

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **SLUHCV2017/0635**

Between

GEORGIA KOUDA

Claimant/Respondent

and

DIMITRIOUS ADAMPOLOUS

Defendant/Applicant

Appearances

Mrs. Shervon Pierre of Counsel for the Claimant/Respondent
Mr. Dexter Theodore Q.C. and Ms. Sueanna Frederick of Counsel for the
Defendant/Applicant

2020: July 17th
2020: October 22nd

JUDGMENT

Introduction

- [1] **SANDCROFT, M. [Ag.]**: Generally speaking, the exercise of the Court's discretionary power [under the CPR 2000 (as amended)], appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The onus of showing the existence of sufficient-cause for relief was on the applicant in each case, and he had to satisfy the Court, inter alia, that there was some reasonably satisfactory explanation as to why the judgment was allowed to go by default.

Background/Chronology

- [2] On 25th October 2017, the claimant filed a claim in defamation against the defendant, claiming damages as well as injunctive relief (the "Claim").

- [3] The defendant was served with the claim form, statement of claim, the amended list of exhibits and the required forms on 2nd November 2017. This is evidenced by an affidavit of service filed by Process Server Police Officer, Lucius Bruce on 21st November 2017.
- [4] No acknowledgment of service had been filed by the defendant; the claimant filed a request for default judgment on 24th November 2017. On 22nd January 2018, the Court, noting that all the requirements of Rule 12.4 of the **Civil Procedure Rules 2000 (CPR)** had been satisfied, granted judgment to the claimant (the “Judgment”).
- [5] The judgment was not served on the defendant until 21st June 2018. The claimant stated that the defendant was evading service and filed an affidavit of attempted service to that effect, together with the required affidavit of service.
- [6] After the judgment had been served on the defendant, the claimant filed an application for assessment of damages. The application was eventually heard on 29th April 2019 and the Court issued directions for assessment. The defendant was present and the directions were explained to him by the Court.
- [7] On 29th May, 2019, one month after the court hearing and one year and four months after the judgment was granted, the defendant filed the present application, alleging that he had never been served with either the claim or the judgment and requesting that the judgment be set aside. The defendant later added a further ground, to wit, that the affidavit of service evidencing service of the claim did not specify the year of service and was therefore fatally flawed.
- [8] The defendant submitted that he was never served with the claim form, statement of claim and other related documents and that he saw these documents for the first time on 16th May 2019. He therefore denies that there was any personal service on him.

Submissions of the defendant/applicant

- [9] Counsel for the defendant/applicant submitted inter alia that the claimant had failed to comply with Part 5.5 of the **Civil Procedure Rules 2000** as the Affidavit of SPC Lucius Bruce filed on November 21st, 2017 stated under paragraph 2 that he purportedly served the Defendant on 2nd November and stated no year. This renders the affidavit fatally flawed and this is the affidavit which the court relied upon to enter judgment. Accordingly, the judgment is irregular and ought to be set aside as of right. Manipulation of the affidavit or the filing of a supplemental affidavit at this juncture and after the entry of judgment cannot assist the claimant as it remains that judgment was entered

in reliance upon a deficient and defective Affidavit. The defendant maintained that he had never been served with the claim form, statement of claim and supporting documents in the instant matter.

[10] Counsel also submitted that the affidavits of the claimant are defective and incomplete, thus rendering the judgment irregular. The defendant further contends that that he was never served with the claim form, statement of claim or judgment and he having provided the Court with overwhelming evidence to support his contention that he was never served with the said documents, the defendant invites the Court to set aside the judgment and to strike out the Submissions on Assessment in accordance with Part 26.3(a) of the **Civil Procedure Rules 2000**.

[11] Counsel further submitted that the affidavit of SPC Lucius Bruce filed on 21st June 2019, the defendant noted that the said affidavit was filed further and in addition to the previous affidavits. The claimant cannot at this juncture proceed to advance evidence of proof of service and ought to have advanced all evidence of service before the entry of judgment, so as to cause any judgment entered to be a regular judgment rather than an irregular judgment, as the current judgment now is.

[12] Counsel also posited with respect to paragraph 5 of the said Affidavit and the purported picture referred to therein, it cannot be said conclusively that the person in the picture is the Defendant, that the documents in the person's hand are the claim form and statement of claim or that the said picture was taken in 2017 or 2019 or any other year.

[13] Counsel further posited that exhibit L.B. 2 and paragraphs 6, 7, 8 and 9 of the aforesaid affidavit, are entirely unreliable as a photograph can easily be manipulated through computer software or mobile phone applications and it remained that the documents in the individual's hand could not be confirmed to be any particular set of documents.

[14] Council submitted that the combined judgment of the appellate court in the three cases of **Denton, Decadent and Davies**¹ made the following observations of what Courts ought to take into consideration when examining a set aside application:

¹ Denton v TH White Ltd, [2013] 12 WLUK 844., Decadent Vapours Ltd v Bevan, [2014] 2 WLUK 571 & Utilise TDS Ltd v Cranstoun Davies [2014] EWHC 834

“In future, judges were to adopt a three-stage approach: (a) they had to identify and assess the seriousness or significance of the relevant failure. Triviality was not part of that stage. There were clearly degrees of seriousness and significance. The assessment ought not to involve consideration of past unrelated failures, only the seriousness and significance of the very breach in respect of which relief from sanctions was sought. If a breach was not serious or significant, relief would usually be granted and there would be no need to spend much time on the second and third stages; (b) the second stage did not derive from r.3.9 but was nevertheless important: the court had to consider why the failure or default occurred”.

