[2026] JMCA App 17

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE LAING JA

APPLICATION NO COA2024APP00189

BETWEEN	**BRANCH DEVELOPMENT LIMITED (t/a Iberostar Rose Hall Beach Limited)**	**1ST APPLICANT**
AND	**EMPLOY LIMITED**	**2ND APPLICANT**
AND	**MELDON MCCOLLIN**	**RESPONDENT**

Ms Jutina Wilson instructed by Samuda & Johnson for the 1st applicant

John Clarke instructed by I P Davis & Co for the respondent

28 July 2025 and 8 May 2026

Civil practice and procedure – Application for permission to appeal – Default judgment – Order setting aside default judgment – Whether the respondent satisfied the threshold test for the setting aside of default judgment – Whether judge erred in setting aside default judgment – Whether proposed appeal has a real chance of success – Civil Procedure Rules, 2002, rule 13.3 – Court of Appeal Rules, 2002, rule 1.8(7)

(Considered on paper, pursuant to rules 1.7(j) and (j) of the Court of Appeal Rules, 2002)

F WILLIAMS JA

[1] I have read, in draft, the judgment of Laing JA and agree with his reasoning and conclusion. There is nothing that I wish to add.

DUNBAR-GREEN JA

[2] I, too, have read the draft judgment of Laing JA, and I agree with his reasoning and conclusion.

LAING JA

[3] This is an application for leave to appeal the decision of Hart-Hines J ('the learned judge'), made on 12 August 2024. On 28 July 2025, the matter came on for hearing, but due to exigent circumstances, with the parties' consent, the court ordered that the application should be considered on paper.

[4] By an amended notice of application for court orders, filed 21 February 2025 ('the application'), the applicants sought the following orders:

> "1. The Applicants be permitted to appeal the orders of Mrs. Justice N. Hart-Hines made on August 12, 2024, pursuant to the Rule 1.8 of the Court of Appeal Rules.
>
> 2. That a stay of proceedings be granted pending the determination of the appeal.
>
> 3. The costs of this Application to be costs in the appeal.
>
> 4. There be such further or other relief as this Honourable court may deem fit."

[5] The terms of the order in respect of which leave to appeal is sought are as follows:

> "1. Order granted in terms of paragraphs one and three of the Notice of Application for Court Orders filed on 20th April 2023 to wit:
>
> i. That the judgment in Default entered herein on 5th day of July, 2021 against the [Respondent] and all subsequent proceedings be set aside.
>
> ii. That the [Respondent] be permitted to file and serve a Defence to the Defendant's Counterclaim filed on 3rd Day of November, 2020 within 14 days of the Order herein.
>
> 2. Leave to Appeal is refused.
>
> 3. Parties are to bear their own costs in respect of the hearing of this application.
>
> …"

[6] That application was supported by an affidavit sworn by Chevant Hamilton. The orders sought were advanced on the following grounds:

> "1. Rule 1.7(2)(b) of the Court of Appeal Rules and Rule 4 2.13 of the Civil Procedure Rules, 2002.
>
> 2. This Honourable Court has the power pursuant to 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and Rule 1.8 of the Court of Appeal Rules to grant permission to a litigant to appeal a decision of the court below in circumstances where permission is required.
>
> 3. That the orders of Mrs. Justice N. Hart-Hines made on August 12, 2024, which the Applicants seek to appeal are interlocutory and Counsel for the Applicant immediately on delivery of the orders sought leave to appeal from Mrs. Justice N. Hart-Hines and leave was refused.
>
> 4. Pursuant to Rule 1.8(7) of the Court of Appeal Rules the Applicants have an arguable appeal with a real chance of success.
>
> 5. The Respondent will not be prejudiced if the Applicants are permitted to Appeal.
>
> 6. It is in the interest of justice and the overriding objective that the Orders being sought be made."

Background

[7] The application stems from a claim initiated by the respondent alleging negligence, breach of statutory duty under the Occupier's Liability Act, and breach of his contract of employment. The respondent asserted that he suffered injuries, losses, and related expenses following a fall on 25 February 2015 at the hotel of the 1st applicant ('Branch'), where he was employed as a professional dancer under a contract with the 2nd applicant ('Employ').

