 2nd defendant was duly represented by a person qualified in law who would have had sufficient information on the documents served as to how to proceed in the matter.

[89] Essentially then, the reasons advanced by the 2nd defendant for no defence been filed amounts to no good reason at all, particularly so, in the absence of any explanation forthcoming from Mr. Pearson. As such, the reason advanced is not accepted as a good explanation for the failure to file a defence that would justify setting aside a judgment regularly obtained to the detriment of the claimant. The absence of a good excuse for the failure to file a defence, as required by the rules, is yet another reason that serves to militate against the setting aside of the judgment.

Should the judgment be set aside?

[90] Having examined all the circumstances, I find that the 2nd defendant has failed to show by acceptable evidence that it has a defence on the merits with a real prospect of success. It has failed to seek to have the judgment set aside within a reasonably

practicable time after finding out that it was entered and it has no good explanation for failing to file a defence to the claim. The conduct of counsel for the 2nd defendant cannot be used so as to enure to the benefit of the 2nd defendant and to cause detriment to the claimant who has prosecuted his claim to a final judgment. If counsel failed to carry out his duties in the interest of the 2nd defendant, then there are other options available to the 2nd defendant to remedy that situation. That is a matter between the 2nd defendant and its counsel with which the case for the claimant ought not to be concerned.

[91] As far as the claimant is concerned, he had done everything required of him to secure a judgment of the court following the entry of the 2nd defendant in the matter. The incident occurred in 2004. The judgment was actually being enforced when the effort to do so was thwarted by an application for stay of execution which was granted on terms. The prejudice to the claimant, if the judgment were to be set aside in the circumstances of this case, would be overwhelming. An arguable defence is not enough to displace a judgment properly obtained, it must have a real prospect of success and that has not been sufficiently demonstrated by evidence.

[92] The claimant has something of value in his hand and he ought not to be deprived of it without good and compelling reasons shown. While it is appreciated that the court must not be quick to deprive a litigant of his day in court on a point of technicality and without an assessment of the merits of the case, it is also the duty of the court to ensure that time limits are obeyed and that there are no flagrant disregard for the rules of procedure. The rules must be interpreted and applied in order to give effect to the overriding objective which involves ensuring, as far as practicable, that cases are dealt with expeditiously and fairly. To set aside this default judgment, given all the attendant circumstances of the case, would not be in keeping with the overriding objective of the CPR or in keeping with fairness, broadly speaking.

[93] The application to set aside the default judgment is, therefore, refused.

Order

(1) The 2nd defendant's Notice of Application for Court Orders filed on February 15, 2011, for Judgment in Default of Defence entered on November 17, 2009 in binder 748 folio 247 to be set aside, is refused.

(2) Costs to the claimant to be agreed or taxed.

(3) Leave to appeal granted.

(4) Stay of execution of final judgment granted for fourteen (14) days from the date hereof.