[2016] JMCA App 5

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 146/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**JUNE CHUNG**	**APPLICANT**
AND	**SHANIQUE CUNNINGHAM**	**RESPONDENT**

Gordon Robinson instructed by Miss Winsome Marsh for the applicant

Norman Hill QC and Raymond Samuels instructed by Samuels Samuels for the respondent

14, 15 December 2015, 5 and 19 February 2016

PHILLIPS JA

[1] I have read in draft the reasons for judgment of my sister Sinclair-Haynes JA. I agree with her reasoning and have nothing to add.

SINCLAIR HAYNES JA

[2] Ms June Chung (the applicant) seeks *inter alia,* permission to appeal to the Court of Appeal, the order of Master Rosemarie Harris Ag (as she then was), refusing to set aside default judgment entered in Ms Shanique Cunningham's (the respondent's)

favour and her refusal to grant an extension of 14 days within which to file her defence. Leave to appeal was also refused by the Master. This court heard the application for permission to appeal on 14 and 15 December 2015 and, on 5 February 2016, granted the application and made no order as to costs. These are my reasons for concurring with that decision.

Background

[3] On 22 March 2007, the respondent instituted proceedings against Foo Hing Supermarket and the applicant in which she claimed damages for slander, libel and malicious prosecution. The suit was consequent on the applicant accusing the respondent of stealing a bottle of ketchup from the supermarket which led to the respondent's arrest and charge for simple larceny. She was however acquitted.

[4] The applicant ought to have filed an acknowledgement of service to the respondent's claim on or about 5 April 2007. This was not done. Consequent on the applicant's failure to do so, the respondent requested judgment in default on 15 September 2008. An acknowledgement of service was filed on the applicant's behalf on 19 September 2008. The parties thereafter endeavoured to resolve the matter amicably. Their attempts however failed. On 29 March 2012 the respondent applied to have the applicant's acknowledgment of service struck out. McDonald-Bishop J (as she then was) acceded to the respondent's request on 8 November 2012 and entered judgment in default of acknowledgment of service and defence.

[5] On 4 December 2012, an application was made on behalf of the applicant to set aside McDonald-Bishop J's order. The application was refused by Master Lindo (as she then was) on 22 October 2013. Notice of Change of Attorney was filed on 21 July 2014 in which Ms Winsome Marsh announced her appearance. She renewed the applicant's application which was supported by Ms Chung's affidavit and a draft defence.

The claim

[6] The respondent averred in her particulars of claim that the applicant slandered her on eight occasions. The first was in the supermarket when in demanding to search her bag, in the presence of customers and three other persons the applicant said:

> "Give me your bag and let me search it, I saw when you picked up a bottle of Grace Tomato Ketchup from off the shelf and a pack of Skittles Sweet off the Sweetie Stand and put them in your bag, You are a thief."

[7] The second was in the presence of Woman Constable Sharon Wilson, two other police officers and the said three other persons. She repeated the said words and added the following slanderous words:

> "...and was leaving the store with them. I stopped her and asked her to let me search her hand bag and she gave me the hand bag and when I searched it I found and took out this bottle of Grace Tomato Ketchup and this pack of Skittles Sweets she took off the sweetie stand. She (pointing at and meaning the Claimant) is a thief."

[8] On a third occasion the same day, in the presence of the said Woman Constable Sharon Wilson and "a party of Police Officers", and the said three persons, the applicant told the police that the respondent did not buy the things and she did not

give her any receipt for the items. She again asserted that she saw the respondent remove the said items. She pointed the officers to the place she claimed they were taken from and added, "Is steal she steal them from here".

[9] One of the three persons, a rastafarian man called 'Dread', showed the police a receipt for the Skittles which he told the police the applicant had hidden. The applicant was told by the police to stop accusing the respondent of stealing. The applicant however persisted in her accusation that the respondent had stolen the tomato ketchup.

[10] The fourth occasion occurred at the police station where the applicant accused the respondent in the presence of Woman Police Officer Cynthia Murray, four other police officers and one of the three persons, of removing a bottle of ketchup from a shelf, placing it in her bag, and attempting to leave the supermarket without paying. She told them that she stopped the respondent and requested a search and removed the ketchup from her bag. She repeated the accusation that the respondent had stolen the ketchup, she did not pay for it and she told the respondent that she had stolen it.

[11] The respondent averred that the applicant defamed her on three other occasions by causing Woman Police Officer Cynthia Murray to falsely write and publish the following words on 15 March 2004:

> "On the 15th day of March 2004 one Sanique Cunningham of Pagee in the parish of Saint Mary did unlawfully steal one Grace Tomato Ketchup valued at Fifty Dollars ($50.00) property of Foo Hing and Company Supermarket contrary to Section 5 of the Larceny Act."

