IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010HCV05831

BETWEEN	**THE UNIVERSITY OF TECHNOLOGY JAMAICA**	**CLAIMANT**
AND	**GRACE TURNER**	**1ST DEFENDANT**
AND	**ANDREA WILLIAMSON**	**2nd DEFENDANT**

IN CHAMBERS

Mr. Owen Crosbie and Mrs. Eileen Crosbie – Salmon instructed by Owen S Crosbie & Co for the applicant/1st defendant

Mr. Gavin Goffe, Mr. Jahmar Clarke and Mr. Adrian Cotterell instructed by Myers, Fletcher & Gordon for the respondent/claimant

11 January, 6 February &17 March 2017

Civil Procedure – Application to set aside default judgment - Civil Procedure Rules - Rules 13.3 and 13.4 - Sufficiency of evidence

SIMMONS J

INTRODUCTION

[1] This is an application by the first defendant, Miss Grace Turner seeking an order that the judgment in default of defence entered against her on May 28, 2014 be set aside. It is supported by the affidavit of the applicant which was sworn to on the 13th November 2014 as well as a supplemental affidavit filed on the 7th

December 2015. A document described as a "first and partial defence" is exhibited to the former affidavit.

[2] The applicant has listed a number of grounds on which she has based her application. They can safely be condensed into two, which are:-

(i) The judgment was irregularly obtained as the Registrar had no jurisdiction to enter the said judgment; and

(ii) The applicant has a good defence to the action.

[3] In order to fully appreciate the bases of the application it is useful to outline the chronology of this matter.

CHRONOLOGY

[4] The first defendant was formerly employed to the claimant as a lecturer. In 2001 the claimant agreed to make the sum of one million two hundred and thirteen thousand seven hundred and twenty five dollars ($1,213,725.00) available to her to pursue studies at the University of the West Indies. She was also granted study leave for that purpose. In return, she was required to work with the claimant for two years after she returned from leave. She executed a bond to that effect. The first defendant resigned before the expiration of that period.

[5] On November 23, 2010, the claimant filed a claim in which it claimed the sum of six hundred and six thousand eight hundred and sixty two dollars and fifty cents ($606,862.50) from the defendant for breach of a condition contained in a bond signed between the parties. The second defendant who is the first defendant's guarantor was also sued.

[6] The claim form and particulars of claim did not accurately state the name of the claimant who was named as *"the University of Technology"* and not *"the University of Technology Jamaica"* as required by the ***University of Technology Act***, 1995.

[7] By way of Notice of Application dated April 14, 2011, the claimant sought permission to amend its claim form and particulars of claim. The first defendant countered by filing an application on July 4, 2011 seeking the dismissal of the claimant's application.

[8] On July 27, 2011, Master George (as she then was) dismissed the claimant's application on the basis that the limitation period had not yet expired. The claimant subsequently filed a Notice of Application requesting permission to appeal against that order. It also proceeded to file an amended claim form and particulars of claim to reflect its proper name.

[9] The amended claim form and particulars of claim were filed on October 10, 2011. Those documents reflect an amendment of the name of the claimant wherever it had appeared in the claim form and particulars of claim.

[10] On October 24, 2011 the first defendant filed a Notice of Application seeking the dismissal of the action brought by the claimant. She also sought a declaration that the bringing of the action and the amendment was an abuse of the process of the court. On July 30, 2012 Glen Brown J dismissed the first defendant's application. The first defendant appealed.

[11] Harris JA identified the issues arising in the appeal as being:-

(i) Whether the appellant was afforded a hearing;

(ii) Whether the amendment to the claim form was outside of the limitation period and an abuse of the process of the court;

(iii) Whether the bond was ineffective; and

(iv) Whether the amendment of the name of the respondent is an abuse of the process of the court.

[12] The Court of Appeal dismissed the appeal on December 19, 2013. The finding of the court is succinctly stated in paragraph 32 of the judgment which reads:-

"There is absolutely no merit in this appeal. We cannot say that the learned judge was wrong in refusing the application".[1]

[13] On May 28, 2014 the claimant filed a Request for Judgment and a judgment in default of defence was duly entered. The judgment was served on the first defendant on November 12, 2014.

[14] The claimant subsequently sought to enforce that judgment by way of an Order for Seizure and Sale of goods filed on October 31, 2014.

[15] On November 14, 2014 the first defendant filed this Notice of Application for an order that the default judgment be set aside. That application was amended to include a request for a stay of execution of the judgment.

FIRST DEFENDANT'S/ APPLICANT'S SUBMISSIONS

[16] I will not reproduce the submissions in their entirety; *ex abundanti cautela*, I must indicate that what has been outlined is in no way indicative of all that has been borne in mind.

[17] Mr. Crosbie submitted that the Registrar had no jurisdiction to enter the judgment as no judgment was delivered by the Court of Appeal. In fact, he referred to the judgment of the Court of Appeal in ***Grace Turner v University of Technology*** [2014] JMCA Civ 24 as fraudulent. He based that assertion on the fact that a different panel than that which heard the matter delivered the decision. He submitted that it is trite law that only a court or judge that hears a matter can deliver the judgment and such judgment has to be delivered in open court.

