[2017] JMSC Civ. 175

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV00008

BETWEEN	**SHENEKA KENNEDY**	**CLAIMANT**
AND	**NEW WORLD REALTORS LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Jason Jones and Ms Lauri Smikle instructed by Nigel Jones & Co. for the Claimant/Respondent

Ms Kemilee D. Mclymont instructed by PeterMc & Associates for the Defendant/Applicant

Heard: 5th May, 6th and 21st June, 20th September, 20th October and 21st November 2017

Civil Procedure – Application to set aside default judgment regularly obtained for failing to file defence — No affidavit of merit – Whether there is justification to waive the requirement for an affidavit of merit – Overriding Objective – Rules 13.2 and 13.3 of the Civil Procedure Rules

Costs – Whether wasted costs order to be made – Rules 64.13 and 64.14 of the Civil Procedure Rules

COR: V. HARRIS, J

Background/procedural history

[1] On the 5th of January 2015, the claimant instituted a claim against the defendant company for breach of statutory duty (pursuant to the **Occupiers' Liability Act**) and negligence. She alleged that two years prior, on or about the 29th of October 2012, while delivering mail to the defendant's premises she slipped and fell down the stairs. According to her the stairway was unsafe and in particular there were cracks in some of the tiles and only a partial railing. As a result, she is seeking to obtain damages for injuries which she sustained to her back, as well as, to recover monies for medical and transportation expenses.

[2] The defendant was duly served with the claim form, particulars of claim and the accompanying documents on the 19th of January 2015. In response an acknowledgement of service was filed within time, on the 3rd of February 2015, in which the defendant indicated its intention to defend the claim.

[3] On the 9th of March 2015, six (6) days after the period for filing the defence expired, the claimant requested that a default judgment be entered for failure to defend in accordance with rule 12.5 of the **Civil Procedure Rules** ('the **CPR**'). The default judgment was entered accordingly and an assessment of damages hearing was scheduled for the 22nd of May 2015.

[4] However, on the 19th of March 2015, 15 days after the period for filing the defence expired and 10 days after the claimant secured the default judgment, the defendant filed its defence. The essence of the defence is that the stairway was not unsafe and that it was the claimant who was negligent, or at least contributory negligent. The defendant contends that the claimant failed to exercise proper care in traversing the stairs.

[5] There were a number of adjournments for the assessment of damages hearing. On the 9th of March 2016, there was an adjournment to the 22nd of November

.2016 and on that date there was a further adjournment to the 3rd of July 2017, pending the determination of the instant application to set aside default judgment. On the 21st of June 2017, this court made an order to vacate the date for the hearing of the assessment of damages set for the 3rd of July 2017 and ordered that the hearing be set for the 2nd of February 2018. Naturally, whether that date will be kept depends on the outcome of the instant application.

The defendant's application

[6] It should be noted that the defendant's notice of application to set aside default judgment was filed on the 14th of October 2016, well over a year of being served with the default judgment on the 21st of April 2015. The following orders were being sought:

1. *That the Applicant's Acknowledgment of Service of Claim Form stands as if filed and served in time.*

2. *That any Default Judgment entered herein, be set aside.*

3. *Such further relief as may be just.*

. 4. *The costs of this application shall be costs in the claim.*

[7] The grounds on which the defendant/applicant relied are:

1. *That the period for the Defendant to file and serve its Defence as prescribed in the Civil Procedure Rules, 2002 (CPR) was complied with.*

2. *That pursuant to Rules 13.2(1)(b) [sic] of the CPR, at the time the Claimant requested the default judgment the period for filing and serving a defence did not expire.*

3. *That consistent with CPR 13.3(1) the Defendant has a real prospect of successfully defending the claim.*

[8] The application was originally supported by the affidavit of Ms Sharon Chin, a process server employed to PeterMc & Associates. Ms Chin's affidavit was filed on the 14th of October 2016 and sworn to by her on the 10th of October 2016.

Exhibited to Ms. Chin's affidavit (as 'SC-1') was a copy of the defence filed on the 19th of March 2015.

[9] As may be observed, the application was based on a factual inaccuracy. It is apparent that counsel for the defendant/applicant Ms Mclymont was of the mistaken view that the defence was filed within time and that it was the acknowledgement of service that was filed out of time. Accordingly, she made the application pursuant to **CPR** 13.2, on the basis that the default judgment was irregularly obtained.