[8] In his particulars of claim, the respondent averred that Branch's dance choreographer instructed him to teach a dance routine to two of its new employees, on the hotel's stage. While demonstrating the routine with one of the employees, he lifted

her into the air, and she began to twist and turn. He returned her to the stage, but immediately after, he felt a tingling sensation in his right hand and leg, followed by excruciating pain in his lower back that radiated to both legs. He alleged that the stage had been buffed earlier by the applicants' servant and/or agent, leaving it shiny and slippery, and that this caused the accident and his resulting injuries, including lumbar disc herniation.

[9] The applicants filed a joint defence and counterclaim of Employ, on 3 November 2020, which was later served on the respondent's attorney-at-law on record on 5 November 2020. In the defence, the applicants admitted that Branch was the occupier of the hotel and that the respondent was employed to Employ. However, they denied failing to discharge their common law and statutory duty of care to the respondent and averred that the incident was caused solely, or at least contributed to, by the respondent's negligence.

[10] The applicants claimed in their defence that the respondent was in breach of clause 5(f) of the contract of employment between the respondent and Employ, to use the property and facilities of Branch properly and professionally and to observe the workplace policies and directives. In the alternative, the applicants claimed that in breaching the contract in the manner aforesaid, the respondent was bound to indemnify Employ against all loss, damage, or liability resulting from his said breach, in keeping with clause 5(k) of the contract of employment. In respect of the counterclaim, Employ repeats the assertions made in the defence and counterclaims for fees, costs and expenses incurred in defending the claim.

[11] The respondent failed to file a defence to the counterclaim within the prescribed time; consequently, on 5 January 2021, Employ applied for a default judgment. It was granted and then served on the respondent on 18 November 2022. Subsequently, on 20 April 2023, the respondent applied to set aside the default judgment entered against him on the counterclaim. This application was granted on 12 August 2024 in accordance with

the order at para. [2] and, on 26 August 2024, the respondent filed his defence to the counterclaim.

[12] In his defence to the counterclaim, the respondent denied being negligent or in breach of the contract of employment. He stated that at all times he conducted himself professionally and observed all workplace practices, safety directives, and standards, which enjoined him to exercise due care in performing his work. Further, he alleged that the applicants are not entitled to damages, whether directly or indirectly, under clause 5(k), as the indemnity applies only to acts, neglects, or defaults of the employee and not to those that can be attributed to the employer. He also stated that the claim for the costs of defending the present proceedings was baseless.

Proposed grounds of appeal

[13] On 15 August 2025, the applicants filed a further affidavit, which included the proposed grounds of appeal they seek to rely on. They are as follows:

> "1. The Learned judge erred in fact and in law by setting aside the default judgment notwithstanding her acknowledgement that service of the ancillary claim and related documents had been properly effected on the Claimant's attorney-at-law, prior to any change in legal representation. In the circumstances where no notice of change of attorney had been filed until years later, the Learned judge therefore had no proper basis to disregard the validity of service of the counterclaim and displace the default judgment in the absence of compliance with the established rules of the Civil Procedure Rules.
>
> 2. The Learned judge erred in fact and in law by setting aside the default judgment that was regularly obtained, contrary to the structured approach required under Rule 13.3 of the Civil Procedure Rules and the principles established in binding case law.
>
> 3. The Learned judge erred in fact and law by setting aside the default judgment in circumstances where neither the respondent's affidavit nor draft defence

disclosed a real prospect of success. The judge failed to properly assess the merits of the Affidavit and defence, which did not establish any causal link between the respondent's alleged injury and the Appellant.

4. The Learned judge erred in fact and in law by setting aside the default judgment notwithstanding her own finding that the application was not prompt and that the explanation provided in the affidavit was deficient, including the absence of evidence as to the nature of any real efforts made to contact the Claimant.

