

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P (AG)
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)**

APPLICATION NO COA2021APP00087

**BETWEEN ORAL MYERS APPLICANT
AND DANE DAMION LAING RESPONDENT**

Richard Reitzin instructed by Messrs Reitzin & Hernandez for the applicant

Kwame Gordon instructed by Samuda & Johnson for the respondent

21 February 2022 and 27 February 2026

Civil practice and procedure – Application for leave to appeal – Application for leave to appeal treated as hearing of the appeal – Application to set aside default judgment regularly obtained – Whether there is a real prospect of successfully defending the claim – Whether respondent applied to set aside default judgment as soon as reasonably practicable – Whether good reason given for failure to file acknowledgement of service – Whether the learned master was correct to set aside default judgment – Overriding objective – Costs – Civil Procedure Rules, 2002, rules 13.3 and 64.6

MCDONALD-BISHOP P (AG), D FRASER JA AND G FRASER JA (AG)

[1] This is the judgment of the court.

[2] The applicant, Mr Oral Myers, seeks leave to appeal from the order of Master Ms S Reid (Ag) (as she then was) ('the learned master'), made on 17 May 2021. By that order, the learned master set aside a judgment in default of acknowledgement of service that the applicant had obtained against Mr Dane Damion Laing ('the respondent') in the Supreme Court, in Suit No SU 2019 CV 03359 ('the Supreme Court claim'), a personal

injury action. The applicant also challenges the learned master's order on costs in favour of the respondent.

[3] At the hearing of the application for permission to appeal, the parties agreed that the application should be treated as the substantive hearing of the appeal. Accordingly, pursuant to the discretion conferred by rule 1.8(8)(c) of the Court of Appeal Rules, 2002 ('CAR'), this court directed that the hearing proceed on that basis.

Background

[4] On or about 26 September 2018, a motor vehicle collision occurred along the Mandela Highway involving three vehicles travelling in convoy. The applicant was the driver of the lead vehicle. He was followed by a vehicle driven by Mr Karim Rahman White ('Mr White'), the 1st defendant in the proceedings below, and thereafter by a third vehicle driven by the respondent. The applicant alleges that he sustained personal injuries as a consequence of the collision. He accordingly commenced proceedings in the Supreme Court on 22 August 2019, against both Mr White and the respondent. The initiating documents were served on the respondent on or about 26 August 2019, whereupon he forwarded them to his insurers, Advantage General Insurance Company Limited ('the insurers').

[5] The insurers commenced their investigations; however, no acknowledgement of service was filed on the respondent's behalf until 4 October 2019. By that time, the prescribed period for filing had elapsed, and the applicant had already requested judgment in default of acknowledgement of service. Although the parties thereafter explored the possibility of mediation, counsel for the applicant informed the respondents on 10 August 2020 that an application for default judgment had already been made.

[6] On 14 August 2020, the respondent applied to set aside the default judgment. In her decision delivered on 17 May 2021, the learned master:

- a. rejected the applicant's preliminary issue grounded in waiver, election and estoppel, holding that the respondent was entitled, pursuant to rules

13.3(1) and (2) of the Civil Procedure Rules, 2002 ('CPR'), to seek relief from the default judgment;

- b. considered the affidavit evidence of Miss Vanessa Nesbeth ('Miss Nesbeth') and the respondent. While acknowledging deficiencies in the affidavit of merit, she concluded that, having regard to the overriding objective, the interests of justice warranted setting aside the default judgment. In this regard, she relied on **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy** (unreported), Supreme Court, Jamaica, Claim No 2008 HCV 05707, judgment delivered 4 April 2011 ('**Victor Gayle**'), for the principle that litigants ought not ordinarily to be penalised for inadvertent errors of their attorneys;
- c. examined the draft defence exhibited to the affidavit and, although recognising that pleadings do not constitute evidence, determined that it disclosed a good defence with a real prospect of success and raised questions of fact and triable issues to be determined by the court;
- d. observed that, in any event, the litigation between the parties would continue by reason of ancillary claims, even if the default judgment were to remain extant;
- e. noted that the applicant's attorneys delayed for approximately one year before notifying the respondent that default judgment had been sought, and further noted the absence of any affidavit evidence contradicting Miss Nesbeth's evidence. She, therefore, concluded that the applicant would suffer no prejudice if the default judgment were set aside;
- f. determined that the respondent had acted promptly once he became aware that a default judgment had been requested;

- g. accepted that the respondent's reliance on his insurers constituted a good explanation for the failure to file the acknowledgement of service within time;
- h. further found that there had been a delay on the part of the applicant in notifying the respondent of the default judgment entered against him; and
- i. considered, but ultimately rejected, the contention that the applicant had waived his entitlement to pursue default judgment by engaging in mediation.

[7] The learned master consequently set aside the default judgment, permitted the acknowledgement of service filed out of time to stand, made no order as to costs, and refused leave to appeal.

