[2020] JMSC Civ 107

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 07856

BETWEEN	**SEYMOUR FERGUSON**	**CLAIMANT**
AND	**AMECO CARIBBEAN INC.**	**1st DEFENDANT**
AND	**KEEBLE DIXON**	**2ND DEFENDANT**

IN CHAMBERS

Mr. A. Christie instructed by Hart Muirhead and Fatta for the applicant

Miss Gillian Burgess for the Claimant

Heard: 25 July 2017 and May 27, 2020

CIVIL PRACTICE APPLICATION TO SET ASIDE JUDGMENT – WHETHER APPLICATION MADE AS SOON AS REASONABLY PRACTICABLE – EXPLANATION FOR DELAY – PREJUDICE TO CLAIMANT IF JUDGMENT SET ASIDE

STAMP J,

[1] By Notice of Application filed 15 May 2017 the first defendant/applicant seeks to have a judgment in default of acknowledgement of service set aside and to extend time for the filing of its Acknowledgement of Service and Defence. On 27 July 2017, I refused the application and delivered an oral judgment summarising my reasons. I had intended before now to reduce my reasons into writing, however there was

a significant delay in doing so, partly because my notes could not be located for a prolonged period but also for reasons for which I take responsibility.

[2] The Claim is for damages for personal injuries, losses and expense arising from an accident of 3 February 2010 that the claimant/respondent avers was caused by the negligent driving of the second defendant who was the servant and/or agent of the first defendant/applicant, the owner of a motor truck which knocked him down. The second defendant is not a party to the application before me. It does not appear from the record that he was served with the Claim Form.

[3] The first ground of the application as evidenced in the supporting affidavit and draft Defence is that the applicant has a real prospect of successfully defending the claim as it was not vicariously liable for the negligence of the second defendant. At the material time the motor truck was being used for the exclusive purposes of a third party, Caribbean Broilers Limited, which had leased the motor truck from the applicant on terms which permitted Caribbean Broilers Limited to use it exclusively for its own purposes. The applicant retained no control over the motor truck and the second defendant was never its servant or agent. Caribbean Broilers Limited was also responsible for insuring the vehicle and indemnifying the applicant, for any loses or claims resulting from the use of the motor truck.

[4] I reproduce the second ground in full:

> ***Timeliness of Ameco's Application***
>
> *Ameco made its first application to set aside default judgment as soon as it was reasonably practicable, in October 2014. This first application was made after the legal vacation when it was aware that the claimant requested a default judgment.*
>
> *This application is made in light of the court's refusal to grant the initial order.*

HISTORY

[5] It is useful to set out the procedural history in some detail. The Claim was filed on 15 December 2011 and was served on the applicant by registered post in January 2012.

[6] On 7 December 2012 judgment in default of acknowledgement of service was entered against the applicant and the matter was set down for assessment of damages. The applicant applied to set aside the judgment on 6 October 2014 and on 13 November 2014, Batts J giving his reasons orally, dismissed the application with costs to the claimant. He gave his reasons in writing on 14 November 2014. See ***Seymour Ferguson v Ameco Caribbean Incorporated*** *[2014] JMSC CIV 233*.

[7] The record reflects that the matter was again set for assessment of damages on 16 May 2017 but that hearing was adjourned at the request of both parties after the filing on 15 May 2017, the day immediately before, of this second application to set aside the default judgment. It is supported by an affidavit of Novelette Appleby, the administrative assistant to the country manager of the applicant, with exhibits annexed including a copy of the draft Defence.

[8] The first ground was the same advanced before Batts J, that is, there is a real prospect of successfully defending the claim as the applicant had leased the motor vehicle to Caribbean Broilers Limited which used it exclusively for its own purposes and that the second defendant was not its servant or agent. Batts J held that it was "….manifest that a Defence with a real prospect of success has been demonstrated." See paragraph 11. The issue at the trial would be whether the driver was or was not the servant or agent of the applicant. I agree with Batts J and adopt his reasoning. It is important to add that in the application before me the evidence in support of that ground is much more powerful and cogent. In the first application, it was merely an averment in the supporting affidavit and draft

Defence. The applicant has now furnished copies of the fleet services agreement between the applicant and Caribbean Broilers Limited and the rental history of the motor truck. These documents strongly support the defence that the applicant was not in physical possession of or had any control over the motor truck at the material time, that Caribbean Broilers Limited was exclusively using the motor truck for its operations and was responsible for insuring it and indemnifying the applicant from all claims arising from its use. They also lend support to the Defence that the second defendant was an employee or agent of Caribbean Broilers Limited and not of the applicant. The respondent has not challenged these documents.

