JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 58/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MS JUSTICE LAWRENCE-BESWICK (Ag)

BETWEEN	**ROHAN SMITH**	**APPLICANT**
AND	**ELROY HECTOR PESSOA**	**1ST RESPONDENT**
AND	**NICKEISHA MISTY SAMUELS**	**2ND RESPONDENT**

Richard Reitzin instructed by Reitzin and Hernandez for the applicant

John Givans instructed by Givans and Company for the respondents

16 June, 31 July and 26 September 2014

PHILLIPS JA

[1] This is an application for leave to appeal against the judgment of Edwards J made on 31 March 2014 in which she set aside a default judgment entered against the respondents by the applicant and ordered that the respondents' defence and counterclaim as well as an acknowledgment of service and amended acknowledgment of service filed on their behalf be allowed to stand as filed in time.

Background

[2] On or about 30 May 2011, the applicant and the 2nd respondent were involved in a motor vehicle accident along the Constant Spring main road in St Andrew. The applicant was riding a Siski motorcycle while the 2nd respondent, Miss Nickeisha Samuels, was driving a 1988 Honda Civic motor vehicle. As a result of the accident, the applicant sustained injuries and on 19 August 2011, he commenced proceedings against the 1st and 2nd respondents as owner and driver respectively of the Honda Civic motor vehicle, claiming damages, interest and costs.

[3] In paras 7 and 8 of his particulars of claim, the applicant gives this account of how the accident happened:

> "7. … the claimant was riding the motor cycle in an approximately northerly direction along Constant Spring Road near a shopping plaza (in the direction of Constant Spring). At the same time, the second defendant was driving out of [a] shopping plaza and attempting to make a right-hand turn across the northern-bound lanes of traffic in Constant Spring to begin travelling in an approximately southerly direction along Constant Spring (in the direction of Half Way Tree) whereupon the motor vehicle collided with the motor cycle.
>
> 8. The collision was caused by the negligence of the second defendant in and about her care, management and/or control of the motor vehicle."

[4] There is some dispute over the date of service of the claim. According to the respondents, on the one hand, both respondents were served on 6 September 2011, while, on the other hand, the 2nd respondent was served on 6 September and the 1st

respondent, Mr Elroy Pessoa, was not served. An acknowledgment of service was filed on behalf of both respondents on 4 October 2011 by Miss Nicosie Dummett, attorney-at-law for the respondents' insurers, NEM Insurance Co Ltd (as it was known then), indicating the date of service to be 6 September 2011, but this acknowledgment of service was subsequently amended and re-filed twice to indicate the non-service of the claim on the 1st respondent. The applicant, however, contends that both respondents were served on 29 August 2011, and on 19 August 2011 notice of the proceedings was served on NEM Insurance Co Ltd. Judgment in default of acknowledgment of service was requested by the applicant and entered on 14 September 2011. A defence and counterclaim was filed on 28 October 2011.

[5] On 2 December 2011, the respondents made an application seeking orders that:

1. The claim form and particulars of claim served without the proper claim reference number were not validly served.

2. The acknowledgment of service filed on 4 October 2011 be allowed to stand.

3. The time for filing the defence and counterclaim be enlarged to allow same filed on 28 October 2011 to stand and/or alternatively that the default judgment be set aside.

4. Permission be granted to file and serve the ancillary claim and particulars.

5. The respondents be granted relief from sanctions.

Among the grounds relied on were that the claim form and particulars had been served during the long vacation during which time did not run and that the claim form and particulars were without the claim number and could not be regarded as being properly served until the number was obtained on 27 September 2011. The application was supported by an affidavit filed by both respondents in which they stated that they had received the claim form and particulars on 6 September 2011 but the documents did not have a claim number. They deposed that they had handed the documents over to their insurer, NEM, on 8 September 2011 and that they had been advised by their attorney-at-law that the claim number was received on or about 27 September 2011. They further deposed that they had a good defence as "the long line of vehicles had stopped to allow the vehicle to exit the plaza" and they attached a copy of their draft defence. In the draft defence, several particulars of negligence were alleged against the applicant, which included overtaking a long line of traffic when it was unsafe to do so and travelling at "an excessive rate of speeding". An affidavit sworn to by Karlene DaCosta, a paralegal employed to NEM, was also filed on the same day on behalf of the respondents. Miss DaCosta confirmed that the claim number was obtained by her on 27 September.