[8] Dissatisfied with that decision, the applicant filed an application for leave to appeal, accompanied by proposed grounds of appeal. At the stage of treating the application as the hearing of the appeal, written reasons for the decision had not yet been provided. This court, therefore, requested that the learned master furnish the reasons for her orders. Although Mr Richard Reitzen ('Mr Reitzin'), counsel for the applicant, indicated that, having reviewed the reasons, he would have advanced additional grounds, no formal amendment to the notice of appeal was filed. In the particular circumstances, and with the parties' agreement, this court permitted reliance on additional grounds of appeal.

[9] When the matter came before this court on 21 February 2022, directions were given for the parties to file written submissions upon receipt of the learned master's reasons. In compliance with that order, the applicant, at para. 48 of his submissions, articulated 38 proposed grounds of appeal upon which he contends he may rely. Those grounds, which may conveniently be grouped by reference to the issues they raise, collectively assert that the learned master fell into error in the following respects:

1. Failing to appreciate that, since the respondent elected not to file an acknowledgement of service within time, he could not, by reason of estoppel, waiver and/or cognate concepts, apply to set aside the default judgment (grounds i to xi).
2. Finding that she was restricted to rule 13.3 of the CPR, to dispose justly of the application to set aside the default judgment (ground xii).
3. Finding that the respondent had a good explanation for not filing the acknowledgement of service within time (ground xiii).
4. Finding that the respondent's pleadings raised issues to be tried (grounds xiv, xv, xvi and xvii).
5. Failing to make a determination on the applicant's objections as to the admissibility of the respondent's affidavit filed in support of his application to set aside the default judgment (grounds xviii, xix, xx and xxi).
6. Failing to appreciate that the default judgment requested by the applicant had not been entered and that, therefore, the applicant had not delayed in informing the respondent of the default judgment (grounds xxii and xxiii).
7. Concluding that the respondent's defence was filed within time (grounds xxiv and xxv).
8. Taking into account irrelevant considerations relating to the respondent's pleadings (grounds xxvi, xxvii and xxviii).
9. Failing to deal with the case justly (grounds xxix and xxx).
10. Treating the continued litigation between the defendants (in the court below) and the applicant, as a relevant factor (ground xxxi).
11. Considering whether the respondent genuinely wanted to contest the claim (grounds xxxii and xxxiii).

12. Determining that the applicant's willingness to pursue mediation meant that the pleadings were closed (grounds xxxiv and xxxv).
13. Determining that a default judgment could be waived (ground xxxvi).
14. Finding that the applicant had taken inconsistent positions in pursuing both default judgment and mediation (ground xxxvii); and
15. Characterising the judgment obtained as one entered in default of defence (ground xxxviii).

[10] Although the grounds of appeal did not initially address costs, Mr Reitzin, subsequently filed a notice of application to amend the application for permission to appeal on 7 February 2022, seeking costs both in this court and in the court below, and addressed that issue in his written submissions. In those circumstances, this court will also determine the question of costs.

The submissions

The applicant's submissions

[11] Mr Reitzin submitted that the respondent's failure to file his acknowledgement of service within the prescribed time amounted to a waiver of his right to do so and, further, of his right to apply to set aside the default judgment. He contended that this omission enabled the applicant to request judgment in default of acknowledgement of service. In those circumstances, he argued, the respondent made an election between inconsistent rights. Mr Reitzin maintained that the learned master erred in failing to recognise that the only reasonable conclusion was that the respondent had elected not to file an acknowledgement of service and was thereby estopped from, or had waived his right to, both file the acknowledgement and seek to set aside the default judgment. Although the learned master accepted that, even where waiver, election, or estoppel is established, an applicant may still seek to defend or apply to set aside a default judgment, he contended that the present case was distinguishable from the authority upon which she relied.

[12] Mr Reitzin further argued that the learned master's finding that the respondent's failure to file the acknowledgement of service was unintentional was unsupported by evidence. He contended that the material before the court suggested that the failure was deliberate. In any event, he submitted, even if the omission were unintentional, that fact alone would not justify the grant of the application. Mr Reitzin argued that rule 13.3(2)(b) of the CPR contemplates unintentional failures, not deliberate defaults. While acknowledging that the court retains a discretion to set aside a default judgment upon a good explanation being shown, he maintained that such discretion ought to be exercised only in compelling circumstances.

[13] Counsel also submitted that the learned master erred in concluding that there were issues to be tried. Although she correctly observed that a defence is not evidence, he contended that she improperly relied upon the draft defence in determining that triable issues existed. He argued that such findings must be grounded in affidavit evidence. Mr Reitzin reasoned that since the affidavit material disclosed no issues fit for trial, the learned master must have relied on the draft defence, which was impermissible. He further submitted that the purpose of rule 13.4(3) of the CPR, which requires the filing of a draft defence, is merely to enable the court to assess whether it discloses reasonable grounds for defending the claim.

[14] Additionally, Mr Reitzin contended that the learned master erred in finding that the respondent had a real prospect of successfully defending the claim. He argued that such a prospect must carry some degree of conviction and that the respondent failed to meet that threshold. He submitted that the supporting affidavit contained inadmissible material of which the learned master was aware but which she failed to strike out. Counsel maintained that it was unnecessary for the applicant to apply formally to strike out the offending portions because:

- a. the learned master, by virtue of rule 30.3(3) of the CPR, is empowered to strike out inadmissible evidence without the need for an application to that effect;

- b. if he raised the issue of inadmissible evidence earlier, the respondent would have been able to correct it; and
- c. the learned master requested submissions on the admissibility of the affidavit evidence, which she should have treated as an application to strike out the inadmissible sections of the respondent's affidavit.