[10] When the matter came before this court on the 5th of May 2017, Ms Mclymont conceded that the defence was in fact filed out of time and was permitted to file a supplemental affidavit in support of an application to set aside the default judgment, presumably pursuant to **CPR** 13.3. It should be noted, however, that no amendments were sought to be made to the application.

[11] This supplemental affidavit was to be filed on or before the 12th of May 2017. On the 15th of May 2017 the said affidavit sworn to by Mr. Lascelles Poyser, the Managing Director of the defendant company, was filed. The draft defence was not exhibited to Mr. Poyser's affidavit. Mr. Poyser however gave evidence that the failure to file the defence within time was due to *'making efforts to retain an Attorney-at-Law and give instructions in advancing a defence.'*[1] He also stated that compliance was further delayed by the fact that members of staff within the defendant company were *'unable to readily recall details of the incident to assist in putting forward a defence to the claim.'*[2]

[12] Mr. Poyser also admitted in his affidavit that the defendant became aware of the default judgment on the 21st of April 2015 and he sought to account for the delay in making the application to set aside over a year later. To this end, he stated

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[1] See: paragraph 6 of the Supplemental Affidavit of Lascelles Poyser filed on the 15th of May 2017
[2] See: paragraph 7 of the Supplemental Affidavit of Lascelles Poyser filed on the 15th of May 2017

that *'the failure to file an application to set aside within an earlier period was due to the fact that the Applicant's Attorney had taken an extended maternity leave. Additionally her Junior Counsel who initially assumed conduct of the matter left the Firm during the period and the successive Junior Counsel required an extension of time to take instructions and prepare complete [sic] and file application.'*[3]

[13] Noticeably absent from both Ms Chin's and Mr. Poyser's affidavits was anything in relation to the defence, save for paragraph 12 of Mr. Poyser's affidavit in which he stated: *'That I verily believe that the Applicant has a real prospect of successfully defending the claim herein based on the responses set out in the Defence.'* I will revisit this point subsequently.

Claimant's submissions

[14] For clarity and comprehension, I will set out Mr. Jones' (counsel for the claimant /respondent) submissions first. Since Mr. Jones' submissions were filed first[4], much of Ms Mclymont's submissions[5] seem to be in response.

[15] By reference to **CPR** 3.2(3) and 3.2(4), Mr. Jones submitted that the defence was filed out of time and as such the request for default judgment was not premature. Accordingly, he correctly submitted that the default judgment was not irregularly entered, as originally contended by Ms Mclymont. As previously mentioned Ms Mclymont conceded that the default judgment was not irregular and as such the governing rule was **CPR** 13.3 and not **CPR** 13.2.

[16] Having established that this is a case in which the court may set aside or vary the default judgment pursuant to **CPR** 13.3 and not one in which the court must set it aside as of right (by virtue of **CPR** 13.2), Mr. Jones submitted that the application

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[3] See: paragraph 10 of the Supplemental Affidavit of Lascelles Poyser filed on the 15th of May 2017
[4] Filed on the 6th of June 2017
[5] Filed on the 20th of June 2017

must fail as there is no affidavit of merit before the court and as such the defendant has not shown that it has a real prospect of successfully defending the claim.

[17] Reliance was placed on the ***Joseph Nanco v Anthony Lugg and B&J Equipment Rental Limited***[6], which Mr. Jones submitted is quite similar to the instant case. In particular paragraphs [67] – [69] of the judgment of McDonald-Bishop J (as she then was) were commended to the court:

