[2016] JMCA App 31

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 47/2016

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

BETWEEN	**LLOYD KERR (T/A EMPIRE SUPERMARKET)**	**1ST APPLICANT**
AND	**CHRISRYON LIMITED**	**2ND APPLICANT**
AND	**CHRISTENE MYERS**	**RESPONDENT**

Kevin Williams and Mrs Kimberley McDowell instructed by Grant, Stewart, Phillips & Co for the applicants

Joseph Jarrett instructed by Joseph Jarrett & Company for the respondent

18 April and 25 November 2016

BROOKS JA

[1] In 2002, with the introduction of the Civil Procedure Rules, a regime was established whereby it was envisaged that civil cases originating in the Supreme Court would be dealt with justly. Several cases since that time have emphasised that cases compete for the scarce resources of the court and therefore litigants should be mindful not to abuse the time offered to them by the court for the just disposal of their

respective cases (see for example **Commissioner of Lands v Homeway Foods Ltd and Another** [2016] JMCA Civ 21 at paragraphs [50] and [119]).

[2] The present case is one in which the applicants, Mr Lloyd Kerr and Chrisryon Limited have not been mindful of that restriction. The circumstances leading to their present application for permission to appeal a judgment of Master Harris, which is dated 15 February 2016, is an example of their disregard.

[3] On 30 March 2012, Ms Christine Myers was injured at a supermarket at Portmore Pines, in the parish of Saint Catherine. She was employed at the supermarket. The name of the supermarket is Empire Supermarket. Curiously, that name has been used by both of the applicants as a trading name. Mr Kerr first registered that name in 1981 (paragraph 5 of the affidavit of Christene Myers filed on 13 December 2013). Chrisryon Limited (hereafter called Chrisryon), although registered as a limited liability company in 1982, also registered Empire Supermarket as a trading name in 2010 (pages 107 and 108 of the record of appeal). Mr Kerr is the managing director of Chrisryon.

[4] In October 2012, Ms Myers filed a claim in the Supreme Court, naming both Mr Kerr and Chrisryon as defendants thereto. The applicants failed to file an acknowledgement of service within the stipulated time and in October 2013 a judgment in default of acknowledgement of service (dated 11 December 2012) was entered against them.

[5] Although they do not dispute that Ms Myers is entitled to recover damages for her injuries, the applicants have sought to set aside the default judgment. They applied, in an application for court orders filed on 18 May 2015, to be allowed to enter a defence as to quantum. They now assert that Mr Kerr is not a proper party to the claim and that Chrisryon, although admitting liability, would like to be able to test Ms Myers' claim with respect to the quantum of damages to which she is entitled.

[6] They have, however, not been diligent in their approach. At least three applications were made in the Supreme Court with respect to the setting aside of the judgment. In two of them, the applicants failed to attend at the allotted time and a decision, adverse to them, was made in their absence. Their application to set aside the default judgment finally came on before Master Harris, who, after hearing both parties, dismissed the application and refused leave to appeal. The orders made by the learned Master are:

> "1. The Application to Set Aside Default Judgment is refused
>
> 2. The Application to enter judgment on admission is refused.
>
> 3. Permission to enter Defence as to quantum is refused.
>
> 4. Permission to remove the 1st Defendant as a party to the proceedings is refused.
>
> 5. Matter to proceed to assessment of damages.
>
> 6. Leave to appeal refused

7. Costs of this application to the claimant to be taxed, if not agreed.

8. Applicant's Attorneys-at-Law to prepare, file and serve this order."

It is from that decision that the applicants now seek permission to appeal.

The time within which the application ought to be made

[7] Counsel for Ms Myers, Mr Jarrett, submitted that the application for leave to appeal was filed out of time and therefore the application was not properly before the court. He accepted that although the document containing the written reasons for judgment of Master Harris is dated 15 February 2016, it was in fact handed down to the parties on 16 February 2016. Nonetheless, he argued, the present application, having been filed on 2 March 2016, was filed out of time. He submitted that the last date for filing the application was 1 March 2016.

[8] Mr Williams, on behalf of the applicants, submitted that the application had been filed within the time specified by rule 1.8(1) of the Court of Appeal Rules 2002 (CAR).

[9] The issue raised by Mr Jarrett turns on an interpretation of the term "within 14 days of the order" as used in rule 1.8(1) of the CAR. The rule states:

> "Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission **within 14 days of the order** against which permission to appeal is sought." (Emphasis supplied)

[10] The issue was recently analysed in **Royal Caribbean Cruises Ltd and Another v Access to Information Appeal Tribunal** [2016] JMCA App 19. Although,

in that case, the court was considering rule 56.4(12) of the Civil Procedure Rules 2002 (CPR), the relevant part of that rule is materially indistinguishable from rule 1.8(1) of the CAR. Rule 56.4(12) states:

> "Leave is conditional on the applicant making a claim for judicial review **within 14 days of receipt of the order granting leave**." (Emphasis supplied)

[11] By a majority, the court decided in **Royal Caribbean Cruises** that when the rule stipulated that an act should be done "within" a number of days, under the principle guiding "clear days" as used in the CPR and CAR, it was only the first day that ought not to be counted for the purposes of calculating the time for performing the act, so that the act ought to be done no later than the 14th day after the triggering event. In this case, the triggering event was the handing down of Master Harris' judgment. That was done on 16 February 2016. Starting counting on 17 February 2016, the 14th and last day for complying with rule 1.8(1) of the CAR was 1 March 2016. The applicants had therefore filed their application out of time. Having been filed out of time, it is therefore ineffective (see **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** SCCA No 109/2007 Application No 166/2007 (delivered 26 September 2008 at page 5)). There is no application for an extension of time and therefore that should be the end of the matter, and the present application should fail.

Prospects of success

[12] Despite the procedural defect, there is another basis on which the applicants ought not to be granted permission to appeal. The test for determining whether permission to appeal should be granted is whether the applicant has a real chance of success in the proposed appeal. Rule 1.8(7) of the CAR stipulates the test:

> "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**." (Emphasis supplied)

The CPR does not provide, as does the Civil Procedure Rules of England and Wales, for setting aside a default judgment for "some other good reason" (rule 13.3(1)(b)).

[13] The issue to be determined in the proposed appeal is whether the learned Master can be faulted in the exercise of her discretion in the application that was before her. In undertaking the task of convincing this court that the learned Master was in default of her duty, the applicants have an uphill task. This court has, on a number of occasions, pointed out that it will not lightly disturb a decision in which the tribunal in the court below was exercising its discretion. In **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, Morrison JA (as he then was) set out this court's approach at paragraph [20] of his judgment (with which the other members of the panel agreed). He said:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist -

> which 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 judge regardful of his duty to act judicially could have reached it'."

In taking that approach, the court adopted, as being valid in our jurisdiction, the position taken by the House of Lords in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042. Morrison JA said at paragraph [19] of his judgment:

> "...the proposed appeal will naturally attract Lord Diplock's well-known caution in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046 (which, although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):
>
> > '[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.'"

In **The Attorney General v John Mackay** the court was considering an application for permission to appeal.

[14] In this case the learned Master was asked to set aside a regularly entered judgment in default of appearance. The other major requests in the application, which was filed on 18 May 2015, was for the applicants to be allowed to enter a defence as to quantum and that Mr Kerr be removed as a party to the proceedings.

[15] The learned Master set out the provisions of rule 13.3 of the CPR, which deal with applications to set aside judgments in default. She also considered the history,

including the delays, of the matter, the various applications that were made by the applicants and their failure to attend on the various dates when those applications were to have been heard. She contemplated the fact that the applicants were not contesting liability, but noted that they had provided no basis on which to advance a defence as to quantum. The learned Master examined various decided cases that dealt with the issues before her. After that analysis, she stated at paragraph [23] of her written judgment:

> "Having examined all the circumstances, the applicant has failed to show by acceptable evidence that it has a Defence on the merits with a real prospect of success. If counsel failed to carry out their duties in the interest of the defendant, that is a matter between counsel and the Defendant. As far as the Claimant is concerned, she has done everything to secure her judgement which ought not to be deprived [sic] without good and compelling reasons being shown. To set aside the default judgment given the totality of the circumstances would not be in keeping with the overriding objective of the CPR which is generally speaking to engender justice between the parties and to put all the parties on an equal footing."

The learned Master did not consider, in her concluding paragraphs, that Mr Kerr was applying to be removed as a party to the litigation.

[16] The learned Master made no error of judgment when she refused to allow the applicants to substitute a defence as to quantum for a default judgment. The applicants had shown no basis on which it could be said that they had a real prospect of success in contesting Ms Myers' claim for damages. They have not indicated any evidence that they would wish to produce in order to counter her disclosed evidence. In that regard their proposed defence is no more than fanciful (see the reasoning on the point in **Harris v Fyffe and Another** 2005 HCV 2562 (delivered 30 July 2007)). Their right to

participate in the exercise of assessing those damages, based on the decision of the Constitutional Court in **Natasha Richards and Another v Errol Brown and the Attorney General** [2016] JMSC Civ 22, is not an issue for analysis in this application. There is therefore no real prospect of success of an appeal against the learned Master's decision on this aspect of the case.