[9] There is no doubt that the applicant has established that it has a real prospect of successfully defending the claim. Indeed, it seems to me that, if the documentary evidence furnished is validated, it has a very strong if not overwhelming case.

[10] Batts J refused the first application because of a lacunae in the evidence proffered by the applicant to enable him to assess the reasons for the delay in filing the Acknowledgement of Service and to assess whether the applicant acted with alacrity when making the application to set aside. He said at paragraph 17:

> *'… The applicant has provided no information as to when the oversight was discovered, or as to what brought knowledge of the claim to their attention, or as to when their attorneys were instructed. This court cannot begin to assess whether an explanation for a delay in filing Acknowledgement and Defence is "good" within the meaning of the rules or, whether an application has been made as soon as "reasonably practicable" without such information. It is the duty of the Defendant/ Applicant to provide this* ***because the burden lies on the applicant to satisfy the court,*** *moreso when the entire period involved is two years.' [****emphasis*** *mine]*

[11] Batts J added at paragraph 18 that it would be manifestly unfair to the claimant if he were to set aside the judgment in those circumstances.

EXPLANATION OF THE FAILURE TO FILE ACKNOWLEDGMENT AND DELAY IN MAKING THE FIRST APPLICATION

[12] In this present application, in addition to the documentation provided, the applicant also provides new information in the supporting affidavit of Novelette Appleby with the aim of explaining the delay in filing the Acknowledgement of Service and showing that the first and second applications to set aside were made as soon as reasonable practicable.

[13] Ms Appleby says that the applicant's failed to take any active steps in the matter and to file an Acknowledgement of Service or Defence within the prescribed time because the officers of the company were unaware of the Claim until 2 May 2014. She says that through a mixture of inadvertence and administrative oversight, the house procedures were not followed and the Claim was not recorded in the company's log book or brought to the attention of the relevant officers of the company, so that it could be dealt with in a timely manner. According to her, they became aware of the Claim when they received a faxed copy of a Notice of Change of Attorney on 2 May 2014. That is one and half (1 ½) years after judgment had been entered. The applicant immediately contacted and faxed the Notice to Caribbean Broiler's Limited that she says was contractually obligated to handle any potential claims that may arise in relation to their use of the motor truck.

[14] She further states that the applicant became aware of the judgment in or around the last week of July 2014 when it was brought to the attention of the applicant's attorney-at-law Mr Stuart Stimpson by the attorney-at-law for the claimant. Mr Stimpson thereafter undertook a review of the court file to confirm details of the service of the Claim and then undertook an investigation with the Post and Telecoms Department to verify whether the registered letter which included the Claim Form and Particulars of Claim was actually collected. This would determine the grounds upon which the application to set aside the judgment would be made. In late August 2014 it was confirmed that these documents were in fact collected by a member of its staff on 25 January 2012. A decision was taken to file the

application to set aside the judgment at the start of the new court term, 16 September 2014. However, the first application to set aside was filed on 6 October 2014.

EXPLANATION OF THE DELAY IN FILING THE SECOND APPLICATION

[15] In the Grounds of the Notice of Application there is no averment of any reason for the delay in filing the second application to set aside on 15 May 2017 some two and a half years after the decision of Batts J on the 13 November 2014 dismissing the first application. However, in her affidavit Ms Appleby attempts to address the matter. I set out what she deponed in full below.

> ***'Timeliness and the present application***
>
> *34. Mr. Simpson confirmed that he received a copy of the court's judgment on the 3rd April, 2017.*
>
> *35. He advised, and I verily believe that our initial application was refused because Ameco failed to sufficiently establish its intended defence. We there after provided Mr. Stimpson with further instructions to make this application.'*

[16] This is the explanation, if explanation it is, for the two and a half year delay.

[17] I recall that Batts J delivered his oral decision on 13 November 2014 and the written decision on 14 November 2014. The Minutes of Order of Batts J on the 13 November 2014 reads:

> *Application dismissed*
>
> *Costs to the claimant to be agreed or taxed.*
>
> *Reasons delivered orally.*
>
> *…..*
>
> *Appearances: …. Mr S. Stimpson and Mr. F. Halliburton for Defendants.*

Clearly, counsel representing the defendant were well aware of the reasons for dismissal of the first application on the day the oral judgment was delivered and would certainly be expected to have had sight of the written decision on or about 14 November 2014.

