[2019] JMCA Civ 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 4/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN	**PLANTATION HOLDINGS LIMITED**	**1ST APPELLANT**
AND	**PLANTATION DEVELOPMENTS COMPANY LIMITED**	**2ND APPELLANT**
AND	**CHRISTOPHER KERR**	**3RD APPELLANT**
AND	**JENNIFER MESSADO**	**1ST RESPONDENT**
AND	**LANZA TURNER BOWEN**	**2ND RESPONDENT**

Paul Beswick and Miss Gina Chang instructed by Ballantyne, Beswick & Company for the appellants

Miss Carol Davis for the respondents

30 May 2018 and 15 November 2019

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

PHILLIPS JA

[1] I have read the detailed comprehensive reasons for judgment prepared by my esteemed brother Brooks JA. While I take very little issue with his chronology of events,

regrettably, I see things a little differently which affects how I view the ultimate result of this procedural appeal.

Background

[2] The respondents (Mrs Jennifer Messado (JM) and Ms Lanza Turner Bowen (LTB)), in their capacity as attorneys-at-law, practising as Jennifer Messado & Co (JM&Co), represented the appellants (Plantation Holdings Limited, Plantation Developments Company Limited and Mr Christopher Kerr) in various matters, including real estate development and other conveyancing matters. That work included the development which is the subject of this litigation, namely, No 54 Norbrook Drive, Kingston 8. These lands were being developed as multi-family dwelling homes.

[3] A dispute arose between the parties. JM&Co claimed that certain sums were due for work done. They presented statements in respect of fees and disbursements. At the time, JM&Co represented the appellants (the developers and purchasers) and the vender, Mr Lloyd Pommells, owner of the subject land.

[4] In an effort to settle the dispute, the parties arrived at a settlement agreement entered into on 10 March 2015. It concerned terms 1-15 as follows:

> "1. The [appellants] will pay the sum of $12,500,000.00 by a managers cheque made payable to Jennifer Messado & Co, as an immediate payment on account of the fees, bills and disbursements as presented, which have been disputed, which said payment shall be made on the execution of this Agreement.
>
> 2. The manager's cheque in the sum of $12,500,000.00 made payable [to] Jennifer Messado & Co shall be

delivered to Clough, Long & Co which amount shall be held by the said firm and delivered to Jennifer Messado & Co on the receipt by Gordon|McGrath of the documents mentioned [at] paragraphs 8, 9 10, 11 and 12 hereunder.

3. A letter of undertaking will be given by Gordon|McGrath, secured by $20,500,000.00 held in a joint account between Clough, Long & Co and Gordon|McGrath in National Commercial Bank Jamaica Limited, to pay the balance of fees, bills and disbursements as shall be determined, by the procedure suggested by the Attorneys-at-Law, that the fees, bills and disbursements with [the appellants'] objections and disputes be reviewed by the firm of Accountants BDO of 28 Beechwood Avenue, Kingston 5, in the parish of Saint Andrew.

4. The parties agree that the said Accountants will review the fees, bills and disbursements presented by Jennifer Messado & Co which said Accountants shall examine the fees, bills and disbursements along with any objections raised by the Clients, and determine the amount due and owing to Jennifer Messado & Co.

5. The parties agree to pay the fees and costs [to the] said Accountants in equal shares.

6. The parties shall present all papers, documents, bills, receipts and evidence to the said Accountants within thirty (30) days of the date of this agreement.

7. The review procedure referred to in paragraphs 3 and 4 (above) shall be completed within forty-five (45) days of the date of this agreement and shall be binding on the parties.

8. In consideration of the immediate payment of the sum referred to in paragraph 1, Jennifer Messado & Co will release all caveats that it has lodged against all Certificates of Title of the development scheme.

9. Jennifer Messado & Co will also release all other liens registered or held, against property (real and

chattels) owned by Messrs Christopher & Donald Kerr, Pauline James, as well as the [appellants].

10. Jennifer Messado & Co will deliver all duplicate Certificates of Title in its possession to Gordon|McGrath, Attorneys-at-Law for each unit (in the development scheme), along with a Vendors and Purchasers statement of account for each suit as was sold.

11. Jennifer Messado & Co will deliver to Gordon|McGrath, Attorney-at-Law, the said documents in paragraph 8 and all originals of the signed instruments of transfer in relation to purchasers of the units in the development scheme.

12. Jennifer Messado & Co will deliver and transfer all existing undertakings in relation to purchasers of the units in the development scheme to Gordon|McGrath, Attorneys-at-Law, so that completion of the existing sales can be seamless and expedient.

13. Jennifer Messado & Co will exercise best efforts to facilitate the completion of the development scheme should the firm be needed in a legal capacity and subject to mutually agreeable terms following this agreement.

14. Upon the signing of this agreement Jennifer Messado & Co will be released from all undertakings, claims and/or potential liabilities and obligations to any purchasers pursuant to its obligations to any such purchasers and/or under the Real Estate Dealers and Developers Act; inclusive of but not limited to the Real Estate Board once it no longer has carriage of sale.

15. Each party shall bear its own costs of this Agreement."

[5] From the documentation, affidavits and exhibits, it seems that the appellants produced a manager's cheque in the sum of $12,500,000.00 in respect of fees, bills and

disbursements, which, though presented, had been disputed. It was payable on the execution of the agreement. It was supposed to be delivered to Clough Long & Co, and held by the said firm, and would only be delivered to that firm when the documents mentioned at paragraphs 8, 9, 10, 11 and 12 of the settlement agreement had been received by attorneys-at-law, Gordon|McGrath. Those particular clauses refer to: release of caveats lodged against the certificates of titles in respect of the development scheme; release of all liens held against the said property; and the delivery of all duplicate certificates of title, all originals of signed instruments of transfer in relation to purchases, and existing undertakings. One of the issues which arose on the documentation, was, as the cheque made payable to JM&Co had been paid to JM&Co, had the documents mentioned in clauses 8, 9 10 11 and 12 been submitted as agreed.

Pleadings and proceedings in the court below

[6] Issues of non-compliance of the agreement arose and, as a result thereof, the first claim was filed on the 15 June 2015. In that claim, the only claimant, although referred to as the "1st claimant", was JM (t/a Jenifer Messado & Co). The defendants were the same as the appellants in this appeal. This claim was described as claim no 2015CD00077. In that claim, the reliefs sought were as follows:

> "1. Specific Performance of Agreement dated 15th March, 2015 between [JM] and the [appellants].
>
> 2. An injunction restraining the [appellants], their servants or agents from in any way parting with, or dealing with 14 titles registered respectively at Volume 1447 Folios 297, 298, 299, 300, 301, 303, 304, 305, 306, 307, 308, 309, 310, and 311 of the Register Book of Titles, all currently registered in the name of Lloyd Michael Pommells and all

> handed to the [appellants'] agents pursuant to the agreement between the parties.
>
> 3. An [sic] mandatory injunction requiring the [appellants] to establish a joint account in the names of the Attorneys-at-law for [JM] and the [appellants] respectively, in the sum of $20,500,000.
>
> 4. In the alternative, damages in lieu of specific performance.
>
> 5. Interest at a commercial rate of 15% per annum or such other rate as determined by the Court pursuant to the Law Reform (Miscellaneous Provisions) Act on the sums due to [JM].
>
> 6. Costs
>
> 7. Further or other relief..."

[7] In essence, it appears that JM was then claiming specific performance of the settlement agreement, simpliciter.

[8] In the notice of application for injunction, filed 15 June 2015, JM sought the restraint of the appellants in dealing or parting with the duplicate certificates of title registered in the name of Mr Pommells, until the trial and determination of the matter. The grounds of the application were that a dispute existed between the parties, the payment of $10,500,000.00 had been paid, the files and certificates had been handed over to the appellants' agents, but the joint account had not been established. JM feared that the appellants, unless restrained, would use the duplicate certificates of titles, which were in their possession, for completing the sales in the development to third parties, and there would be no assets remaining that could satisfy any amount found to be due to JM for legal fees and charges.

[9] JM swore to an affidavit in support of the injunction on 15 June 2015. She set out the history of the matter from her perspective. She stated that the funds of $12,500,000.00 had been paid over; the appellants' attorneys had satisfied themselves that the precondition for the payment of the cheque had been satisfied; and the duplicate certificates of titles in her possession had been handed over. She listed the said certificates of title and attached copies of them. She referred to the fact that the joint account had not been opened and that no letter of undertaking had been provided. She stated that she had compiled her fees, bills and disbursements to be presented to BDO (the accountants), and was "ready willing and able to proceed with the implementation of the agreement" (Emphasis supplied).

[10] JM insisted that a joint account was to be established and voiced her concern about the failure to do so. She indicated that she had submitted 14 of 16 titles in her possession in respect of the development. Two of the certificates of title were not in her possession. She had delivered them to Mr Pommells as she stated that they had been pledged by the 3rd appellant, Mr Christopher Kerr, to Mr Pommells as security for a loan. She indicated that she had acted for Mr Pommells but due to the dispute she had advised him to obtain alternate legal representation and he had done so. She attached the signed agreement dated 2 March 2012.

