[2023] JMSC Civ.132

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2019CV02484**

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|---|---|---|
| **BETWEEN** | **HEATHER HASTINGS** | **CLAIMANT** |
| **AND** | **LOIS ROSE** | **DEFENDANT** |

**IN CHAMBERS**

**Ms. Analiese Minott instructed by Livingston Alexander and Levy for the Claimant**

**Mr. Jonathan Morgan and Kymberly Hanniford instructed by DunnCox for the Defendant**

**Heard: June 7th 2023 and July 21st 2023**

**Civil Procedure - Application to set aside Default Judgment – Whether Defendant has a real prospect of successfully defending the claim- Good explanation- Risk of Prejudice- Rules 13.2 and 13.3 of the CPR**

**T. HUTCHINSON SHELLY, J**

**INTRODUCTION**

**[1]** The matter for consideration is an application by the Defendant to have a judgment in default set aside on the basis that it was irregularly obtained as the Claim Form and Particulars of Claim have not been served on the Defendant as required under **Rule 5.3** of the **CPR**. The Application is supported by affidavit sworn by the Defendant, Dr. Lois Rose. The application is opposed by the

Respondent who relies on the evidence of the process server, Mr. Clement Savage and Mrs. Heather Hastings herself.

## BACKGROUND

**[2]** By way of a claim form filed on the 17th of June 2019, the Respondent/Claimant claims against the Applicant, damages for interference with her quiet enjoyment. The claim arose as a result of the Defendant's alleged breach of the implied covenant for quiet enjoyment on the basis that she disconnected or discontinued the water supply to the premises which the Claimant leased from her at Suite #6, 50 Molynes Road, Kingston 10 in the parish of Saint Andrew in an attempt to force the Claimant out of the aforementioned premises.

## CHRONOLOGY

**[3]** The chronology of events which resulted in this application and hearing are outlined below:

a. The Claimant commenced proceedings against the Defendant by way of a Claim Form and Particulars of Claim filed on the 17th of June 2019;

b. The Claimant subsequently filed a Without Notice Application for Court Orders along with the Affidavit of Heather Hastings in Support. These documents were filed on June 17, 2019 in which she sought an interim injunction for the reconnection of water supply to Suite #6;

c. On the 3rd of July 2019, the Honourable Justice Palmer-Hamilton granted the interim injunction;

d. The interim injunction granted on July 3, 2019 was extended on January 27, 2020 and further extended to March 19, 2020 at an inter-partes hearing;

e. On July 25th 2019, service of the Claim Form and Particulars of Claim and other accompanying documents were said to be effected. This service was sworn to in an affidavit from Mr. Clement Savage;

f. No Acknowledgment of Service or Defence was filed within the required timeline. Consequently, on the 6th of September 2019, a request for default judgment was filed on the basis that the Defendant had failed to file an Acknowledgment of Service. Judgment in default was entered against the Defendant in Judgment Binder No. 776 Folio 138 on the 20th of February 2020;

g. On the 31st of July 2019, the Claimant filed an affidavit sworn to by Mr. Richard Hamil, who outlined his attempts at personal service of the Claim Form and other accompanying documents on the Defendant without success.

h. On the 21st of February 2020 and 16th of March 2020, affidavits sworn to by Mr. Ivor Chevannes, a freelance bearer who occasionally works for Livingston, Alexander & Levy were filed. These documents outlined visits to the home of the Defendant to serve Formal Orders dated the 2nd August 2019, 5th of February 2020 and 27th of February 2020. The Defendant was not seen and Mr Chevannes averred that these documents were placed in her mail box.

i. On the 17th January 2023, a Notice of Case Management Conference was issued for Assessment of Damages which was scheduled to be heard on February 28th, 2023.

j. On the 2nd of February 2023 at 3:10 p.m., an Affidavit of Service sworn to by Mr. Clement Savage, Process Server, was filed. In his Affidavit, Mr. Savage stated that he visited the Applicant/Defendant and personally served Dr. Lois Rose with Notice of Case Management Conference for Assessment of Damages.

k. On the 23rd March, 2023, the Defendant filed a Notice of Application to set aside Default Judgment. This application was supported by an affidavit sworn to by Dr Rose which was filed on the 24th March 2023.

l. On the 27th April 2023, the Affidavit of Heather Hastings was filed in Response to the Affidavit of the Applicant.