[18] I also note that the first sentence of paragraph 35 of the affidavit quoted above is entirely inconsistent with paragraph 33 which states:

> *"33. It is my understanding that the application was refused on that occasion because the sequence of events and the timeliness involved were not fully set out before the Court to allow the Court to assess whether we acted swiftly in bringing our application to set aside before the Court, or, or whether we were dilatory in our response, having heard about the judgment hanging over our heads."*

This I think, not paragraph 35, correctly represents the state of awareness of the applicant at the time the first application was refused.

[19] During this more than two and a half year interregnum and while the claimant was taking steps to enforce his judgment, on 3 February 2016, any claim he may have had against a third party became barred under the ***Limitation of Actions Act***.

LEGAL DISCUSSION

[20] It is well settled that a party may make a second application to set aside a judgment after the first application has been refused as long as the applicant has put forward new evidence that was not placed before the court at the hearing of the first application. See Phillips JA in ***Rohan Smith v Elroy Hector Pessoa and Another*** *[2014] JMCA App 25* at paragraphs 34-35. It was also not disputed by the parties that the applicant had furnished new relevant material in the affidavit of Novelette Appleby.

[21] The application is made pursuant to Rule 13.3 of the ***Civil Procedure Rules (CPR)*** which states:

> *"(1) The court may set aside or vary a judgement entered under Part 12 if the defendant has a real prospect of successfully defending the claim.*
>
> *(2) In considering whether to set aside or vary a judgment under this rule, the court **must** consider whether the defendant has:*
>
> *(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.*
>
> *(b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be…" [my **emphasis**]*

[22] As is standard in applications to set aside judgments, the starting point of both parties is ***Evans v Bartlam*** *[1937] 2 All ER 646*, mutually recognized as the leading authority in this area. However, as is equally standard when these applications are contested, the parties had divergent submissions on how it is to be applied to this case.

[23] Counsel for the applicant submitted that the overriding principle is whether the proposed defence has a real prospect of success. As regards the first application, the applicant had now provided a good explanation for the failure in filing the Acknowledgement and had established that the application was made as soon as reasonably practicable. While accepting that delay in the filing of the second application is a relevant consideration, even if the explanation for the delay is not a good one, or even if there is no explanation, that failing ought to be overlooked or deemed of minimal importance, particularly so in this case where there is a strong defence.

[24] Counsel relied on dicta from **Rohan Smith** *(supra)*, a Court of Appeal decision refusing an application for permission to appeal a judge's decision to set aside a default judgment. In rejecting that applicant's argument that, if there is no explanation for the delay, no relief should be granted, Phillips JA said:

> *"[39] … However, the overriding factor is whether the defendants … 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 be determinative of the application. It is therefore necessary to consider whether the learned judge was correct in finding whether the respondents had a good prospect of successfully defending the claim. …

[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."

[25] Counsel for the respondent stressed that even if a real prospect of success was established, where the delay is inordinate and there is no good explanation, or any explanation at all, as in this case, these should weigh as important factors in the determination of the application. She relied on ***Flexnon Limited v Constantine Michell and others*** *[2015] JMCA App 55*. This was an application for permission to appeal a decision to set aside a judgment in default. McDonald-Bishop JA there said:

"[27] It is clear from rule 13.3(2)(a) and (b) that it is incumbent on the court to consider whether the application to set aside was made as soon as was reasonably practicable after finding out that judgment had been entered and that a good explanation is given for the failure to file an acknowledgement of service and or a defence as the case may be. So the duty of a judge in considering whether to set aside a regularly obtained judgment does not automatically end with a finding that there is a defence with a real prospect of success. Issues of delay and an explanation of failure to comply with the rules of court as to time lines must be weighed in the equation.

[28] While it is accepted that the primarily consideration is whether there is a real prospect of the defence succeeding, that is not the sole consideration and neither is it determinative of the question whether a default judgment should

be set aside. The relevant conditions specified in rule 13.3(2) must be considered and such weight accorded to each as a judge would deem fit in the circumstances of each case, whilst bearing in mind the need to give effect to the overriding objective."