[12] The respondent further averred that the summons was given to another police officer who took the summons to a justice of the peace for his signature. The applicant, she said, falsely and maliciously caused the Justice of the Peace for the parish of Saint Mary to read the said words.

[13] On 25 March 2004, she claimed that the following words were read in court by the Clerk of Courts for the Resident Magistrate's Court for the parish of Saint Mary :

> "Shanique Cunningham you are hereby charged that on the 15th day of Marc [sic] 2004 you did unlawfully steal one bottle of Grace Tomato Ketchup valued at Fifty Dollars ($50.00) the property of Foo Hing and Company Limited Supermarket, how do you plead, guilty or not guilty."

The respondent attended court on 16 occasions and on the sixth occasion the said aforesaid slanderous words were read in a packed court room. The respondent suffered humiliation and suffered shame as a consequence.

[14] It was her claim that the said words which were spoken and read were defamatory of the respondent. In so far as they were written, read and published, they were defamatory and constituted a libel of the respondent. The respondent was taken into custody and charged and lost her liberty as a result.

The grounds on which the application was sought before the Master

[15] Ms Marsh urged the court to hear the applicant's second application to set aside the respondent's default judgment and to extend the time for the filing of her defence. The applicant proferred the following grounds as reasons for the Master to accede to her application:

> "a. The 2nd Defendant has a real prospect of successfully defending the claim;
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> b. The Second-named Defendant has provided a good explanation for the delay in filing her defence which is that the delay was as a result of circumstances beyond her control;
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> c. In all the circumstances, this Application has been made as soon as is reasonably practicable after learning that such an application was permissible and necessary;
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> d. The Claimant will not suffer any prejudice as a result of the setting aside that cannot be cured by way of an order as to costs;
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> e. The Claimant has exhibited inordinate delay in her prosecution of the claim."

She pointed out that the delay in filing the acknowledgment of service was attributable to her previous attorney-at-law and to cultural issues which prevented the applicant from personally conducting her defence.

[16] The respondent however trenchantly resisted the application. It was contended on her behalf that the matter and issues having been litigated, a rehearing would have constituted an abuse of the process of the court. It was also argued on behalf of the respondent that the inadvertence of counsel to file an acknowledgement of service was not a good reason for failing to file an acknowledgement of service or defence.

[17] Although an application to set aside a default judgment can be made more than once, in order to succeed the applicant is required to provide the court with new and relevant material which the applicant did not provide. Further, it was argued that the applicant ought to have sought relief from sanction because her defence was struck

out. She contended that the applicant's application for leave to file her defence is not properly before the court because she has failed to file an acknowledge of service stating her intention to defend the matter.

The Master's treatment of the matter

[18] The Master, in determining the matter, posed the following questions:

> "Firstly, can another application to set aside the default judgment be requested and entertained? Secondly, what is the law that the court needs to be cognisant of? Should the claimant's default judgment be set aside?"

[19] In respect of her first question, having examined the authorities, she accepted that an application could be made if fresh and relevant evidence was provided. She said:

> "[16] Counsel for the applicant was at pains to point out to the court that the application was being made because there was new relevant material that was available now that was not available at the time of the previous applications, including cultural issues that prevented the Applicant from having conduct of her own defence as well as the unfortunate lapses of her previous attorneys.
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> ...
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> [19] ... The defining factor seems to be whether this new material is relevant. In the instant application the cultural practices of the defendant were stated as being this new relevant material. The Applicant in an affidavit deponed that it was the practice in her Chinese culture to leave such matters of legal documentation up to the males in the family and she was not fully seised or notified of the matter.
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> [20] I do not find the arguments of the Applicant compelling. Cultural practices of any group within a society unless specifically legislated are always subject to time lines and procedural requirements that the Rules of Court dictate.

> Previous affidavits of the Applicant indicate that she had knowledge of the Claim as she signed those Affidavits and Defence. This court finds that the judgment filed on the 22nd day of October 2012 and entered in Judgment Binder 761 Folio 471 was regularly entered. The Defendant was properly served and was duly notified of the claim.
>
> [22] [sic] In this renewed application, the applicant has used the opportunity to fashion another defence. That being the case the Applicant has attempted to show that she has a reasonable prospect of success in defending the claim."