[18] He also referred to a letter from the Honourable Mr. Justice Panton (now retired) dated the 31st March 2014 in which he stated that *"it is a misconception to say*

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[1]Grace Turner v University of Technology [2014] JMCA Civ 24, judgment delivered 13 June 2014

that the panel that sat on 19 December 2013 gave an oral judgment. We did no such thing. We merely announced the decision arrived at by the panel that had heard the appeal, and indicated that the written reasons would follow "as supporting his submission.

[19] He further submitted that it is only in the Parish and Supreme Courts that a third party can deliver a judgment of another Judge. Reference was made to section 6 (1) of the ***Judicature (Supreme Court) Act*** in support of that submission. The section states:-

> *"Judges of the Supreme Court shall have in all respects, save as in this Act otherwise provided, equal power, authority and jurisdiction".*

He also stated that Harris JA was not a Judge at the time when the written judgment was delivered.

[20] Counsel stated that once a request is made for judgment the Registrar has a duty to enter the judgment. He referred to an extract from the 2nd edition of the text **Commonwealth Caribbean Civil Procedure** which states that the entering of a default judgment is essentially an administrative process. There is no investigation of the merits of the claim and this could potentially cause injustice; therefore the court retains wide powers on such terms as it thinks just to set aside or vary any such judgment and an applicant may make repeated applications to set aside a default judgment.

[21] He stated that where the application is made without full disclosure, in this case the fact that no judgment had been delivered by the Court of Appeal, the judgment ought to be set aside.

[22] Counsel submitted that the default judgment ought to be set aside under rule13.3 of the ***Civil Procedure Rules (CPR)***. With respect to rule 13.3(1) he stated that the first and partial draft Defence filed with the Notice of Application speaks eloquently to a real prospect of success.

[23] Mr. Crosbie referred to paragraphs two (2) and three (3) of the first and partial draft Defence which states as follows:

> *"(2) The 1st Defendant denies that on July 22, 2001 while employed to the Claimant executed a bond (sic) and says that the copy marked 'A' for identity is not dated July 22, 2001, on the place provided, what is shown is 'Dated day of 2001' and is not a Bond for want of due execution to prove same as a Bond and is otherwise not a Bond not having been executed in accordance with section 9 of the Probate of Deeds Act…No acknowledgement is shown on the document being relied on by the claimant as a bond.*
>
> *(3) In respect of paragraphs 4, 5, 6, 7 & 8, the 1st Defendant repeats paragraph 2 denying the existence of a Bond and says further the interest claim amounts to a penalty and in any case is not recoverable or in the alternative is oppressive and unconscionable and if any is due and payable that amount should be determined by the court."*

[24] He cited the ***Grace Turner***(supra)judgment which, in his view, supports the position that the claimant has a real prospect of successfully defending the case. Paragraph 31 reads:

> *"…A photocopy of the bond was exhibited. It shows that it was executed by the appellant, the guarantor, Ms. Williamson, and two witnesses. That document is incomplete as to whether the execution was sworn or acknowledged before any of those persons prescribed by the Act. That defect, if it be one, is not fatal to the claim. The respondent avers in its statement of case that it provided consideration for the promises made by the appellant and Ms. Williamson, in that it paid the sum agreed over the course of eighteen (18) months. It is entitled to file a claim in that regard and the present claim does not preclude such an approach."*

[25] Where the requirements of part 13.3(2)(a) are concerned, Counsel submitted that there can be no question that the defendant applied to the court as soon as was reasonably practicable after finding out that judgment had been entered. Counsel

indicated that the first defendant received the default judgment on November 12, 2014. The Notice of Application to set aside was filed on November 14, 2014.

[26] Mr. Crosbie stated that whilst service of the claim form and particulars of claim was acknowledged no Defence had been filed because the procedural appeal in respect of the name of the claimant was in progress.

[27] He argued that the claimant sought and obtained default judgment in its correct name without disclosing the fact that the matter was before the Court of Appeal to the Registrar. He contended that the Registrar therefore had no jurisdiction to enter the judgment as the matter in the Court of Appeal had to be disposed of before any application could be made. Counsel submitted that although there was no formal stay of execution, in all the circumstances, in terms of the law, there was a stay.

[28] He further contended that by making the application for default judgment the claimant did not come to the Court with clean hands and therefore cannot benefit from its fraud.

CLAIMANT'S/ RESPONDENT'S SUBMISSIONS

[29] Mr. Goffe submitted that the application falls to be considered under rule 13.3 of the ***CPR*** and not rule 13.2 which deals with situations in which the court must set aside a default judgment. He stated that in the instant case the court should first determine whether the first defendant has a "real prospect of successfully defending the claim". He also stated that the court should also consider whether the application was made as soon as reasonably practicable after finding out that the judgment had been entered.

[30] Reference was made to the case of ***Swain v Hillman*** [2001] 1 All ER 92 in which the court held that in order to satisfy the 'real prospect of success' test the defendant must have a 'realistic' as against a 'fanciful' prospect of success.