[17] There is however the aspect of whether Mr Kerr ought to have been removed as a party. The learned Master failed to specifically consider this aspect in her analysis of the application. The major point which would be the subject of an appeal, if one were permitted, is whether the person who is the registered holder of the business name, Empire Supermarket, should be removed as a defendant to the claim, because a limited liability company claims to also operate under that name.

[18] The affidavit evidence shows that Chrisryon was Ms Myers' employer. Nonetheless, counsel for Ms Myers has pointed out that her claim is also founded on the Occupiers' Liability Act and that she was injured on the premises occupied by the business, Empire Supermarket. She has asserted that Mr Kerr is the owner or lessee of the premises and her assertion has not been denied.

[19] In my view, the learned Master was exercising a discretion whether or not to set aside the default judgment in the face of a cavalier approach by the applicants' attorneys-at-law to Ms Myers' position. They did not deal with her case justly. They delayed in filing an acknowledgment of service, they failed to attend court, not once, but twice, when their application to set aside the default judgment was scheduled for

hearing, and they caused Ms Myers unnecessary expense with their multiple applications.They have used more than their fair share of the court's scarce resources.

[20] It is not to be ignored, and it did not escape the learned Master's attention that when the applicants first applied to set aside the default judgment, they proposed to enter a defence as to liability. In addition to that fact, it has been asserted by Ms Myers' attorney-at-law, and not denied by the applicants, that Chrisryon, since the filing of the claim, "has ceased to function and is believed to be in insolvency/bankruptcy" (paragraph 7 of affidavit filed on 21 March 2016).

[21] All that an appeal would achieve is to force Ms Myers to incur further expense before being able to pursue the assessment of damages, with the possibility, that she could be met with a situation where she would recover nothing because of the judgment debtors' inability to pay. A court should never consider that as dealing with a case justly.

[22] On the contrary, there would be no irrevocable prejudice to the applicants. Chrisryon, as mentioned before, has accepted that it is liable to Ms Myers. It should know as quickly as possible what the quantum of that liability is. The applicants can resolve, between themselves, what their individual liabilities should be. If it is that Chrisryon should bear all the responsibility for paying Ms Myers, Mr Kerr is in a position to either have Chrisryon settle the liability with her directly or to have it reimburse him for any expense that he incurs in that regard.

Conclusion

[23] Despite her failure to consider the aspect of Mr Kerr's removal, the learned Master was entitled to take the course that would move the case forward. The case was scheduled for an assessment of damages. It should be heard without further delay. That would be the course that would tend toward achieving the overriding objective. This court should follow the learned Master's course and dismiss this application as having no real prospect of success.

[24] Based, therefore, on both the procedural defect and a lack of a real prospect of success, I would refuse the application with costs to the respondent.

SINCLAIR-HAYNES JA (DISSENTING)

[25] This is an application by Lloyd Kerr (the 1st applicant) and Chrisryon Limited (the 2nd applicant) seeking leave to appeal the order of Master Rosemarie Harris refusing leave to set aside default judgment *inter alia*. The application is trenchantly resisted. There have been several delays in adhering to the guidelines. The issue is whether the learned master's exercise of her discretion ought to be interfered with. Scrutiny of the reasons for and the extent of the delays is necessary in determining whether the exercise of her discretion was in keeping with rule 13.3 of the Civil Procedure Rules (CPR).

The claim

[26] It is Ms Christene Myers' (the respondent) claim that on or about 30 March 2012 whilst she was in the wash area of the Empire Supermarket, three heavy boxes which contained bottles of water fell on her back causing her to fall on her left knee. As a consequence, she suffered personal injuries, loss and damage.

The background

[27] The applicants say they were served with claim form and particulars of claim on 26 October 2012. The respondent however says it was on 22 October 2012.The affidavit of service was however not exhibited. An acknowledgement of service was not filed until 14 December 2012, 35 days after the appointed time. Their attorney attributes this failure to "administrative oversight". Counsel for the applicants say they became aware of their non compliance upon the receipt of a letter of 11 December 2012 from the respondent's counsel which informed of the respondent's intention to obtain judgment in default. Their request for an extension of time was refused. A request for default judgment was filed on 11 December 2012.

[28] Thus on 14 December 2012, an acknowledgement of service and an application to file defence out of time were filed on behalf of the applicants. The acknowledgement of service advised that Mr Kerr, the 1st applicant named in the suit was incorrectly joined and that the correct party was "Chrisryon Limited (T/A Empire Supermarket)".

[29] The notice of application for court orders was also filed on behalf of the applicants on 14 December 2012 in which the applicants sought an extension of time for filing and serving their defence and permission to file their defence within three days of the hearing of the application.

[30] The application was supported by learned counsel Ms Kimberly McDowell's' affidavit of 14 December 2012 in which she deponed that the applicants were served with the claim form and particulars on 26 October 2012 and on that same day they forwarded the documents to her office with instructions to act on their behalf. Her secretary however failed to prepare the acknowledgement of service and she (counsel) overlooked the preparation and the filing of the documents. The month of October, was extremely hectic with "immense work pressure" which resulted in her overlooking the file thus neglecting both the preparation and filing of the acknowledgement of service. The applicants were not aware of the state of affairs, she says.

[31] Ms McDowell was made aware that the respondent had requested judgment in default on 12 December 2012 by way of letter from the respondent's attorney at law. The time for filing the defence had expired on 7 December 2012. The following day she advised the respondent's attorney of the issues which confronted her.

[32] The application came up for hearing on 2 May 2013 and was struck out by Master Bertram-Linton because of the applicants' attorneys' failure to attend at 10:00 am when the matter was called before her in chambers. Counsel for the applicant however deponed that at 10:00 am they were in open court attending to a winding up

petition which had been wrongly listed in the court for 10:00 am instead of 2:00 pm. She attended upon that court to inform the court of the error. Having dealt with that matter, counsel returned to her chambers where she became aware that the instant matter had been set for 10:00 am and not 2:00 pm as had been diarized. She forthwith contacted the court and counsel for the respondent but was advised that the application had been struck out.

[33] A draft defence was subsequently exhibited to Ms McDowell's supplemental affidavit of 2 May 2013 in which the applicants denied that Mr Kerr was a businessman trading as Empire Supermarket and asserted *inter alia*, that Mr Kerr was the managing director of Chrisryon Limited and therefore a separate personality.

[34] Consequently, renewed applications were filed on 2 May 2013 and on 18 November 2013. In the application of 2 May 2013, the 2nd applicant admitted liability, but sought:

i. An extension of time for serving and filing of the defence pursuant to rule 10.3(9) of the CPR; and

ii. Permission to file their defence within three days of the hearing of the application.

[35] The grounds on which the application was sought was that the applicants wished:

i. an extension of time for filing a defence as to quantum;

ii. the [respondent] will suffer no prejudice in the circumstances;

iii. the overriding objective favours the grant of the orders sought; and

iv. to rely on Ms McDowell's affidavit of 14 December 2012; and her supplemental affidavit filed 2 May 2013.

[36] The application was supported by two affidavits of Ms Kimberley McDowell. In her affidavit of 14 December 2012 she averred that the 1st applicant had a good defence to the claim because he was/is not a proper party to the claim and that the second applicant attributes liability and or contributory negligence to the respondent. In that affidavit she averred that the respondent had contributed to her injuries.

[37] In her supplementary affidavit of the 2 May 2013 however she deponed that the 2nd applicant desired to be heard at the assessment of damages. A draft defence was attached to Ms McDowell's affidavit in which it was again asserted that Mr Kerr was not a proper party to the claim.

[38] Whilst that application was pending, the respondent filed an amended request for default judgment on 12 June 2013 and on 11 October 2013 the deputy registrar entered default judgment for the respondent.

[39] The applicants renewed their application on 18 November 2013, for the judgment entered against the applicants to be set aside pursuant to rule 13.2 of the CPR and for permission to file their defence within three days of the application. The grounds on which the application was sought were:

> "1. The Defendant has filed an acknowledgment of service dated December 14, 2013 out of time.
>
> 2. Rule 12.4 (c) (i) cannot be satisfied as the Defendant has filed and served an acknowledgment of service in this claim.
>
> 3. Rule 12.5 (e) of the Civil Procedure Rules precludes a default judgment from being entered once there is a pending application for an extension of time to file a defence.
>
> 4. An application for an extension of time to file defence was filed by the [applicants'] attorneys-at-law on May 2, 2013 supported by the Affidavits of Kimberley McDowell filed on December 14, 2012 and May 2, 2013 respectively.
>
> 5. The said application has been set to be heard by the court on December 5, 2013 at 2:30 p.m.
>
> 6. Rule 13.2 of the Civil Procedure Rules requires the court to set aside any default judgment entered under Part 12 where such judgment was wrongly entered because the conditions under rule 12.4 or 12.5 could not be satisfied.
>
> 7. The [Applicants] would like the opportunity to be heard on the issue of quantum and accordingly seeks to have the court's permission to file their Defence as to quantum as exhibited to the said Affidavit of Kimberley McDowell filed on May 2, 2013.
>
> 8. The court's granting of the orders sought herein will not adversely prejudice the [Respondent].
>
> 9. The application of the overriding objective favours the grant of the orders sought herein, who will be receiving assessed damages in any event."