[15] Counsel posited that paragraphs 13 to 15 of the affidavit of SPC Bruce attempted to correct, further explain, elaborate upon, clarify, add weight to and make sense of the previous defective and deficient affidavit upon which the Court relied to cause itself to be satisfied that the judgment had been served upon the defendant. It was also submitted firstly that the current expedition by the claimant and SPC Bruce to bolster the said affidavit is an acknowledgment that the previous affidavit was deficient. It was also submitted secondly that the claimant at this juncture could not venture to prove service as such proof ought to have been properly before the Court before the entry of judgment.

[16] Counsel further posited that given that SPC Bruce had acknowledged at paragraph 15 that his previous affidavit was deficient in that it did not contain evidence which he purportedly conveyed to a Legal Assistant, this admission has left the Court with no option but to set aside the judgment.

[17] Counsel also posited that in one affidavit Officer Bruce remained in the car and witnessed the defendant come to the door of the apartment but in another Affidavit he disembarked the vehicle and whilst still in the yard he saw documents being dropped at the defendant's feet. That there was no mention of Officer Bruce disembarking the vehicle in the affidavit of attempted Service and this was simply an embarrassing and unfortunate attempt by him to explain away the fact that the defendant's front door could not be seen from the road or from a vehicle, and which the defendant clearly illustrated in his application to set aside the judgment. These statements by Officer Bruce were embarrassing, a poor attempt to mislead the Court, contradictory in and of themselves, inconsistent and untrue, as usually occurs when an attempt is made to create an untrue story.

[18] Counsel further submitted that in keeping with the overriding objective of the **Civil Procedure Rules, 2000** and the administration of justice that the Court ought to exercise its discretion in favour of the applicant and grant the application as prayed.

Submissions of the claimant/respondent

[19] Counsel for the claimant/respondent submitted inter alia that the affidavit evidence of the parties should be weighed by the Court to determine, on the balance of probabilities, which is more likely to be the truth. See, for example: **Imelda Estephane qua representative of the estate of Cherilyn Estephane v Coolie and Smith**, decided in 2013².

[20] Counsel also submitted that Officer Lucius Bruce, process server, gave evidence in support of service of the claim on the defendant. Officer Bruce had served as a process server and police officer for over thirteen years and he was attached to the Crown Prosecution Service, that Officer Bruce was well aware of the consequences of falsifying evidence. He stated that he took his duties as a process server very seriously. The evidence of the parties did not suggest that he had any personal interest in these proceedings whatsoever.

[21] Counsel further submitted that the defendant, having been served with the judgment in default in respect of this matter on 24th November, 2017, took no steps to set aside same, more than one year and four months after being served.

[22] Counsel submitted too that Officer Bruce's being alerted as to possible difficulties with serving the defendant, he took photographic evidence of the defendant immediately after he had been served with the claim. The photographs, including a time stamp, were exhibited to his witness statement which stood as his evidence in chief.

[23] Counsel also submitted that the defendant's response to the photographs is that "[he is] unable to say who is in that picture" since the person's face is not visible. In his submissions, the defendant stated that "it cannot be said conclusively" that the photograph is of the defendant and that the

² SLUHCV2011/1214 at paragraphs 10.

documents in his hands are the claim documents. However, the standard of proof in civil proceedings was not “conclusive proof” but proof on the balance of probabilities.

[24] Counsel posited that it was more likely that the defendant was in fact served. That on a balance of probabilities, it was more likely that it was the defendant who was shown in the photograph taken at 3:01 p.m. on 2nd November 2017. That the photograph provided compelling proof which, taken together with the other evidence, establishes clearly that there was personal service of the claim on the defendant, Dimitrios Adamopoulos on 2nd November, 2017.

[25] Counsel further posited that the aforementioned was supported by the fact that the purported evidence of Dr. Phillips could not state with any degree of certainty that the defendant was at a medical appointment at the time of service. Indeed, the only thing she could state for sure was that the defendant had an appointment which was scheduled for 11:00 a.m., that he was late, and that she did not know “the exact time the patient left the office”.

[26] Counsel also posited that Dr. Phillips is not a witness in this matter and that the Defendant made no application to this Court to admit hearsay evidence. Further, we submit that with or without any application, the Court cannot admit and consider evidence which amounts to hearsay if the Defendant cannot bring himself within the exceptions contained at section 49 et seq of the Evidence Act of Saint Lucia³. This was established clearly by the Court of Appeal in **Franciscus Petrus Vingeheodt (also known as Frans Vingerhoedt) v Stanford International Bank Limited (In Liquidation)**⁴.

[27] Counsel further posited that Part 5, CPR 2000 deals with the manner in which a claim may be served. The rule reads as follows:

“5.1(1) The general rule is that a claim form must be served personally on each defendant.”

....

“5.3 A claim form is served personally on an individual by handing it to or leaving it with the person to be served...”

“5.5 (1) Personal service of the claim form is proved by an affidavit sworn by the

³ Cap 4.15 of the revised Laws of Saint Lucia.

⁴ ANUHCVP2014/0030

server stating –

(a) the date and time of service;

(b) the precise place or address at which it was served;

(c) the precise manner by which the person on whom the claim form was served was identified; and

(d) precisely how the claim form was served.”

[28] Counsel posited that the defendant’s argument that the Affidavit of Service is defective is misguided. Though ideally, the year should be inserted next to the date of service, there is no such requirement, provided that the date is stated and ascertainable. In any case, this would not automatically invalidate service. The claimant referred to the dicta in **Lawrence Anselm v Hildreth and John Balthazar**⁵ in which Justice Glasgow referring to relevant case law stated that:

“... It was noted that a distinction could be drawn between those cases where judgment was obtained where the defendant was not served with the originating process and those in which there was a defect in service but the writ came to the knowledge of the defendant. In the former instance, the judgment should be set aside ex debito justitiae.”

[29] The claimant also posited that there was neither breach of rule 5.5 nor any other relevant rule and that the affidavit of service filed on 21st November, 2017 and relied on by the Court in entering the judgment was entirely valid.