[31] He argued that if the first defendant fails to establish that she has a 'real prospect of success' then the entire application fails. Reference was made to the case of ***Teslyn Carter v Jamaica Urban Transit Company Limited and another***(unreported), Supreme Court, Jamaica, Claim No. 2008 HCV 00555, judgment delivered 9 November 2009 in support of that submission.

[32] Mr. Goffe stated that in considering whether the first defendant has satisfied the threshold test the court must have sufficient regard to the defence without embarking on a trial of the issue.

[33] Where the issue of the appeal is concerned, counsel submitted that the first defendant was always aware of the identity of the party that had brought the suit against her and she was served with the amended claim form and particulars of claim which described the claimant by its correct name.

[34] Mr. Goffe also addressed the issue of the judgment of the Court of Appeal being delivered by a different panel from that which heard the appeal. He referred to paragraph 33 of the judgment where it was stated as follows:-

> *"We wish to make it abundantly clear that our decision, which is as indicated in paragraph [1] hereof, was arrived at through the deliberations of only the judges of appeal who sat and heard the submissions of counsel for both parties. It's delivery by a differently constituted panel in no way affects its validity."*

He disagreed with Mr. Crosbie's submission that the judgment was invalid or fraudulent. He stated that the situation was by no means unique and was designed to ensure that litigants are advised as soon as possible of the outcome of their appeals.

[35] Where the draft defence is concerned, Mr. Goffe submitted that it has no merit as the first defendant has not contested the claimant's assertion that funds were advanced to her and that she failed to work for the claimant for the agreed period.

[36] He also addressed the first defendant's assertion that the bond was invalid as it was not signed or acknowledged in the presence of any of the persons prescribed by the ***Probate of Deeds Act.*** In this regard he referred to paragraph 31 of ***Grace Turner*** (supra) which states:-

> *"The issue advanced by the appellant as to the bond raises a point of law which can be entertained by this court even if it had not been raised in the court below. A photocopy of the bond was exhibited. It shows that it was executed by the appellant, the guarantor, Ms Williamson, and two witnesses. That document is incomplete as to whether the execution was sworn or acknowledged before any of those persons prescribed by the Act. That defect, if it be one, is not fatal to the claim. The respondent avers in its statement of case that it provided consideration for the promises made by the appellant and Ms Williamson, in that it paid the sum agreed over the course of 18 months. It is entitled to file a claim in that regard and the present claim does not preclude such an approach".*

[37] He stated that if the document was found not to be a bond the claimant could argue as follows:-

(i) The claimant provided consideration, in the form of an agreed amount that was paid to the first defendant in monthly tranches on the promise that the first defendant would resume her employment for a period of not less than two years and six months upon completion of the course of studies.

(ii) Valid consideration was given to the first defendant and as a result of the first defendant not fulfilling her promise under the agreement the contract was breached and as such entitles the claimant to successfully claim for the outstanding amount owed under the contract.

[38] It was also submitted that the fact that the letter accepting the first defendant's resignation did not refer to any bond between the parties but instead wished her success and a satisfactory career is not a substantial ground for the first

defendant to derogate from the said bond. Counsel also stated that the claimant was under no duty to remind the first defendant of her contractual obligations.

[39] Counsel for the claimant submitted that the document shows 'inter alia' at 3 (b) that "Upon satisfactory completion of the aforesaid course of study he/she shall *recommence* his/her employment with UTECH". Counsel argued that by the use of the word 'recommence' it is clear that the spirit of the bond between the parties was not intended to render the employment continuous. According to Mr. Goffe, the claimant had the option of either collecting payment for the sums allotted to the first defendant or accepting the first defendant's service for a specific period in lieu of payment. He stated that the first defendant's failure to satisfy either option would therefore be classified as a breach of the bond. Reference was made to the case of ***University Technology Jamaica v Davis (Colin) & Anor*** [2015] JMCA Civ 29, judgment delivered 29 May 2015 in support of that submission.

[40] Mr. Goffe contended that the submissions made by the first defendant amount to a merely fanciful basis as opposed to a real prospect of the defendant succeeding in her Defence and given her failure to satisfy the primary 'real prospect of success' test the claimant should not be deprived of its default judgment.

[41] He relied on the case of ***International Finance Corporation v Utexafrica S.P.R.L*** [2001] EWHC 508 (Comm) where Moor-Bick J said:

> *"A person who holds a regular judgment even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason".*[2]

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[2]Paragraph 8

[42] Counsel stated that the first defendant has not given a good reason for her failure to file a Defence. He submitted that her reason for failing to file a defence is flawed as the filing of a procedural appeal does not operate as a stay of proceedings.

[43] Mr. Goffe cited the case of ***Rayton Manufacturing Ltd et al v Workers Saving & Loan Bank Ltd et al***SCCA No. 20/2009, judgment delivered 30 July 2009 which he argued is authority for the position that both parties have an obligation to perform their duties within the time prescribed under the ***CPR***, as time will continue to run against them both irrespective of the fact that there may be a pending appeal.

[44] Counsel submitted that the Registrar having been notified of the decision of the Court of Appeal where no application for an extension of time to file her Defence was made by the first defendant, quite properly, entered the default judgment. Counsel also relied on rule 12.5 of the ***CPR*** and the ***Rayton Manufacturing Ltd*** case in support of that submission. He stated that in the circumstances the default judgment was regularly obtained and should not be set aside.