[11] She stated that she had executed instruments of discharge of all caveats lodged by her and submitted the instruments to her attorneys. Her attorneys, she stated, had undertaken to hand them over, once she had been provided with evidence showing that the appellants had sufficient funds to establish the joint account, as they had agreed to

do. She indicated that she did not hand over the release of caveats to the appellants as she had agreed to do in the settlement agreement, because she feared that sales in the development would be completed without the payment of her outstanding fees. She was concerned about a lack of security for her fees, particularly, she said, as her knowledge of the appellants' financial situation led her to believe that they would not otherwise be able to do so.

[12] From the documentation supplied it appears that this application was withdrawn by the respondents. However, this affidavit was attached to one of the affidavits in support of the application to set aside the default judgment entered in the claim, the subject of this appeal.

[13] Based on the documentation before us, it appeared that the claim no 2015CD00077 remained extant, while the second claim form (claim no 2016CD00019), the subject of this appeal, was filed. In fact, it was eventually discontinued on 8 June 2017.

[14] In the 2016 claim, there were two claimants (JM and LTB), the defendants (the appellants) as indicated, remained the same. The reliefs claimed in this suit were:

> "1. A declaration that the [appellants] owe the [respondents] money for fees and disbursements.
>
> 2. Specific Performance of the Settlement Agreement dated March 10, 2015 specifically;
>
> a) That the [appellants] pay half the fees and costs of BDO of 28 BA, Kingston 5 in the parish of St. Andrew to prepare a report

determining the fees, bills and disbursements owed to the [respondents].

b) That the [appellants] present all papers, documents, bills, receipts and evidence to the accountant within 7 days from the date of judgment.

3. The [appellants] shall authorize Gordon McGrath and Clough Long & Co to pay out such fees and disbursements found to be due to the [respondents] by BDO being held on account by them on their behalf.

4. Costs to the Claimants."

[15] The particulars of claim in this action merely repeated the background facts in the claim filed previously. It set out the relationship between the parties, the existence of the dispute and the compromise settlement agreement. The claim focused on paragraphs 4, 5 and 6 of the settlement agreement (as outlined in paragraph [4] herein). In essence, the respondents' complaint against the appellants was that they had not handed over the necessary documents to the accountants, despite being notified by the respondents that they were ready to proceed; and that they had failed and/or refused to pay their one-half share of the accountants' fees.

[16] The appellants filed an acknowledgment of service on 23 March 2016, but failed to file their defence in the time prescribed in the Civil Procedure Rules 2002 (CPR). The defence was due on 22 April 2016, but was not filed until 11 July 2016. The claim was one that required judicial intervention for the default judgment to be entered. The matter was referred to Sykes J (as he then was).

[17] Before Sykes J, JM swore to an affidavit on 22 June 2016, in which she once again set out the background facts to this matter, reiterated her complaint against the appellants (as stated at paragraph [15] herein), and indicated that a defence to the claim had not yet been filed.

[18] In his reasons for judgment, Sykes J found that pursuant to rule 12.10 of the CPR, no notice was required to be given to the appellants against whom a default judgment has been entered. He indicated the agreement appears valid since: (a) the respondents were owed fees and an agreement was made to determine the balance owed; (b) the agreement was sealed and signed by representatives for both parties; and (c) there was nothing vague in the agreement and would not require constant monitoring by the court. On that basis, Sykes J found that specific performance was applicable, and at paragraph [23] of his reasons for judgment, granted the order in terms sought by the respondent, and awarded costs to the respondents to be agreed or taxed.

[19] The application to set aside that order was filed on 27 February 2017. The appellants sought several orders, *inter alia*, that the orders made by Sykes J on 27 September 2016 be set aside; the defence filed on 11 July 2016 be allowed to stand; and that the claim be fixed for a case management hearing. Several grounds were relied on which state *inter alia*, that:

1. Since the application to enter the default judgment had been without notice, pursuant to rule 11.16(1) of the CPR, an applicant to whom notice had not been

given, could apply to the court for any order which had been made on the application to be set aside or varied.

2. The attorneys then representing the appellants had not received all the papers from the previous attorneys on record.

3. When the application to enter judgment was before the court, but judgment had not yet been delivered, the defence had been filed and served on the respondents, and they had failed to bring that fact to the attention of the learned judge.

4. The appellants had a good defence to the claim, and although filed out of time, the delay was not inordinate and there was a good reason for the delay.

5. There was no prejudice to the respondents if the default judgment were to be set aside as the case had not been tried on its merits.

6. The filing of previous law suits amounted to an abuse of process.

[20] Mr Christopher Kerr (the 3rd appellant) deposed to an affidavit on 27 February 2017 in support of the application to set aside the default judgment. In addressing the issue of delay, he specifically referred to the earlier claim no 2015CD00077, between JM

and the appellants herein, as an abuse of process and indicated that that claim had been withdrawn after extensive arguments were made to the court on his behalf. He deponed that he had been subjected to a "multiplicity of claims", and highlighted several matters, in both the civil and the criminal courts, which he had been forced to attend to, arising out of the same background of facts, and relating to the same dramatis personae, which, he stated, were spurious, and baseless. Two such claims were related to Mr Pommells, the former client of JM. He stated that trying to defend these claims, and other matters arising therefrom, resulted in him not giving his attorneys instructions timeously in order to defend the subject claim. He deposed that the delay was therefore not intentional or inordinate.

[21] He reiterated that he had a good defence to the claim, with a real chance of success; that fairness and justice demanded that the matter be heard on its merits, especially since the respondents would suffer no prejudice if such an order was made. He maintained that the claim was an abuse of process and entirely without merit.

[22] The 2nd respondent, LTB, deponed to an affidavit in response sworn to on 25 April 2017, wherein she relied on the contents of the affidavit of JM sworn to on 22 June 2016, and filed in support of the application to enter judgment referred to previously. She pointed out that the claim no 2015CD00077 had been discontinued. It was her contention that there were multiple claims but they were all independent of each other. She maintained that the appellants had no defence, and any further delay would result in prejudice to the respondents.

[23] An application was filed on behalf of the appellants on 16 May 2017 by Messrs Ballantyne, Beswick & Company. It requested that the funds represented by the managers' cheque in the sum of $12,500,000.00, receipted by LTB, but held by Clough Long & Co, former attorneys-at-law for LTB, be immediately paid into a joint escrow account between the current attorney-at-law for LTB, Miss Carol Davis, and the appellants' attorneys-at-law, Ballantyne, Beswick & Company, until further order of the court.

[24] Mr Christopher Kerr, in his affidavit filed 16 May 2017 in support of this application, referred to the terms of the settlement agreement, and exhibited the cheque made payable to JM&Co. At paragraph 8 he stated:

> "[t]hat to date Jennifer Messado & Company has not fully complied with the provisions of paragraphs 8, 9, 10, 11, and 12 and therefore these funds would still be held by Clough Long & Company." (Emphasis added)

In paragraph 9, he stated:

> "[t]hat the Attorneys-at-Law having been changed by all parties to the instant Claim, it is only fair and equitable that the funds herein be immediately transferred to an account in the names of the current Attorneys-at-Law."

[25] JM responded to that affidavit by another of her own sworn to on 7 June 2017. She averred that there was no dispute that the sum of $12,500,000.00 had been paid to JM&Co. She further averred that JM&Co had complied with the settlement agreement. She stated that the claim before the court related to the payment of sums

due from the appellants in relation to the order for specific performance set out in previous orders, in respect of which, she claimed, there was no defence.

[26] Subsequent to that, the appellants filed an amended notice of application on 9 June 2017. This application essentially asked that the default judgment entered previously on 27 September 2016 be set aside; that the defence filed on 11 July 2016 be permitted to stand; and that the claim be fixed for case management hearing. In the alternative the appellants asked the court to strike out the claim as an abuse of process, or in the further alternative, not to exercise its jurisdiction to try the claim.

[27] The grounds for the application remained the same with some additions. In essence, the appellants claimed that they had filed a defence with a real prospect of success; and that the previous claim filed in 2015 asked for the same relief, was extant when the default judgment had been entered, which represented an abuse of process. The appellants indicated that the respondents were asking for the remedy of specific performance, and so they should come to the court "with clean hands".

[28] The affidavit of April Grapine-Gayle, sworn to on 9 June 2017, was also filed in support of the appellants' application to set aside the default judgment. She referred to the fact that in filing the claim no 2015CD00077, JM had sought to enforce the entire settlement agreement, which was the same settlement agreement, the subject matter of the instant claim. She set out the reliefs claimed in that suit (set out previously). She indicated that although the application for the injunction had been withdrawn on that

claim, the claim had remained extant when the current claim was filed and when the default judgment was entered.

[29] She referred to the fact that the defence had been filed in the subject suit on 11 July 2016, and had been served on the same day. She outlined her concern that although the defence had been filed and served, it had not been brought to Sykes J's attention before he came to his decision on a without notice application to enter default judgment.

