[2019] JMSC Civ 134

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV04585

BETWEEN	**MARLAN HIGGINS** **(Executor of Estate of Egbert Higgins)**	**CLAIMANT**
AND	**GEOFFREY JOHNSON** **(sued as Junior Johnson)**	**DEFENDANT**

Appearances: Mr. Ravil Golding instructed by Lyn-Cook, Golding & Company for the Defendant/Applicant.
Written submissions filed by the Claimant/Respondent and written submissions filed by Lyn-Cook, Golding & Company on behalf of the Defendant/Applicant.

Heard June 26, 2019 and July 31, 2019.

Civil procedure – Application to set aside default judgment pursuant to rule 13.2 of the Civil Procedure Rules – Claim commenced by way of fixed date claim form – No proof of service of fixed date claim form – Claim form and particulars of claim subsequently filed with the same claim reference number and served – Application to convert proceedings to claim form filed but not determined – Application to enter judgment in default filed and heard – Whether default judgment entered in respect of claim form is irregular – Whether good explanation provided for the failure to file a defence – Whether defendant demonstrated that he has a real prospect of successfully defending the claim.

MASTER N. HART-HINES

[1] The matter for the consideration of the court is an application to set aside a default judgment pursuant to **rule 13.2** of the Civil Procedure Rules (hereinafter "CPR"). Both the claimant/respondent and the defendant/applicant are said to reside outside Jamaica. At the hearing of the application on June 26, 2019, the claimant was absent and was unrepresented. Notwithstanding, the claimant, as a litigant in person, filed

written submissions and an affidavit in opposition to the application. Upon the court's directions, written submissions were also filed on behalf of the defendant. The court so directed as it is only appropriate that the claimant be afforded an opportunity to see the written submissions filed, since the claimant is said to reside in England and his attendance at the hearing was not anticipated. I have given consideration to all the documents filed by the claimant and filed on behalf of the defendant in respect of this application.

BACKGROUND

[2] By way of a fixed date claim form filed on September 24, 2015, the respondent/claimant seeks an order for the recovery of possession property located at 20 Aberdeen, Huntley, Browns Town St Ann and comprised in certificate of title registered at Volume 621 Folio 32 of the Register Book of Titles. The respondent also claims damages for trespass and mesne profit against the applicant. On June 30, 2016, a claim form and particulars were also filed in respect of this matter (bearing the same claim reference number), and it is these documents which were served on the applicant/defendant. I will return to this point when I set out the chronology of events.

[3] Marlon Higgins sues as executor for the estate of his father Albert Egbert Higgins. The respondent/claimant alleges that a sale agreement was entered into in 1994 between Albert Egbert Higgins and the father of the applicant/defendant, one Bishop GW Johnson. However, it is alleged that the said sale agreement was cancelled in 2005, and that the deposit paid by Bishop GW Johnson was returned to him. The respondent further alleges that the applicant entered unto the land in question around 2012 and that this was not pursuant to a sale agreement or by any lawful means.

[4] The court has discerned (through the respondent's written submissions) that the respondent has filed suits against a total of 13 individuals (including the applicant) to have them removed from the said property. The respondent alleges that all 13 persons are squatters and he alleges fraud in some instances. However, there is no allegation of fraud in the instant case. This

claim involves a dispute regarding whether or not the applicant/defendant has a legal or equitable interest in the land in question and whether the respondent/claimant is entitled to possession of the land.

[5] By his affidavits filed on October 12, 2018 and June 5, 2019 and the draft defence, the applicant alleges that he bought approximately half an acre of land from Albert Higgins on February 26, 1993 and paid the sum of $110,000.00 towards the purchase, with an outstanding balance $5,000.00 still owed to Mr. Higgins' estate. He alleges that in 1994 a further $20,000 was paid at the request of Albert Higgins, towards the processing costs. He denies that any money was refunded to him or to anyone else in relation to the alleged purchase of the said parcel of land. The applicant further alleges that his copy of the written sale agreement was kept by an Attorney-at-Law G. W. Thompson and that it was unlawfully taken from Mr. Thompson by the respondent in June 1995, when the respondent assaulted Mr. Thompson. Mr. Thompson is said to have since died. The applicant further alleges that he commenced building his dwelling house on the land in 1993 and completed it in 2010, and it is now valued in excess of $35,000,000.

[6] The applicant states that he was served with the claim form in 2016 and that he filed an acknowledgment of service, but failed to file a defence due to a misunderstanding of what was required of him.

CHRONOLOGY

[7] The chronology of the salient events is relevant in determining this application. I now set this out:

1) On September 24, 2015 a fixed date claim form was filed in the Registry and assigned claim reference number 2015HCV04585.

2) On December 8, 2015 an affidavit of service was filed, sworn to by Nicholas Brown, alleging service by registered post.

3) On April 13, 2016 an affidavit was filed by the defendant stating that he was away from the island between May 2015 and February 2016 and indicating that though he is aware of the claim, he was not served.

4) On April 20, 2016 the matter was listed before a judge for the hearing of an application for an order for the defendant to vacate the property. The learned judge ruled that service was defective as there was no proof of service on the defendant. The claimant was directed to serve the defendant.

