[2015] JMCA App 55

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 51/2015

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MRS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**FLEXNON LIMITED**	**APPLICANT**
AND	**CONSTANTINE MICHELL**	**1st RESPONDENT**
AND	**MARIA MICHELL CARAS**	**2nd RESPONDENT**
AND	**THEODORE MICHELL**	**3rd RESPONDENT**
AND	**LAZARUS KIRIFIDES**	**4th RESPONDENT**
AND	**TLC INVESTMENT ASSOCIATES LTD**	**5th RESPONDENT**

Bryan Moodie and Miss Danielle Chai instructed by Samuda & Johnson for the applicant

Ms Georgia Hamilton and Miss Anna Gracie instructed by Rattray, Patterson, Rattray for the respondents

20 and 23 October 2015

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] This is an application brought by Flexnon Limited, the applicant, for (1) permission to appeal the decision of Laing J made on 2 March 2015 refusing its application to set aside a default judgment entered against it by George J on 28 February 2012; (2) stay of execution of the said judgment; and (3) stay of execution of a subsequent order of Sinclair-Haynes J made on 17 April 2013 compelling its directors to comply with the judgment pending the hearing of the appeal.

Grounds for the application

[2] The grounds on which the applicant is seeking permission to appeal the decision of Laing J and for the stay of execution of the default judgment and the order of Sinclair-Haynes J are set out in the notice of application for court orders as follows:

> "1. The learned judge erred when he found that the Applicant had no real prospect of defending the claim;
>
> 2. The learned judge erred when he placed undue weight on the Applicant's delay and not sufficient weight on the Applicant's prospects of success;
>
> 3. The learned judge incorrectly found that the explanation proferred by the Applicant for the delay, namely, that the parties were engaged in good faith settlement negotiations, was not a good explanation;
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> 4. The Applicant's Attorneys-at-Law applied orally to the learned judge for permission to appeal on the 2nd March 2015 but permission was refused;
>
> 5. The appeal has a real chance of success because the Applicant has a good defence on the merits and a reasonable explanation for the delay in applying to set aside the default judgment;

6. In all the circumstances Justice Laing wrongly exercised his discretion."

[3] In relation to the application for stay of execution the grounds are:

"1. The Honourable Mrs Justice George ordered default judgment on the 28th February 2012 against the Applicant and ordered that the Applicant render an independently audited account of all sums due to the Claimants in respect of gross room revenue for the period December 1, 1999 to the date of the account and that the Applicant pays to the Claimants all sums due upon the taking of said account.

2. On the 17th day of April 2013 the Honourable Mrs Justice Sinclair-Haynes made an order compelling the Applicant, its directors and officers or servants to comply with the order of Mrs Justice George dated 28th February 2012 failing which the Claimants be at liberty to institute contempt proceedings against the Applicant, its directors and/or officers.

3. The Applicant would be ruined if a stay of execution of the orders is not granted as it would be forced to pay out a significant sum of money in damages, interest and costs to the Claimants despite having an appeal with a real prospect of success and there is no guarantee that it would be refunded its money if the appeal is successful."

The factual background

[4] For the sake of expediency, the facts as summarized in paragraphs 1-8 of the speaking notes of counsel for the respondents are accepted, with slight modification, as accurately presenting the background to these proceedings. Those facts are as follows: The respondents in separate co-ownership arrangements are the registered proprietors of three properties comprised in certificates of title registered at Volume 1084 Folios 821, 830 and 922 of the Register Book of Titles. These units were in turn comprised in strata lots numbered 130, 139 and 231 of Strata Plan No 11, Seawind Towers, Montego

Bay in the parish of St James. For several years, the respondents had an agreement with Montego Freeport Limited (MFL) (previously the 1st defendant but which is no longer a party to the proceedings) whereby these properties, as originally constituted, were operated as part of MFL's hotel known as "Seawind Beach Resort". The respondents and MFL agreed that, in exchange for MFL's use of the properties, the respondents would be paid a commission of the gross revenue earned. The hotel was later sold to the applicant.