[6] The application came on for hearing on 7 May 2012 before Master Bertram-Linton, at which time the matter was adjourned to 13 June 2012, apparently at the instance of the respondents, and the respondents were ordered to file and serve a further affidavit by 11 May 2012. There is no evidence as to what transpired at the

hearing of the matter on 13 June 2012, but Mr Reitzin, in his summary of the factual background, indicated that certain objections were raised on behalf of the applicant to the further affidavit of the 2nd respondent filed on behalf of the respondents on 11 May 2012. As a result of the objections, paragraphs of the affidavit were struck out wherein the 2nd respondent deposed that: the motorist who had allowed her to exit the plaza had put on his "four way flasher" and had "fanned down" the vehicles behind to allow her to exit the plaza; the speed at which the applicant's motorcycle had been travelling did not allow him to stop; and a police report, which was exhibited was "a true and correct representation of how this accident occurred". The hearing of the matter was then adjourned to 2 July 2012, but before that hearing date arrived, two affidavits, one sworn to by Miss Dummett and the other by the 2nd respondent, were filed on behalf of the respondents on 26 June 2012 and 2 July 2012 respectively. When the matter came up before Master Bertram Linton on 2 July 2012, she ruled that the respondents were not allowed to rely on the two affidavits in light of her previous order of 7 May 2012. The matter was adjourned thereafter to 12 July 2012, 24 October 2012 and 28 January 2013, for reasons which are not apparent from the record, and on 28 January 2013, it was dismissed by the Master for want of prosecution.

[7] On 21 May 2013, the respondents filed a second application seeking similar orders to those sought in the application made on 2 December 2011, in particular that the default judgment be set aside. The application was supported by an affidavit sworn to by the 1st respondent, stating that he had not been served as the claim had been served on the 2nd respondent at home when he was at work. He deposed that he and

the 2nd respondent handed over the documents to his insurer, NEM. An affidavit sworn to by Miss Dummett was also filed on that day. A perusal of her affidavit discloses that there were matters included in this affidavit which had been included in her affidavit that had been disallowed by the Master such as the service of the originating documents without the claim number; the non-inclusion of the claim number on these documents; and the judgment in default which had been granted before the time for the filing of the acknowledgment of service had passed. However, she deposed to certain other facts/information such as her discovery that only one set of the documents had been served and these were on the 2nd respondent. She set out what she regarded as a good defence, which was that, according to the 2nd respondent the applicant had been travelling at a fast speed, and in overtaking the long line of vehicles that had stopped to allow the 2nd respondent to exit onto the road, had driven on the wrong side of the road. She explained that the reason for failing to file the acknowledgment of service in time was occasioned by the applicant's failure to include the claim number and that the application to set aside the default judgment had been filed on 2 December 2011, even though NEM had not received the default judgment until 29 March 2012. She indicated at para 38 of her affidavit that the second application was being "brought to address the apparent deficiencies in the previous application".

[8] An affidavit was also filed by the 2nd respondent on 13 September 2013. It is clear from this affidavit that the 2nd respondent also included evidence that had been included in her affidavit which had been disallowed by the Master: for instance, she

deposed to certain observations she had made as to the manner in which and the speed at which the applicant was riding his motorcycle; that he had been engaging in a "manoeuvre fraught with danger" and that he had been warned for prosecution. She referred to and exhibited the police report, which stated that the applicant had been warned for prosecution.

[9] The second application came on for hearing before Edwards J, who set aside the default judgment, ordered that the defence and counterclaim filed on 28 October 2011, the acknowledgment of service and the amended acknowledgment of service be allowed to stand, that the parties should proceed to mediation and she refused leave to appeal. The learned judge produced no written reasons, but according to Mr Reitzin's notes, to which there was no objection from counsel for the respondents, she expressed the view that the rule relating to service of a claim form without the claim number is mandatory and could not be waived and therefore the service in that manner was invalid. The learned judge went on to consider that even if she were wrong on the issue of service, in the alternative, there was a valid defence on the merits with a reasonable prospect of success, the delay had not been inordinate and the defence had been filed in time.

[10] The applicant framed 16 proposed grounds of appeal, and I hope to do no injustice to them by summarising them thus:

(a) The learned judge failed to appreciate that the second application to set aside amounted to an abuse of process because it was founded exclusively on

evidence that could, with reasonable diligence, have been placed before the Master; it involved an evasion of the Master's order; and there was no explanation for the delay of five months in the filing of it.

(b) Granting the second application was prejudicial to the applicant by reason of the extraordinary and unexplained delay and/or it brought the administration of justice into disrepute.

(c) Any irregularity in service had been waived by the filing of the acknowledgment of service and the failure of the respondents to file an application disputing the jurisdiction of the court.

(d) The respondents' failure to cross-examine the deponent of the affidavit of service amounted to an acceptance of its contents and the judge had failed to give sufficient weight to the affidavit of service.

(e) The judge failed to give any or any sufficient weight to the service of the notice of the proceedings on the respondents' insurers, in which the claim number of the proceedings was clearly disclosed.

(f) The judge failed to appreciate that the contradictions and inconsistencies in the respondents' affidavits on the issue of service made it unsafe to rely on them.

(g) The correct procedure to be adopted by the respondents was an appeal against the Master's orders.

(h) There had been no or no sufficient explanation for the respondents' delay in filing the two affidavits and filing the second application.

(i) The judge in holding that it was not possible for the Master to have dismissed the respondents' application for "want of prosecution" erred in treating the matter as an appeal and holding that this dismissal justified the hearing of the second application.

(j) The judge failed to recognise or attach sufficient significance to the fact that it was the respondents' conduct that was responsible for the dismissal for want of prosecution.

