[2019] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 67/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**AL-TEC INC LIMITED**		**APPELLANT**
AND	**JAMES HOGAN**	**1ST**	**RESPONDENT**
AND	**RENEE LATTIBUDAIRE**	**2ND**	**RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**		**INTERESTED PARTY**

Mrs Georgia Gibson-Henlin QC and Miss Kristen Fletcher instructed by Henlin Gibson Henlin for the appellant

Nigel Jones and Miss Kashina Moore instructed by Nigel Jones & Co for the respondents

Miss Carla Thomas and Miss Tamara Dickens instructed by the Director of State Proceedings for the interested party

2O, 21, 22, 25, 27 July 2016 and 12 April 2019

BROOKS JA

[1] I have read, in draft, the judgment of my learned sister Edwards JA, who was acting as a judge of appeal when this matter was heard, but is now a welcome permanent

member of the court. Apart from a small deviation in respect of the issue that she has identified, in her judgment, as issue 1, I agree with her reasoning and conclusion.

[2] Issue 1 concerns the handling, by the learned judge in the court below, of the matter of service of court documents by the respondents, Mr James Hogan and Ms Renee Lattibudaire, on the appellant Al-Tec Inc Limited. The respondents had sued Al-Tec for damages for breach of contract. The learned judge refused to set aside a default interlocutory judgment and a final judgment that had been entered against Al-Tec. Al-Tec has appealed from his decision. I agree with the learned judge that the default interlocutory judgment ought not to have been set aside.

[3] My learned sister has carefully set out the facts of the case and it is unnecessary for me to do so in full in this short opinion. The relevant facts for the context of this discussion are that when the respondents served the claim form and particulars of claim, they did so by registered post. Those documents were sent to Al-Tec's registered office. Al-Tec failed to file an acknowledgment of service and the respondents requested that judgment be entered against Al-Tec in default of acknowledgment of service, with damages to be assessed. It was entered on 23 July 2008.

[4] The respondents eventually had the damages assessed, entered a final judgment and proceeded to execution. The difficulty arose because all of its posting of court documents, after the claim form and particulars of claim, and up to the securing of a provisional charging order, were to the wrong address. It was only in March 2013, that a posting was made to Al-Tec's correct address. The documents then posted concerned an

application for a final charging order for the sale of Al-Tec's property in order to satisfy the judgment debt.

[5] On 30 June 2014, Al-Tec applied to set aside the judgments and the consequential process. It challenged the validity of the service of the court documents. As far as the service of the claim form and particulars of claim are concerned, Al-Tec contended that it did not receive the claim form and particulars of claim and that, in any event, the service of those documents was improper service because:

a. the affidavit of service that was used to ground the application for the default judgment did not speak to the service of certain documents (the accompanying documents) that should have accompanied the claim form (the requirement of rule 8.16(1) of the Civil Procedure Rules (the CPR)); and

b. the affidavit of service did not exhibit a copy of the claim form (a requirement of rule 5.11(2) of the CPR).

[6] Al-Tec correctly complained that those failures constituted breaches of the CPR and, along with the other complaints to which Edwards JA has alluded, warranted the setting aside of the default judgment, which was entered against it.

[7] The respondents, in addressing these complaints, filed, on 11 July 2014, a supplemental affidavit of service by the process server, Mr Brenton Brown. In that affidavit, Mr Brown deposed that the accompanying documents had been served with the

claim form. He still did not, however, comply with the requirement that a copy of the claim form should be exhibited.

[8] It was in those circumstances that the learned judge made his decision on this issue.

[9] Al-Tec has complained that the learned judge erred in allowing the default judgment to stand. It contends, among other complaints, that the learned judge improperly failed to apply the decision in **Dorothy Vendryes v Dr Richard Keane & Another** [2011] JMCA Civ 15, which states that a failure to serve the accompanying documents, rendered the judgment liable to be set aside as of right.

[10] According to Mrs Gibson-Henlin QC, on behalf of Al-Tec, the learned judge was wrong to apply instead, the decision in **Coates v XXtra Lee Supermarket Limited** (unreported), Supreme Court, Jamaica, Claim No 2003/HCV0390, judgment delivered 3 March 2004**.** In the latter case, the court found, in circumstances where the breach of the rules is not non-service of the accompanying documents but instead a failure to specify, in the affidavit of service, that the documents were in fact served, that it was open to the court to:

a. refuse to set aside the service of the claim form; and,

b. allow the claimant to cure the defect in the affidavit of service.

[11] It is my view that that is the issue that the learned judge faced in respect of the service of the claim form. I take the view that there was no real dispute as to service of the claim form and the particulars of claim. Service was deemed effected for the various reasons that my learned sister has outlined. In that context, the learned judge had evidence before him, by virtue of the supplemental affidavit, which, if he accepted, cured the procedural defect concerning the non-service of the accompanying documents.

[12] There was, in my view, no obligation on the learned judge to have conducted an oral hearing concerning service of the claim form and particulars of claim. Al-Tec could not reasonably expect to challenge the registered slip from the post office certifying postage to Al-Tec's registered office. It therefore could not challenge the service of those documents mentioned in the original affidavit of service. Al-Tec also had nothing to contradict the evidence in the supplemental affidavit. It was in no position to do so. It had said that it had received nothing at all.

[13] It is apparent that the learned judge accepted, as true, the contents of the supplemental affidavit. In that case, it is my view that it necessarily follows that the principle emanating from **Dorothy Vendryes v Dr Richard Keane & Another** would not apply. The learned judge was entitled to say that Al-Tec was not entitled, as of right, to have the default judgment set aside. He was entitled to say, in my view, that the defect in respect of the recording of the service of the accompanying documents, had been cured. He was also entitled to stipulate steps by which the defect, concerning the attachment of the claim form to the affidavit of service, should be cured. He having failed

to do so, it is open for this court to do so in order to regularise matters (see rule 26.9(3) of the CPR and rule 2.15(b)(b) of the Court of Appeal Rules).

[14] It is for those reasons that I hold a nuanced view to the issue set out and explained by my learned sister Edwards JA, to whom the court must be grateful for her sterling effort.

P WILLIAMS JA

[15] I have read both the judgments of Brooks JA and Edwards JA. While I generally agree with the commendably comprehensive judgment of my sister, I am in agreement with my brother as it relates to issue 1.

EDWARDS JA

Background facts

[16] On 30 June 2014, Al-Tec Inc Limited (the appellant), filed a notice of application for court orders seeking to set aside both interlocutory and final judgments that were entered against it. They alleged irregularity of service of the claim form, particulars of claim, default judgment and final judgment following assessment of damages. That application was heard and determined by B Morrison J (the judge) who ruled against the appellant. The appellant appealed to this court against the decision of the judge, contained in his order dated 22 May 2015.

[17] The facts giving rise to that application may be stated shortly. By an agreement for sale dated 4 May 2007, the appellant entered into a contract with James Hogan and Renee Lattibudaire (the 1st and 2nd respondents), for the sale of a parcel of land, registered at volume 1190 folio 426 and volume 1195 folio 223, of the Register Book of Titles, referred to as South Sea Park in the parish of Westmoreland. The purchase price was listed as US$580,000.00, which at the time was equivalent to J$38,280,000.00. The terms of the contract dictated that an initial payment of US$87,000.00, that is, J$5,742,000.00, would be made upon the signing of the agreement. It further dictated that completion should take place on payment, in full, of the balance of the purchase price and costs of transfer, and such other payments payable, in exchange for the duplicate certificate of title registered in the name of the purchaser, on or before 45 days of the date of the signing of the agreement.

[18] It was also a term of the contract that the purchaser shall satisfy himself of the boundaries within 28 days of the signing of the contract, "after which the purchaser is taken to have accepted the boundaries of the land as is, if the vendor was not put on notice to make any rectification required". The respondents obtained a surveyor's ID report dated 23 May 2007. This report was prepared by Mr Andrew Bromfield, Commissioned Land Surveyor, and it outlined several defects to the appellant's title. By letter dated 30 May 2007, the respondents' attorneys-at-law informed the appellant's attorneys-at-law of these defects and requested that the appellant's attorneys, within 10 days, make a proposal as to how they intended to perfect the certificate of title. A copy of the surveyor's report was also enclosed in the letter.

[19] By letter dated 8 June 2007, the respondents' attorneys made it clear to the appellant's attorneys that they were not prepared to accept title with the defects. On 19 June 2007, the respondents' attorneys sent the appellant's attorneys, by way of facsimile, a notice to complete. This notice gave the appellant seven days within which to complete the sale. This was not done and the agreement for sale was, thereafter, cancelled by the respondents, by a letter dated 29 June 2007.

[20] The reason for the cancellation was premised on the appellant's inability to give good title and generally to comply with the notice to complete. On 12 July 2007, the respondents' attorneys, by facsimile, requested a reimbursement for the relevant costs incurred. These included the surveyor's report, valuation assessment, attorney's fees for handling the sale and attorney's fees for reviewing and settling the agreement for sale of chattels.

[21] By letter dated 24 July 2007, the appellant presented three cheques refunding the following items; the sum refunded by the Stamp Commissioner, one half of the cost of preparing the contract with general consumption tax and the amount paid as deposit after all relevant deductions.

[22] On 14 August 2007, the respondent's attorneys again wrote to the appellant's attorneys, advising them that they had received instructions to take action to recover costs and damages. They also advised that if the appellant failed to pay the sums outlined in their facsimile, dated 12 July 2007, within three days, an action would be initiated in

the Supreme Court to recover the sums, plus the difference between the purchase price and the actual value of the property.

Procedural history of the claim

[23] The appellant failed to meet the demands in the letter dated 14 August 2007 and as a result, on 2 October 2007, the respondents commenced suit by filing a claim form and particulars of claim in the Supreme Court, claiming damages for breach of contract, including the difference between the purchase price and the value at the date of judgment, amounting to J$9,053,000.00. In their particulars of claim, the respondents averred that they were entitled to damages on the basis that the appellant had failed to deliver good title, and in the alternative that the appellant had failed to complete within the time stipulated by the notice making time of the essence. The claim form and particulars of claim were served on the appellant at its registered office by post. The address of the registered office is 3 Washington Court, Kingston 8 in the parish of Saint Andrew. Proof of service was provided by the process server Brenton Brown (Mr Brown) in an affidavit filed in court.

[24] The appellant failed to file an acknowledgment of service or to file a defence to this claim. On 13 November 2007, the respondents filed a request for judgment in default of acknowledgment of service. The evidence in proof of the service of the claim form and particulars of claim was contained in an affidavit of service deponed to by Mr Brown, filed 12 November 2007 and attached to the request. It details the documents that were served on the appellant at its registered office, but mentioned only the claim form and particulars of claim.

[25] A judgment in default of acknowledgement of service was, thereafter, entered on 23 July 2008. It was purportedly served on the appellant by registered post at 2 Washington Court, Kingston 8 in the parish of Saint Andrew, on 19 September 2008. I say "purportedly" because this was not the appellant's registered address. Proof of this service is contained in an affidavit of service deponed to by Devon Lawson and filed on 18 June 2009. The required documents for proof of service by registered post is not attached to this affidavit.

[26] On 5 December 2008, the court issued a notice of assessment of damages for hearing on 28 January 2009 at 10:00 am. This was not served on the appellant and the notice does not bear an address for service for the appellant. The assessment was adjourned to 27 April 2009.

[27] On 27 April 2009, the matter came before Brown-Beckford J for assessment of damages. It did not proceed. On that date, Brown-Beckford J adjourned the hearing to 13 July 2009. The assessment was adjourned because no bundles were filed. The court also ordered that a notice of adjourned hearing be served on the appellant. The notice of adjourned hearing along with other documents were served by Devon Lawson, by post addressed to 2 Washington Court, Kingston 8, on 11 June 2009. This is confirmed by the affidavit of service deponed to by Devon Lawson, to which was exhibited the registered slip bearing number 9589. On 24 June 2009, further documents in support of the assessment of damages were sent, by post, to 2 Washington Court, Kingston 8. This is confirmed by the affidavit of service deponed to by Devon Lawson and filed on 29 June

2009, to which was exhibited the registered slip number bearing number 9650. Again, there was no service of the notice of adjourned hearing or the accompanying documents on the appellant, as the address at which service was effected was not the appellant's registered office.