[5] The applicant converted the three strata units owned by the respondents into five hotel rooms and brought them within its operation under the "Sunset Beach Resort" Brand from 1999. The applicant has not accounted to the respondents for the room revenues it has earned from the use of their properties. Consequently, the respondents filed a claim against the applicant and MFL on 9 October 2009 for, among other things, damages for restitution, unjust enrichment and for an accounting of all sums due to the respondents in respect of the operation of the said units for the period to the date of judgment.

[6] The applicant, having been served with the claim form, failed to file an acknowledgment of service and a defence and so judgment in default was entered against it on 28 February 2012 with an order made for, inter alia, an accounting as well as damages to be assessed. The default judgment was served on the applicant on 12 March 2012. Despite that, the applicant failed to comply with the order for the accounting.

[7] As a result, the respondents filed another notice of application, which was served on the applicant, for enforcement of the order for the accounting. The application was heard by Sinclair-Haynes J and on all occasions when the matter came before the court, the applicant was represented. Sinclair-Haynes J made an order extending the time for the applicant and its officers to provide the accounting in accordance with the judgment in default. The respondents were also granted liberty to institute contempt proceedings against the applicant and its directors if the order of the court extending time was not complied with.

[8] It was not until 1 October 2014 that the applicant filed its application in the court below to set aside the default judgment entered on 28 February 2012. The application was heard and refused by Laing J on 2 March 2015. His reasons for doing so was recorded by counsel in the following terms:

> "a. He was not convinced that there is a defence with a prospect of succeeding as the issues raised by the applicant in its draft defence, such as the claims for a proportionate share of maintenance and strata fees, are issues that will be dealt with on an accounting.
>
> b. Even if he had found that there was a defence with a real prospect of success, which is the paramount consideration, he would not be minded to grant the application, because parties cannot flout the Rules and turn around and ask for the court's assistance. He said he found the letter written by the applicant's representative and dated 8 October 2010 very telling, as the applicant dealt with the matter in a flippant way. On top of that, the applicant did not acknowledge service in a timely manner, did not defend the claim, did not treat with contempt proceedings but, instead, had come to court two years later.

c. It was not shown that the application was made as soon as was reasonably practicable.

d. He was concerned that if the defence was allowed to stand, that every party with a reasonable prospect of success would ignore the orders of the court and turn up years later to have the judgment set aside.

e. The suggestion that "without prejudice" discussions provide a good explanation for the delay could not be accepted, as the judgment creditors, before the application to set aside was filed, had pursued contempt proceedings, which showed they were proceeding with their claim notwithstanding whatever discussions were taking place."

[9] Laing J also refused the applicant's application for leave to appeal. Consequently, the applicant was impelled to make this application before this court for permission to appeal with which we are now concerned.

The applicant's submissions

[10] The main planks of the submissions made by Mr Moodie on the applicant's behalf are outlined as follows:

(i) Laing J wrongly placed emphasis on the issue of delay rather than on the primary consideration, which is whether the applicant's defence had a real prospect of success. The learned judge was unable to get past the conduct of the applicant's representatives and as a result did not pay attention to the primary test, which is the real prospect of success of the defence.

(ii) The respondents were asking for an accounting of all sums due from gross revenue but the learned judge failed to give due weight to the fact that when the claim was filed in 2009, it related to sums due from 1999. Accordingly, the learned judge did not take into account that when the claim was filed, a large part of the sums claimed was statute barred.

(iii) The default judgment was entered for an amount greater than the claim. The respondents have claimed that they are entitled to a commission to be agreed over time equal to 20% of the gross room revenue received by the applicant from the bookings of the hotel rooms owned by the respondents. The documents relied on in support of the claim and which are exhibited to the claim form indicate, however, that an allowance is to be made for capital expenditure, being 15% of gross room revenue. The respondents are not entitled to gross room revenue without any allowance for expenditure by the applicant. An order that the respondents are to be paid on gross room revenue would result in them getting a windfall.