(k) The judge failed to appreciate that the respondents' remedy was to seek redress against their attorney for negligence in the conduct of the application.

Submissions

[11] In written submissions, Mr Reitzin submitted that the proposed appeal would raise the important issue of whether there is in Jamaican law a general rule precluding unsuccessful applicants for interlocutory orders from repeating their applications simply because they seek to rely on additional relevant facts which do not amount to fresh evidence – or whether some other factor must be present before an abuse of process is established. It was further submitted that if the general rule obtains, then the applicant would have a reasonable prospect of success on appeal as: the evidence that the respondents sought to rely on in their second application was evidence that was a mixture of old and new evidence, new evidence being evidence that with reasonable

diligence could have been placed before the Master, and there was no fresh evidence; there was no relevant change in circumstances between the two applications; and there was no disentitling conduct on the part of the applicant. Therefore leave to appeal should be granted. If, on the other hand, there has to be some other factor present for a second application to amount to an abuse of process, the appeal would also have a reasonable prospect of success in that it would be argued on appeal that the learned judge erred in holding that the second application did not amount to an abuse of process as she did not give any, or any sufficient, weight to the fact that the second application permitted the Master's order to be circumvented, ignored, disobeyed, subverted, skirted around and held in contempt. The second application, he argued, included material that the Master had not permitted to be relied on, but the respondents had "gone next door" and relied on the same evidence. The court simply cannot allow applications to be made in a piecemeal manner as they encounter objections, counsel argued.

[12] Referring to the dictum of Mason P in the case of **Nominal Defendant v Manning** [2000] NSWCA 80, Mr Reitzin submitted that the "general rule" should be recognized because to do otherwise would result in the risk of conflicting decisions, the unnecessary vexing of respondents; judge-shopping; the diminution of certainty in the conduct by respondents of their affairs; the damaging of public confidence in the integrity of judicial decisions; and expending time and money on litigation unnecessarily.

[13] Relying on the judgment of this court in **Granville Gordon & Adelaide Gordon v William Vickers and Lucille Vickers** (1990) 27 JLR 60, counsel submitted that the very precise words of Rowe P in that case had been lost sight of, viz, that if a second application to set aside a default judgment is made, unless new material is available to the court, it is likely that the discretion would be exercised in the same way as in the earlier applications. Counsel submitted further that the old authorities generally have no relevance because they were decided under the Civil Procedure Code. Counsel submitted that the Civil Procedure Rules (CPR) make it clear that not only the rights of a defendant ought to be taken into account, but also the administration of justice. The CPR, he submitted, would appear to countenance only one application to set aside a default judgment since rule 12.13 does not expressly, or appear, to permit a second application being made. He submitted further that since it is enumerated in rule 12.13, the only matters on which a defendant against whom a judgment in default has been entered, may be heard, then the *expressio unius est exclusio alterius* should apply to result in the exclusion of a second application being made. Also, he submitted, from a reading of **Vickers**, it does not appear that the argument that the rules do not contemplate more than one application being made had been raised before the court, but, in any event, **Vickers** appears to support the applicant's position that there ought to be fresh evidence on a second application to set aside judgment entered in default.

[14] In relation to the issue of service, Mr Reitzin submitted that the affidavit of service deposing service on the respondents was clear and, was sworn prior to any controversy relating to the question of proper service; and, it was submitted further,

the respondents' own affidavits in relation to service contradicted themselves in damaging ways so as to render them unreliable. Mr Reitzin also submitted that the respondents never sought to challenge the jurisdiction of the court under rule 9.6 of the CPR. Further, the respondents waived any alleged irregularity by their attorney preparing, filing and serving an acknowledgment of service which acknowledged that both respondents had been served with the claim form bearing the correct claim number. He argued that the irregularity point was abandoned before the Master and the Master's order was not appealed. Counsel submitted further that the learned judge had failed to recognise that the appropriate mode of redress against the Master's order was for the respondents to appeal rather than make a second application.

[15] Mr Reitzin also submitted that there had been a five month delay between the refusal of the first application and the filing of the second application, for which the respondents had failed to provide an explanation. Relying on **Ratnam v Cumarasamy** PCA No 41/1962, delivered 23 November 1964, [1965] 1 WLR 8, he submitted that the applicant has a real chance of success on appeal of showing that the learned judge was wrong in acceding to the second application in the absence of such explanation.

[16] In relation to prejudice, Mr Reitzin submitted that the learned judge failed to take account of the prejudice that the applicant has suffered in that though the circumstances were not of such as to make a fair trial impossible due to the loss of documents or the absence of witnesses, the applicant has suffered delay and increased costs.

[17] Finally, in addressing the merits of the claim, Mr Reitzin submitted that the 2nd respondent had been engaging in an activity that was "fraught with danger" in that she had been "emerging in a motor vehicle 'blind' from a plaza's exit- her ability to see and be seen had been compromised dramatically by stationary traffic". He submitted further that the respondents had included no allegation of negligence against the applicant in their counterclaim. The assertions of the respondents were self-serving and "vacuous' and the police report that had been exhibited to their affidavit on which they had sought to rely is not evidence of its contents. Overtaking, he argued, is not an offence and the evidence put forward by the respondents would not have convinced any tribunal acting reasonably that they had a reasonable prospect of successfully defending their claim.