[30] She indicated that the formal order had been served on 13 February 2017, and the application to set aside the default judgment had been filed on 27 February 2017. She stated that there was a three month delay in filing the defence, which is not inordinate, and explained that the delay was due to the extensive research that had been necessitated to reply to the multiplicity of suits. She reiterated that the appellants had a defence with a real prospect of success, and stated that no prejudice would have been suffered by the respondents if the orders, as prayed, were granted, especially since, as stated previously, the matter had not been disposed of on its merits.

[31] She deposed to a further affidavit sworn to on 30 June 2017. She made it clear that although the respondents had referred to the settlement agreement in their earlier claim as being dated 15 March 2015, that had been stated in error, as there was only one settlement agreement between the parties, and it was dated 10 March 2015. That agreement, she stated, had been exhibited to more than one affidavit in the

proceedings, which had been signed by the parties, the execution of which was not in dispute.

[32] In the defence filed by the appellants on 11 July 2016, they pleaded the relationship between the parties and the fact that there was an arrangement for the payment of fees to JM&Co which was not followed. They pleaded further that JM&Co insisted that fees were still owed in spite of that arrangement. As a consequence, JM had taken possession of the certificates of title in relation to the subdivision, without the appellants' permission, and had placed caveats on the properties in the development, and on other properties owned by the appellants and other relatives. This, the appellants pleaded, resulted in a compromise in order to resolve the situation, and the settlement agreement was executed by the parties.

[33] The appellants relied on the terms of the settlement agreement for their full terms and legal effect. The appellants pleaded that in breach of the settlement, only 14 of 18 certificates of title were handed over to the mediator, attorneys-at-law, Gordon|McGrath, three of which were given to Mr Pommells, and an additional certificate of title had been retained by JM. The appellants contended that they had not given JM any authority to hand over any certificates of title to Mr Pommells or to any third party. The appellants also claimed that to date, although the agreement required it, and although an undertaking had been given for the caveats to be released in short order, the caveats had not been released. They indicated that although JM had sought specific performance of the settlement agreement in claim no 2015CD00077, including

the payment of $20,500,000.00 in a joint escrow account, she had failed to perform her obligations under clauses 8, 9, and 10 of the said agreement.

[34] The appellants stated that the cheque of $12,500,000.00 had been paid to JM directly, as the firm of Clough Long & Co was no longer representing them.

[35] The appellants made no response to the respondents' assertions that they had failed to pay the one-half share of costs and/or to present any papers, documents, bills and receipts to the accountants. They specifically denied that the respondents have been unable to recover any monies due to them on the basis of their inaction, and also specifically denied that they had failed to make any payments to the respondents, and referred to their earlier statements in their pleadings.

Sykes J's reasons for judgment

[36] The application to set aside the default judgment was heard by Sykes J. In his reasons for judgment given on 8 January 2018, relative to this aspect of the matter and, in particular, with regard to the issue of whether the appellants had a realistic prospect of success in defending the claim, the learned judge once again focused on what he considered the two main issues before the court: (1) whether sums were owed to JM&Co that the appellants had refused to pay; and (2) whether the appellants had produced the documents required under the settlement agreement. The learned judge stated that there was no mention of those issues by the appellants in their defence. In paragraph 16, he set out what he considered to be the issues raised in their defence:

"(a) they had an attorney client relationship with [JM] but not [LTB];

(b) [JM] was handling a real estate development at 54 Norbrook Drive, Kingston 8 on behalf of the second and third [appellants];

(c) arrangements were made for [JM] to be paid but she insisted that she was owed legal fees in the amount of JA$33,000,000.00;

(d) [JM] retained possession of a duplicate certificate of title without the [appellants'] consent and that frustrated their effort to find funding to complete the project;

(e) in an effort to resolve the situation the [appellants] entered into an agreement with [JM] on March 10, 2015;

(f) [JM] was paid JA$12,500,000.00;

(g) speaks of alleged breaches by [JM] of terms of the agreement."

[37] Although the learned judge found that the application to set aside the default judgment had been made promptly, he found that there was no good explanation for the failure to file the defence in the prescribed time, and that the proposed defence had no real prospect of success. He therefore dismissed the application with costs to the respondents, and granted leave to appeal.

The appeal

[38] The appellants lodged an appeal against Sykes J's decision made on 8 January 2018. They argued that the learned judge erred in his interpretation of various facts in the instant case and had also erred in his consideration as to whether the appellants'

defence had a real prospect of success. They sought orders that Sykes J's decision should be set aside; that the default judgment entered on 27 September 2016 should be set aside; that the appellants' defence filed on 11 July 2016 be permitted to stand; and that the matter be remitted to the Supreme Court for trial. In the alternative, they sought an order striking out the claim as an abuse of the process of the court. They also sought costs here and below to be taxed or agreed.

Discussion and analysis

[39] The approach of an appellate court in reviewing the exercise of discretion by a judge in a lower court is well known (see **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042). Therefore, this court can only interfere with Sykes J's exercise of his discretion to refuse the application, if the court is satisfied that he has proceeded on some error of law, misapplied some principle of law, misdirected himself as to the facts, or on the application of the law to the facts, so that one can say the exercise of his discretion was palpably wrong. I shall now go on to make an assessment as to whether the exercise of his discretion was palpably wrong.

[40] My first comment is with respect to paragraphs 24 and 25 of the defence. The appellants deny that they have failed to make any payment to the respondents; that they have failed to present any and all documents challenging the fees to the accountants; and also that they have failed and refused to pay the half-share of the accountants fees. I recognise and acknowledge that the learned trial judge referred to rule 10 of the CPR and cases relative thereto, to say, that more than what was stated is required in order to be able to set out one's version of the facts, so the old general

formulas were ineffective. However, the more important concern for me is that the parties agreed on certain terms. Subsequent to the payment of $12,500,000.00, which was duly paid, and there is no dispute about that, no more funds were due to be paid to the respondents, until, pursuant to the settlement agreement, the accountants determined it to be so.

[41] The next steps agreed by the parties were that the accountants would review all fees, bills, and disbursements presented by the firm and examine the same with any objections made by the appellants; the parties would pay the fees and costs of the accountants in equal shares; and they would present all documents, bills, receipts and evidence to the accountants within 30 days of the date of the agreement. The review procedure was to have been completed in 45 days and the accountants' results was binding on the parties. Those steps have not been completed. The accountants have not given a decision. The law firm has stated that they are ready and willing to submit the papers and the fees to the accountants. The appellants deny that they have failed and refused to do so.

[42] In these circumstances, there does not seem to be any evidence before the court indicating that the appellants have admitted that sums are due to the law firm. They have accepted that certain sums were initially due, which is why the $12,500,000.00 was agreed to be made as an immediate payment on account of fees, which sum was to be made on the execution of the agreement. The parties agreed on a method to determine any sums due to the law firm, and to secure payment of such sums which may be due. The law firm had submitted invoices in the amount of $33,000,000.00

which was disputed and which led to the compromise represented in the settlement agreement.

[43] The appellants had also claimed in their defence that the respondents have not fulfilled their obligations under the settlement agreement, which were conditions precedent for the appellants' further performance under the agreement, as those obligations were to have been effected in consideration of the immediate payment of the $12,500,000.00. It seems to be clear that, on the documents and affidavit evidence, both parties do have unfulfilled obligations in respect of the specific performance of the settlement agreement. As a consequence, with regard to the remaining statements made by Sykes J, in paragraphs [19] to [33] of his reasons for judgment, I am unable to agree with my learned brother Brooks JA that the claim made by the appellants that the respondents have not fulfilled their obligations under the settlement agreement, was not a proper basis for challenging the learned judge's findings as an incorrect finding of fact.

[44] Indeed, the appellants are relying on the fact that the law firm has failed to comply with its obligations under the settlement agreement, and that, in my opinion, is a good defence to the claim. The fact that the appellants have not specifically said that no moneys are owed (as that is a matter to be determined under the agreement), and that they did not sign the agreement (as they too are relying on the settlement agreement), is therefore of no moment, in my view, as both parties are relying on the validity and proper execution of the settlement agreement. The agreement itself does

not acknowledge any specific amount of sums due to the respondents but provides the mechanism to ascertain the amount due and owing to the law firm.

[45] It is of significance that the appellants have not yet presented the papers and/or documents of objection to the accountants as agreed, and they have not stated that they had paid their portion of the fees either. Based on these two positions, an order for specific performance in relation to those terms of the settlement agreement in respect of paragraphs 4, 5 and 6 of the agreement would be appropriate. However based on the evidence, the respondents themselves have only stated their readiness to do so.

[46] Additionally, and of even more significance, JM has stated that she has submitted certain certificates to the appellants, but that she has not delivered two of those certificates as she has submitted them to Mr Pommells. The appellants say that one certificate had also been retained by her without their permission. With regard to the certificates delivered to Mr Pommells, the appellants' contention in their defence was that three certificates of title were given to Mr Pommells unauthorisedly, resulting in pending litigation. On the other hand, JM has explained her actions by reference to a document exhibited to her affidavit in which she indicated that the certificates had been pledged to Mr Pommells.

