[2017] **JMSC Civ. 226**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 04306

BETWEEN	**JOHN SMALL**	**CLAIMANT/RESPONDENT**
AND	**HYACINTH SMALL**	**1st DEFENDANT/APPLICANT**
AND	**THE ESTATE OF JAMES ALEXANDER SMALL** **(By Hyacinth Small, Legal Representative of the Estate)**	**2nd DEFENDANT**

IN CHAMBERS

Mr. Harrington McDermott instructed by Campbell McDermott for the 1st Defendant/Applicant

Mr. Jeffrey Daley instructed by Betton, Small, Daley and Company for the Claimant/Respondent

Heard: February 17, 22, and December 8, 2017

Civil practice and procedure– Application to set aside default judgment– Whether defendant has real prospect of successfully defending the claim– Contested Probate– Rule 68.55 (1) of the Civil Procedure Rules

PALMER HAMILTON, J (AG.)

BACKGROUND

[1] By this application, the 1st Defendant (hereinafter the Applicant) is seeking an order to, inter alia, set aside the default judgment entered against her on the 27th day of April, 2015 and a stay of execution of the judgment. The Applicant desires that all

orders flowing from the default judgment be set aside and that permission be granted for her to file and serve her defence.

[2] The Applicant cited grounds on which the application is based, the pith of which is that the Applicant has a real prospect of successfully defending the Claim and that contrary to rule 68.55 (1), the probate claim, which is the substantive claim herein, was not commenced by fixed date claim form. In order to render the instant proceedings more intelligible, I deem it necessary to provide a synopsis of the facts of the case and a brief chronology of the events.

[3] The substantial dispute concerns two Wills that were allegedly created by Mr. Charles Emanuel Small (hereafter "the testator"), one dated the 30th day of January 1973 (hereafter "the January Will") and one dated the 20th day of November 1975 (hereafter "the November Will"). Both Wills devised property situate at and known as Land part of Blue Mountain in the parish of Manchester registered at Volume 1029 Folio 349 in the Register Book of Titles (hereinafter "the property").

[4] In the substantive Claim, the Respondent indicated that he is the nephew of the testator and one of two beneficiaries to the property named in the January Will. He further maintained that in the January Will, the testator left the house on the property to his wife, Ms. Georgianna Small for her lifetime with the remainder to go to the Respondent and a Mr. James Alexander Small, his estate being the 2nd Defendant in this matter. Both Ms. Georgianna Small and Mr. James Alexander Small having died, the Respondent claims that he is now the sole beneficiary of the property.

[5] In the November Will, the testator devised the property to his wife Ms. Georgianna Small for her lifetime and upon her death the property was to pass to Mr. James Alexander Small, the son of the testator. The Respondent challenged the validity of the November Will on the grounds that Mr. James Alexander Small is the one that created the Will and forged the signature of the testator. He further alleges that, the 2nd Defendant used a fraudulent Will to obtain a grant of probate dated

the 30th day of January 1997 in the Manchester Resident Magistrate's Court (as it then was). The Respondent also contended that the Applicant, pursuant to the fraudulent Will took possession of the property and undertook renovations and structural changes to the dwelling house thereon. He sought orders restraining the Applicant from dealing with the property and that she quit and deliver up possession of the property.

[6] The Applicant herein is the wife and administratrix of the 2nd Defendant's estate. She was served with the Claim Form and Particulars of Claim in or around 2012. The Applicant did not file an acknowledgement of service or defence and the Respondent subsequently filed a Notice of Application for Court Orders for Judgment in Default. The Respondent successfully secured a default judgment against the Applicant which included injunctions restraining her from carrying out any further construction at the property, mandating that she remove any structure erected by her on the property and that she made good any damage caused to the existing building by any construction or demolition work carried out by her. The Applicant was also ordered to vacate and deliver up possession of the property. This lead to the Applicant filing the instant application before the Court.

[7] The Application herein first came before my brother the Honourable Mr. Kirk Anderson on the 6th day of December, 2016. The nature of the Application at the time was inter partes and Anderson, J adjourned the matter the matter for it to be heard inter partes and made orders to facilitate same. the Applicant subsequently filed a further Notice of Application and sought the following additional orders: -

> *"(1) That the applicant be permitted to rely on the following grounds in addition to those contained in her ex parte application for court orders dated December 6, 2016:*
>
> *(i) The applicant has a real prospect of successfully defending the claim; and*
>
> *(ii) The applicant has a good explanation for her failure to file an acknowledgement of service and a defence.*

(2) That the order of the Honourable Mr. Justice Anderson dated December 6, 2016 be varied to permit the applicant to file a further affidavit treating with her prospects of successfully defending the claim and exhibiting a draft defence in answer to the Amended Particulars of Claim filed October 16, 2013.

(3) That the time for the service of this application be abridged.

(4) Such further and other relief as this Honourable court deems fit."

[8] This application is amalgamated with the application to set aside the default judgment and is also before me for consideration.

THE APPLICANT'S POSITION

[9] The Application is supported by two affidavits deponed by the Applicant. She revealed that Mr. James Alexander Small and herself were married on the 7th day of March 1998. From in or around the year 2000 up until his death, they both lived at the house on the property which is the heart of this matter. The Applicant also stated that prior to her late husband's death, he showed and advised her of the November Will which devised the property to him and the grant of probate in relation to said Will.

[10] It was disclosed by the Applicant that some time in or around 2012 she was served with court documents but she did not understand them. She took them to her then attorney-at-law who assured her that he would deal with the matter. She also indicated that prior to receiving these documents, she went to the said attorney-at-law and showed him the documents she got from her late husband and she was advised that it was possible for her to get title to the property in her name.

[11] The Applicant stated that from time to time she would be served with court documents, she would take them to the said attorney-at-law and when she enquired about the status of her application to receive title to the property she was told that everything was okay. The crux of her averments is that she verily believed that said documents were related to her application for title and it was not until in or around December 2016 when the bailiff executed the warrant of execution

evicting her from the property that she realized otherwise. She was off the island when the bailiff executed the warrant.

[12] After seeking alternative legal advice, she became aware of the default judgment. The Applicant averred that she has been shown the Claim Form and Particulars of Claim and deny the allegations contained therein. She stated that the Respondent's allegations are made without proof, furthermore, that at no time prior to and after her husband's death did anyone raise the allegation of a fraudulent Will, neither did her husband inform her that anyone contacted him about these allegations. The Applicant stated that the Respondent has simply sought to take advantage of the fact that her husband is not around to clear his good name. she maintained that she has a good prospect of successfully defending the Claim for the following reasons: -

(1) She has a beneficial interest in the property by virtue of being the surviving spouse of Mr. James Alexander Small;
(2) The Claim itself does not comply with certain aspects of the Civil Procedure Rules, 2002 (hereinafter "the CPR") and by virtue of this and other matters, she is entitled to the default judgment being set aside as of right; and
(3) The allegation of fraud is not made out.

[13] The applicant has exhibited a draft defence outlining these asseverations.

THE RESPONDENT'S POSITION

[14] The Respondent's opposition to the application is contained in his affidavit in response. He expressed his surprise at the Applicant making the application herein since the Writ of Possession has been executed and the judgment of the Court has already been satisfied. The Respondent indicated that since the Applicant did not respond to the Claim that was personally served on her, the application for default judgment was made and said application was served by registered post. He also alleged that the application for default judgment was never returned by the post office.