[28] On 13 July 2009, at the hearing for assessment of damages, Campbell J entered final judgment in favour of the respondents, with costs against the appellant. The appellant was neither present nor represented at this hearing. The respondents were awarded general damages in the sum of J$9,053,000.00, with interest. This means that the respondents were awarded general damages in the sum claimed in the claim form, being the difference in the value of the land at the time of judgment and the purchase price. They were also awarded special damages in the sum of J$1,987,470.00 and US$17,700.00, with interest.

[29] The order on the assessment of damages for final judgment against the appellant was not served on the appellant, neither was the appellant aware of it, in so far as it was not brought to its attention or to the attention of its servants and/or agents before April 2013.

[30] The respondents, after the assessment of damages, filed their bill of costs on 12 December 2012 and, on 22 November 2012, they obtained a provisional charging order. The appellant was not served with this order. None of the affidavits of service referred to by the judge in his judgment, speaks to service of this order. On 6 December 2012, the respondents applied to make the provisional charging order final. At this application,

reliance was placed on the affidavit of Renee Lattibudaire filed 14 November 2012, to which was attached the final judgment made by Campbell J.

[31] On 26 March 2013, the following documents were served at 3 Washington Court, Kingston 8, the registered office of the appellant; the notice of application for final charging order, filed 6 December 2012, the formal order filed 27 November 2012, the affidavit in support of the provisional charging order filed 14 November 2012 and a further affidavit of Renee Lattibudaire, filed 22 November 2012. On 23 April 2013, these aforementioned documents were also served on a Mr Crawford McLeish, a director of the appellant, at Lot 23, South Sea Park, in the parish of Westmoreland by Mr Cedric Patten, an assistant bailiff at the Westmoreland Parish Court. The documents were served on Mr McLeish, through his caregiver, at the land that is the subject of this claim.

[32] B Morrison J made the provisional charging order final on 6 May 2013. The default costs certificate was filed on 10 October 2013. There is no evidence that the former was served on the appellant. On 17 October 2013, the respondents filed a notice of application for sale of land. The respondents averred, in that application, that the appellant failed to pay anything on the judgment, despite being served with it. It is purported that the application for the sale of land as well as the affidavits in support was served on Mr McLeish personally, on 3 May 2014. The final judgment made on the assessment of damages was exhibited to the affidavits of Renee Lattibudaire filed and served in support of the application for the provisional charging order and the affidavit in support of the order for sale of land. The affidavit filed in support of the application for a provisional

charging order was served by post by Sheldon McDonald at the appellant's registered address, on 26 March 2013.

The application

[33] The appellant, thereafter, took action and by notice of application for court orders filed 30 June 2014, it challenged the validity of the service of all relevant documents. The following orders were sought in the Supreme Court:

> "1. The interlocutory judgment in default of acknowledgment of service dated the 23rd July 2008 be set aside;
>
> 2. The Final Judgment and all consequential orders entered on the 13th July 2009 be set aside;
>
> 3. The Default Cost [sic] Certificate dated the 10th October 2013 whereby the Defendant was ordered to the [sic] pay costs in the sum of $864,852.90 be set aside;
>
> 4. The Provisional Charging Order granted on the 22nd November 2012 be discharged;
>
> 5. A stay of execution of the final judgment dated the 13th July 2009 and the order for costs dated the 10th October 2013 pending the hearing of the Application to set aside the judgments herein."

[34] The grounds on which these orders were sought are as follows:

> 1. "Pursuant to rules 39.6 herein;
>
> 2. The judgments were irregularly entered;
>
> 3. The Defendant was not served with the documents in accordance with r. 8.16 of the CPR;
>
> 4. The judgments were not served on the Defendant or a director of the Defendant in accordance with any rule or law as required;

5. Notice of the [assessment of damages] was not served on the Defendant, if notice of the proceedings was served on the Defendant and the Defendant was present at the trial a different judgment or order would have been made:

    a. The Defendant would have been granted an opportunity to set aside the Default judgment on the basis that it was wrongly entered;

    b. The Notice of [assessment of damages] was not served on the Defendant;

    c. If the Defendant was present at the trial another order would have been made. The Claimants would only be awarded damages for investigation [sic] of the title. This is because there is no evidence that they are entitled to an award of damages other than in accordance with the principle in **Bain v Fothergill** (1874) LR 7 HL 158. This case was not cited to the learned judge at the assessment of damages;

    d. There is no pleading that supports an award of damages on the basis of the ordinary contractual principles which is what was awarded in this case;

6. To date it is unclear as to whether the final judgment has been served on the Defendant its servants and or [sic] agents;

7. A bundle of documents was delivered to the premises that is the subject matter of the order for sale and came to the attention of one director Crawford McLeish. It was in those circumstances that the Application is now being made;

8. The stay is necessary to preserve the subject matter of the Applications and the Applicant's interest therein;

9. That if the stay is not granted the Applicant's [sic] will be rendered nugatory and it is likely to suffer irremediable prejudice.

10. This application is urgent."

[35] At the hearing of this application, the respondent relied on an additional affidavit of the process server, Mr Brown, filed on 11 July 2014, seeking to demonstrate that the

prescribed documents were served on the appellant along with the claim form and particulars of claim.

[36] The undisputed evidence, which was accepted by the judge, is that the appellant, its servants and/or agents, only became aware of the orders made against it by way of service, as early as 26 March 2013 (service by post to its registered office) or as late as 23 April 2013 (personal service on a director of the appellant). The appellant's version of the circumstances surrounding the manner in which it became aware of the orders is described in the affidavit of Garfield Whyte (Mr Whyte), filed on behalf of the appellant, in support of its application to set aside the judgments and orders made against it. On 22 May 2015, having heard the application brought by the appellant, the judge refused the orders sought.

[37] On 3 June 2015, the appellant filed a notice of appeal in this court. This notice of appeal was amended pursuant to an order of the court dated 27 July 2016 and refiled on 2 August 2016. The appellant, by way of this amended notice of appeal, appealed the decision of B Morrison J refusing to set aside the judgment and orders made against it and the consequential orders following that refusal.

[38] The amended grounds of appeal were stated as follows:

> a. "The learned judge erred as a matter of fact and/or law in finding that the application was not made in the prescribed time in that time does not begin to run for the filing of an application to set aside a judgment under r. 39.6 until fourteen (14) days after the service of the judgment on the Appellant.

i. The Default Judgment was served at 2 Washington Court, Kingston 8, in the parish of St. Andrew which is not the Appellant's registered address or in any way connected with the Appellant.

ii. There was no evidence contradicting the Appellant's evidence that it was not served with the Final Judgment.

b. The learned judge erred as a matter of fact in failing to have regard to the fact that no notice of trial was served on the Appellant even after this was directed by the Court, and insofar as Rule 16.2(2) only provides for notice to the Claimant, it is unconstitutional and in breach of section 16(2) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.

c. The learned judge erred as a matter of law in applying r.26.9 to cure the Respondent's failure to serve the Defence Forms etc [sic] in accordance with r.8.16 of the CPR 2012 particularly having regard to the principles set out in the **Dorothy Vendryes v Keane & Anor** [2011] JMCA Civ 15 decision which confirmed that compliance with r. 8.16 is mandatory.

d. The learned judge erred as a matter of fact and/or law in failing to set aside the default [judgment] which was irregularly entered in the circumstances and moreso where the general words of r.26.9 could not regularize matters that were not permitted by the rules.

e. The learned judge erred as a matter of fact and/or law in finding that there was no distinction between this case and the facts of the **Coates v XXtra Lee Supermarket Limited** JM 2004 SC 14.

f. The learned judge erred as a matter of fact and/or law and applied the wrong principles, in that having accepted that there were contests as to the issue of service that could not be resolved without cross-examination of the affiants, he nevertheless refused to set aside the judgment in default of acknowledgement of service, consequential orders and the final judgment.

g. The learned judge erred as a matter of fact and/or law by taking into account rule 12.13 of the CPR 2002 as a barrier to the Appellant's ability to set aside the judgment at the Assessment of Damages. Rule 12.13 construed as and applied as it is by the learned trial Judge infringes the Appellant's right to a fair hearing as guaranteed by s.16(2) of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act, 2011 is [sic] unconstitutional, null and void."

[39] The orders as sought by the appellant in its amended notice of appeal are:

a. "An order setting aside the Judgments in the Court below.

b. An order declaring that CPR 12.13, insofar as it purports to restrict the Appellant to be heard only on the matter of costs at the hearing of the assessment of damages following default judgment, is unconstitutional, null and void.

c. An order declaring that CPR 16.2(2), insofar as it only provides for notice to the Claimant, is unconstitutional, null and void, and in breach of section 16(2) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.

d. Costs here and in the court below to the Appellant to

be taxed if not agreed.

e. Such further and/or other relief as this Honourable Court deems just."

[40] The appellant also challenged numerous findings of fact and law made by the learned judge.

[41] The appellant's amended notice of appeal was followed by a notice of appeal for court orders to adduce fresh evidence on appeal, which was filed on 14 July 2016. The orders sought by the appellant in this application are as follows:

"1. The Appellant is permitted to adduce fresh evidence in the form of the following correspondence:

a. Letter dated the 2nd June 2015 from the Appellant's Attorneys-at-Law to the Postmaster General;

b. Letter dated the 16th June 2015 from the Postmaster General to the Appellant's Attorneys-at-Law

For the purpose of establishing that the registered articles numbered 9589 and 9650 dated the 11th June 2009 and the 24thJune 2009 respectively, addressed to 2 Washington Court and by which the Claimants purportedly served the Defendant, were not delivered to the Defendant's registered address and consequently prevented them from setting aside the interlocutory judgment and being heard at the assessment of damages hearing;

2. Time for filing and serving the application herein is abridged;

3. Liberty to apply;

4. Costs of this application are costs in the appeal;

5. Such further and/or other relief as this Honourable Court deems fit."

[42] The appellant sought these orders, pursuant to section 28 of the Judicature (Appellate Jurisdiction) Act; Part 2.15 and rule 1.7 of the Court of Appeal Rules, on the basis, in summary that:

a) the proposed evidence related to matters which occurred after the date of the application to set aside the judgment in the Supreme Court;

b) the information could not have been obtained with due diligence at the time of the hearing;

c) the information could not have been made available at the time of the hearing before the learned judge; and

d) the evidence was credible evidence and if given, it would influence the results.

[43] A counter-notice of appeal was filed by the respondents; this was followed by an amended counter-notice of appeal filed on 25 July 2016. By way of their amended counter-notice of appeal the respondents contended that the decision of the judge, in the court below, should be affirmed. This contention was premised on the following grounds:

> "(a) The Honourable Judge was entitled to refuse the application to discharge the default judgment and the Final Judgment as the evidence from the Defendant that it did not receive the Claim Form, Particulars of Claim, Prescribed Notes, Acknowledgment of Service, Defence, Notice of Assessment, Notice of Adjourned Hearing of Assessment and the Final Judgment was hearsay evidence and he was entitled to reject it.
>
> (b) The judge was entitled to refuse to set aside the default judgment as the Defendant did not satisfy rule 13.2 of the Civil Procedure Rules."

The issues

[44] This appeal raises four issues. These are:

(1) Whether the learned judge erred in finding that the appellant was properly served and was, therefore,

wrong in refusing to set aside the judgment entered in default of an acknowledgment of service and all consequential judgments and orders thereafter - grounds (c), (d), (e) and (f) and the respondents' counter notice of appeal.

(2) Whether the learned judge erred as a matter of fact in failing to have regard to the fact that no notice of trial was served on the appellant even after this was directed by the court – first part of ground (b).