[47] The document exhibited to her affidavit was entitled "AGREEMENT", and actually speaks to a loan between Mr Pommells and Mr Christopher Kerr on certain terms. In the preamble it recognises the fact that Mr Kerr was engaged in a development of "the

project" on lands at 54 Norbrook Drive, Kingston 8, and that the parties had agreed that the certificate of title for the land (registered at Volume 1438 Folio 155 of the Register Book of Titles) should "be kept free and clear... in order not to impede the process of obtaining duplicate Certificates of Titles for the Project". It sets out the sum of money loaned (US$300,000.00 or J$25,500,000.00) and how the sums were to be repaid. It states that the parties agreed that in the event of a default of "payment of the monthly compensation and the principal due and owing" that Mr Kerr would execute a first legal mortgage on the security of two of the individual duplicate strata certificates of title. These two duplicate certificates of title would be in the custody of JM&Co "for safekeeping for and on behalf of the Lender".

[48] There was no explanation from the parties with regard to their competing positions. There was no indication whether there had been a default on the repayment obligations, whether a first legal mortgage had been executed, and no indication as to whether, as a consequence of all of this, the two duplicate certificates of titles ought to have been given to Mr Pommells by JM. These issues, however, could no doubt be clarified and resolved readily.

[49] JM had also confirmed in her affidavit that she had executed instruments of discharge of the caveats that she had lodged against the relevant certificates of title, but she had delivered those instruments to her attorneys-at-law. This was in breach of the settlement agreement, but she said that her attorney had undertaken to submit the same to the appellants once there was evidence that funds were in place to establish

the joint account in respect of the $20,500,000.00 as provided for in the settlement agreement.

[50] So, at the end of the day, there was no evidence that all the relevant certificates of title had been submitted to the appellants, and no evidence that the discharge of the caveats, or releases of all liens had been submitted to the appellants either.

[51] The learned judge did not appear to consider this aspect of the case sufficiently, and certainly, in my view, not satisfactorily in respect of whether the appellants had a good defence to the claim. JM's explanation for why it is that she has not demonstrated that she has released all caveats, and presented the discharges of the same to the appellants is that she would be prejudiced if all the documents were in the possession of the appellants without any protection of her ultimate payment of fees. In spite of that, the position is that she has not submitted the discharges of caveats, as agreed, and as a consequence, she is in breach of the settlement agreement for having not done so.

[52] In my opinion, in executing the terms of the settlement agreement, the parties envisaged that both sides would comply with all of their obligations set out therein. As indicated, both sides were to submit documents, pay the accountants their one-half share of the accountants' fees, and the accountants were to do the work to ascertain the extent of the fees allegedly due to the law firm. Additionally, JM was to submit the releases of the caveats on payment of the $12,500,000.00, which was payable on execution of the settlement agreement. Gordon|McGrath were to provide the letter of

undertaking secured by the joint account between Clough Long & Co and Gordon|McGrath, to pay the balance of fees, bills, disbursements as determined by the accountants as agreed by the parties.

[53] Indeed, subsequent to receipt of the written submissions in this matter as it was being considered on paper, we directed the registrar to request counsel to make further submissions on the following:

> "The settlement agreement between the parties recognizes that on payment of $12.5M, the law firm was to have released all caveats and all liens, registered or held by it against property 'owned by Christopher & Donald Kerr, Pauline James, as well as the Clients', and 'deliver all duplicate certificates of Title in its possession to [Gordon|McGrath] along with Vendors and Purchasers statement of account for each such unit sold'.
>
> The claim seeks specific performance of the settlement agreement, and in particular, two elements thereof.
>
> Why, therefore, should the default judgment have been restricted to the two elements of the settlement agreement?
>
> Was the learned judge, on the application to set aside, obliged to consider varying the default judgment in order to mandate the [respondents] to specifically perform their obligations under the agreement as well?"

[54] Submissions were received by both counsel representing the parties but with the greatest respect to counsel, the respective submissions did not assist us in our deliberations, as counsel in the main reiterated their previous submissions without really addressing the point submitted to them.

[55] The order of Sykes J (as represented by the default judgment) declares that moneys are owed by the appellants, when this has not yet been determined, as agreed by the parties. The order also requires that the appellants should authorise Gordon|McGrath and Clough Long & Co to pay out fees and disbursements found to be due to the respondents (which has not yet been determined), being held on their behalf (which funds are currently not being so held).

[56] It is clear to me that on all accounts, on the basis of the above, the appellants did have a realistic chance of success in defending the claim. The defence before the court challenged the position of the respondents to specially obtain specific performance of the settlement agreement only in relation to certain clauses, when they have not complied with obligations placed on them in the agreement. The parties, relying as they were on the terms of the settlement agreement, seemed to be praying the court's aid to dispose of their competing contentions.

[57] I also find it to be of some significance that the first claim filed by JM (t/a as JM&Co) allegedly, or so styled, sought specific performance of the settlement agreement without any limitation. That for me was telling, and the affidavit in support of the injunction referred to the letter of undertaking and the funds to be established in the joint account. The default judgment was obtained when that claim was still extant. In all these circumstances, it does not seem that paragraphs 4, 5, and 6, of the agreement are the only clauses that require specific performance in respect of the settlement agreement, and the defence and the documentation before the court on the application to set aside the default judgment demonstrated that.

[58] The order for specific performance of the agreement was specifically in respect of paragraphs 4, 5 and 6 of the settlement agreement, represented in claim no 2016CD00019 in orders 2 a) and b) of the claim form (as stated in paragraph [14] herein). The order also directed performance of another clause, which, based on the agreement, could not be achieved, as has been previously indicated, the funds were not in place. This would call for the default judgment to be set aside. However, that is not the end of the discussion.

[59] As also indicated previously, the court has powers under rule 13.3 of the CPR to set aside or vary a judgment entered under Part 12 of the CPR, if the defendant has a real prospect of successfully defending the claim. I have already stated that the appellants had a real prospect of successfully defending the claim. Under rule 13.3 of the CPR the court must consider whether the applicant has applied to the court as reasonably practicable after finding out that judgment had been entered. That was so in this case. The application to set aside the default judgment had been filed within 14 days after the default judgment had been served on the appellants.

[60] With regard to rule 13.3(2)(b), was there a good reason for failing to file the defence? The appellants said that they were dealing with a multiplicity of suits and had difficulty in giving their attorneys instructions timeously. They stated that the first claim for similar reliefs was still extant and also required their attention. Even if this may not be considered a good reason, as the learned judge in the court below so found, the delay occasioned by their failure to act was clearly not inordinate, as the delay in filing the defence was approximately three months outside the required time frame.

[61] The court was therefore in a position to exercise its powers under this rule. In the circumstances of this case, there appears to be no basis for the matter to go to case management for a trial date to be set. In the interests of justice, and good administration, and in furtherance of the overriding objective in dealing with cases justly, and in particular, saving the parties unnecessary expense, and, finally, ensuring that the matter is dealt with expeditiously and fairly, and only taking up so much of the court's resources as needs be in order to allot resources to other cases, this seems an appropriate case for the court to exercise its powers under rule 13.3(3) to vary the default judgment, and I would so order. It is in this respect that I found that the learned judge erred. The respective positions taken by the parties and an examination of the provisions of the agreement, ought to impel the court, in my mind, to enforce the performance of the agreement by the parties through their compliance with the specific obligations that they had agreed to do, and had undertaken to satisfy.

[62] I would therefore order that the appeal ought to be allowed in part. The default judgment entered on 27 September 2016 ought to be varied, and the order made by Sykes J on 8 January 2018, refusing to set aside the default judgment, ought also to be varied.

[63] Bearing in mind how I see the conclusion of this matter, I did not think it was necessary to refer to the other grounds dealt with by my learned brother, Brooks JA. Suffice it to say I was not of the view that a defence filed out of time subsequent to submissions having been heard, but before the decision of the court had been given, and without any order of the court extending the time to do so and or without the

consent of counsel, was effective. There was therefore no obligation on the part of the respondents to bring the same to the attention of the learned judge, so no duty of disclosure either existed or was breached in that regard. Equally, I was not of the view, that in the circumstances, although I had some sympathy for the appellants with the several suits requiring attention, and especially the earlier claim with similar reliefs to those made in the instant claim, there were circumstances of an abuse of process. The claimant in the first claim, and the claimants in the second claim were different. It was evident that to proceed to claim relief under and therefore relying on the settlement agreement the correct participating parties in law had to initiate the claim.

[64] In my view, the learned judge, in the exercise of his discretion on those issues, cannot be faulted for rejecting the submissions in that regard.

[65] The respondents would have been entitled to costs in the court below since the application was necessitated by their failure to comply with the CPR. Since the appeal is allowed in part only, the appellants would also have been entitled to a portion of their costs on the appeal. In my view, however, the interests of justice would be better served if all parties were to bear their own costs on the appeal, and I would so order.