[15] The Respondent declared that the application for default judgment obtained an expert report from a handwriting expert, Mr. Carl Mingo Major who had confirmed that the November Will was forged. He also alleged that although the Applicant was made aware of the Claim herein, she did not raise any issue or opposition thereto. Also, the Applicant was served with the Formal Order setting aside the default judgment.

[16] Essentially, the core of his allegations is that the Applicant had numerous opportunities to raise objections to the Claim over the four (4) years of its currency and failed to do so. The Respondent proffered that the Claim has been concluded, the Writ of Possession has been executed and therefore, there is no basis at this stage for the Applicant to be heard on her application. This he based on the Applicant's failure to give any good reason for her inordinate delay in responding to the Claim and that she has not demonstrated that she has a real prospect of success.

ISSUES

[17] There are two primary issues that arise before the Court for determination. They are as follows: -

1. **Whether the substantial claim was properly commenced?**

2. **Whether default judgment entered ought to be set aside as of right?**

[18] The success of this application will primarily depend on the answer to these issues. My answer to these questions will also determine whether I need to consider the merits of the case.

[19] At this juncture, I thank Learned Counsel for their industry in preparing written submissions as well as for their oral submissions on behalf of the Applicant and the Respondent. I will only address the aspects as regards to the law in relation

to my findings however, I assure them that I have considered their submissions in full.

THE APPLICANT'S SUBMISSIONS

[20] Learned Counsel for the Applicant, Mr. Harrington McDermott commenced his submissions by indicating that the default judgment was entered contrary to rule 12.2 (c) of the CPR in that, in respect of probate claims, default judgments cannot be entered. It was submitted that pursuant to rule 68.54, it was unassailable that the substantive Claim comprises a probate claim, in particular contentious probate proceedings governed by section 2 of part 68 of the CPR, as the matter concerns firstly, a claim for the revocation of the grant of probate issued in respect of the November Will and secondly, orders pronouncing that said Will is invalid. The cases of **CDF Scaffolding & Building Equipment Limited and Owen Chambers v Ian Smith** [2012] JMSC Civ 96 and **Lousie Rebecca Watson v Earle Parchment** [2015] JMCA Civ 28 were cited in support of these submissions.

[21] Mr. McDermott avouched that the rules set out a specific procedure to be followed in circumstances where no acknowledgement of service or defence are filed. The rules provide that upon proof of service, the claimant can apply to the court at the first hearing to deal with the claim summarily or that a trial date be set and any necessary directions be given. Learned Counsel submitted that the tenor of rule 68.62 is that notwithstanding the failure of the defendant, in this case the Applicant, to file an acknowledgement of service or defence, the Court will nevertheless consider the claim on its merits based on the evidence before it.

[22] Pursuant to rule 12.2 (c) of the CPR it was not open to the Court to grant the default judgment and as such, the Applicant is entitled to have the default judgment set aside as of right. Paragraphs 63-65 of the case of **Dale Austin v Public Service Commission and Attorney General of Jamaica** [2016] JMCA Civ 46 was cited in support of this submission.

[23] Learned Counsel submitted that there are other procedural irregularities in that given that the substantive Claim is a probate claim governed by section 2 of part 68 of the CPR, the claim ought to have been commenced by Fixed Date Claim Form. The rule is expressed in mandatory terms and the Respondent has not complied with these mandatory requirements. Mr. McDermott proffered that this is another reason why the default judgment ought to be set aside as of right.

[24] It was submitted that the Applicant has a real prospect of successfully defending the Claim. Mr. McDermott indicated that as to the contents of a defence in response to a probate claim, rule 68. 60 contemplates that it is a good defence to put the Respondent to proof of his Claim.

[25] Learned Counsel also submitted that the Applicant has a good reason for failing to file an acknowledgment of service and a defence. He asserted that if it is found by the Court that the explanation provided is not a good one, then this is not the end of the matter. The courts have held that a defendant should not be precluded from mounting a defence to the claim as a result of a procedural default. This is especially in circumstances where such a defendant has a good defence to the claim. Mr. McDermott cited the following authorities in support of this submission: -

1. **A Practical Approach to Civil Procedure**, Stuart Sime, 5th edition, page 24;
2. **Finnegan v Parkside Health Authority** [1998] 1 All ER 595;
3. **Thorn PLC v MacDonald** [1999] CPLR 660; and
4. **Rayner (JH) (Mincing Lane) v Cafénorte SA Importadora** [1999] 2 All ER (Comm) 577.

[26] On the issue of the application for the stay of execution of the judgment, Learned Counsel stated that it is settled law in this jurisdiction that the Court has an inherent jurisdiction to grant a stay. The cases of **Albertha Dewdney and Ors v Enid**

Louise Brown-Parsons and Anor, (unreported) Supreme Court, Jamaica, Claim No. 2004 HCV 421, judgment delivered on the 20th day of August 2009 and **Wilbert Walker v Jamaica Public Service Company and Ors**, (unreported), Supreme Court, Jamaica, Claim No. C.L. W 186 of 1995, judgment delivered on the 18th day of August 2004 were quoted to buttress this submission.

[27] Mr. McDermott commended to the Court the same reasoning in the case of **Natasha Richards and Anor v Errol Brown and the Attorney General of Jamaica** 2016 JMFC 15 as to the unconstitutionality of any rule that would preclude a defendant from applying for a stay of execution pending their application to set aside default judgment. He submitted that the jurisdiction exists whether it is a stay pending an appeal or a stay pending an application to set aside a default judgment.

THE RESPONDENT'S SUBMISSIONS

[28] Learned Counsel Mr. Jeffery Daley submitted that the Applicant failed to give any good explanation for the inordinate delay in making such an application to set aside the default judgment and it is fatal to her application. It was averred that the Applicant has not claimed any impediment such as illiteracy and with the gravity of the assertions against her former attorney-at-law, the Court should issue a subpoena for him to explain his instructions and the fatal delay of the Applicant in failing to respond or defend the Claim timeously.

[29] Mr. Daley submitted that the defence of the Applicant purports to challenge the Respondent's claim that the November Will is fraudulent whilst proffering no evidentiary material to substantiate the challenge. He stated that in the absence of any tangible challenge to the Handwriting Expert's Report prepared by Mr. Carl Major, the Applicant's purported defence is fanciful. Learned Counsel cited paragraph 15-014 at page 264 of **O'Hare and Brown, Civil Litigation**, 15th Edition, and the case of **Three Rivers DC v Bank of England (No.3)** [2001] 2 All E.R. 513 HL in support of this averment.

[30] It was also submitted that from the Applicant's own evidence, she only joined the Small family around 1998 therefore, in the absence of any documentary proof she would have to produce, she cannot speak to occurrences that happened in the 1970's when the testator made his Will. Accordingly, this case fits squarely into one where the Applicant's Statement of Facts is contradicted by the very same material upon which it is based.

[31] Learned Counsel contended that the default judgment in the instant matter was regularly obtained, all proceedings having been served on the Applicant according to the CPR. The distinction in the default judgment now before the Court for consideration, being one that was made after it was initially considered on its merits, respectfully cannot be set aside by a Court of concurrent jurisdiction in the same way as a default judgment that has been administratively entered upon request by the Respondent to the registry of the Supreme Court.