(3) Whether the learned judge erred as a matter of fact and/or law in finding that the application to set aside the default judgment was not made in the prescribed time - ground (a).

(4) Whether rule 12.13 as construed and applied by the learned judge infringes the appellant's right to a fair hearing as guaranteed by section 16(2) of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act, 2011 and is unconstitutional, null and void - ground (g) and second part of ground (b).

[45] Although not argued in this order, it is convenient to deal with grounds (c), (d), (e) and (f) first, as they deal with the question of whether the judgment entered in default

of acknowledgment of service was irregularly entered and also with the manner in which this issue was treated by the learned judge. I will then deal with ground (a), followed by the first part of ground (b) and then ground (g), followed by the second part of ground (b).

The basis on which an appellate court may set aside the judge's orders

[46] It is well to bear in mind at the outset of this aspect of the discussion, the well-known rule that this court will only interfere with the exercise of a discretion by a judge on an interlocutory application, where it is shown that the judge's decision was based on a misunderstanding of the law or the evidence, or on an inference that can be shown to be demonstrably wrong, or where the judge's decision "is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it" (**Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046, per Lord Diplock; see also **Attorney General v McKay** [2012] JMCA App 1, paras [19] and [20]). This court would, therefore, ordinarily defer to the judge's exercise of his discretion, unless it can be shown to have been plainly wrong.

Issue 1 –Whether the learned judge erred in finding that the appellant was properly served and was, therefore, wrong in refusing to set aside the judgment entered in default of an acknowledgment of service and all consequential judgments and orders thereafter-Grounds (c), (d), (e) and (f).

Appellant's submissions

[47] Queen's Counsel, Mrs Gibson-Henlin, on behalf of the appellant, submitted that the appellant was not disputing that service of the claim form and particulars of claim had been effected by registered mail. The complaint was that the affidavits of service

deponed to by Brenton Brown did not comply with rules 5.11(2), 6.2 or 6.7 of the Civil Procedure Rules 2002 (CPR), that is, they did not exhibit a copy of the claim form or the relevant accompanying documents which were served. Queen's Counsel also contended that, as stipulated in rule 8.16(1) of the CPR, the affidavit did not reflect that the form of defence or a form of acknowledgement of service was served with the claim form. Queen's Counsel submitted that the affidavits of Mr Brown being non-compliant with the rules, it was not open to the respondents nor could the judge allow the respondents, at the time when service was being challenged, to simply allow an affidavit to be filed by the respondents to rectify the matter. This was particularly so, she said, in circumstances where the learned judge had also found that service was disputed, such that it would require cross-examination for it to be resolved.

[48] Queen's Counsel pointed out that the judge, instead of ordering cross-examination of the relevant parties, ignored the mandatory requirements of rule 8.16, in favour of the general powers in rule 26.9 and accepted that the second affidavit of Brenton Brown filed on 11 July 2014, was capable of curing the defect in procedure in relation to rule 8.16. She further submitted that in taking that approach the learned judge fell into error.

[49] Queen's Counsel relied on the case of **Dorothy Vendryes v Keane & Anor** [2011] JMCA Civ 15. She further argued that, the only method by which the irregularity could be cured is, either by proving service in the manner prescribed by the rules or in the alternative, re-serving the claim form and particulars of claim, in compliance with rule 8.16(1).

[50] Queen's Counsel also argued that the circumstances in this case was wholly different from that in **Coates v Xxtra Lee Supermarket Limited** (unreported), Supreme Court, Jamaica, Claim No 2003 HCV 0390, judgment delivered 3 March 2004. In that case Queen's Counsel pointed out, there was a zoning error in the address at which the documents were served but it was an address used by the defendant who had in fact been served. In this case, she noted, the default judgment and the notice of adjourned hearing was served at the wrong address altogether. In any event, Queen's Counsel maintained, rule 5.11(2) was not complied with and the irregularity in service under rule 8.16 of the CPR could not have been cured by rule 26.9.

Respondent's submissions

[51] Counsel for the respondents, Miss Moore, submitted that the judge did not apply rule 26.9 to cure any perceived failure to serve the requisite forms along with the claim form and particulars of claim. Counsel contended that the judge referred to rule 26.9 when making reference to the affidavits of service in relation to the application for a provisional charging order and that for a final charging order. In support of this counsel pointed to paragraph 54 of the judgment.

[52] Counsel further submitted that the judge had observed that rule 5.11(2) required that the affidavit establishing proof of service by post should also exhibit a copy of the claim form. Counsel also made reference to **Coates v Xxtra Lee Supermarket Limited** where Brooks J (as he then was) found that the failure to attach the claim form to the affidavit, was a procedural error that could be cured by the court using rule 26.9 of the CPR.

[53] Counsel submitted also, that the learned judge below was fully aware of the mandatory requirement of rule 8.16, that the requisite documents must be served with the claim form. Counsel noted that the evidence from the appellant that it was not served with the originating documents came from the attorney handling the conveyance of the property in dispute, on behalf of the appellant. Counsel submitted that the judge was correct to be sceptical of that affidavit, as the knowledge of the attorney was questionable, so that that evidence could rightly be treated by the judge as a bare denial. She pointed out that the judge had before him the affidavits of service of Brenton Brown dated 12 November 2007 and 11 July 2014. The affidavit of the 11 July 2014, she said, indicated that his reference to claim form, in his initial affidavit, included all the attached documents. Counsel pointed to the findings of the judge at paragraph [75] – [76] of his judgment. Counsel submitted that the judge had found that there was no evidence that the documents alluded to by Mr Brown in his affidavit of 12 November 2007 were never served on the appellant and there was no evidence that they were returned undelivered. The judge, she noted, found that they were deemed to have been properly served.

[54] It was submitted that, although the judge was cognizant of this court's decision in **Dorothy Vendryes v Keane & Another** [2011] JMCA Civ 15, he was not satisfied that the appellant had established that the attachments to the claim form were not served along with it. Counsel further noted that rule 12.4 of the CPR dictates that the registrar must enter judgment against a defendant if satisfied that the claim form and particulars of claim were served on a defendant. Counsel argued that the learned judge was clearly satisfied that the registrar had evidence that the claim form and particulars of claim were

served at the registered office of the appellant and that it was on this basis that he found that the default judgment was regularly entered and therefore could not be set aside.

[55] Counsel submitted that the judge was not in error when he stated that there was no distinction between the case of **Coates v Xxtra Lee Supermarket** and the instant case. Counsel argued that once the judge was satisfied as to service and that the registrar had a sufficient basis on which to enter a default judgment, then any inadequacies in the procedure could be cured by using rule 26.9 of the CPR.

Analysis

[56] The judge was enjoined to, firstly, determine whether the default judgment was validly entered. In this particular case, he was required to determine whether service was properly effected on the appellant when the claim form and particulars of claim were mailed to the appellant's registered office. Further, where the affidavit of service, filed in proof of service, indicated service of only the claim and particulars of claim, the judge was required to determine whether the requisite documents were served with the claim form and if not, what, if any, was the effect on the validity of the service. An analysis of the judge's approach to this issue is necessary to determine if the judge did what was required of him.

[57] At paragraph [31] of his judgment the judge identified six issues "spawned" by the application. He listed them as follows:

i) "Service within Rule 8.16 of the CPR.

ii) Whether the Application was filed within 14 days of the Judgement or Order being served on the Applicant.

iii) Whether the Applicant has given a good reason for failing to attend the hearing.

iv) Whether it is likely that had the Defendant attended a different Order would have been made.

v) Whether the judgment was irregularly obtained.

vi) Whether a stay of execution of the Final Charging Order should be granted."

[58] At paragraph [32] he indicated that the issues would be dealt with conveniently, with the issue of service being dealt with as issue number (i). Issues (ii), (iii), and (iv) were dealt with under the heading "The Application", and all together treated as issue number (ii), whilst (v) and (vi) were to be dealt with separately. To my mind the judge ought to have considered the issue of service (issue (i)), along with the issue of whether the judgment was irregularly obtained (issue (v)), which required him to consider whether the documents were served. Issue (v) was instead abandoned by him. In doing so, he failed to determine the important question arising on the application before him as to whether it was possible that the default judgment was irregularly obtained as a result of the failure to serve the requisite documents along with the claim form.

[59] In his judgment, the learned judge considered the various steps the respondent took to serve the appellant at the different stages of the proceedings. He listed and considered all the affidavits of service filed in this matter. He, therefore, considered the two affidavits of service of Brenton Brown, the process server. The first, dated 12

November 2007, indicated that he served the claim form and particulars of claim by sending them by post to the registered office of the appellant. The second affidavit, dated 11 July 2014, was filed in response to the appellant's application. In that affidavit Mr Brown indicated that when he mentioned service of the claim form in the first affidavit, it included all the requisite documents.

[60] The learned judge found that, of the eight affidavits he reviewed, only three were purportedly served at the appellant's address and two were purported to have been served on the appellant's director, Mr McLeish, personally. He then went on to consider the various applicable rules in the CPR most notably under Parts 5, 6, 8 and 42 of the CPR, all dealing with service.

[61] With respect to the first affidavit of Mr Brown, the judge at paragraph [54] of his judgment said this:

> "As far as these [sic] affidavit of Brenton Brown is concerned its only deficiency subsequently made right by his second affidavit, was its failure to mention the other relevant documents as being served at the time of the serving of the Claim form and particulars of claim."

[62] The appellant's complaint in the court below, was firstly, that it 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 appellant's denial that these were served raised a dispute as to service, which required resolution. It is the appellant's contention that the judge did not resolve this issue.

[63] It is clear that the judge was cognizant of the fact that under the relevant rules it was a condition precedent for the entry of a default judgment that proper service of all relevant documents must be proved. He said so at paragraph [65] of his judgment. However, in the face of a clear dispute as to service, he failed to determine by viva voce evidence that there was proof of proper service of all the requisite documents on the appellant along with the claim.

[64] In determining what he referred to as issue [ii], the judge showed that he had an appreciation of what was required of him. He said at paragraphs [75] and [76] that:

> "[75] One formidable hurdle which the 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 [sic].
>
> [76] 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."

[65] The judge also referred to 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, he said, he 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. After quoting the principles from that case, the judge then said at paragraph [93] of the judgment, that:

> "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 [sic] being cross-examined."

[66] One would then have expected the learned judge to call for cross-examination of the process server and the representative of the appellant who gave an affidavit, or give reasons why he felt it was not necessary to do so, in the light of the principles he alluded to. He did no such thing. Instead, he concluded that the claim form and particulars of claim were served and that the required documents were served along with it. He also concluded that there was no need to determine issue [v], as to whether the default judgment was irregularly obtained. He seemed to have resolved the issue in favour of the respondent, based solely on the affidavit evidence of Mr Brown, without cross-examination and without giving reasons why he felt it was not necessary in the circumstances.

[67] 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."

[68] In the case of **Dorothy Vendryes v Keane & another**, this court 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.

[69] Although the learned judge referred to the case of **Dorothy Vendryes v Keane & another** as being germane to the issues before him, he did not apply the principle in that case, at all. Instead he referred to and applied the case of **Coates v Xxtra Lee Supermarket**. **Coates v Xxtra Lee Supermarket** was a case where service was effected by post to the correct location of the defendant. The registered address was the same address in terms of the street name and the number of the premises, but was different in terms of the postal zone. The difference was found to be because of an error in the stating of the address of the registered office. In addition, the process server had also failed to exhibit a copy of the claim form to the affidavit of service, as required by the rules. That case raised no substantive issue as to service, the court having determined that service had been effected at the correct address despite the misdescription, but it raised a procedural point, in that, the court had to determine whether the failure to exhibit

a copy of the claim form to the affidavit of service was fatal. Brooks J determined that it was a procedural defect which could be cured pursuant to rule 26.9. He, therefore, ordered that a supplemental affidavit be filed exhibiting a copy of the claim form.