**THE APPLICATION**

**[4]** In the Notice of Application to set aside the Default Judgment, the Applicant seeks the following orders from the Court:

1. *Default Judgment dated the 20th of February 2020 entered in Judgment Binder No. 776 Folio 138 against the Defendant be set aside;*
2. *The timing for filing a Defence is extended to 14 days of the date of this Order;*
3. *Costs; and*
4. *Such further or other relief as this Honourable Court deems just.*

**[5]** The grounds indicated in the Notice of Application are that:

1. *The said Default Judgment entered was in default of filing an Acknowledgment of Service.*
2. *Pursuant to Rule 13.2 (1) (a) of the Civil Procedure Rules, 2002 (as amended), (the "CPR"), the Court must set aside a Judgment entered under Part 12 if judgment was wrongly entered because –*
    *(a) In the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied.*
3. *The conditions set out in CPR Rule 12.4 (a) have not been satisfied. A filed and sealed copy of the Claim Form with Prescribed Notes to Defendant, Form of Acknowledgment of Service, Form of Defence pursuant to CPR Rule 8.16 and Particulars of Claim ("Documents") have not to date been served on the Defendant personally as required under CPR Rule 5.3 and as erroneously purported in the Affidavit of Service of Clement Savage fled on July 31, 2019 copied recently from the Court's file.*
4. *Alternatively:*
    *(a) Pursuant to 13.3 (1) and (2) of the CPR, 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.*
    *(b) The Defendant first became aware of the existence of the Claim herein on February 12, 2023, when an envelope from the Claimant's Attorney-at-Law containing the Notice of Case Management Conference for Assessment of Damages filed on January 17, 2023, was retrieved from the mailbox at her home by a visitor. Thereafter, the Defendant sought to retain Attorneys-at-Law and had sight of the Claim Form and Particulars of Claim filed herein for the first time received from her Attorneys-at-Law who obtained copies of the same directly from the Supreme Court.*

(c) *The Defendant has a real prospect of successfully defending the Claim. The Defendant has a case that is better than merely arguable and has a defence that is substantial. The Defendant denies that the disruption in the water supply to the suite rented by the Claimant (if any) was as a result of any action on the part of the Defendant as alleged. The Defendant therefore denies the Claimant's assertion that there was breach by her of the implied covenant for quiet enjoyment and further denies that the Claimant is entitled to any damages.*

(d) *The Defendant made the application to set aside the default judgment as soon as was reasonably practicable after finding out that judgment has been entered.*

(e) *The failure of the Defendant to file an acknowledgment of service and defence in the stipulated time was not intentional nor the Defendant's own fault not having been served with the Documents.*

5. *The Defendant would be greatly prejudiced if the orders are not granted as prayed.*
6. *The Defendant relies on her Affidavit filed herein and all other Affidavits filed on her behalf.*

**[6]** The premise of the application is that the Defendant was never served as required. The application also states in the alternative that the Defendant has a real prospect of successfully defending the claim and has applied to the court as soon as reasonably practicable after finding out that the judgment has been entered against her.

**DEFENDANT'S SUBMISSIONS**

**[7]** Mr. Morgan submitted that the default judgment entered against the Defendant was irregularly obtained as the Defendant was not served with the originating documents. He took issue with the veracity of Mr. Savage's account and highlighted the differences between his viva voce account and the affidavit sworn to by him. Mr. Morgan argued that the differences wholly undermined the reliability of the witness and described his explanation that '*he had confused this matter with another'* as being incredible.