[15] Mr Reitzin further argued that the respondent failed to particularise his own conduct or explain how it rendered him blameless in respect of the accident, instead focusing on the actions of the 1st defendant. He also criticised the failure to incorporate the draft defence into the affidavit, emphasising that a draft defence is not evidence. In support of these submissions, he relied upon **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1.

[16] Also challenged by Mr Reitzin was the learned master's conclusion that the applicant's delay in notifying the respondent of his request for default judgment was a factor weighing against him. He submitted that the learned master erred in proceeding on the basis that a default judgment had been entered when, in fact, it had not. In those circumstances, there was no document capable of service upon the respondent. He further contended that the learned master was incorrect in stating that the judgment was obtained in default of defence.

[17] Mr Reitzin argued that the learned master took into account irrelevant considerations in exercising her discretion. These included the absence of an affidavit filed by the applicant in response to the respondent's affidavit, the timeliness of the defence, the conduct of the applicant and his attorney-at-law, and the finding that the respondent had a genuine desire to contest the claim, notwithstanding the absence of supporting affidavit evidence. He submitted that reliance on these matters resulted in a denial of natural justice.

[18] He further complained that the learned master denied the applicant natural justice by relying upon matters in respect of which submissions had not been invited. Although

she referred to the overriding objective, he argued that she misapplied that principle by deploying it to the benefit of a party in default.

[19] Mr Reitzin also submitted that the applicant had instituted separate claims against the defendants and, accordingly, the principles in **Sasha-Gaye Saunders v Michael Green et al** (unreported), Supreme Court, Jamaica, Claim No 2005 HCV 2868, judgment delivered 27 February 2007 (**Saunders v Green**), were inapplicable. He argued that the learned master, therefore, erred in setting aside the default judgment, as a judgment against the respondent would have resolved the issues pertaining to him. He further maintained that the applicant's willingness to pursue mediation did not signify that the pleadings were closed.

[20] Moreover, Mr Reitzin criticised the learned master's comparison between the late filing of the acknowledgement of service and the timely filing of the defence. He submitted that the two were not analogous, since an acknowledgement of service must be filed before a request for default judgment is made, which had already occurred in this case. In his submission, the subsequent filing of a defence was immaterial.

[21] Finally, counsel contended that the learned master erred in making no order as to costs in favour of the applicant. He suggested that this flowed from her mistaken view that the applicant had delayed in notifying the respondent of the default judgment and had acted inconsistently in pursuing mediation. Mr Reitzin maintained that requesting default judgment was not inconsistent with engaging in mediation.

The respondent's submissions

[22] Mr Kwame Gordon ('Mr Gordon'), on behalf of the respondent, submitted that the learned master properly exercised her discretion in setting aside the default judgment. He contended that Mr Reitzin sought impermissibly to expand the applicable test by introducing extraneous considerations such as election, estoppel, waiver, and related doctrines. Mr Gordon maintained that the only relevant criteria are those prescribed by

rule 13.3 of the CPR, and that the learned master correctly confined herself to those considerations.

[23] Mr Gordon rejected the contention that the respondent's affidavit contained inadmissible material. He submitted that the affidavit sufficiently addressed the substance of the applicant's claim and disclosed the basis of the proposed defence. In any event, he argued that even if the impugned portions were excised, the essential thrust of the affidavit would remain intact, namely, that the 1st defendant's motor vehicle collided with the applicants' vehicle, thereby demonstrating a real prospect of successfully defending the claim.

[24] Mr Gordon candidly acknowledged that the affidavit of merit exhibited certain deficiencies. However, he submitted that the learned master, in furtherance of the interests of justice, appropriately intervened to prevent the respondent from being unfairly prejudiced by inadvertent errors on the part of his attorneys-at-law in the preparation of that affidavit. Having recognised the deficiencies, the learned master considered the draft defence and the ancillary claims and properly concluded that the interests of justice warranted the setting aside of the default judgment.

[25] Further, Mr Gordon submitted that the learned master was entitled to consider the draft defence, which was before her and properly filed. Even if it were regarded as irregular, he contended that she was entitled to treat it as a proposed defence for the purposes of the application. He argued that the material before the learned master demonstrated the existence of live issues between the applicant and the respondent, as well as between the respondent and the 1st defendant, which required ventilation at trial. He submitted that, in those circumstances and in keeping with the overriding objective, the default judgment was properly set aside. Mr Gordon added that it was implicit in the learned master's reasoning that permitting the default judgment to stand would create the risk of inconsistent or irreconcilable findings.

[26] Mr Gordon further submitted that the learned master carefully considered the evidence and relevant authorities before concluding that the applicant would suffer no prejudice if the default judgment were set aside. He maintained that she was correct in finding that the respondent applied to set aside the judgment as soon as it was reasonably practicable after becoming aware of it, and that his reliance upon his insurers constituted a good explanation for the failure to file the acknowledgement of service within the prescribed time.