[20] Being aggrieved by the Master's decision, the applicant in her application indicated the following as her proposed grounds of appeal:

> "1. The Learned Master erred in finding that the proposed Defence had no reasonable prospect of success in light of the many triable issues raised therein; the strength of the merits of the pleaded defence; and the fatal flaws in the claimant/Respondent's own causes of action;
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> 2. The Learned Master erred in finding that the 2nd Defendant/Applicant had failed to file her application to set aside as soon as was reasonably practical after learning about the entry of Judgment in light of her unchallenged evidence that she was advised by previous Counsel that there was nothing she could do; the illness of her late husband; and the prompt way in which the matter was treated by herself and her son after her husband's death;
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> 3. The Learned Master erred in finding that there was no sufficient explanation of the delay when, in addition to the many other challenges she itemized, the 2nd Defendant/Applicant relied on the inadvertence of her previous Attorney-at-Law which was unchallenged and which this Honourable court has held to be sufficient explanation;
>
> 4. The Learned Master erred in finding that the material presented by the 2nd Defendant/Applicant was new but irrelevant when the material directly addressed the issues at

hand; was unchallenged; and the 2nd Defendant/Applicant was frank and open with the Court;

5. The Learned Master failed to take into account that the evidence by the 2nd Defendant/Applicant was unchallenged as the Claimant/Respondent filed no affidavit in reply;

6. In assessing the issue of delay, the Learned Master failed to take into account that the 2nd Defendant/Applicant's previous Attorney-at-Law had taken steps, albeit out of time without consent, to place an Acknowledgment of Service and Defence on the Record and that the Parties had been in without prejudice settlement talks which had broken down. In this regard, the Learned Trial Judge [sic] failed to take into account the reasons why the first acknowledgement of Service was struck out and the unchallenged evidence by the 2nd Defendant/Applicant as to the issue of service which was not in legal dispute;

7. The Learned Master erred in law in taking the draconian step of barring the 2nd Defendant/Applicant from disputing the Claimant/Respondent's Claim in light of the strong Defence proposed; the lack of real prejudice to the claimant/Respondent should the matter be tried; and the Claimant/Respondent's own delays in prosecuting the Claim;

8. The decision of the Learned Master is contrary to the over-riding objective and failed to deliver justice to both sides."

[21] It is important at this juncture to clarify this court's position in respect of what constitutes "new material" in second and subsequent applications to set aside a default judgment. In the case **Rohan Smith v Elroy Hector Pessoa and Anor** [2014] JMCA App 25, Phillips JA quoted, with approval, Harrison P (Ag) (as he then was) in **Trevor McMillan and Others v Richard Khouri** SCCA No 111/2002, delivered 29 July 2003, in which he said:

> "A second and subsequent application may be made to the same or another judge of the Supreme Court to set aside such a judgment as long as the applicant can put forward new relevant material for consideration (**Gordon et al v Vickers** (1990) 27 JLR 60). Facts may be regarded as new material, although through inadvertence or lack of knowledge such facts were not placed before the court on the first occasion provided they are relevant (See also **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies et al** [1971] 1 WLR 550)."

The application before this court

[22] It is necessary to note at this juncture that rule 1.8(9) of the Court of Appeal Rules 2002 states the general rule which governs applications for permission to appeal. Rule 1.8(9) provides:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

The issue therefore is whether the appeal has a real chance of success.

[23] The Master's treatment of the matter comes in for scrutiny. Uppermost in my mind is that an appellate court is not to substitute its opinion for that of the Master's. This court's interference will only be warranted if the Master, in the exercise of her discretion, drew inferences on non-existent facts; misunderstood the law or evidence; or her decision "was so aberrant that it must be set aside on the ground that no judge mindful of his duty to act judicially could have reached it" (**Hadmor V Hamilton** [1982] 1 All ER 1042 at 1046) or as the Privy Council in **G v G** [1985] 2 All ER 225 puts it, "was blatantly wrong" [Per Lord Fraser of Tullybelton].

[24] An application to set aside a default judgment must surmount the hurdles required by rule 13.3(1), (2) and (3) of the Civil Procedure Rules (CPR). By virtue of rule 13.3(1), the overarching consideration is whether the applicant has a real prospect of successfully defending the claim. Rule 13.3 provides:

> "(1) The Court may set aside or vary a judgment entered under Part 12
>
> if the defendant has a real prospect of successfully defending the claim
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> (2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
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> (a) applied to the court as soon as is reasonably practicable
>
> after finding out that judgment has been entered.
>
> (b) given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be.
>
> (3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."

[25] Grounds 1-3, on which the application was sought before Master Harris, reflect the requirements of rule 13.3(1), (2) and (3) of the CPR.

Proposed ground 1

> "The Learned Master erred in finding that the proposed Defence had no reasonable prospect of success in light of the many triable issues raised therein; the strength of the merits of the pleaded defence; and the fatal flaws in the Claimant's/Respondent's own causes of action."