[32] With regards to the injunctions granted, they are final injunctions and not interlocutory injunctions, therefore, they may only be overturned on Appeal if such appeal is made within the time allowed by the CPR. The Respondent has been put into possession and the time limited for appealing the final injunctions have long since expired. The case of **National Water Commission v Delton Knight** [1997] 34 JLR 617 was cited in support of this submission.

[33] Learned Counsel stated that this Court is now *functus officio* in respect of the granting of all the injunctions. **Celie Diane Persadsingh v Dr. Jephtha** (2015) JMSC Civ 123 was used to bolster this position. It was also submitted that the case of **Norman Washington Manley Bowen v Shahine Robinson and Neville Williams** [2010] JMCA App 27.

[34] Mr. Daley submitted that the Applicant has made no application for relief from sanction or proffered any explanation for failure to comply with the Order of the Court. Her routinely dilatory behaviour in her treatment of this serious Claim ought

not to be excused and her application ought not to be permitted to proceed any further.

[35] On the issue of the procedure to commence the Claim, Learned Counsel for the Respondent indicated that by virtue of rule 68.55, the provisions of Part 68 which relates to contentious probate proceedings are not applicable to the instant Claim. In the instant case, there was not one (1) but two (2) Grants of Probate that were issued well over fifteen (15) years ago and there is no contention in relation to the fact that these Grants of Probate have already been issued by two (2) Courts of competent jurisdiction.

[36] Mr. Daley further submitted that the Respondent's Claim is concerned with whether the two Grants of Probate in relation to the estate could co-exist and also to protect the only asset in the estate which he has an interest in based on the provision of the true Will, that is, the January Will. In order to protect this asset, the Respondent required injunctive relief and the non-contentious Probate Rules would not have permitted the Claimant to injunctive relief under that procedure. Accordingly, a regular Claim was the appropriate procedure to use in the instant case, since it would provide for declaratory and injunctive relief in the same Claim. The case of **Dale Austin v The Public Service Commission and the Attorney General of Jamaica** (supra) was used to buttress this submission.

LAW AND ANALYSIS

Whether the substantial claim was properly commenced?

[37] I will first consider the procedural irregularity in this matter. The Applicant contended xthat the claim is not under the scope of probate proceedings under part 68 of the CPR. The argument advanced by the Respondent is that probate proceedings relate to the seeking of authority whether by grant of probate or letters of administration to administer the estate of a deceased person or challenging the validity of a Will. He argued that the purpose of the proceedings was to protect the

assets by preventing the Applicant from appropriating the only asset in the estate and to establish the basis for removal of the second grant issued in the November Will. Thus, he claims his purpose was not to administer the estate.

[38] Pursuant to rule 68.55 (1) of the CPR, probate proceedings must be commenced by issuing a fixed date claim form in form 2. It must state the nature of the interest of the claimant and of the defendant in the estate of the deceased person to which the claim relates.

[39] In outlining the scope of the section relating to contentious probate, rule 68.54 (3) of the CPR states: -

> *"**probate claim**" means a claim for-*
>
> *(i) the grant of probate of the will in solemn form, or letters of administration of the estate of a deceased person;*
>
> *(ii) the revocation or amendment of such a grant;*
>
> *(iii) for a decree pronouncing for or against the validity of an alleged will, not being a claim which is non contentious or common form probate business;"*

[40] It is well recognised that rule 26.9 of the CPR gives the court a general power to rectify matters where there has been a procedural error. This position was echoed in the case of **Roger Hunter v Alma Grace Leahy and Bupa Insurance Limited (T/A "Bupa Global")** [2015] JMCC COMM 20. The Honourable Mr. Justice Bryan Sykes (as he then was) indicated at paragraph 27 that rule 26.9: -

> *"… gives the court maximum discretion where the consequence of a procedural failure has not been specified in any rule, practice direction or court order. It also stated that where the consequence is not specified, the court must look at things in the round and determine the way that is the best to proceed. This is in keeping with the overriding objective to dealing with cases justly."*

[41] In **James Brown v Karl Rodney and Maureen Rodney** [2017] JMSC Civ 32, the Honourable Mr. Justice Kirk Anderson at paragraph 6 stated that rule 8.1 (4) of the

CPR required that a fixed date claim form *'must be used'* in respect of claims for possession of land. In this case the proceedings were commenced by way of a claim form. In addressing the procedural irregularity, Anderson, J stated at paragraph 7 that it was open to the court, as a matter of case management, to convert the proceedings to be treated as fixed date claim form proceedings and no new documents needed to be filed. Anderson, J at paragraph 15 stated: -

> *"… Whilst it is correct that the claimants' amended statement of case did not comply with the requirements of Part 8 of the C.P.R in that the claim ought to have been pursued as a Fixed Date Claim Form proceeding and ought to have been supported by affidavit evidence, this court though, has made an order converting this claim to a Fixed Date Claim Form proceeding. Since witness statements have already been filed and served by the parties, this court will not require affidavit evidence to be hereafter, separately filed and served. In a matter of this nature, the costs which would have to be incurred by the parties, for such affidavits to be prepared, filed and served, cannot properly be justified."*

[42] In **Thomas v Gonsalves** VC 2016 CA, it was established that there is power under rule 26.9 to put matters right and a claim in the wrong form does not thereby make the claim any different in substance to the claim which it is. In answer to the appellant's assertion that because the claim had been commenced as a fixed date claim it must be taken that the judgment entered must be treated as irregular or one which was made without jurisdiction, having regard to rules 12.2(b) and 15.3(c), the court said at paragraph 15: -

> *"To my mind, this overlooks the power residing in the judge to have treated the claim for precisely what it was in substance and to overlook the defect in form in which the action was brought… The Court is there to do justice between the parties, not punish litigants who have failed to properly follow all the required procedural steps in seeking to have their matter adjudicated."*

[43] Also, in the case of **Forde v. John** VC 2015 HC 19, the claimant commenced his action by a claim form. The claimant applied for entry of judgment in default of defence. Default judgments however, were not available if the claim was one in probate proceedings or a fixed date claim. The court stated that probate proceedings involved claims for the grant of probate of a will, or letters of administration of the estate of a deceased person, for the revocation of such grant

or for a grant pronouncing for or against the validity of an alleged will. It was held that the claim brought by the claimant sought none of those reliefs and was not a probate claim. The court went further to examine the substance of the claim to determine whether it is one which was mandated to be commenced by fixed date claim form under the CPR.

[44] After carefully examining the substance of the Respondent's Claim, I find, respectfully, that the arguments on this issue are ill-founded. The Respondent's Claim was for injunctive and declaratory relief in order to protect the sole asset of the estate of the testator. However, as correctly pointed out by the Respondent these could not amount to a substantive Claim. Thus he would need to establish a cause of action to obtain this relief. It is evident that the substance of the proceedings went to challenging the validity of the November Will. This cause of action was clearly within the realm of probate proceedings. His claim to the beneficial interest in the property was dependent upon satisfying the court that the November Will was invalid and the January Will was valid.

[45] This is so as by virtue of the rules governing probate proceedings, the November Will being later in time would have revoked the January Will. The Respondent would have had no beneficial interest and no basis on which to recover possession as he was not given an interest in the property under the November Will. Consequently, the Respondent was in fact seeking a decree pronouncing for the validity of the January Will and the invalidity of the November Will.