(iv) The default judgment is also irregular in other respects as follows:

a. There is an irregularity with respect to the interest rate that was awarded. There was nothing informing the

interest rate, that is to say, that there was nothing placed before George J at the time the judgment in default was entered to indicate the origin of the interest rate. There was no indication as to the currency for the value of the claim and the source of the interest rate was also unknown.

b. The second irregularity is that by the terms of the judgment, the respondents are to be paid sums due on gross revenue following on the accounting as well as damages for unjust enrichment. These are two causes of action arising on the claim that are not permitted to stand together. There cannot be a claim for an account of profit and one for damages for unjust enrichment. The respondents should elect which cause of action they are pursuing as they cannot pursue both. The default judgment is, therefore wrong, in allowing both remedies. The award of damages would result in double recovery and would take it beyond unjust enrichment on the part of the respondents. This is so because the judge at the hearing of the assessment of damages will not be dealing with accounting, but only with damages and so will not be in a position to take

into account any amount that could be said to be due and payable following the accounting exercise. So, if the judgment is not set aside and the matter should proceed to an assessment of damages, the applicant would not have a voice at that hearing to raise any objections in relation to the claim.

c. The third irregularity is that the wording of the order makes it difficult to ascertain what it is that the judgment has awarded and so the judgment, on the face of it, is unclear. This has resulted in the inability of the applicant to comply with its terms.

(v) While, admittedly, there has been inordinate delay and the explanation given for the delay may not be seen as a good one, the applicant had not been sitting on its laurels doing nothing. It had been in active discussions with the respondents with a view to settling the matter both prior to and after the default judgment was entered. A valuation report was to be obtained in an effort to resolve the issues between the parties but the valuation report was not available until January 2014. So, the delay, albeit inordinate, ought not to be used to militate against the application to set aside the judgment.

(vi) Laing J did not pay sufficient regard to the draft defence, which is one of merit and by focusing on the delay he fell into error albeit that it is appreciated that he was being protective of the rules of court. He, however, failed to consider the issues raised in the draft defence and counterclaim.

(vii) Also, given that the defence has a real prospect of success, there are other sanctions that the learned judge could have applied, such as making an order for the applicant to pay costs or interest on costs, rather than refusing the application to set aside the default judgment.

[11] In support of his arguments, learned counsel relied on dicta from **Aberdeen Engineering Ltd v Albany** BS 2011 SC13, paragraph 27 and **Standard Bank PLC & Another v Agrinvest International Inc & Others** [2010] 2 CLC 886, paragraph 21; [2010] EWCA Civ 1400. He also reminded the court of the well-known dictum of Lord Atkin in **Evans v Bartlam** [1937] 2 All ER 646, at page 650 C-D that:

> "…unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."

The respondents' submissions

[12] The contention of the respondents, on the other hand, is that the application for leave to appeal and for the stay of execution ought to be refused. Counsel for the respondent, Ms Hamilton, in a comprehensive and helpful response, maintained that Laing J was not plainly wrong in refusing to set aside the default judgment and so the exercise of his discretion should not be disturbed. The main planks of her submissions are outlined thus:

(i) It is clear that the learned judge considered and applied rule 13.3 of the Civil Procedure Rules (CPR) and that he clearly proceeded to treat with the issue of whether there was a defence with a real prospect of success as the "paramount consideration". An examination of the applicant's defence and counterclaim clearly reveals that there is no defence with a real prospect of success. There are several reasons for saying so, which include the following:

a. The respondents' claim is not statute–barred because the applicable limitation period is that provided by sections 3 and 25 of the Limitation of Actions Act.