[70] In the instant case, the learned judge, after setting out, at paragraph [88], that the affidavit of service of Mr Brown sworn to on 27 November 2012 spoke only to the service of the claim form and particulars of claim and that it was only after the application was filed that he sought to cure the defect by filing a second affidavit of service, found that there was no distinguishing characteristics between the case of **Coates v Xxtra Lee Supermarket** and the instant case.

[71] The learned judge, faced with a contest as to service of the requisite accompanying documents (for in truth there could be little contest regarding the service of the claim form by post to the correct registered office of the defendant, as this was deemed service), was required to determine the issue on viva voce evidence. **Coates v Xxtra Lee Supermarket Limited** was not applicable to that issue. The issue facing the judge was one where it was being averred that the claim form and particulars of claim were not served on nor received by the appellant, and that the accompanying documents were not served along with the claim form, as required by the rules. On the authority of **Dorothy Vendryes v Keane & another**, if this were so, then the service was irregular. It is not in the same vein as a failure to attach the claim form to the affidavit, which was a procedural error that, on the authority of **Coates v Xxtra Lee Supermarket Limited**, could be cured by an application under rule 26.9 of the CPR.

[72] Rule 29.6 speaks to the general powers of the court to rectify matters where there has been a procedural error. Rule 26.9 stipulates that-

> "26.9 (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."

[73] Brooks J in **Coates v Xxtra Lee Supermarket** stated the following-

> "My view of the rules has not revealed a stipulation as to the consequence of a failure to comply with rule 5.11(2). I am of the view that the defect is a procedural one and it clearly could not invalidate service, as long as that service had been properly effected.
>
> Rule 26.9(2) stipulates that an error of procedure or failure to comply with a rule "does not invalidate any steps taken in the proceedings unless the court orders so."

[74] Rule 5.11 stipulates how service by registered post must be proved and states:

> "5.11 (1) Service by registered post is proved by an affidavit of service by the person responsible

for posting the claim form to the person to be served.

(2) The affidavit must exhibit a copy of the claim form and state-

(a) the date and time of posting: and

(b) the address to which it was sent."

[75] 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 post requires an affidavit of service indicating 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 5.11 or rule 8.16. Of course 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.

[76] The case before this court concerns the allegation that the form of defence, form of acknowledgement of service, prescribed notes etc, were not served with the claim form

as stipulated by rule 8.16, which is an issue dealt with by this court in **Dorothy Vendryes v Keane and Another**. Whether those documents were served and the effect of the failure to serve were what the judge was required to determine. The question of the effect of the failure to serve the requisite documents is answered in the judgment of this court in **Dorothy Vendryes v Keane & another** and not in **Coates v Xxtra Lee Supermarket**, which provides no answer to this question.

[77] This court's decision laid down in **Dorothy Vendryes v Keane & another** made it clear that the requirement is mandatory and a failure to serve the attendant documents with the claim form renders a default judgment irregular. Harris JA put it this way at paragraph [12]: -

> "Rule 8.16 (1) expressly specifies that, at the time of service, the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word "must', as used in the context of the rule is absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated, offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside. The learned judge was correct in so doing."

[78] Here, Harris JA was affirming the position as stated by Sykes J (as he then was) in the court below. Sykes J had said 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 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."

[79] It is explicit in Sykes J words, which was later affirmed by Harris JA, that the rationale behind stipulating that these documents must be attached to the claim form 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. Implicit in this rationale, is the inference that rule 26.9 does not provide an approach which permits a decision to be arrived at that service was effected where there was a total failure to serve at all. In such circumstances a claimant may serve the documents, or in the exceptional case, apply for service to be dispensed with.

[80] In this regard, **Coates v Xxtra Lee Supermarket** avails the respondent only to the extent of their argument that the failure to attach the claim form to the affidavit of service was a procedural error that could be cured by the court making orders pursuant

to rule 26.9 of the CPR. Brooks J, in handing down judgment, outlined that the method of curing this defect was for the claimant to file a supplemental affidavit of posting of the claim form, which complied with rule 5.11(2). In this case, the second affidavit of Mr Brown did not cure the defect in the first affidavit in so far as the requirements of rule 5.11 is concerned. There is no evidence that either of the two affidavits of service of Mr Brown complied with that rule by exhibiting a copy of the claim form which was alleged to have been posted. In applying rule 26.9 of the CPR, in order to set matters right, the judge could have ordered that a supplemental affidavit be filed by Mr Brown exhibiting a copy of the claim form which he served.

[81] At paragraph [88] of his judgment, the learned judge said that:

> "...The question which begs to be answered is can the unilateral act of the Claimants by seeking to advance an explanation for the defect or error or omission in the first affidavit give to it retrospective validity? I should think so in spite of its being characterized as "self-serving'. The truth is, it is also amenable to rule 26.9: "This rule applies only where the consequences 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."

[82] Therefore, in respect of that aspect of the failings of the affidavit of Mr Brown, the judge treated his second affidavit as a cure to the defect in procedure in his first affidavit, pursuant to rule 26.9. In my view, the judge was wrong to apply rule 26.9 to cure the

procedural defect in the first affidavit of service of Mr Brown, before determining who was to be believed with regard to whether the requisite documents were actually served along with the claim form and particulars of claim, which was the main issue before him. Even if he did not accept the appellant's denial of receipt of those documents, the fact that the original affidavit in proof of service did not speak to service of those documents, and the appellant was denying service or receipt of them, it raised a dispute as to such service, which could only be answered after viva voce evidence. In those circumstances, it was not open to him to merely accept the second affidavit evidence of Mr Brown, without more.

[83] To my mind, the learned judge could only act on the second affidavit of Mr Brown, if he had 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 them and the second affidavit in mentioning them, cured that defect. The Privy Council decision in the case of **Chin v Chin** Privy Council Appeal No 61 of 1999, judgment delivered 12 February 2001, [2001] UKPC 7 (which the learned judge himself, referred to) 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.

[84] The judge failed to make any findings with regard to the dispute over service, therefore, when he purported to apply the authority of **Coates v Xxtra Lee**

Supermarket and rule 26.9, to cure the defect in Mr Brown's first affidavit, he was clearly in error.

[85] The failure to serve the documents along with the claim form and affidavit of service is a totally different thing from failing to mention in the affidavit of service that they were served and failing to attach the claim form to the affidavit. The appellants maintained that they were not served with the documents, the respondents maintained that the documents were served but it was not mentioned in the first affidavit of the process server. The judge was required to determine the issue of service.

[86] It would also appear from the judge's reasoning that one of his primary reasons for accepting that the judgment in default of acknowledgment of service was properly entered, is that, on the literal meaning of rule 12.4, he says, the registrar merely has a duty to ascertain whether or not there was service of the claim form and the particulars of claim. In his view, there was no duty on the registrar to ascertain whether the attendant documents were attached to the claim form. This position is outlined in paragraph [89] and [90] of his judgment which reads as follows-

> "[89] As have been already alluded to, according to Rule 12.4, the Registry must enter judgment, at the request of the Claimant against a Defendant who has failed to file an Acknowledgment of Service where the Claimant proves service of the Claim Form and Particulars of Claim on that Defendant and, where the period for filing and acknowledgement of service has expired.
>
> [90] It seems to me that primarily what the registry is to be concerned about is the proof of the service of the Claim Form and the Particulars of Claim on the Defendant, whereas according to the Vendryes case it is mandatory that the

> Defendant be served with not only the Claim Form and Particulars of Claim, but also, a Form of Acknowledgement of Service, a Form of Defence and the Prescribed Notes for the Defendants."

[87] Although the judge made this statement, he did not say how he resolved what appeared to him to be a conflict between the registrar's duty under rule 12.4 and the decision in **Dorothy Vendryes v Keane & another**, he simply seemed to have ignored this court's decision.

[88] 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.

[89] 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 5.11 of the CPR.

[90] Although there is some merit in these grounds of appeal regarding the judge's approach, the success of the appellant's appeal on these grounds has to be considered in light of the respondents' counter notice of appeal.

The counter notice of appeal

[91] Counsel for the respondents, in their counter notice of appeal, asked this court to find that the judge was entitled to refuse to discharge the default judgment as the evidence relied on by the appellants was hearsay evidence. Counsel maintained that the judge would have been correct to reject the affidavit of Mr Whyte as hearsay and in those circumstances there would have been no basis upon which he could have rejected the evidence of service on the appellant.

[92] Counsel submitted further, that the judge was correct to have found that where there is a conflict on the evidence it could not be resolved on affidavit evidence alone. Counsel argued however, that the judge was nevertheless entitled to disregard the affidavit deponed to by Mr Whyte, the attorney for the appellant, in support of the application to set aside the judgment and orders of the court. Counsel argued that Mr Whyte, as attorney having conduct of the conveyancing aspect of the matter involving the subject property, could not positively assert that the documents were not served or received. Counsel maintained that, as Mr Whyte had not identified the source of his information, the information was hearsay and the court was not in a position to act on this evidence. Counsel further submitted that the judge was not in a position, based on the hearsay evidence, to reject the respondents' evidence that the documents, including all the attachments were properly served.

[93] Queen's Counsel for the appellant maintained that since the appellant's application was an interlocutory proceeding, the court could have regard to hearsay evidence in order to come to a determination. Queen's Counsel argued that rule 30.3(2) allowed for hearsay

evidence to be admitted once the affiant indicates which statements are made from his own personal knowledge and which are from information and belief and the source of that information and belief. Queen's Counsel submitted that the application was made on an urgent basis and the hearsay evidence was the only available evidence at the time. Queen's Counsel further submitted that since the rules provided for hearsay evidence to be admitted there was no basis on which any court should have felt it necessary to disregard it. Queen's Counsel submitted that on this basis the counter notice should fail.

[94] In this case the judge made no express finding that the affidavit of Mr Whyte contained hearsay statements. His only reference to any complaint he may have had regarding the affidavit made in support of the appellant's application is at paragraph [68] where he said:

> "I pause here to venture upon a remark: Surely Mr. Whyte's saying that he is authorized to give his affidavit on behalf of the Defendant is not borne out by any such authority. Nevertheless, he continues."

[95] However, it is from Mr Whyte's affidavit that the judge was able to find support for his finding that the appellant became aware of the final judgment as late as April 2013 and only applied to set it aside more than a year later. Based on that he found that the application was not made in time and that the appellant had not provided a good explanation for the delay. It is clear therefore, that the judge did not reject Mr Whyte's affidavit for want of authority. Counsel however, is asking the court to find that the judge ought to have rejected the affidavit in so far as it contained hearsay evidence and could not have provided a basis upon which the judge could have rejected Mr Brown's affidavit evidence in proof of service.

[96] 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 his or her information or belief provided that the affidavit indicates which of the statements are within the affiants 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).

[97] Rule 30.3 of the CPR sets out the basis upon which a judge may admit hearsay evidence in an affidavit. The judge in this case did not question the admissibility of the evidence contained in Mr Whyte's affidavit but he did question his authority to make the affidavit. What is clear is that the judge rejected the affidavit evidence of Mr Whyte that the appellant was not served, in favour of the affidavit evidence of Mr Brown that it was served. The question raised by the counter notice is whether there was any basis for him to have done that.

[98] Mr Whyte claimed to have been the conveyancing attorney for the appellant and that it was he who had conduct of the sale of the subject property to the respondent. At paragraph 7 of his affidavit he deposed that the claim form, particulars of claim, a form of acknowledgment of service, a form of defence and the prescribed notes for defendants (Form 1A) was not served on or received by the appellants.