> *"[67] It is noted that Miss Bennett who is the major affiant for the 2nd defendant has not, in any of her affidavits, set out the case for the 2nd defendant with any particularity or detail. There is nothing in evidence as to the facts on which the defendant is relying to establish its defence. What the 2nd defendant has done instead is to simply exhibit a draft defence to the affidavit along with an investigator's report. The proposed defence must form part of the evidence presented. The facts being relied on must be stated in the affidavit and be attested to by someone who can speak to them from personal knowledge or who can speak to such matters by way of information and belief but with the source of such information and belief disclosed in the affidavit. All this must be evidence on oath. (See CPR 30.3 & 30.4)*
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> *[68] In looking at whether the evidence in this case has reached the threshold required, I have particularly observed that Miss Bennett has set out no facts in her affidavit whether in her personal knowledge or from information and belief with source indicated that could be evidence of the defence being relied on. There is no reference to the incident giving rise to the claim and how it happened. It is the draft defence that contains alleged facts which is proposed to be signed by Miss. Bennett.*
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> *[69] However, Miss Bennett does not indicate being an eye witness to the incident and there is nothing to suggest that she was present at the time. It means whatever is to be stated by her, on behalf of the 2nd defendant, by way of defence, would be hearsay. There is nothing to indicate what facts she would be able to prove from her own knowledge and what facts are based on hearsay. There is, in essence, no, prima facie, admissible evidence of a defence revealed on the affidavit evidence filed in support of the application. The rule in 13.4 is clear that the application to set aside must be supported by affidavit evidence and the draft defence must be exhibited. The draft defence must reflect the facts on which the defendant is seeking to rely as set out in evidence. In this*

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[6] [2012] JMSC Civ. 81; upheld on appeal [2013] JMCA Civ 2

> *case, none of the facts constituting the defence has been stated on oath as required. The affidavit is certainly not one of merit."*

[18] Mr. Jones also referred the court to paragraph [73]:

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

[19] He submitted that the court should adopt the same position as the same situation applies. He contends that the draft defence in the instant case is similarly predicated on hearsay with no source of information disclosed in the affidavit evidence. It was emphasised, again, that the defendant has failed to present an affidavit of merit and thus has failed to show that it has a real prospect of successfully defending the claim (per **CPR** 13.3(1)). Reference was also made to the recently decided case of ***Kimaley Prince v Gibson Trading & Automotive Limited*** **(GTA)**[7], wherein McDonald J opined at paragraph [22] 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)."*

[20] Even though Mr. Jones submitted that the absence of an affidavit of merit was fatal to the application, he went on to contend that in any event the defendant would also need to satisfy **CPR** 13.3(2) and that it had failed to do so. Mr. Jones strenuously submitted that the delay of approximately one and a half years was unacceptable given that the defendant was aware of the default judgment from the 21st of April 2015. Reference was made to the case of ***Sasha-Gaye***

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[7] [2016] JMSC Civ 147

Saunders v Michael Green et al[8] wherein my brother Sykes J held that two (2) months was too long to be ignored and in the modern era of civil litigation, that time lapse was inordinate.[9]

[21] Mr. Jones further submitted that the reason for the delay, contained in the affidavit of Mr. Poyser at paragraph 10 (set out at paragraph [12] herein) was not a good one. He bemoaned the fact that no days were provided as to when Ms Mclymont went on maternity leave, when her junior counsel left, and when the successive junior counsel was given conduct of the file. It was contended that these questions would have to be answered before the court could properly conclude that the application was made as soon as reasonably practicable, given that the delay was inordinate.

[22] Another point taken by Mr. Jones was that paragraph 10 of Mr. Poyser's affidavit constitutes hearsay and is inadmissible. It was contended that Mr. Poyser is speaking of things which took place at his attorney's office and he has not satisfied **CPR** 30.3 which deals with what may be contained in an affidavit. The general rule being that an affidavit may only contain such facts as the deponent, in this case Mr. Poyser, is able to prove from his knowledge.[10]

[23] It was further submitted that even though in interlocutory applications it is permissible for affidavits to contain statements of information and belief, this would require compliance with **CPR** 30.3(2)(b). There has been no such compliance in this case as Mr. Poyser has not indicated which statements are from his own knowledge and which are matters of information and belief (and the source of same). A number of cases were relied on in support. Mr. Jones went further to ask that paragraph 10 be struck out and deemed inadmissible, since

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[8] (unreported), Supreme Court, Jamaica, Claim No. 2005HCV2868, judgment delivered 27 February 2007
[9] See: paragraph [14]

[10] See: rule 30.3(1)

Mr. Poyser could have no personal knowledge of those facts and there was no compliance with **CPR** 30.3(2). He further submitted that if this paragraph is struck out then there was no information provided to show that the defendant applied as soon as reasonably practicable.