b. There was no agreement between the parties that the costs of renovations would be set off against

the applicant's operation of the properties as part of its hotel. Further, there is no evidence of any agreement between the parties that in exchange for having undertaken repairs/renovations of the properties, it would be allowed to operate these as part of the Sunset Beach Resorts. The absence of any agreement as alleged by the applicant is manifested in communication between the parties as exhibited.

c. Even if there were an agreement whereby the costs of renovations were to be set off against room revenues, these claims have become statute – barred.

d. In any event, the quality of the evidence proffered in respect of the costs of renovations is extremely vague and wanting.

e. There is also no evidence of any payments of property tax, strata fees, maintenance or insurance premiums nor any evidence that the strata remains operational. These are all matters within the peculiar knowledge of the applicant and are all

matters that "will come out in the wash" during an accounting as Laing J had stated.

(ii) There was also no good explanation for the delay. The fact that discussions were taking place could not amount to a good explanation in circumstances where the respondents were proceeding with contempt proceedings of which the applicant was aware and in respect of which it participated.

(iii) The application was made some two years and seven months after the applicant was served with the default judgment and some four years after having been served with the claim. This application was made after contempt proceedings were brought and disposed of. It was also made after the applicant had those contempt proceedings adjourned on two separate occasions. In the circumstances, where it has no good explanation and given that contempt proceedings were underway, there can be no saying that the application was made as soon as was reasonably practicable.

(iv) Should the court be minded to grant leave to appeal, the application for a stay should be refused because the applicant has no real prospect of succeeding on the appeal for the reasons already given and the case for other reasons [as detailed] is not one fit for a stay. The justice of the case demands that the

application for a stay be refused. See **Sagicor Bank Jamaica Limited v YP Seaton & Ors** [2015] JMCA App 18.

Analysis and findings

The application for permission to appeal

[13] Rule 1.8(9) of the Court of Appeal Rules (CAR) states that as a general rule, permission to appeal in civil cases will only be given if the court considers that the appeal will have a real chance of success. So, for the applicant to succeed on its application before this court, it must satisfy the court that it stands a real chance of successfully moving the court, if leave to appeal is granted, to conclude that Laing J erred, in the exercise of his discretion within the ambit of rule 13.3(1) and (2) of the CPR.

[14] Rule 13.3 states:

> "13.3 (1) The court may set aside or vary a judgement entered under Part 12 if the defendant has a real prospect of successfully defending the claim.
>
> (2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
>
> (a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.
>
> (b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.
>
> (3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."

[15] It is clear that the primary test for setting aside a default judgment regularly obtained is whether the defendant has a real prospect of successfully defending the claim. The defence must be more than arguable to be such as to show a real prospect of success. The defence must have a 'real' as opposed to a 'fanciful' prospect of success (same as in a summary judgment application). See **Swain v Hillman and another** [2001] 1 All ER 91 and **E D & F Man Liquid Products Ltd v Patel & Anor** [2003] EWCA Civ 472; the *Times* 18 April 2003. The court, in order to arrive at a reasoned assessment of the justice of the case, must form a provisional view of the likely outcome of the case if the judgment were set aside and the defence developed: **Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc** [1986] 2 Lloyd's Rep 22.

[16] Based on the provisions of the CPR and the relevant case law, the considerations for the court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence; the period of delay between the judgment and the application made to set it aside; the reasons for the defendants' failure to comply with the provisions of the rules as to the filing of a defence or an acknowledgement of service, as the case may be, and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside. See Blackstone's Civil Practice 2004 paragraph 20.14 and the cases cited therein.

[17] Given also that the court hearing the appeal would, in effect, be called upon to disturb the exercise of the learned judge's discretion, guidance is obtained from the well-known principles enunciated by Lord Diplock in the oft-cited case of **Hadmor**

Productions Limited v Hamilton [1982] 1 All ER 1042, 1046 and reiterated by Morrison JA (as he then was) in **Attorney General v John MacKay** [2012] JMCA App 1 at paragraph [19] that:

> "[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently."

