[2016] JMCA Civ 41

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 65/2015

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

BETWEEN MECHANICAL SERVICES COMPANY LIMITED APPELLANT

AND CLINTON ELLIS RESPONDENT

Written submissions filed by Georgia Hamilton and Company for the appellant

Written submissions filed by Taylor-Wright and Company for the respondent

8 July 2016

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MORRISON P

[1] I have read, in draft, the judgment of my sister P Williams JA (Ag) and agree with her reasoning and conclusion. I have nothing useful to add.

McDONALD-BISHOP JA

[2] I too have read the draft judgment of my sister P Williams JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA (AG)

[3] This is an appeal against the decision of Master Harris (Ag), as she then was, made on 2 July 2014 whereby the appellant's application to set aside a default judgment and to extend time for filing its defence was refused.

Background

[4] On 1 June 2009 the respondent filed a claim against the appellant seeking to recover damages for negligence, breach of the Occupier's Liability Act and breach of contract. He alleged in this claim that, on or about 25 March 2008, he was in lawful execution of his duties as a labourer under a contract of service with the appellant when he was injured as a consequence of the negligent manner in which the appellant executed its operation in the course of its trade. He had slipped and fallen from a work van and had sustained serious personal injury and had suffered loss and damages.

[5] In his particulars of claim he alleged the following particulars of negligence:

> "(i) Failing to provide a proper system of work
>
> (ii) Failing to provide a safe place of work
>
> (iii) Failing to provide the requisite warnings, notices and/or special instructions to the [respondent] and its other employees in the execution of its operations so as to prevent the [respondent] being injured
>
> (iv) Failing to provide a safe system of work
>
> (v) Failing to provide a competent and sufficient staff of men
>
> (vi) Failing to maintain its premises in a safe manner

(vii) Failing to modify, remedy and/or improve a system of work which was manifestly unsafe and likely at all material times to cause serious injury to [the respondent]

(viii) Failure to provide adequate safety equipment."

[6] Pursuant to the affidavit of service by registered mail filed by Fitzroy Cameron on 15 October 2009, the claim form, particulars of claim along with the acknowledgement of service and a letter addressed to the appellant were sent by registered post on 10 June 2009. The appellant was deemed to have been served 21 days after the posting and would then have been required to file an acknowledgment of service 14 days after the deemed date of service and to file its defence 42 days after that deemed date of service. The appellant failed to file the requisite documents at that time and a judgment in default was obtained, dated 15 October 2009.

[7] The appellant had registered offices situated at Shop 125, Princeville Commercial Centre, 95A Constant Spring Road, Kingston 10, St Andrew. The Managing Director for the appellant was Mr Neville Glanville and he asserted that it was not until on or about 9 October 2009 that the appellant received the registered mail with the documents. He shortly thereafter contacted attorneys-at-law with instructions for them to represent the appellant's interest.

[8] Mr Glanville was subsequently advised that an acknowledgment of service was filed on 20 October 2009 and a defence on 29 October 2009 on behalf of the appellant. The defence, as filed, denied that the respondent was working at the material time with

the appellant. It stated that he worked with TC Mechanical Services, Salt Mills Plaza, Grace Bay, Providenciales, Turks and Caicos Islands and that the incident that had been referred to by the respondent had occurred in the Turks and Caicos Islands.

[9] The appellant's version of the incident that gave rise to the claim was that, whilst working on contract with TC Mechanical Services Ltd in the Turks and Caicos Islands, the respondent had accepted a ride in a dodge pick-up truck, owned by Mr Russell Garland and registered in the Turks and Caicos Islands. The truck was being driven by Mr Patrick Pottinger, a former employee of TC Mechanical Services Limited. The appellant contended that the respondent had fallen from the truck in circumstances where the driver, whilst stationary, had observed a backhoe being driven in the direction of the dodge truck at a fast rate of speed. Mr Pottinger then suddenly drove forward to avoid a collision and shortly thereafter he had been alerted to the fact that the respondent had fallen from the dodge truck.

[10] The medical report filed with the particulars of claim indicated that the respondent had explained to the doctor that, while he was attempting to get into the pick-up truck, it had driven off causing him to fall backwards resulting in the injury.

[11] Mr Glanville also asserted that, on 24 November 2010, an application was filed on behalf of the appellant to strike out the respondent's claim on the grounds that (i) the claim form and the particulars of claim, for and on behalf of the respondent failed to comply with the Civil Procedure Rules (CPR), in that, the nature of the claim and the specific remedy being sought were not set out therein, (ii) the particulars of claim were

confusing, and (iii) that the court had no jurisdiction to hear the matter because the accident had occurred in the Turks and Caicos Islands. This application had been set for hearing on 26 March 2012 when it was adjourned due to the non-attendance of the parties. Mr Glanville explained that the appellant was not advised of that date for hearing.