[30] The claimant further posited that the defendant/applicant did not satisfy the requirements as set out in Rule 13(2), which would allow this Honourable Court to set aside the judgment in default and as such the defendant averred that the application before the court should be denied.

Issues

[31] The issues for my determination are:

- (i) whether the judgment in default irregularly obtained by the claimant and entered by the Court should be set aside.

⁵ DOM2013/0201 at paragraph 8. See also Herbert v Spence, ANUHCv 2014/0391

- (ii) If yes, whether an extension of time can be granted for the defence, filed out of time, to be allowed to stand
- (iii) If no, whether the irregularity can be corrected under rule 26.9 of the CPR 2000 and
- (iv) whether the defendant, Dimitrious Adamopoulos, has a real prospect of successfully defending the Claim?

Analysis of the Law

[32] It is necessary at this stage to refer to the provisions of the **Eastern Caribbean (EC) Civil Proceedings Rules (“the CPR, 2000”)** which are material to this application.

“1.1(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes –

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to –

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

1.2 The court must seek to give effect to the overriding objective when it –

(1) exercises any discretion given to it by the Rules; or

(2) interprets the meaning of any rule.

[33] **Rule 1.1** of the **C.P.R, 2000**, speaks to the overriding objectives which are aimed at enabling the court to deal with cases justly, such as, ensuring that a case is dealt with expeditiously and fairly. The case of **Keene v Martin and another** [1999] ALL ER 1207, made the substantive point that the over-riding objective would more likely be furthered where the Court actively manages cases brought before it.

[28] It is accepted though and the Court must be mindful, as made lucidly in the judgment of Kay, L.J in **Totty v Snowden** [2001] 4 All ER 577, that even though the rules require the court to have regard to the overriding objective in interpreting the rules,

“Where there are clear express words, as pointed out by Peter Gibson, LJ in Vinos’ case, the court cannot use the overriding objective ‘to give effect to what it may otherwise consider to be the just way of dealing with the case’.”

However, **“Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective”.**

[29] There is no doubt therefore that the court, in interpreting the rules, must at all times give effect to the overriding objective, and to that extent in the circumstances of this case, in dealing with the case justly, would include, although would not be limited to, being focused on and endeavouring to ensure that the matter was dealt with expeditiously and fairly, while saving expense and not utilizing too much of the court’s time.

[30] The Rules give no guidance as to the way in which the overriding objective is to be applied. In the absence of practice directions, appellate guidance and principles of general application governing the exercise of discretion, which have been enunciated in previously decided cases, may be useful.

[31] The statutory provision in our CPR 1.1 permits relevant common law principles to be considered and applied by a judge when exercising any discretion or interpreting the rules. In my view, since in this provision, by the existence of the word "includes" in rule 1.1 (2), it contemplates that the considerations listed in CPR 1.1 (2) (a) to (e) are not exhaustive of the matters to be taken into account, when the court strives to deal justly with cases. However, in applying any such principles the court's discretion, by its very nature should be guided and not fettered by the principles. It must also be borne in mind that the **CPR 2000** has significantly changed the practice in relation to applications, and the court must be cautious in applying the common law principles under the old rules, which may not necessarily reflect the transformation under the new regime.

[32] In **Vinos v Marks and Spencer**⁶ Lord Justice May opined that:

"The Civil Procedure Rules are a new procedural code, and [in considering whether the court has the power to extend time for service of a claim form where the claimant applied after the expiration of the period provided for in Rule 7.6(2) of the

⁶ [2001] 3 All E.R., 784 at para. 26

English CPR] the question for this court in this case concerns the interpretation and application of the relevant provisions of the new procedural code as they stand untrammelled by the weight of authority that accumulated under the former rules. The court is not in the first instance concerned with the exercise of discretion. Decisions about the exercise of the court's discretion to strike out cases for delay are not in point. There is, in my judgment, no basis for supposing that rule 7.6 in particular was intended to replicate, or for that matter not to replicate , the provisions of former rules as they had been interpreted."

[33] Having regard to the overriding objective, Lord Justice Peter Gibson in **Michael Vinos v Marks & Spencers** (supra) aptly observed and I concur with him, that:

"The language of the rule to be interpreted [in the Civil Procedure Rules] may be so clear and jussive that the Court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischief which the Civil Procedure Rules were intended to counter were excessive costs and delays. Justice to the defendant [or claimant] and to the interest of other litigants may require that a claimant [or defendant] who ignores time limits prescribed by the rules forfeits the right to have his claim tried..."

[34] **Vinos** (supra) explained the impact, of the overriding objective. This was an action for damages for personal injuries and the claimant issued proceedings one week before the expiry date of the limitation period. He did not serve the claim form until 9 days after the 4-month period (Page 9 of 11 provided by the rule (7(5)2)) had elapsed. The delay could not be related to any difficulty over service, which was a requirement for extension of time. The English Court of Appeal was faced with a question of construction of the Civil Procedure Rules as the present application had presented. The Court in **Vinos** had to determine whether it had the power to extend time for service of a claim form if the claimant only applied after the period provided for in rule 7.6(2) of the English CPR, had expired, and if the conditions in Rule 7.6 (3) were inapplicable. It is the principle that is being extracted from **Vinos** as to how rule 3.1(2) (a), which is similar to our CPR 26.1 (2) (k) should be construed where there is a specific rule setting out, in detail, what the non-compliant party must do if that party wants an extension of time, and the circumstances in which the Court may exercise the discretion.

The Evidence

[35] Evidence of the defendant:

Dimitrios Adamopoulos

Affidavit was sworn to by me on May 29, 2019. I swore that the claim form was never served on me.

Question: Are you aware that Mr. Lucius Bruce gave evidence on November 2, 2017 that at 3:00 p.m. that you were served?