[18] It is against this background that the impugned decision of the learned judge, in refusing the application to set aside, would have to be assessed by the court hearing the appeal. The question, therefore, is whether the applicant stands a real chance of succeeding on appeal. This would necessitate this court forming a provisional view of the outcome of the case if permission to appeal were granted to the applicant. Having closely examined the circumstances and having taken into account the arguments so ably advanced by counsel on behalf of the parties, we have made several findings as detailed below under consecutively numbered headings (1) to (7).

Findings

(1) The learned judge did not fail to take into account the defence and the counterclaim

[19] The 'gateway' for the grant of the application to set aside the regularly obtained default judgment is whether the defence proposed has a real prospect of success. The applicant had attached its draft defence which the learned judge found had not satisfied the test. He found, primarily that the issues raised in the defence were issues that could properly be dealt with in the accounting that has been ordered on the terms of

the judgment. The defence and the counterclaim have been examined and it is recognised that the learned judge had not failed to pay attention to the nature and quality of the draft defence and the proposed case of the applicant, overall. Basically, it is contending that it has operated the respondents' units as part and parcel of the Sunset Beach Resort but that the respondents had agreed to extensive renovation of the units and are now indebted to it for the costs of such renovations along with other incidental operational costs in respect of which it has filed a counterclaim.

[20] The learned judge's conclusion that the issues raised in the defence and counterclaim can be addressed on the accounting that was ordered by the court and that, as a result, there is no need to set aside the judgment, cannot be faulted. It cannot be said that the position that was taken by the learned judge was unreasonable when one considers the contention of the respondents, which is borne out of documentary evidence, as to what was agreed or not agreed between them, on the one hand, and the applicant. The entitlements of the parties will definitely "come out in the wash" following that accounting exercise. The accounting must be a critical exercise given the issues between the parties. There is nothing to suggest, and it is hardly likely, that the applicant's case could be prejudiced by the order for the taking of the accounts as an accounting is imperative in all the circumstances of the case.

(2) The claim is not statute-barred

[21] The respondents' submission that the claim is not statute barred, as contended by the applicant, is also accepted. The claim is in relation to an interest in land and,

more specifically to recover rent and so for that reason, sections 3 and 25 of the Limitation of Actions Act, relied on by the respondents do become applicable. The sections provide, respectively:

> "3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.
>
> …
>
> 25. No person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity."

[22] Section 2, defines "rent" as extending to all annuities and periodical sums of money charged upon or payable out of any land. The term "land" is defined as extending to "messuages and all other corporeal hereditaments whatsoever, and also to any share, estate or interest in them, or any of them, whether the same shall be a freehold or chattel interest". The respondents' claim clearly relates to such matters.

[23] It is concluded, therefore, that there is no real prospect of success of the applicant's defence in relation to this contention that a part of the claim is statute-

barred. It follows that there is no real chance of the applicant succeeding on this ground if permission to appeal is granted.

(3) The defence otherwise lacks merit

[24] In relation to the argument that there is an agreement between the parties for renovation and repairs in respect of which there is a counterclaim, it was pointed out by learned counsel for the respondents, by reference to exhibited correspondence between the parties that no such agreement exists. According to learned counsel, the parties were in discussions concerning the matter and there was no consensus *ad idem,* which is necessary for a binding agreement. This contention on behalf of the respondents is, indeed, borne out on the undisputed documentary evidence and is, therefore, not without merit.

[25] Furthermore, and even more significantly, the quality of the documentary evidence presented by the applicant in support of the averment that it has expended monies to meet renovations and other expenses left much to be desired. The respondents' argument that the learned judge was not placed in a position to take the defence seriously is an attractive one given the paucity of documentary proof to substantiate the averments of the applicant. It is quite evident that the applicant could not mount an arguable defence, much more one with a real prospect of success, on the proposed pleadings and evidence that it had presented before the learned judge. He would, therefore, have been justified in treating the defence as insincere and as one without a real prospect of success.