**[8]** Counsel invited the Court to accept the evidence of the Defendant, specifically her denial that anyone visited her home in order to serve her with papers. He also highlighted her assertion that at no time on the 25th of July 2019 did she identify herself and collect any documents from anyone. Mr. Morgan argued that if the Defendant's account is accepted by the Court, this would mean that

the Claim Form, Particulars of Claim and accompanying documents would not have been served on the Defendant.

**[9]** Mr. Morgan submitted that the conditions set out in **Rule 12.4 of the CPR** have not been satisfied as the Claimant failed to prove service. He further submitted that this failure to satisfy the conditions set out in **Rule 12.4 (a) of the CPR** is detrimental to the default judgment which must now be set aside.

**[10]** Counsel contended that with the failure of the Claimant to satisfy **Rule 13.2,** the default judgment entered on the basis of non-service cannot stand. In support of this position, Mr. Morgan relied on the case of ***Cheseina Brooks v Davern Rumble*** (2017) JMSC Civ. 34, where it was declared that the duty of the Court under **rule 13.2** is mandatory and any deviation from the rules would cause the judgment to be automatically set aside[1].

**[11]** Learned Counsel also directed the court's attention to the Court of Appeal's decision of ***Frank I Lee Distributors Ltd v Mullings & Company (A Firm) (unreported)*** *Court of Appeal, Jamaica, [2016] JMCA Civ. 9,* where P. Williams JA (Ag) (as she then was) stated at paragraph 37, the following:

> *"The entering of the default judgment is regarded as a purely administrative procedure. The attitude of the courts has always been not to easily deprive a party the right to having their matter heard and thus the need for the court to have the power to set aside judgments entered without a full consideration of the merits of the claim."*

**[12]** Mr. Morgan submitted that the application to set aside the default judgment was made as soon as reasonably practicable after finding out that judgment has been entered and there was no unreasonable delay in the filing of same. He argued that the default judgment was never served on the Defendant and she only became aware of it on February 12, 2023, when she received the Notice of Case Management Conference for Assessment of Damages.

**[13]** Learned Counsel submitted in the alternative that if the Court found that the default judgment was properly entered, it is still empowered to set aside same, if satisfied that the Defendant has a real prospect of successfully defending the

[1] Paragraph 21

claim. He relied on the authority of ***Swain v Hillman*** [2001] 1 All ER 91, where Lord Woolf MR stated –

> **"***the words 'no real prospect of success' do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success ….. they direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success."*

**[14]** In addressing the relevant considerations for the Court, Counsel made reference to the decision of ***Christopher Ogunsalu v Keith Gardner*** *[2022] JMCA Civ 12,* in which D Fraser JA said in paragraph 22 that:

> *"The application to set aside default judgment is to be supported by an affidavit of merit, which should exhibit a draft defence (see rule 13.4 (2) and (3) of the CPR. This court must consider whether the defendant has a real prospect of successfully defending the claim……."*

**[15]** Mr. Morgan also submitted that the Defendant has a real prospect of successfully defending the claim as her defence is one that is more than arguable, not fanciful, has conviction and makes good sense. He argued that the defendant has a substantial defence as the Claimant has failed to provide any evidence to show that the lack of supply of water to Suite #6 was as a result of any action on the part of the Defendant. He also insisted that there was a dearth of evidence presented by the Claimant in support of her argument that there had been a breach of the implied covenant for quiet enjoyment as a result of any disruption in her water supply.

**[16]** Mr. Morgan made reference to the evidence of the Defendant and highlighted her denial of the existence of a separate lock off that could only be accessed by her. He also emphasized her repudiation of the Claimant's assertion that she had engaged in any action to manipulate the lock off in order to prevent water being supplied to her unit. Counsel submitted that the Defendant was not involved with the water supply to the Claimant's Suite as it had separate meter connections through arrangements made between the Claimant and the National Water Commission.