Real prospect of success

[26] The Master's treatment of this most important consideration, that is, whether the applicant has a real prospect of success, was perfunctory at best. She said:

> "[22] In this renewed application, the applicant has used the opportunity to fashion another defence. That being the case the Applicant has attempted to show that she has a reasonable prospect of success in defending the claim."

[27] Thereafter, the only other reference she made to her prospect of success was to quote rule 13.3. She engaged in no analysis and arrived at no conclusion as to the applicant's prospect of success.

The draft defence

[28] A proposed defence was attached to the applicant's affidavit in support of her application. The applicant averred that she saw the respondent remove from a shelf in the supermarket, a bottle of Grace tomato ketchup which she placed in her handbag and was about to leave without paying. Her bag was searched by the applicant and the ketchup was removed from her bag. The respondent claimed that she had purchased the said ketchup elsewhere but was unable to provide any receipt.

[29] The respondent left the shop and returned shortly after with a mob who abused the applicant. The respondent and the mob left but returned about an hour after whereupon a man snatched the bottle of ketchup from the applicant's desk and went away with it. The applicant reported the matter to a nearby police officer. Police from

the Port Maria Police Station was called and they came. She reported the matter and the respondent was charged for simple larceny.

Submission on the applicant's behalf

[30] It was Ms Marsh's written submission that the applicant's unchallenged evidence was that she had seen the respondent pick up a bottle of Grace ketchup from the supermarket shelf with which she walked past the cashier without paying. Counsel submitted that it was also her evidence that she accosted the respondent and retrieved the ketchup. She reported the matter to the police who did their investigations and charged the respondent.

[31] Counsel argued that the Master erred in law in holding that the applicant's defence had no reasonable prospect of success in light of the applicant's unchallenged evidence that the applicant did not commence the prosecution nor did she act out of malice. She contended that the applicant's defence to the claimant's claim of malicious prosecution is unanswerable.

[32] Further, she submitted that much of the respondent's pleadings on her claim for libel or slander disclosed no cause of action and no reasonable ground for bringing the claim. In respect of the claim for libel or slander, she said the majority of the complaints were based on the applicant's statement to the police and as a witness at the trial. Those statements, she submitted, even if untrue, would have been covered by qualified privilege.

[33] Mr Gordon Robinson submitted before us that on the applicant's proposed defence, she will establish that there is a real chance of successfully convincing a tribunal that the Master was demonstrably wrong and that she proceeded on a misunderstanding of the law and evidence. It was also his submission that her first egregious mistake was to misquote his written submissions which was before her. He said the Master misunderstood the bases for the application. He directed the court's attention to paragraph 4 of his submissions at which he referred to "new evidence".

[34] He submitted that "new" in the context of his submission was "new relevant" and not that it was not presented before. He submitted that there is a difference between "new" and "fresh". The rule applicable to "new" evidence is not the same as that which is applicable to "fresh evidence", he submitted.

[35] The primary consideration, he submitted, is whether the applicant has a real prospect of success. Counsel complained that the Master's entire focus was on the issue of delay. He posited that the applicant's draft defence is unanswerable and exceeded the real prospect of success test. He said the evidence before the Master was that the applicant saw the respondent remove the item. Regarding the claim for defamation, the statements were made to the police and in court. In respect of the claim for malicious prosecution, he said that the respondent has not established a case because it was the police and not the applicant who laid the charge.

[36] He argued that the applicant ought not to be shut out because of the errors of her former attorney. Her attorney had wrongly advised her that there was nothing she

could do but await the outcome of an assessment. He said that advice was incorrect because under the CPR, in order to contest the assessment of damages the applicant must have filed a defence. He relied on the case of **Rohan Smith v Elroy Pessoa and Anor**.

The respondent's position

[37] The respondent resisted the application on the ground that the applicant's defence was merely a bare denial of the claim as it failed to state the facts it relied on to dispute the claim as required by rule 10.5 of the CPR. In the circumstances, the respondent said, there is no indication from the draft defence what the applicant's defence is. According to her, it merely repeated the defamation.

[38] Mr Norman Hill QC, submitted that the respondent's judgment is a thing of value therefore the standard for wresting it from her is higher. An examination of the chronology, he said, shows that the applicant has not provided any basis for success more less a real chance. The CPR, he said, states that applications must be promptly made after judgment has been entered. Dealing promptly with a matter, he said, meant with reasonable celerity which he said can only be one point in time and one application. He relied on the English Court of Appeal case of **Mullock v Pryce (t/a Elma Hotel Restaurant** [2009] EWCA Civ 1222. He pointed out that the applicant had made two prior applications. In arriving at the decision that the delay was egregious, the Master examined the entire period and ruled as she did.