[27] With respect to costs, Mr Gordon acknowledged that the learned master made no order and did not provide detailed reasons. Nevertheless, he argued that her decision should not be disturbed. He submitted that counsel for the applicant acted unreasonably in delaying notification of the request for default judgment and in advancing arguments irrelevant to an application under rule 13.3 of the CPR. In support of his submissions on costs, he relied upon rule 64.6 of the CPR and the decision in **Straker v Tudor Rose (a firm)** [2007] EWCA Civ 368.

[28] In conclusion, Mr Gordon submitted that none of the grounds of appeal disclosed any error of principle or misdirection sufficient to justify appellate intervention.

Discussion and analysis

[29] This appeal concerns the learned master's exercise of discretion under rule 13.3 of the CPR to set aside a default judgment. Rule 13.3 requires a court to consider whether the applicant has a real prospect of successfully defending the claim. Additionally, the court must be satisfied that:

- a) the application was made as soon as reasonably practicable after the applicant became aware of the judgment; and
- b) whether there is a good reason for the non-compliance.

The court must also consider any prejudice to the respondent and view the circumstances in the light of the overriding objective and the need to do justice between the parties

(see **Russell Holdings Limited v L&W Enterprises Inc and ADS Global Limited** [2016] JMCA Civ 39). These are the governing criteria.

[30] It is well established that an appellate court will not lightly interfere with the exercise of such a discretion. Intervention is warranted only where it can be shown that the learned master misunderstood the law or the evidence, or reached a conclusion on an inference that certain facts existed or did not exist which is demonstrably wrong or the decision is so aberrant that no judicial officer, regardless of his or her duty would arrive at that decision (see **Hadmor Productions Ltd and others v Hamilton and another** [1982] 1 All ER 1042).

[31] Furthermore, this court bears in mind the guidance of Moore-Bick J in **International Finance Corporation v Ute Africa SpA** [2001] All ER (D) 101 (May), at para. 8, that a party in whose favour a regular judgment has been entered, including a judgment in default, possesses a valuable right. Such a judgment is not to be set aside lightly, nor should the successful party be deprived of its benefit absent good and sufficient reason. While doctrines such as waiver, election, and estoppel may arise in appropriate cases, they do not supplant the procedural framework established by the CPR. This appeal will, therefore, be determined through the lens of rule 13.3 of the CPR and the justice of the case.

[32] The applicant contends that by failing to file his acknowledgement of service within time, the respondent waived his right to defend and elected to stand by that default. We are unable to accept that submission. A failure to comply with a procedural time limit, without more, does not ordinarily constitute an unequivocal representation or conduct giving rise to waiver or estoppel in the strict legal sense. Nor does it amount to an election between inconsistent substantive rights.

[33] The learned master correctly directed herself that the applicable inquiry was governed by rule 13.3, and was also correct in determining that the issues of election, estoppel and waiver did not arise in the matter. To elevate the respondent's procedural

default into an irrevocable abandonment of his right to defend would be inconsistent with the structure and purpose of the CPR, which expressly contemplates that default judgments may, in appropriate circumstances, be set aside. Rule 13.3 of the CPR, by its very nature, aids a litigant against whom judgment in default has been entered, usually because of a failure to fulfil a procedural requirement. It affords such a litigant, once its requirements are satisfied, the opportunity to seek the court's indulgence in having a default judgment set aside. The learned master, therefore, correctly directed herself that the determination of the application was to be confined to the framework of rule 13.3 and that there was no basis for importing additional principles beyond those prescribed by the rule (see para. [35] of her judgment).

Whether the respondent has a real prospect of successfully defending the claim

[34] The proper approach to determining whether a defendant has "a real prospect of success" is well settled. In **Swain v Hillman and another** [2001] 1 All ER 91, Lord Woolf MR explained that the prospect must be "real" as opposed to "fanciful". The Court of Appeal of England and Wales elaborated in **ED & F Man Liquid Products Ltd v Patel & another** [2003] EWCA Civ 472, at para. 8, that what is required is that the defendant's case be "better than merely arguable". It is against that settled jurisprudence that the material before the learned master must be assessed.

[35] In paras. 7 to 10 of his affidavit, the respondent deposed that the accident involved three motor vehicles; that it was caused wholly or partially by the negligence of the 1st defendant; that he did not collide with the applicant's vehicle at all; and that he did not cause the 1st defendant to collide with the applicant. He concluded that, in those circumstances, he had a real prospect of successfully defending the claim.

[36] Mr Reitzin's submission that the respondent's affidavit contained inadmissible material is not without substance. It is beyond dispute that the court may, of its own motion, strike out such material; however, the invocation of that power lies within the court's discretion. The learned master was plainly cognisant of the deficiencies identified and expressly adverted to them. The absence of a discrete ruling on each objection does

not, without more, advance the applicant's case. Even on the hypothesis that the objectionable portions were removed, the respondent's primary contention, that responsibility rested elsewhere, would have persisted. The residual content of the affidavit disclosed a proposed defence substantially consonant with the draft defence filed on 28 October 2019. In these circumstances, it has not been demonstrated that the impugned material materially influenced the result or that any material prejudice arising from the inclusion of the inadmissible passages has been established.