[12] The appellant on 27 May 2011 in other matters discovered that the judgment in default had been entered against it. Being dissatisfied with the way those matters were being handled by its then attorneys-at-law, it sought to obtain new representation. The attorneys-at-law presently on record were retained. A letter dated 8 June 2011 was sent to the previous attorneys-at-law requesting that the files be given to the appellant. A notice of the change of attorneys was filed on 10 August 2012.

[13] On 30 October 2012 an application was made by the appellant to set aside the default judgment entered in this matter, and to extend the time within which to file its defence. This step was taken because on 20 July 2012, the appellant was served with a notice of adjourned hearing, indicating that the matter had been set for assessment on 1 November 2012 for one day.

The application before the Master

[14] The grounds on which the appellant sought the orders were set out as follows:

> "(i) That the [Application] is being made as soon as is reasonably practicable after finding out that judgment has been entered herein.

(ii) That the [Applicant] had always thought that its acknowledgment of service and defence were filed within the timelines stipulated under the Civil Procedure Rules.

(iii) The [Applicant] has a reasonable prospect of successfully defending his claim."

[15] In the affidavit of Mr Glanville in support of the application to set aside the default judgment, the timeline that the appellant would have been aware of, was outlined. The appellant asserted its belief that it had acknowledged service and had filed its defence within the times stipulated in the CPR. Further, it was contended that the file had not been received from the previous attorneys-at-law until 29 October 2012.

[16] Additionally, the appellant explained that it also had to make contact with TC Mechanical Services and Mr Russell Garland, both of the Turks and Caicos Islands, for assistance in getting the necessary information to instruct the attorneys-at-law.

[17] In its proposed defence, the appellant challenged the respondent's assertion that he was employed by it at the time of the accident. It contended that the respondent provided services to it as a plumber on an "as needed basis" on specific projects and for specific periods. It exhibited a contract of service signed by the respondent with TC Mechanical Services for the period 23 June 2007 to 23 June 2008. It gave the details of the incident as it had ascertained them to be and asserted that if the respondent had suffered injury, loss and damage, as alleged, the resulting injury, loss and damage were either in whole or in part due to the negligence of the driver of the backhoe, who had

caused the driver of the dodge to suddenly drive off. It gave particulars of negligence of the driver of the backhoe. It also challenged the medical report dated 23 March 2009 which, it asserted, failed to provide a sufficient nexus between the accident being complained of and the respondent's injury. This report stated that the respondent had been seen by the doctor on 24 November 2008, some eight months after the incident which was alleged to have led to his injuries.

[18] The respondent, in his affidavit opposing the application, complained of having to wait from 2009 to 2013 to benefit from the default judgment. He believed it was highly unlikely for registered mail to take four months to be delivered inland. He challenged the appellant's assertion that it had not recovered its file from the previous attorney-at-law until in October 2012. He said that in the application made by that attorney-at-law to have his name removed from the record, it was indicated that, as at October 2011, the appellant had taken its file.

[19] The respondent also noted that the appellant had given instructions to its present attorneys-at-law since 8 June 2011, and the court's file had been copied by them on 10 August 2012, yet permission to extend time was not sought until 31 October 2012, the day before the adjourned assessment hearing.

[20] The respondent challenged the assertion that he was employed directly to TC Mechanical Services Ltd but said he was sent there by his employer, the appellant, who had a relationship with that company. The document, which he signed before going to the Turks and Caicos Islands to work, was done at the request of Mr Glanville and he

had been advised that it was for the purpose of obtaining the necessary work permit to enable him to work in that country. He maintained that he had been permanently employed to the appellant since 2005 and it was the appellant who took care of all his expenses, including plane fare and accommodations whilst he was in the Turks and Caicos Islands working. He exhibited his last pay check which he had received since his return from the Turks and Caicos Islands which he had been given by Mr Glanville at the appellant's office in Kingston. It was for the period August to September 2008 and was signed by Mr Glanville.

[21] The Master, having heard the matter on 12 May 2014, made the following orders on 2 July 2014:

> "(1) Defendant's application to set aside Default Judgment is denied.
>
> (2) Permission to file defence out of time is not granted.
>
> (3) Costs to the claimant summarily assessed in the sum of $75,000.00.
>
> (4) Leave to appeal is refused."