[24] Issue was also taken with the reasons for the failure to file the defence within time. These reasons were proffered by Mr. Poyser at paragraphs 6 and 7 of his affidavit (set out at paragraph [11] herein). Mr. Jones submitted that the failure to file the defence within time could not have been as a result of efforts to retain an attorney, since the defendant had already retained an attorney from the time that the claim form was served. He emphasised that the said attorney, Ms Mclymont, filed an acknowledgement of service (within time) indicating an intention to defend the claim and the same attorney then filed the defence (out of time).

[25] Mr. Jones further submitted that the failure of staff members to recall the details of the accident is also not a good reason, since the parties were in negotiations prior to the filing of the claim (on the 5th of January 2015). Further, it was contended that based on those pre-litigation discussions Ms Mclymont ought to have ensured that all the necessary information was gathered with a view to filing a defence.

Defendant's submissions

[26] In response to Mr. Jones' submission that there is no affidavit of merit before this court, Ms Mclymont made the following submissions which are summarised below:

i) the wording of paragraph 12 of Mr. Poyser's affidavit (set out at paragraph [13] herein) purports to incorporate into the affidavit the statement of case set out in the defence and as such renders the affidavit one of merit;

ii) some weight ought to be given to the fact that the defence has already been filed and has the requisite certificate of truth attached. Even though this does

not make the defence an affidavit, it was submitted that it renders the defence more than a mere draft defence. Reliance was placed on **CPR** 3.13 (1) which provides that *'The court may strike out any statement of case which has not been verified by a certificate of truth.'* It was contended that in this instance, the defendant has already set out its statement of case, certified the truth of its content and indicated in an affidavit that it will be relied on;

iii) alternatively, if the court is minded to find that there is no affidavit of merit, it was submitted that there is justification to waive this requirement. Ms Mclymont contends that this is one of those rare circumstances that warrant a departure from the conventional approach. She emphasised that the claim ought to be heard on the merits. She has asked that the court have regard to the nature of the claim, the fact that the defendant is an institutional litigant and that the defence demonstrates that the defendant has a real prospect of success; and

iv) in support of Ms Mclymont's submission that the defendant has both a sincere desire to contest the claim, as well as, a real prospect of successfully defending the claim, she contends that the defence raises questions of fact and law. It is not a defence of bare denials and even goes further to raise issues of contributory negligence. The court was asked to consider the claimant's medical report[11] which indicates that she suffered from an ear infection and also the opinion that *'ear infections are associated with loss of balance and vertigo. It is possible that this ear infection could have contributed to her fall.'*

[11] Dated the 24th of May 2013 by Dr. Cecily Thompson of the Erudite Medical Centre & Day Surgery Unit

[27] With regards to the **CPR** 13.3(2) considerations, Ms Mclymont submitted that the explanation provided by Mr. Poyser at his paragraph 10, is sufficient and is not hearsay. Her precise submissions were:

> *30. …We submit further that the evidence adduced by Mr. Poyser is evidence that was within his knowledge, information and belief. Pregnancy is a matter of fact and can be verified either during the course of pregnancy or as an end result. This is a matter capable of being within Mr. Poyser's personal knowledge. The matter of whether associates have left or joined a firm is also a matter of fact which can easily be verified from one's own observation or interaction with a firm.*
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> *31. …*
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> *32. …*
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> *33. …*
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> *34. We submit that these are sufficient reasons for the delay in filing the application to set aside where Counsel with conduct of the matter must ensure that necessary supervision is provided to the junior charged with preparing the application and also the continuity of the matter with a successive junior. Such are the unfortunate realities of practice [sic] of law which Attorneys must contend.*

[28] Ms Mclymont further submitted that in addition to there being good reason for the delay in filing the application to set aside, that the delay was not excessive nor did it cause undue hardship on the claimant. Reference was made to the case of ***Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy***[12] where Edwards J opined that although the defendant was unreasonably tardy in filing its application to set aside, the primary focus should be on whether the defendant could prove that there was a real prospect of successfully defending the claim. Ms Mclymont submitted that the defendant in **Victor Gayle** had also exceeded a

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[12] (unreported), Supreme Court, Jamaica, Claim No. 2008HCV05707, judgment delivered 4 April 2011

year in making its application to set aside the default judgment and this was not found to be manifestly excessive.