[66] In all the circumstances I would propose the following orders:

1. The default judgment entered on 27 September 2016, should therefore be varied to read as follows:

"IT IS HEREBY DECLARED AS FOLLOWS:

1. The [appellants] owe the [respondents] such money for fees and disbursements as shall be determined by BDO pursuant to the settlement Agreement dated 10 March 2015.

IT IS HEREBY ORDERED AS FOLLOWS:

2. There shall be Specific Performance of the Settlement Agreement dated March 10, 2015.

3. Costs to the [respondents] to be taxed if not agreed."

2. The court shall give directions and have oversight of the completion of the settlement agreement.

3. The order of Sykes J made on 8 January 2018 should be varied to read as follows:

"The application succeeds in part. The default judgment entered on 27 September 2016 is varied to read [as set out above]."

4. There shall be no order as to costs in this appeal.

BROOKS JA (DISSENTING IN PART)

[67] This is a procedural appeal arising from the refusal by a judge of the Supreme Court to set aside a judgment, which he had previously ordered to be entered in default of a defence being filed. The appellants, Plantation Holdings Limited, Plantation Developments Company Limited and a director of both, Mr Christopher Kerr, are aggrieved by the learned judge's refusal. They were the defendants in the court below.

[68] They contend that the learned judge improperly exercised his discretion in refusing to set aside the default judgment, which was entered in favour of the

respondents, Mesdames Jennifer Messado and Lanza Turner-Bowen, the partners of the law firm Jennifer Messado & Co (the law firm). According to the appellants, the learned judge misdirected himself as to the facts of the case, misdirected himself as to the contents of the defence that they wish to advance, and misdirected himself as to the procedure required for the proper conduct of the litigation. These errors, they contend, resulted in his employing an incorrect approach to the case, and arriving at a flawed conclusion and decision.

[69] The appeal, but for oral submissions on one point, was considered on paper. Mrs Turner-Bowen died in the time between the hearing of the appeal and the delivery of this judgment (the delay in which is regretted). Her untimely passing, which is also regretted, does not prevent the delivery of the judgment.

The background to the application before the learned judge

[70] The background to the application that was before the learned judge is set in the context where the law firm acted for the appellants in various land developments. Mrs Messado was the attorney-at-law in the law firm, who had conduct of the appellants' legal work. Apparently, she and the appellants had a disagreement, and the appellants retained other attorneys-at-law to represent them. The law firm handed over the appellants' files and presented a bill for $33,000,000.00 for work done. It, however, retained, by way of an exercise of a lien, some documents, including duplicate certificates of registered titles for some of the properties forming part of one of the land developments. The law firm also lodged caveats against titles for properties owned by the appellants, whether individually or collectively.

[71] The appellants disputed the bill. The parties sought to resolve the dispute by agreeing to have a firm of accountants determine the amount owed by the appellants, if any. On 10 March 2015, the parties signed an agreement (the settlement agreement) aimed at achieving resolution. By the settlement agreement, the appellants were required to pay over to Messrs Clough Long & Co a cheque in the sum of $12,500,000.00 being an initial payment on account of the amount that the law firm had claimed was owed by the appellants. Pursuant to the settlement agreement, Clough Long & Co was required to pay over the cheque to the law firm, upon the law firm having performed the tasks set out below.

[72] The law firm should have:

a. removed the caveats it had lodged against the titles for property owned by the appellants and parties connected to the appellants;

b. handed over the titles and other documents that it had retained by way of exercise of a lien;

c. handed over all statements of accounts for units already sold; and

d. delivered and transferred to Messrs Gordon|McGrath, attorneys-at-law, all undertakings given to it in respect of ongoing sales of units in the development.

The titles and other documents, mentioned above, should have been handed over to Messrs Gordon|McGrath.

[73] In addition to the sum of $12,500,000.00, the appellants should have arranged for a further sum of $20,500,000.00 to be paid into a joint account in the names of Clough Long & Co and Gordon|McGrath. Gordon|McGrath was thereafter to give an undertaking "to pay the balance of fees, bills and disbursements as shall be determined," by the accountants (paragraph 3 of the settlement agreement).

[74] In order to obtain the opinion of the accountants, each side agreed to turn over to the accountants, the documents it relied upon. Each side also agreed to pay a half of the accountants' fee for carrying out the exercise. The handing over to the accountants was to have been done within 30 days of the signing of the settlement agreement.

[75] Although those were the major elements of the settlement agreement, other aspects shall be mentioned below in the context of issues as relied on by either of the parties for its particular purposes. The relevant portion of the settlement agreement has already been set out in the judgment of Phillips JA. It is unnecessary to set it out again.

[76] By a variation of the settlement agreement, the appellants paid the sum of $12,500,000.00, mentioned above, directly to the law firm, instead of to Messrs Clough Long & Co. Mr Kerr deposed, at paragraph 6 of his affidavit filed on 16 May 2017, that the sum was paid to the law firm, and he exhibited an undated receipt issued by the law firm. The record does not otherwise disclose the date of the payment, but based on an affidavit filed by Mrs Messado in June 2015, it appears that the appellants made the payment during March 2015.

[77] Mrs Messado filed that affidavit as part of a claim that she alone filed in June 2015, seeking specific performance of the settlement agreement. More details will be given of the contents of that affidavit, but it is sufficient, at this stage, to state that Mrs Messado deposed that she had:

a. prepared all the documents required by the settlement agreement;

b. handed over such titles that she had; and

c. was ready to present the material to the accountants,

but that the appellants had not set up the joint account for the holding of the $20,500,000.00, or indicated a readiness to hand over their material to the accountants. She filed that affidavit in support of an application for the court to prevent the appellants from using the titles, which she had handed over. That application was ultimately withdrawn, and the claim itself was discontinued on 8 June 2017.

[78] The next significant development for these purposes was that the law firm's attorneys-at-law wrote a letter, dated 17 January 2016, to the appellants. In that letter, the attorneys-at-law asked whether the appellants were ready to submit the documents to the accountants, or had already done so. The attorneys-at-law indicated in their letter that the law firm was "ready to proceed".

[79] There was no acceptable response, and the respondents filed the claim, which is the subject of this appeal. The particulars of claim asserted that the respondents practised "as the firm of Jennifer Messado & Co". The claim was essentially for:

a. a declaration that the appellants were indebted to the law firm;

b. specific performance of the settlement agreement; and in particular,

c. the delivery of the documents and the payment of the money to the accountants, in order for the accountants to perform the services mentioned above.

[80] The claim documents were served on the appellants on 11 March 2016. They filed an acknowledgment of service on 23 March 2016. In the acknowledgment of service, they denied any liability. They should have filed and served a statement of defence by 22 April 2016 (rule 10.3(1) of the Civil Procedure Rules (CPR)). They failed to do so.

[81] The respondents applied for judgment in default of defence, but the nature of the claim required the application to be considered by a judicial officer. The learned judge heard the application on 14 and 20 June 2016. He reserved his decision, and, on 27 September 2016, handed down a written judgment granting the judgment in default of defence. The relevant portion of the formal order states:

"IT IS HEREBY DECLARED AS FOLLOWS:

1. The [appellants] owe the [respondents] money for fees and disbursements;

IT IS HEREBY ORDERED AS FOLLOWS:

2. Specific Performance of the Settlement Agreement dated March 10, 2015 specifically [:]

    a) That the [appellants] [pay] half the fees and costs of [the accountants] to prepare a report determining the fees, bills and disbursements owed to the [respondents];

    b) That the [appellants] present all papers, documents, bills, receipts and evidence to the accountant within 7 days from the date of judgment;

3. The [appellants] shall authorize Gordon|McGrath and Clough Long & Co. to pay out such fees and disbursements found to be due to the [respondents] by [the accountants] being held on account by them on their behalf;

4. Costs to the [respondents] to be taxed if not agreed."

[82] During the time between the reserving and the delivery of the decision, the appellants purported to file and serve a statement of defence. They filed the document on 11 July 2016, which was almost three months late. They did not then apply for an extension of the time within which to do so. Without the consent of the respondents, the document would have been of limited value. The appellants asserted in the document, that the law firm had:

a. charged for its services in an improper manner;

b. improperly retained the appellants' duplicate certificates of title;

c. failed to hand over all documents and titles despite the appellants having made the payment that was stipulated in the settlement agreement;

d. improperly handed three of the titles to a party with whom the appellants were contending in litigation; and

e. filed the claim despite the fact that Mrs Messado had previously filed another claim, which sought similar relief to that requested in the present claim.

[83] On 13 February 2017, the respondents served the appellants with the formal order for the default judgment. On 27 February 2017, the appellants filed their application to set aside the default judgment. A major aspect of their application was that the claim was an abuse of process, in that Mrs Messado had an existing claim, which was seeking the same remedy.

[84] The appellants filed an application on 16 May 2017 asking for an order that Clough Long & Co pay over the sum of $12,500,000.00 into a joint account in the names of attorneys-at-law who were representing the parties in the claim. The application was wholly misguided, as the sum had never been paid to Messrs Clough Long & Co. It does not appear that it was either heard or ruled upon.