[37] It is accepted that, in circumstances where no acknowledgement of service was filed within the prescribed time and a request for default judgment had already been made, the proper course under rule 13.4(3) of the CPR was to exhibit a draft defence to an affidavit rather than to rely upon a defence subsequently placed on the record. Although the defence was filed within the 42-day period, the absence of a timely acknowledgement rendered it procedurally irregular, particularly in light of the intervening request for judgment. To the extent that the learned Master proceeded on the basis that the defence had been filed within time, that constituted an error. However, that mischaracterisation did not undermine or materially affect the substance of her reasoning.

[38] Contrary to the applicant's submission, and consistently with the authorities (see **Russell Holdings Limited v L&W Enterprises Inc and ADS Global Limited**), the learned master was not only entitled but obliged to examine the draft defence in determining whether triable issues were disclosed. The rule expressly envisages the exhibition of a draft defence to enable the court to assess whether there exists a real prospect of success. The draft defence advanced a factual narrative materially divergent from that proffered by the applicant. The respondent contended that the 1st defendant overtook and swerved into his path; that the applicant brought his vehicle to a sudden stop; that the 1st defendant collided with the applicant; and that any subsequent impact involving the respondent was with the 1st defendant's vehicle, not that of Mr Myers. He maintained that the collision with the applicant's vehicle was caused solely by the 1st

defendant and that any resultant damage was attributable, in whole or in part, to that defendant's negligence.

[39] By that account, the respondent plainly disassociated himself from liability. As was observed in **Victor Gayle** (citing Blackstone's Civil Procedure 2004 para. 34.14), a case relied upon by the learned master, a defendant may demonstrate a real prospect of success by denying the facts essential to the claimant's cause of action. The learned master, while cognisant of the affidavit's deficiencies, was also required to consider the overriding objective and the totality of the circumstances. Within that framework, she assessed whether triable issues arose.

[40] The learned master accepted that the deficiencies identified in the affidavit were the product of inadvertence on the part of the respondent's attorneys-at-law. In that regard, she placed reliance on the dictum of Phillips JA in **Merlene Murray-Brown v Dunstan Harper and another** [2010] JMCA App 1, to the effect that the court may, in an appropriate case, intervene to shield a litigant from the consequences of his attorney's inadvertent error. She proceeded to consider the pleadings in their entirety and observed that the defence and the ancillary claims were internally consistent and disclosed issues properly to be resolved at trial. She further reasoned that, even if the default judgment were permitted to stand, the controversies between the parties would nonetheless subsist within the ancillary proceedings.

[41] Against that background, the learned master found that the respondent's defence squarely traversed the factual foundation of the applicant's claim, advanced a materially different account of the accident which exculpated him from liability, and raised triable issues of fact. On that basis, she concluded that the defence was a good one and that the respondent had demonstrated a real prospect of successfully defending the claim.

[42] The material before the learned master indicated that liability for the motor vehicle collision was disputed and that there were competing accounts involving the 1st defendant. In those circumstances, it was open to her to conclude that issues of fact

arose which were more appropriately determined at trial. Her finding that the respondent had demonstrated a real prospect of successfully defending the claim, therefore, cannot be characterised as irrational or unsupported.

Multiple defendants and the risk of inconsistent judgments

[43] The learned master further observed that, even if the default judgment remained extant, the litigation between the applicant and the 1st defendant would necessarily involve examination of the respondent's role in the collision. That approach accords with the reasoning of Sykes J (as he then was) in **Saunders v Green**, where he stated that, in cases involving multiple defendants, the court should favourably consider setting aside a default judgment where the issues concerning that defendant would, in any event, fall to be examined at trial, provided that no serious injustice would be occasioned to the claimant.

[44] Brooks JA (as he then was) adopted and affirmed that principle in **Hoip Gregory v Vincent Armstrong; Hoip Gregory v O'Brien Kennedy** [2012] JMCA App 21. At para. [15], he stated that:

“Sykes J recognised the practicality of this position in **Saunders v Green and Others** 2005 HCV 2868 (delivered 27 February 2007). In a case in which one of several defendants had failed to file a defence within the prescribed time, Sykes J ruled that a judgment in default of defence should be set aside to enable the defaulting defendant to participate in the trial, where the issues concerning that defendant would have had to have been tried in any event.”

[45] At para. [16], Brooks JA specifically endorsed the pronouncement of Sykes J, made at para. 27 of his judgment, in **Saunders v Green**. Brooks JA quoted as follows:

“[16] ...in cases where there are multiple defendants and a default judgment has been entered against one and that judgment does not relieve the court, at any subsequent trial, from exploring issues directly involving that particular defendant, the court should favourably consider any

application to set aside judgment provided this can be done without serious risk of injustice to the claimant. The risk of injustice to the claimant must be considered because justice cannot be for the defendant alone or for one party.”

At para. [17] Brooks JA further stated that, “[t]he learned judge relied on, as authority for that principle, **Hussain v Birmingham City Council and Others** [2005] EWCA Civ 1570. I respectfully agree with his enunciation of the principle”.