**[17]** Mr. Morgan argued that the Claimant has failed to give sufficient evidence to support the Claim made against the Defendant and in so doing has failed to

discharge the evidential burden of proof. Counsel also invited the Court to find that the Defendant's ignorance as to the existence of the claim is a good explanation for not filing an acknowledgement of service on time.

**CLAIMANT'S SUBMISSIONS**

**[18]** In her response to the submissions advanced on behalf of the Applicant/Defendant, Ms. Minott asked the Court to deny the Application. Counsel made reference to and relied on the Affidavits of Heather Hastings, Clement Savage and Richard Hamil in support of this position. In his affidavit, Mr. Hamil outlined the unsuccessful attempts at service on the Defendant while

Ms. Hastings took issue with the Defendant's assertion that she had no way of interfering with the Claimant's water supply. Ms. Minott described the evidence of the Applicant as wholly unreliable and argued that while Dr Rose insists that she could not have been served on the 25th of July 2019 as she had been at a nursing home where her sister was being admitted as a patient; she later contradicted this statement by saying that her sister had been admitted to the home 5 years ago. Counsel argued that this was but one example of the contradictions in her evidence and brought into question the Defendant's veracity on the point of non-service.

**[19]** In respect of the Defendant's assertion that she had a real prospect of success, Ms. Minott placed reliance on the guidance of Lord Woolf MR in ***Swain v Hillman*** *(supra)* and the Jamaican Court of Appeal in ***Christopher Ogunsalu v Keith Gardner*** *(supra)* which both emphasized the importance of the requirements that the Defendant has a real prospect of success, the Defence being more than merely arguable and that justice is done. Ms. Minott argued that the Defendant has no real prospect of successfully defending the claim as "*the Draft Defence is replete with bare denials and the Defendant has failed to plead any brief statement of facts in support of the said denials, which is in breach of Rule 10.5 of the CPR.*" Counsel also contended that the Defendant has not set out all the facts relied on to dispute the claim.

**[20]** Ms. Minott insisted that the Defendant has not provided any reasons for denying the allegations in the Particulars of Claim neither did she appear to take steps to remedy the disruption in the water supply upon being notified of the issue in order to ensure that the Claimant's quiet and peaceful usage of Suite #6 was not disturbed.

**[21]** Learned Counsel relied on the decision of Anderson K.J in ***Ian Lunan v Rohan Sudine*** [2015] JMSC Civ. 260, wherein the Learned Judge noted that '*the covenant for quiet enjoyment is one which is for the benefit of the tenant and*

*thus requires the landlord, during the course of the tenancy, to refrain from doing anything that will impede or outrightly prevent the tenant's quiet and peaceful enjoyment of the premises*'. Ms Minott argued that any omission or failure to act to remedy an issue is therefore prima facie evidence of a breach of the covenant. She propounded further that the Defendant was under an obligation to remedy the disruption in the water supply and her failure to do so detrimentally affected the Claimant's quiet enjoyment.

**[22]** In concluding her submissions, Learned Counsel asserted that the Applicant's evidence has not met the relevant threshold as she has failed to advance a defence which has a real prospect of success**.**

**ISSUES**

**[23]** The Court has to decide the following issues:

1. Whether the Default Judgment was properly entered?

2. In the alternative, whether the Applicant has a real prospect of successfully defending the claim to justify the setting aside of the judgment in default?

3. Whether the Applicant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered?

4. Whether the Applicant has given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be?

**THE LAW**

**[24]** My starting point in treating with this application is an examination of the rules of the CPR which are relevant to the question of whether the application to set aside a default judgment should be granted. It is noteworthy that the language of the relevant provisions make it clear that there are instances where the court must set aside a default judgment and there are instances where the court may set it aside.