The appellant made an application to this court seeking permission to appeal and was granted permission to do so on 15 May 2015.

The appeal

The appellant filed notice and grounds of appeal in the following terms:

[22] 1. **THE DETAILS OF THE ORDER APPEALED ARE:**

(a) Court rules in favour of the Claimant.
(b) Application to set aside is denied.

(c) Permission to file defence out of time is not granted.
(d) Costs to the Claimant are summarily assessed in the amount of $75,000.00.
(e) Leave to appeal is refused.

2. **THE FOLLOWING FINDINGS OF FACT AND LAW ARE CHALLENGED**:

(a) **Findings of fact**:

i. That it was in 2011 that the Appellant found out that judgment in default was entered herein in favour of the Respondent when there was no evidential basis for said finding;

ii. That the Respondent was employed to the Appellant when on the Respondent's own assertion, the basis on which he claimed he was so employed was his contract of employment with TC Mechanical Services, which he described was no more than a sham;

iii. That the Respondent was employed to the Appellant, at the material time, even though the parties made competing contentions on the issue and these contentions were never tested;

(b) **Findings of law**:

i. That there is no substantial issue of law or fact from which the court find that there is a defence with a real prospect of success;

ii. That the proposed defence lacks merit;

iii. That the proposed defence was frivolous and vexatious in circumstances where the proposed defences are not only known to law but also viable;

iv. That the failure of the Appellant's previous attorneys-at-law to take the necessary steps to timeously and adequately represent its interests was not a good reason for the Appellant's failure to acknowledge service and file a defence within time;

v. That as employer of the respondent, the appellant is ipso facto liable for his injuries without any regard being had for the relevant principles of employer's liability and vicarious liability or the need to establish a duty of care owed by the appellant to the respondent in the circumstances and

vi. That costs should be assessed summarily in the circumstances.

3. **THE GROUNDS OF APPEAL ARE THAT**:

(a) The learned Master failed to:

i. Pay any or any sufficient regard to the evidence proffered and which remained unchallenged by the Respondent that Patrick Pottinger, who was the driver of the Dodge pick-up truck from which the Respondent fell, was not employed to the Appellant, at the material time, but, instead, was employed to TCV Mechanical Services.

ii. Have any or any sufficient regard to the evidence proffered and which remained unchallenged by the Respondent that [the] Respondent fell from the Dodge pick-up truck when the driver of [the] said Dodge pick-up truck, Patrick Pottinger, had to move from a stationary position in trying to avoid a situation of danger created by a speeding backhoe being driven in the direction of the Dodge pick-up truck;

iii. Pay any or any sufficient regard to the fact that the Respondent's fall from the pick-up was not occasioned by anyone employed to the Appellant, at the material time;

iv. Have any or any adequate regard to the severe problems faced by the Respondent in proving that his injury was caused by the accident giving rise to his claim, in circumstances where the medical evidence

proffered by him does not provide a sufficient nexus to the claim;

v. Have any or any sufficient regard to the fact that this matter raises issues as to the proper forum and the proper law to be applied as the cause of action arose outside of the jurisdiction; that is, in the Turks & Caicos Islands;

vi. Have any or any sufficient regard to the duty of the Court to give effect to the overriding objective to deal with cases justly when interpreting the Civil Procedure Rules ('CPR') and exercising its powers under the CPR, in circumstances where the Appellant had from 29 October 2009 and onwards manifested a clear intention to resist the claim; and

vii. Have any or any sufficient regard to proper procedure whereby costs may be summarily assessed under the CPR.

(b) In all the circumstances of the foregoing, the learned Master misunderstood the evidence before her and the applicable procedure and law.

(c) The decision of the learned Master was demonstrably wrong and was so aberrant that no Judge or Master regardful of his duty to act judicially would have reached it.

4. **ORDERS SOUGHT**:

(a) The appeal be allowed and the order of the learned Master be set aside.

(b) The default judgment entered on 15 October 2009 be set aside.

(c) Costs here and below be paid by the Respondent to the Appellant."

The submissions

[23] Counsel for the appellant in her written submissions stated that the primary basis of this appeal was that the learned Master erred in refusing the application and also in proceeding to assess costs summarily without complying with rule 65.9. of the Civil Procedure Rules (CPR). Appreciating the basis on which this court must approach matters such as this, counsel referred to the principles expressed in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1.

[24] She submitted that the decision of the learned Master was based on a misunderstanding of fact (as to the date of service) and of law (on whether the appellant's proposed defence had any merit). Counsel quite properly recognised that the relevant test for the consideration is set out in rule 13.3 of the CPR, which states:

> "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 the 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 acknowledgment of service or a defence, as the case may be."