DISCUSSION

[45] It is well established that a person who holds a regular judgment ought not to be deprived of it without good reason. This principle is based on the premise that a judgment of any kind is something of value and it would be an injustice to deprive its holder of its benefit in the absence of sufficient reason.

[46] Rule 13.3 of the ***CPR*** seeks to balance the rights of the holder of a judgment vis-a-vis a party seeking to set it aside. The rule 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 acknowledgment of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.

(Rule 26.1(3) enables the court to attach conditions to any order)"

[47] The court must also have regard to rule 13.4, which I will reproduce for ease of reference.

"(1) An application may be made by any person who is directly affected by the entry of the judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence."

Real prospect of success

[48] The test as to whether there is a real prospect of success has been described as being similar to that required for the entry of summary judgment. Rule 13.3 (1) of the ***CPR*** is similar to rule 13.3 (1) (a) of the ***English Civil Procedure Rules, 1998***. The latter rule has been described by the learned editors of ***Civil Procedure 2002*** (*the* ***White Book***) as a "…re-statement of the principles laid down by the Court of Appeal in ***Alpine Bulk Transport*** **Co** ***Inc v. Saudi Eagle Shipping Co Inc*** [1986] 2 Lloyd's Rep. 221." It was also said to reflect the test for summary judgment. The learned authors of the ***White Book*** also stated that *"It is not enough to show an 'arguable' defence; the defendant must show that it has 'a real prospect of successfully defending the claim'…"*

[49] In ***Swain v. Hillman***[2001] 1 All ER 91 it was stated that the defendant must have *"a 'realistic' as against a 'fanciful' prospect of success".* This, according to the court in ***International Finance Corporation v. Utexafrica S.P.R.L.***

(supra)means that the case must be more than just arguable. However, this does not require the defendants to convince the court that their defence must succeed. Their prospect of success may be real even if it is improbable.

[50] The above principles were set out and discussed by Edwards JA (Ag) in ***Russell Holdings Limited v L & W Enterprises Inc and Ads Global Limited*** [2016] JMCA Civ 39, judgment delivered 1 July 2016. Her judgment is quite instructive and I am led to quote extensively from it.

[51] The learned Judge of Appeal stated as follows:-

> *"The focus of the court in hearing an application to set aside a default judgment regularly obtained under rule 13.3 of the CPR and in considering how to exercise its discretion should be on whether the applicant has a real prospect of successfully defending the claim. The court must also consider the matters set out in rule 13.3 (2)(a) and (b). The primary consideration therefore is whether the appellant has a defence on the merits with a real prospect of success.*
>
> *For there to be a real prospect of success the defence must be more than merely arguable and the court, in exercising its discretion, must look at the claim and any draft defence filed. Whilst the court should not and must not embark on a mini trial, some evaluation of the material placed before it for consideration should be conducted. The application must therefore be accompanied by evidence on affidavit and draft of the proposed defence.*
>
> *A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the factors in rule 13.3 (2)(a) and (b) are considered against his favour and if the likely prejudice to the respondent is so great that, in keeping with the overriding objective, the court forms the view that its discretion should not be exercised in the appellant's favour. If a judge in hearing the application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the end of the matter. If it is considered that there is a good defence on the merits with a real prospect of success, the judge should then consider the other*

factors such as any explanation for not filing an acknowledgement of service or defence as the case may be, the time it took the defendant to apply to set the judgment aside, any explanation for that delay, any possible prejudice to the claimant and the overriding objective.

She continued:-

"The prospect of success must be real and not fanciful and this means something than a mere arguable case. The test is similar to that which is applicable to summary judgments…

In ***Blackstone's Civil Procedure*** *2004 paragraph 34.13 the learned editors in reference to summary judgment applications argued that a defendant could show that the defence had a real prospect of success by:*

(a) Showing a substantive defence, for example volentinon fit injuria, frustration, illegality etc;

(b) Stating a point of law which would destroy the claimant's cause of action;

(c) Denying the facts which support the claimant's cause of action; and

(d) Setting out further facts which is a total answer to the claimant's cause of action for example an exclusion clause, agency etc.

Accepting that the principles to be applied regarding a defence on the merits in summary judgment applications are similar to that in an application to set aside a default judgment regularly obtained, a defence with a real prospect of success in such an application may therefore involve a point of law, a question of fact or one comprising a mixture of fact and law. A defence will have little prospect of success if it is weak or fanciful and lacking in substance or if it is contradicted by documentary evidence or any other material on

which it is based. A defence consisting purely of bare denials may have little prospect of success…"[3]

[52] In order to determine whether the first defendant has a real prospect of successfully defending the claim "*some evaluation of the material placed before it for consideration should be conducted".*

[53] The claimant has claimed the sum of six hundred and six thousand eight hundred and sixty two dollars and fifty cents ($606,862.50) which it alleged was owed as a result of the first defendant's breach of the bond signed by the parties and dated the 22nd July 2001. The particulars of claim indicate that the claimant disbursed the sum of one million two hundred and thirteen thousand seven hundred and twenty five dollars ($1,213,725.00) to the first defendant in monthly tranches. The first defendant proceeded on study leave and returned to work on May 1, 2003. She resigned on the 30th November 2004. The bond provided that she was to work for the claimant for two years and six months after the conclusion of her studies.