[99] The service, as found by the judge, was effected by means of post at the registered office of the appellant. Mr Brown exhibited the registered slip in proof of that posting. It was deemed service. Mr Whyte did not indicate in his affidavit how he came to know that

the documents were not served, more than his mere say so. The judge referred to this as a mere denial. In his affidavit he deposed that he had personal knowledge of "the matters in respect of which depone [sic] herein". He also deposed that such matters that are not within his personal knowledge are "true to the best of my information and belief". He, however, failed to indicate what were matters of information or belief and the source of his information or belief. Mr Whyte is not a director or officer of the appellant. He did not indicate how he knew that the documents were not served or received by the appellant. By giving evidence of facts that he had no personal experience of, for the purpose of proving the truth of it, Mr Whyte provided the court with hearsay evidence. Since he did not state that it was a matter of information and belief and did not state the source of that information or belief, there was no admissible evidence as to lack of service before the judge. In those circumstances there was no evidence to refute that of Mr Brown that the documents were served and therefore there was no basis upon which the judge could have set aside the default judgment. Therefore, although his approach to the determination of the issue was faulty and he failed to make relevant findings, the judge, in the final analysis, was entitled to find that there was no evidence to contradict the assertion made by the respondents, through the process server Mr Brown, that there was proper service on the appellant and that as a result, the default judgment was regularly obtained.

Grounds (c), (d), (e) and (f) of the appellant's grounds of appeal fail and the respondent's counter notice of appeal succeeds.

Issue 2 -whether the learned judge erred in failing to have regard to the fact that no notice of hearing was served on the appellant even after this was directed by the Court-First part of Ground (b)

Appellant's submissions

[100] Mrs Gibson Henlin submitted that the failure to serve the appellant with the notice of assessment is an irregularity which renders the assessment of damages a nullity. The case of **Watson (Linton) v Sewell (Gilon) and ors** [2013] JMCA Civ 10 was relied on in support of this assertion. Counsel contended that, as the assessment of damages is a nullity, the appellant is entitled to set aside the assessment as a matter of right, so that it may at the very least defend the issue of quantum. Queen's Counsel made reference to **Mills v Lawson & Skyers** (1990) 27 JLR 196, where Downer JA held that "before the trial commences the appellant would have to satisfy the court that the procedural requirements as to notice were complied with." This requirement, Queen's Counsel submitted, was not satisfied in this case.

[101] Queen's Counsel also highlighted that, as per Downer JA, only the final judgment could have been set aside after assessment "as the interlocutory order was then merged with the final order". Queen's Counsel submitted that, should this court not agree that the default judgment ought to be set aside as of right, then the view as expressed in **Mills v Lawson & Skyers** should be adopted. That is, that the default judgment having merged with the final judgment after assessment, only the final judgment would need to be set aside, if this court agrees that the assessment was a nullity. Queen's Counsel therefore requested that, if this court found that the assessment was a nullity, the final

judgment of Campbell J should be set aside and the matter be remitted for trial on the issue of quantum.

Respondent's submissions

[102] Counsel Miss Moore contended, on behalf of the respondents, that the learned judge did take note of the fact that the notice of assessment was not served on the appellant. However, counsel maintained that the lack of service of the notice was not a good reason for the appellant's failure to apply to set aside the final judgment, within the stipulated time. Counsel argued that the judge had given due consideration to the fact that the notice was not served but was also mindful of the fact that the application to set aside could not succeed based on the cumulative effect of rule 39.6. Counsel pointed out that, the appellant maintained that it only became aware of the matter in April 2013, when service was effected on Mr McLeish, yet the application was only made on 30 June 2014. It was on that basis, counsel argued, that the judge refused to set aside the final judgment.

Analysis

[103] The court below issued notice of assessment of damages on 5 December 2008 for hearing on 28 January 2009. It was thereafter adjourned to 27 April 2009, at which time a further adjournment was made on the basis that bundles were not filed. At this time Brown-Beckford J ordered that the appellant was to be served with a notice of adjourned hearing. Mr Whyte, in his affidavit evidence presented to the court below, outlined that the appellant did not receive a copy of the notice of assessment of damages, neither did it receive a copy of the notice of the adjourned hearing. The process server, Devon

Lawson, in his affidavit sworn to on 15 June 2009 deposed that the notice of adjourned hearing was served at 2 Washington Court, Kingston 8 in the parish of Saint Andrew. As established above, the appellant's registered office is at 3 Washington Court, Kingston 8. Based on the history of the matter, there is no dispute that the appellant did not receive a notice of the assessment of damages or notice of the adjourned hearing of the assessment of damages. The question which follows therefore, is, what are the implications of the failure to serve the notice of the adjourned hearing of the assessment of damages on the defendant? This was not considered by the judge at all.

[104] On the question of the effect of the failure to serve the notice of assessment on the defendant, I find guidance in the case of **Watson (Linton) v Sewell (Gilon) and ors**. In that case, the notices for the hearing of the assessment in respect of two of the respondents were dispatched by registered post. The posting was done on 19 April 2010. The affidavits of service showed that the documents had been sent to the correct addresses for service of the respondents. In keeping with rule 6.6(1) of the CPR all documents sent were deemed to have been served 21 days after the date indicated on the post office receipt, that is, 11 May 2010. The assessment of damages was heard and the formal judgment given on 5 May 2010, this would have been four clear days before the notice for the hearing was served. Phillips JA held at paragraph [43] that:

> "...The assessment would therefore be a nullity, and the respondents would be entitled to set aside the service of the same ex debito justitiae. There is therefore no need to deal with the issues which were raised tangentially with regard to rule 39.6 of the CPR. Whilst I am of the view that the assessment is a trial (see **Leroy Mills v Lawson and Skyers**

> (1990) 27 JLR 196), and the respondents, had they been properly served with the notice of the assessment, would have had to apply under rule 39.6 to set aside the judgment, that would have required the application to have been filed within 14 days of service of the judgment, and that having not been done, the determination of the matter may have been different."

[105] Although the learned judge noted that the service of the notice of adjourned hearing of the assessment of damages was effected by Devon Lawson at the wrong address, and that it was a procedural error, he seemed to believe it was one which could be cured by rule 29.6. This is what the learned judge said on the issue:

> "In the instant case from the affidavit of Devon Lawson, sworn to on the 18th of June 2009, the interlocutory judgment in default of acknowledgment of service was served by him via registered mail at 2 Washington Court, Kingston 8, St. Andrew. Obviously, this is a procedural error having regard to the fact that previous service of court processes was effected at #3 Washington Court, Kingston 8. I am mindful that the court through Rule 29.6 has the power correct [sic] procedural errors."

[106] To the extent that this appears as if the learned judge thought he could cure the defect in service, where service was effected at the wrong address, and could not and did not by virtue of that error come to the attention of the appellant, by using rule 29.6, he was plainly wrong. That rule cannot be used to make a failure to serve effective. See **Credit Agricole Indosuez v Unicof Ltd** [2003] EWHC 77 (Comm), a ruling by Langley J on rule 3.10 of the English CPR, which is similar to our rule 26.9.

[107] The judge did not determine the effect, if any, of the failure to serve the notice of assessment or the notice of adjourned hearing on the appellant.

[108] It therefore follows that, in keeping with this court's decision in **Watson v Sewell**, since the appellant did not receive a copy of the notice of assessment of damages or the notice of the adjourned hearing of the assessment of damages; which was ordered by the court to be served on it, the assessment of damages is a nullity. On this premise, the appellant would be entitled to have the final judgment set aside without having to make an application under rule 39.6 of the CPR.

[109] This ground of appeal succeeds.

Issue 3- whether the learned judge erred as a matter of fact and/or law in finding that the application under rule 39.6 was not made in the prescribed time-ground (a).

[110] I take the view, that in the light of my position on the two previous issues, it is not necessary to make any determination on this issue.

The fresh evidence application

[111] I will briefly make reference to the appellant's application for permission to adduce fresh evidence. In my view, the fresh evidence which the appellant is asking this court for permission to adduce, would not in any way advance its case. The appellant, by way of letter dated 2 June 2015 addressed to the Post Master General, requested the tracking information for registered mail number 081931 dated 5 October 2007, sent to 3 Washington Court, being that containing the claim form and particulars of claim, registered mail number 9589 dated 11 June 2009 sent to 2 Washington Court, being that containing the notice of adjourned hearing and registered mail number 9650 dated 24 June 2009 sent to 2 Washington Court, being that containing the supplemental witness

statement of Renee Lattibudaire. In a letter dated 16 June 2015, the Head Postmaster, although asked about three articles for posting, seemingly adverted only to the items addressed to 2 Washington Court. The Head Postmaster advised Mrs Gibson Henlin that the "both articles" were received but could not be delivered to the addressee as the company, Al-Tec Inc. Ltd had removed from 2 Washington Court Kingston 20 and were subsequently "returned to the sender".

[112] The view that this fresh evidence does not advance the appellant's case is predicated on the fact that the learned judge had accepted the evidence that the aforementioned documents, the claim form and particulars of claim excepted, were all served at the wrong address, hence, the appellant had no notice of them at that time. I reiterate that the learned judge had refused to set aside the judgment in default of acknowledgment of service, as well as the final judgment on assessment of damages because of the time which had elapsed between when the appellant became aware of the orders and when it sought to have the judgments set aside. The learned judge also found that the appellant had failed to advance a good reason for the delay.

[113] Therefore, the evidence, though apparently credible, is not relevant to any issue arising on the appeal and cannot have any influence on the outcome of the case.

Issue 4 -whether rule 12.13 as construed and applied by the learned judge infringes the appellant's right to a fair hearing as guaranteed by s.16(2) of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act, 2011 and is unconstitutional, null and void - Ground (g) and second part of Ground (b)

Appellant's submissions

[114] The appellant's contention is that rule 12.13, as interpreted by the judge infringes the right to a fair hearing which is guaranteed by the Charter of Fundamental Rights and Freedom. Mrs Gibson Henlin outlined that the learned judge felt himself constrained in considering the appellant's application from the outset, and that he had taken the view that, even if the assessment was set aside, the appellant's limited rights following a default judgment, would mean that it was not likely to get a different judgment or order.

[115] Queen's Counsel pointed out that the judge took the view that because of rule 12.13, there was no question of the appellant being heard on anything, except the matters set out in that rule. Queen's Counsel submitted that barring the appellant under rule 12.13, particularly when the circumstances of this matter are taken into account, demonstrated the injustice that the rule can give rise to.

[116] She outlined further that, in this appellant's case, if it could be heard at the assessment even on the issue of quantum, a different order would likely be made. However, rule 12.13 bars it completely, although, in a case of this kind, the law gives the appellant the option of arguing that the measure of damages should be different from that claimed by the respondent. To bar the appellant from making this legal argument, Queen's Counsel submitted, would be a total failure of justice and totally disproportionate in any free and democratic society. This position, Queen's Counsel highlighted, was accepted in the Eastern Caribbean in **George Blaize v Bernard La Mothe (Trading as "Saint Andrews Connection Radio" SAC FM RADIO and The Attorney General**

(Intervener) HCVAP2012/004 (unreported), judgment delivered 9 October 2012 and has found some support in our local case of **Wayne Reid v Jentech Consultants Limited v Curtis Reid** [2015] JMCA App 3. Mrs Gibson Henlin also made reference to the case of **Natasha Richards & Phillip Richards v Errol Brown and the Attorney General** [2016] JMSC Civ 22, a matter where the Full Court granted a declaration to the applicants in terms that rule 12.13 of the CPR is unconstitutional, null and void, which thereafter, resulted in an order that the rule be struck from the CPR.