5. The Learned judge erred in fact and law by setting aside the default judgment notwithstanding that the respondent's application was not made promptly. The delay was inadequately explained and the judge failed to treat this failure as a sufficient bar to granting relief.

6. The Learned judge erred in by [sic] setting aside the default judgment, despite correctly stating at paragraph 33 of her judgment that the default judgment may be entered administratively without the court's permission where the procedural requirements are met. The judge failed to apply her own correct statement of the law to the facts before her.

7. The learned judge erred in fact and in law by setting aside the default judgment on the basis that the Appellant had not pleaded the consequences of the alleged breach of contract sufficient to warrant an award of damages. The judge mischaracterised the pleadings and failed to recognise that the counterclaim included a claim for legal and administrative costs already incurred. Her further finding — that such costs were not assessable because they would continue to accrue — was legally unsustainable and contrary to the provisions of the Civil Procedure Rules governing default judgments for unspecified sums.

8. The learned judge erred in fact and in law by concluding that there was no real prejudice to the Appellant due to the delay, given that there was no allegation that a witness could not be located. In so doing, the judge failed to give proper weight to the

prejudice identified by the Appellant, including the natural fading of memory over time, which is a recognised form of prejudice affecting the fairness of a trial.

9. The Learned judge erred in fact and law by finding that the prejudice to the respondent outweighed that of the Appellant, notwithstanding the absence of an affidavit of merit to ground that finding.

10. The Learned judge erred in fact and law by finding that the Appellant's pleading of contributory negligence in the alternative warrants a trial of the claim.

11. The Learned judge erred in law in failing to give any weight to the absence of contravening factual or direct evidence sub judice of the circumstances of the accident in setting aside the Default Judgment."

The applicants' submissions

[14] Counsel for the applicants, Ms Wilson, relying on her submissions before the court below as well as those filed in support of the application for permission to appeal, contends that the respondent failed to satisfy the conditions for setting aside the default judgment. She submits that the application was not made promptly, having been filed on 20 April 2023, several months after judgment was entered on 5 January 2021 and after the respondent was served on 18 November 2022. Counsel further argues that the explanation provided for the delay, namely, that the defence was not received due to the relocation of the office of the respondent's counsel, was unconvincing. Instead, she asserts that the respondent failed to undertake the necessary checks on the court's file to establish the status of the matter.

[15] Ms Wilson also submits that the respondent had no real prospect of successfully defending the counterclaim, as the draft defence reveals no causal nexus between any act or omission of Branch and the injuries alleged by the respondent. This deficiency, she states, was compounded by the lack of a realistic defence regarding the binding contractual issue that the respondent was obliged to indemnify Employ. Ms Wilson further argues that the prejudice to Branch if the application is granted would significantly

outweigh the prejudice to the respondent and could not be remedied by an order for costs, given the age of the claim and the practical difficulties in preserving witnesses in the tourism industry.

[16] She further submits that a close examination of the affidavit filed in support of the respondent's application to set aside the default judgment, particularly paras. [15], [16] and [19], revealed a mixture of the affiant's purported statements and counsel's advocacy, thereby calling into question the integrity of the averments and, consequently, the validity of the respondent's application. She relied on the Singaporean authority of **Lee Theng Wee v Tay Chor Teng** [2003] SGHC 173, where the court dismissed an application to set aside a default judgment, despite the existence of a real prospect of success, because of the applicant's failure to provide satisfactory reasons for the late application and to be truthful in the affidavit.

[17] Counsel argues that the respondent's application was further weakened by clear and irreconcilable conflicts within the affidavit supporting it. Additionally, counsel points out what she claims is an irregularity in the application to set aside the default judgment. That is, when the application was submitted, Mr John Clarke was not the attorney of record for the respondent. Instead, the attorney of record remained Davis Robb & Co (which was succeeded by the firm I P Davis & Co). No notice of change of attorney had been filed to reflect any change in representation, and this remains the case. She contends that any subsequent filing would not remedy the irregularity, as it had the effect of rendering the application void from the outset.