[39] Queens Counsel submitted that if the court is satisfied that the delay was overwhelming, the Master's failure to adjudicate on real prospect would not constitute a misdirection. Regarding the issue of malicious prosecution, he submitted that the applicant was the prosecutor because all the facts of which the applicant spoke, were solely within her knowledge. He relied on the case of **Martin v Watson** [1996] AC 74.

Discussion

[40] There does appear to be merit in counsel for the applicant's submission in respect of the claim for slander and libel that the circumstances under which the utterances were made can be considered qualified privilege. In respect of the respondent's claim for malicious prosecution, the burden rests with the respondent to prove, at the required standard that, "the law was set in motion against her by the applicant".

[41] In light of the settled law on the matter (see **Wills v Voisin** (1963) 6 WIR 50) it cannot be properly asserted that the applicant confronts an insuperable task in defending the matter. The police are usually regarded as the prosecutor in ordinary cases. Although it could be argued that this case might fall within the **Martin v Watson** exception, that is, the applicant was the sole witness to the alleged actions of the respondent (the alleged removal of the bottle of Grace ketchup from the shelf and her attempt to leave without paying), that issue is arguable as there were other persons in the store whom the police could have interviewed.

[42] The unchallenged evidence is that the respondent did not leave the store with the item. She was stopped by the applicant before. In the circumstances, assuming that the respondent's actions were as attributed to her by the applicant, the offence of larceny would not have been committed. That notwithstanding, if she is found to have been the prosecutor, it is arguable that her prosecution could not have been malicious and without reasonable cause, if her evidence is accepted.

[43] Also if a court accepts her evidence, but finds that the accusation was prematurely made, it is arguable that a court may still find that the applicant had a genuine belief that the item was stolen and reject the respondent's claim that the prosecution was malicious and without probable cause. In light of the foregoing, the applicant's chance of succeeding on her defence cannot be said to be fanciful. There is therefore merit in this ground.

Delay

[44] For convenience, the proposed grounds 2, 3 and 6 of will be dealt with together.

> "2. The Learned Master erred in finding that the 2nd Defendant/Applicant had failed to file her application to set aside as soon as was reasonably practical after learning about the entry of Judgment in light of her unchallenged evidence that she was advised by previous Counsel that there was nothing she could do; the illness of her late husband; and the prompt way in which the matter was treated by herself and her son after her husband's death;
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> 3. The Learned Master erred in finding that there was no sufficient explanation of the delay when, in addition to the many other challenges she itemized, the 2nd Defendant/Applicant relied on the inadvertence of her

> previous Attorney-at-Law which was unchallenged and which this Honourable court has held to be sufficient explanation;
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> ...
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> 6. In assessing the issue of delay, the Learned Master failed to take into account that the 2nd Defendant/Applicant's previous Attorney-at-Law had taken steps, albeit out of time without consent, to place an Acknowledgment of Service and Defence on the Record and that the Parties had been in without prejudice settlement talks which had broken down. In this regard, the Learned Trial Judge [sic] failed to take into account the reasons why the first acknowledgement of Service was struck out and the unchallenged evidence by the 2nd Defendant/Applicant as to the issue of service which was not in legal dispute;"

[45] It is the applicant's evidence that service was effected on the applicant's ailing husband in March 2007. In keeping with their Chinese culture, the applicant was not informed about matters concerning interaction with the public. Matters of that nature were entirely within the province of the men in her family. Her husband required surgery which necessitated them leaving the island on 10 April 2007. They returned on 31 May 2007. She then became aware, although she was not involved, that her husband had sent the documents to the family attorneys instructing them to represent her.

[46] She is of the view that her husband, who was a community leader, would not have wanted to engage in a legal battle with a member of the community and would have requested a settlement of the matter. Her husband, because of his unofficial designation as "mayor" of the town, endeavoured to avoid confrontation with persons from the area.

[47] Over a year after, she was asked by her previous attorney to sign an affidavit which had been drafted by the said attorneys. She complied. The affidavit stated that she had instructed them to settle the matter. She was prepared to ratify her husband's actions. She maintains that she and her husband were of the view that the lawyers were attempting to settle on a without prejudice basis as both she and her husband knew that she was not liable. She and her husband expected that if they could not arrive at a reasonable settlement, the matter would have been defended.

[48] Sometime in or about August 2008, she discovered that attempts at a settlement had failed and that she would have had to defend the matter. She was however unaware that during the negotiations no acknowledgement of service was filed nor was permission sought to file her defence out of time. It has come to her knowledge that an acknowledgement of service and a defence were filed on her behalf without the required permission which she has been advised was required. She has also become aware of the fact that the date of service was not stated in the acknowledgement of service as was required. Consequently, the acknowledgement of service was struck out.