[85] On 9 June 2017, the appellants filed an amended notice of application for court orders seeking to have the default judgment set aside. The amendment sought an

extension of time for the filing of the defence and for the claim to be struck out, as an abuse of process.

[86] In addressing the requirements for setting aside the default judgment, the appellants asserted, in attempted compliance with rule 13.3 of the CPR, that:

a. the delay in filing the defence was not inordinate;

b. the delay was caused by the need to do extensive research in relation to this claim as well as other matters;

c. the filing of the claim was an abuse of process given the existence of Mrs Messado's claim; and

d. they had a real prospect of defending the claim as the respondents were seeking specific performance of the settlement agreement but had not themselves fulfilled their obligations under that agreement.

[87] The learned judge heard the appellants' application on 30 June 2017. On 8 January 2018, he handed down his written decision refusing it.

The judgment of the learned judge

[88] In his characteristically careful style, the learned judge assessed the application against the requirements set out in rule 13.3 of the CPR. He set out in his written judgment, his reasons for refusing the application. He found that:

a. the application had been made promptly; but

b. there was no good explanation for the failure to file the defence within the prescribed time; and

c. the proposed defence had no real prospect of success.

The learned judge stressed that the appellants had not provided any material that showed that they did not owe the law firm any money, or that they had performed the tasks that the settlement agreement required of them. On that basis, he held that they had no real prospect of defending the claim.

[89] Rule 13.3 of the CPR, to which the learned judge properly referred, states:

> "(1) The court may set aside or vary a [judgment] entered under Part 12 if the defendant has a real prospect of successfully defending the claim.
>
> (2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
>
> (a) applied to the court as soon as 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.
>
> (3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.
>
> (Rule 26.1(3) enables the court to attach conditions to any order.)"

He granted leave to appeal. It is that appeal, which is the subject of this judgment.

The appeal

[90] The appellants filed several grounds of appeal. They are:

"(i) The Learned Judge erred in his interpretation of the facts and as such arrived at the wrong conclusions of both fact and law;

(ii) The Learned Judge failed to adequately consider the terms of the Agreement being the subject of the Claim herein, that it was the [respondents] who failed to adhere to the provisions of the Agreement detailed in Clauses 2, 8, 9, 10 and 11 which has resulted in the non-performance of the Agreement;

(iii) The Learned Judge misdirected himself with regard to the instant claim and the previously filed Claim No. 2015CD00077 [filed by Mrs Messado] wherein the same enforcement of the agreement was in issue, and that the filing of the instant claim is an abuse of process;

(iv) The Learned Judge misdirected himself as to the contents of the Defence and as such fell into error when he concluded that there was no real prospect of success;

(v) The Learned Judge failed to appreciate that it was his own judgment which granted the Default Judgment to which the Appellants referred concerning there being no Defence on the Court file up to the 27th September, 2016, when the Defence was actually filed and served on July 11, 2016;

(vi) The learned Judge...erred when he rejected the [Appellants'] reasons for the failure to file the Defence by the timelines set by the Court and further failed to appreciate that one of the orders requested by the [appellants] was that the Defence of the 1st, 2nd and 3rd [appellants] filed on July 11, 2016 do stand; which would axiomatically mean a request for an extension of time to file the said Defence;

(vii) That shutting out the [appellants] from successfully defending the claim is a draconian action and one which the Court should exercise only in circumstances where the [appellants have] no chance of defending the Claim.

> The case at bar and the evidence presented to the learned Judge of the egregious acts of the [respondents] were not properly considered and [caused] the learned Judge to arrive at the wrong conclusions."

[91] These grounds may be analysed in the context of issues of fact (ground (i)), issues of law (grounds (ii), (iii) and (iv)) and issues of procedure (grounds (v), (vi) and (vii)). They will be so examined below.

[92] It must be borne in mind, however, that the assessment of those issues is to be done in the context of the overarching consideration that this court will not lightly set aside a decision made by a judge at first instance, in the exercise of a discretion, which is given to that judge. This was well explained by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, at page 1046:

> "[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**." (Emphasis supplied)

That principle has been accepted by this court in a number of its decisions. Morrison JA, as he then was, explained at paragraph [20] of **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, the grounds on which this court will set aside the exercise of a judge's discretion:

> "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'**." (Emphasis supplied)

The issues of fact (ground (i))

[93] In their notice of appeal, the appellants identified a number of the learned judge's findings of fact, with which they disagreed. Of the seven paragraphs of the judgment, which the appellants alleged had contained findings of fact, only three, generally speaking, could be said to have done so.

[94] The first, is paragraph [13] of the judgment, in which the learned judge decided that the reasons advanced for the delay in filing the defence, were not good reasons. As was mentioned above, the appellants' explanation for missing the deadline was that they were involved in investigating a number of issues. The issues, they said, involved other litigation as well as this claim. The appellants are not on good ground with their complaint that the findings of fact are unreasonable.

[95] The learned judge put his finding in the context of the administration of justice. He cited **Mitchell v News Group Newspapers Ltd** [2014] 2 All ER 430 in support of the principle that litigation must now be conducted with a greater sensitivity for the administration and dispensation of justice, not so much for individual cases, but for the majority of cases. The learned judge referred specifically to paragraph [41] of their Lordships judgment in **Mitchell v News Group Newspapers Ltd**, in which they said that overwork is unlikely to be a good reason for missing deadlines. The learned

judge cannot be properly criticised for adopting that approach. Paragraph [41], mentioned above, stated, in part, that:

> "…**But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason**. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. **Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all.** This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms [proposed in England] were intended to change will continue...." (Emphasis supplied)

[96] The second paragraph, containing findings of fact, to be considered, is paragraph [19] of the judgment. In that paragraph, the learned judge made only two findings of fact. He found, firstly, that nowhere in the proposed defence did the appellants state that they did not owe Mrs Messado or the law firm any money. The learned judge also found that the proposed defence did not answer the paragraphs of the settlement agreement that the respondents were stressing in support of their claim. Those were accurate statements of fact by the learned judge. The appellants are not on good ground in complaining against these findings. The learned judge supported his findings of fact in paragraph [19] of his judgment. He said, in part, that:

> "...Nowhere in the defence does it say that Mrs Messado or the firm was not owed money. The [appellants] in effect

> admit signing the agreement because they say that they will ask the court [to look] at it because they are relying on it for its full effect and meaning. The [appellants quote] paragraphs 1, 2, 8, 9, 10 and 11 of the agreement but remarkably [make] no reference to paragraphs 4, 5, and 6 which are the paragraphs on which the claim and judgment are based. The [appellants] plead the alleged sins of Mrs Messado. Even assuming that Mrs Messado has committed the various breaches attributed to her those breaches respectfully are not a defence to (a) whether she or the law firm is owed money; (b) not presenting the papers to the accountants in accordance with the March 2015 agreement and (c) not paying the accountants."

[97] It is noted, however, that Mrs Messado deposed that she did carry out specific tasks. On her account, the only task that she did not faithfully perform was to hand over the instruments withdrawing the caveats. In that regard, she said that she had delivered the instruments to her attorney-at-law, who had undertaken to deliver them to the appellants as soon as the joint account with the $20,500,000.00 had been established.

[98] The appellants did not specifically answer Mrs Messado's assertions. Their general statement that "the [respondents] themselves have not fulfilled their obligations which are conditions precedent to the further performance by the [appellants]" (paragraph 17 of the affidavit of one of the appellants' attorneys-at-law, Ms April Grapine-Gayle, filed on 9 June 2017) is not a proper basis for asserting that the learned judge made an incorrect finding of fact.

[99] The third paragraph of the judgment, concerning findings of fact, is paragraph [32]. In that paragraph, the learned judge found, on an assessment of the

proposed defence, that the appellants had not joined issue with the claim in respect of critical matters. He said:

> "...The [appellants] have not said:
>
> (a) no money is owed to the [respondents];
>
> (b) they did not sign the agreement;
>
> (c) that they have turned over the documents to the accountant as agreed;
>
> (d) that they have paid the accountant their portion of the money."

[100] Those are accurate statements of fact. In their proposed defence, the appellants, at best, only took umbrage to the fact that they had been asked to comply with the aspects of the settlement agreement, which were specified in the claim, while the law firm had not done what it should have done under the settlement agreement. The appellants said at paragraph [21] of the proposed defence:

> "The [appellants] will say that by not removing the caveats and handing over **the correct number** of duplicate Certificates of Title, [Mrs Messado] has not complied with Clause 2 of the Agreement which compels her to do the same. The [appellants] will say that [Mrs Messado] is hereby insisting on the performance of Clause 4 of the Agreement whilst [she] has not performed her obligations under Clauses 2, 8, 9, 10, and 11 of the Agreement." (Emphasis supplied)

The use of the term, "the correct number", in that paragraph, seems to support Mrs Messado's assertion that she did hand over some titles to the appellants.

[101] The learned judge concluded from those findings of fact that the proposed defence had no real prospect of success. That is a finding of law. Such findings will be addressed below.