**[25]** **Rule 12.4** which contains the provision on which the Respondent relied in applying for default judgment states as follows:

> *12.4 The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if*
> *(a) the claimant proves service of the claim form and particulars of claim on that defendant;*
> *(b) the period for filing an acknowledgment of service under rule 9.3 has expired;*
> *(c) that defendant has not filed (i) an acknowledgment of service; or (ii) a defence to the claim or any part of it;*
> *(d) where the only claim is for a specified sum of money apart from costs and interest, that defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;*
> *(e) that defendant has not satisfied in full the claim on which the claimant seeks judgment; and*
> *(f) (where necessary) the claimant has permission to enter judgment.*

**[26]** A review of the request for default judgment which was filed on the 6th of September 2019, shows that it contained a request that judgment be entered as no acknowledgment of service had been filed and the time for doing so had expired under **12.4 (b)**. In order to determine whether judgment had been irregularly entered, I considered **Part 9 of the CPR** with emphasis on **9.3(1)** which reads:

> *9.3 (1) The general rule is that the period for filing an acknowledgment of service is the period of 14 days after the date of service of the claim form.*

**[27]** **Rule 13.2** of the CPR which outlines the instances where the Court must set aside a Default Judgment was also examined and states as follows:

> *13.2 (1) The Court must set aside a judgment entered under Part 12 if judgment was wrongly entered because –*
>
> *(a) In the case of failure to file an acknowledgment of service, any of the conditions in Rule 12.4 was not satisfied;*
>
> *(b) In the case of judgment for failure to defend, any of the conditions in Rule 12.5 was not satisfied;*
>
> *(c) The whole claim was satisfied before judgment was entered.*

**[28]** **Rule 13.3** of the CPR, which addresses the alternate order sought, grants the Court the power to set aside a default judgment where it provides:

> *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 acknowledgment 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."*

**[29]** The relevant considerations regarding the setting aside of default judgments is encapsulated in the seminal case of ***Evans v Bartlam (1937)*** *AC 473*, where Lord Atkins stated that:

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

**[30]** These considerations were also examined in ***Flexnon Limited v Constantine Michell and Others*** *[2015] JMCA App 55,* where, at paragraph 15 of the judgment, McDonald-Bishop JA noted that:

> *"the primary test for setting aside a default judgment regularly obtained is whether the defendant has a real prospect of successfully defending the claim. The defence must be more than arguable to be such as to show a real prospect of success."*

**[31]** Paragraphs 16 and 27 of the judgment are also instructive where the Learned Judge stated:

> *[16] "Based on the provisions of the CPR and the relevant case law, the considerations for the court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence; the period of delay between the judgment and the application made to set it aside; the reasons for the defendants' failure to comply with the provisions of the rules as to the filing of a defence or an acknowledgement of service, as the case may be, and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside.*
>
> *[27] "It is clear from rule 13.3(2)(a) and (b) that it is incumbent on the court to consider whether the application to set aside was made as soon as was reasonably practicable after finding out that judgment had been entered and that a good explanation is given for the failure to file an acknowledgement of service and or a defence as the case may be. So the duty of a judge in considering whether to set aside a regularly obtained judgment does not automatically end at a finding that there is a defence with a real prospect of success. Issues of delay and an explanation for failure to comply with the rules of court as to time lines must be weighed in the equation."*

**AFFIDAVIT OF MERIT**

**[32]** In ***Evans v Bartlam*** (supra), at page 480, Lord Atkin noted that one of the rules laid down to guide the courts in exercising its discretion to set aside a regularly obtained default judgment is that:

> *"…where the judgment was obtained regularly,* ***there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence."*** *(My emphasis).*

**[33]** At page 489 of the judgment, Lord Atkins explained that:

> "*The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication… The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."*

**DISCUSSION AND ANALYSIS**

**Whether the Default Judgment should be set aside as of right?**

**[34]** The answer to this question hinges on whether the defendant was served with the originating documents. If the defendant was not served, then the default

judgment must be set aside as of right. The Claimant in reliance on an Affidavit of Service of Clement Savage filed on July 31st, 2019, asserts that the Claim Form, Particulars of Claim and accompanying documents were served on the Defendant on July 25th, 2019.