In her affidavit in support, Ms McDowell asked to be heard on the issue of quantum and to file a "Defence as to quantum as exhibited" to her affidavit filed on 2 May 2013.

[40] The applications were heard by Master Bertram-Linton on 5 December 2013. All parties attended and the matter was adjourned part heard for continuation on 26 March 2014.

[41] On the 26 March 2014, the applicants' attorney was absent and the matter was struck out. On 31 March 2014, a notice of application for court orders was filed on behalf of the applicants requesting, *inter alia*, permission:

i. to enter a defence to quantum within three days; and
ii. to attend the assessment of damages hearing to lead evidence in support of the defence as to quantum.

[42] In support of that application, on 31 March 2014, Mr Mark Reynolds, counsel for the applicants, deponed that on 5 December 2013 the matter had been adjourned to 2:00pm on 26 March 2014 and not 10:00 am. He averred that on the said 26 March 2014 he attended the chambers of the learned master at about 12:30 am and was informed by her clerk, Ms Fenton that the matter had been set for 10:00 am.

[43] He was also informed by Master Bertram-Linton that he had "missed the time for the application" and that the application had been dismissed with costs to the respondent in the sum of $50,000.00. A perusal of the minute sheet however revealed that the matter was neither set down for 10:00 am nor 2:00 pm.

[44] Counsel, in his affidavit in support of the application, reiterated that the 2nd applicant was not contesting liability but wished to be heard on the issue of quantum

of damages at the assessment hearing and desired the ability to adduce evidence to clarify salary payments and medical care which they had made to the respondent.

[45] The renewed application of 31 March 2014 came up before Master Harris on 9 March 2015 and case management orders were made. Ms McDowell averred in her affidavit of 2 March 2016 that on 9 March 2015 an oral application which to set aside the default judgment. Ms McDowell also submitted that the applicants requested permission and were allowed to amend their notice of application for court orders to formally include a request for an order to set aside the default judgment and for the removal of the 1st applicant as a party to the proceedings in keeping with the assertion which had been made in the acknowledgement of service.

[46] On the said 9 March 2015, the respondent, by way of judgment summons, sought to imprison the first applicant. An amended notice of application was subsequently filed on 18 May 2015 in which the applicants sought *inter alia* the following orders:

> "The judgment entered against the [appellants] be set aside pursuant to rule 13.3 of the CPR;
>
> The [appellants] be allowed to enter a defence as to quantum within three days of the date of hearing of this application;
>
> The [appellants] be permitted to attend upon the assessment of damages hearing and lead evidence in support of the defence as to quantum;
>
> That the first [appellant] named herein, Lloyd Kerr T/A as Empire Supermarket be removed as a party to these proceedings."

[47] On 15 June 2015, case management orders were made by Master Harris. The matter was adjourned to 4 and 23 November 2015. On 15 February 2016 she gave an oral decision refusing the applications. Her written reasons were emailed to the parties on 4 March 2016. The learned master ordered as follows:

> "1. The Application to Set Aside Default Judgment is refused.
>
> 2. The Application to enter judgment on admission is refused.
>
> 3. Permission to enter Defence as to quantum is refused
>
> 4. Permission to remove the 1st Defendant as a party to the proceedings is refused.
>
> 5. Matter to proceed to assessment of damages
>
> 6. Leave to appeal refused
>
> 7. Costs of this application to the claimant to be taxed, if not agreed.
>
> 8. Applicant's Attorneys-at-Law to prepare, file and serve this order."

The application for leave to appeal

[48] Consequently, on 2 March 2016, the applicants sought the leave of this court to file the following proposed grounds of appeal challenging the order of Master Harris. The affidavit in support of the application deponed to by Ms McDowell exhibited a draft notice and grounds of appeal. The said proposed grounds of appeal were subsequently

amended and exhibited to the supplemental affidavit of Ms McDowell which was filed on 13 April 2016. The facts and law stated hereunder were challenged:

> "1. The learned Master erred in refusing to set aside the default judgment against the Appellants herein. More specifically, the learned Master failed to recognize that on the evidence that was before the Court on the hearing of the Defendants' Application the Court could
>
> (a) Set aside the Default Judgment and/or
>
> (b) Vary the default Judgment and substitute therefor a Judgment on Admission against the 2nd Defendant;
>
> 2. The learned Master erred and/or failed to recognize that in order to fully participate in the hearing of the Assessment of Damages the CPR allowed the 2nd Defendant to apply to set aside the default judgment and/or ask the court to substitute a judgment on Admission in place of the default Judgment. In any event, the failure to make an Order allowing the 2nd Defendant to fully participate in the Assessment of Damages has been overtaken by the recent decision of Constitutional Court in **NATASHA RICHARDS & ANOR. -V- ERROL BROWN & THE ATTORNEY GENERAL [2016] JMSC CIV. 22**
>
> 3. The learned Master erred in finding that the Appellants have failed to show by acceptable evidence that they have a Defence on the merits with a real prospect of success;
>
> 4. The learned Master erred in failing to appreciate that on the unchallenged evidence that was before the Court on the hearing of the Application there was either no Claim with a real prospect of success against the 1st Defendant and/or any reasonable ground for bringing the Claim against the 1st Defendant. As such the learned Master ought to have exercised her discretion under PART 15.2(a) AND/OR PART 26.3(1)(c) of the CPR in making an order in favour of the 1st Defendant.
>
> 5. The learned Master erred in finding that the Amended Application to set aside the default judgment and enter Judgment on Admission was filed more than a year after the order on the

application of the 23rd day of March 2014 and more than a year since the default judgment was filed;

6. The learned Master erred by failing to consider the timeline and totality of the circumstances in relation to all the applications made by the Appellants herein;
7. The learned Master erred in refusing to allow the 2nd Appellant to file a Defence as to Quantum in that:

    i. The medical evidence that is being relied upon by the Respondent herein does not support the injuries as pleaded and claimed by the Respondent;

    ii. The Appellants did not have a duty to provide medical evidence during a preliminary application; and

    iii. The Respondent would not have been prejudiced as the matter would proceed to an Assessment of Damages hearing in any event.

8. The learned Master erred in refusing to strike out and/or remove the 1st Appellant herein as a party to these proceedings, in that:

    i. The learned Master failed to consider that there was no evidence put forward by the Respondent showing a nexus between the 1st Appellant herein and the Respondent in so far as liability;

    ii. The evidence put forward by the Respondent supported the arguments that the 1st Appellant was not a proper party to these proceedings;

    iii. The learned Master failed to adjudicate as to the reasons for the exercise of her discretion in refusing to remove the 1st appellant herein as a party to these proceedings;

    iv. The learned Master failed to consider that notwithstanding the Respondent being notified that the 1st Appellant was not personally liable to her, the Respondent nevertheless sought to enforce judgment for costs against the 1st Appellant in his personal capacity by seeking an order of commitment against him;

v. The learned Master failed to consider the unchallenged evidence put forward by Lloyd Kerr (1st Defendant) demonstrating that Empire was owned by Chrisryon Limited and not by him; and

vi. The learned Master failed to properly consider the Affidavit of Lloyd Kerr filed on May 20, 2015 and exhibiting a Draft Defence setting out that he was not personally liable to the Respondent in circumstances where he did not employ her in his personal capacity.

9. The learned master erred in finding that to set aside the default judgment given the totality of the circumstances would not be in keeping with the overriding objective of the CPR."

[49] The applicants also challenged the following findings of fact and law:

i. The Appellants did not satisfy Civil Procedure Rule 13.3;

ii. The Appellants have failed to show an Affidavit on the merits;

iii. The appellants have failed to show by acceptable evidence that it has a Defence on the merits with a real prospect of success;

iv. The Appellants wished to have the Default Judgment set aside and a Judgment on Admission entered in favour of the Respondent (Claimant herein);

v. The Appellants ought to have shown evidence which contradicts the claimants [sic] factual assertions in their pleadings or otherwise which their active involvement in the assessment exercise can fully reveal;

vi. The Affidavit of Lloyd Kerr filed May 20, 2015 only indicates a schedule of payments;

vii. The Affidavit of Kimberley McDowell in paragraph 15 merely states that they would like to be heard on the issue of quantum and seeks the courts [sic] permission to file its defence as to quantum;

viii. **To set aside the default judgment given the totality of the circumstances would not be in keeping with the overriding objective of the CPR;**

ix. The Appellants failed to apply to set aside the default judgment promptly; and

x. The Respondent (Claimant herein) would be prejudiced if the default judgment were to be set aside."