[29] Reference was also made to the dicta of Phillips JA from ***Merlene Murray-Brown v Dunstan Harper and Winsome Harper***[13] and in particular paragraph [30]:

> *"[30] There is just one other matter that I must comment on however that is, the statement made by the learned trial judge that, "by no stretch of the imagination can inadvertence be a good explanation for failing to file defence [sic] in the time stipulated".* ***The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys errors made inadvertently, which the court must review. In the interest of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended.*** *(See the St Margaret Insurance case). However, as this was only one part of the court's considerations and based in the view I take of the substantive ground, the application would fail in any event." (Emphasis supplied)*

[30] Ms Mclymont submitted that should the court find that the reason provided is insufficient, the defendant should not be held accountable for the actions or the inactions of its attorneys, and should be allowed to answer to the claim based on its merits and in accordance with the overriding objective. Reference was made to the case of ***Cynthia Smith v Movac Protection Limited***[14] where Straw J set aside the default judgment notwithstanding that the delay of one year and three months was inordinate and without a good explanation. Paragraph [33] in particular was commended to the court:

> *"[33] The affidavit of Kevin Savage speaks to the failure to file defence as being due to an administrative error in that the date for filing the defence was entered as 6th November 2014. The Defence was subsequently filed on that date. Ms. Dunn's affidavit also speaks to this. It*

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[13] [2010] JMCA App 1

[14] [2016] JMSC Civ. 75

> *is my opinion that this reason for the late filing can be described as an error by counsel and ought not to be one visited on the defendant. I bear in mind also that the delay, as stated previously was one of 15 days. This certainly cannot be considered inordinate as counsel for the claimant has admitted. In all the circumstances, I am of the opinion that an acceptable reason has been offered for this short delay."*

[31] With regards to the reason for the delay in filing the defence, it was submitted that the reasons contained at paragraphs 6 and 7 of Mr. Poyser's affidavit are 'solid reasons' and ought to be accepted by the court. I think it best to set out Ms Mclymont's written submission on this point:

> *40. In the instant case the reason was a delay in formulating instructions and retaining Counsel. The Claimant's Counsel submitted that the reason was not sufficient since an acknowledgement of service was filed by same Counsel and negotiations had been ongoing with the Defendant prior to the commencing of the claim. We submit that the reasons provided are in fact very convincing reasons for the delay and the latter argument advance [sic] by Claimant/Respondent's Counsel is in support of our argument. In the practice of law it should be borne in mind that the retainer of Counsel may be limited to a particular undertakings [sic] and that further arrangements may be required for additional actions to be taken. It should also be borne in mind that a litigant is at liberty to determine its Counsel of choice for particular undertakings. We therefore submitted that the statement made by Mr. Poyser regarding retaining Counsel, is not inaccurate, misleading or implausible.*
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> *41. With regard to the formulating of instructions to give Counsel also resulting in delays we rely on the fact that the Defendant/Applicant is an institutional litigant and acts through its servants and or agents. Instructions therefore must come from such sources. Given the date of the accident 2012 [sic] and the vagueness of the allegations surrounding the accident material time, effort, recollection and investigation would have to have been employed to place the Defendant/Applicant in a position to give instructions. We submit also that perhaps the negotiations being had with Counsel for the Claimant/Respondent may have even contributed to the delay as perhaps is customary the Defendant/Respondent would have weighed the nature of those discussions against the need to defend the case.*

[32] On the point of prejudice, it was submitted that the claimant has provided no real evidence that she would be prejudiced by the grant of the application, save for the inability to speedily proceed to assessment of damages. Ms Mclymont contends that this was more akin to an inconvenience than a prejudice.

[33] It was further submitted that while recognising that a default judgment is a thing of value which the claimant should not be quickly deprived, the approach by the court has been to apply the overriding objective of the **CPR**, which grants a discretion in the interest of dealing with matters justly and the preference to allow cases to be decided on its merits rather than be rejected due to a procedural default/ technicality.

The Law and Analysis

[34] Notwithstanding the failure to amend the application, it is quite clear that the relief being sought by the defendant are as follows:

That the default judgment entered on the 9th of March 2015 be set aside;
That time be extended for filing the defence; and
That the defence filed on the 19th of March 2015 be permitted to stand.