[49] Her husband died in October 2011 and she is unable to say whether he was aware that the acknowledgement of service was defective and that the defence was filed without permission. Nor was it ever explained to her. Although she was never told the date of service, she believes that an approximate date could have been inserted or it could have been stated that the defendant could not recall the exact date but that it was in March 2007. The claimant, she said, if it became necessary, could have stated

the correct date. On 23 December 2013, her son (again in keeping with Chinese culture) was informed by her previous attorneys by way of letter, that:

> "Unfortunately, because we were not able to give a date when the Claim form was left at your father's offices, the plaintiff took a technical point and struck out our Defence in the matter as a result a judgment had been entered in favour of Miss Cunningham against your mother."

[50] Her son was advised that the only recourse was to contest damages. Her son, having discussed the matter with the said attorneys, accepted the attorneys' advice and waited to be updated by their attorneys. After a few uneventful months elapsed, she discussed the matter with her son who retained her present attorney, Ms Winsome Marsh. The files were delivered to Ms Marsh after a few weeks because they were in different offices which were located in two different parishes. In June 2014 she was informed by Ms Marsh that her defence was struck out because it was filed out of time, without permission *inter alia.*

[51] She averred that it was never her intention to allow the respondent a "free ride". An attempt at a settlement was to save expenses and to avoid the inconvenience immanent in a trial. It is her evidence that she has "a complete defence" to the claim and she has been advised by her attorney that her defence has more than a real prospect of success. She averred further that, following **Wills v Voisin**, the claimant will suffer no prejudice that an order for cost cannot address.

[52] Counsel's proposed submission is that the applicant's unchallenged evidence was that she was advised by her former attorneys, after having made a grossly inadequate

application to set aside; filed acknowledgment and defence out of time and without consent which resulted in the acknowledgement of service being struck out, that there was nothing further she could have done. Also, the applicant's unchallenged evidence was that her previous attorneys were guilty of numerous errors which the applicant would not have known until she sought further legal advice.

[53] Counsel argued that the dismissal by the learned Master of the applicant's explanation that the delay was also as a result of cultural challenges, exposed a misunderstanding on the part of the learned Master as to the explanation for the delay. She posited that the overriding concern for the Master ought to have been the applicant's prospects of success, and not the delay, although the delay is a factor to be borne in mind. For this proposition, reliance was placed on the cases of **Trevor McMillan et al v Richard Khouri** SCCA No 111/2002, judgment delivered 29 July 2003 and **Rohan Smith v Elroy Pessoa and Anor**.

[54] Mr Robinson also argued that the inadvertence of counsel, the cultural challenges, the unchallenged evidence of the need to attend to her husband's grave illness and her attention to the matter within a reasonable time after his death in spite of the advice from her previous attorneys were exemplary. Mr Hill however postulated that this court has held that the inadvertence of previous counsel is not a sufficient explanation of delay.

Master Harris' treatment of the issue of delay

[55] The Master relied on the cases **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4, a decision of this court which approved Lightman J's statement in the English case of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others** [2001] EWHC Ch 456 in respect of the factors a court ought to be mindful of in considering how to excercise its discretion in cases of delay.

[56] She also cited the case of **International Finance Corporation v Utexafrica** SPRL 2001 EWHC 508 in which Moor-Bick J opined that:

> "A person who holds a regular judgment even a default judgment has something of value and in order to avoid injustice, he should not be deprived of it without good reason."

She then observed that the claimant was served on 22 March 2007 with the documents and that judgment in default was obtained on 22 October 2013. She noted also that the applicant's first application was determined on 22 October 2013 and this application was filed nine months later. It was her finding that the applicant failed to act promptly and that her explanation for her failure to file the acknowledgement of service and defence "was not a good reason bearing in mind the particulars of claim".

[57] The Master failed to express any view concerning the manner in which the applicant's case was dealt with by her former attorneys. Her reference to the conduct of the applicant's former attorneys was to state that the applicant's counsel:

> "was at pains to point out that the application was being made because there was new relevant material that was available now that was not available at the time of the previous applications, including cultural issues that prevented the Applicant from having conduct of her own defence as well as the unfortunate lapses of her previous attorneys."

[58] She apparently did not view the cultural issue or the "unfortunate lapses of her previous attorneys" as relevant facts. No attempt however was made to consider the effect of the lapses of the previous attorney or to proffer any reason for her rejection of that as a relevant fact. Nor is there any indication that she adverted to the effect which the illness and death of the applicant's husband might have had on her ability to comply timeously.

The law/discussion

[59] It is settled that this court frowns upon wanton disregard for timelines. In **Peter Haddad v Donald Silvera** SCCA No 31/2003, delivered 31 July 2007, Smith JA noted that:

> "...one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with the proper expedition'."