The respondent's submission

[50] In resisting the application, the respondent says that the application was filed a day out of time and therefore is not properly before the court. On behalf of the respondent, Mr Jarrett submits that the applicants have not complied with rule 1.8(1) of the Court of Appeal rules (CAR). Counsel contends that the Master, having given her decision on 15 February 2016, the application ought to have been filed on 1 March 2016 and not 2 March 2016.

[51] He posits that of the four occasions the applicants applied to the court for court orders, their applications were dismissed on three. He complains that although the applicant has accepted liability, they have made no offer of interim payment and have refused to contribute towards the costs of the medical report.

[52] According to counsel, the 1st applicant is the chief executive officer and owner/founder of Empire supermarket which is registered under the Business Names Act. He contends that at the time of the accident he was the lessee of the premises which was operated by the 2nd applicant. He argues that the claim also includes

damages for breach of the Occupier's Liability Act. The first applicant, he postulates, was therefore a proper party to the claim. He points out that:

1. since the matter has been filed, the 2nd applicant is apparently in bankruptcy/insolvency and has ceased to function;

2. there has been no rebuttal of the respondent's assertion that the 1st respondent is the owner lessee of the building in which she was injured.

[53] Counsel argues that the applicants have failed to satisfy the court that the default was irregularly entered or that they have a good and arguable defence. He argues that, they have no real prospect of succeeding on their appeal. Further, he submits that the applicants are not disputing liability so there was no reason for the court below to have set aside the default judgment and no reason has been advanced to this court which merits the grant of a stay. He says they have been allowed sufficient latitude in the matter.

The law

[54] I am mindful that only if the learned master's decision is "blatantly wrong" or her decision so deviant, would this court's interference be justified (see **G v G** [1985] 2 All ER 225 and **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042). By virtue of Rule 1.8(7) of the CAR, in order to obtain permission to appeal in civil cases, the applicants are obliged to demonstrate that the appeal has a

real chance of success. It is settled that the use of the word "real", requires the applicant to have a 'realistic' as opposed to a 'fanciful' prospect of success, which as Potter LJ in **ED and F Man Liquid Products Ltd v Patel and Anor** [2003] EWCA Civ 472 further clarified, must carry some degree of conviction (see also **Swain v Hillman** [2001] 1 All ER 91).

[55] Rule 13.3(1), (2) and (3) of the CPR deals with the factors the learned master ought have considered in determining whether to set aside or vary the default judgment of Master Bertram Linton. Rule 13.3 (1), (2)and (3) reads:

> "13.3 (1) the court may set aside or vary a judgement [sic] 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."

Is the application for permission to appeal out of time?

[56] It was also counsel's submission that by virtue of rule 1.8(2) of CAR, the applicants were mandated to first apply to the court below for permission to appeal

and such an application was in fact made before the learned master who refused same.

[57] Rule 1.8(1) of the CAR states:

> "Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought."

By majority decision in a recently decided case of this court, **Royal Caribbean Cruises Ltd and Another v Access to Information Appeal Tribunal and Port Authority of Jamaica and Jamaica Environment Trust** [2016] JMCA App 19, the court held that in calculating time for performing an act pursuant to the CPR and CAR, the interpretation to be given to "clear days" will in cases such as the instant case exclude only the first day. On that interpretation of the rules, the applicant's application would have been out of time by one day.

[58] The issue is whether the application ought to fail on that basis. In making a determination on the issue, the court ought, in my view, to consider the fact that until the determination of **Royal Caribbean** on 24 June 2016, in the matter of the consolidated appeals of **Lijyasu M Kandekore v COK Sodality Co-Operative Credit Union Limited and Deidre Daley and Donnovon Ward** [2016] JMCA Civ 23, a fairly recent decision emanating from this court, which was decided on 6 May 2015, it was held that the calculation of time within which to perform an act excluded both the first and last days. The filing of this application predated the determination of the **Royal Caribbean** case.

Grounds 3, 4, and 8 i-vi

[59] Grounds 3, 4, and 8 will be dealt with together

> 3. The learned master erred in finding that the Appellants have failed to show by acceptable evidence that they have a Defence on the merits with a real prospect of success.
>
> 4. The learned master erred in failing to appreciate that on the unchallenged evidence that was before the Court on the hearing of the Application there was either no Claim with a real prospect of success against the 1st defendant and/or any reasonable ground for bringing the Claim against the1st defendant. As such the learned Master ought to have exercised her discretion under PART 15.2(a) AND/OR PART 26.3(1)(c) of the CPR in making an order in favour of the 1st defendant.
>
> 8. The learned master erred in refusing to strike out and/or remove the 1st appellant herein as a party to these proceedings, in that:
>
> i. The learned master failed to consider that there was no evidence put forward by the respondent showing a nexus between the 1st appellant herein and the respondent in so far as liability;
>
> ii. The evidence put forward by the respondent supported the arguments that the 1st Appellant was not a proper party to these proceedings;
>
> iii. The learned master failed to adjudicate as to the reasons for the exercise of her discretion in refusing to remove the 1st Appellant herein as a party to these proceedings;
>
> iv. The learned master failed to consider that notwithstanding the respondent being notified that the 1st appellant was not personally liable to her, the respondent nevertheless sought to enforce judgment for costs against the 1st appellant in his personal capacity by seeking an order of commitment against him;
>
> v. <u>The learned master failed to consider the unchallenged evidence put forward by Lloyd Kerr (1st</u>

Defendant) demonstrating that Empire was owned by Chrisryon Limited and not by him; and

vi. The learned master failed to properly consider the Affidavit of Lloyd Kerr filed on May 20, 2015 and exhibiting a Draft Defence setting out that he was not personally liable to the Respondent in circumstances where he did not employ her in his personal capacity.

Is there a real chance of the appeal succeeding?

[60] The applicants' applications before the learned master were:

(i) to set aside the default judgments and instead enter judgment of Admission against Chrisyron;

(ii) to remove Mr Kerr as a party to the proceedings; and

(iii) to file a defence as to quantum.

[61] Chrisryon wished to be heard on the issue of quantum as they desired to challenge aspects of the respondent's medical evidence and wished clarification on certain issues in respect of the respondent's evidence.

Discussion/law

Is Mr Kerr a proper party?

[62] The overarching consideration for the master, in determining whether to set aside or vary the default judgment, was whether the applicant had a real prospect of successfully defending the claim. That fact has been repeatedly expressed by this court. **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** SCCA No 109/07, delivered on 26 September 2008, is

demonstrative of that position. In that case, in the absence of an application for permission to appeal, a Notice of Appeal was filed. Indeed, the applicant later filed amended and further amended notices of appeal. Considerable time had elapsed beyond the prescribed 14 days before the application for leave was eventually filed. The excuse proffered by counsel was spurious. The applicants' notice of appeal was in the circumstances invalid.

[63] In spite of the circumstances, Smith JA noted that:

> "... in the circumstances of this case where there was obviously confusion on the part of Counsel for the applicant as to the effect of the early filing of a written application for leave in the court below, **if there is a real chance of an appeal succeeding the court should give permission.**" (Emphasis added)

In this matter, the applicants' notice for leave was a day late.

But is there a real prospect of the appeal succeeding? At paragraphs 3 and 4 of her particulars of claim the respondent stated:

> "3. That at all material times [the 1st applicant] was a businessman trading as Empire Supermarket which is registered under The Business Names Act, Business Registration Number 3398 of 2010 operating at 1-3 Retirement Road, Cross Roads, Kingston 5 and at Portmore Pines Plaza in the parish of Saint Catherine. The [1st applicant] carries out the function of General Manager and or Chief Executive for Empire Supermarket and also with the [2nd applicant].
>
> 4. That at all material times the [2nd applicant] is a duly incorporated company under the laws of Jamaica and having their registered office at 1-3 Retirement Road, Kingston 5 in

> the parish of St. Andrew. The [2nd applicant's] name appears on my wage slip as my employer."

[64] It was the applicants' contention that Empire Supermarket is owned by Chrisryon Limited and not the 1st applicant. The 1st applicant had requested of the learned master that he be removed as a party to the proceeding. The learned master however ignored the assertion in the acknowledgment of service, the draft defence which was exhibited to Ms McDowell's affidavit of 2 May 2013, and the attorney's evidence at paragraph 13 of affidavit of 14 December 2012 that the 1st applicant ought not to have been named as a defendant in the matter because the business is not operated in his personal capacity.

[65] Even if the 1st applicant is the chief executive officer of the companies as asserted by respondent, his legal personality is separate from that of Empire Supermarket and Chrisryon Limited. He would therefore not be a proper party to the suit (see **Salomon v Salomon and Company Limited** [1897] AC 22) unless the "corporate veil is lifted". Ground 8 has a real chance of success.