[117] Mrs Gibson-Henlin contended that the constitutionality of rule 12.13, in barring the appellant's access to fully participate in an assessment of damages hearing, in circumstances where it has a valid legal argument which could result in a different measure of damages being applied by the court at the assessment, is an overriding consideration. In her view, the appellant would have been able to demonstrate that there were grounds which entitled it to set aside the judgment, as a matter of justice, as it was not served with the documents in accordance with rule 8.16. Queen's Counsel further postulated that had the appellant been present at the assessment the respondents would only have been awarded damages for investigation of the title. This she premised on the fact that there is no evidence that they were entitled to an award of damages other than on the basis of the principle stipulated in the judgment by the House of Lords in the case of **Bain v Fothergill.**

[118] Queen's Counsel submitted that based on the timeline from which the alleged breach of the sale agreement between both parties stemmed, the respondents could not

successfully argue that the appellant was unreasonable. She stated that the respondents were unreasonable in terms of the time given to the appellant to correct the defect in title and that the respondents calculated the days before completion as part of the appellant's default in completion or failing to rectify the title. It was Queen's Counsel's submission that had the appellant been present at the hearing, it would have been able to make that argument. She highlighted that the appellant was given seven days after the completion date to complete the sale with the defects in title corrected; this, in Queen's Counsel's view, was unreasonable. She submitted that the respondents were required to act reasonably and could not unilaterally impose an unreasonable completion time on the appellant.

Respondent's submissions

[119] Counsel for the respondents submitted that the effect of rule 12.13 was considered in the case of **Winston Johnson v Norbert Lawrence** [2012] JMCA Civ 3 as well as **Jamalco v The Owners and Persons Interested in the Ship M/V Asphalt Leader of the Port of Piraeus Greece and Her Cargo** [2011] JMCA Civ 47 and contended that rule 12.13 does not suffer from want of clarity. The underlying principle, counsel argued, is that a defendant will not be allowed audience, except in those circumstances stipulated by the rule. On this basis, counsel submitted, the judge was correct to have regard to the rule and find that at the assessment of damages hearing, the appellant would not be entitled to be heard on the issue of the respondents' entitlement to damages.

[120] Reference was also made to **Richard Lewis v Norma Dunn** (unreported), Supreme Court, Jamaica, Claim No L098/2001, judgment delivered 22 June 2004, where Brooks J (as he then was) considered the defendant's application in which submission was made that, had the applicant been present at the assessment of damages hearing a different order would have been made, albeit the default judgment had not been set aside. At pages 8 – 9 Brooks J said this –

> "The difficulty in Mrs Gibson Henlin's submissions is that it seeks to focus entirely on the assessment of damages and to ignore the previous proceedings. If the submissions were correct it would mean that it would be easier for a defaulting defendant to set aside a final judgment than he could an interlocutory judgment.
>
> Such a defendant who had deliberately allowed a default interlocutory judgment to be entered against him could have a final judgment set aside as long as he could prove that he did not deliberately absent himself from the hearing of the assessment of damages.
>
> It is my view not permissible.
>
> Rule 39.6 prevents such a perverse result. The question to be asked is; what other order would have been made if the defendant had attended the hearing of the assessment of damages.
>
> It most certainly would not be the setting aside of the interlocutory default judgment. Rule 12.13 restricts a defaulting defendant in the areas on which he may be heard…
>
> …The point however, is that Miss Dunn even if she had attended the hearing of the assessment of damages could not have secured an order other than that which was made except in those restricted areas. She could of course have applied for an adjournment to allow for an application to set aside the default judgment to be heard. I however doubt that that is the type of difference in order, which was contemplated by rule 39.6.

> On this basis alone therefore I find that she has not satisfied the requirements of rule 39.6(3)(b) and her application should fail."

[121] As regards the appellant's averment that rule 12.13 infringes on the appellant's constitutional right to a fair hearing, counsel submitted that this provision is not unconstitutional. Counsel argued that a defendant who finds himself unable to cross-examine or make submissions at an assessment of damages hearing, is actually the author of his own misfortune, having defaulted in filing an acknowledgement of service and/or defence. It was further argued that with each right there is a corresponding responsibility, therefore, there must be a balancing act in weighing an individual's rights and access to the court. This, counsel outlined, was highlighted in **George Blaize v Bernard La Mothe and the Attorney General of Grenada** where at paragraphs 8 and 12 it was said that –

> "Although section 8(8) of the Constitution does not confer the right of access to the court in express terms it is generally accepted that it does. Notwithstanding that section 8 is not subject to express limitations, the right of access is not absolute. All rights are subject to the rights of others and the public interest whether expressly stated inherent or implied…
>
> The right of access to court not being absolute, the question is whether the limitation imposed by the rule with respect to cross-examination and the bar to counsel making submissions on the issue of quantum pursues a legitimate aim in the public interest and whether the rule is necessary and proportionate to the achievement of the aim. In Michael Laudat, Edwards JA stated:
>
> > 'Regardless of whether or not the defendant is permitted to be heard on the issue of quantum, the court should critically carry out the assessment on the scheduled date on the evidence adduced, with the overriding

> objective of minimizing the costs of the assessment, ensuring that it is dealt with expeditiously and that the judicial time and resources of the court are not disproportionately allotted in assessing the quantum of damages on the claim.'"

[122] Counsel asserted that section 16(2) of the Charter of Fundamental Rights and Freedoms does not create an absolute right. Counsel referred to the Privy Council decision of **Bell v The Director of Public Prosecution** (1985) 22 JLR 268, where Lord Templeton highlighted that in giving effect to sections 13 and 20 (from which section 16(2) of the Charter stems) of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within reasonable time, against the public interest in the attainment of justice, in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica.

[123] It was further submitted that a fair hearing means that a litigant should have an opportunity to present his case and to participate in the proceedings, but, this right is not an absolute one and a litigant cannot conduct himself in a manner that amounts to a disregard of the laws, be it statute or the rules of court and then say my constitutional right is being infringed. In support of the contention that this right is not absolute, counsel relied on the case of **R v Jones** [2002] UKHL 5, where the question of whether the court can conduct a trial in the absence of the defendant was considered; and the court held that it could.

[124] Counsel contended further that, insofar as rule 12.13 limits the defendant's ability to participate in the proceedings, it does not do so without more and that it arises because the defendant has "voluntarily chosen not to exercise his right" and where the defendant waives his right to participate, the CPR empowers the judge to hear and dispose of the matter without hearing from the defendant, on the substantive issues.

[125] Counsel further submitted that our courts have long recognized the balancing act that sometimes has to be done in the administration of justice. This, counsel submitted, was made evident in **ELM Hardware Distributors Ltd v Taylor et al** (unreported), Supreme Court of Jamaica, 2006 HCV 02057, judgment delivered 18 May 2007 where Sykes J (as he then was) at paragraph 42 stated that –

> "…The tardy litigant was going to be placed under a more stringent regime and the stringency increased if there had been a previous striking out. His Lordship was indicating that the days of leisurely litigation with attendant increase in costs to the opposing side, utilisation of the Court's finite resources and consequential deprivation of other litigants of their opportunity to have their matters heard within a reasonable time were over. This approach is a salutary one. No country can keep increasing expenditure on judicial services without a commensurate change in [the] attitude of those who use those services. Litigants must understand that the administration of justice is costly and while litigants are not [to] be lightly turned away, the sluggish litigant who has been presented with more than reasonable opportunity to take his case to finality should be ushered through the door. No one deprived him of justice. He got justice. The justice he got is of his own making. He had a fair share of the [c]ourt's resources allocated to him and he failed to make the best use of it. I shed no tear for him and the less of them the [c]ourts see the better the administration of justice will be."

[126] Therefore, as regards the ruling of Baptiste JA in **George Blaize v Bernard La Mothe and the Attorney General of Grenada** which found that the interference with the right to cross-examine and make submissions reduced the defaulting defendant's access to a fair hearing to such an extent that it impaired the essence of the right to a fair hearing, counsel submitted, that this is not so. Counsel outlined that a defendant who wished to be heard has been provided for in the CPR. The CPR, counsel said, provided a basis to set aside the default judgment and a defendant who is able to do so, will be heard. It was further pointed out that in **Winston Johnson v Norbert Lawrence**, Harris JA outlined the fact that, notwithstanding a defendant being unable to cross-examine or make submissions, the judicial system provides adequate safeguards to administer justice.

[127] Counsel fired their final salvo by contending that this court had determined this very issue in **Hugh C Hyman & Co and Another v Dave Blair** [2013] JMCA App 15, where Dukharan JA outlined that rule 12.13 is subject to and in conformity with the dictates of the Constitution.

The Attorney General's submissions

[128] The appellant was supported in its submissions by the Attorney General of Jamaica, who provided written and oral submissions in this matter.

[129] Counsel for the Attorney General submitted firstly, that this court, contrary to the submission of counsel for the respondent, has never pronounced on the constitutionality of rule 12.13, and certainly has not done so in the cases relied on by the respondent.

Counsel pointed out that in the case of **Hugh C Hyman et al (a firm) et al v Dave Blair,** the constitutionality of rule 12.13 was not a ground of appeal before this court. Counsel further indicated, that whilst it had been submitted in that case that the section was repugnant to the principles of natural justice, it was merely done to buttress counsel's substantive arguments in relation to the grounds of appeal. Counsel for the Attorney General pointed out that no specific provision of the Constitution was cited and no authorities were cited. In essence, counsel's submission was that the issue was not a live issue before this court and was never fully argued, therefore, counsel submitted, the statement made by Dukharan JA, which was now being relied on by counsel for the respondent, was at most, obiter dicta.

[130] Counsel also noted that in the case of **Blagrove v Metropolitan Management Transport Holdings Limited and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 111/2005, judgment delivered 10 January 2006, cited by Dukharan JA, the constitutionality of rule 12.13 had not been considered and determined. As a result, counsel submitted, the issue of the constitutionality of rule 12.13 was now fresh and live for this court to determine.

[131] The submissions by the Attorney General surrounded, in summary:

(1) the nature and scope of a default judgment;

(2) the nature and content of the right to be heard;

(3) whether rule 12.13 is an infringement of the right to be heard; and

(4) whether the rule is demonstrably justified in a free and democratic society.

[132] Having made clear and succinct submissions on those factors, counsel concluded that, in so far as rule 12.13 seeks to severely abrogate or curtail a defendant's right to cross-examine, to challenge evidence and make submissions in relation to his obligation to pay damages, it is an infringement of his right to be heard enshrined in section 16(2) of the Charter of Fundamental Rights and Freedoms. Furthermore, counsel argued, it divests the judiciary of the authority to determine the penalty to be imposed on a defaulting defendant, where a default judgment has been entered. It is therefore, counsel argued, unconstitutional and there is no basis on which it could be regarded as being demonstrably justified in a free and democratic society.

[133] I will directly address those submissions in the discussions.

Discussion and Analysis

[134] I will approach this discussion in the same structured manner as did counsel for the Attorney General, by first looking at the nature and scope of the default judgment.

[135] As regards the respondents' contention that this honourable court has already considered the constitutionality of rule 12.13 in **Hugh C Hyman et al (a firm) et al v Dave Blair**, my position is similar to that taken by Batts J in **Natasha Richards & Phillip Richards v Errol Brown and the Attorney General** at paragraph [25] where he said:

> "It is not surprising that this bit of dicta is the only reference in his judgment to a 'constitutional issue'. This is because no

> ground of appeal raised a constitutional issue, nor was the constitutionality of the rules challenged in the grounds of appeal. The reference by Dukharan JA is not to be regarded as a considered decision of the court because the case he referenced (Blagrove) was not a case which considered the constitutionality of rule 12.13. When read carefully, Dukharan JA was assuming, not deciding, that rule 12.13 is 'subject to and in conformity with the dictates of the Constitution.' The question before us, which was not before the Court of Appeal, is whether rule 12.13 offends the provisions of the Constitution and ought to be struck down."

[136] I agree with the position taken by Queen's Counsel for the appellant and counsel for the Attorney General and I accept that the constitutionality of rule 12.13 of the CPR was never argued or determined in this court. Therefore, the issue is live and open to debate in and a ruling from this court.

[137] Prima facie, it may appear that a litigant who finds himself in the unfortunate position in which the appellant now stands, may very well be the author of his own peril. Therefore, the question that arises is, whether or not a non-compliant litigant, against whom a default judgement had been entered, should have his or her right to be heard, restricted at the hearing of the assessment of damages.

(i) The nature of a default judgment

[138] 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.

[139] 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. Counsel for the Attorney General pointed this court to 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.