This relief is being sought pursuant to **CPR** 13.3 which states:

> *13.3 (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:*
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> *(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.*
>
> *(b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.*

> *(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.*
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> *(Rule 26.1(3) enables the court to attach conditions to any order.)*

[35] **CPR** 13.4 is also relevant as it sets out the procedure:

> *13.4 (1) An application may be made by any person who is directly affected by the entry of judgment.*
>
> *(2) The application must be supported by evidence on affidavit.*
>
> *(3) The affidavit must exhibit a draft of the proposed defence.*

Procedural errors

[36] As can be observed from the rehearsal of the procedural history, this is a case which has been characterised by a series of missteps and/or failures on the part of counsel for the defendant.

[37] Firstly, the defence was filed 15 days out of time. No extension of time was sought. It appears to me that perhaps there was a miscalculation of the time. This would explain why the application was made on the basis that the default judgment was irregularly entered. This is also why Ms Chin stated that she was advised by Mrs Rebecca Neil, an associate in the firm, that the defence was filed within time. As an aside, there is a common misconception that the 42 days begin to run after the time for filing the acknowledgement of service. This of course is not the case, the 42 days start to run after the date of service of the claim form (see: **CPR** 10.3).

[38] Secondly, the application to set aside the default judgment was made most belatedly. There is no dispute that the default judgment came to the attention of the defendant on the 21st of April 2015, yet the application was made on the 14th of October 2016, well over a year of being served.

[39] Thirdly, the application itself was fraught with errors. As noted previously the relief being sought was in relation to the acknowledgement of service and not the defence. It was also incorrectly made pursuant to **CPR** 13.2 instead of **CPR** 13.3. There was no application to amend the application. *Prima facie*, the supplemental affidavit sworn to by Mr. Poyser was not an affidavit of merit as it did not set out the substance of the defence. Also, it is to be noted that it was filed after the time permitted by the court.[15]

[40] Fourthly, counsel has through her submissions sought to supplement the 'good explanation' for the failure to file the defence within time as well as to account for the delay in making the application to set aside. It seems the defendant may have been better assisted by an affidavit sworn to by Ms Mclymont herself, particularly as it relates to the extreme delay in making the application and/or the inadvertence alluded to in the submissions.

Waiver of affidavit of merit

[41] Having regard to the dicta of Lord Atkins from the case of ***Evans v Bartlam***[16] it is clear that the court can waive the requirement for the affidavit of merit in rare but appropriate cases. His Lordship opined at page 480:

> *"The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.*
>
> ***But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavits of merit could, in no doubt rare but appropriate cases be departed from."*** (Emphasis added)

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[15] Filed on the 15th of May 2017 instead of on or before the 12th of May 2017.

[16] [1937] AC 473

[42] The reasoning of Lord Atkins was adopted by McDonald-Bishop J (as she then was) and upheld by the Court of Appeal in the case of ***B&J Equipment Rental Limited v Joseph Nanco***,[17] I would similarly adopt the reasoning as summarised in paragraph [66]:

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

[43] I wish to point out that in **Kimaley Prince** McDonald J at paragraphs [24] to [26] of the judgment considered whether or not there was justification for waiving the affidavit of merit in that case. However, she found that there "were no exceptional circumstances to justify a waiver of the requirement or a departure from the rules."

[44] To my mind therefore, it is clear that the affidavit of merit can be waived. However, I am mindful that this discretion is to be exercised sparingly and only in exceptional circumstances.

Real prospect of successfully defending the claim

[45] Based on the authorities, it is clear that the paramount consideration for the court is whether the defendant has a real prospect of successfully defending the claim.

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[17] [2012] JMSC Civ. 81; upheld on appeal [2013] JMCA Civ 2

In order to make such a determination, the court is to have regard to the evidence. This is why the affidavit of merit is crucial. **CPR** 13.4(2) and (3) set out two distinct requirements, namely that the application must be supported by evidence on affidavit and that the affidavit must exhibit a draft of the proposed defence.

[46] What the defendant has done in the instant case is to exhibit the actual defence (filed out of time) to the affidavit of Ms Chin (which was in support of the inapt application pursuant to **CPR** 13.2). It was not exhibited to the affidavit of Mr. Poyser, nor was the substance of the defence contained in his affidavit. On this point, Ms Mclymont has made a number of submissions which I have already set out (see: paragraph [26] *et seq*).