Occupiers Liability

[66] The respondent, at paragraph 13(g) of her particulars of negligence averred "Breach of Occupiers Liability Act". There was no assertion in the particulars of claim that the 1st applicant was the lessee. The applicants having denied that the 1st applicant was personally liable in the draft defence, at paragraph 8 they accepted that there was a breach of the Occupier's Liability Act. Paragraph 8 reads:

> "Save for paragraph 13(g) of the Particulars of Claim, [the applicants] deny all the assertions therein"

[67] By their draft defence they have denied that the 1st applicant was personally liable and therefore the acceptance of occupier's liability was in respect of the 2nd applicant only.

[68] No arguments were advanced in respect of the respondent's assertion that Mr Kerr was the lessee of the property before the learned master. In her affidavit of 30 April 2013, the respondent merely repeated her averment at paragraph 3 of her particulars of claim. Nor was any evidence in support of that assertion provided. The issue was also not dealt with by the learned judge.

[69] Mr Jarrett, in paragraph 7 of his affidavit in response to the applicant's leave to appeal stated that:

> " …the Applicants have never rebutted paragraph 10 of the respondent's affidavit of the 16th March, 2015 in which she stated: '[t]hat as far as I am aware Lloyd Kerr is the owner or Lessee of the building in which the accident occurred and I am holding the [applicants] jointly and severally liable for my injuries. I believe that Lloyd Kerr is a proper party to the claim.'"

That affidavit of the respondent was not exhibited. Nor is there is any evidence that it was before Master Harris. In any event, "he who asserts must prove". The applicants having repeatedly denied the 1st applicant's personal liability, in the absence of proof before the learned master, grounds 3 and 8 are meritorious.

Rule 12.5(e)

[70] The applicants challenge the learned master's finding of fact that:

> "that to set aside the default judgment given the totality of the circumstances would not be in keeping with the overriding objective of the CPR."

It is also a ground of appeal.

[71] It was a complaint of the applicant before Master Bertram Linton that on 11 October 2013 when the deputy registrar entered the default judgment, the applicants' application to extend time was pending. This, the applicants contend, was contrary to rule 12.5(e) of the CPR which precludes a default judgment from being entered once there is a pending application for an extension of time to file a defence. Although that argument was seemingly not advanced before Master Harris, it is an important factor which might render the amended default judgment of the deputy registrar nugatory.

Rule 12.5 (e) states:

> "The registry must enter judgment at the request of the claimant against a defendant for failure to defend if-
>
> …
>
> (e) there is no pending application for an extension of time to file the defence."

[72] On 11 December 2012 the respondent requested judgment in default of acknowledgment of service and defence. On 12 June 2013 an amended request was filed. Those papers were not before this court. I therefore have no knowledge as to the

reason for the amended request being filed. The reason is important to the disposal of the matter.

[73] In **Conrad Graham v National Commercial Bank Jamaica Limited** SCCA No 37/2009, delivered 25 September 2009, Morrison JA (as he then was) considered the effect of an amended application for default judgment. It had been argued in that case on the behalf of the respondent, relying on the case **Workers Savings & Loan Bank Ltd v McKenzie et al** (1996) 33 JLR 410, that the default judgment was to be regarded as having been entered when the request for it was filed and the 14 May request was to be treated, as the judge treated it, as an amendment of the original request for judgment and not as a fresh request.

[74] The appellant however contended that the 14 May 2004 request for default judgment was a new request made under the CPR. The first was made pursuant to the Civil Procedure Code. An important consideration was the reason for the amendment. In that case the amendment was vital to properly reflect the purport of the respondent's claim. Morrison JA with whom the other members agreed, held the view that the respondent was not entitled to have judgment entered on the subsequent default judgment as the respondent was unable to maintain an argument that:

> "[T]he judgment entered in 2004 "amounted to a mere amendment" the [earlier] request".

[75] Because of the absence of copies of the applications for default in the instant case, this court not placed in a position to determine the effect of the subsequent amended application, that is, whether it transformed the claim. In any event at the time

the deputy registrar entered judgment in default the applicants' application to extend time to file defence was a pending.

[76] By virtue of rule 12.5(e), it is arguable that the deputy registrar's order would have been irregularly obtained and therefore a nullity.

Grounds 1, 2, 7 and 9

1. The learned Master erred in refusing to set aside the default judgment against the Appellants herein. More specifically, the learned Master failed to recognize that on the evidence that was before the Court on the hearing of the Defendants' Application the Court could

   (a) Set aside the Default Judgment and/or

   (b) Vary the default Judgment and substitute therefor a Judgment on Admission against the 2nd Defendant;

2. The learned Master erred and/or failed to recognize that in order to fully participate in the hearing of the Assessment of Damages the CPR allowed the 2nd Defendant to apply to set aside the default judgment and/or ask the court to substitute a judgment on Admission in place of the default Judgment. In any event, the failure to make an Order allowing the 2nd Defendant to fully participate in the Assessment of Damages has been overtaken by the recent decision of Constitutional Court in **NATASHA RICHARDS & ANOR. -V- ERROL BROWN & THE ATTORNEY GENERAL [2016] JMSC CIV. 22**

7. The learned Master erred in refusing to allow the 2nd Appellant to file a Defence as to Quantum in that:

   i. The medical evidence that is being relied upon by the Respondent herein does not support the injuries as pleaded and claimed by the Respondent;

   ii. The Appellants did not have a duty to provide medical evidence during a preliminary application; and

iii. The Respondent would not have been prejudiced as the matter would proceed to an Assessment of Damages hearing in any event.

9. The learned master erred in finding that to set aside the default judgment given the totality of the circumstances would not be in keeping with the overriding objective of the CPR.

Should the applicants be allowed to contest quantum?

[77] The learned Master noted that, by their submission, the applicants:

(1) admitted liability;

(2) wished to have the Default judgment set aside and a judgment on Admission entered in the respondent's favour;

(3) desired only to be heard on the issue of quantum;

(4) to test the medical evidence; and

(5) to clarify issues with the relevant experts and witnesses.

[78] She then said that the applicants' acknowledgement of service of 14 December 2012 gave no indication that the applicants were admitting liability and that Mr Kerr's affidavit of 20 May 2015 merely indicated a schedule of payment. Ms McDowell's affidavit, she noted, only stated the applicants' desire to be heard on the issue of quantum and requested permission to file a defence as to quantum.

[79] She observed that:

> "The proposed Defence alleges that paragraph 11 of the particulars of claim is admitted. Paragraph 11 pleads the Particulars of Injuries. There is no medical report to counter the claims of the applicant. He must do so by showing that he has some evidence which contradicts the claimants [sic] factual assertions or by showing that there is some defect in the Claimants [sic] assertions in his pleadings or otherwise which the defendants [sic] active involvement in the assessment exercise can fully reveal. Those requirements have not been satisfied. At best they express a hope that by their cross examination the quantum would be reduced. This is insufficient to set aside the Claimants [sic] default judgment which is something of value."

[80] She concluded that:

> "Having examined all the circumstances, the applicant has failed to show by acceptable evidence that it has a Defence on the merits with a real prospect of success."

[81] By their application of 2 May 2013 and subsequent applications, the applicants were obviously seeking an opportunity to be heard on quantum. The affidavits of Mr Kerr and Ms McDowell made that fact quite plain. I am therefore perplexed as to the significance of the learned master's observation that the affidavits of Mr Kerr and Ms McDowell did not so indicate.

[82] The 2nd applicant desires to participate in the assessment of damages. Counsel submitted that the medical certificates did not support the injuries pleaded in the respondent's particulars of claim. He pointed out that the respondent, in her particulars of claim, has averred that her injuries are as follows:

(1) Damage to her right hand.

(2) Constant pain in the right hand.

(3) Constant pain in her left knee.

(4) Cramps around the region of the right scapula (back shoulder bone).

(5) Damage to cervical spine.

(6) Damage to thoracic spine.

[83] Whereas, Dr Phillip Waite's medical report of 23 October 2014 stated that a MRI of her spine revealed minimum degenerative changes and normal nerve conduction studies, no abnormality to her wrist was detected by the X-ray. The assessment by the pain specialist was not supportive of chronic regional pain syndrome. In fact Dr Waite's final assessment revealed conclusively, mild upper back pain and mild contusion to her right hand. Counsel submitted that in the light of the doctor's inability to substantiate her injuries, there is therefore scope for further clarification and for testing the doctor's assertions.

[84] Counsel also submitted that the learned master erred in her finding that the applicants ought to have adduced medical evidence to contradict the reports which the respondent relied upon. He says to do so would have been premature as at that stage (the hearing of the application), as evidence as to the medical condition of the respondent had not been admitted.