[18] Ms Wilson also argues that the respondent failed to file an affidavit of merit containing the requisite evidence to support the asserted defence. She submits that this obligation could not be satisfied by merely exhibiting a draft of the proposed defence, although such a draft is itself a separate requirement, as pleadings do not constitute evidence. In support of the submission, counsel relies on **Kimaley Prince v Gibson Trading & Automotive Limited (GTA)** [2016] JMSC Civ 147.

[19] For these reasons, counsel submits that the learned judge erred in the exercise of her discretion in setting aside the default judgment, and the appeal has a real chance of success.

[20] Regarding the request for a stay of proceedings, counsel submits that, pursuant to rule 2.11(b) of the Court of Appeal Rules, the court is empowered to grant a stay of any judgment or order pending the determination of an appeal. However, such a discretionary order will not be granted unless it is disclosed that the appeal has some prospect of success. Having established that the appeal meets this threshold, counsel argued that a stay ought to be granted. Reference was made to **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2010] JMCA App 25 in support.

[21] On the issue of costs, counsel submitted that the customary order upon an application to set aside a default judgment, that is, costs of the application and costs thrown away to the respondent to be taxed if not agreed, should be made.

The respondent's submissions

[22] Counsel for the respondent, Mr John Clarke, submits that the relevant test for deciding whether permission to appeal should be granted is whether the judge erred in law or principle, or misunderstood the facts in setting aside the default judgment. He argues that Branch's affidavit evidence revealed no such mistake on the part of the learned judge, justifying the intervention of the appellate court. Instead, he contends that the applicant, through this application for permission to appeal, was effectively inviting this court to rehear the submissions made in the court below in the hope of obtaining a different outcome. He, therefore, argues that the applicants have not met the threshold for the grant of permission to appeal.

[23] Counsel also submits that the appeal has no prospect of success. He notes that the counterclaim concerns fees, costs, and expenses incurred in defending the current proceedings, and that, if the applicants were ultimately to succeed in their defence, costs would naturally be awarded in their favour to compensate them for these expenses. In

those circumstances, he submitted that the issue of whether an ancillary claim should be dealt with separately from the main claim becomes relevant, and the applicant would have needed to comply with rule 18.11 of the Civil Procedure Rules ('CPR') to obtain judgment on the respondent's failure to file a defence to the ancillary claim, assuming an ancillary claim form had been filed and served. However, counsel contends that, in this case, no ancillary claim form had been filed and served.

[24] Notwithstanding this, he submits that the default judgment was irregularly obtained as it was entered without the court's permission, in circumstances where the claim was "based solely on a claim for cost". He further asserts that, on a plain reading of the main claim and the proposed defence to the counterclaim, there was a clear defence to the ancillary claim with a prospect of success. Counsel also contends that the applicant was not entitled to a default judgment, as, pursuant to rule 12.10(4) of the CPR, it is the court, rather than the registrar, that decides whether permission should be granted to enter a default judgment. He maintains, therefore, that under Part 12 (rules on default judgment) and Part 18 (rules on ancillary claim) of the CPR, the court retains jurisdiction to decide whether a default judgment should be entered in these circumstances.

[25] Accordingly, Mr Clarke submits that because the appeal has no prospect of success, no stay should be granted in respect of the proceedings in the main claim, which must be resolved before any judgment on the ancillary claim. He further argues that the respondent would face a greater risk of injustice if a stay were granted, as he would be deprived of the timely adjudication of the main claim, which has been pending since 2020. Counsel also contends that if the applicants were ultimately to succeed on appeal, the main claim would still need to be determined before any assessment of the default judgment on the counterclaim, leaving the applicants in the same position if the stay were refused. He additionally notes that the applicants have not demonstrated any discernible risk of injustice if the proceedings continue in the court below.

[26] Considering the foregoing, counsel submits that the applicants have failed to satisfy the standard required for the grant of either permission to appeal or a stay of proceedings. He, therefore, argues that the application should be refused and that costs should be awarded to the respondent.

Discussion and analysis

[27] Although the applicants have filed 11 grounds of appeal, they can be resolved by analysing one main issue, namely:

> Whether the learned judge wrongly analysed the requirement of the CPR in exercising her discretion to set aside the default judgment.