[102] None of the appellants' complaints about findings of fact, by the learned judge, have any merit.

The issues of law (grounds (ii), (iii) and (iv))

[103] The appeal raises three distinct issues of law, namely, whether:

a. the appellants had a real prospect of defending the claim;

b. the filing of the claim is an abuse of the process of the court in light of the existence of the previous claim; and

c. the failure to disclose that the appellants had filed a late defence deprived the respondents of the right to hold the default judgment.

a. Whether the appellants have a real prospect of defending the claim

[104] As was mentioned above, the learned judge found as a matter of law that the prospective defence had no real prospect of success. He did so in the following paragraphs of his judgment where he found that:

> [20] – the appellants had not challenged the validity of the settlement agreement, and that the essence of the respondents' claim had not been denied;
>
> [32] – the prospective defence had "no realistic prospect of success because it has not controverted the main claims on which the judgment is based"; and
>
> [33] – the appellants had not "joined issue with the respondents on the matters relied on to secure the summary judgment".

[105] In this appeal, the appellants contend that the proposed defence has a real prospect of success, and that the learned judge was wrong to find otherwise. They argue that a party to a contract, who had failed to perform an aspect of the contract, was barred from seeking performance of other aspects of the contract, by another party to that contract. In the written submissions to this court, they did not cite any specific authority to support that contention, but relied on the equitable maxim that, "he who seeks equity must come with clean hands".

[106] Relief in equity is, however, a matter of discretion. In this case, the learned judge was being asked to set aside a judgment. That judgment consisted, in part, of orders for specific performance of the settlement agreement. In refusing to set aside the judgment, the learned judge addressed the complaint that the law firm had not performed its obligations under the settlement agreement (see paragraph [19] of his

written judgment, which, has already been quoted above). It is, however, relevant at this point to note that, in that paragraph, the learned judge did consider the accusation of non-performance by the respondents:

> "…The [appellants quote] paragraphs 1, 2, 8, 9, 10, and 11 of the agreement...The defendants plead the alleged sins of Mrs Messado. Even assuming that Mrs Messado has committed the various breaches attributed to her those breaches respectfully are not a defence to (a) whether she or the law firm is owed money; (b) not presenting the papers to the accountants in accordance with the March 2015 agreement and (c) not paying the accountants."

It would not be therefore, correct, to say that the learned judge did not address that aspect of the appellants' case.

[107] It is true to say that the evidence of performance by the law firm is not entirely clear, but the appellants only made a bald assertion of non-performance. In his affidavit in support of the original application to set aside the default judgment, filed 16 May 2017, Mr Kerr asserted at paragraph 8 that the law firm "has not fully complied with the provisions of paragraphs 8, 9, 10, 11 and 12" of the settlement agreement. The use of the term "fully complied" suggested that there had been some compliance. It has already been mentioned that the appellants seem to have accepted that Mrs Messado did deliver some of the certificates of title.

[108] In their amended application to set aside the default judgment, the appellants asserted that "the [law firm is] seeking to enforce the performance of obligations under the contract by the Defendant[s] when the [law firm has] not fulfilled [its] obligations which are conditions precedent to further performance by the

Defendants" (see paragraph 12). The affidavit in support of that application was sworn to by Ms Grapine-Gayle. In addressing this aspect of the application, Ms Grapine-Gayle merely:

a. repeated the broad statement that the law firm had "not fulfilled [its] obligations which are conditions precedent to further performance by the [appellants]" (see paragraph 17 of the affidavit filed on 9 June 2017); and

b. relied on the equitable maxim referred to above.

[109] Curiously, however, Ms Grapine-Gayle exhibited an affidavit that Mrs Messado had sworn to in the claim that she had filed before filing the claim, which is the subject of this appeal. In that affidavit, sworn to on 15 June 2015, Mrs Messado deposed to specific items of performance. She said that:

a. the sum of $12,500,000.00 should have been paid to Messrs Clough Long & Co and then handed over to her "on certain conditions being met" (paragraph 8);

b. the parties varied the settlement agreement by agreeing that the appellants and the appellants' representatives would attend her offices and satisfy themselves that clause 2 of the settlement agreement, dealing with the performance of the law firm's obligation, had been satisfied (paragraph 9);

c. the appellants' representatives did attend her office "and duly paid to me cheque in the sum of $12,500,000. They further duly satisfied themselves that all the preconditions for the payment of the said cheque were satisfied" (paragraph 10);

d. she did hand over to the appellants' representatives:

   i. "all the relevant sale files in her possession with respect to the properties in the development" (paragraph 11); and

   ii. "14 original duplicate certificates of title for properties in the…development" (paragraph 11);

e. there were two other certificates of title that she could not have handed over to the appellants' representatives because the appellants had pledged them to a third party as security for loans, and those titles had been delivered to the pledgee's attorney-at-law; and

f. she had executed instruments of discharge for the caveats that she had lodged against the titles and she had delivered those instruments to her attorney-at-law, who had undertaken to deliver them to the

> appellants as soon as there was evidence that the funds were in place to establish the joint account for $20,500,000.00 as provided for in the settlement agreement.

Mrs Messado's affidavit purported to have exhibited documentary support for the assertions as to the titles that were handed over and as to the pledge given by the appellants. Those documents, however, were not included in the record of appeal.

[110] This court, nonetheless, secured copies of the documents from the Supreme Court. The documents purport to be copies of the certificates of title and other documents to which Mrs Messado referred in her affidavit.

[111] Purely as an aside, the pledge of titles to which Mrs Messado referred was not strictly a pledge. It was an agreement between Mr Kerr and a Mr Pommells that in the event that Mr Kerr did not repay monies owed to Mr Pommells, Mr Kerr would execute a first legal mortgage over two of the relevant titles and that those titles would be "in the custody of [the law firm] for safekeeping for and on behalf of [Mr Pommells]". In the event that the monies were not repaid, the appellants could not properly complain that the two titles were not delivered to them. The appellants have not asserted that there was repayment.

[112] As has already been pointed out, Mrs Grapine-Gayle did not seek to contradict any of the assertions in Mrs Messado's affidavit. Nor did she contest the validity or accuracy of any of the documents exhibited to it. She was content to rely on

the affidavit only to demonstrate that Mrs Messado had previously filed a claim dealing with the same subject matter as the claim, which is the subject of this appeal.

[113] Paragraph [19] of his judgment demonstrates that the learned judge did not ignore the allegations of the respondents' failures. It is however true, that he only did so generally. There is one failure of the law firm that he did not consider; it is the failure to deliver the instruments of withdrawal of caveat to the appellants.

[114] Instead of delivering the instruments of withdrawal to the appellants, Mrs Messado had delivered them to her attorney-at-law. She had sought to justify her failure, strictly to abide by the terms of the settlement agreement. She set out that justification in her affidavit filed in her 2015 claim. After deposing that the appellants had failed to pay the sum of $20,500,000.00 for the establishment of the joint account, as security for her fees, she said, in part, at paragraph [20] of that affidavit:

> "…I have [given those documents to the attorneys-at-law] because, as stated above, I have already handed over the duplicate certificates of titles and sales files [to the appellants]. I verily believe that if I also hand over the [withdrawal of] caveats, there would be no impediment to the [appellants] proceeding to complete all the sales in the development without paying my fees. The intention of the parties and the whole purpose of the agreement between myself and the [appellants] was to provide a mechanism by which I would have security for my fees by the payment of the $10,500,000 [sic] and the establishment of the joint account in consideration for me releasing all liens on the titles in my possession."

[115] It is true, therefore, that the learned judge did not specifically consider the appellants' contention that the law firm, in seeking equity, by way of specific

performance of aspects of the settlement agreement, should have done equity by performing their obligations under the settlement agreement. Nonetheless, when Mrs Messado's explanation for her alternative arrangement is considered, the learned judge arrived at the correct position. The equitable situation was for both sides to be protected. The default judgment would have a proper basis to achieve that result, in that, in performance of the judgment:

a. the accounting would have been done;

b. the release of caveats could have been secured upon the establishment of the joint account and the giving of an undertaking by Gordon|McGrath;

c. the payment of the monies due to the law firm could then have been made.

The learned judge cannot be faulted for his decision based on principles of equity.

[116] It is unfortunate that the default judgment requires Gordon|McGrath to make a particular payment when, based on the evidence, they had not yet been placed in a position to make that payment. The envisaged payment should have been made from the sum of $20,500,000.00 that should have been placed into an account under the control of Gordon|McGrath and Clough Long & Co. The default judgment should have included an order that the appellants should have paid over that sum so that it could have been placed in a bank account set up for that purpose.

[117] Such an order could be the subject of an additional application for court orders.

b. Whether the filing of the claim is an abuse of the process of the court in light of the existence of the previous claim

[118] The learned judge found that the respondents' claim was not an abuse of the process of the court. Strictly speaking, that is a finding of fact (see **Aldi Stores Ltd v WSP Group plc and others** [2008] 1 WLR 748 at paragraph 16), but it is guided by several principles of law.