[85] By way of affidavit of 26 March 2014, the 1st applicant averred that the applicants had paid for the respondent's medical expenses including office visits and physiotherapy treatment and her salary up to 18 October 2012 until they were served with the particulars of claim and claim form on 26 October 2012. Proof of his assertion was exhibited to his affidavit. It was his evidence that they discontinued paying her salary and medical expenses because the matter had unexpectedly become litigious and they desired to seek legal advice. It was also his evidence that at no point in time that the respondent communicated either to him, his agents or officers that the payments were unsatisfactory.

[86] In assessing damages, payments made to the respondent by the applicants in respect of the respondent's medical expenses and salary ought to be considered. In dealing with matters justly, an important consideration must be the payments which the applicants have already made. The exclusion of such evidence would not be in keeping with the requirement to deal justly with the matter. To prevent the applicants from participating in the assessment of damages in light of the forgoing would be, in my view, antithetical of the overriding objective which is to do justice between the parties.

The Constitutional point

[87] In any event, the applicant's contention that by virtue the decision of **Natasha Richards & Anor v Errol Brown & The Attorney General** [2016] JMSC Civ 22 the 2nd applicant is in any event, entitled to fully participate in the assessment cannot be refuted. That issue was considered by Full Court of the Supreme Court which

declared rule 12.13 of the amended CPR, unconstitutional, null and void and struck from the CPR 2002. That court further ordered and declared that applicants are entitled to actively participate in assessment of damages hearings. That ruling stands unless overturned by this court. In my view, there is a real chance of grounds 7 and 9 succeeding.

Grounds 5 and 6

The applicants' failure to adhere to time lines

[88] I must respectfully disagree with Williams JA' s interpretation of Ms McDowell's assertion at paragraph 11 of her affidavit which attributes inactivity to the applicants and failure to enquire about the matter and also her observation that the applicants failed to instruct their attorneys in a timely manner. This interpretation, in my view, belies the evidence. It was Ms McDowell's evidence that on 26 October 2012, the same day that the applicants were served with the documents, they were forwarded to their office with instructions to represent them. It is also her evidence that the failure to file the acknowledgment of service was wholly their fault (administrative oversight). It is therefore manifest that the attorneys would have been adequately instructed from 26 October 2012 that the 1st applicant was not a proper party.

[89] The time for filing the defence expired on 7 December 2012. On 14 December 2012, seven days would have elapsed. On Ms McDowell's evidence, the applicants must have instructed her office prior to 14 December 2012 as to the basis for their defence. Paragraph 13 of her affidavit makes this plain. Her evidence is:

> "that the [1st applicant] has a good defence because he is not a proper party to the suit as he does not operate the business in his personal capacity and the [2nd applicant] has a good defence because we have been advised and do verily believe that the [respondent] was wholly responsible for the incident and/or contributory negligent."

[90] The draft defence exhibited to Ms McDowell's affidavit of 2 May 2013 merely repeats those assertions. Ms McDowell's averment that she "was currently in the process of receiving full and complete instructions, for the filing of a defence" is not an indication that the applicants' failed to instruct their attorney in a timely manner.

[91] Disregard for timelines is not lightly countenanced by this court which has adopted and has repeatedly echoed the sentiments expressed by Panton JA (as he then was) in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** Motion No 12/1999, delivered on 6 December 1999:

> "The legal position may therefore summarized thus:
>
> (1) Rules of court providing a timetable for the conduct of litigant must, primafacie, be obeyed.
>
> (2) Where there has been a none 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 party 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.**" (Emphasis added)

[92] In determining whether to set aside or to vary the judgment of Master Bertram Linton, rule 13.3(2)(a) and (b) requires that consideration must be given as to whether the application was made as soon as was reasonably practicable after discovering that judgment was entered and whether the applicant provided a good explanation for his failure to file his acknowledgement of service or defence.

[93] The delays in this matter, that is: counsel's failure to file the acknowledgement of service within the stipulation period; the lateness in filing this application and their absence from court were attributable to the applicants' attorney. *Prima facie*, there appears to be wanton disregard for timelines by counsel.

[94] In fact it is counsel's evidence that the applicants' instructions to her firm were prompt. Examination of the reasons however, reveals that on both occasions counsel's absence could not be classified as falling within the category of contumacy. On 2 May 2013 as explained, by counsel, her absence was not intentional, but rather due a misunderstanding of the time which she sought to address the same day. Counsel's second absence, was again, not wilful. It is yet uncertain whether indeed the matter had been fixed for 10:00 am and not 2:00 pm, in light of counsel's unchallenged evidence that the time was not reflected in the minute sheet.

[95] Even if on the first occasion, it was counsel's error and not the court's, her absence, as aforesaid, cannot be classified as contumacious. Indeed, the unchallenged

evidence is that upon discovering that the matter was dealt with, learned counsel forthwith contacted the respondent's counsel and the application was renewed the same day.

[96] The applicants' counsel's dilatoriness in dealing with this matter cannot therefore be said to fall into the category frowned upon by this court and outlined by Panton JA (as he then was) in **Paulette Bailey and another v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies** SCCA No 103/2004, delivered 25 May 2005, that:

> "... For many years, litigants with no chance of success frustrated the system, preventing the timely disposition of matters by employing every possible delaying tactic. In the process, the Courts gained the reputation in some quarters of being supportive of dilatoriness. The 2002 Rules are aimed at changing that perspective, and providing litigants with speedy justice. The Courts cannot now, **without very good reasons,** countenance disobedience of these Rules, and say simply that the panacea is 'cost'. Those days are gone."

[97] The learned judge of appeal referred specifically to matters which had no chance of success however his views expressed at page 17 provide guidance as to the important issues to be considered generally in dealing with these applications.

> "There is a further consideration which is of supreme importance in today's world. It has to do with the length of time that Courts take to bring issues to finality. In order that the Court may maintain its place as the rightful decider of issues, it needs to do so in a timely fashion, giving due consideration to difficulties that parties may encounter along the way in the preparation and presentation of their cases, but not countenancing shifts in positions and strategies that have the apparent intention of prolonging proceedings, and

> frustrating those who wish to have their legitimate rights recognized and enforced'."

[98] Although an amended application to set aside the default judgment was filed on 18 May 2015, Master Harris' assertion that the applicants' "Amended Application to set aside the default judgment on Admission" was filed more than a year after the order on the application of the 26 March 2014 incorrectly conveys the impression that the applicants were guilty of inactivity. Indeed, the applicants' application to enter defence to quantum and permission to attend the assessment of damages hearing was made as afore stated on 31 March 2014.

[99] The circumstances under which the amended application for court orders of 18 May 2015 was made, has also been outlined. It is therefore manifest that the Learned Master failed to appreciate the "totality of the circumstances" in respect of the applications. Grounds 5 and 6, in my view, are meritorious.

Should the applicants suffer for the attorneys' blunders/missteps?

[100] The applicants have, at every stage acted with the necessary celerity in dealing with the matter. Upon receiving the claim, Mr Kerr forthwith instructed his attorneys. The delay which resulted in the acknowledgment of service being filed 35 days out of time was entirely attributable to his attorneys. On the two occasions his applications were struck out were as a result of problems with the court list. The learned master's statement that: *"If counsel failed to carry out their duties in the interest of the defendant that is a matter between counsel and the Defendant"* is contrary to the law.

[101] Lord Denning's (Master of the Rolls as he then was) following statement in **Salter Rex and Co v Ghosh** [1971] 2 All ER 865 has been adopted by this court in matters in which the delay was attributable to the attorney and not the litigant.

> "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 merit 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." (page 866)

[102] That view has been espoused by this court in a number of decisions. In **The Attorney General of Jamaica and Another v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Snr (his father and next friend)** [2013] JMCA Civ 16 at paragraph [32] it was said:

> "...Miss Chisholm attributed the initial delay to administrative oversight in her chambers. Such oversight has, more than once, been excused in these courts on the basis that a deserving litigant ought not to be shut out because of an error by his attorney-at-law. It is usually when the behaviour is grossly negligent that the litigant's position is imperilled."

See also **June Chung v Shanique Cunningham** [2016] JMCA App 5.

[103] In **Sylvester Dennis v Lana Dennis** [2014] JMCA App 11, there was a delay of two years and six months in applying for leave to file its notice and grounds of appeal. In those circumstances this court acceded to the applicant's request. Mangatal JA (Ag), with whom Phillips JA and McIntosh JA agreed, extended time for the filing of

the notice and grounds of appeal. In so doing she relied on Morrison JA's (as he then was) statement in **Jamaica Public Service Co Ltd v Samuels** [2010] JMCA App 23. At paragraph [44] she said:

> "In **Jamaica Public Service Company Ltd v Samuels**, this court, in dealing with an application for an extension of time within which to file an appeal in respect of a Summary Judgment, pointed out at paragraph [29], that the question of the merits of the proposed appeal is an important one. (See also on the issue of an extension of time this court's decision in **Haddad Silvera** SCCA No 31/2003 delivered 31 June 2007 and the English decision of **Finnegan v Parkside Health Authority** [1998] 1 All ER 595, referred to in Haddad). In **Jamaica Public Service Company Limited v Samuels…** In relation to the merits of the appeal in that case, Morrison JA simply and succinctly stated at paragraph [29] that:
>
> > **'…from a reading of the judgment of Williams J (Ag) and the material placed before us in the written and oral submissions of both the Applicant and the Respondent, I am quite unable to say that there is no merit in the proposed appeal in this matter'**" (Emphasis added)

[104] Mangatal JA (Ag) pointed out that at paragraph [27] of his judgment Morrison JA quoted with approval the decision in **Salter Rex & Co v Gosh** and noted that the other judges agreed with the Learned Master of the Rolls as he then was. Morrison JA said:

> "This is how Lord Denning MR, with whom the other judges agreed disposed of the application to extend time (at page 866):
>
> > '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 merit 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.'"