**[35]** The Claimant on the strength of this Affidavit applied to the registry for judgment in default of acknowledgment of service to be entered. The Registry, as it was entitled to do on the prima facie evidence presented, entered judgment in default of acknowledgment of service on February 20th, 2020.

**[36]** As outlined in her application, the defendant subsequently contended that she was not served with the documents as alleged by the claimant. The burden therefore shifts to the defendant to prove that she was not served. In evidence advanced to satisfy the relevant threshold, the defendant has denied that she ever met with or identified herself to Mr. Clement Savage. She also insists that she never collected the initiating documents or any other documents from Mr. Savage at her home.

**[37]** During the course of this hearing, I had the opportunity to see and assess both Mr. Clement Savage and the defendant. I was more impressed with the demeanour of Mr. Savage than that of the defendant as while he was consistent and frank in his response, she consistently sought to avoid answering direct questions and volunteered information which was wholly irrelevant. It was evident that she is an educated and intelligent woman yet she sought to convince the Court that she did not know what the word 'affidavit' meant in spite of the fact that she had provided one and sworn to the truth of same.

**[38]** I found her to be evasive in several respects particularly her whereabouts on the relevant dates. I had questions as to the reliability of her account as while she insisted that she was not served on the 25th of July 2019, she undermined this assertion by providing another possible period when her sister was admitted to the nursing home. I found it significant that in circumstances where documentary proof of the date of her sister's admission would have been invaluable, no such record was provided.

**[39]** It was also noteworthy that while she insisted that no one would have been at her house, to speak to Mr Savage, she eventually relented and accepted that she had a male gardener who was at the house at times and who maintained the property with a machete. This information provided strong support for the account of Mr Savage who had averred that he visited the house and had been informed by a male, who appeared to be the gardener, that the Defendant was not at home. He deponed that he subsequently revisited the same location and service was effected. In circumstances where the Defendant has sought to persuade the Court that the service did not occur, I found her evidence on this issue to be vague, contradictory and wholly unreliable.

**[40]** On the other hand, Mr Savage was adamant that he had served the defendant on the day in question and he maintained this position under probing cross examination. When asked to explain the circumstances in which service was effected, he provided details of visiting the property and seeing the Defendant there in the company of another female. He said that at the time of his arrival the place was being tiled, he indicated his reason for being there to the Defendant then served her with the documents after she had identified herself. He was cross-examined as to the absence of these details from his affidavit and accepted that his affidavit did not mention these details. He also explained that he may have confused this matter with another.

**[41]** While it was evident that there was a difference between his affidavit and his viva voce account, I found that Mr Savage did not shy away from accepting this, he acknowledged the difference and provided an explanation. I accepted his explanation and found it to be credible given his engagement in this role from 1999 and the number of services he had likely effected in this period. I found him to be an honest and forthright witness and I was satisfied that he had visited the actual residence of the Defendant and had returned there to effect service on her. In respect of the point that the Claim Form and Particulars were not attached to his affidavit, I did not believe that this was sufficient reason to doubt the veracity of his account on service especially since it was not his evidence that he was responsible for preparing and filing his affidavit.

**[42]** It is my finding therefore that the default judgment entered against the defendant should not be set aside on the basis of non-service, as she has not satisfied the threshold in this regard.

**Whether there is a real prospect of successfully defending the claim?**

**[43]** Having concluded that the Applicant has failed to satisfy the Court that there is a proper basis to exercise its powers under **Rule 13.2 of the CPR**, consideration was then given to the question whether this course of action could be taken under **13.3**. The first limb of the rule is often described as being of paramount consideration to the Court, that is, whether the defendant has a real prospect of successfully defending the claim. The test is the same as in an application for summary judgment, ***Swain v Hillman and Another*** *supra,* which states that the defendant must have a real prospect of successfully defending the claim rather than a fanciful one. In determining whether the test has been satisfied, there must be a defence on the merits to the requisite standard. The case law also makes it clear that the evidence presented should reveal more than a merely arguable case.