[54] The sum claimed was stated to have been arrived at after consideration was given for the one year and six months that the first defendant had worked. The sum claimed was stated to be equivalent to six of the monthly disbursements.

[55] The first defendant has relied on two affidavits in this matter. The first affidavit can be reproduced without significantly impacting the length of the judgment. It states:-

"I, GRACE TRUNER being duly sworn make oath and say as follows:-

1. That my true place of abode and postal address is 3 Washington Court, Kingston and for the purpose of this matter c/o my Attorneys-

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[3]Paragraphs 81 - 86

at-Law, Messrs Owen S. Crosbie & Company of 3 Hotel Street, Mandeville in the parish of Manchester and that I am the 1st Defendant/Applicant in this matter.

2. That I incorporate and repeat all that I have stated in the application and repeat for emphasis that the Registrar had no jurisdiction to enter default judgment for the reasons shown therein.

3. ***That further or in the alternative if the court does not find favour with the above, I have a very good defence to the claim as shown in the first and partial draft Defence attached and marked "Exhibit GT2".***

4. That in spite (sic) of no judgment having been delivered to the actual knowledge of the Attorneys on the other side, they filed an application not only for Default Judgment, but in the name of 'THE UNIVERSITY OF TECHNOLOGY, JAMAICA', which was the central issue of the appeal that the claim that was filed was not filed in the name of a person as required by trite law of which judicial notice is to be taken.

5. That I humbly pray that Judgment in Default of Defence dated 28th May, 2014 entered in Judgment Binder No. 762 Folio 195 be set aside in terms set out above.

[My emphasis]

[56] The foregoing affidavit itself does not disclose any evidence regarding the defence although the draft defence is exhibited. The first defendant has simply stated as a matter of law, that no judgment was delivered by the Court of Appeal and that in those circumstances the Registrar had no jurisdiction to enter the default judgment. The sufficiency of that affidavit must therefore be evaluated.

[57] In the recent decision of ***Kimaley Prince v Gibson Trading & Automotive Limited (GTA)*** [2016] JMSC Civ 147, judgment delivered 15 September 2016, McDonald J said:-

"14. Noticeably absent from Mr. Gibson's affidavit is any evidence with regards to the defence. It is noted that paragraph 12 of Mr. Gibson's affidavit..., merely states-

> *"That I intend to defend the claim as I have a good Defence on the merits. Attached hereto and marked as "I.G.1." for identification is a draft copy of the Defendant's Defence."*

[58] The learned judge then considered the judgment of McDonald Bishop J (as she then was) in the decision of ***Joseph Nanco v Anthony Lugg and B & J Equipment Rental Limited*** [2012] JMSC Civil 81, judgment delivered July 2, 2012, which was upheld on appeal.

[59] In ***Joseph Nanco***, McDonald Bishop J stated as follows:-

> *"63. By now, it is well known that the primary test for setting aside a default judgment regularly obtained is that the defendant must have a real prospect of successfully defending the claim rather than a fanciful one: (**Swain v Hillman and another** [2001] 1 All ER 91)*
>
> *64. In evaluating whether the test has been satisfied, there must be shown a defence on the merits to that requisite standard. In **Furnival v Brooke** (1883) it was said (and I take it as being applicable today) that **where the judgment is regular the court has a discretion in the matter and the defendant, as a rule, must show by affidavit that he has a defence to the action on the merits**. Stuart Sime, in his text, **A Practical Approach to Civil Procedure**, 6th edition, p. 248, noted that the written evidence in support of the application to set aside will have to address, in particular, the alleged defence on the merit, the reason for not responding to the claim in time, and the explanation for any delay in making the application to set aside. This, of course, is in keeping with the prerequisites that must be satisfied pursuant to the rules.*
>
> *65. According to Craig Osbourn, (**Civil Litigation, Legal Practice Course Guides 2005-2006**, p. 365), the defendant must file evidence to persuade the court that there are serious issues which provide a real prospect of him successfully defending the claim. The evidence filed must set out the case in sufficient detail to satisfy the test.*
>
> *66. It is with all this in mind that I have set out to examine the affidavit filed in support of the application to see the substance and quality of the proposed defence. The evidence put forward in support of the application had prompted Mrs. Mayhew to argue that*

> *there is no affidavit of merit.* ***The law is clear that the affidavit must contain the facts being relied on and that the draft defence should be exhibited****. In* ***Evans v Bartlam*** *[1937] A.C. 473, it was said that before a judgment regularly obtained could be set aside, an affidavit of merit was required and when the application is not so supported, it ought not to be granted except for some sufficient cause shown. I do note however, that Lord Atkins, at the same time, has stated that in rare but appropriate cases this requirement could be waived so as not to prevent the court from revoking its coercive powers.*
>
> [My emphasis]

[60] In ***Kimaley Prince*** (supra) McDonald J, after reviewing the relevant authorities, concluded that *"Mr. Gibson's affidavit does not provide sufficient evidence in support of the application and is not an affidavit of merit".* She then said:-

> *"22...it is apparent that the affidavit of merit ought to disclose facts which constitute the defence and in my view this obligation is not met by exhibiting a draft of the proposed defence which is a separate requirement under rule 13.4 (3)"*

[61] I concur with the reasoning of McDonald J and have concluded that the affidavit dated November 14, 2014, is deficient. (See also ***Shirley Beecham v Fontana Montego Bay Ltd. t/a Fontana Pharmacy*** [2014] JMSC Civ 119, judgment delivered May 26, 2014, paragraph 23).