[46] The learned judge of appeal underscored that, where liability stems from the same transaction and turns on a substantially common factual matrix, the court must be vigilant to avoid inconsistent or conflicting determinations. The mere fact of a default does not relieve the court of its responsibility to secure coherence and fairness in the administration of justice. Brooks JA accepted that, while a claimant is ordinarily entitled to judgment against a defendant in default, particular care is required in cases involving multiple defendants whose alleged liability is interrelated or arises from the same set of events. He cautioned that entering a default judgment against one defendant, while substantially identical issues proceed to trial against another, may yield contradictory outcomes. In such cases, the court may, and where appropriate must, consider whether entering or sustaining a default judgment would occasion injustice or procedural dissonance. He further stressed that the CPR must be applied in harmony with the overriding objective, so that procedural rights do not eclipse substantive justice when the liability of the defendants is closely interconnected.

[47] In substance, Brooks JA applied the well-established principle, derived from English authority, that where defendants are alleged to be jointly liable, or where findings against one would inevitably bear upon the position of another, the court should avoid fixing one defendant with liability by default while another may successfully resist the same claim at trial.

[48] In the present matter, if the default judgment were allowed to stand, the trial between the applicant and the 1st defendant would still require examination of whether the respondent’s vehicle collided with the 1st defendant’s vehicle and whether that

collision contributed to the impact with the applicant. The potential for inconsistent determinations is, therefore, evident.

Prejudice

[49] The learned master carefully and explicitly considered the question of prejudice to the applicant in the event that the default judgment was set aside. She correctly acknowledged that a party that has obtained a regular judgment acquires a substantive and valuable procedural advantage which ought not to be disturbed lightly. In accordance with rule 13.3, she balanced that consideration against the broader interests of justice and the need to ensure that disputes raising genuine triable issues are determined on their merits.

[50] The learned master also addressed the respondent's contention that the applicant, by participating in mediation after the entry of default judgment, had waived his entitlement to rely upon said judgment. While a waiver is not an express requirement under rule 13.3, it was raised before the court and apparently was considered as part of the overall factual matrix. Having examined the circumstances, the learned master was not satisfied that the stringent threshold for waiver, namely, a clear and unequivocal election to abandon reliance on the judgment, had been established. However, given that the determination of the application falls to be made strictly within the confines of rule 13.3, and that waiver does not constitute a freestanding criterion under that rule, we refrain from expressing any concluded view on that issue.

Whether the respondent's application was made promptly

[51] The requirement of promptitude is a cardinal consideration under rule 13.3 of the CPR. The jurisprudence has consistently underscored that an applicant seeking to set aside a regularly obtained default judgment must act with alacrity once he becomes aware of the judgment. In the present case, the learned master found as a matter of fact that the respondent became aware of the request for default judgment on 10 August 2020 and filed his application on 14 August 2020. An interval of four days is, on any

objective assessment, well within the ambit of what is contemplated by the phrase “as soon as reasonably practicable”. That finding was grounded in the evidence and discloses no error of principle nor any misapprehension of the material before the court.

[52] The approach accords with the guidance articulated in cases such as **International Finance Corporation v Ute Africa Spri**, where the court emphasised that a party who has obtained a regular judgment possesses something of value and ought not to be deprived of it absent good reason. Promptitude is therefore essential because it demonstrates respect for the finality of judgments and the efficient administration of justice. Conversely, delay may signal acquiescence or indifference and can, in an appropriate case, tip the balance against the favourable exercise of the court’s discretion.

[53] One of the applicant’s complaints was that the learned master did not appreciate that the default judgment was requested but was not entered. It is correct, as a matter of procedural law, that a distinction exists between the request for default judgment and the formal entry of that judgment. However, the critical inquiry is when the applicant became aware, or ought reasonably to have become aware, that judgment had been or was about to be entered against him. The material before the learned master did not establish any period of inaction attributable to the respondent after he acquired knowledge of the impending judgment. There was, therefore, no evidential foundation upon which to conclude that he slept on his rights.

[54] The authorities make clear that promptness is not measured by rigid timeframes but by the circumstances of each case, including the complexity of the matter, the need for legal advice, and the speed with which the applicant took concrete steps to invoke the court’s jurisdiction. An application brought within four days of knowledge of the default judgment is, by any reasonable standard, expeditious. Therefore, given the short interval involved, the complaint on this ground cannot be sustained.

[55] Accordingly, the learned master's conclusion that the requirement of promptitude was satisfied is firmly rooted in both principle and authority.

Whether there was a good explanation for the default

[56] The explanation advanced was that the respondent, upon being served with the claim, transmitted it to his insurer in accordance with the terms of his policy. The insurer, thereafter, undertook its own investigations before instructing attorneys-at-law, with the result that the acknowledgement of service was filed outside the time prescribed by the CPR. The learned master accepted that reliance upon the insurer constituted a good explanation for the delay.