[46] The Respondent also submitted that probate proceedings as defined under rule 68.55 of the CPR are clearly intended for situations where the grant of probate has not yet been issued. He supports this by highlighting rule 68.55 (5) which provides that no grant may be made until probate proceedings are disposed of. He concludes that since there were already grants of probate in these circumstances, part 68 was inapplicable. However, in my view, it is evident that the scope of the

section is not limited to the period before a grant of probate is received as a probate claim defined under rule 68.54(3) covers revocation and amendment of grants.

[47] I find that the authority of **Dale Austin v. The Public Service Commission and The Attorney General** (supra) cited by the Respondent is inapplicable to the circumstances as the court in that case was dealing with two substantive claims which could have been initiated independently of the other unlike the Respondent's case herein.

[48] The CPR expressly dictates that probate proceedings are to be commenced by way of a fixed date claim form. Thus, a party initiating a claim cannot elect to bring the action by a claim form on the basis that based on the relief sought it would be more appropriate to bring it as a regular claim. Moreover, the framers of the CPR in formulating the rules must have dealt with the issue that matters such as contentious probate would normally have substantial disputes as to fact. The rules contain no requirement that the evidence in such matters must be tried solely on affidavit evidence.

[49] However, by virtue of the authorities advanced above, the CPR gives the Court the power to rectify procedural errors. Therefore, in keeping with the overriding objective of dealing with cases justly, I am prepared to make an order that the proceedings are to be converted and treated as fixed date claim form proceedings. Affidavits and documents have already been prepared, filed and served and the parties would have already incurred costs. This, in my view, is the best way to proceed with the matter.

Whether default judgment entered ought to be set aside as of right?

[50] As is well known, pursuant to rule 12.2 (a) and (b) of the CPR, a claimant may not obtain default judgment where the claim is a fixed date claim or a claim in probate proceedings. In the case of **Speedways Limited v Jonathan Outar** (unreported)

Supreme Court of Jamaica, Suit No. C.L S 109 of 1999, judgment delivered on the 9th day of April 2002, the defendant applied to have the default judgment set aside on the basis that the default judgment was irregularly obtained as it was not served in accordance with the rules that service had to be personally effected. It was held that the service of the summons was irregular and so the defendant was entitled to have judgment set aside with cost, *ex debito justitiae*, without consideration of the merits. At page 6 of the judgment, the Honourable Mr. Justice Roy Anderson said: -

> *"It was well established that an irregular judgment is a judgment that is entered otherwise than in strict compliance with the rules, or a statute. It is a proposition of law that where the judgment is irregular the defendant is entitled to have it set aside."*

[51] In the case of **Royal Bank of Canada v Nedwell** AG 2017 CA 12 the respondent instituted a claim against the appellant seeking various declarations. The appellant failed to file its defence and judgment was entered against it for a specified sum, notwithstanding that no specified sum had been claimed. The appellant applied to set aside the default judgment. On the date of the hearing of the appellant's application, the master set aside the default judgment as being wrongly entered on the basis that the claim was not one for a specified sum but, rather, for declarations and an account. The master also noted that the primary relief sought by the respondent was for an account and thus attracted the procedure set out in rule 41.1(2) requiring the claim to be brought by fixed date claim form which did not allow for the utilization of the default judgment procedure under part 12. Consequently, the court upheld that the default judgment entered was irregular and was wrongly entered and as such, could not stand.

[52] I also examined the case of **United Kingdom Mutual Steam Ship Assurance Assn v Humber (The)** [2000] BHS J. No. 15. The court set aside the service of the notice of the writ on the defendants outside the jurisdiction and the default judgment, and discharged the injunction granted. The plaintiff's answer to the

defendants' application was that the judgment entered was a "final judgment" and therefore the defendants' recourse was an appeal to the Court of Appeal. Counsel for the plaintiff submitted that the court had no jurisdiction in the circumstances to set aside the final judgment entered and the injunction granted. The court found that it had the jurisdiction to entertain the application. The action against the defendants was improperly commenced as it was commenced as an admiralty in rem claim.

[53] The court in that case treated the claim for what it was in substance as an ordinary common law action for the collection of a debt. The court held that a judgment entered in default of pleadings becomes irregular if the originating process was not served in accordance with the rules governing service and a defendant is entitled to have a judgment set aside as of right if it was irregularly obtained. Therefore, the leave to serve outside the jurisdiction and the issue of the writ was an irregularity and was set aside as of right.

[54] In addition, one of the bases on which the court in that case discharged the injunction was that an injunction that ought not to be granted, should not be allowed to stand unless there was some claim for substantive relief upon which jurisdiction can be founded. Since the service of the notice of the writ and the default judgment entered thereafter had been set aside on grounds of irregularity, the injunction being ancillary could not stand by itself for there would be no substantive claim sustaining the injunction.

[55] In the case at Bar, in commencing the Claim by claim form, the Respondent did not convert the substance of the claim to one which engages the procedure for regular claim forms. It is plain beyond argument that the substance of the Claim is still that of a probate claim and one that must therefore be subject to the procedure which would govern probate claims.

[56] The Applicant in support of his contention that the default judgment should be set aside as of right because the Claim was a nullity as it failed to comply with the mandatory procedural requirements cited the case of **CDF Scaffolding & Building Equipment Limited and Owen Chambers v Ian Smith** (supra). However, I find that this case should be distinguished from the instant case. The basis upon which the court found that the claim was a nullity in that case was that the claimant had no standing and only an interested party could properly apply for the revocation of a grant of probate or administration. The Respondent properly stated the nature of the interest of himself and of the Defendants in the estate of the deceased person to which the Claim related. It was evident that the Respondent in the case at Bar has standing on the basis of being a beneficiary of the will.

[57] As the rules require probate claims to be commenced by a fixed date claim form, I am of the view that default judgment against the Applicant was not available. The default judgment was an irregular judgment as it was a judgment that was entered otherwise than in strict compliance with the CPR. Therefore, in my view, the Applicant is entitled to have default judgment set aside as of right as it was irregularly obtained.

[58] By virtue of the finding that the default judgment should be set aside as of right, there would be no need to look at the merits to determine whether to set aside the judgment and to enlarge time for the filing of the defence. Consequentially, all orders flowing from the default judgment would be set aside. Nonetheless, I will deal briefly with the time to file the defence, which could be seen, in the light of my findings, as a purely academic exercise.

Whether time should be extended for the Applicant to file the defence?

[59] Pursuant to rule 10.3 (1) of the CPR, the general rule is that the period for filing a defence is forty-two (42) days after the date of service of the claim form. Rule 10.

3 (9) allows the defendant to apply for an order extending the time for filing a defence.