[47] The first submission is that the affidavit is one of merit by virtue of the wording of Mr. Poyser's affidavit, wherein he stated:

> *12. That I verily believe that the Applicant has a real prospect of successfully defending the claim herein based on the responses set out in the Defence.*

This in my view does not incorporate the defendant's statement of case into the affidavit. It may also be borne in mind that the defence (draft or otherwise) was not even exhibited to Mr. Poyser's affidavit. As such Mr. Poyser was in essence seeking to rely on pleadings which were irregular (i.e. the defence filed out of time).

[48] I must emphasise that the defence as it stands amounts to irregular pleadings, not evidence. So notwithstanding how enticing Ms Mclymont's submission that the defence has already been filed and contains the requisite certificate of truth, this is not sufficient to elevate it from pleadings to evidence.

[49] The court is however minded to accept Ms Mclymont's alternative submission, namely to waive the requirement for the affidavit of merit. Ms Mclymont contended that this is one of those rare circumstances that warrant a departure

from the conventional approach. She emphasised that the claim ought to be heard on the merits. She has asked that the court regard, *inter alia*, the nature of the claim, the fact that the defendant is an institutional litigant and the defendant's sincere desire to defend the claim.

[50] To my mind, the justification for waiving the requirement is three-fold. Firstly, as Ms Mclymont pointed out, there is a portion of the claimant's own statement of case, which raises a potential defence (i.e. contributory negligence). Namely the medical report[18] which states that she suffered from an ear infection and Dr. Thompson expressed the opinion that *'ear infections are associated with loss of balance and vertigo. It is possible that this ear infection could have contributed to her fall.'* This is a most unique/exceptional fact which is peculiar to this claim and a fact which may ultimately enure to the benefit of the defendant in the instant case, if the claim is heard on its merits.

[51] Secondly, as has been stated throughout this judgment (see: paragraphs [36] to [40]) and tacitly acknowledged in Ms Mclymont's own submissions (at paragraphs [29] and [30]), it is clear that the defendant has been failed by counsel. I think it is appropriate in this case for the court to *'step in to protect the litigant when those whom he has paid to do so have failed him.'*[19] I find the word of Phillips JA to be particularly apt and warrant repeating:

> *"[30] … The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys errors made inadvertently, which the court must review. In the interest of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended. (See the St Margaret Insurance case)…"*

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[18] Dated the 24th of May 2013 by Dr. Cecily Thompson of the Erudite Medical Centre & Day Surgery Unit

[19] See: paragraph [30] of **Merlene Murray-Brown v Dunstan Harper et al** [2010] JMCA App 1

[52] Finally, it is clear to me that the defendant displayed a genuine intention to defend the claim. I say so for the following reasons:

> a. firstly, an acknowledgment of service was filed in time which stated unequivocally that the defendant intended to defend the claim;
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> b. secondly, a defence was filed, albeit out of time by 15 days. I do not consider that this delay (in relation to the filing of the defence only) was inordinate. However, this cannot be ascribed to the defendant but rather to its attorneys. Although I placed little to no reliance on the defence that was filed, I have noted, nonetheless, that it raises certain issues of facts and law which in my view ought properly to be ventilated at trial, especially in light of the claimant's own medical report;
>
> c. thirdly, when the defendant became aware of the default judgment, it made efforts to have it set aside by bringing this fact to the attention of its attorneys. It was they who failed to make the application to do so in a timely manner. I observed from Mr. Poyser's affidavit (assuming that it was not based on hearsay) that he was able to speak to the absence of Ms Mclymont from office due to extended maternity leave, the departure from the firm of the junior counsel who was assigned (in Ms Mclymont's absence), as well as, the need for the attorney who was eventually assigned to take instructions in order to prepare, complete and file the application. This evidence, in my judgment, tend to show that the defendant did attend upon its attorneys to have the default judgment set aside, and demonstrate an ardent desire on its part to defend the claim; and
>
> d. finally, as was indicated above, when the application was eventually made it was fraught with procedural errors. As I have stated, having considered all the circumstances, it is my belief that the defendant was "left exposed and failed" by counsel.

[53] Therefore, I find that this matter meets the threshold of being "the rare but appropriate case" to justify the waiver of the affidavit of merit and I have exercised my discretion and done so.

Reasons for the delay in filing the defence and the promptness in making the application to set aside

[54] Both considerations set out at **CPR** 13.3(2) can be conveniently dealt with under the same heading. Especially since, Mr. Poyser's affidavit was primarily focused on proffering reasons for the delay in filing the defence as well as accounting for why the application to set aside was made over a year after finding out that judgment had been entered.