[60] Panton JA's (as he then was) following statement in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** Motion No 12/1999, judgment delivered 6 December 1999, of the court's position on failure to adhere to timelines, ought now to be well known. He summarized this position thus:

> "The legal position may therefore be summarised thus: (1) Rules of court providing a time-table for the conduct of

> litigation must, prima facie, be obeyed. (2) Where there has been a non-compliance with a timetable, the court has a discretion to extend time. (3) In exercising its discretion , the Court will consider – (i) the length of the delay; (ii) the reasons for the delay; (iii) whether there is an arguable case for an appeal and; (iv) the degree of prejudice to the other parties if time is extended. (4) Notwithstanding the absence of a good reason for delay, the court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

In the case of **Jamaica Public Service Company Ltd v Rose Marie Samuels** [2010] JMCA App 23 Morrison JA (as he then was) regarded and adopted as correct, the position taken by Panton JA.

[61] The Master's failure to properly address the errors/negligence of the applicant's former attorneys which she cited as a reason for the delay has provided room for this court to express its view on the matter. A factor of importance was certainly the extent to which the delay was attributable to the attorney. In **Salter Rex and Co v Ghosh** [1971] 2 All ER 865 Lord Denning MR, in dealing with that issue, said:

> "So [the applicant] is out of time. His counsel admitted that it was his, counsel's mistake and asked us to extend the time. The difference between two weeks and four weeks is not much. If [the applicant] had any merits which were worthy of consideration, we could certainly extend the time **We never like a litigant to suffer by the mistake of his lawyers.** I can see no merit in [the applicant's] case. If we extended his time it would only mean that he would be throwing good money after bad. I would therefore refuse to extend the time. I would dismiss the application." (Emphasis supplied)

So the issue ought to arise whether the applicant should be shut out of court as a result of her attorney's lethargy and or mistakes. Because the real question is: has the

applicant, in any event, satisfied the court that her application was made "as soon as was reasonably practicable after finding out that judgment has been entered"?

[62] On the applicant's evidence, it was on 13 December 2013 that she became aware of the judgment against her. Her application was made on 21 July 2014. The period of approximately seven months cannot be regarded as "soon after her discovery of the judgment against her". But was it made "soon after it was reasonably practicable"? The answer lies in her reason for the delay.

[63] Her evidence is that her husband had engaged the services of attorneys on her behalf. An acknowledgement of service and defence had been filed but both were deficient. The said documents were struck out on 8 November 2012. Her previous attorney failed to remedy that matter and indeed failed to communicate the status of the matter to either herself or her husband. It was only on 23 December 2013 that the said attorney informed her that judgment in default was entered. That was 13 months after the documents were struck out.

[64] Even if the learned Master was correct in not regarding culture as a good reason, it cannot, in light of the applicant's actions upon being informed of the default, be said that she failed to act with dispatch or that she has not provided a good explanation for the failure to file her acknowledgment of service and defence within the time stipulated.

[65] Of importance also is the fact that the supermarket which was managed by her husband and at which she was employed was also sued as the 1st defendant and she the 2nd defendant. Apart from Chinese culture, it is not far-fetched that her husband

would have had conduct of the matters since the first named respondent was the supermarket.

[66] As submitted by Mr Robinson, the overriding consideration is whether the applicant has a real prospect of successfully defending the matter. The Master, apart from examining the law and the applicant's delay, failed to consider the reasons she proffered for the delay. Grounds 2, 3 and 6 are also not without merit and do have a chance of succeeding.

Ground 7

> "The Learned Master erred in law in taking the draconian step of barring the 2nd Defendant/applicant from disputing the Claimant/Respondent's Claim in light of the strong Defence proposed; the lack of real prejudice to the claimant/Respondent should the matter be tried; the Claimant/Respondent's own delays in prosecuting the Claim."

The respondent's delay

[67] Mr Robinson submitted that there were delays on both sides. There was a nine months hiatus between the steps taken by the respondent. He pointed out that there was a one year delay in pursuing the matter whilst the parties were in discussion. He submitted that the fact that the respondent took no step to enforce the judgment for such a long time ought also to have been considered.

[68] He submitted that the overriding objective in matters of this nature, is to ensure that the matter is tried on its merits unless irreparable prejudice would occur. He argued that there was no evidence that the respondent would suffer prejudice which

could not be addressed by costs. He submitted that any prejudice suffered by the respondent can be dealt with by costs. He relied on Phillips JA's decision in **Rohan Smith v Elroy Pessoa and Anor** in support of his argument.

[69] Mr Hill relied on his earlier submissions in opposing this ground.