[25] Counsel, in addressing the primary issue of whether or not the appellant had a real prospect of successfully defending the claim, pointed to the evidence of the

appellant which raised material questions of fact and law which required consideration by a trial judge. The matters on which she relied are summarized below:

(1) The respondent was not employed to the appellant which is a solid basis on which this claim may be defended. The respondent's assertion that his final salary was paid to him in Jamaica and that the contract of employment was signed at the behest of the appellant for work permit purposes are material factual issues to be considered by a trial judge.

(2) The accident occurred in another jurisdiction and not on premises owned by the appellant nor was the vehicle in which the respondent was injured owned by the appellant or driven by the appellant's servant or agent.

(3) The appellant maintained that the accident was wholly caused by a negligent driver of a backhoe which caused the driver of the vehicle the respondent was entering to move forward to avoid collision. The issue of liability will have to be determined.

(4) The accident occurred while the respondent was being given a ride by a co-worker and it had not been

averred that this was done during the course of either person's employment to their respective employers.

(5) The accident was unconcerned with the system or place of work in which the respondent was employed, since it was a vehicle not belonging to either company that was involved.

(6) There was no duty or obligation to provide the respondent with safety equipment warnings, notices or special instructions.

(7) There is no evidence or pleading to say that the system of work in which the appellant was employed was unsafe.

(8) The accident did not occur while the appellant was executing its operation in the course of trade as alleged by the respondent.

[26] Counsel contended that the learned Master erred in law and/or misunderstood the evidence before her in finding that the appellant had no realistic prospect of defending this claim and that its defence was frivolous or vexatious.

[27] In considering whether the appellant had applied to the court as soon as was reasonably practicable, counsel contended that it was on 20 July 2012 that the

appellant learnt by way of a notice of adjourned hearing that this claim was set for assessment of damages. Counsel further explained that the appellant had to retain new counsel, experienced delay in getting its file from its previous counsel and then had to make checks with the court and get information from the Turks and Caicos Islands before being able to make the application. She submitted that the time taken was not unreasonable, especially since the appellant was maintaining that it was not in receipt of its file before 29 October 2012.

[28] Counsel submitted that the learned Master erred in concluding that the appellant learnt of the default judgment in 2011. This, she contended, was a misunderstanding of fact that was demonstrably wrong and contrary to the evidence which was before the Master.

[29] Finally, counsel for the appellant considered the question of whether the appellant had given a good explanation for the timing of the filing of its defence and acknowledgment of service. Counsel submitted that the unchallenged evidence of the appellant was that it had received the registered parcel on 9 October 2007. It was further submitted that the burden of proving the date of service should be on the respondent. The true date of service would be the date the appellant said it was received, despite there being an earlier deemed date of service. Counsel referred to this court's decision in **Linton Watson v Gilon Sewell and others** [2013] JMCA Civ 10 and the Supreme Court's decision in **Beecham v Fontana Montego Bay Ltd** [2014] JMSC Civ 119 in advancing submissions on how to approach the issue of a determination of the date of service in circumstances such as this.

[30] Counsel submitted that the appellant had provided a good explanation as to why its acknowledgement of service and defence were filed on 20 and 29 October 2009, respectively. She noted that those dates would have been well within the time for filing those documents if they had been received on 9 October 2009. Counsel also urged that it cannot be said that the appellant was not regardful of its obligations under the CPR and that the efforts it had taken to defend this matter should not have been lost on the Master.

[31] Counsel raised a matter that had not been pursued in the application to set aside the default judgment. It is now being submitted that the learned Master erred in not setting aside the judgment as a matter of right *ex debito justitae* as the appellant had not been served within time.

[32] In this regard counsel relied on an observation of this court in the judgment delivered in respect of the application for permission to appeal in **Mechanical Services Company Ltd v Clinton Ellis** [2015] JMCA App 20 where, at paragraph [29], Phillips JA stated:

> "It will therefore be a matter for this court to decide whether in all the circumstances, Master Harris ought to have set aside the default judgment *ex debito justitae* as the judgment given would have been irregularly obtained, or she could have removed 'the legal fiction of deemed service' (**Watson v Sewell and others** [at paragraph 41]) and proceeded to exercise her discretion to set aside the default judgment, in any event, so that all the matters in contention between the parties could be determined by the trial judge."