**[44]** In the case of ***Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited*** *[2016] JMCA Civ. 39*, Edwards JA (Ag) (as she then was) also considered the relevant factors and stated:

> ***[84] The prospect of success must be real and not fanciful and this means something more than a mere arguable case. The test is similar to that which is applicable to summary judgment…..***
>
> ***[85]*** *In Blackstone's Civil Procedure 2004 paragraph 34.13 the learned editors in reference to summary judgment applications argued that a defendant could show that the defence had a real prospect of success by: (a) showing a substantive defence, for example volenti non fit injuria, frustration, illegality etc; (b) stating a point of law which would destroy the claimant's cause of action; (c) denying the facts which support the claimant's cause of action; and (d) setting out further facts which is a total answer to the claimant's cause of action for example an exclusion clause, agency etc."*

**[45]** The defendant has posited that she has a real prospect of successfully defending the claim. As gleaned from her draft defence, her position is grounded in the assertion that she did not carry out the disconnection of the

water supply for Suite #6. She also denies that she breached the Claimant's enjoyment of Suite #6.

**[46]** It is trite law that in determining whether there was a real prospect of success, the court must give consideration to the claim, the nature of the defence, issues of the case and whether there is a good defence on the merits with a realistic prospect of success. In the case at bar, the Defendant averred that at the beginning of the Claimant's occupation of the premises and after the signing of the Lease Agreement, she was informed that the suite being rented by her would only come with the basic plumbing set up in which only a connection from the main supply would be installed. The Defendant further averred that the Claimant was also advised that any other specific plumbing fixtures and arrangements would have to be done by her and would not have her involvement.

**[47]** The Defendant also deponed that the claimant was informed that she would need to obtain separate metered water supply for her rented suite from the National Water Commission ("NWC"). The separate arrangement with NWC would mean that she was responsible for the payment of the water bill, for water used by her in the suite and all issues and queries related to the water was to be directed to NWC.

**[48]** She also contends that she did not contact the NWC to have the Claimant's water supply disconnected neither did she take any action to have the water supply disrupted. The Defendant also refuted the Claimant's assertion that she controlled access to the lock offs by insisting that the lock offs were located within the same area as the meters and were not under her control.

**[49]** The Claimant/Respondent on the other hand stated that the disruption of her water supply only occurred after she failed to comply with the notice to quit and insisted that there was still a measure of control over the lock off maintained by the Defendant as she controlled the supply from the main in an area which was not accessible by anyone else.

**[50]** While the Court recognizes that the finer details are matters for a tribunal of fact and that the hearing of the application does not constitute a mini-trial, there is still the requirement for the evidence being relied on to present more than an arguable case or fanciful prospect of success. In this situation, the parties are at odds as to whether or not the Defendant would have been in a position to disrupt the Claimant's water supply and as such be liable in damages for breach of quiet enjoyment.

**[51]** While the Claimant has provided evidence as to what she has been told by a plumber, I am mindful that this account has not been tested on cross-examination, neither has the Court been provided with any physical or other evidence in respect of the location of the lock offs and access to same. In these circumstances, it is evident that these would be questions for a Tribunal of Fact to determine. As such, I am satisfied that the Defendant has provided evidence to the Court which raises a real prospect of success and has met the threshold for the default judgment to be set aside pursuant to **Rule 13.3(1)**.

**Whether the defendant applied to the court as soon as reasonably practicable after finding out that judgment has been entered?**

**[52]** The issue of whether the application had been made to the Court as soon as practicable has been extensively considered in a number of authorities from this jurisdiction**.** In the course of examining a like application in ***Pacha Zona Libre v Sawalha, Mamdouh Saleh Abdul Jaber*** *[2014] JMSC Civ. 232*, Batts J stated**:**

> **"***clearly if an application is not made as soon as is reasonably practicable or if the explanation is not good then the chances of a successful application reduces significantly."*

**[53]** Similar guidance was given by Sykes J (as he then was) in ***Sasha-Gaye Saunders v Michael Green etal*** *[2005] HCV 2868,* where having reviewed the evidence he stated:

> *"If the application is quite late, then that would have a negative impact of successfully setting aside the judgment."*

**[54]** In the **Flexnon** decision (supra), McDonald Bishop JA opined:

> *[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."*

**[55]** In addressing this issue, Mr. Morgan submitted that the applicant had only become aware of the claim on the 12th of February 2023 and by the 23rd of March 2023, an application was filed to have the default judgment set aside. In his submissions, Counsel contended that there was no unreasonable delay between the point at which the applicant had notice of the judgment claim and the application being filed.