[57] With respect, that conclusion cannot be sustained without closer scrutiny of the principle. It is well established that litigants are personally responsible for ensuring compliance with procedural rules. The Civil Procedure Rules are not aspirational guidelines; they are designed to secure the overriding objective of dealing with cases justly and expeditiously. To permit routine reliance on an insurer's internal processes as a sufficient explanation would risk undermining the discipline which the CPR is intended to impose.

[58] The authorities have repeatedly emphasised that a "good explanation" connotes more than an account of what occurred; it requires a reason which is objectively satisfactory and which demonstrates that the default was not the result of indifference, inefficiency, or a failure to prioritise compliance. Administrative delay, whether on the part of a litigant, an insurer, or even legal representatives, does not ordinarily qualify. As has been stated in numerous decisions throughout the Commonwealth Caribbean, a party cannot shelter behind an agent's inefficiencies to excuse non-compliance with clear procedural timelines. An insurer, in this context, stands in no higher position than any other agent acting on behalf of a defendant.

[59] In the instant case, the explanation discloses no supervening circumstance, mistake beyond reasonable control, or procedural ambiguity. Rather, it reveals a

deliberate choice to allow investigations to run their course before engaging attorneys-at-law. While that approach may be commercially understandable from an insurer's perspective, it does not displace the mandatory obligation to file an acknowledgement of service within the stipulated time. The filing of an acknowledgement does not preclude investigation; it merely preserves the defendant's right to defend. The failure to take that elementary procedural step cannot, without more, be characterised as a good explanation. In that respect, the learned master erred in principle.

[60] That, however, does not conclude the matter. As this court made clear in **Trade Board Limited v The Attorney General of Jamaica and Daniel Robinson** [2013] JMCA Civ 46, the absence of a good explanation, while a highly material factor, is not invariably fatal to an application under rule 13.3 of the CPR. The discretion to set aside a regularly obtained default judgment is a broad one, guided, but not shackled, by the specified criteria. The court must undertake a holistic evaluation, giving due weight to all relevant considerations.

[61] Accordingly, even where the explanation for default is weak or unsatisfactory, the court must still ask the two pivotal questions: first, whether the defendant has demonstrated a defence with a real prospect of success; and second, whether the application was made promptly. These factors go to the substantive justice of the case. A defendant who moves swiftly and can show an arguable defence that is more than fanciful may, in an appropriate case, be granted relief notwithstanding an inadequate or unsatisfactory explanation. In this instance, the respondent did respond with some alacrity by bringing the claim to the attention of his insurers, even if, in the end, he should have gone further by acknowledging service. The overarching aim remains to balance the need for procedural discipline with the imperative to determine disputes on their merits where justice so requires. The fact that the respondent's explanation for not filing the acknowledgement of service may not be accepted as a good one would not have been determinative of the application to set aside the default judgment, and neither is it

determinative of the appeal. The overriding consideration is whether there is a defence with a real prospect of success, which the court has already found.

Conclusion

[62] The learned master adverted to certain considerations which were not strictly dispositive of the application to set aside a default judgment, and erred in concluding that a good explanation for the delay had been established. Also, her treatment regarding the request for default judgment versus the formal entry of that judgment may also not be acceptable, as contended by Mr Reitzin. However, her errors or missteps did not distort her analysis of the other weightier criteria and vitiate her ultimate determination.

[63] The learned master's conclusion was firmly anchored in the applicable legal principles and the structured inquiry mandated by rule 13.3 of the CPR. She directed herself to the relevant criteria, including the existence of a real prospect of successfully defending the claim and the overall justice of the case. Her assessment that the proposed defence raised genuine triable issues was grounded in the pleadings and the evidentiary material before her. She was satisfied that the respondent had demonstrated a defence with a real prospect of success, one that was neither fanciful nor merely arguable, but raised triable issues fit for determination at a full hearing. She further found, on sound evidential footing, that the application to set aside the default judgment was made promptly. These conclusions were clearly open to her.

[64] It bears repeating that the discretion to set aside a regularly obtained default judgment is not exercised mechanistically. While the presence or absence of a good explanation is a significant factor, it is not dispositive, as this court made clear in myriad decisions. The court must undertake a holistic evaluation of all the circumstances, with particular emphasis on whether the proposed defence carries a real prospect of success and whether the applicant has acted with due expedition. These considerations go to the heart of the justice of the case. The function of rule 13.3 of the CPR is not to punish procedural missteps in a manner that extinguishes potentially meritorious defences, but

to balance procedural discipline against the imperative of resolving disputes on their merits.

[65] Accordingly, when the decision is viewed in its totality, the identified errors in the learned master's reasoning do not undermine the propriety of the exercise of her discretion. The learned master reached a conclusion that was open to her on the evidence and consistent with established principle. It cannot be said that she misdirected herself in law, took into account irrelevant matters of significance, failed to consider relevant ones, reached a conclusion that was plainly wrong, or so aberrant that no judge, being mindful of her duty to act judiciously, would have made it. Her decision, therefore, falls well within the generous ambit of discretion afforded to her as a judge considering such an application before her.

[66] Accordingly, the appeal should be dismissed as it relates to the learned master's decision setting aside the default judgment.