Both the Court of Appeal and the judge below found that there was no defence with a real prospect of success and so the passage quoted should be regarded bearing in mind that qualification.

[26] ***Evans v Bartlam*** *(supra)* has been reviewed in many subsequent cases and I do not propose to do so again. In summary, ***Evans v Bartlam*** *(supra)* decided that the paramount consideration on an application to set aside a judgment regularly obtained was whether there was a *prima facie* or serious defence that may succeed. However, the judge ought to give some consideration to how the applicant found himself bound by the judgment, that is, the reason why he failed to enter an appearance or file a defence in the time limited; but proof of good reason is not a consideration precedent to the exercise of the discretion to set aside the judgment. The underlying principle is that unless and until the court has pronounced a judgment upon the merits or by consent, it retains the power to set aside a judgment that has been obtained only by failure to follow any of the rules of procedure. *Ibid.* at page 650.

[27] Subsequent authorities have interpreted ***Evans v Bartlam*** *(supra)* to decide that the merits of a defence will almost always supersede procedural deficiencies like timeliness. In ***Blossom Edwards v Rhonda Bedward*** *[2015] JMSC Civ. 74*. Sykes J (as he then was), after analysing the relevant law, said at para. 24:

"It is fair to say that if the defendant has made an assertion that cannot be defeated at the setting aside stage, then it is difficult to see how it can be said that the defence has no real prospect of success. If this is now the primary criterion and even a lying defendant can still have the judgment set aside then it is not easy to see how the factors listed at rule 13.3 (2) even if decided

against the defendant can deny the application ***except on grounds such as loss of evidence or witnesses, that is to say, matters that affect the ability of the claimant to prosecute his claim effectively.****"* [**emphasis** mine]

[28] The comment re a lying defendant is a reference to ***Vann v Awford*** *[1986] Times LR 23/4/86*, where the Court of Appeal of England and Wales set aside a judgment in spite of the fact that the applicant/defendant had, in his own account of the matter, lied on affidavit. Weighing the defence on the merits against possible prejudice to the plaintiffs, the Court applied the principle that the judgment should not stand as there had been no adjudication on the merits of the case.

[29] This interpretation of ***Evans v Bartlam*** *(supra)* frequently informs the attitude of defendants in applications to set aside default judgments. It amounts to this: once it is established that there is a defence with a real prospect of success, in the absence something extraordinary, that is decisive of the matter and the judgment **must** be set aside notwithstanding the absence of good reason for the delay, or even if the reason given was advanced without due diligence or was untrue.

[30] I decline to accept this proposition. While I accept that the merits of the defence is the paramount consideration, I adopt the view, firstly, that the extreme tardiness of a defendant without any or any good explanation for it, or the lack of due diligence or insincerity in providing an explanation may, in appropriate circumstances, justly motivate a court's refusal to set aside. It may seem quite elementary but it warrants reiteration that in this jurisdiction the court must not lose sight of and must give effect to the overriding objective of the ***CPR*** when interpreting the rules or exercising any powers under them.

[31] So Rule 13.3 must be interpreted and applied subject to the overriding objective. That seems to me to be the approach of Batts J in the first application in deciding that the absence of an explanation for the delay was sufficient to justify his refusal to set aside as such a course would be manifestly unfair to the claimant.

[32] The judgment of McDonald Bishop JA in ***Flexnon*** *(supra)* at paras. 29 to 32 offers, I think, immense guidance on the modern approach of a trial judge to applications under Rule 13.3. These passages bear quotation in full but for the sake of brevity I will try to distil the essence. Her Ladyship referred to paragraph 21 of the judgment of Moore-Bick LJ in **Standard Bank v Agrinvest International** *[2010] EWCA Civ 1400*, which was relied upon to reinforce the point that delay is rarely a decisive factor if the defendant could show that there is a real prospect of successfully defending the claim. She continued:

> *"[30] What is clear from a paragraph 21, when read together with the preceding paragraph, is that Moore-Bick LJ was speaking to what had obtained in the pre-CPR era. What is worthy of note, however, is what the learned judge noted in paragraph 22 of the same judgment in respect to the introduction of the CPR. There, he opined:*
>
> > *"22. The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objective expressly recognized for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one. However promptness will always be a factor of considerable significance, as the judge recognized in paragraph 27 of his judgment, and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial."*