[62] Where the issue of the sufficiency of the affidavit is concerned I am also guided by the decision of the Court of Appeal in ***B & J Equipment Rental Limited v Joseph Nanco*** [2013] JMCA Civ 2, judgment delivered 15 February 2013, Morrison JA (as he then was) cited with approval a passage in Mr. Stuart Sime's text '**A Practical Approach to Civil Procedure** (10th edn, para. 12.35) which states as follows:-

> *"the written evidence in support of the application to set aside will have to address [the relevant] factors, and in particular the alleged defence on the merits."*

[63] Consequently, in the case at bar, I consider myself fully justified in finding that the affidavit is deficient.

[64] That being said, I must point out that the first defendant's supplemental affidavit which was filed on December 7, 2015 is more detailed than her first affidavit. However, it does not wholly set out what is being relied on in the draft defence that was exhibited to the first affidavit. Paragraphs 8,9 and 17 do however refer to aspects of the defence.

[65] In paragraphs 8 and 9, the first defendant avers that:-

> *"8 ....it is unchallenged that the Court of Appeal determine (sic) as shown above and as raised as the central and foremost issue in the draft Defence that there was no bond to be enforced but that did not deny the entitlement of the Claimant to file a claim..."*
>
> *9. That in the context of paragraph (8), the irresistible conclusion is not only that at the time of the judgment in default was obtained there was a good defence (sic), but the Court of Appeal had so determined before the judgment in default was entered."*

[66] She subsequently states, in paragraph 17, that:-

> *"incidentally, I resigned from UTECH with the blessing of that institution for another position in the public service and so it could be argued that my service in the public service was continuous..."*

[67] It is evident from the above that the first defendant's assertion that she has a real prospect of successfully defending the claim is made on three grounds. They are:-

(i) That the bond is invalid;

(ii) That the claimant failed to alert her regarding her obligations under the bond;

(iii) That her employment in another public sector organisation could be viewed as continuous service;

[68] For reasons that will become evident later in this judgment, I will also mention that in her draft defence, the first defendant states that she did not go to work with the claimant on the 1st May 2003 but had resumed duties having been on leave. I have noted that the bond speaks to the recommencing of employment and the fact that the claimant was not obliged to employ the first defendant after the completion of her studies. The first defendant has denied receiving a loan and has asserted that she what she received was "earned vacation study leave pay".

The Bond

[69] The first defendant has denied the existence of a bond on the basis that the document in question was not properly executed; not being in accordance with section 9 of the ***Probate of Deeds Act***.

[70] In ***Grace Turner v University of Technology*** (supra), Harris JA stated that an issue that arose for consideration was whether the bond was effective. The learned Judge of Appeal made the following pronouncement:-

> *"The issue advanced by the appellant as to the bond raises a point of law which can be entertained by this court even if it had not been raised in the court below. A photocopy of the bond was exhibited. It shows that it was executed by the appellant, the guarantor, Ms. Williamson and two witnesses. That document is incomplete as to whether the execution was sworn or acknowledged before any of those persons prescribed by the Act.* ***That defect, if it be one is not fatal to the claim.*** *The respondent avers in its statement of case that it provided consideration for the promises made by the appellant and Ms. Williamson, in that it paid the sum agreed over the course of 18 months.* ***It is entitled to file a claim in that regard and the present claim does not preclude such an approach****."*
>
> [My emphasis]

[71] Mr. Crosbie has interpreted the above paragraph to mean that the Court of Appeal held that there was no bond but that the claimant could file a claim in the

future. Mr. Goffe on the other hand was of the view that the Court of Appeal ruled that the even if there is a defect it is not fatal to the claim, as there was clearly a contract between the parties.

[72] Whilst there is a possibility that paragraph 31 when read in isolation may be open to different interpretations, it is evident from paragraph 23 of the judgment that Mr. Goffe's interpretation is the correct one. Paragraph 23 states:-

> *"...**The action is founded in simple contract**. In an action relating to a simple contract, the Limitation of Actions Act provides for a period of limitation of six years from the date of the accrual of the cause of action. The cause of action arose on 30 November 2004, the date of the appellant's resignation. The claim form was filed on 23 November 2010 just before the expiration of the limitation period."*
>
> [My emphasis]

[73] Mr. Crosbie's view is, in my opinion, untenable, as it is evident that at the time of the hearing of the appeal the limitation period for an action relating to simple contracts would have already expired. It would therefore have been curious for Harris JA, having indicated that the action was founded in simple contract, to declare that the claimant could still file a claim if there was no bond in existence.