Answer: Yes. I was at a dental appointment at the time of service. I also said that I could not be served at that time, at 3:00 p.m. My evidence was that in had the dental appointment at 11:00 a.m. I could not be served at 3:00 p.m. There is a four hours difference. One cannot travel from Castries to Gros Islet within an hour. Sometimes it takes less than an hour or more than an hour.

Paragraph 16 of the affidavit speaks to a letter from the dentist dated November 2, 2017. (D. A. 6 -Dr. C. A. Phillips-Jordan) provided a letter in response to then counsel's request. (D.A. 7) Letter states that Mr. D. A. had a dental appointment on 2/11/2017 but was late.

Dentist had not given evidence neither orally nor by way of affidavit.

Given my career in banking I have taken written notes as to my daily activities. I am expecting this court to believe that I would take notes as to my dental appointments.

February 5, 2019, I was served with a notice of hearing. I am now aware that the notice pertained to these proceedings. No, it is not the natural reaction to find out about the proceedings.

April 16, 2019: Served again with Notice of Application for hearing. I did not know what these proceedings were about.

On 2nd November 2017 I lived at Rodney Heights. After leaving the dentist, in the afternoon I was not in Rodney Heights. I am familiar with Rodney Bay and Rodney Heights area.

June 21, 2019- Affidavit of response to set aside Default Judgment. Some pictures were attached to the affidavit of June 21, 2019.

In my response I did not say it was not me. I see two pictures.

I do not agree that the person in the picture is of the same height.

I do not agree that he has the same complexion like me. I am not the one standing in the picture, reading documents. I do agree that the picture says November 2, 2017 at 3 pm

Thursday.

Those documents are not the claim form and other documents. There is also evidence that the judgment and other documents were served on me. I was not served on the 21st of June 2018.

I am aware that Mr. Bruce and Mr. Chicot alleged that I was served with the judgment at 11:45 am on June 21, 2018. However, I was not at my son's school at that time, I could not have been served. (D.A.4 and D.A.5) by Officers Bruce and Chicot.

Letter from Leon Hess School, that I left the school at 11:45 am. There are about 90 students in my son's class.

Vice principal saw someone was leaving at 11:45 am. Vice Principal did not give oral evidence or an affidavit. (D. A. 14)

I do not agree that all the arguments surrounding where my house is about the service of the judgment.

Witness later said yes, he agrees that the service of the judgment is separate from the service of the claim.

My son is 18 and I have 14 years of age and he lived with me at the time. He would have been 16 at the time.

As of June 21, 2018, I had a teenage son living with me. I accept what was said by Officer Bruce in paragraph 17. It was not my son who answered the door on June 21, 2018 at 11:45 am.

I was not served with the judgment on 21 June 2018.

RE-EXAMINATION: (Mr. Theodore Q.C.)

I am unable to say who the person in the picture is because I cannot make out the person in the picture.

[36] Evidence of process server:

Lucius Bruce (Examination-in-Chief)

Lucius Bruce, police officer, process server attached to the DPP's office aka Crown Prosecution. Affidavits of November 21, 2017, August 27, 2018 and June 21, 2019; affidavit relating to service of the claimant of the judgment to stand as his examination in chief.

CROSS-EXAMINATION (Mr. Theodore Q.C.)

I was referred to (3) affidavits; my affidavit filed on November 21, 2017, was the one referring to the service of the claim.

Question: August 27, 2018; was an affidavit which referred to the default judgment

Answer: Yes, that is so. In my affidavit of June 21, 2019; I said more things. I am not aware of when Jonathan Chico filed his affidavit.

Question: In your affidavit of August 27, 2018; you had said that you had waited in the car while Chico served the judgment.

Answer: That is so.

I cannot recall when I picked up the claim form from Amicus Legal in October 2017.

I picked up the claim and I cannot remember serving the defendant before October 2017.

I don't think I knew the claimant before October 2017.

Question: Whether the witness recalls that he was called to Amicus Legal in late October 2017 to collect a claim and associated documents for service on the defendant as per paragraph (3)

Answer: That is so.

In relation to paragraph 4: I made a few attempts, several attempts: to his telephone. Yes, much more than 3. I cannot recall how long the period would have been. The attempts were restricted to telephone calls.

Question: You got the telephone number from Amicus Legal.

Answer: I never got any number for the claimant from Amicus Legal. I cannot recall getting a number for the claimant. I dealt directly with Amicus Legal.

Yes, I have been in touch with the claimant since the filing of the claim SLUHCV2017/0635.

I served the defendant on the 2nd of November, with. I spoke to him at one point. I spoke to the defendant on 2 occasions on the telephone before I served him.

The first time I got Mr. Dimitrios on the telephone and I told him that I had some documents to serve him and he said to serve them on McNamara, who represented him. He hung up the phone after I told him that I don't serve documents other than personally.

I disagree that I never spoke to Mr. Dimitrios Adamopoulos

In paragraph 5 referred to I have never said in any other affidavit or this one where I got the information from.

In my affidavit of the 21st of November 2017, I did not refer to the (2) previous telephone calls.

In my only affidavit of service of November 21, 2017, I did not mention that the defendant had agreed to meet me near KFC.

The KFC discussion related to the service of the claim. I did not mention that I took a photograph of the defendant in my affidavit of November 21, 2017.

I have been doing service of documents for 14 years.

For those 14 years I know that the address is stated on the affidavit of service.

I do not agree that Rodney Bay Mall, Rodney Bay, Gros Islet is not (a specific address) precise description. It is a precise description.

I do not agree that there are many addresses in Rodney Bay. I am familiar with the Bay walk Mall in Rodney Bay. I am not familiar with the Rodney Bay Mall; I am familiar with the J.Q. Charles Mall, Rodney Bay.

No, it is not correct to say that the J.Q. Charles Mall are not the same address.