(4) The learned judge did not err in placing undue weight on the applicant's delay

(5) The application to set aside was not made as soon as was reasonably practicable after the applicant had found out that that judgment had been entered

[26] Having found that there was no defence with a real prospect of success, which he recognised to be the paramount consideration, the learned judge contended that he would not have been minded to set aside the default judgment due to the conduct of the applicant in prosecuting its case. He reportedly took into account the fact that the applicant did not acknowledge service in a timely manner, did not defend the claim, did not treat with contempt proceedings but instead approached the court two years later after the judgment had been entered.

[27] It is clear from rule 13.3(2)(a) and (b) that it is incumbent on the court to consider whether the application to set aside was made as soon as was reasonably practicable after finding out that judgment had been entered and that a good explanation is given for the failure to file an acknowledgement of service and or a defence as the case may be. So the duty of a judge in considering whether to set aside a regularly obtained judgment does not automatically end at a finding that there is a defence with a real prospect of success. Issues of delay and an explanation for failure to comply with the rules of court as to time lines must be weighed in the equation.

[28] While it is accepted that the primary consideration is whether there is a real prospect of the defence succeeding, that is not the sole consideration and neither is it

determinative of the question whether a default judgment should be set aside. The relevant conditions specified in rule 13.3(2) must be considered and such weight accorded to each as a judge would deem fit in the circumstances of each case, whilst bearing in mind the need to give effect to the overriding objective.

[29] Mr Moodie relied on a portion of paragraph 21 of the judgment in **Standard Bank v Agrinvest International** to reinforce the point that delay is rarely a deciding factor if the defendant could show there is a real prospect of defending the claim. In that paragraph, Moore-Bick LJ stated:

> "21. The authorities relating to setting aside default judgments laid considerable emphasis on the desirability of doing justice between the parties on the merits. Delay in making an application to set aside rarely appears to have been a decisive factor if the defendant could show that he had a real prospect of successfully defending the claim against him. Thus in *JH Rayner (Mincing Lane) Ltd v Cafenorte SA Importadora e Exportadora* SA [1999] EWCA Civ 2015 judgment was set aside after 7½ years on the applicants' showing that they had a defence with a real prospect of success."

[30] What is clear from paragraph 21, when read together with the preceding paragraph, is that Moore-Bick LJ was speaking to what had obtained in the pre-CPR era. What is worthy of note, however, is what the learned judge noted in paragraph 22 of the same judgment in respect of the introduction of the CPR. There, he opined:

> "22. The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that

> one finds for the first time in rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one. However, promptness will always be a factor of considerable significance, as the judge recognized in paragraph 27 of his judgment, and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial."

[31] In **Peter Haddad v Donald Silvera** SCCA No 31/2003, judgment delivered 31 July 2007, Smith JA, in similar fashion, stated at page 11:

> "It was emphasized that 'one of the important aims of the Woolf reforms was to introduce more discipline into the conduct of civil litigation. One of the ways of achieving this is to insist that time limits be adhered to unless there is good reason for a departure'. The Court quoted Lord Woolf in **Biguzzi v Rank Leisure plc** [1999] 1 WLR 1926 at p. 1933 D. ['If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant']."

[32] In our jurisdiction, where there is an embedded and crippling culture of delay, significant weight must be accorded to the issue of delay, whenever it arises as a material consideration on any application. The application to set aside a regularly obtained default judgment is one such type of application where the consideration of delay should figure prominently.

[33] So, in this case, the delay and the conduct of the applicant, in treating with the claim (that he knew existed from 2010) and the application to set aside the default judgment that was entered in 2012, were material considerations for Laing J, which he properly took into account. The record shows that the applicant stated that it had received the claim form with all relevant supporting documents on 27 September 2010. However, the acknowledgement of service was filed roughly four years later on 30 September 2014. Up to then, no defence was filed in keeping with the rules. Judgment in default was entered on 28 February 2012 but the application to set it aside was not made until 1 October 2014, which would have been roughly two years and seven months later.