McDonald Bishop JA then referred to **Peter Haddad v Donald Silvera** *SCCA No. 31/2003* where Smith JA in similar vein emphasized that one important aim of the new dispensation was to introduce more discipline in the conduct of civil litigation including the adherence to time limits. She continued:

> *"[32] In our jurisdiction, where there is an embedded and crippling culture of delay, significant weight must be accorded to the issue of delay, whenever it arises as a material consideration on any application. The application to set aside a regularly obtained default judgment is one such type of application where the consideration of delay should figure prominently."*

[33] Equally apropos the particular circumstances of this case is the issue of prejudice to the respondent. I accept from the authorities the principle that if setting aside may result in real prejudice to a claimant the court should weigh the possible prejudice against the merits of the defence in addition to the factors set out in Rule 13.3 (2). This seems to be what **Sykes J** (as he then was) meant in the emphasized passage from ***Blossom Edwards*** *(supra)* quoted earlier (although I am not convinced that in all cases the prejudice need be as severe as the examples given). Weighing the merits of the defence against the possible prejudice to the claimant was also the methodology adopted in **Vann v Awford** *(supra)*. I also take from these authorities and fully embrace the principle that, where grave and irremediable harm may be done to a claimant if a judgment is set aside, any inordinate delay without good and satisfactory explanation is a material factor to be considered in the exercise of the discretion to set aside*, even if* the proposed defence may seem impregnable on paper.

[34] As regards the two cases that the parties placed primary reliance on, ***Rohan Smith*** *(supra)* and ***Flexnon*** *(supra)*, I do not see any tension between them. In both cases it was accepted that a good defence is paramount and both cases recognised that compliance with timelines is an important consideration. In each case the Court of Appeal arrived at its decision after applying the law to the idiosyncratic factors of the case before it.

[35] There is however further relevant guidance to be gleaned from ***Rohan Smith*** *(supra)*. Philips JA held that the Rule 13.3 (2) consideration that the application to set aside must be made "as soon as is reasonably practicable after finding out that judgment has been entered" also applies to the period between a refusal to set aside on a prior application and a subsequent application. She said (at paragraph 37)

> *" … I am of the view that the length of the time between the dismissal 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."*

[36] In that case the Court of Appeal held that, although the delay of four months "was not with dispatch", it ought not to be regarded as inordinately long. Thus, in light of the finding that there was a real prospect of successfully defending the claim, the absence of an explanation for the delay did not prevent the exercise of the discretion to set aside the judgment. See para. 44 quoted above. This case was decided on its own distinctive facts, mainly the finding that four months was not an inordinately long delay in the circumstances of that case. However, this does not detract from force of the principle that a relevant consideration is whether the second application to set aside was made with alacrity and where the delay is inordinately long it ought to be satisfactorily explained.

APPLICATION

[37] So to recap, the timeline is

- 15 December 2011, the Claim and Particulars are filed;
- January 2012, the applicant served by registered mail;
- 7 December 2012, default judgment entered;

- 26 June 2013, application for assessment of damages filed, it is fixed for 24 Oct 2013 when it was adjourned;

- 2 May 2014, the applicant becomes aware of the claim and transmits that information to the third party;

- last week of July 2014, the applicant became aware of the judgment;

- 6 October 2014 application to set aside the judgment filed;

- 13 November 2014, Batts J dismisses application with costs;

- 15 May 2017 this second application to set aside the judgment filed.

[38] On the question whether there is a good explanation for the failure to file an acknowledgment of service in a timely manner, Ms Appleby says that although the registered letter with the filings were collected from the post office and therefore the applicant was properly served, due to inadvertence and oversight it was not properly logged in the applicant's books. The result was that the relevant officers of the applicant were unaware of the existence of the claim and therefore could not respond within the time limited. I hold that this is a good explanation for the failure to file the Acknowledgment.

[39] In respect to the promptness of the first application before Batts J, I do not accept that, having become aware of the default judgment during the last week of July 2014, the application to set it aside filed 6 October 2014 was made as soon as reasonably practicable. The delay of approximately two months and two weeks was in my view unduly long although not exceptionally so, especially as it partly traversed the court vacation. Ms Appleby says that time was spent on inquiries to discover whether the applicant was properly served as this would inform how the application to set aside would be grounded. I take it that she means whether the application would be to set aside a regularly obtained judgment or to set aside one that was not regularly obtained. However, in July 2014 the default judgment was more than 2 ½ years old and it seems to me that with such a longstanding judgment

hanging over the applicant and with the claimant seeking to enforce it, the applicant would have moved with urgency and diligence. I see no good reason that prevented the applicant from speedily applying to set aside relying on alternative grounds, pending the result of the inquiries. The gravamen of the reasons for delay was that the officers of the applicant were, until then, unaware of the judgment even if they were not sure of whether or not it was regularly entered.