[60] The correct procedure that the Respondent should have taken when the Applicant did not file an acknowledgment of service or defence was to make an application to the court pursuant to part 68.62 (3) of the Civil Procedure Rules. I am guided by the dictum of the Honourable Mrs. Justice Andrea Thomas (Ag) (as she then was) in the case **Marline Clarke, Monique Clarke and Lesia Clarke v Enos Clarke and Victor Clarke (executor of the estate of Linton Lloyd Clarke)** [2017] JMSC Civ 195. At paragraph 9 Thomas, J stated: -

> *"**Part 68 of the Rules** deals with the consequence of failing to file an Acknowledgement of Service and or a Defence in relation to a Fixed Date Claim Form. It specifically indicates that Part 12 does not apply to Probate Proceedings. Therefore, in these proceedings, the Claimants do not have the right to apply for Default Judgment in the absence of a Defence.*
>
> *Section 68.62 (1) reads:*
>
> > *"Part 12 does not apply to probate proceedings."*
>
> *However, **Rule 68.62** does give the Claimant certain entitlements where the Defendant fails to file an Acknowledgement of Service and a Defence. These provisions are as follows;*
>
> > *"68.62(2) Where any of several defendants to probate proceedings fails to file an acknowledgment of service or to file and serve a defence, the Claimant may –*
> >
> > *(a) after the time for entering an acknowledgment of service or filing a defence has expired; and*
> >
> > *(b) upon filing an affidavit proving due service of the claim form and particulars of claim on that defendant, proceed with the claim as if that defendant had entered an acknowledgment of service.*
>
> *(3) Where the defendant, or all the defendants, to probate proceedings, fails or fail to file an acknowledgment of service or file and serve a defence, then, unless on the application of the claimant the court orders the claim to be dismissed or discontinued, the claimant may apply to the court at the first hearing for –*
>
> *(a) the claim to be dealt with summarily at that hearing; or*

(b) a trial date to be fixed and any necessary directions to be given.

(4) Before applying for an order under paragraph (3) the claimant must file an affidavit proving due service of the claim form and particulars of claim on the defendant.

(5) Where the court grants an order under paragraph (3), it may direct the proceedings to be tried on affidavit evidence"."

[61] In the case of **Mary Wallace (Executor of the estate of Bernitta Brown deceased) and Paulette Brown v Juliette Morrison** [2012] JMSC Civ 78 the claimants initiated proceedings against the defendant by a fixed date claim form. At the first hearing of the matter the defendant made an application pursuant to rule 10.3 (9) of the CPR which permits a defendant to apply to the court for an order extending the time for filing a defence. The Honourable Mrs. Justice Vivene Harris, (Ag) (as she then was) cited the case of **Fiesta Jamaica Ltd. v National Water** [2010] JMCA Civ 4 and outlined the principles to be taken into consideration when enlarging the time for the defence. At paragraph 19 the Harris, J (Ag) said: -

*"The case of **Fiesta Jamaica Ltd. v. National Water Commission** SCCA 19/2009 (26.02.2010) is instructive as it sets out the principles that are applicable when considering an issue of this nature. These principles are:*

(1) Does the affidavit supporting the application contain material which is sufficiently meritorious to warrant the order sought? That is, does the affidavit disclose any plausible excuse for the defendant's failure to adhere to rule 10.3 (1) of the CPR and whether the proposed defence has merits.

(2) In making this assessment the court should pay special attention to:

i. the length of the delay

ii. the explanation for the delay

iii. if there is any prejudice to the other party

iv. the merits of the case

v. the effect of delay on public administration

vi. the importance of compliance with time limits since they are to be observed

> *vii. the resources of the parties which might be relevant to the question of prejudice*
>
> *viii. whether the proposed defence, when examined, discloses an arguable defence to the claim, that is whether the proposed defence raises any triable issues worthy of a defence."*

[62] After examining those factors, Harris, J (Ag) stated at paragraph 35 that: -

> *"While I agree that the case has not yet been decided upon its merits, that the explanation given for the delay offers a plausible excuse, that the delay in filing the defence has not been inordinate and the claimants have not suffered any prejudice as a result, it is my view that a close examination of the defence reveals that it is lacking in merit and the defendant does not have a real prospect of successfully defending the claim."*

[63] At paragraph 36 it was noted that rule 27.2 (8) of the CPR permits the court to treat the first hearing of a fixed date claim as the trial of the claim if it is not defended or if the court considers that the claim can be dealt with summarily. It held that in light of the overriding objective to deal expeditiously and justly with the matters before it and the fact that it was a case that could have been dealt with summarily, the court struck out the defence.

[64] In the case of **Hyacinth v Joseph** (2016) 89 WIR 303, the applicant applied for an extension of time to apply for leave to appeal and for leave to appeal against the order striking out his defence and counterclaim. In looking at the issue of delay, the court stated that the delay of twenty (20) months between the judge's order striking out the defence and the applicant's application was an inordinately long delay and could only be justified if there was good reason for the delay.

[65] The applicant's reason for the delay in that case was that immediately after the judge struck out his defence and entered judgment against him he told his attorney to appeal the judge's decision and the attorney agreed to file the appeal. Thereafter he was labouring under the belief that the appeal had been filed. He only realised that the appeal had not been filed when he was served with a copy of the judgment. By then the attorney who he had instructed to file the appeal was no longer available and he took the judgment to another attorney who in turn referred him to

his current attorney. His current attorney told him that no appeal had been filed against the judge's order and that he had to apply to the court for an extension of time to apply for permission to appeal the judge's order.

[66] The court adopted a well-reasoned approach to the issue of delay attributable to an attorney's inaction. At paragraph 18 Webster JA (Ag) said: -

> *"By this explanation the applicant is laying the blame for the delay squarely at the feet of his former attorney. There are numerous cases in the English speaking Caribbean dealing with the issue of litigants missing deadlines because of their attorney's error. The principles that emerge from the cases are that timelines must be observed but an attorney's error can be a good reason for missing a deadline and applying for an extension of time to appeal. The applicant must show that the delay was substantially due to the conduct of the attorney. Each case must be decided on its own facts and the court must exercise its discretion in accordance with those facts."*

[67] In finding that the applicant's reasons for the delay in applying for an extension of time were not sufficient to justify the long delay Webster JA (Ag) continued at paragraph 19: -

> *"I appreciate that the applicant in this case is a fisherman and spends long periods of time at sea. But he has shown little interest in defending himself against the respondent's claim. It is very easy for him to say that he handed the matter of the appeal over to his attorney. But in a situation where he became aware that judgment had been entered against him in January 2014, it behoved him to make enquiries over the next 20 months as to the progress of the appeal. A short delay for this reason may have been acceptable, but a delay of 20 months displays little, if any, regard for the court system. Litigants must show some degree of vigilance in protecting their own interest. It is not sufficient to simply hand the matter over to the attorney and wait for extended periods to see what happens. Failing to make at least periodic enquiries can result in the court being of the view that the attorney's conduct may have contributed to the delay, but it was not the substantial reason."*

[68] In the Court of Appeal decision of **Dale Austin v. The Public Service Commission and The Attorney General of Jamaica** (supra) the Court highlighted that whilst rule 10.3(9) of the CPR allowed a defendant to apply for an order extending the time for filing a defence, the rule, did not stipulate the factors to be taken into consideration in the exercise of the discretion. At paragraph 36 the court cited the case of **The Attorney General of Jamaica and Western Regional**

Health Authority v. Rashaka Brooks Jnr (a minor) by Rashaka Brooks Snr (His father and next friend) [2013] JMCA Civ 16 that established that the principle that operates is, in the absence of specific guidance in a particular rule, the court is to have regard to the overriding objective in applying that rule. Moreover, a court should not be inflexible in exercising its discretion, but that each case is to be decided on its own facts.

[69] The Court at paragraph 38 also considered Court of Appeal decision of **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4, wherein at paragraph 15, highlighted the principle from the case of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors.** [2001] EWHC Ch 456. In that case Lightman J. stated that when the Court is deciding whether an application for extension of time should succeed, it was no longer sufficient to apply a rigid formula in deciding whether an extension was to be granted as each application had to be viewed by reference to the criterion of justice.