I disagree that it cannot be precise, and that Rodney Bay contains many addresses.

I am aware that in my affidavit of service that I must state the precise way of how the person was identified.

Would have been relevant to have said that the person had previously described themselves, that that would have been relevant.

In affidavit of Nov. 21, 2017 para. (4) I had said how the service took place and identification. I did not put in that affidavit of November 21, 2017; I did not speak of a conversation with the defendant.

The conversation with the defendant did happen.

Question: I put it to you that you did not serve the Statement of Claim as sworn by you on 21st November 2017.

Answer: I disagree.

Re-Examination by Mrs. Pierre:

The format used in the 21st November 2017 is the format that I have used over the last 14 years.

A standard form is used when the documents are served so just the necessary details are included.

Setting Aside a Judgment in Default

[37] The applicant's complaint in the present matter before the court was firstly, that he was not served with and did not receive the claim form, particulars of claim, a form of acknowledgment of service, a form of defence or the prescribed notes for defendants (Form 1A). Proof of service of these documents is a condition precedent for entry of a default judgment. The applicant's denial that these were not served raised a dispute as to service, which required a resolution.

[38] There are certain primary considerations which a court must take into account:⁷

[T]he key question for the court, when it decides whether to adhere to or depart from the ex debito justitiae rule, is whether there has been such an egregious breach of the rules of procedural justice as to warrant the setting aside of the irregular default judgment as of right. In addressing this issue, the court should consider, inter alia:

(a) the nature of the irregularity, in particular, whether it consists of: (i) entering a default judgment prematurely; or (ii) failing to give the defendant proper notice of the proceedings;

(b) whether the defendant took a fresh step in the proceedings after becoming aware of the irregular default judgment;

(c) whether there was any undue delay by the defendant in filing its setting-aside application; and

(d) where a judgment is irregular because of the plaintiff's breach of procedural rules (which would be the case for the majority of irregular default judgments), whether the breach was committed in bad faith.

[39] The court will be particularly ready to set aside an irregular default judgment where the judgment was entered prematurely or where the defendant had no notice of the proceedings against him ...

⁷ [2008] 4 SLR 907 at [76]. Also see [96].

as these are plain instances of injustice that offend the essence of due process.

[40] Delay is a factor which the court will take into account and although delay is potentially prejudicial to the defendant's chances of having the irregular default judgment set aside, it is not invariably fatal. Delay is a relevant consideration and may be determinative. The principles governing delay in an application to set aside a regular default judgment apply equally to irregular default judgments. This Court has also regarded the following factors as being germane to a court's discretion to set aside: the blameworthiness of the respective parties e.g., whether there has been undue delay on the defendant's part in making its setting-aside application; whether the defendant has admitted liability under the default judgment; and whether the defendant would be unduly prejudiced if the irregular default judgment is allowed to stand. Apart from the factors listed above (which "are by no means exhaustive"), the court may take into account any other consideration in determining whether or not to set aside the judgment.

[41] If the court determines that the judgment should not be set aside *ex debito justitiae*, its next step is to consider whether it should be set aside on any other ground. At this point, the merits (if any) of the defence come into issue. The judgment of the English Court of Appeal in **Faircharm Investments Ltd v Citibank International plc ("Faircharm")**,⁸ which essentially stands for the proposition that if the defendant is "bound to lose" the case, the judgment should stand. The rationale of the principle is that it would be purposeless to set aside a judgment and permit the proceedings to continue despite the inevitable outcome against the defendant. **Faircharm** is in line with the goal of efficient case and resource management that courts continuously strive towards.

[42] This Court has considered the **Faircharm** principle as being particularly beneficial where the plaintiff does not enter the default judgment prematurely or in bad faith and/or the defendant was not prejudiced by the irregularity. The point here is that the claimant will not be permitted to abuse the **Faircharm** principle by taking advantage of its breach of the rules of procedure. If the claimant believes that the defendant is bound to lose, he could deliberately enter a default judgment in an irregular manner in the expectation that it will be upheld on the basis of the **Faircharm** principle.

[43] Therefore, if the defendant raises a defence or an issue which could be a sham but the Court has the slightest doubt about whether the defendant would lose, the **Faircharm** principle would not apply. The primary concern of the **Faircharm** principle is to avoid the purposeless continuation of

⁸ Also see *Standard Chartered Bank v Chip Hong Machinery (S) Pte Ltd* [1990] SLR 1230 in this regard.

proceedings; that is when the defendant has not even a glimmer of hope in challenging the claimant's action.

[44] Another formidable hurdle which the defendant/applicant would have to surmount is that it was not served. This it cannot prove by a mere denial through affidavit evidence: See **Chin v Chin** Privy Council Appeal No. 61 of 2009

[45] **Rule 8.16(1) states that:**

"(1) When a claim form is served on a defendant, it must be accompanied by-

(a) a form of acknowledgment of service (form 3 or 4);

(b) a form of defence (form 5);

(c) the prescribed notes for defendants (form 1A or 2A);

(d) a copy of any order made under rules 8.2 or 8.13; and,

(e) if the claim is for money and the defendant is an individual, a form of application to pay by instalments (form 6);

(2) There must be inserted on each form-

(a) the address of the registry to which the defendant is to return the forms;

(b) the title of the claim; and

(c) the reference number of the claim.

(3) Where there is a standard defence form appropriate to the particular case set out in a practice direction, the form sent to the defendant must be in a standard form of that type.

[46] Since there is a contested issue as to service it can only be resolved through viva voce evidence where the affiants would be subject to cross-examination.