**[56]** On this specific issue, Ms. Minott did not proffer any submissions. There is however an affidavit from Mr Savage that the Defendant was served personally on the 2nd of February 2020, ten days earlier than the Defendant asserts. Even if the Court accepts that the evidence of Mr Savage should be accepted on this point, the result would mean that the application to set aside was made just under two months later.

**[57]** I have examined the timing of this application and although there was this further delay of just under two months, I am of the view that this was not the most egregious situation as in ***Victor Gayle v Jamaica Citrus Growers and Anthony McFarlane 2008HCV05707***, the Court had set aside the default judgment in circumstances where the application was filed a year after. In allowing the application, the Learned Judge made it clear that this delay in and of itself did not outweigh the other factors that supported the setting aside of the Judgment.

**Whether there is a good explanation for failure to file an acknowledgment of service or a defence**?

**[58]** On the issue of whether the defendant has provided a good explanation for the failure to file the Acknowledgment of Service within the prescribed period, I

examined the judgment of Sykes J, (as he then was) in the case of **Sasha Gaye Saunders v Michael Green et al (supra)** at paragraph 24 where he stated:

> *"….in the absence of some explanation for the failure to file the acknowledgment of service or the defence, the prospect of successfully setting aside a properly obtained judgment could diminish."*

**[59]** The explanation given by the defendant for failing to file the Acknowledgment of Service was simply that she was not served with the Claim Form and Particulars of Claim. I am however of the view that the defendant was in fact served with the Claim Form and Particulars of Claim, hence this explanation is without merit.

**[60]** In light of my finding however that the Applicant has satisfied **Rule 13.3(1),** I adopt the words of Panton JA in ***Strachan v The Gleaner Co Motion* 12/1999** delivered 6th December 1999 where he stated:

> *"Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done*."

**PREJUDICE**

**[61]** In **Flexnon Limited (supra)**, the Court affirmed that prejudice to a party must be considered in determining whether a regularly entered default judgment is to be set aside. Undoubtedly, the Claimant would be prejudiced if the court is to grant the orders sought by the defendant and set aside the default judgment. The financial and emotional prejudice likely to be suffered have been outlined by Ms. Minott and I do not propose to re-state them here. The Court is tasked with balancing this against any equal or greater prejudice which may be caused to the defendant if she is to be barred from proceeding with her defence in a trial on its merits. Although her affidavit is silent on this point, I note that she would be faced with having to comply with an award of damages in a significant sum if the matter proceeds to assessment.

**[62]** The Court accepts that the discretionary power to be exercised in an application of this nature is not to punish a party for incompetence or a technical breach without having a hearing on the merits. On a careful assessment of the

circumstances of the respective parties, I am satisfied that any prejudice which may be caused to the Claimant can be addressed with an award of costs against the Applicant and the scheduling of the matter for trial within the Fast Track Court to ensure that a trial occurs within the next twelve months.

**CONCLUSION**

**[63]** In light of the foregoing discussion, it is my finding that the defendant was served. The default judgment can be set aside however as she has demonstrated that she has a real prospect of success. Accordingly, the following orders are made:

1. The Default Judgment entered on the 20th of February 2020 is set aside.

2. The Defendant is to file and serve her Defence by the 31st of July 2023.

3. Costs is awarded to the Claimant/Respondent to be taxed if not agreed.

4. The Defendant's Attorney-at-Law to prepare, file and serve this order.