[105] Mangatal JA(Ag) with the concurrence of the other members of the panel concluded:

> "[51] In my judgment, whilst the Respondent will suffer the disadvantage of further delay in being able to proceed on the summary judgment order obtained, there is in place a ruling in her favour pending appeal. On the other hand, the Applicant would in effect have had the access door of justice slammed in his face.
>
> [52] Notwithstanding the absence of a good reason for delay, in my view the proposed appeal has merit. In all the circumstances justice requires that this applicant... ought to be allowed to put forward his appeal to this court."

[106] In the case **Dorothy Vendryes v Dr Richard Keane & Karene Keane** [2010] JMCA App 12, the appellant's record of appeal which should have been filed on 21 August 2009 was not filed until 3 May 2010. It was only after the respondents filed their application to dismiss the appeal on 14 April 2010 that the appellant, as the learned judge of appeal said, "the appellant sprung into action again", and applied to extend time on 4 May 2010. McIntosh JA (acting as she then was) in refusing the respondent's application to dismiss the appellants' appeal for failure to comply with rule 2.6(1)(c) and 2.7(3)(iii) and allowing the appellant's application to extend time for filing their

skeleton arguments, chronology and record of appeal examined a number of authorities in the matter and said:

> "[26] Since the inception of the new regime in the civil arena occasioned by the CPR and the CAR, several applications for extension of time within which to comply with the steps required to be taken in the civil litigation process have come up for consideration in the courts and a body of local authorities is steadily developing in this area. Some of these authorities were referred to by the Attorneys-at-Law and they require careful scrutiny to see what principles may be distilled from them as to how the court maybe guided in the exercise of its discretion when dealing with these applications.
>
> [27] In **CVM [Television Limited v Fabian Tewari** (SCCA No 46/2003)] the court had before it an application by the Respondent to extend time to file Skeleton Arguments. The Appellant had filed a Notice of Preliminary Objection submitting that the court ought not to hear the application as the Respondent was in breach of Rule 2.6 (2) of the CAR by not filing its Skeleton Arguments for one year and two months outside of the prescribed time. Along similar lines as the Respondent submissions in the instant case, the Appellant in **CVM** argued that the delay was extreme and portrayed a defiant disregard for the rules. Further, the reasons advanced (due to an oversight by the respondent's Attorneys-at-Law and a heavy work schedule), were insufficient and the course of conduct was prejudicial.
>
> [28] P. Harrison, JA (as he then was), reasoned that although the explanation given for the delay was good but not altogether adequate, it was not entirely nugatory. **Further, his Lordship pointed out that the delay was not that of the respondent (as in the instant case) and 'the interest of the respondent not to be excluded from the appeal process due to the fault of Counsel, is an aspect of doing justice between the parties'**.
>
> [29] His Lordship went on to say that the delay being significant may have created some prejudice to the appellant. However, an expedited date of hearing of the

> appeal would be a helpful cure. In all the circumstances, a two (2) day extension was granted to the respondent.
>
> [30] In **Auburn Court** two (2) applications were considered by the court namely, (i) an application by the respondents to strike out the appeal and (ii) an application by the appellant to enlarge the time to file the record of**. Harris JA (Ag), (as she then was), stated at page [4] of her judgment) that it was incumbent on the court after examining all the circumstances of a case to determine how best to deal with it justly**." (Emphasis added)

[107] In **Auburn Court Limited v The Town and Country Planning Appeal Tribunal and others** SCCA No 70/2004, delivered 28 March 2006, there was protracted delay in filing the record, the applicant had also failed to file the said record after two reminders were issued to the appellant's attorney-at-law by the registry. According to the Respondent's submission, the appellant was forced to act by the respondent's application to strike. The reason proffered for the non-compliance was heavy work schedule and court appearances, personal difficulties requiring counsel to leave the jurisdiction among others.

[108] The court nevertheless held that the explanation for the non-compliance though deficient could not be ignored as it was not intentional and the delay from August 9, 2005 to 26 February 2006 (the filing of the application) was not excessive. Harris JA held the view that the interest of the appellant and the "just disposal of the case" are of "manifest importance". She opined that the appellant should not suffer because of his attorneys "dereliction of duty".

[109] In **Vendryes** McIntosh JA at paragraph [50], having examined a number of cases, concluded *inter alia*:

> "a. **Each case must be decided on its particular facts.** There are no hard and fast theoretical circumstances which will trigger the court's discretion to grant or refuse an application.
>
> b. The sufficiency of the reason/explanation proferred is entirely for the court having regard to all the surrounding circumstances – ('It is incumbent on the court, after examining all the circumstances of a case to determine how best to deal with it justly', per Harris JA(Ag) in **Auburn Court**.
>
> c. Although the length of the delay is a factor to be considered, there is no principle to be extracted from the decided cases as to any particular period of time beyond which an application may not succeed. The length of the delay is but one factor to be considered by the court in its aim of dealing fairly with the parties, avoiding prejudice, saving expenses and ensuring that cases are dealt with expeditiously. (See for example **Finnegan v Parkside Health Authority** referred to above).
>
> d. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties (See **Beguzzi v Rank Leisure plc**[1999] 4 All ER 934 at 939 – a quotation by Harrison JA taken from Lord Woolf's judgment in **Haddad**).
>
> e. While a likelihood of the success of the appeal is a factor for the court's consideration, there is no requirement for an applicant to file an affidavit of merit. There is no principle enunciated in any of the authorities reviewed which required such an affidavit." (Emphasis added)

The prejudice issue

[110] An important consideration is whether the respondent will suffer prejudice if the applicants are granted the orders sought. The 2nd applicant has conceded liability and is

seeking to participate in the assessment of damages. They are therefore not seeking to prolong the matter but desire the opportunity to challenge the respondent's claim in respect of her injuries which apparently is in conflict with the medical evidence.

[111] The applicants, in light of the forgoing, would not be merely embarking on a fishing expedition as there exists a real prospect of the challenge succeeding. If in fact they have contributed to her medical expenses, to prevent the applicants from so participating would in my opinion, not only be unfair but contrary to the overriding objective which is to do justice between the parties. Sir Thomas Bingham MR in **Costellow v Somerset County Council** [1993] 1 WLR 256 plainly makes the point:

> "Cases involving procedural abuse (such as Hytrac Conveyors Ltd. v. Conveyors International Ltd. [1983] 1 W.L.R. 44) or questionable tactics (such as Revici v. Prentice Hall Incorporated [1969] 1 W.L.R 157 may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant...Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord. 3, r. 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed."

[112] In **Finnegan v Parkside Health Authority** (1998) 1 WLR 411 Hirst LJ, relied on the learned master's statement. He added, *inter alia*, that:

> "... the overriding principle that justice must be done ... between the parties, that the absence of a good reason for non-observance of the rules was not an inflexible and automatic consequence that a court should refuse the exercise of its discretion and that the court should also consider any prejudice involved."

[113] This court has in paragraphs [80] and [81] of **June Chung v Shanique Cunningham**, in dealing with the issue of prejudice, agreed with the statement of Phillips JA in **Rohan Smith v Elroy Pessoa and Anor** [2014] JMCA App 25 on the issue of prejudice that:

> "[80] …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."

[114] In agreeing with that statement this court expressed the view of Phillips JA at paragraph [39] of **Rohan Smith v Elroy Pessoa and Anor** that:

> " 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."

[115] The case, **The Commissioner of Lands v Homeways Food Ltd and Stephany Muir** [2016] JMCA Civ 21 is distinguishable. The appellant had taken

possession of the respondents' land from 2006 without compensating the respondent. In that case, quite apart from the several delays in complying with timelines, the appellant had no real prospect of succeeding on their appeal. To have allowed the appellant to further delay the matter would have greatly prejudiced the respondents while benefitting the appellant. In those circumstances an extension of time would have been wholly unjust.

[116] In the instant case, on the totality of the circumstances, there is certainly merit in the applicants' complaint that the learned master's failure to set aside the default judgment was not in keeping with the overriding objective of the CPR. Ground 9 also has a real chance of success.