Analysis

[70] This proposed ground necessitates a chronological examination of the respondent's actions in prosecuting the matter. The unchallenged evidence is that the claim form and the particulars of claim were filed 22 March 2007. The parties embarked on discussions with a view to resolving the matter amicably. The respondent's affidavit of service was filed on 18 December 2007. The discussions between the parties ended in or about August 2008.

[71] The parties were attempting to settle the matter amicably hence both parties ignored the matter for almost three years when the respondent applied to have the said acknowledgment and defence struck out and obtained judgment in default. That fact notwithstanding, it was incumbent on the appellant to ensure that she complied with the rules.

[72] The respondent's request for judgment in default, an undated interlocutory judgment, and a notice of assessment of damages were filed on 15 September 2008. They were re-filed at the registrar's request on 22 October 2008. An acknowledgment of service and defence were filed on behalf of the applicant on 19 September 2008 albeit late.

[73] On 29 March 2012, the respondent's application, which was dated 29 December 2011, was filed requesting that the applicant's application, acknowledgement of service and defence be struck out. The respondent's affidavit in support, which was sworn to on 29 December 2011, was filed on 29 March 2012. The applicant's acknowledgement of service and defence were struck out on 8 November 2012.

[74] The respondent filed an undated new request for interlocutory judgment against the applicant on 22 October 2012, which the applicant's attorney has not had sight of. The applicant's former attorney's sworn affidavit was filed 6 November 2012 opposing the respondent's application. The application was heard on 8 November 2012 and the applicant's acknowledgement of service and defence were stuck out. On 4 December 2012 the applicant's application for leave to file her defence and affidavit was filed. The respondent's affidavit in response was filed on 30 January 2013.

[75] On 31 January 2013, the applicant's application for leave to file her defence and affidavit which were fixed for hearing was adjourned because the time allotted was insufficient. On 7 May 2013, an amended application requesting, *inter alia*, that the judgment entered against it in default be set aside was filed. On 15 May 2013, an acknowledgment of service was filed. The applicant's amended application was heard in July 2013. The decision refusing the application was delivered on 22 October 2013. Notice of change of attorney was filed on the applicant's behalf on 21 July 2014.

[76] In the English Court of Appeal case of **Finnegan v Parkside Health Authority** [1998] 1 WLR 411 Hirst LJ, in considering the exercise of the court's discretion in

deciding applications for extension of time plainly stated that prejudice is a factor to be considered. At pages 421-422 he said:

> "...clearly prejudice forms part of the overall assessment, and is a factor which needs to be taken into account in deciding how justice is to be done.
>
> ...
>
> But of course that is not the end of the case, since each application must be judged on its own fact and where, as here, there is a very considerable delay, with no explanation of the critical period, the court will apply the guidelines laid down in *Mortgage Corporation Ltd. v. Sandoes*, The Times, 27 December 1996 including guideline 1 stressing that the rules are to be observed."

[77] There is in fact no evidence that the respondent who has also been guilty of delay in prosecuting her claim will suffer prejudice which costs cannot address. This ground too, has a chance of succeeding.

Ground 8

> "The decision of the Learned Master is contrary to the over-riding objective."

[78] Mr Robinson argued that the primary focus of the Master ought to have been the merits of the applicant's reasons for the delay. He said the primary consideration for the Master was to do justice. In so doing, she ought to have looked at justice to both sides. Queen's Counsel however argued that in arriving at a just position, the totality of the evidence must be examined. The Master, he argued, considered the applicant's egregious delay and arrived at a correct decision.

Discussion /law

[79] Rules 1.1(1) and (2)(d) and (e) of the CPR are relevant and state:

> "(1) 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-
>
> ...
>
> (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."

[80] Phillips JA, in dealing with a similar matter in **Rohan Smith v Elroy Pessoa and Anor** enunciated at paragraph [39]:

> " the overriding factor is whether the defendants, in this case the respondents, had a real prospect of successfully defending the claim, and the consideration of whether the application was made timeously is merely a factor to be borne in mind, and ought not by itself to be determinative of the application."

I am in agreement with that statement. Delay, although undesirable and ought not to be countenanced lightly, is but a factor to be considered.

[81] By virtue of rule 13.3(1), the overarching consideration is whether the defendant has a real prospect of successfully defending the matter. The applicant's delay in pursuing the matter has been inordinate and undesirable. However, in light of the

Master's failure to address the applicant's prospect of success and her failure to adequately consider the reasons for her delay; this challenge is also not without merit.

[82] It is for the foregoing reasons that I concurred with the order outlined in paragraph [2] herein.

F WILLIAMS JA (AG)

[82] I too have read the draft reasons for judgment of my sister Sinclair-Haynes JA and agree with her reasoning. There is nothing I wish to add.