[33] Counsel submitted that she was at liberty to pursue this issue now since an appeal is a rehearing of the application below (rule 1.16(1) of the Court of Appeal Rules) and as such this court can set aside this judgment as of right pursuant to CPR 13.2(2), which provides that:

> "The court may set aside judgment under this rule on or without an application."

[34] Further, she contended, there would be no prejudice to the respondent in advancing this issue since they were duly alerted to this position during the application for leave to appeal. Counsel referred to this court's decision in **Tristar Engineering Ltd v Alu-Plastic Ltd et al** [2015] JMCA App 8 in support of this position.

[35] Counsel considered the respondent's assertion of there being prejudice if he were unable to realize the fruits of his judgment for six years. She submitted that the respondent ought to accept that half of that time was caused by his own delay since having obtained judgment in October 2009, it was not served it until two years and six months later, in April 2012.

[36] Further, counsel submitted that the appellant had moved expeditiously to file its defence upon receiving the papers in October of 2009. She said that, the appellant had remained unaware of a default judgment having been entered for two years and six months and was left under the belief that all was in order.

[37] It was counsel's contention that it would be far more prejudicial to allow this judgment on "a strange and spurious" claim to go unchallenged.

[38] Counsel for the respondent commenced her written submissions with the following statement:

> "Without conceding the factual or legal correctness of the Defence, the Respondent concedes that there are triable issues raised by the Appellant which requires ventilation at a trial in accordance with paragraphs 16 to 18 of its submissions."

[39] Counsel however took issue with the fact that the appellant was advancing matters on appeal, which it had neither sought nor obtained permission to do. Thus counsel submitted that:

> "(a) permission to appeal was never sought nor obtained on the basis that the learned Master had been aberrant;
>
> (b) permission to appeal was never sought nor obtained on the basis [that] costs were improperly assessed summarily. Indeed the Appellants has raised its first challenge to costs in the Notice of Appeal;
>
> (c) permission to appeal was never sought nor obtained on the basis that the learned Master had misunderstood the evidence before her or the procedure;
>
> (d) permission to appeal was sought by the Appellant on the grounds set out in its Notice of Application for Permission to Appeal, a copy of which is attached hereto."

[40] Counsel went on to submit that the appellant's complaints, which underlay the permission granted to it, taken at their highest, were that the learned Master had not paid any or any sufficient regard to the evidence, had not paid any regard to issues of proper forum or proper law and that certain findings allegedly made were done in error. Further, it was counsel's submission that at the hearing of the application for leave no

arguments were put forward concerning the learned Master's misunderstanding of law or evidence or any aberrance on her part. Thus counsel contended that the appeal should properly only be confined to the grounds advanced by the appellant at the permission stage on which permission to appeal was granted.

[41] On the issue of service, counsel submitted that judgment cannot be set aside as of right since the issue of service was waived or never challenged before the Master. Ultimately counsel stated that:

> "[I]t is reasonable that by consent,
>
> (i) the appeal is allowed
>
> (ii) no order as to costs
>
> (iii) matter to proceed to trial."

Analysis

[42] The appellant has sought to have this court set aside the decision of the learned Master in exercise of the discretion given to her by rule 13.3(1) of the CPR to set aside a default judgment in the circumstances as set out in para [22] above. This court is guided by the factors as delineated by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, as to the exercise of the judge's discretion at first instance where at page 1046 he stated:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be

> the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It 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. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong on by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it."

[43] This principle has been accepted and applied in several cases by this court and in the one relied on by the appellant, **The Attorney General of Jamaica v John MacKay**, where Morrison JA (as he was then) had this to say at paragraph [20].

> "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 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'."

[44] It is therefore the obligation of the appellant to present cogent reasons for asking this court to find that the Master erred in one of the ways, which would lead this court to interfere with the exercise of her discretion. Hence the complaint made by the respondent about the failure of the appellant, when seeking leave to appeal, to advance

arguments concerning the learned Master's misunderstanding of the law or evidence or any aberrance on her part, meant that it ought not to be permitted to do so on the hearing of the appeal, is misguided.

[45] There is, as noted, a concession by the respondent that there are "triable issues raised by the appellant which requires ventilation at a trial". This court however is still obliged to be satisfied that the Master in fact erred and her decision must be set aside so as to allow for the ventilation of those issues.

[46] We have not had the benefit of any reasons the Master may have given for her decision to refuse the applications made before her. It is also noted that the respondent, in an affidavit made when challenging the application for permission to appeal, took issue with some of the matters the appellant said the Master had found and determined in the proceedings before her. No such complaint has been advanced before this court and as has been noted, the submissions made on behalf of the respondent urged only that the appeal should be confined to the grounds advanced by the appellant at the permission stage and for which permission to appeal was granted.