[28] Accordingly, the appeal being submitted by the applicants is primarily a challenge to the learned judge's exercise of her discretion. The relevant principles were outlined by Lord Diplock in **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042, 1046 ('**Hadmor**'). These principles have been adopted in numerous decisions of this court, including by Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 at paras. [19] and [20], which states:

> "[19] … It follows from this that 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.'
>
> [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 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'."

[29] To warrant the appeal court's interference with the decision of the learned judge in the court below, the applicants will have to demonstrate that the learned judge's exercise of her discretion to set aside the default judgment was palpably wrong.

[30] The CPR dictates the process to be employed in setting aside a default judgment which has been regularly obtained, and it is in these terms.

> "13.3 (1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.
>
> (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."

[31] In her written reasons, the learned judge correctly observed that the application to set aside the default judgment on the counterclaim must be assessed pursuant to rule 13.3 of the CPR. She reviewed several authorities addressing the applicable principles governing the setting aside of default judgments, including **Russell Holdings Limited v L&W Enterprises Inc and ADS Global Limited** [2016] JMCA Civ 39; **Merlene**

Murray-Brown v Dunstan Harper and Winsome Harper [2010] JMCA App 1, and **Flexnon Limited v Constantine Michell and others** [2015] JMCA App 55.

[32] The learned judge considered the guidance offered by McDonald-Bishop JA (as she then was) in **Flexnon Limited v Constantine Michell and others** on the procedure to be applied in setting aside regularly obtained default judgments pursuant to rule 13.3(2), in particular at paras. [27] and [28] of that judgment, where the following is stated:

> "[27] It is clear from rule 13.3(2)(a) and (b) that it is incumbent on the court to consider whether the application to set aside was made as soon as was reasonably practicable after finding out that judgment had been entered and that a good explanation is given for the failure to file an acknowledgement of service and or a defence as the case may be. So the duty of a judge in considering whether to set aside a regularly obtained judgment does not automatically end at a finding that there is a defence with a real prospect of success. Issues of delay and an explanation of failure to comply with the rules of court as to time lines must be weighed in the equation.
>
> [28] While it is accepted that the primary consideration is whether there is a real prospect of the defence succeeding, that is not the sole consideration and neither is it determinative of the question whether a default judgment should be set aside. The relevant conditions specified in rule 13.3(2) must be considered and such weight accorded to each as a judge would deem fit in the circumstances of each case, whilst bearing in mind the need to give effect to the overriding objective."

[33] The learned judge considered two ancillary issues, which she identified at para. [9] as follows:

> "3. Whether the second defendant was in a position to prove the amount of damages, when the claim had not been determined.
>
> 4. Whether a default judgment should have been entered administratively in circumstances where the facts

> alleged in the ancillary claim are closely connected with the facts alleged in the claim."

The learned judge's conclusions on these issues were, firstly, that damages on the counterclaim could not be proved while the main claim remained unresolved, rendering the default judgment on the counterclaim effectively otiose. Secondly, the learned judge spent considerable time addressing whether there is, as she frames it, "an anomaly in the CPR in that it does not appear to have been envisaged that the Registrar should have the discretion to decline to enter a default judgment, even if there is a close connection between the claim and counterclaim and even if they should be tried together". She concluded that, based on the wording of rule 12.5 of the CPR, it appears that the Registrar has no discretion when presented with a request for default judgment in respect of a counterclaim to consider whether the counterclaim ought to be dealt with together with the main claim. It is of significance that the counterclaim does not ask for a specific sum of money but seeks an amount to be determined if it is proven that the respondent breached his contract of employment and is liable to indemnify Employ for the damages assessed. The primary risk of granting a judgment in default of defence to the counterclaim is that it could lead to an inconsistent judgment if allowed to stand, especially if the respondent succeeds in his claim by making findings of fact or legal conclusions that undermine the fundamental basis for the respondent's liability on the counterclaim.