[18] Counsel for the respondents, Mr Givans, submitted that the application for leave to appeal is entirely misconceived and has been launched on a false premise because the fundamental point of fact which seems to have been lost sight of, or has not been given sufficient attention by the applicant, is that the first application to set aside the default judgment was never heard on the merits. Further, it was submitted, the order made by the Master whereby she disallowed the two affidavits did not preclude the learned judge from considering fresh affidavits concerning the exact same facts. Once it was accepted that the Master's decision indicated no hearing on the merits, then the matter resolved itself into the simple issue of whether there was material before the learned judge permitting her to make the orders she did.

[19] Counsel submitted further that the issue of whether the evidence relied on before Edwards J was fresh or new is irrelevant because it was in this second application that the learned judge was for the first time considering the respondents' affidavit evidence. Counsel also submitted that no order made by the Master in the first application was being circumvented in the second application. In any event, it was argued, it is settled law according to **Vickers** that an application to set aside a default judgment may be made more than once. Counsel argued further that the position of the respondents in the instant case was even stronger than the applicant's in **Vickers** as the earlier application that had been made in **Vickers** had been heard and dismissed on the merits. In response to the submission that the respondents ought to have appealed the Master's order instead, it was submitted that the respondents had a right to apply a second time and therefore they would have had no need to appeal the Master's order and this was buttressed by the fact that there had been no hearing on the merits in the first application.

[20] In relation to the argument concerning the irregularity of the service and that the respondents had not challenged the jurisdiction of the court, counsel relied on **Dorothy Vendryes v Dr Richard Keane et al and Another** [2011] JMCA Civ 15 and submitted that the absence of the claim number from the claim form and the particulars rendered the said documents invalid or null and void, and the respondents could not waive compliance with a mandatory rule of the CPR nor could any act on their part give validity to the null and void claim form and particulars of claim.

[21] In relation to the issue of delay, counsel submitted that the provisions of rule 13.3 of the CPR speak to a period of delay between entry of the judgment and the first application for setting aside. Therefore, it does not concern the period of delay leading up to the second application. Further, counsel submitted, no issue was made below about the period of delay between the two applications. Counsel also submitted that the period of delay in filing the first application, which was about three weeks, was not inordinate or excessive, but was relatively short. Counsel submitted also that the applicant had not demonstrated that he has suffered any prejudice that could not be addressed by an award of costs.

[22] On the merits of the claim Mr Givans submitted that even if it could be said that the claim form and particulars were not invalid, the alternative ground relied on by the judge that the respondents have a valid defence with a reasonable prospect of success is equally unassailable under rule 13.3 of the CPR. Relying on **Evans v Bartlam** [1937] 2 All ER 646 and **Sydney Malcolm v Metropolitan Management Transport Holdings Ltd & Dickson** Suit No CL 2002/M225, delivered 21 May 2003, it was submitted that the primary consideration under the rule is whether the respondents have a real chance of successfully defending the claim and the test for deciding whether there is a real prospect of success is to be found in the latter case. Counsel submitted that the affidavit evidence of the 2nd respondent shows that their position had surpassed this threshold. The action of the applicant in overtaking the stationary line of traffic, and in doing so, riding on the incorrect side of the road, was negligent in the extreme, it was submitted. The police report that had been exhibited to the

respondent's affidavit supported the position that the applicant was negligent. According to the report the applicant had been warned for prosecution. Counsel submitted that the learned judge had all this information before her and could have come to no decision other than that the default judgment had to be set aside.

[23] Counsel also submitted that rule 13.3 makes it clear that the court has a discretion whether to set aside the default judgment. And unless it could be demonstrated that some extraneous material or, some error of principle had crept into the learned judge's consideration and decision, the application for leave to appeal should fail. The applicant, it was argued, had failed to show that the learned judge exercised her discretion in an improper or otherwise wrong manner.

[24] Mr Reitzin in reply submitted that there is authority from this court as to the test of a reasonable prospect of success, which is that the court must carry out a preliminary assessment of the probable outcome of the case in the context of the sufficiency of the evidence before the court. Although, it was said in relation to summary judgment applications, it was equally applicable by way of analogy in light of the close wording of the rules relating to summary judgments and default judgments.

Analysis

[25] Rule 1.8(9) of the Court of Appeal Rules (CAR) provides that, generally, leave to appeal will only be granted where the appeal will have a real chance of success. In this case, the proposed appeal concerns the correctness of the learned judge's decision to

set aside the default judgment. Rule 13.3 of CPR governs the setting aside of a default judgment regularly entered. The rule provides thus:

> "(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 the rule, the court must consider whether the defendant has:
>
> (a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.
>
> (b) given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be."