[140] It was argued, both by Queen's Counsel for the appellant and counsel for the Attorney General, that in respect of a claim for damages for an unspecified amount, which has to be assessed, a distinction has to be drawn between facts that are traversable and those which are not. Those in the former category are the ones in respect of damages, while those in the latter, counsel submitted, are the ones concerning liability. Counsel argued, in effect, that a defendant who defends the claim ought to be in no better position than one against whom there is a default judgment, where an allegation which is not traversable is concerned. In other words, the defendant who has had a default judgment entered against him ought not to be deemed to admit an allegation as to damages, if he could not have been deemed to admit such an allegation if he had filed a defence. It was further submitted, that having regard to the provisions of Part 12 of the CPR, the effect of a default judgment for damages to be assessed is that the defendant is deemed to have admitted the contents of the claim and particulars of claim, in so far as it concerns liability only.

[141] Since the Full Court of the Supreme Court of Jamaica has made a declaration on this very issue, I will begin the discussion there. In **Natasha Richards & Phillip Richards v Errol Brown and the Attorney General** the Full Court made the declaration that rule 12.13 of the CPR is unconstitutional, null and void and should therefore be struck from the CPR. In doing so, the Full Court provided a thorough and well-reasoned discussion of the relevant considerations.

[142] The approach taken by Batts J where he made a distinction between claims for a specified sum (liquidated damages) and claims for an unspecified sum (unliquidated damages) has much to recommend it. At paragraph [30], the learned judge had this to say in relation to a claim for an unspecified sum-

> "...The defendant after all may well and reasonably expect that, although liable, if and when a court is to make a determination on quantum his or her input, no matter how negligible, will be accepted. That input may amount to no more than attendance at the assessment to ask the Claimant giving evidence if he is still feeling pain, or more likely to cite some relevant case on damages to assist the court while it assesses quantum. I believe the ordinary Jamaican would be surprised to know that a court of law would, at a hearing to quantify damages against him, say he must remain silent because he had not filed an 'admission'. Moreso, because even if no acknowledgement were filed, it has long been the practice of our court to accept undertakings to file, and allow an immediate right of audience. Form, in the way of a failure to file an acknowledgment, was not allowed to prevail over the substantive right to be heard. **We should not by this decision allow substantive rights to be taken away because of formalities. Even if one has no positive case to put, the trial process will still benefit from cross-examination (which tests the witness) or by submissions which may bring to the attention of the court aspects of the medical report or authorities on**

> **damages, relevant to the issue of quantum**." (Emphasis added)

[143] In rule 10.2(4) of the CPR, a defendant who admits liability but wishes to be heard on the issue of quantum, must file and serve a defence dealing with that issue. This rule indicates that the framers of the rules gave consideration to the litigant who may wish to admit liability but who, nonetheless, would still like the opportunity to be heard on the issue of quantum. In effect, there is very little difference between the litigant who formally accepts liability and the one who informally accepts liability by not filing a defence. However, the former has the opportunity to participate in the assessment of quantum, whilst the latter does not. It seems to me that the purpose of the rule in punishing the latter for not defending or admitting liability is disproportionate to any other purpose it may serve.

[144] In paragraph [21] of **Winston Johnson v Norbert Lawrence** it reads as follows-

> "Miss Dummett's concerns about the appellant's claim for damages are legitimate and, quite possibly, cross-examination could assist in addressing these concerns. However, to argue that without cross-examination a claimant's loss will not be required to be proven is to ignore the assessment judge's duty to adhere to the principle of law that proof of damages is an essential pre-requisite for an award of damages. The assessment judge will no doubt apply the relevant principles irrespective of whether submissions are advanced on behalf of the defence. There may be instances in which the defendant has a strong challenge to the claim for damages but that, in my view, would provide ample ground to cross the threshold of a good defence dealing with quantum as is contemplated by rule 10.2. In those circumstances, that defence if filed in time would constitute a good prospect of successfully defending the claim so as to warrant a setting aside of the default judgment or a variation of that judgment so as to allow for a judgment on admission

> to be entered and with it, access to all the attendant privileges of cross-examination, the making of submissions and the calling of opposing evidence."

[145] Whilst there is merit in these assertions, I am of the view that it superimposes an attorney's duty on to a judge. It is the duty of an attorney to research the law and provide the hearing judge with the relevant authorities, following which the hearing judge does an analysis and then makes a decision. Although a judge is presumed to know the law, Homer occasionally nods. The danger apparent in not allowing submissions from the defendant is marked in this case. In this case, there is a defence to quantum open to the defendant on the **Bain v Fothergill** principle, which was not raised before the assessment judge and was not considered by him, resulting in the respondent being awarded damages which it may otherwise have not been awarded had the defendant been allowed to participate. On the **Bain v Fothergill** principle, damages for breach of contract resulting from the vendor's inability to pass good title under a contract for the sale of land, where the defect in title was due to no fault of the vendor, is limited to the sum expended for investigating the title and the repayment of any deposit which may have been paid. Therefore, had the defendant been given the opportunity to make submissions on the issue of quantum, a different outcome may have been achieved.

[146] There is also the notion that the assessment hearing is a separate and distinct hearing from a trial of the issues, thus rule 12.13 of the CPR breaches a defendant's right to be heard at the assessment hearing. The reasoning behind this notion is that in not filing an acknowledgment of service or a defence, the litigant waived his rights to be heard at the trial, but in my view, since the assessment hearing is a distinct hearing from

the trial, the litigant's actions would not amount to a waiver of the right to be heard at the assessment.

[147] I appreciate that a trial hearing may be separate from an assessment hearing, although in most cases they are combined. However, it is recognised, even in the rules, that separate hearings may be necessary to determine the entitlement of a claimant. Therefore, to determine damages for an unspecified sum, the court has to embark on an enquiry. In this enquiry, proof of assertions will have to be provided. Assertions may be made which need to be tested. Is it expected that the court will take on the mantle of advocate to cross-examine the claimant and his witnesses as to the truth of their assertions? Clearly not.

[148] At the point where a defendant fails to file a defence, his conduct is tantamount to saying "I am not bothering to dispute the claim against me". Where this claim is as to liability only for damages to be assessed by the court, it is a fallacy to say that a defendant has agreed, by his conduct, to be bound by whatever amount the court may order as claimed and proved by the claimant, without his input.

[149] To say the very least, it is for this reason that the drafters of the rules included a provision to cater to those circumstances where a defendant may wish to admit liability but dispute the quantum that is claimed (see rule 10.2(4) of the CPR).

[150] 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.

(ii) The nature and content of the right to be heard

[151] The right to be heard is a fundamental principle underpinning our legal system. This right has been codified in section 16(2) of our Constitution. The question is whether any limits can be placed on that right and what are the boundaries of any such limitation. The right to be heard is guaranteed by section 16(2) of the Charter of Fundamental Rights and Freedom. Such a right is not absolute and, pursuant to section 13(2) of the Charter that guaranteed right may yet be abrogated where it is shown that such abrogation is "demonstrably justified in a free and democratic society". Section 13 of the Charter provides that:

> "Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and **save only as may be demonstrably justified in a free and democratic society**
>
> (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16, and 17; and
>
> Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights."

[152] In addressing this venerable principle Batt's J in **Natasha Richards** said at paragraph [22]:

> "One would have thought that the matter would be impatient of debate. Audi alteram partem has been a sine qua non of British Constitutional law for hundreds of years. Proponents of natural justice, the rule of law and all it implies, regard with anathema the prospect of a person's rights or obligations being determined without reference to that person. This basic principle has been adopted and applied in the Commonwealth Caribbean and is to be regarded as an integral part of our legal fabric. The principle has found concrete manifestation in section 16(2) of the Constitution of Jamaica. Section 16 states:
>
> > '(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
> >
> > (2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.'
>
> The rights enshrined in the Bill of Rights or Charter of Fundamental Rights and Freedom, 'The Charter' as it is called, may only be vitiated if legislation is passed by Parliament which is 'demonstrably justified in a free and democratic society'. (See section 13.2 of the Constitution of Jamaica)."

[153] Counsel for the appellant, supported by counsel for the Attorney General, asked this court to be guided by the jurisprudence in relation to the European Convention on

Human Rights Article 6(1), which, with respect to the right to be heard, counsel submitted, is in similar vein to section 16(2). It provides:

> "In the determination of his civil rights and obligations…, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice."

[154] Counsel also commended the "Guide to Article 6: Right to Fair Trial (Civil Limb) issued by the European Court of Human Rights". The guide provides the following explanation:

> "78. The right to a fair trial, as guaranteed by Article 6(1), must be construed in light of the rule of law, which requires that litigants should have an effective judicial remedy enabling them to assert their civil rights *(Beles and others v the Czech Republic)….*
>
> 79. Everyone has the right to have any claim relating to 'his civil rights and obligations' brought before a court or tribunal. In this way Article 6(1) embodies the 'right to a court' of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect (Golder v the United Kingdom)…"

[155] Of equal significance are paragraphs 49 and 61 of **Beles and Ors v the Czech Republic**, Application No 47273/99, ECHR 2002 (unreported) judgment delivered 12 November 2002 which examined Article 6[1] of the European Convention on Human Rights which confers the right to a fair hearing. It reads as follows:

> "The Court has already stated on a number of occasions that the right to a fair trial, as guaranteed by Article 6[1] of the

> Convention, must be construed in the light of the rule of law, one of the fundamental aspects of which is the principle of legal certainty, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights...
>
> ...the 'right to a court', of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard... Nonetheless, the limitations applied must not restrict or reduce the individual's access in such a way or to such an extent as to impair the very essence of the right. Furthermore, limitations will only be compatible with Article 6[1] **if they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued**. See Guerin v France judgment of 29 July 1998, Reports 1998-V, p 1867 & 37." (Emphasis added)]

[156] The scope and content of the right to a fair trial includes not only compliance with the principle of equality of arms but also the right to cross-examine witnesses, right of access to facilities on equal terms and to be informed of and be able to challenge reasons for administrative decisions. See **Beles and others v the Czech Republic** and Law of the European Convention on Human Rights Harris D J, O'Boyle M & Warbrick C (1995) London Butterworths at 206-214.

[157] In **Al Rawi and others v The Security Service and others** [2012] 1 AC 531 Lord Kerr, in his dissenting judgment in that case, opined at pages 592-593 that:

> "[93] ...To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and

> assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable."

[158] In **George Blaize v Bernard La Mothe and the Attorney General**, it was said that:–

> "15. Cross-examination is undoubtedly a potent weapon in the arsenal of a lawyer and is a fundamental aspect of the judicial process. In an adversarial system such as ours, it provides a means whereby the case of the other party can be effectively challenged and undermined. It is also important to the judicial process that a party has the right to explain and comment on all 'the evidence adduced or observations submitted, with a view to influencing the court's decision'. Thus in **Vanjak v Croatia** [2010] ECHR 34 at paragraph 52, the European Court of Human Rights said:
>
> > 'independently of whether the case is a civil, criminal or disciplinary one, the right to adversarial proceedings has to be complied with. That right means in principle the opportunity for parties to court proceedings falling within the scope of Article 6 to have knowledge of and comment on all evidence adduced or observations submitted, with a view to influencing the court's decision.'
>
> 16. We are cognisant that the right of access to the court calls for regulation by the State. We are also satisfied that interference with the right may be justified on the grounds that the particular legislation may pursue a legitimate aim and if the scope of the legislation is necessary and proportionate to the achievement of the aim."