[34] However, in my view, it is not necessary for this court to examine and reach a final decision on the issue of whether a default judgment should have been entered administratively, as the application for leave to appeal can be resolved by assuming that the default judgment was properly entered, and by applying the general process of assessing whether the default judgment should be set aside in this case. This approach will not prejudice the applicants.

Is the absence of an affidavit of merit fatal?

[35] It is important to note that the core of the counterclaim is that, by performing the routine in the manner he did, the respondent acted negligently and breached his employment contract. The learned judge observed that the respondent's affidavit, sworn to and filed on 20 April 2023, does not include any facts in defence of the counterclaim but instead presents a draft defence in which he denies having breached the contract, claiming that he acted professionally and adhered to all business practices and standards of the workplace.

[36] It is a well-established view, following **Evans v Bartlam** [1937] AC 473, that applications to set aside judgments in default must be supported by an affidavit incorporating evidence as to the nature and strength of the defendant's case, demonstrating that the applicant's proposed defence had a real prospect of success. This is generally referred to as an affidavit of merit. This approach has been followed in regional cases such as **Ramkissoon v Olds Discount Co (TCC) Ltd** (1961) 4 WIR 73, in this jurisdiction in **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2 ('**B & J Holdings**'), in which Morrison JA (as he then was) examined several cases that addressed "the **Evans v Bartlam** requirement that the affidavit of merit should be sufficient to demonstrate a 'prima facie defence'". One such case was **European Partners in Capital (Epic) Holdings Bv v Goddard & Smith (A Firm),** in respect of which Morrison JA made the following observation:

> "[50 I would distinguish ***European Partners in Capital (Epic) Holdings Bv v Goddard & Smith (A Firm)*** on at least two bases. In the first place, it is a case concerned with whether the defendants ought to have been given leave to defend on an application for summary judgment, and not with an application to set aside judgment in default, to which, as the cases indicate, special rules requiring an affidavit of merit have always applied. But secondly, and perhaps of greater significance, the … the draft defence provided by the solicitor's affidavit indicated clearly that the defendants intended to rely at trial on the correctness of the very valuation report which was the subject of the action: in this

circumstance no further affidavit of merit could have been expected and it is perhaps for this reason that no issue appears to have been taken as to the solicitor's affidavit."

[37] The question in this case, as it arose in **B & J Holdings**, is whether the respondent's affidavit sufficed as an affidavit of merit. To complete that analysis, it is necessary to reproduce Employ's counterclaim as follows:

> "19. By way of counterclaim, the Second Defendant repeats paragraphs 1 to 18 particularly paragraph 16 hereof and avers that the Claimant was in breach of the contract of employment for which the Second Defendant is entitled to damages.
>
> 20. Further or in the alternative, the Second Defendant maintains that in the event the claim fails entirely or partially it is entitled to and seeks damages from the Claimant in the amount of fees, costs and expenses incurred in defending the present proceedings the particulars of which appear hereunder
>
> **PARTICULARS OF FEES COSTS EXPENSES LOSS AND DAMAGES**
>
> (a) Legal fees: JMD 300,000.00 (and continuing);
>
> (b) Administrative costs: JMD 80,000.00 (and continuing)."

[38] Para. 16 of the applicants' defence, which they emphasise, is in the following terms:

> "16. Further or in the alternative, the Second Defendant in relation to the claim will further rely on Clause 5(k) of the contract of employment between the Claimant and itself wherein the Claimant agreed to indemnify and keep the Second Defendant indemnified from and against any or all loss and damage or liability whether criminal or civil suffered and legal fees and cost incurred by the Second Defendant which directly or indirectly results from a breach by the Claimant of the said contract which shall include but which is not limited to any act, neglect or default of the Claimant and/or breaches committed by the Claimant in respect

of any matter arising from the Claimant's employment."