[119] This finding was also an exercise of the learned judge's discretion to refuse to set aside the judgment based on abuse of process. The alleged abuse, as mentioned above, is because the claim was filed while Mrs Messado's previous claim, seeking the same relief, existed.

[120] In respect of this aspect of the appeal, learned counsel for the appellants argued that the circumstances required the application of the principles established in **Henderson v Henderson** (1843) 3 Hare 100; [1843-1860] All ER Rep 378; (1843) 67 ER 313. That principle generally requires a court to prevent a party from raising, in a fresh claim, an issue that it could have raised in an earlier claim.

[121] The learned judge considered the point. In doing so, he assessed the relevant cases, including **Johnson v Gore Wood & Co (A firm)** [2001] 1 All ER 481 and **Hon Gordon Stewart OJ and others v Independent Radio Company Limited and another** [2012] JMCA Civ 2, and drew certain principles from them. The

learned judge pointed out, at paragraph [37] of his judgment, that the issue of striking out a claim, based on abuse of the process of the court, by this means, would only be applicable if the judgment in default had been set aside. He declined, in exercise of his discretion, to take that step. He stated in that paragraph that there were differences between the two claims:

> "…the court observes that Mrs Lanza Turner-Bowen was not named as a party to the 2015 claim. The remedies sought were not identical. Having regard to the cases cited above [dealing with abuse of process]…the court declines to exercise its discretion to strike out the claim on the basis of abuse of process. In any event, the exercise of this power would depend on whether the judgment is set aside."

[122] The learned judge's reasoning, in this regard, cannot be faulted. An important principle to be derived from **Johnson v Gore Wood & Co** is that the court should not utilise a mechanical approach to the issue of previous claims. Their Lordships made it clear that a court should consider the facts of each individual case.

[123] In this case, Mrs Messado's previous claim was not going forward. It might well have been doomed, considering that it was the law firm that had entered into the agreement, which she was seeking to enforce. For that reason, the learned judge was correct in identifying Mrs Turner-Bowen's absence, from that previous claim, as being important.

c. Whether the failure to disclose that the appellants had filed a late defence deprived the respondents of the right to hold the default judgment

[124] The learned judge also found that the respondents' failure to disclose to the court that the appellants had belatedly filed a defence, did not mandate that the default judgment should be set aside. It must be remembered that that filing was during the time that the learned judge had reserved judgment on the application for the default judgment. He held, at paragraph [39] of his judgment, that the late filing of the defence could not have affected the application for judgment in default of defence. He said:

> "...The application for default judgment was properly made and the filing of the defence after the time permitted for filing the defence is of no moment. **The defence being out of time, in the absence of an application for an extension of time within which to file defence, cannot delay the application for judgment in default of defence or the grant of it.** The court is unable to accept the proposition that a litigant who is late and does not apply for an extension of time can delay a legitimate application for judgment in default of defence. The court will not say such a late filing has no legal significance but one which it cannot have is to precipitate a setting aside of a lawful default judgment in circumstances where no application for extension of time within [which] to file a defence is before the court. **Therefore the submission that this non-disclosure without more is sufficient to set aside the judgment on the basis of being irregularly obtained has no legal foundation in this court's view**." (Emphasis supplied)

[125] The appellants, in appealing from that finding, assert that the respondents' failure to disclose that the prospective defence had been filed did mandate the setting aside of the judgment in default. They cited authorities to demonstrate that where

there is a without notice application, the applicant has a duty to make full disclosure. These authorities included **Brink's-Mat Ltd v Elcombe and others** [1988] 3 All ER 188 and **Behbehani and others v Salem and others** [1989] 2 All ER 143.

[126] Despite the validity of those principles to other circumstances, especially without notice applications for injunctions, they did not apply to the situation under consideration. The prospective defence, which had been filed, did not affect the application that had been made. There was no application for extension of time for the filing of the defence. The appellants sought to rely on the notice of application for setting aside the default judgment, which included a claim for an order that the defence that was filed should "stand". That application, however, was filed after the fact. It did not affect the status of the proposed statement of defence while the learned judge was considering whether to allow the default judgment to be entered. It was within the discretion of the learned judge to reject the argument that disclosure was required in the circumstances. He did so after considering the appellants' submissions in respect of their assertions.

[127] It is true that, in **The Attorney General v Keron Matthews** [2011] UKPC 38, their Lordships of the Privy Council stated that the late filing of a defence does not automatically render it void, but their Lordships distinguished that situation from the one where a judgment in default had already been entered. They said at paragraph [14]:

> "...a defence can be filed without the permission of the court after the time for filing has expired. If the claimant does

> nothing or waives late service, the defence stands and no question of sanction arises. **If, as in the present case, judgment has not been entered when the defendant applies out of time for an extension of time, there is no question of any sanction having yet been imposed on him**…." (Emphasis supplied)

The attitude of the claimant in the case of the late service of a statement of defence is important in this regard. Where a judgment had been entered, it is clear from their Lordships reasoning that, apart from a sanction having been imposed, the claimant could not waive late service. In this case, their Lordships' reasoning could be extended to the situation, which existed in the court below, where the claimant has already applied for judgment in default of defence. A sanction may not yet have been imposed, but the claimant, having already applied for judgment in default of defence, would, most likely, be averse to waiving late service. The proposed document has very limited significance. It is not for the claimant to take a step to validate it.

[128] The learned judge's exercise of discretion in this regard cannot be faulted and accordingly the grounds in relation to these issues should fail.

Issues of procedure (grounds (v), (vi) and (vii))

[129] In ground (v), the appellants contend that the learned judge had failed to appreciate that "it was his own judgment which granted the Default Judgment".

[130] It must be stated, at the outset, that there is no rule in the CPR, nor is there a principle of law that prevents a judge from considering an application to set aside that judge's own order for the entry of a default judgment. Nor is there any requirement that that judge must specifically state that it is his or her order, which is under review.

[131] In any event, it is beyond credibility that the learned judge, whilst he was preparing for, hearing and considering the application to set aside the default judgment, would not have realised that the case before him was one that he had, just a year previously, considered. It must be noted that when he granted the application for the entry of the default judgment, the learned judge handed down, as is his wont, a written judgment (**Jennifer Messado and Another v Plantation Holdings and Others** [2016] JMCC Comm 26). In that judgment, the learned judge referred, albeit briefly, to the facts surrounding the dispute. He referred to:

a. the names of the parties, (at least one of whom is well known in the legal profession);
b. the client-attorney relationship between the parties;
c. the address of the property which was the subject of the development;
d. the law firm's claim for fees;
e. the settlement agreement between the parties; and
f. the failure of the appellants to deliver to the accountants, their portion of the fees along with the "papers, document, bills and receipts", on which they relied.

[132] Even then, failing to refer to his previous involvement in the case could not be fatal to his findings.

[133] With regard to ground (vi), it has already been pointed out that the relief claimed by the appellants, for the proposed defence to "stand", was well after the time when the learned judge was considering whether to grant the application for leave to enter a judgment in default. The claim for that relief could not have affected the learned judge's comment that the proposed defence had been filed without an application for extension of time within which to file same.

[134] Finally, the complaint set out in ground (vii) that the appellants had been shut out by "a draconian action" from defending the claim, is not a valid one. The learned judge arrived at his decision on a careful analysis of the case and the submissions. He took the philosophical position that adherence to the provisions of the CPR was an important part of the administration of justice in civil cases. He was entitled to arrive at the conclusion that he did. There is no failure in law or fact which would justify interfering with his decision.

[135] The grounds in relation to these issues should fail.

Summary and conclusion

[136] The principle in **Hadmor Productions Ltd v Hamilton** should be applied. The procedural appeal herein should be dismissed as the appellants have failed to show that the learned judge, in refusing to set aside the default judgment, erred in the exercise of his discretion.

SINCLAIR-HAYNES JA

[137] I have read, in draft, the judgments of Phillips JA and Brooks JA. The judgment of Phillips JA accords with my own views. It would appear to me that, in the interests of justice, since both parties are relying on the settlement agreement, the default judgment should be varied to reflect that position.

PHILLIPS JA

ORDER

By a majority (Brooks JA dissenting in part)

1. Appeal allowed in part.
2. The default judgment entered on the 27 September 2016 is therefore be varied to read as follows:

> "IT IS HEREBY DECLARED AS FOLLOWS:
>
> 1. The [appellants] owe the [respondents] such money for fees and disbursements as shall be determined by BDO pursuant to the settlement Agreement dated 10 March 2015.
>
> IT IS HEREBY ORDERED AS FOLLOWS:
>
> 2. There shall be Specific Performance of the Settlement Agreement dated March 10, 2015.
> 3. Costs to the [respondents] to be taxed if not agreed."

3. The Court shall give directions and have oversight of the completion of the settlement agreement.
4. The order of Sykes J made on 8 January 2018 is varied to read as follows:

> "The application succeeds in part. The default judgment entered on 27 September 2016 is varied to read [as set out above]."

5. There shall be no order as to costs in this appeal.