[40] Further, I do not understand why, having received confirmation of service from the post office in late August, the applicant did not act immediately. And there is no explanation why, having decided to wait until the beginning of the next term to apply, i.e. on 16 September 2014, it nonetheless delayed to do so until 6 October, another three weeks hiatus.

[41] I do not think that the applicant at any stage - when it became aware of the claim, or more importantly when it became aware of the judgment - treated the matter with the urgency it deserved. This is a factor that I considered, but the matter does not end there.

[42] As regards the promptness of the second application made after the dismissal of the first, I hold that the delay of two and a half years is remarkably inordinate and is a very material consideration that I must take into account. No explanation is given for this delay. Ms Appleby's affidavit is, as demonstrated earlier, internally inconsistent on this matter and worse, it also contradicts the record of the court. In adjudicating this matter, it was not my intention to launch any examination of the sincerity of the affiant or her informant but it is sufficient to say that, having regard to the record of the court, I do not accept that the applicant's attorney-at-law only became aware of the reasons for Batts J's decision on 3 April 2017. That is just not true, whether due to lack of diligence in the preparation of the affidavit or lack of sincerity, although I hasten to add that, having regard to the clumsy juxtaposition of the inconsistencies in paragraphs 33 and 35 of the affidavit, I suspect that the reason is likely to be from carelessness.

[43] Similar to Batts J in the first application, I have no information to enable me to assess whether this second application was made as soon as "reasonably practicable" after his refusal of the first application. Like Batts J, I am not minded to set aside the default judgment in these circumstances where the delay is inordinate and there is no explanation for it.

[44] I also note that this second application contains essentially the same material as the first, the only substantial difference being the provision of copies of the fleet services agreement, the rental history of the motor truck and the addition in the supporting affidavit of an explanation for the first delay. That was all, really very little, that was required of the applicants to renew the application with alacrity. In this context, the period of inaction lasting until the day before the date fixed for assessment of damages, more than two and a half years, cries out even more loudly for an explanation

[45] On 3 February 2016, the respondent's claim became statute barred against any other party. The respondent will suffer grave and irremediable harm if the default judgment that he has relied upon and acted upon over all these years is set aside. That would result in a serious injustice to him.

[46] In the course of argument before me, it was suggested that on the filing of the first application, the respondent was alerted to the defence and could have made responsible inquiries that would have resulted in him adding Caribbean Broilers Limited as a defendant before the matter became statute barred. While I agree that claimant was on notice that the issue was live and that he should be careful to ensure that the proper defendant is before the court, I am mindful that at the time of the first application the defence was a bare assertion unsupported by documentation. Indeed the veracity and validity of the defence was an issue at the prior hearing where Batts J rightly held (in my respectful view) that the provision of documentation was not necessary for the determination of the matter at that stage. I do not think that, based on the bare assertion of the applicant, it would be right to impose an onus on the respondent to investigate the validity of the proposed

defence. He already had a judgment in hand that he relied upon and was trying to enforce. In my judgment, there was a greater responsibility on applicant to proceed with alacrity to renew the application to set aside if it believed that there was a defence with a real prospect of success. That is simply what the rules require.

[47] In brief summary, I recognize that the existence of a defence with a real prospect of success is the paramount consideration in the determination of this application. The proposed defence proffered here appears to be very strong and cogent. Notwithstanding, I hold that in all the circumstances of this case it would be wholly unjust, unfair and in contravention of the overriding objective to set aside the default judgment so late in the proceedings. The circumstances include, in particular, the absence of any reasonable explanation for the prolonged delay between the refusal of the first application and the instant application as well as the grave prejudice that the respondent would suffer if the judgment is set aside.

[48] For these reasons, I refused the application to set aside the judgment with costs to the claimant/respondent. I gave permission to appeal having regard to the apparent strength and cogency of the prospective defence.

…….
Chester Stamp
Puisne Judge