[47] There was a restatement of this principle in the case of **Capital and Credit Merchant Bank Limited v Lenbert Little-White & Anor** [2012] JMCC Comm 14, which, I have accepted as correct. In that case, the issue for the judge's determination was whether the judgment entered in default of

service and defence was properly entered due to the lack of proof of service of the claim form and particulars of claim. Accepting that to be a true statement of the principle, I am to say that any contest as to issue concerning service, generally of the relevant documents, cannot be resolved on the basis of affidavit evidence of disputative affiants without their being cross-examined.

[48] In the case of **Dorothy Vendryes v Keane & Another** [2011] JMCA Civ 15, the Court of Appeal of Jamaica was at pains to point out that failure to serve all the documents as required by rule 8.16, is an irregularity which must result in the judgment being set aside, as of right, in keeping with the dictates of rule 13.2.

[49] I hasten to state that legal practitioners must accordingly again be reminded that the mere existence of some exigency cannot therefore necessarily justify an applicant not abiding by the rules. If a deviation is to be permitted, the extent thereof will depend on the circumstances of the case. The principle remains operative even if what the applicant is seeking in the first instance is merely to have a default judgment set aside as the case here. A respondent is entitled to resist even the grant of such relief. The applicant, or more accurately, his legal advisors, must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is merited and must in all respects responsibly strike a balance between the duty to obey the rules and the entitlement to deviate therefrom, bearing in mind that that entitlement and the extent thereof, are dependent upon, and are thus limited by, the urgency which prevails. The degree of relaxation of the rules should not be greater than the exigencies the case demands and these exigencies must appear from the affidavits. On the practical level it will follow that there must be a marked degree of urgency before it is justifiable for the court to exercise its discretion.

[50] **“Courts across jurisdictions have long departed from the era when justice was readily sacrificed on the altar of technicalities. The rationale behind this trend is that justice can only be done if the substance of the matter is considered. Reliance on technicalities tends to render justice grotesque and has the dangerous potentials of occasioning a miscarriage of justice.”**⁹

[51] **“The universal trend is that courts are interested in substance rather than mere form. This**

⁹ Savannah N. Maziya Sandanezwe V GDI Concepts and Project Management (Properties) Limited High Court Case No. 905/2005 Her Lordship, Ota J, said in page 7.

is because the spirit of justice does not reside in forms and formalities, nor in technicalities nor is the triumph of the administration of justice to be found in successfully picking ones between the pitfalls of technicalities. Justice can only be done if the substance of the matter is considered.”¹⁰

[52] Rule 12.4 stipulates, inter alia, that at the request of a claimant, the registry must enter judgment against a defendant for failure to file an acknowledgment of service if the claimant proves service of the claim form and particulars of service on the defendant. Rule 13.2(1) stipulates that a court must set aside a judgment entered under part 12 if the judgment was wrongly entered because, inter alia, any of the conditions in rule 12.4 was not satisfied. One of the conditions of rule 12.4 is proof of service. Proof of service by personal means requires an affidavit of service indicating that all the required documents were served and exhibiting a copy of the claim form. If there is no such proof provided there are at least two consequences. The first is that a claimant ought not to get a judgment in default and secondly, if a claimant did get such a judgment, it must be set aside as of right, if on the application to set aside, the claimant fails to prove that he or she satisfied the requirements of proper service. This is the consequence for failing to comply with either rule 5.5 or rule 8.16. Certainly, this is subject to the right to apply to the court to have a defective service remedied under rule 26.9 or dispensed with under rule 6.8.

[53] Analogously, the case before this court concerns the allegation that the claim form, statement of claim, form of defence, form of acknowledgement of service, prescribed notes, etc., were not served as stipulated by rule 8.16, which is an issue dealt with by the Court of Appeal of Jamaica in **Dorothy Vendryes v Keane and Another (supra)**. Whether those documents were served and the effect of the failure to serve is what I am required to determine.

[54] As the position stated by Sykes J (as he then was) in the Supreme Court of Jamaica, Sykes J stated this at paragraphs 12-13 –

“These documents are important. It must not be forgotten that it is not a legal requirement that [the] defendant retains counsel. He may choose to represent himself. One of the purposes of the new rules was to make justice more accessible by removing all the legal terminology that tended to hinder understanding. The CPR is written in plain ordinary English which a literate layman will be able to understand and apply. This underscores another

¹⁰ Phumzile Myeza and Others v The Director of Public Prosecutions and Another Case No. 728/2009.

important objective of the CPR which was to give greater access to justice. It does this by making civil procedure more user friendly which in turn is accomplished by giving instructions in plain English.

The litigant is actually encouraged to be a full participant in the process. He is required to attend case management conference and the pre-trial review or be represented by someone who can adequately represent his interest (see rule 27.8).

It is my view, that the objective of access to justice and telling the defendants of his rights are vital components of the new civil litigation process that ought to be reinforced and strengthened. Were I to decide that these documents need not be served I would be undermining an important concept that permeates the CPR. More important, I would be deciding that 'must' in the rule does not mean what it says. I do not see any good reason for treating the word as meaning less than mandatory."

[55] Service is indeed a fundamental aspect in any court proceeding as it is the means by which the interested party is informed that a proceeding has been initiated, and of the materials used in support of that proceeding. Rule 5.1(1) of the CPR makes it clear that the preferred method of service is personal service as it provides that "the general rule is that a claim form must be served personally on each defendant". It is explicit in Sykes J's words, and was later affirmed by Harris JA, that the rationale behind stipulating that these documents must be attached to the claim form and also brought to the attention of the defendant, is so that the layman who wishes to represent himself would have a detailed understanding of the court's processes and how to proceed upon being served with a claim against him, right up to the point where litigation comes to an end.