[26] The wording of the rule is clear: although there are three considerations mentioned, the primary consideration is whether the defendant has a real prospect of successfully defending the claim or, put another way, whether there is a defence that has merits. Also, as rightly submitted by Mr Givans, the decision to set aside a default judgment involves the exercise of a discretion by the judge considering the application. It is well-known that in matters of this nature, an appellate court will interfere with the exercise of a discretion only where it was entirely wrong in that it was based on a misunderstanding by the judge, of the law or of the evidence before him, or on an inference - which can be shown to be demonstrably wrong, inferring, for instance, that particular facts existed that did not exist. Additionally, the appellate court will interfere if the decision "[was] 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" (**Hadmor Productions v**

Hamilton [1982] 1 All ER 1042, 1046; **Attorney General v McKay** [2012] JMCA App 1). Therefore, it would seem to me that for the applicant to succeed in his application for leave, he must demonstrate that he has a real, and not fanciful, chance in the appeal of showing that the judge was wrong in concluding that the judgment should be set aside because the service of the claim form and particulars of claim was not in compliance with rule 8.16(2) of the CPR and rendered service invalid, or in the alternative, because the respondents had a real prospect of successfully defending the claim. The crux of the applicant's challenge in the proposed appeal, however, is to the fact of there being a second application upon which the discretion to set aside the default judgment was exercised. In my view, therefore, three issues arise for consideration:

1. Whether service of the claim form and particulars was in such a manner as to allow for judgment for failure to file acknowledgment of service to be entered;

2. (a) Whether a defendant against whom a default judgment has been entered may make repeated applications to set aside a default judgment subsequent to a dismissal of the first application;

   (b) If so, does the material to be relied on in the subsequent application have to be fresh in the sense that the material must be of such that it could not have been obtained with reasonable diligence at the time of the first application?

3. Do the factors in rule 13.3(2) apply equally to a second application to set aside as they do to the first application?

Issue 1 - Whether service of the claim form was in such a manner as to allow for judgment for failure to file acknowledgment of service to be entered

[27] In my view, it is unclear from the documents, (as the affidavit of service of the claim form and the particulars of claim was not placed before us), when exactly service of the originating documents was supposed to have been effected in these proceedings. It appears from the applicant's perspective to have been on 29 August 2011, which meant that the default judgment for failure to file the acknowledgment of service could have been entered 14 clear days after that, as time runs in the long vacation save and except against statements of case, but not in relation to the originating documents; default judgment could therefore have been entered on 13 September 2011.

[28] However, the respondents were always challenging the validity of the service of the documents due to the fact that the reference number of the claim had not been inserted on the claim form (in accordance with rule 8.16(2)) and there does not seem to have been any specific answer to that challenge, in that the applicant had not placed before the court, any evidence that the claim form and particulars of claim which were allegedly served on the respondents, had the claim number inserted thereon. As a consequence thereof, the service of the originating documents without the claim number would have been invalid and any default judgment entered pursuant thereto would be able to be set aside *ex debito justititae*. Additionally if the applicant was

relying on the acknowledgment of service filed by the respondents to prove service of the claim, as the respondents' claim was that service was effected on 6 September 2012, then the default judgment filed on 14 September would have been filed prematurely and would not have been filed in compliance with rule 12.4 of the CPR.

[29] The respondents' position appears to be equally unclear. If the date of service of 6 September 2013 indicated in the acknowledgment of service is only in respect of the 2nd respondent, then one would have expected that there would have been some further challenge to the alleged non-service of the 1st respondent other than the indication in the further amended acknowledgment of service, and there was none. Also there was no application to set aside the service of the claim due to the fact that the reference number of the claim had not been inserted in the claim form. The failure therefore to do so would indicate that there is no challenge to the court exercising its obvious jurisdiction in the matter as any such application ought to have been filed within the time for filing the defence (namely 42 days from receipt of the claim), in accordance with rule 9.6, which, as indicated, was not done. Perhaps what is most telling, is that on 2 May 2013, when the respondents filed their second application seeking the setting aside of the default judgment, among the orders sought was that the acknowledgment of service filed on 4 October 2011 be allowed to stand. That acknowledgment of service indicated that the respondents had been served with the claim form and particulars of claim with the claim reference number inserted thereon and that service had been effected on 6 September 2011. Therefore the respondents' position at the hearing of the second application to set aside the default judgment,

appeared to be that they were not challenging service, whether in relation to the 1st or 2nd respondent.