[47] It has already been noted, that rule 13.3 of the CPR requires the appellant to have demonstrated that he has a "real prospect of successfully defending the claim". It is now well settled that this means that the question for the court was whether there was a realistic, as opposed to a fanciful, prospect of success.

[48] The respondent in his claim failed to disclose the fact that the incident took place in the Turks and Caicos Islands and that at the time he was injured he was travelling in

a pick-up being driven by someone who did not have any obvious connection with the appellant or this jurisdiction. These facts are supportive of the appellant's assertion that there is an issue as to whether this is the proper forum for the hearing of this matter and this issue could well be resolved in its favour.

[49] The appellant, in its defence filed in October 2009, challenged the assertion that the respondent was its employee. The issue of vicarious liability was raised and has been made an important aspect of this matter. The fact that the appellant has exhibited the employment contract signed by the respondent is, prima-facie, enough for the appellant to assert that it has a real prospect of successfully defending the claim on this aspect of the matter.

[50] The particulars of claim is also silent as to whether the respondent was engaged in an activity which was necessary to the course or execution of his employment during the ride in the pick-up. The fact that the appellant has offered the explanation that the respondent was accepting a ride, without more, would seem to negative any inference that this was somehow connected to his employment and raised an issue which would need to be explored. Again, in so doing, the appellant has demonstrated that he has a realistic prospect of successfully defending the claim.

[51] The respondent had failed to give any details of how he came to have "slipped and fallen from a work van". Hence the assertion by the appellant that it had occurred while the driver of the pick-up van was executing a manoeuvre designed to avoid a

collision with a backhoe being carelessly operated cannot be viewed as providing a fanciful defence.

[52] The particulars of negligence which speak to the system and place of work and the equipment and warnings and notices are not manifestly relevant, given how and where the respondent asserted he came by his injuries. Further, there is no indication as to how issues such as failing to provide a competent and sufficient staff of men and maintaining premises in a safe manner would arise in these circumstances. The appellant in challenging the respondent's ability to prove the particulars as pleaded in the circumstances of the accident that they rely on is supporting their realistic prospect of defending the claim.

[53] Ultimately, although there are no reasons provided for the decision of the Master, on this consideration of the proposed defence, it cannot be seen how the Master on these facts would have been correct in concluding that the appellant had an unrealistic prospect of success on a defence which was a 'sham'. It seems safe to conclude that the appellant does have a defence on the merits with a realistic prospect of success as required by rule 13.3(1) of the CPR. Accordingly the primary pre-requisite for setting aside a regularly obtained default judgment would be satisfied.

[54] The consideration must now be as to whether the appellant had failed to satisfy the discretionary criteria set out in rule 13.3(2)(a) and (b) of the CPR.

[55] The appellant asserted that it was in July 2012 that it had learnt, by way of the notice of adjourned hearing, that this claim was set for assessment of damages. The

appellant offered an explanation as to why it then took it four months to make the application to set aside the judgment in default.

[56] It is, for the purposes of this appeal, significant to note that the appellant is challenging the finding of fact made by the Master that it was in 2011 that it had found out that the judgment in default was entered. In Mr Glanville's affidavit, he had asserted that on or about May 2011 the appellant discovered that judgment had been entered against it in other matters in which it had provided timely instructions to its attorney-at-law. Mr Glanville exhibited the letter he had sent to that attorney terminating their relationship which dated 9 Jun 2011 and refers to a matter that is unrelated to the instant matter.

[57] There is no other indication by the appellant of learning about the default judgment in the instant matter in 2011. If the Master came to the conclusion that, that was the time the appellant had first learnt about the default judgment, it would seem that she had misunderstood the evidence.

[58] It is recognised that the respondent sought to challenge the appellant's explanation as to why there was a delay in its application to set aside the default judgment. The appellant had asserted that it had not been able to retrieve the files from the previous attorney-at-law on record until October 2012. The respondent pointed to the fact that, that attorney in making an application to have his name removed from the records in May 2012, had asserted that it was in October 2011 that the appellant had indicated the intention to seek new representation. It was asserted

by the respondent that it was at that time, in October 2011, that the appellant was said to have had taken the file. A reading of the affidavit filed by the attorney-at-law as exhibited by the respondent did not however say any such thing. The attorney-at-law said that the appellant had refused to pay legal fees and had in October 2011 indicated that it did not wish to be represented by that attorney-at-law and that it was seeking new representation. Further, it was asserted that the attorney had not seen or heard from the appellant from that time. No mention was made in that affidavit with respect to the handing over of files. However, in the notice of application for court orders filed 1 May 2009, one of the grounds on which the attorney sought to have his name removed was that, "the defendant has terminated his retainer by taken[sic] his file and indicated he no longer wished for us to represent him".