[34] Notwithstanding the fact that the default judgment was served on the applicant and the order was made by Sinclair-Haynes J on 17 April 2013, compelling the directors of the applicant to comply with the default judgment, no step was taken to have the default judgment set aside. This was so although Sinclair-Haynes J in that order had stipulated that the respondents were at liberty to pursue contempt proceedings against the directors of the applicant if the order for the accounting was not complied with. The applicant did nothing about the judgment until roughly one year and five months later.

[35] It is indisputable that the applicant has failed to comply with every applicable rule and every order of the court for approximately four years even when the respondents had taken steps to enforce the judgment and were permitted to pursue

contempt proceedings if the non-compliance continued. Despite all that, the applicant has failed to comply with the rules and orders of court and had waited for well over a year to approach the court for relief.

[36] In **Arbuthnot Latham Bank Ltd & Another v Trafalgar Holdings & Others Ltd** [1997] EWCA Civ 2999 [1997] TLR 698, Lord Woolf MR stated:

> "It is already recognised by *Grovit v Doct*or (1997) TLR 214; [1997] 1 WLR 640 that to continue litigation with no intention to bring it to a conclusion can amount to an abuse of process. We think that the change in culture which is already taking place will enable courts to recognise for the future, more readily that heretofore, that a wholesale disregard of the rules is an abuse of process…"

(See **UCB Corporate Service Ltd (formerly UCB Bank plc) v Halifax (SW) Ltd** TLR 23 December 1999.)

[37] Without the need for closer scrutiny, it is considered safe to say that the delay on the part of the applicant is inexcusable and its conduct from the date the claim form was served on it does show scant regard or, rather, 'wholesale disregard' for the rules and orders of the court. Indeed, it may be said to be tantamount to an abuse of the process of the court. Given the circumstances of this case, the learned judge cannot at all be faulted for taking a robust stance in the protection of the rules and of the authority of the court in making its orders. The learned judge cannot be faulted in giving significant weight to the question of delay, which was warranted on these facts. There is no merit in the contention that he fell in error in placing undue weight on delay and insufficient weight on the prospect of success of the defence. In fact, the delay is of such magnitude that it would have overshadowed or outweighed the merits of the

defence, had there been any. This ground is one on which the applicant also has no real chance of succeeding on appeal.

(6) The learned judge was correct to find that the explanation proffered by the applicant for the delay was not a good one

[38] The applicant has contended that it was always taking steps to resolve the matter and so it was engaged in negotiations for the settlement of the matter. It was after the applicant had exhausted such negotiations and no resolution was arrived at, that it took steps to have the default judgment set aside. This explanation is by no means an acceptable one. It should have been abundantly clear to the applicant and its legal representatives from the very outset that even with discussions, the respondents were active in prosecuting their claim. If no other step taken by the respondents in the proceedings would have made this clear, the proceedings before Sinclair-Haynes J for enforcement of the judgment would have done so. This would have shown that regardless of discussions, the respondents were serious about their claim.

[39] The applicant ought to have treated the claim and its response to it with the same seriousness displayed by the respondents. The need on the part of the applicant to move with some degree of responsibility and alacrity in protecting itself against contempt proceedings would have become greater with the order of Sinclair-Haynes J, yet the applicant failed to approach the court to deal with the judgment that had been entered for almost two years. Simply put, no effort was made by the applicant to comply with any rules of court applicable to the case.