[30] With regard to the argument that the claim form was a nullity due to the non-compliance with rule 8.16, I should note that, as I have mentioned previously, it appears that the judge was of the view that the service of the claim form and particulars without the claim number was prima facie invalid and consequently, judgment should have been set aside as of right. In my view, the learned judge was correct in finding that service was invalid as it was not in accordance with rule 8.16(2). However, I would disagree with the learned judge's conclusion that the service could not be waived. As has been observed in several authorities, the requirement relating to service is for the protection of the defendant and as such, he is entitled to waive such a requirement if he wishes (**Gneizo: Owners of the Motor Vessel Popo Owners of Steamship or Vessel Gniezo** [1967] 2 All ER 738; **B & J Equipment Rental Ltd v Joseph Nanco** [2013] JMCA Civ 2). Counsel for the respondent has, however, sought to visit on the applicant's breach of rule 8.16(2) the more dire consequence of the originating documents being invalid and has prayed in aid the case of **Dorothy Vendryes**. With the greatest respect, I would wish to state that any such position coming out of that case would have been *obiter* as the issues in that case which were decided by the court with great clarity were: (i) whether the original claim remained valid once the claim form had been amended and before the default judgment had been entered, (ii) as the original claim was not valid having been amended, whether the default judgment entered would have to be set aside because the amended

documents had not been served on the defendant, and (iii) whether the summary judgment could have been entered on the amended claim form when that amended document had not been served.

[31] In **B & J Equipment v Nanco**, Morrison JA in commenting on **Dorothy Vendryes** and the question of whether the claim form could be rendered invalid due to failure to observe rule 8.16(1) stated:

> "[37] Indeed, it is difficult to see why, as a matter of principle, it should follow from a failure to comply with rule 8.16(1), which has to do with what documents are to be served with a claim form, that a claim form served without the accompanying documents should itself be a nullity. While the purported service in such a case would obviously be irregular … I would have thought that the validity of the claim form itself would depend on other factors, such as whether it was in accordance with Part 8 of the CPR, which governs how to start proceedings. It is equally difficult to see why a claimant, who has failed to effect proper service of a claim form because of non-compliance with rule 8.16(1), should not be able to take the necessary steps to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule …."
>
> [38] Accordingly, given that the validity of the claim form as such was not an issue before the court in **Vendryes**, I can only regard the statements that the claim form served in breach of rule 8.16(1) was a nullity as obiter, and not part of the court's reason for its decision in that case…."

I fully endorse this dictum and would only add that the reasoning is equally applicable to a failure to observe rule 8.16(2) which would produce the result that the service would be irregular, and that there ought to be no reason in principle that the reference

number could not be inserted on the claim form and the particulars and the documents re-served in accordance with that rule.

[32] In this case, it would appear therefore that the default judgment would have been liable to have been set aside as there was no proof of service of the claim form with the reference number inserted on the claim form. However, the irregularity in service would have been waived by the acknowledgment of service filed on 4 October 2011, which although the judge had ordered that both acknowledgments of service stand, would be the operative one. The applicant would therefore have a real chance of success on the grounds which touch and concern this argument of waiver of service. However, there being no proof of service of the properly endorsed originating documents on the part of the applicant, if the proof of service was on 6 September 2011 as indicated in the acknowledgment of service filed on 4 October 2011 and relied on in the application to set aside filed on 21 May 2013, the default judgment entered on 14 September 2011 was, as stated previously, premature and could be set aside as being in breach of rule 12.4.

[33] Nonetheless, as the real contest of this application appeared to be what the position of this court is in respect of repeated applications with regard to setting aside judgments entered regularly, I will now consider the second issue.

Issue 2 (a) Whether a defendant against whom a default judgment has been entered may make repeated applications to set aside the default judgment subsequent to a dismissal of the first application

(b) If so, does the material to be relied on in the subsequent application have to be fresh in the sense that the material must be of such that it could not have been obtained with reasonable diligence at the time of the first application?

[34] The law relative to whether more than one application to set aside a default judgment may be entertained by the court has been settled for some time now with some clarity in **Vickers** and **Trevor McMillan & Others v Richard Khouri** SCCA No 111/2002, delivered 29 July 2003. There is no doubt that a court will entertain an application to set aside a default judgment made subsequent to the dismissal of another application to set aside. Indeed, both parties relied on **Vickers** indicating an acceptance that this is the position, but the point of departure concerns the circumstances in which such an application will be favourably considered. In **Vickers**, Rowe P, referred to, with approval, the dictum in **Evans v Bartlam** that until the court has made a pronouncement on the merits of a case or by the consent of the parties, the court is to have the power to revoke the expression of its coercive powers where that has been done only by a failure to follow any rules of procedure. He referred also to **General Motors Corporation v Canada West Indies Shipping Co Ltd** CL 1700/67, reported in Essays on the Jamaica Legal System 1660 – 1973 by HVT Chambers, page 65 in which the Master in Chambers had stated:

> "… the Court may in the exercise of its discretion relieve the Defendant of the 'punishment' meted out to him for his, omission, tardiness, negligence or what have you, provided he begs, prays or pleads in the proper manner, whether it took him two or more occasions to beg or pray properly…"

Mr Reitzin has submitted that the court ought not to be so lenient as the learned Master expressed, relying on the dictum of Mason P in **Nominal Defendant v Manning**. Yet, Rowe P expressed no reservations in approving that dictum clearly stating that in the light of the extensive width of the discretion given under the Civil Procedure Code, the Master was correct in deciding that it is open to a defendant to make more than one application to set aside a default judgment entered against him. He went on to note that this did not mean that the court would be powerless to stop an abuse of its process nor did it mean that the defendant could make repeated applications to set aside the default judgment without adducing new relevant facts. The learned president did not ascribe any special meaning to 'new', as is being advocated for by Mr Reitzin. It is my view, therefore, that repeated applications to set aside a default judgment will be entertained by the court regardless of whether the first application was heard on its merits. Further, the applications need not be confined to evidence that could not have been obtained with reasonable diligence at the time when the first application was being made; what is required is that the evidence is new in that it is based on material that was not placed before the court at the hearing of the previous application.