[56] It is also important to note the purpose of service of the claim form. In **Hoddinott v Persimmon Homes (Wessex) Ltd** [2008] 1 WLR 806, it was said at page 821 at paragraph 54:

"...service of the claim form serves three purposes. The first is to notify the defendant that the claimant has embarked on a formal process of litigation and to inform him of the nature of the claim. The second is to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted: until he has been served, the defendant may know that proceedings are likely to be issued, but he does not know for certain and he can do nothing to move things along. The third is to enable the court to control the litigation process.... But until the claim form is served, the court has no part to play in the proceedings..." (My emphasis)

- [57] Even if I did not accept the applicant's denial of receipt of those documents, the fact that the original affidavit in proof of service did speak to service of those documents, yet the applicant denying service or receipt of them, raised a dispute as to such service, which could only be answered after viva voce evidence. In those circumstances, it is not open to this Court to merely accept the second affidavit evidence of Mr. Bruce, without more.
- [58] To my mind, I could only act on the November 21st, 2018 affidavit of Mr. Bruce, once I have made a finding, after cross-examination, that the documents were indeed served, and that the first affidavit was merely deficient, in that, even though the documents were served, the affidavit failed to mention the precise date. The Privy Council decision in the case of **Chin v Chin** Privy Council Appeal No 61 of 1999, judgment delivered 12th February 2001, [2001] UKPC 7, established that where there is any dispute as to fact, this dispute cannot be resolved by affidavit evidence alone, instead the affiant must be cross-examined.
- [59] The registrar, in entering a default judgment, is carrying out an administrative function, but in so doing, must comply with the rules. The registrar must enter judgment in default only on proof of proper service. Service is proper if it is done in conformity with the rules. If the registrar enters judgment in default when service in conformity with the rules is not proved, a judge must set that judgment aside.
- [60] In my view, the registrar has a duty before issuing a default judgment, to ensure that service was properly effected. In the case of a claim, service is only properly effected when the claim form and the requisite accompanying documents are served in the manner prescribed by the rules. Therefore, before entering a judgment in default of acknowledgment of service, the registrar ought to have before him or her, an affidavit of service which speaks to service of all the documents, and which complies with rule 8.16 and, if applicable, rule 5.5 of the CPR 2000.
- [61] Rule 30.3 of the CPR sets out the basis upon which a judge may admit hearsay evidence in an affidavit.
- [62] The general rule is that an affiant must speak to facts within his or her own knowledge. See rule 30.3(1). However, an affiant may make statements as regards to his or her information or belief provided that the affidavit indicates which of the statements are within the affiant's own knowledge and which are matters of information or belief. The affiant must also state the source for any

matters of information or belief. See CPR rule 30.3 (2).

The nature of a default judgment

[63] A default judgment is one handed down without a trial, where a defendant has failed to file an acknowledgment of service or a defence in the time permitted to do so. The default judgment may be granted on a claim for a specified sum, or where the claim is for an unspecified sum, it is judgment for an amount to be assessed by the court. See rule 12.10 of the CPR 2000.

[64] Where the judgment is entered in default for a specified sum, an assessment of damages would not be required and the defendant who defaults, could be regarded as having accepted all the contents of the claim, including the sum claimed. The case of **Lunnun v Singh and others** [1999] CPLR 587; [1999] EWCA Civ 1736, where Parker LJ stated that a default judgment is conclusive of issues of liability in the statement of case. If this court were to accept that as a correct principle of law, it still leaves open the issue whether it is conclusive as to issues regarding damages as well.

[65] Therefore, in the case of a claim for unliquidated damages, where the defendant has not filed an acknowledgment of service or a defence as to quantum or otherwise, the matter automatically proceeds to assessment, as this would be the next step in the process. By failing to file an acknowledgment of service or a defence, a defendant would be deemed to be saying that he has nothing to say as regards the issue of liability, but I cannot agree that he is also saying that he has nothing to say on the issue of quantum, which has to be assessed separately. In the same way the litigant who expressly admits liability is allowed to defend the issue of quantum, there is no valid reason in law, why the litigant who implicitly by conduct agrees that he is liable, should be barred from contesting the measure of his liability.

[66] Rule 13.2 outlines the circumstances in which the court must set aside a Judgment entered in Default of Defence. It states;

(1) “The court must set aside a judgment entered under Part 12 if the judgment was wrongly entered because –

(a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;

(b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or

(c) the whole of the claim was satisfied before judgment was entered”.

[67] The issue that next arises therefore is whether the failure to prove service was an irregularity curable under rule 26.9 of the CPR, which provides that:

“(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party.”

[68] This rule has been interpreted by Morrison JA in **Hon Gordon Stewart OJ v Senator Noel Sloley Sr and others** [2011] JMCA Civ 28, at paragraph [47] where he said:

“[47] ... rule 26.9(3) provides that the court may „put matters right“, where there has been any error of procedure or failure to comply with a rule, practice direction or even a court order. I naturally accept, as the rules themselves state and as the authorities relied on by the appellant confirm, that it is the duty of the court to seek to give effect to the overriding objective when interpreting the rules or exercising any powers under these rules...”

[69] McDonald-Bishop JA in **Bupa Insurance Limited v Roger Hunter** [2017] JMCA Civ 3, interpreted the rules in a similar manner. In describing rule 26.9 of the CPR at paragraph [58] of the judgment, she said:

“...that rule gives the court an unfettered discretion to determine how a breach of a rule of procedure (which was involved in the case before him) should affect the proceedings, having regard to all the circumstances and the clear dictates of the overriding objective in the interpretation and operation of the rules.”

I could do no more justice to the interpretation accorded to rule 26.9 of the CPR by Morrison JA and McDonald-Bishop JA and so I would adopt their views in that regard.