[74] It is my view that in dismissing the first defendant's appeal, the Court of Appeal in substance, ruled that the action should not be dismissed on the basis of any perceived defect in the bond. This approach is in keeping with that adopted in the case of ***Medical and Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson***[2010] JMCA Civ 42, judgment delivered 3 December 2010, where Phillips JA reasoned:-

> *"I also do not think the appellant is precluded from pursuing the claim in negligence because its ancillary claim as pleaded seemed to rely on the Sale of Goods Act only and did not explicitly refer to negligence as an alternative cause of action. Once the facts establishing the cause of action have been pleaded, it is not fatal that the claimant has not identified the cause of action".*

[75] It is also my view that although the amended claim form does not explicitly refer to a breach of contract, the facts establishing that cause of action have been pleaded. In addition, Harris JA stated that if there was a defect, it was not fatal to the claim. In the circumstances, I find that the illegitimacy of the bond as a defence is fanciful and has little prospect of success.

The claimant's failure to inform the first defendant of her obligations under the bond

[76] It is also my view that resigning with the blessing of the institution is not a defence that has any real prospect of success. The agreement between the parties provided that if the first defendant failed to observe or perform certain conditions she would have to, immediately and *without demand*, pay to UTECH or such other person entitled to the benefit of the agreement the sum that had been disbursed to her with interest thereon.

[77] I am in agreement with Mr. Goffe that the claimant was under no obligation to remind the first defendant of her contractual obligations. She ought to have been cognizant of the terms of the agreement between her and the claimant. It is also a bit late in the day for her to assert that she did not receive a loan when she agreed to the terms of the bond.

Continuity of service in the public service

[78] The first defendant averred that after resigning from UTECH she continued to work in the public service; consequently, her employment should be treated as continuous. The agreement also provided that if the claimant made the decision to re-employ the first defendant she would be required to "recommence" her employment with UTECH for a period of not less than two years and six months or else she would be required to repay the sums disbursed. The relevant sections of the agreement were reproduced in a letter from Mr. Crosbie dated the 4th September 2006 that was exhibited to the affidavit of Robert Collie sworn to on the 8th August 2011. Clauses 3 (b) and (c) are stated to read as follows:-

"3 (b) Upon satisfactory completion of the aforesaid course of study he/she shall recommence his/her employment with UTECH for period of not less than two (2) years and six (6) months from the date hereof. UTECH shall be under no obligation to employ the Obligor.

(c) In the event of his/her failing to observe or perform 3 (a) hereof, and in the event that he/she does not work with UTECH for the stipulated period (including but no limited to where he/she is dismissed for cause) he/she shall immediately and without demand pay to UTECH or such other person entitled to the benefit of the agreement the sum due with interest thereon from the date of disbursement of each and any sum paid by UTECH calculated in pursuance hereof, at the rate of twenty-five (25%) per annum as and for liquidated damages..."

[79] The agreement clearly speaks to the recommencement of employment and in my view does not seem to contemplate that if the defendant was employed in another position in the public service her service would be treated as continuous. I have also noted that the agreement states that where the "obligor" does not recommence employment or fails to remain in the employment of UTECH he/she would be required to repay the sums disbursed. Generally speaking, parties are bound by the terms of their agreement. The first defendant's defence in this respect is unmeritorious.

[80] In assessing whether the first defendant has a real prospect of success, I have out of an abundance of caution addressed issues that were raised in the draft defence but not in the affidavits in support of the application. In so doing, I have adopted the approach taken by the court in ***Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy*** (unreported) Supreme Court, Jamaica, Claim No. 2008 HCV 05707, judgment delivered 4 April 2011. In that case, Edwards J (as she then was) said:-

*"73. The oft quoted dictum of Lord Atkins in **Evans v Bartlam** (1937) 1 AC at page 65 outlines the policy underlying the court's discretion to set aside or vary a default judgment and suggests a*

> *guideline for the court when considering its draconian powers, In short, Lord Atkins, suggested that a court must weigh the use of its coercive powers where there is a failure to follow any rule of procedure, against the need for the court to hear cases on the merits and pronounce judgment. The balancing exercise must take place against the background of the overriding objective.*
>
> *74. The learned judge in **Marcia Jarrett** quoted from the case of **C.B Braxton Moncure v Doris Delisser** (1997) 34 JLR 432, judgment of Rattray, P in the Court of Appeal and I find it sufficiently compelling to repeat it here. In that case the President of the Court of Appeal as he then was said at page 425;*
>
> > ***"The court will not allow a default judgment to stand if there is a genuine desire of the defendant to contest the claim supported by the existence of some material upon which that defence can be founded"***

[81] The learned judge pointed out that despite the decision of ***C.B. Braxton Moncure*** predating the ***CPR*** it was still relevant.

[82] Having assessed the material on which the proposed defence is based, I am of the view that there is no real prospect of success. In the circumstances, there is no need to determine whether the criteria listed in rule 13.3 (2) of the ***CPR*** have been satisfied.