[70] The Court of Appeal whilst addressing the issue of length of the delay pointed out that the question of whether or not the period of delay ought to be viewed as inordinate, must be examined in light of the respondents' overall conduct. Moreover, in relation to the reason for delay the court noted that even in cases where no reason or a poor reason is given, that factor by itself is not conclusive in the application being refused.

[71] The affidavits supporting the application in the instant case was the Affidavit of Urgency in Support of Notice of Application dated the 6th day of December 2016 and the Second Affidavit of the Applicant in support of Application for Court Orders dated the 12th day of December 2016. These affidavits did address the Applicant’s excuse for failure to adhere to rule 10.3 (1) of the CPR and the argument that her proposed defence has merits.

[72] The amended Claim Form, Amended Particulars of Claim and Formal Order dated the 10th day of October, 2013 along with the accompanying documents were served personally the Applicant on the 4th day of December. 2013. The Applicant applied for permission to file her defence on the 6th day of December, 2016. In my view, it is inevitable that this delay of approximately three (3) years would be regarded as inordinate.

[73] The Applicant in explaining her delay admitted that she was served with the aforementioned documents and that she tried to read them but could not understand them. I find that the reasons advanced by the Applicant are somewhat dubious. Even if it is true that she did not understand the nature of the documents, she should have enquired about the contents. She said she made checks in relation to getting the title. It is implicit that her former attorney being a creature of instruction would advise her on the progress of the application in relation to getting the title. In addition, before the bailiff arrived, the last time she contacted her attorney was more than a year ago. Therefore, it is evident that she was not making sufficient steps to follow up on the matter and make periodic enquiries. In my view, it is highly unlikely that it could be said that the delay was substantially due to the conduct of the attorney but more to her inattentive and slipshod conduct. The Applicant failed to display any vigilance in protecting her interest.

[74] If it is concluded by the court that the Applicant's reason for delay was not a good reason, this by itself is not determinative as to whether her application for extension time to file her defence should be refused. The Court must go on to consider the merits of the defence and the prejudice to the other party.

[75] I will now consider the merits of the proposed defence. The Claim against the estate of James Alexander Small, the 2nd Defendant in the substantive Claim is that he by means of fraud and deception created a fraudulent Will purporting to be made by Charles Emmanuel Small dated the 20th day of November, 1975 and thereafter obtained a purported grant of Probate dated the 30th day of January, 1997 with a view of transferring the property including the house thereon into his

sole name. The Respondent furnished the Court with an opinion of a handwriting expert, Carl Mingo Major, dated the 12th day of May, 2014 who confirmed that the signature on the said November Will was signed by someone other than the testator. In relation to the Claim against the Applicant herself it is alleged that she is a trespasser with no legal or beneficial interest in the property and has conducted construction on the property unlawfully.

[76] In defence to the fraud, the Applicant stated that she does not believe that the allegations of fraud are true. Additionally, she states that prior to her husband's death, at no time did anyone contact her regarding any property in issue and at no time did anyone raise any allegations that the November Will was forged or that there was a previous Will. The Applicant said that her husband did not inform her that anyone contacted him regarding those allegations. She maintained that the Respondent is simply trying to take advantage of the fact that her husband died and is not here to defend his good name.

[77] In light of the evidence presented by the Respondent regarding the allegation of fraud, the Applicant's evidence is unlikely to be seen as arguable or as one that has a good prospect of success. She has presented no documentary evidence or otherwise to dispute the findings of the expert witness. At this juncture, it is worthy to highlight that the Applicant is being sued in her representative capacity as the representative of her husband's estate. I find that this factor is attributable to her lack of solid proof. The Applicant cannot speak first-hand to any of the allegations put forward by the Respondent in relation to the fraud. She cannot speak to the circumstances of and surrounding the execution of Wills to rebut the Applicant's evidence nor can she speak to the circumstances as to whether there was revocation of the January Will.

[78] The evidence put forward by the Applicant consists of mainly statements made by her husband and the documents he showed her which was said to be the Last Will and Testament of the testator dated the 20th day of November, 1975 and the Grant of Probate granted to Clive King and Darius Stewart by the Manchester Resident

Magistrate's Court on the 30th day of January, 1997. Whilst this may be admissible at trial pursuant to section 31E of the Evidence Act, there is also the real possibility that Mr. James Alexander Small could have lied to his wife. Thus the evidential value of the statements would be very tenuous in comparison to objective, expert evidence.

[79] However, in relation to the allegations of trespass, the Applicant has put forward that she has an equitable interest in the property by virtue of being the surviving spouse of James Alexander Small and in light of him dying intestate. Therefore, she asserts that she is entitled to possession and has no way trespassed on the property. The Claimant put forward that the January Will left land located to the rear of the house on the property to her husband and that he returned from Canada to Jamaica in the late 1980s after the death of the wife of testator and took up occupation of the house.

[80] The Applicant also disclosed that herself and her husband have lived at the house on the property as husband and wife from, in or around the year 2000 up to her husband's death in February 2006. The Applicant contends that during the life of her husband, they expended sums on the development of the property and in particular, to construct a concrete house. The Applicant indicated that she has also carried out further development on the said property subsequent to her husband's death. She also submitted that the legal title to the property still vests in the name of the testator and the Respondent at this juncture only has a beneficial interest. I find that she would have an arguable case in this regard.

[81] In my judgment, the proposed defence denies the facts which support the Respondent's cause of action and also raises answers to the Respondent's Claim. I find in the circumstances that the proposed defence raises triable issues, that is sufficiently meritorious to justify the order sought.

[82] As it relates to the issue of prejudice, there is no doubt that the delay would cause prejudice to the Respondent if time was extended to permit the filing of the defence.

Litigants must feel secured about the finality of their claim especially where a significant amount of time has lapsed. The Respondent had to expend further costs to deal with the current application and judgment was already executed. There is also no doubt that the Applicant's inordinate delay without a good reason for same has negative effects on public administration. Moreover, it shows blatant disregard for compliance with time limits. On the converse, it should also be borne in mind that the court should not be too quick to deprive a litigant of his day in court on a point of technicality and without an assessment of the merits of the case, especially in a case such as this where to deprive the Applicant of the chance to defend her rights would deprive her of her potential interests in the property she has invested a good portion of her life in.

[83] For completeness, I will also consider the other issues raised by the parties herein in brief.

Whether a default judgment entered on application may be set aside by a judge of concurrent jurisdiction?

[84] The Civil Procedure Rules define the scope of Part 12 to be where a claimant obtains judgment without trial where a defendant has failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9 or has failed to file a defence in accordance with Part 10.

[85] Rules12.10 (4) and (5) defines the nature of default judgment where the claim is for some other remedy. It states that it shall be in such form as the court considers the claimant to be entitled to on the particulars of claim. Furthermore, an application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 which requires service of the application where order made on application made without notice does not apply.