Costs

[67] The applicant has also challenged the learned master's costs order. The learned master had made no order as to costs in the court below and did not explain the basis for that decision. While it is well established that costs lie within the discretion of the court and, generally, follow the event, that discretion must be exercised judiciously. In further considering the exercise of the court's discretion on costs, it is necessary to have regard to Part 64 of the CPR, which addresses the general principles and the conduct of the parties, as follows:

- “64.6 (1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(Rule 65.8(3)(a) contains special rules where a separate application is made which could have been made at a case management conference or pre-trial review.)

- (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.
 - (3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.
 - (4) In particular it must have regard to -
 - (a) the conduct of the parties both before and during the proceedings;
- ..."

[68] Part 64 underscores that costs are intended to compensate a successful party for expenses reasonably incurred in the course of litigation and to deter unnecessary or improvident steps. Where an application arises from a party's own default, the costs and consequences must reflect that causative factor. In the present case, the respondent's application to set aside the default judgment arose directly from his prior inaction and non-compliance with the rules of court. As such, the costs thrown away as a result of that default, specifically, the costs incurred by the applicant in obtaining and seeking to enforce the regular judgment, must be weighed in assessing what, if any, costs order is just.

[69] A proper assessment of costs also requires consideration of the principle that costs are intended to recompense a party for expenses reasonably incurred and to deter unnecessary or avoidable litigation. Where litigation has arisen as a result of a party's default, consideration must be given to costs thrown away as a consequence of that default and the resultant litigation that could have been avoided. In this regard, rule 65.8 of the CPR is directly apposite, permitting the court to order that a party bear costs which have been incurred unnecessarily due to another party's act or omission. The applicant's costs incurred in responding to the respondent's application, which led to an avoidable satellite proceeding, must be viewed in this context. The respondent was forced to defend his regularly obtained judgment on a separate application brought about by the respondent to have it set aside. Had the respondent complied with the court rules for

filing a default judgment, the applicant would not have had to incur additional costs in that satellite proceeding.

[70] Those costs incurred by the applicant could reasonably be characterised as “thrown away” to the extent that the respondent’s subsequent application sought to revisit a matter that had been resolved due to his prior inaction. Equally relevant is the position of the applicant, who had obtained a regular judgment, as a thing of value, that he will lose due to no fault of his own. In this light, a decision to make no order as to costs appears difficult to justify and arguably fails to reflect the balance of justice. It disregards both the procedural responsibility of the respondent and the applicant’s entitlement to costs incurred as a result of the respondent’s default.

[71] Viewed in this light, the learned master’s decision to make no order as to costs is difficult to reconcile with the principles underpinning the CPR. A reasoned exercise of discretion, having regard to the conduct of the parties, the events leading to the application, and the costs already incurred, would have suggested that some order for costs in favour of the applicant as the compliant party was appropriate. Such an order would have recognised the applicant’s entitlement to recover costs expended as a direct consequence of the respondent’s default, and would have aligned the costs determination with the overarching objectives of fairness, coherence, and proportionality enshrined in Parts 64 and 65 of the CPR. Accordingly, the applicant is entitled to his costs thrown away in the proceedings in the court below, including the costs of the application to set aside the default judgment. The appeal succeeds on this ground concerning the costs below.

[72] In all the circumstances, the appeal fails in relation to the learned master’s decision to set aside the default judgment, but succeeds in relation to the costs order she made. The costs order should therefore be set aside, and an order for costs in favour of the applicant be made for the costs thrown away in the proceedings below, including the costs of the application to set aside the default judgment.

Costs of the appeal

[73] The applicant has asked that the costs of the appeal be awarded to him. Given that the applicant has not succeeded on the substantial and more critical aspects of the appeal, and the respondent is predominantly the successful party, we conclude that the appropriate order should be that each party bear its own costs of the appeal.

Apology

[74] Before concluding, we acknowledge the undue delay in delivering this judgment and proffer our sincerest apologies. The court recognises that such a delay is inordinate and undesirable, and no excuse will be advanced as none is considered sufficient to remedy the inconvenience and anxiety that must have been caused by the delay. We will simply say that the delay is profoundly regretted.

Order

[75] The court makes the following orders:

1. The application for permission to appeal, filed on 19 May 2021, is granted.
2. The hearing of the application for permission to appeal is treated as the hearing of the appeal.
3. The appeal against the judgment of the learned master, Ms S Reid, made on 17 May 2021, is allowed, in part (only as it relates to costs).
4. Order 1 of the learned master, to wit: "The judgment in default entered herein against the defendant and all subsequent proceedings are set aside on the ground that the defendant [the respondent] has a real prospect of successfully defending the claim", is affirmed.
5. Order 4 of the learned master that "[t]here be no order for costs" is set aside and substituted therefor is the following order:

“Costs thrown away in the proceedings and costs of the application to set aside the default judgment to the claimant [the applicant] to be taxed if not agreed.”

6. The defence filed on behalf of the respondent, on 28 October 2019, shall stand as properly filed.
7. The applicant is at liberty to file and serve a reply to the defence within 14 days of the date of this order.
8. A case management conference is to be fixed at the soonest possible time by the Registrar of the Supreme Court after the time limited for the filing of the reply.
9. Each party to bear his own costs of the appeal.