[59] In any event, the appellant's explanation as to when it had heard about the default judgment remained unchallenged. Its explanation as to why it had delayed filing an application to set aside the default judgment remains credible. This explanation, in the circumstances was not unreasonable and it cannot be said, without more, that the application to have the default judgment set aside was not made as soon as was reasonably practicable. Hence rule 13.3(2)(b) would have been satisfied.

[60] The appellant asserted that it had received the registered correspondence enclosing the claim form, particulars of claim and acknowledgment of service on or about 9 October 2009. The acknowledgment of service and the defence which were then filed on 20 October 2009 and 29 October 2009 respectively would have been compliant with the time for filing those documents based on the time within which the

appellant said it was in receipt of them. In the circumstances, it would have become necessary for the Master to determine whether the appellant could have been served at any other time since there had not been a failure to file the acknowledgment of service or defence as required.

[61] The respondent properly exhibited the post office receipt attached to an affidavit of service by registered mail from Fitzroy Cameron attesting to the fact that the required documents had been posted on 10 June 2009. Service was therefore effected pursuant to rule 5.7 of the CPR which provides:

> "5.7 Service on a limited company may be effected -
>
> (a) by sending the claim form by telex, FAX, prepaid registered post, courier delivery or cable addressed to the registered office of the company;..."

The proof of service was pursuant to rule 5.11 which provides:

> 5.11 (1) Service by registered post is proved by an affidavit of service by the person responsible for posting the claim form to the person to be served.
>
> (2) The affidavit must exhibit a copy of the claim form and state -
> (a) the date and time of posting: and
> (b) the address to which it was sent."

[62] The documents having been served in this manner, the provisions of the CPR in relation to the deemed date of service becomes applicable. There are two rules which deal specifically with this issue, namely rules 5.19 and 6.6.

Rule 5.19 provides:

> "(1) A claim form that has been served within the jurisdiction by prepaid registered post is deemed to be served unless the contrary is shown, on the day shown in the table in rule 6.6.
>
> (2) Where an acknowledgment of service is filed, whether or not the claim form has been duly served, the claimant may treat -
>
> (a) the date of filing the acknowledgment of service; or
>
> (b) (if earlier) the date shown on the acknowledgment of service; for receipt of the claim form, as the date of service.
>
> (3) A claimant may file evidence on affidavit to prove that service was in fact effected on a date earlier than the date on which it is deemed to be effected."

Rule 6.6(1) provides:

> "(1) A document which is served within the jurisdiction in accordance with these Rules shall be deemed to be served on the day shown in the following table -
>
> | **Method of Service** | **Deemed date of service** |
> |---|---|
> | Post | 21 days after posting |
> | Registered Post | 21 days after the date indicated on the Post Office receipt." |

[63] In the decision of this court **Linton Watson v Gilon Sewell et al**, Phillips JA carried out a careful consideration of these rules recognising the significance of the words "unless the contrary is shown". At paragraph [40] she concluded:

> "On any interpretation of rule 5.19 of the CPR, as indicated previously, the presumption of service is clearly rebuttable by evidence. This evidence may be adduced on behalf of either the claimant or the defendant, to show that the service of the claim form did not take place on the deemed day of service set out in rule 6.6 or at all."

[64] In the instant case the appellant has asserted that he was in fact served on 9 October 2009. Apart from contending that it was unlikely that the mail would have taken four months to be delivered, the respondent is unable to prove that it was not so delivered. The respondent exhibited a letter which had been written to the Postmistress at the Half-Way Tree Post Office seeking information as to when the letter with the documents was received by the appellant. This letter is dated 15 February 2013 and there seems to have been no response.

[65] As stated in rule 5.19(2), the respondent was now to have treated the actual date of service as either the date of filing the acknowledgment of service or the date shown in the acknowledgment of service. The appellant's behaviour, in acting so expeditiously at the time it said it received the registered post, belie having received it at an earlier time.

[66] There is no question that the respondent, having waited four months before seeking to obtain his judgment in default was entitled to it at the time it was entered on 15 October 2009, which was five days before any acknowledgment of service was filed. This is clearly the position seen from the records. The Master in considering whether there was a good explanation for the appellant's failure to file an acknowledgment of

service or a defence should have considered the issue of the deemed date of service since those documents were in fact filed. There was enough to challenge the correctness of the the deemed date of service. Thus the appellant is to be viewed as having adequately addressed the requirements of rule 13(2)(b) of the CPR.