[40] Mr Moodie had also indicated to this court (albeit that this was never raised before Laing J) that the applicant was unable to comply with the judgment because it is not clear on the face of it as to what was awarded. It is noted, however, that at no time did the applicant approached the court for clarification or further directions, which it could have done. This would have been so even though adjournments were granted to it to respond to the proceedings that were before Sinclair-Haynes J. In considering the arguments advanced on behalf of the applicant, the dictum of Lord Dyson, speaking on behalf of the Privy Council in **Attorney General v Universal Projects Limited** [2011] UKPC 37, is instructive. At paragraph 24 of the judgment, his Lordship approved the reasoning of Jamadar JA of the Court of Appeal of Trinidad and Tobago, when he stated that:

> "A party cannot in the face of a court order pursue a course that it knows or reasonably anticipates will lead it afoul of that order and then pray in aid of relief from the sanctions of the order the circumstances that it was aware could lead to default. In such circumstances a party must act promptly to either comply with the court order or to secure further directions so as to avoid default."

[41] The applicant ought to have acted promptly in all the circumstances to comply with the court order and if there were problems being encountered, to approach the court for further directions in order to avoid default with the concomitant sanctions. The learned judge was correct in rejecting the applicant's explanation as a good one in all the circumstances of the case. There is no real chance of this ground succeeding if the matter were to proceed to appeal.

(7) New grounds improperly raised in submissions that were not raised in the court below and not set out as grounds for the application for permission to appeal

[42] Mr Moodie has highlighted several matters that he called 'irregularities' in the default judgment which he said provide additional basis for it to have been set aside by Laing J. He sought to challenge the propriety of the award of interest and the order that damages for unjust enrichment are to be assessed. He also alleged that the default judgment was entered for a sum greater than the claim and (as already alluded to) that the judgment is not clear on the face of it. (See the applicant's submissions at paragraph [10 (iv)] above.)

[43] It is observed that these matters labeled as irregularities were not part of the grounds on which the application to set aside the default judgment was based when the matter was considered by Laing J. In fact, those matters were raised for the first time before us and only during the course of oral submissions. These issues raised by learned counsel for the applicant do relate to the validity or accuracy of the default judgment entered by George J. As such, Mr Moodie's stance on these matters does amount to an appeal against that judgment in respect of which the time to file an appeal in relation to it had long passed. This approach of learned counsel (albeit, seemingly, unwittingly taken) does amount to an appeal being brought against the judgment of George J, 'through the back door'. The approach cannot be sanctioned by this court and so these submissions cannot be accepted.

[44] It should be noted too, in any event, that Laing J was not sitting as an appellate court in relation to the action of George J in granting the default judgment in the terms she did. His duty was to consider the application to set aside the judgment within the ambit of rule 13.3 that expressly specifies the matters to which he must have regard. Having considered what Mr Moodie has urged on this court in relation to these matters against this background, it will simply be said that those matters are not accepted as forming any valid basis on which the decision of Laing J, in refusing to set aside the default judgment, could properly be disturbed.

Conclusion

[45] All the arguments efficiently and vociferously advanced by Mr Moodie on the applicant's behalf have been considered, but, unfortunately, there is nothing in them that could justify the court in interfering with the decision of Laing J, if permission to appeal were granted. It cannot at all be contended, with any sincerity, that the learned judge exercised his discretion given to him by rule 13.3, on wrong principles of law, so as to warrant interference with his decision on appeal. He gave due regard to all material considerations that were applicable to the application before him and treated properly with them. The applicant would, therefore, face a formidable challenge in convincing the court, if permission to appeal were granted, that the learned judge had exercised his discretion wrongly.

[46] Accordingly, the applicant on the grounds outlined in its notice of application and as advanced before this court does not have a real chance of succeeding on appeal and for that reason permission to appeal is refused.

[47] In the light of this finding, there is no need to consider the second limb of the notice of application for stay of proceedings. There is no basis on which a stay of the default judgment and of the order of Sinclair-Haynes J, as applied for, could be granted.

ORDER

(1) The applicant's notice of application for leave to appeal and stay of execution filed on 12 March 2015 is refused.

(2) Costs of the application to the respondents to be agreed or taxed.