[86] In **Russell Holdings Limited v L&W Enterprises Inc. and Ads Global Limited** [2016] JMCA Civ 39, the respondents filed a claim against the appellant seeking

damages for breach of contract and an injunction. The respondents applied for a default judgment as the appellant did not file an acknowledgement of service or a defence in response to the claim. The appellant applied to set aside the default judgment. The appellants were appealing on the basis that the judge at first instance erred when he ruled that the application to set aside the default judgment was not the proper procedure and that an appeal ought to have been filed to challenge the order made. The court concluded at paragraph 69 that the learned judge in ruling that the proper procedure was to file an appeal clearly misunderstood the law in relation to the challenges that can be made to the order entering a default judgment. At paragraph 73 the court stated that in the same way the appellant would have had the right to apply to set it aside if it had been a judgment in default entered by the registrar, so too it had a right to apply to set aside the judgment in default entered by the court. In addressing the issue as to whether an appeal was the correct procedure it stated at paragraphs 74 to 76 and 78 to 79 that: -

> *"No doubt, although he gave no reasons, the learned judge was influenced in his observation by the fact that P Williams J made a finding of fact when she found that the claim and particulars of claim were properly served. He may have felt that this was a finding that properly ought to be appealed. If that is so, he would have been incorrect.*
>
> *This effectively means therefore, that even if Morrison J was of the view that the issue of service had been traversed in the application to enter judgment before P Williams J, he was duty bound to hear the application to set aside the judgment on the basis of non service under rule 13.2 of the CPR and consider any new material presented as to service. The appellant's grounds in the application before him for setting aside being two-fold he was also obliged to consider the application as to whether the defendant had a good defence with a real prospect of success under rule 13.3 of the CPR.*
>
> *As a corollary to that point, even if the application before Morrison J was a second application to set aside the default judgment, he was still in error when he determined that the order of P Williams J ought to be appealed instead. This is because there is no general rule prohibiting an unsuccessful applicant for an order to set aside a default judgment from making a second application…There is now no doubt that a court may entertain an application to set aside a default judgment even if a previous application had been made and dismissed. It also does not matter whether the previous application was heard on the merits and the evidence in the*

> *second application need not be evidence which was not available at the time of the first but must be new in the sense that it had not been placed before the court at the hearing of the first application.*
>
> *…There is no doubt therefore that Morrison J's approach was incorrect. Even if the learned judge was of the view that the hearing before P Williams J was a hearing on the merits he was wrong to have dismissed the application to set aside on the basis that it was an abuse of process because the wrong procedure had been followed.*
>
> *Applications to set aside a default judgment are made under Part 13.3 of the CPR which outlines the requirements that must be met. Morrison J was required to consider whether the applicant met those requirements."*

[87] In **Sterling v Sterling** [2009] CA 107 the appellant commenced proceedings by way of claim form. He subsequently applied for the Court to determine the terms of the default judgment to be entered against the defendant. The court addressed the nature of an application for default judgment for some other remedy. It stated at paragraphs 18 and 19 that: -

> *"Where the claim is for a remedy other than the foregoing, judgment is for a remedy to be determined by the Court. The claimant must file an application for Court orders supported by affidavit evidence and the Court shall enter judgment in the form it considers appropriate based on the particulars. In my judgment then, the judge is under an obligation to determine the form of the default judgment. Any discretion that the judge has is limited to determining the form the default judgment should take, provided that the particular of claim discloses a justiciable claim…*
>
> *It follows that once the learned judge was satisfied that the relevant the particulars of claim and determine the terms upon which the default judgment should be entered."*

[88] The Respondent herein contended that the court was functus and could not hear the application to set aside default judgment as a court of concurrent jurisdiction had decided the case on the merits. His reasoning was that there was a distinction between a default judgment entered administratively in the registry of the Supreme Court as opposed to one such as in the instant case which is entered on application by the claimant supported by affidavit evidence. In addition, it was argued that the judgment containing both declaratory and injunctive relief required consideration of its merits of the evidence. Moreover, the judgment had already been executed.

[89] It seems that the Respondent's view on this issue is incorrect. The rules expressly give the power to the court to entertain an application for default judgment. The case of **National Water Commission v Delton Knight** [2012] JMSC Civ 96 should be distinguished on the basis that it was not in the context of an application for default judgment but an order on a regular application. **Celia Diane Pershadsingh v Dr. Jepthah Ford** [2015] JMSC Civ 123 is not proper authority for the proposition put forward by the Respondent. The judge in the latter case did not make a determinative statement that she could not exercise her discretion. Her uncertainty was borne out in the fact that she still considered the defendant's application. Moreover, the judge made the remark that it was a case where the defendant and the claimant were heard prior to making the decision to enter judgment and was not a decision made ex parte or in the absence of the Defendant. In the instant case, the Applicant was not heard in the application to enter default judgment. In addition, the case of **Russell Holdings Limited v L&W Enterprises Inc. and Ads Global Limited** (supra) a Privy Council decision which is later in time to **Celia Diane Pershadsingh v Dr. Jepthah Ford** (supra) demonstrates that even if the defendant were present, a court of concurrent jurisdiction still had the jurisdiction to hear the application to set aside the default judgment.

[90] A judge is duty bound to hear the application to set aside the judgment to consider whether the requirements that must be met in part 13.3 are indeed met. Therefore, in the same way the Applicant would have had the right to apply to set aside the default judgment if it had been a judgment in default entered by the registrar, she had the right to apply to set aside the judgment in default entered by the court against her. The fact that there are no rules prohibiting an unsuccessful applicant in an application to set aside a default judgment from making a second application shows that default judgment is a different creature and cannot be likened to other judgments where the only recourse is an appeal. Therefore, even if the Respondent was granted the default judgment based on the merits the court still had jurisdiction to hear the application.

[91] The Respondent cited **O'hare and Brown on Civil Litigation** (supra) in support of his argument that an application gives the court the discretion as to whether to grant the order at all and if so in what terms. The Respondent also highlighted that where the default judgment was on application, the normal route of challenge is by way of appeal. It is to be noted that the authors did not say that the court's jurisdiction was ousted and a person could not apply to a court of concurrent jurisdiction to set aside default judgement. It merely said that an appeal was the normal route. It did not say it was the only route. Moreover, the English authority cannot be used as a guide as the UK provision is worded differently and does not have the same effect as our local provision.

[92] The English equivalent gives a wider discretion to a judge on an application for default judgment. Based on the wording of 12.10 (4) and the case of **Sterling v Sterling** (supra), the courts have a limited discretion in determining only the form that default judgment should take, provided that the particulars of claim discloses a justiciable claim. Therefore, once the judge was satisfied that the relevant prerequisites enumerated in Part 12 had been met, it involved only an obligation to examine the particulars of claim and determine the terms upon which the default judgment should be entered. It is not a substantive judgment. This illustrates that there is no real distinction between a default judgment on application and when a registrar has to satisfy herself based on the documents presented that the claimant is entitled to default judgment. The justification for the need for an application for some other remedy is that the relief sought is not usually as straight forward as claims for money or goods. Accordingly, judicial intervention is needed to determine the suitability of the terms of the order.

Whether the court should exercise its discretion to set aside the default judgement?

[93] Pursuant to rule 13.3 of the Civil Procedure Rules, 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. In considering whether to set aside or vary a

judgment under this rule, the court must consider whether the defendant has applied to the court as soon as is reasonably practicable after finding out that judgment has been entered and has given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.

[94] **Russell Holdings Limited v L&W Enterprises Inc. and Ads Global Limited** (supra) is instructive on the principles applicable to setting aside default judgment under rule 13.3 of the Civil Procedure Rules. The court stated that under rule 13.3 of the CPR, default judgment may be set aside if the judge, in his discretion, is of the view that the applicant has satisfied the requirements of the rule that he has a real prospect of successfully defending the claim. Additionally, the court must consider whether the application was made promptly, if there is a good explanation for the failure to file acknowledgment of service or defence and whether there would be any prejudice to the respondent in light of the overriding objective of doing justice between the parties.