[67] The remaining matter that has been challenged by the appellant is the manner in which the Master awarded costs. The complaint is that the Master did not have any or any sufficient regard to proper procedure whereby costs may be summarily assessed. A loo8 at the relevant rules is necessary.

[68] Part 65 deals with the issue of quantification of costs and rule 65.8 deals specifically with 'Assessed costs-procedural applications and enforcement'. Rule 65.8(1) provides:

> "65.8(1) On determining any application except at a case management conference, pre-trial re-view or the trial, the court must decide which party, if any, should pay the costs of that application, and may
>
> (a) summarily assess the amount of such costs in accordance with rule 65.9; an
>
> (b) direct when such costs are to be paid."

[69] Rule 65.9 provides:

> "65.9 (1) In summarily assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing or otherwise dealing with the matter in respect of which costs are to be assessed and must allow such sum as it considers fair and reasonable.

(2) A party seeking assessed costs must supply to the court and to all other parties a brief statement showing -

(a) the disbursements incurred; and

(b) the basis on which that party's attorney-at-law's costs are calculated.

(3) In summarily assessing the costs the court may take into account the basic costs set out in Appendix B to this part."

[70] In the recent decision of **Director of State Proceedings et al v Administrator General of Jamaica** [2015] JMCA Civ 15, this court gave consideration to the rules of court applicable to the award of costs, more particularly, the quantification of costs, in civil proceedings in the Supreme Court. After a careful and clear analysis of all the relevant rules McDonald-Bishop JA (Ag) (as she then was), had this to say at paragraphs [29] and [30]:

"[29] It becomes evident that the summary assessment of costs was not intended by the statute or the rules of court to be done arbitrarily or on any random basis. The relevant rules cited above both stipulate that summary assessment of costs must be done in accordance with rule 65.9.

[30] Rule 65.9 sets out the relevant considerations for the court in determining the quantum of costs that should be paid as well as the duty of the receiving party in the assessment process. The rule specifically states, as an evidently mandatory requirement, that in summarily assessing the amount of costs to be paid, the court must take into account any representations as to the time that was reasonably spent in making the applications and preparing for and attending the hearing or otherwise dealing with the matter. Also, the

> court must, according to the rule, allow such sum as is fair and reasonable."

[71] Further, at paragraph [33], McDonald-Bishop JA (Ag) made the following observation:

> "[33] Furthermore, section 65.9(1) provides that the learned judge must allow such sum as is fair and reasonable, after taking into account the matters placed before him. Again, what is fair and reasonable requires an objective assessment of the circumstances of the case. The CPR, by providing for the 'basis of quantification' in part 65, have laid down certain criteria by which this objective standard as to what is fair and reasonable may be arrived at."

[72] In the instant case, the appellant has not advanced any submissions in support of its contention that the Master failed to exercise her discretion in summarily assessing the costs in accordance with the applicable rules in the CPR. The respondent has also failed to advance any submissions to refute the bald assertion of the appellant that the exercise was improperly done. Nowhere in the records is there any indication of the matters the Master took into consideration in arriving at the award she made. Although it was within the discretion of the Master to award costs in these proceedings, this court would still need to be satisfied that the discretion was exercised judicially. This court would have to be able to determine if the Master had regard to the provisions of the CPR in assessing the costs and in awarding a sum that was fair and reasonable. In the circumstances of this matter, it cannot be said that she summarily assessed costs as she was required to do and that award must be set aside.

[73] However, it is undisputable that the respondent was entitled to have secured the default judgment at the time he did. To my mind, he ought not to be deprived of his cost incurred for the application being made to set it aside, in these circumstances.

Conclusion

[74] The Master in refusing to set aside the default judgment failed to exercise the discretion given to her by rule 13.3 of the CPR with a full understanding of the evidence before her and the correct principles of law that flow there from. Accordingly, I would allow the appeal and make the following orders:

1. The appeal is allowed.

2. The order of Master Harris made on 2 July 2014 is set aside.

3. The default judgment entered on 15 October 2009 is set aside.

4. The costs of the application in the Supreme Court to the respondent to be taxed, if not agreed.

5. The appellant is permitted to file and serve its defence within 14 days of the date of this judgment.

6. A case management conference is to be fixed at the earliest possible time.

7. Costs of the appeal to the appellant to be taxed or agreed.

MORRISON P

ORDER

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