[70] In **Bupa Insurance Limited v Roger Hunter**, McDonald-Bishop JA referred to the distinction highlighted by the Privy Council in **Strachan v Gleaner Co Ltd and Another** [2005] UKPC 33, between an “irregularity” which can be waived or rectified and a “nullity” which cannot be so corrected. In the instant case, in the light of rule 5.5(1) of the CPR 2000 which states that personal service can only be deemed good service if it complies with the method specified in the CPR 2000. The failure to comply with the preciseness of service specified in the CPR 2000 is an irregularity that may be waived or corrected. However, considering rule 26.9 of the CPR, McDonald-Bishop JA in **Bupa Insurance Limited v Roger Hunter** at paragraph [55] indicated that:

“...that the framers of the CPR did not intend for every breach of the rules to be taken as invalidating the proceedings and that would be so whether or not the particular rule that is engaged is stated in mandatory terms. Once the consequence for breach of the rule is not provided for by the CPR or otherwise, then consideration must be given to the provisions of rule 26.9 in determining the way forward in the proceedings.”

[71] I have a discretion as to whether to correct an irregularity in service in accordance with rule 26.9 of the CPR 2000. In the exercise of that discretion, I have directed myself having regard to the factors to be considered when the court formulates its own criteria for determining procedural rules, in the absence of rules and regulations governing a particular enactment, as stated in **Peters (Winston) v Attorney General and Another** at pages 306-307 which include:

1. the significance of the enactment as a protection of individual rights;
2. the relative value that is attached to the rights that may be adversely effected by the decision;
3. the importance of the procedural requirement in the overall administrative scheme established by the statute;
4. the particular circumstances of the case in hand; and
5. whether the breach of the terms of the Act is trivial in nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned.

Findings & Conclusion

[72] The court must take into account all relevant circumstances in considering all the possibilities available to it. In fact, all parties must help the court to further the overriding objective. It is no longer appropriate to “let sleeping dogs lie” (See **Asiansky Properties Television plc and Anor v Bayer – Rosin (a firm)** [2001] EWCA Civ. 1792.

[73] Therefore, I have examined the decision in **Watson v Fernandes** [2007] CCJ 1, where reference was made to **Baptiste v Supersad** (1967) 12 WIR 140 at 144B, in which Wooding CJ cautioned that: “**the law is not a game, nor is the court an arena. It is...the function and duty of a judge to see that justice is done as far as may be according to the merits**”. It has also been said that “**the attainment of true justice is over the highway of realities and not through the valley of technicalities**”: Musmanno J in **Potter Title & Trust Co. v Lattavo Bros Inc.** 88 A.2d 91 at 93.

[74] This court has said repeatedly that the **CPR 2000** provides for timelines that should be adhered to, unless good reason is given for non-compliance. Litigants cannot flagrantly abuse the process and expect the Court to sanction such abuse.

[75] Additionally, it was stated that:

“**...Courts exist to do justice between litigants through balancing the interests of an individual litigant against the interests of litigants as a whole... Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys...**”

[76] 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.

[77] The law is clear that where a defendant seeks to set aside a regular judgment or irregular judgment: “the defendant must, by evidence, establish that he has a defence, that he has a realistic prospect of success. He or others should, therefore, depose in an affidavit or affidavits to such facts and circumstances that demonstrate that the defendant has a realistic prospect of success”: **Anthony Ramkissoo v Mohanlal Bhagwansingh** Civil Appeal No. S-163 of 2013. This principle was buttressed in **Knolly John v Brenda Mahabir et al** CV2005-00866 p.5 as follows: “The

prospect of success must be real i.e. the court will disregard prospects which are false, fanciful or imaginary. A realistic prospect of success means that the defendant has to have a case which is better than merely arguable”.

[78] However, I do believe that the Court retains the jurisdiction and discretion to correct or cure certain defects or technicalities depending on the circumstances, if the interests of justice require it, and, it is my view that the formal defect or procedural technicalities in the application in this matter may be cured by the court and in fact should be so cured at the date of the hearing of this application. I find that it amounted to a procedural inadequacy which should not be fatal to the claim as the court should in the circumstances be able to exercise its discretionary powers to put things right in order to give effect to the overriding objective.

[79] However, based on the authorities, it is pellucid that the paramount consideration for the court is whether the defendant has a real prospect of successfully defending the claim. 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 13.2 (1) (a) set out the 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.

[80] In resolving the present ‘Issues’ I find then, that the application of the defendant/respondent does not satisfy the requirements as set out in rule 13.2 (1) (a), which would allow this Honourable Court to set aside the judgment in default. An irregular judgment is only to be set aside ex debito justitiae if there has been egregious procedural injustice to the defendant.

[81] Finally, it is clear to me that the defendant did not display a genuine intention to defend the claim. I say so for the following reasons:

- a. firstly, an acknowledgment of service was not filed at any time which stated unequivocally that the defendant intended to defend the claim;
- b. secondly, a defence was not filed, albeit that the defendant has asserted in his affidavit that he was not served with certain documents in the claim but even at its highest, the affidavit and evidence of Mr. Dimitrious Adamopoulos is contradictory on the salient issues of lack of service and not being cognizant of the claim; and
- c. thirdly, when the defendant became cognizant of the default judgment, he made no

efforts to have it set aside by bringing this fact to the attention of its attorney. This evidence, in my judgment, tends to show that the defendant did not attend upon his attorney to have the default judgment set aside, and did not demonstrate an ardent desire on his part to defend the claim;

[82] Therefore, I find that this matter does not meet the threshold of being “the rare but appropriate case” to justify the waiver of the affidavit of merit and I have not exercised my discretion to do so.

[83] Order

- (i) The defendant’s/applicant’s application to set aside the judgment in default is refused, on the basis of the foregoing reasons.
- (ii) Costs to the claimant/respondent in the sum of EC\$2,500.00.
- (iii) The matter is to be set for assessment of damages on February 5th, 2021, at the next sitting of the Master’s Court in Saint Lucia.
- (iv) The claimant shall file and serve this order.

Ricardo Sandcroft
Master [Ag.]

By the Court

Registrar