[95] The court went on to elaborate on the applicable principles: -

> *"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 a 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 applicant's favour."*

[96] Reference was made to **Blackstone's Civil Procedure** 2004 paragraph 34.13, where it was said that a defendant could show that the defence had a real prospect of success by: -

> *"(a) showing a substantive defence, for example volenti non 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."*

[97] At paragraphs 81 to 86, the authors illustrated that "*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*."

[98] The court found that the application to set aside the default judgment filed almost exactly a year after judgement was entered was by no means as soon as is reasonable practicable after finding out that judgment had been entered and was a significant factor. There was no explanation given. The court noted however, that the rule whilst requiring the appellant to act promptly, does not specifically require an explanation for not acting promptly but stated that it would be prudent to give one if one expects the application to meet with success. However, based on the circumstances of the case and in the light of the strength of the evidence of the appellant, although the delay was significant, it was not determinative to the outcome of the matter.

[99] In relation to the issue of the delay involving the inadvertence of counsel, the court found that authorities suggested that there was a protective approach towards litigants. It cited the case of **Merlene Murray-Brown v Dunstan Harper et al (Application)** [2010] JMCA App 1 where Phillips JA said at paragraph 30 that: -

> *"The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorney 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."*

[100] The court also approved the principle in **Evans v. Bartlam** [1937] 1 AC 473 at page 650 where it was suggested that a court considering whether to exercise its discretion to set aside a default judgment should weigh the use of its coercive powers against the need for the court to hear cases on the merits and pronounce judgment. This required a balancing exercise which must take place against the background of the overriding objective.

[101] In **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2 the respondent served the appellant with a claim form by registered post. The respondent obtained judgment in default of defence against the appellant as no defence had been filed by the appellant. A final judgment entered. A copy of the final judgment was sent by registered post to the appellant and served on the attorney acting for the appellant. An order for seizure and sale was made and a baliff executed the order on the appellant. By notice of application the appellant sought an order setting aside the judgment in default which was refused. The appellant appealed.

[102] In relation to the delay caused by the attorney in that case, the appellant stated that it was repeatedly assured by the attorney that *"the matter was being dealt with and that we would have our day in court."* It was contended by the appellant that he was not aware of the court's procedural requirements, "apart from the duty to acknowledge service which was the limited information contained in the documents with which we were served on the appellant nor of the hearings in the matter and that he first knew that a judgment had been entered against it when the bailiff visited its offices to execute the order for seizure and sale. After a meeting with the attorney that same day at which the attorney insisted that the document the Bailiff had was a claim form and not a judgment, contact was made with the appellant's current attorneys-at-law the following day and the matter was handed over to them, with instructions to take immediate action to protect their interest.

[103] The court highlighted that on an application to set aside a judgment in default there was a requirement of an affidavit of merit. The court cited the case of **Evans v Bartlam** [1937] A.C. 473 where Lord Atkin said at page 480 that one of the rules laid down by the courts for guidance in exercising the discretion to set aside a regularly obtained judgment in default is that *"there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence"*. It was also noted that as a judge was obliged to assess whether the evidence upon which the appellant proposed to rely in defending the action at trial showed a real prospect of success, a consideration of the admissibility of the proposed evidence was clearly relevant.

[104] The appellant submitted that the requirement of what was done in making the application to set aside default judgment was satisfied by affidavit evidence showing that, once it was made aware of the default judgment, the appellant immediately retained new counsel, who filed the application to set aside. However, it was said that the problem with this evidence was that it provided no explanation whatsoever for the absence of an application to set aside the judgment during the period where the attorney having become aware of the default judgment did nothing to attempt to set it aside, but instead participated on the appellant's behalf in the interim payment hearing and the subsequent assessment of damages.

[105] The court indicated that it was necessary in every case to examine the facts with care before arriving at the conclusion that *"counsel's knowledge was the client's knowledge"*. The previous attorney for the appellant had played an active role at the earlier stage of the proceedings. The appellant's apparent failure to do anything about the judgment in a timely manner even after it must have become aware, having been duly served by registered post with a copy of the final judgment entered after damages were assessed was also taken into account by the court. Therefore, it was concluded that the appellant took no steps as soon as reasonably practicable to set aside the default judgment after becoming aware of it.

[106] The primary explanation given by the appellant for failure to file a defence was that it had given instructions to its counsel and, based on his assurances, it was "labouring under the impression that all was well". There was no evidence from the attorney himself giving any explanation for the failure to file the defence in time, or at all. The court agreed with the judge at first instance that the reasons advanced by the appellant for not filing a defence amounted to no good reason at all, especially, in the absence of any explanation forthcoming from the attorney. More particularly, in the absence of any explanation from the attorney, it concluded that there was in fact no explanation at all. It was evinced that the attorney had been provided with relevant documentation but the court believed that this gave absolutely no indication of any steps taken by the appellant to follow up the matter at any time over the nearly two (2) year period that elapsed between that date and the arrival of the bailiff.

[107] The discussion in relation to whether to extend the time for the Applicant to file her defence should be recalled. In examining the circumstances, if the Court believes that the evidence provided shows a sufficient defence on the merits with a real prospect of success then the discretion to set aside default judgment should be exercised. If the assertions made by the Applicant in relation to her previous attorney-at-law are true, then it would be said that she applied to have the judgment set aside within a reasonably practicable time after finding out that it was entered as the application was made a couple days after becoming aware of the default judgment. It is accepted that the alleged conduct of the Applicant's previous attorney-at-law cannot be used so as to enure to the benefit of the Applicant and to cause detriment to the Respondent who has prosecuted his claim to a final judgment.

[108] The Respondent had done everything required of him to secure a judgment of the Court. The judgment has already been executed. Thus, it can be said that there would be some prejudice to the Respondent if the default judgment were set aside. I reiterate, it should also be borne in mind that the court should not be too quick to deprive a litigant of his day in court on a point of technicality and without an

assessment of the merits of the case, especially in a case such as this, where to deprive the Applicant of the chance to defend her rights would deprive her of her potential interests in the property that she has invested a good portion of her life in. Whilst the facts of **B & J Equipment Rental Limited v Joseph Nanco** (supra) somewhat mirror the instant case there are differences. The attorney in the abovementioned case was actively involved in the case and the defendant was aware of the proceedings against it having participated. The defendant, Ms. Hyacinth Small, may not have been the most prudent person and should have been more diligent. However, this conduct cannot without more be used to deny her the opportunity to defend if it is that her defence shows a real prospect of success.

ORDERS AND DISPOSITION

[109] The Application is therefore granted for the reasons advanced above. In relation to the issue of costs, the Respondent has done no more than seek to protect the judgment to which he has obtained in default of the Applicant's failure to comply with rule 9.2 and cannot be faulted for this. Due to these circumstances, it is my view that it is appropriate to depart from the usual rule, that the successful party is awarded costs against the other, and I make an Order that each party be responsible for their own costs in this application. My Orders are therefore as follows: -

1. Matter to continue as if by way of Fixed Date Claim Form;

2. Order in terms of paragraphs 1-3 of the Ex Parte Application for Court Orders dated and filed the 6th day of December 2016;

3. Costs to be costs in the Application and each party to bear their own costs;

4. Leave to Appeal is granted;

5. Status quo to remain the same pending the determination of the Appeal.