[35] Although **Vickers** was decided applying the Civil Procedure Code, and the wording of the relevant provision is not identical to rule 13.3 of the CPR, I have no difficulty in concluding that these principles apply equally to the latter provisions. In fact, the issue was put beyond doubt by Harrison P (Ag), as he then was, in **McMillan**. In that case, default judgment was entered on 25 October 2001 and an application to set it aside was dismissed on 7 January 2002. A second application was made to set

aside the judgment, which was dismissed on the ground that a second application was the wrong procedure and that an appeal against the earlier dismissal should have been filed. In holding that there was new material relied on in the second application, upon which the court could exercise its discretion, Harrison P (Ag) stated:

> "A second and subsequent application may be made to the same or another judge of the Supreme Court to set aside such a judgment as long as the applicant can put forward new relevant material for consideration (**Gordon et al v Vickers** (1990) 27 JLR 60). Facts may be regarded as new material, although through inadvertence or lack of knowledge such facts were not placed before the court on the first occasion provided they are relevant (See also **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies et al** [1971] 1 WLR 550)."

The learned acting president also stated that the judge below had erred in holding that in making the second application to set aside, the defendant had adopted the wrong procedure, impliedly indicating that it had not been necessary for the appellant to have appealed the previous order dismissing the application to set aside the default judgment. The court set aside the interlocutory judgment entered in default on the grounds that there was no delay and the appellants had a good defence to the claim.

[36] Mr Reitzin's submissions on rule 12.13, are therefore misguided, as that particular rule states quite clearly that it concerns the limited rights of a defendant in circumstances where the defendant has failed to set aside a default judgment, which is in contradistinction to rule 13.3 which deals with setting aside a default judgment. Equally, Mr Reitzin's reliance on **Nominal Defendant v Manning** is misplaced as

Mason P's views do not accord with what the law is in our jurisdiction. Nor, for that matter, do they represent the law in that jurisdiction as the majority expressed views similar to that expressed by Rowe P in **Vickers** and Harrison P (Ag) in **McMillan**. It is therefore my view that the applicant would not have a real chance of success in the appeal relative to the grounds concerning the nature of the material to be relied on and the correct procedure to be adopted by a defendant whose application to set aside a default judgment has been dismissed.

Issue 3 Do the factors in rule 13.3(2) apply equally to a subsequent application to set aside as they do to the first application?

[37] As an alternative to setting aside the judgment as of right for invalidity of service, the learned judge found that the judgment could be set aside, under rule 13.3 it would appear, as the respondents had a reasonable prospect of success in their defence. Although the learned judge was guided by rule 13.3, based on Mr Reitzin's notes of her reasons, there is no express reference to the two considerations mentioned in rule 13.3(2). Those considerations respectively are that the application to set aside the default judgment must be made "as soon as is reasonably practicable after finding out that judgment has been entered" and that there ought to be a "good explanation for the failure to file an acknowledgment of service" in time. Though Mr Givans has submitted that the former consideration does not apply, these considerations are equally applicable to a subsequent application to set aside a default judgment as they are to the first application. However, I am of the view that the length of time between the dismissal of the first and the subsequent application would be an additional factor

for consideration in keeping with the overriding objective of dealing with cases expeditiously and fairly as otherwise, subsequent applications could be made after prolonged delay with impunity.

[38] Mr Reitzin's main complaint in respect of whether the application was made as soon as was reasonably practicable after finding out that judgment had been entered is not with the period leading up to 2 December 2011, when the first application was filed. Rather, his complaint is that there had been a period of five months between the dismissal of the first application and the filing of the second application, which period he characterised as inordinate, and, he argued, no explanation had been provided for the delay. The first application was dismissed on 28 January 2013 and the second application was filed on 21 May 2013, some four months after the dismissal, which, it cannot be denied, was not with dispatch.

[39] There is, as Mr Reitzin has pointed out, no reason proffered by the respondents for what, on my calculation, was a four month delay. There is no requirement expressed in rule 13.3(2) for an explanation to be given for the delay, but, it seems to me that a defendant who has failed to apply for relief against the default judgment obtained against him as soon as is reasonably practicable after finding out about it, should proffer an explanation for failing to do so. There are authorities to the effect that if there is no explanation for the delay, then no indulgence or relief should be granted, in which case, it would seem that Mr Reitzin would have a real chance of success on this proposed ground of appeal. However, the overriding factor is whether the defendants, in this case the respondents, had a real prospect of successfully defending

the claim, and the consideration of whether the application was made timeously is merely a factor to be borne in mind, and ought not by itself to be determinative of the application. It is therefore necessary to consider whether the learned judge was correct in finding that the respondents had a good prospect of successfully defending the claim.