[39] In responding to para. 16, the respondent, in his defence to counterclaim filed 26 August 2024, states:

> "5. That paragraph 16 is vehemently denied as the Claimant cannot be found to be in breach of said clause where it has been asserted that the negligence was caused and or contributed by the Defendant in this matter and as such, the Defendant is put to strict proof. The Claimant will further state that the Defendant is not entitled to damages whether directly or indirectly as a result of the mentioned clause as the indemnity is qualified to acts, neglects or defaults of the 'Employee' and in this instance, the act neglect or default is attributed to that of the 'Employer'."

The counterclaim by Employ, to be successful, must satisfy two requirements. Firstly, that the respondent's conduct constituted a breach of clause 5(f) of his contract of employment to, inter alia, use the property professionally, and secondly, that clause 5(k) of the contract provided that in the event of such breach he was liable to compensate Employ. Clause 5(k) provides as follows:

> "5. **<u>The Employee's Agreements/Warranties</u>**
>
> The Employee agrees or warrants:
>
> …
>
> (k) to indemnify and keep indemnified the Employer from and against any and all loss and damage or liability (whether criminal or civil) suffered and legal fees and costs incurred by the Employer which directly or indirectly results from a breach of this Agreement by the Employee which includes, but which is not limited to, any act, neglect or default of the Employee and/or breaches in respect of any matter arising from the employment and the deployment;"

[40] The applicants, on one hand, and the respondent, on the other hand, are placing the responsibility for the accident on the shoulders of the other. The respondent, in his affidavit, neglected to provide evidence of the facts on which he is basing his defence to the counterclaim (which appears to be the same factual circumstances pleaded in support of his claim). However, although there is the absence of such evidence, the court is empowered to consider that, for the respondent to be liable on the counterclaim, the court must find that he has breached the contract and that, as a matter of law, which ought not to be included in an affidavit, Employ is entitled to enforce the indemnity clause against him.

[41] For this reason, it is my opinion that the absence of an affidavit of merit by the respondent, detailing the facts supporting his defence to the counterclaim, is not fatal because there remains an issue to be determined regarding the enforceability of clause 5(f) of the employment contract. The scope and applicability of clause 5(f) are not immediately clear and are deserving of more detailed consideration during a trial. Therefore, despite the deficiency in the respondent's affidavit, he is still able to demonstrate that he has a real prospect of successfully defending the counterclaim.

[42] The learned judge concluded that, considering the draft defence, the nature of the counterclaim, and the fact that the only loss pleaded consisted of legal fees and costs, which would, in any event, be determined after the main claim had been resolved, the respondent had a real prospect of successfully defending the counterclaim. In my view, the learned judge's conclusion in this regard is reasonable.

The other factors to be considered

[43] Regarding whether the application to set aside was made as soon as was reasonably practicable after the default judgment, the learned judge concluded that, although the five months and two days' delay in making the application was not prompt, it could not be considered inordinate. This is a matter within her discretion, and this delay is not an outlier, considering other cases (see **Russell Holding Limited v L&W Enterprises Inc & ADS Global Limited**).

[44] The learned judge found the explanation for the delay inadequate but emphasised that the overriding objective of the CPR and the assessment of whether there was a real prospect of defending the claim were paramount. She considered the potential prejudice to Employ and concluded that Employ would not suffer any prejudice if the default judgment were set aside, whereas the respondent would be prejudiced if denied the chance to respond to the counterclaim. She, therefore, deemed the matter suitable for setting aside the default judgment.

Conclusion and disposal

[45] The approach of the learned judge to the respondent's application to set aside the judgment cannot be faulted. Under rule 13.3 of the CPR, the key consideration, which she correctly identified, is whether the appellant has a real prospect of successfully defending the claim. Having found that such a defence exists, the learned judge concluded that the other factors she considered did not undermine her decision that the default judgment should be set aside.

[46] I have found that the learned judge did not err in her approach and her decision was not aberrant, and for those reasons, I am of the opinion that the application for leave to appeal should be refused. Accordingly, I propose the following orders:

(1) The application for leave to appeal is refused.

(2) Costs are awarded to the respondent to be taxed if not agreed.

F WILLIAMS JA

ORDER

1. The application for leave to appeal is refused.

2. Costs are awarded to the respondent to be taxed, if not agreed.