Conclusion

[117] The learned master's failure to consider the 1st applicant's assertions that he was not personally responsible is in my view crucial, as she would have failed to properly consider whether his defence has a real prospect of success. That issue was vital to the determination of the application. In light of the foregoing I am of the view that the proposed appeal has a real prospect of succeeding and I therefore would grant the application.

P WILLIAMS JA (AG)

[118] I have had the privilege of reading in draft, the judgments of my brother Brooks JA and my sister Sinclair-Haynes JA. I concur with the conclusion arrived at by my brother Brooks JA that on the procedural defect and the lack of a real prospect of

success, this application should be refused with costs to the respondent. I wish however to add a few words of my own.

[119] The outline of the circumstances and the submissions have been sufficiently set out in the judgments of my brethren, such that I will not be doing so again in any detail.

[120] Regarding the procedural defect, it is accepted that the applicant upon receiving the decision of the learned master, which included the refusal of leave to appeal on 16 February 2016 had 14 days within which to apply for permission to appeal (see rule 1.8(1) of the Court of Appeal Rules). The application was in fact made on the 15th day after the handing down of the judgment and therefore was out of time. In the circumstances of this case, it must be said that the failure of the applicants to move more expeditiously is particularly inexcusable.

[121] Having forwarded the claim form and particulars in this matter, to the attorneys-at-law on the same day they claimed to have been served, the applicants can be viewed as appreciating the need for dealing with the matter in a timely manner. The applicants may well have expected that their matter would have formed part of the immense work pressure that caused their matter to be overlooked for the month of November but instead that work pressure was given as the reason the applicants now find themselves in the position they are in.

[122] Whilst it is commendable that Mrs McDowell has made plain in the various affidavits she has filed in this matter, that the applicants had no knowledge of the

failure to file the acknowledgement of service, her assertion that there was no lack of action on their part cannot be accepted without more. The fact is that in her affidavit of 14 December 2012, Mrs McDowell admitted that she was only then in the process of receiving full and complete instructions for the filing of a defence. Thus the applicants having forwarded the documents to the attorneys-at-law seemed content to have them there without any enquiries as to what was happening with their matter. This was so even in circumstances where it seemed they had not given their attorneys-at-law information to properly mount a defence on their behalf. The first draft of the defence was eventually exhibited to a subsequent affidavit of Mrs McDowell dated 2 May 2013.

[123] Having been advised by the respondent's attorney-at-law of the intention to apply for a judgment in default of acknowledgement of service, the applicants moved promptly to apply for permission to file defence out of time. It would be assumed that the applicants would now have their matter dealt with in a careful and timely manner. The notice of application indicated the hearing of this application would be on 2 May 2013 at 10:00 am. Unfortunately Mrs McDowell had it set in her diary for 2:00 pm and missed the hearing to attend a wrongly listed matter in another court. In their absence the matter was dismissed on the application of the respondent.

[124] There needed to be, once more, prompt efforts to have the matter dealt with and a renewed application was filed on 2 May 2013. However the default judgment (dated 11 December 2012) was entered on 11 October 2013 and was served on the applicant's attorneys-at-Law on 29 October 2013, hence an application was filed on 18

November to set aside the default judgment and this application cannot be regarded as being overly late.

[125] The notice of application to set aside the default of 18 November raised the issue of the failure to adhere to the provisions of rule 12.5(e) of the Civil Procedure Rules. Mrs McDowell in her affidavit in support of this application referred the fact that rule 13.2 of the CPR requires the court to set aside any default judgment entered under Part 12 where such judgment was wrongly entered because the conditions under rule 12.4 or 12.5 could not be satisfied. She also at this time urged that the applicants would like the opportunity to be heard on the issue of quantum. Mr Jarrett in his affidavit in response, filed on behalf of the respondent, challenged the assertion that the default judgment had been wrongly entered. The hearing of this notice of application was commenced before Master Bertram-Linton (as she then was) and set to continue on 24 March.

[126] There was a failure of the applicants to attend the hearing on 24 March. The applicants were absent for a similar reason to that which caused their absence from the previous hearing. The major difference is however that they had been in attendance when the hearing commenced on 5 December 2013 and when the matter had been adjourned to 26 March 2014. It is their recollection that the matter had been adjourned to 2:00 pm on 26 March. The matter had been dealt with at 10:00 am and had been dismissed.

[127] The applicants made another application on 31 March 2014, promptly made again, but for permission to enter a defence as to quantum despite the fact that the default judgment had been entered and the proper application would have been to get it set aside. They did not in this renewed application raise the issue of whether the default judgement had been improperly entered seeking only permission to enter a defence as to quantum and to be permitted to attend upon the hearing and lead evidence in support of the defence as to quantum. This was eventually amended on 18 May 2015 to include the application to set aside the default judgment. This application was then in effect made over a year after the default judgment had been entered. From this chronology, it is clear that the unfortunate errors that had occurred ought to have caused the attorneys-at-law to pursue the permission to appeal with greater diligence and expedition rather than doing so on the 15th day when the rules provide it be done within 14.

Prospect of Success

[128] The learned master in exercising her discretion properly recognised that she was to be guided by rule 13.3 of the CPR. In seeking to show that they have a real chance of success, the applicants complained that the learned master failed to recognise that on the evidence that was before the court, on hearing the applicants' application the court could a) set aside the default judgment and/or b) vary the default judgment and substitute therefor a judgment on admission against the 2nd defendant

[129] This submission to my mind stops short of recognising that the learned master could only take those steps if the 1st applicant in her view had a real prospect of successfully defending the claim. The learned master correctly and properly focused on that requirement and arrived at a conclusion that cannot be shown to be demonstrably wrong.

[130] The applicants did not offer any evidence to counter the respondent's claim as to how the incident that caused her injuries had occurred. In the first place the applicants had indicated an intention to defend the claim in their acknowledgment of service of 14 December 2012, the learned master correctly noted that fact. Then in the first affidavit filed by Mrs McDowell when seeking permission to file a defence, it was asserted that the 1st respondent was not a proper party and the 2nd respondent had a good defence "because we have been advised that the [claimant] was wholly responsible for the incident and/or contributory negligent".

[131] It should also be noted that in the draft defence exhibited by Mrs McDowell, the paragraphs of the particulars of claim where the respondent had detailed how the incident had occurred and the particulars of the injuries she had sustained were admitted.

[132] The learned master, referred to the affidavit of the 1st applicant on 20 May and said it merely set out a schedule of payment. She was however incorrect in that regard. The affidavit to which she referred urged the 1st applicant's assertion that he should properly be removed from the proceeding. He however went on to assert in

that affidavit that the "[2nd defendant] admits liability in this suit under occupiers liability Act but denies all other averments as to negligence made by the claimant and would like the opportunity to enter a defence as to quantum". This certainly would not qualify as sufficient evidence to successfully defend the claim. The 1st applicant did indeed file an affidavit on 26 March 2014 in which he detailed payments that had been made for the respondent's medical expenses which he described as "full and honest disclosure as to the particulars of the [2nd Defendant's] attempt to pay for medical expenses of the [Claimant]". Again this could not be viewed as evidence which was capable of successfully defending the claim.

[133] The learned master also correctly noted that in effect the evidence of the respondent as to her injuries remained unchallenged since there was no medical report submitted to counter the claims. Certainly the basis on which her damages would be assessed would be on whatever medical evidence she presented to the assessment court. If the medical evidence did not support the injuries she claimed she suffered that would be seen and appropriately dealt with.

[134] Further the learned master properly recognised that Mrs McDowell in her affidavits indicated a wish to be heard on quantum. This in effect was no evidence on which a successful challenge of the claim could be mounted.

[135] The learned master could only have allowed the default judgment to be set aside if she was firstly satisfied that the applicants had shown a basis for asserting they had a real prospect of success in contesting the respondents claim for damages. In seeking

to be heard on quantum the applicants did not supply the learned master with such a basis. Hence the learned master finding in this regard cannot be faulted.

[136] In the circumstances I agree that there is no real prospect of success of an appeal against the learned master's decision on this aspect of the case. It is indisputable that the learned master did not consider the aspect as it concerned the removal of the 1st applicant from the proceedings. In regard to this issue, I am in complete agreement with the reasoning and conclusion of my brother Brooks JA.

[137] The applicants have included in their proposed grounds the fact that the recent decision of the Constitutional Court in **Natasha Richards and Anor v Errol Brown & the Attorney General** has overtaken the failure to make an order allowing the 2nd applicant to fully participate in the assessment of damages. It would seem to me that on the strength of this decision, there remains no impediment to the applicants attending and participating in the assessment of damages. This makes me even more satisfied that allowing the respondent to pursue the assessment of damages would be the best course and the applicants would not be prejudiced.

BROOKS JA

ORDER

By majority (Sinclair-Haynes JA dissenting), the application for permission to appeal is refused with costs to the respondent to be taxed if not agreed.