[40] Significantly, none of the proposed grounds dispute this finding of the judge, although in the course of his arguments before this court, Mr Reitzin did mount a challenge to the strength of the defence. There was evidence before the learned judge that a line of vehicles had stopped to allow the 2nd respondent to exit the plaza, but that the applicant had been overtaking and as a consequence had been on the wrong side of the road, which caused him to collide with the 2nd respondent. Further, there was the attached police report providing information in relation to how the accident occurred. Despite Mr Reitzin's assertion that the document was self-serving, the learned judge was entitled to take this report into account, regardless of whether it contained hearsay information as it was being used in interlocutory proceedings (**McMillan**, rule 30.3 of the CPR). This report indicated that the applicant had been warned for prosecution. There was no evidence to rebut this account as the applicant had failed to file any affidavits before the hearing. But even if the applicant had filed affidavits containing an account similar to what had been included in his particulars of claim, his account was not of such a nature as to render the respondents' account unarguable. The result would have been two accounts which were capable of belief, resulting in a conflict which could only be resolved at trial. In my view, on the state of the evidence before the learned judge, she was entitled to conclude that the

respondents had a real chance of successfully defending the claim. Were the proposed grounds to be amended to include a ground attacking this finding of the judge, it is my view that in the light of the evidence presented, the applicant would not have a real chance of success on that ground.

[41] Furthermore, in relation to the explanation provided for failing to file the acknowledgment of service in time, I consider that the explanation given that the respondents had been awaiting the claim number is a reasonable one. A defendant would need the claim reference number to enable him to file the acknowledgment of service and any further documents in the matter. Mr Reitzin has, however, argued that the insurers had been served the notice of proceedings which disclosed the claim number. Needless to say, service on an insurer is not sufficient service on the respondents as there is no certainty that the claim will be defended by the insurers. There may be circumstances in which the insurers are entitled to avoid the claim, in which event the respondents would be required to defend the claim in their own stead. Further, the notice of proceedings which had been served was not before the court. Therefore, there is no material from which to ascertain whether the claim number was on the claim form and particulars which accompanied the notice of proceedings, and further, there was nothing to confirm that the claim reference number on the notice of proceedings was in fact the correct claim number assigned to the claim. Therefore, it is my view, that Miss Dummett could not be faulted for seeking to ascertain the correct claim number from the applicant or his attorney.

[42] The respondents would therefore have satisfied the major hurdle to be crossed in their application to set aside the judgment as well as the other consideration as to the good explanation for failure to file the acknowledgment of service in time.

[43] It has not gone unnoticed that the second application would have been made over a year after the respondents became aware of the judgment. This, it would seem, was due, at least partly, to the fact that the first application had not been determined before 2013. Mr Reitzin has asserted that the delay in the hearing of the first application was wholly due to the respondents' behaviour. Although not argued by him, the delay in filing the second application when looked at in the light of this argument appears to assume greater significance. However, at the adjourned hearing on 11 May 2013, the further affidavit had been filed and as can be seen from para [6] above, it contained evidence of the 2nd respondent's account of the incident, but certain paragraphs of it were struck out in response to the applicant's objections. In my view, the respondents having filed the further affidavit containing information that was relevant to the defence and there being no apparent basis in law for the paragraphs to be struck out, the hearing of the application could have proceeded on the evidence before the court on that date. Unfortunately, the matter was further delayed, but there is no indication from the record what was the reason for this, nor was there any explanation from counsel on either side as to the reason for the subsequent adjournments leading up to the dismissal of the matter for want of prosecution on 28 January 2013. So, it would not be entirely correct to say that the respondents were wholly responsible for the delay in the hearing of the application.

[44] In my view, a period of four or five months, even in light of the history of the matter as I have outlined above, ought not to be regarded as inordinately long. The learned judge having been satisfied that the respondents had a real prospect of successfully defending the claim, the absence of an explanation for the delay in filing the second application would not have operated as a bar to prevent her from exercising her discretion to grant the application. This, in addition to the respondents' good explanation for their failure to file the acknowledgment of service and the failure of the applicant to advance any argument of merit in relation to whether a second application to set aside a default judgment should have been made in the circumstances of this case, lead me to the conclusion that the applicant would not have a real chance of success on appeal in disturbing the decision to set aside the judgment.

[45] I would therefore dismiss the application for permission to appeal and order that the applicant should pay the respondents' costs for the application. In keeping with the order of Edwards J, the parties should therefore proceed to mediation with dispatch, and make every effort to resolve the real issue in controversy between them.

MCINTOSH JA

[47] I agree that this application should be refused for the reasons advanced by my learned sister Phillips JA.

LAWRENCE-BESWICK JA (AG)

[48] I have read in draft the judgment of Phillips JA. I agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

The application for permission to appeal is dismissed. The judgment of Edwards J shall stand. The parties are to proceed to mediation. Costs of the application are the respondents to be taxed, if not agreed.