[83] This approach was confirmed by Edwards JA (Ag) in ***Russell Holdings Limited v L & W Enterprises Inc and Ads Global Limited***(supra). The learned Judge of Appeal stated:-

> *"If a judge in hearing the application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the end of the matter. If it is considered that there is a good defence on the merits with a*

real prospect of success, the judge should then consider the other factors."[4]

The judgment of the Court of Appeal

[84] Before concluding I must point out that Counsel for the first defendant spent a great deal of time trying to persuade this court to set aside the default judgment on the basis that the Court of Appeal judgment in ***Grace Turner v University of Technology*** (supra) was not a judgment at all as it was not delivered by the same panel that heard the appeal.

[85] It is on that basis that he alleged that the Registrar of the Supreme Court had no jurisdiction to enter the judgment in default of defence.

[86] It is trite law that this court is bound by the rulings of the Court of Appeal which is a superior court. Surprisingly, Counsel has sought to discredit the above judgment even though the Court of Appeal has itself addressed the issue in the postscript of the judgment which indicates that it is in no way invalid because of the procedure adopted in its delivery. I wish to take this opportunity to remind Counsel that in ***Connelly v DPP*** [1964] A.C. 1254, the House of Lords, said the following in passing:-

"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice..."[5]

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[4]Paragraph 83

[5]See the Court of Appeal civil case of ***Taylor and another v Lawrence and another***[2002] EWCA Civ 90 in which Connelly was cited.

[87] Furthermore, the letter of the Honourable Mr. Justice Panton (now retired) on which Mr. Crosbie relied, also states that the practice whereby a decision of the court is delivered by another panel is not a new one. The learned President of the Court of Appeal also stated as follows:-

> *"It has been in force for several decades, and is done for administrative reasons, as well as to ensure that litigants are advised of the result of their appeals as soon as decisions have been arrived at. The panel that announces the decision has no input in the decision, seeing that appeals are determined only by the members of the court who heard them".*[6]

[88] By way of comment, I have noted that Mr. Crosbie has sought to rely on paragraph 31 of the said judgment which he has alleged is invalid and of no effect.

Stay of proceedings

[89] Mr. Crosbie was also of the view that the default judgment was dishonestly obtained because Mr. Goffe did not inform the Registrar that there was a matter pending before the Court of Appeal at the time when it was sought. He also expressed the view that although there was no formal stay of proceedings there was one in practice.

[90] In ***Albertha Dewdney et al v Enid Louise Brown-Parsons & Clive Newman*** (unreported) Supreme Court, Jamaica, Claim No. 2004 HCV 421, judgment delivered 20 August 2009, Brooks J (as he then was) said:

> *"It has long been the law that the mere lodging of an appeal does not operate as a stay of the order or judgment of the court. So it was, by virtue of section 21(1)(a) of the Judicature (Court of Appeal) Rules 1962 and so it is, by virtue of rule 2.14 of the Court*

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[6]Page 3

of Appeal Rules 2002 which replace the 1962 rules. Rule 2.14 presently gives authority to the Court of Appeal to order a stay, if it so minded".

[91] Rule 2.14 of the ***Court of Appeal Rules*** states as follows:

> *"**Stay of execution***
>
> *Except so far as the court below or the court or a single judge may otherwise direct -*
>
> *(a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and*
>
> *(b) no intermediate act or proceeding is invalidated by an appeal.*

[92] Therefore, even If an appeal was pending at the time of the request for default judgment, Mr. Goffe's actions could not be frowned upon. The onus was on Mr. Crosbie to apply for a stay of the proceedings to prevent steps being taken by opposing Counsel while the matter was being appealed. The case of ***Rayton Manufacturing Ltd et al v Workers Savings & Loan Bank Ltd et al***(supra), supports this position. In that case Morrison JA (as he then was) said:-

> *"…I think Rayton was under a clear duty to have made the necessary application for case management in the Supreme Court action by 31 December 2003, irrespective of the fact that on that date there was an appeal pending in this court from the order of Reid J. Such an application (which could have been made at any time during 2003) would have sufficed to preserve the status of the Supreme Court action, without impeding the progress of the appeal or prejudicing Rayton's position in any way."*[7]

[93] The opening paragraph of the ***Grace Turner*** judgment states as follows:-

> *"In this appeal, the appellant challenges an order of Glen Brown J, in which he refused an application by her to strike out a case*

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[7]Paragraph 32

> *brought by the respondent against the appellant and Ms. Andrea Williamson.* ***On 19 December 2013, we dismissed the appeal and awarded costs to the respondent****.*"
>
> [My emphasis]

The claimant requested default judgment on December 30, 2013. I therefore agree with Mr. Goffe that there was no pending appeal at the time, as the Court of Appeal had already made a decision in the matter with written reasons to follow.

[94] I am therefore satisfied that the Registrar had the jurisdiction to enter the default judgment. I am also satisfied that there is no basis for the allegation of dishonesty made against Mr. Goffe. It is indeed unfortunate that in the circumstances of this case, such a baseless allegation was made against fellow counsel.

CONCLUSION

[95] The first defendant's application to set aside the default judgment is dismissed with costs to the claimant to be taxed if not agreed. Leave to appeal is refused.