[159] Counsel for the appellant and the Attorney General also contended that the right to cross-examine also includes the right to challenge the claim for loss and to call witnesses or evidence in opposition to any such claim. In **Lunnun v Singh**, Parker LJ held that all questions as to quantum remained open at the assessment of damages

hearing. In **Tariq v Home Office** [2011] UKSC 34, Lord Kerr in emphasising the importance of the right to cross-examine and call witnesses said this:

> "[102] The right to know and effectively challenge the opposing case has long been recognised by the common law as a fundamental feature of the judicial process. In *Kanda v Government of Malaya* [1962] AC 322, 337 Lord Denning said:
>
> > 'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice down* to the decision of their Lordships' Board in *Ceylon University v Fernando.* It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.'
>
> [103] The centrality of this right to the fairness of the trial process has been repeatedly emphasised. Thus, in *Re K (infants)* [1963] Ch 381, Upjohn LJ at pp 405-406, said:
>
> > 'It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial.'"

[160] The situation in **R v Jones**, relied on by the respondent, is entirely different. That case deals with situations where a defendant voluntarily absconds from his trial. In such a case, the trial may continue in his absence. However, even in those cases of voluntary

abstention, a defendant may return and participate fully at any stage of his trial, and cannot be barred from doing so. If his attorney wishes to stay and represent him, cross-examine on his behalf and make submission in his absence, he has to be allowed to do so, even if his client is absent.

[161] Intrinsic to the right to be heard is the right to make legal submissions on points of dispute, to have knowledge of and be able to comment on all evidence adduced or observations submitted, with a view to influencing the court's decision. See the case of **Vanjak v Croatia** [2010] ECHR 34 at [52]. If this court is to accept that an assessment hearing is a trial, which all the authorities say that it is, then a defendant against whom an adverse result may be made at such a trial, has a right to be heard at that trial.

(iii) Does Rule 12.3 of the CPR infringe on the right to be heard

[162] Rule 12.13 of the CPR expressly limits the right of a defendant to be heard at the assessment of damages hearing, where that defendant has had a default judgment entered against him. Such a defendant can only be heard on the issue of costs, time of payment of the judgment debt and enforcement of the judgment or for delivery of goods. It manifestly, therefore, limits such a defendant's right to be heard on the issue of quantum. He cannot cross-examine on evidence, call any witnesses, object to any evidence being presented, and make any submissions as to fact or law, all of which are integral to the right to be heard, which is guaranteed by the Constitution.

[163] In **George Blaize v Bernard La Mothe and the Attorney General of Grenada**, the Eastern Caribbean Court of Appeal came to the conclusion, after hearing

a constitutional challenge to a provision similar to rule 12.13 of the CPR, that such a provision was unconstitutional, in so far as it purports to limit the participation of a defendant, against whom a default judgment had been entered, in the assessment of damages hearing, to the issue of costs only. The Full Court in **Natasha Richards & Phillip Richards v Errol Brown and the Attorney General** came to the same conclusion. I must say that I agree.

(iv) Is the rule demonstrably justified in a free and democratic society?

[164] The right to be heard not being an absolute right, a rule limiting the right may not be unconstitutional, if it is demonstrably justifiable in a free and democratic society. How is it determined whether a restriction is demonstrably justifiable? There are essentially five central criteria which must be met. See **R v Oakes** [1986] 1 SCR 103; **Defreitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing** [1998] 3 WLR 675; **Huang v Secretary of State for the Home Department** [2007] 2 AC 167; **R v Secretary of State for the Home Department** [2014] UKSC 60. These criteria in summary are that:

> (1) there must be a sufficiently important objective in making the restriction;
>
> (2) the measures used must be carefully designed to achieve that objective and must be rationally connected to that objective;
>
> (3) the means used should be the least drastic so that it impairs as little as possible, the protected rights or freedoms;

(4) the effect should not be disproportionate; and

(5) the interests of society must be balanced against those of individuals and groups.

[165] Counsel for the Attorney General submitted that rule 1.1 of the CPR provides a clear indication of the objective of the CPR. That rule provides that:

> "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing justly with a case includes-
>
> (a) ensuring, so far as is practicable, that the parties are on equal footing and are not prejudiced by their financial position;
>
> (b) saving expense;
>
> (c) dealing with it in ways which take into consideration –
>
> (i) the amount of money involved;
>
> (ii) the importance of the case;
>
> (iii) the complexities of the issues; and
>
> (iv) the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; 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."

[166] Counsel submitted that it could not be reasonably argued that there is proportionality between the effects of rule 12.13 and the objectives set out in 1.1 of the CPR. Counsel therefore submitted that rule 12.13 is unconstitutional and cannot be regarded as being "demonstrably justified in a free and democratic society."

[167] I agree with counsel's submission that one of the objectives of the provisions of the rule allowing for a default judgment to be entered, is to ensure that cases are dealt with expeditiously and to save expense. It is also in the interest of the society to have cases heard and disposed of in a timely manner. Additionally, it is in the interest of the individual claimant to have his or her judgment, where the defendant has failed to respond to the claim. It can safely be said, therefore, that there is a legitimate aim in ensuring that there is universal compliance with the rules of court.

[168] However, rule 12.13 restricts the right of a defendant to be heard on the issue of damages in a way which renders the right to be heard non-existent. Where an assessment is heard which bars the defendant from fully participating, the effect is that the court would have determined the quantum of damages he is liable to pay, although he has not admitted to and could not have admitted to that sum, it being an undetermined sum. Whilst it could be argued that there is a sufficiently important objective for this restriction imposed by rule 12.13, it is clearly not the least drastic measure that could have been designed to achieve that objective.

[169] In my view, the provisions in rule 12.13 of the CPR is disproportionate to the aim pursued. The danger associated with barring a defendant from fully participating at an assessment hearing (which is a trial in itself), is that it creates an avenue, that enables a claimant to make one sided submissions entirely untested. This is clearly not in the interests of justice. The perpetual silence that the defendant must maintain on all issues relating to quantum, gives a claimant the unfettered opportunity to claim unreasonable

and exorbitant sums, which, had the defendant been allowed to speak, evidence or submissions or both could be presented to the court, as to the reasons why a claimant is not entitled to the sums claimed.

[170] In **George Blaize v Bernard La Mothe and the Attorney General of Grenada** Baptiste JA, in giving the judgment of the Eastern Caribbean Court of Appeal on the same question, said at paragraph [16] of the judgment that:

> "…We are of the opinion and hold that barring the right to be heard (cross-examination and the right to make submissions) in the circumstances dictated by CPR 12.13 effectively restricts or reduces the access left to a defaulting defendant to such an extent that it impairs the very essence of the right of access to the court. Furthermore, there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved ..."

[171] The Full Court came to a similar conclusion in **Natasha Richards & another v Errol Brown & the Attorney General**, concluding that the matter was "impatient of debate".

[172] The entry of a default judgment by a registrar is an administrative function. Where the claim is for an unspecified sum, damages must be assessed. This means a hearing must be held before a judge. The judge must hear evidence. It seems to me that if a hearing must be held, there is no rational reason connected to the objectives of expedition and universal compliance to the rules of practice, to restrict a defendant from participating in a hearing, which must take place, in any event. In my view, that response is disproportionate to the objective sought to be achieved. In a claim involving unspecified damages for which a hearing must be held, as in the present case, barring a defendant

from actively participating in such a hearing by cross examining witnesses and making submissions, is not demonstratively justified in a free and democratic society. Rule 12.13 of the CPR is, therefore, unconstitutional.

[173] Ground (g) therefore, has merit.

Whether Rule 16.2(2) is unconstitutional-second part of Ground (b)

[174] A declaration that rule 12.13 of the CPR is unconstitutional, would, invariably, result in a finding that rule 16.2(2) of the CPR, insofar as it only provides for notice to the claimant only, is also unconstitutional. Like rule 12.13, this rule amounts to a breach of the audi alteram partem rule, as the defendant's right to be present and to address the court would be abrogated.

[175] Rule 16(2) reads as follows-

> "(1) An application for a default judgment to be entered under rule 12.10(1)(b), must state
>
> (a) whether or not the claimant is in a position to prove the amount of the damages; and, if so
>
> (b) the claimant's estimate of the time required to deal with the assessment.
>
> (2) Unless the application states that the claimant is not in a position to prove the amount of damages, the registry must fix a date for the assessment of damages **and give the claimant not less than 14 days' notice of the date, time and place fixed for the hearing.**
>
> (3) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.

(4) The registry must then fix:

(a) The date for the hearing of the assessment;

(b) A date by which standard disclosure and inspection must take place;

(c) A date by which witness statements must be filed and exchanged; and

(d) A date by which a listing questionnaire must be filed."

[176] This opinion would be incomplete if reference was not also made to rule 16.2(4) of the CPR. When juxtaposed against rule 12.13 of the CPR, there appears to be a conflict with rules 16.2(4) (b), (c) and (d) of the CPR. The former rule, as it stands now, dictates that a defendant against whom a default judgment has been entered, does not have the right to fully participate at the assessment hearing, therefore, such a defendant has no rights in relation to cross-examination, the making of submissions or the calling of witnesses. This raises the question of the utility of rule 16.2(4). I adopt the words of Harris JA at paragraph [19] of **Winston Johnson v Norbert Lawrence** where she said that:

> "What then is the purpose of rule 16.2(4)? I confess that in light of the conclusion to which I have arrived, it does not seem that any useful purpose would be served in the exchange of witness statements as the defendant would not be able to make use of the claimant's statement; nor does there seem to be any purpose for a listing questionnaire. There is, however, merit in the submission that rule 16.2(4) can facilitate the claimant in proving damages where he is not in a position to do so. To embrace an example to which Mr Reitzen made reference, it may be of usefulness where the claimant needs to see the defendant's documents to prove his claim as may be the case in a passing off claim. This restricted

> use, however, cannot be a basis for praying in aid the overriding objective to adopt an interpretation that does not accord with the unambiguous words of the rule ..."

[177] Rule 16.2(4) indicates the anticipation of a greater level of participation than that which is being argued by the respondent is allowable under rule 12.13 of the CPR and it is therefore imperative that the CPR is amended accordingly.

[178] The appellant, therefore, also succeeds on the second aspect of ground (b).

What are the legal implications of finding that rule 12.13 and 16.2(2) of the CPR are unconstitutional?

[179] I have already determined that the respondents' failure to serve the adjourned notice of hearing as ordered by Brown-Beckford J amounted to the assessment hearing being a nullity. However, this pronouncement was of little value as there is an extant default judgment that prohibited the appellant from being heard on the issue of quantum, and this privilege would only be accorded if rule 12.13 of the CPR is declared to be unconstitutional. It follows, therefore, that in finding that rule 12.13 of the CPR is indeed unconstitutional, and this means the appellant is at liberty to address the court on the issue of quantum and to present the authorities that support his argument that the respondents are not entitled to the sums being claimed as damages.

[180] It must be noted that, having determined that the assessment hearing was a nullity for want of service of the notice which was ordered by the court, it is my view that a notice of assessment must be reissued and served in accordance with the order of the court and that the appellant is entitled to fully participate in that assessment.

Disposition

[181] In the light of this, the matter must be remitted to the Supreme Court for damages to be assessed. We regret the delay in delivering this judgment.

BROOKS JA

ORDER

i) The appeal is allowed.

ii) Order 1. and 2. of the orders of B Morrison J made on 22 May 2015 are set aside.

iii) The application to set aside the interlocutory judgment herein in default of Acknowledgment of Service, dated 23 July 2008 is refused.

iv) The final judgment herein entered on 13 July 2009 and all the consequential orders thereto, including default costs certificate and charging orders are set aside.

v) The assessment of damages is a nullity and is hereby set aside.

vi) The respondents shall file and serve within 14 days of the date hereof, an affidavit fully complying with rule 5.11(2) of the Civil Procedure Rules.

vii) The matter is remitted to the Supreme Court for an assessment of damages to be held.

viii) It is hereby declared that rule 12.13 of the Civil Procedure Rules is unconstitutional to the extent that it restricts the right of participation by a defendant in an assessment of damages hearing.

ix) It is hereby declared that rule 16.2(2) of the Civil Procedure Rules is unconstitutional to the extent that it provides for notice of the assessment to be sent to a claimant only.

x) Costs to the appellant here and in the court below (in respect of the application to set aside the judgment), to be taxed if not agreed.