[55] With regards to the reason for the failure to file the defence within time, I do not accept that this was as a result of making efforts to retain an attorney-at-law. Ms Mclymont's firm, PeterMc & Associates, was on record from as early as the 3rd of February 2015 when the acknowledgment of service was filed (within time). The instructions may have taken some time, especially since the incident took place two (2) years prior to the claim and possibly due to the defendant being a company, however, it is to be noted that the defendant's intention to defend the claim was memorialised in the acknowledgement of service which actually stated (incorrectly) a shorter period of time[20] for filing the defence. Based on this error coupled with the time needed to take instructions, one would expect that steps would have been taken (prematurely) to either apply for an extension of time[21] or seek the claimant's agreement to same.[22] Neither of which was done (this again is but another example of the defendant being failed by counsel).

[56] In the circumstances, I do not accept that there was a good explanation for the failure to file the defence within the prescribed time. As I noted previously, a more plausible explanation would have been that the time had been

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[20] 28 days instead of 42 days

[21] See: **CPR** 10.3(9)

[22] See: **CPR** 10.3(5)

miscalculated. However, there is no evidence from counsel or anyone to this effect. An affidavit from Ms Mclymont, in my view, would have greatly aided the defendant in this regard.

[57] While the defence was only 15 days out of time, a factor which the court may consider, it is to be noted that the consideration, specified under **CPR** 13.3(2), with regards to promptness has to do with the application to set aside. I do not accept that the defendant applied to the court as soon as reasonably practicable after finding out that the default judgment had been entered. As previously stated this application was made over a year after finding out about the default judgment and by the same attorneys on record.

[58] With regards to the reason for the delay, which is also not a specified consideration, I think there is merit in Mr. Jones' submission that the explanation contained in Mr. Poyser's affidavit was unlikely to have been from his own personal knowledge. It is more likely that he was advised of same. Even if the internal workings of the firm were in fact known to Mr. Poyser by virtue of his visits to the firm or otherwise, I would not regard this as a satisfactory explanation for the inordinate delay.

Conclusion

[59] It is perhaps necessary to emphasise that although this court has enormous sympathy for the defendant, that it is the combination of the factors identified at paragraphs [36] to [40] and [50] to [52] which has ultimately led me to waive the requirement of the affidavit of merit, to overlook the unsatisfactory reasons and to be minded to set aside the default judgment. It is common ground that a default judgment is a thing of value and that the claimant ought not to be arbitrarily deprived of same. However, having regard to the particular facts of this case and the court's duty to give effect to the overriding objective when exercising its powers, any other outcome would in my view be unjust. While I accept that the claimant may be inconvenienced by the delay, I would adopt the reasoning of my

sister, Straw J from ***Cynthia Smith v Movac Protection Limited***[23], and have regard to the fact that the defendant has already filed the proposed defence and the claimant would have similarly been put on notice of the defence. To my mind this would mitigate any real prejudice to the claimant.

[60] Based on the exceptional nature of the instant case and the conduct of counsel for the defendant, the court is minded to make a wasted costs order pursuant to **CPR** 64.13. It seems that while it would be appropriate for the claimant to be awarded the costs of this application, it would be unreasonable to expect the defendant company to pay same. Having regard to **CPR** 64.14, the court hereby notifies Ms Mclymont that it is minded to make such an order for the reasons contained in paragraphs [36] to [40] and [55] to [56] herein. Ms Mclymont will be permitted to show cause why such an order should not be made, on the 9th of January, 2018 at 9:30 a.m. before me in Chambers 5.

Disposal

[61] It is hereby ordered that:

1. The affidavit of merit is hereby waived.
2. The default judgment entered on the 9th of March 2015 is set aside.
3. The time for filing the defence is extended to the 19th of March 2015.
4. The defence filed on the 19th of March 2015 is permitted to stand.
5. The issue of costs is adjourned to the 9th of January 2018 at 9:30 a.m.
6. Counsel for the defendant is to file and serve written submissions on the issue of wasted costs on or before the 8th of December, 2017.
7. The assessment of damages hearing set for the 2nd of February 2018 is vacated.

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[23] [2016] JMSC Civ. 75, see: paragraph [35]

8. The Registrar of the Supreme Court is to fix a date and time for Case Management Conference as soon as possible.