5) On April 26, 2016 a reissued fixed date claim form was filed in the Registry.

6) On June 30, 2016 a claim form and particulars of claim were filed in the Registry and also assigned claim reference number 2015HCV04585.

7) On July 13, 2016 the defendant filed an acknowledgement of service indicating that he was served with the claim form on June 6, 2016. I must indicate that if the defendant was served with the claim form on June 6, 2016, this would have been before the claim form was issued on June 30, 2016.

8) On August 2, 2016 an affidavit of service was filed alleging that the defendant was served with the claim form and particulars of claim by a District Constable on July 8, 2016.

9) On August 2, 2016 the claimant filed a request for default judgment.

10) On 13 October 2016 a Notice of Application was filed seeking an order that the proceedings be deemed to have commenced by claim form. On 3 November 2016 the application was listed for hearing but the hearing was adjourned to June 27, 2017 for the claimant to obtain legal representation.

11) On November 11, 2016 the claimant again filed a request for default judgment, along with the draft order.

12) On April 3, 2017 a requisition was issued that a default judgment could not be entered and that an application must be filed.

13) On June 27, 2017 claimant's application for an order that the proceedings be deemed to have commenced by claim form was listed as a Case Management Conference and the hearing was adjourned to March 20, 2018 with directions that the notice of adjourned hearing be filed.

14) On November 7, 2017 the firm Dunn Cox filed a Notice of Acting indicating that they appeared on record for the claimant.

15) On March 20, 2018 the matter was adjourned as the file could not be located.

16) On June 22, 2018 an affidavit of service was filed averring to service of the previous orders made on 3 November 2016 and June 27, 2017.

17) On June 22, 2018 the claimant's application for default judgment was filed.

18) On June 25, 2018 the application was heard and default judgment was entered against the defendant, in the following terms:
    - "*That the Defendant vacates and deliver up possession forthwith of all that portion of parcel of land located at No. 20 Aberdeen, Huntley, Browns Town, St. Ann, registered at Volume 621 Folio 32 of the Register Book of Titles;*
    - *That the Defendant pay Damages (Mesne Profits) to the Claimant for his unlawful trespass, and unlawful occupation of all that portion of parcel of land located at No. 20 Aberdeen, Huntley, Browns Town, St. Ann, registered at Volume 621 Folio 32 of the Register Book of Titles, in an amount to be decided and assessed by this Honourable Court;*
    - *That the Defendant be restrained from permitting or otherwise encouraging third parties to enter, modify, construct on, or otherwise interfere with all that portion of parcel of land located at No. 20 Aberdeen, Huntley, Browns Town, St. Ann, registered at Volume 621 Folio 32 of the Register Book of Titles;*
    - *Costs of the Application and Costs of the Claim to the Claimant/Applicant.*
    - *Matter set for Assessment of Damages on the 2nd November 2018.*
    - *Applicant's Attorney-at-Law to prepare, file and serve Orders made herein."*

19) On July 24, 2018 a request for a writ of possession was filed.

20) On September 19, 2018 a Notice of Application for court orders was filed on behalf of the defendant, seeking to set aside the default judgment and stay the Writ of Possession. An affidavit in support of the application was filed, sworn to by Cecile Johnson, wife of the defendant.

21) On October 12, 2018 an affidavit sworn to by the defendant was filed in support of the application. No draft of the proposed defence was exhibited.

22) On June 5, 2019 a supplemental affidavit in support of the application was filed, sworn to by the defendant. A draft defence is exhibited to that affidavit.

23) On June 12, 2019 the claimant filed an affidavit in response to the Notice of Application filed on September 19, 2018.

THE APPLICATION

[8] The Notice of Application for court orders filed on September 19, 2018 seeks to have the default judgment set aside pursuant to **rule 13.2** of the CPR on the basis that the default judgment was irregularly entered in respect of the alleged failure to file an acknowledgment of service (pursuant to **rule 12.1(1)(a)**). As the defendant maintains that he filed the acknowledgment of service in time, it is contended that the default judgment ought to have been entered instead in respect of his failure to file a defence (pursuant to **rule**

12.1(1)(b)).

[9] The Notice of Application indicates that the following orders are sought:

1. *"That the Ex parte Default Judgement obtained herein on June 25, 2018 be set aside;*
2. *That the Writ of Possession dated July 24, 2018 be stayed until further ordered by the Court.*
3. *That the Defendant be allowed to file his defence within fourteen days any order granted herein to set aside the judgment.*
4. *That the Defendant be allowed to file his Counter Claim within fourteen days of any order granted herein to set aside the default judgment of June 25, 2018.*
5. *Any further or other relief."*

The grounds on which the claimant seeks the orders are:

a) *That the Defendant erroneously thought that the Court would have contacted him before any further steps were taken in the matter and in fact thought he would have been advised of a trial date when he would present his defence; thereby confusing the procedure in the Supreme Court with that in the Parish Court.*
b) *The Defendant has an excellent prospect of successfully defending the Claim as he paid the full purchase price of the parcel of land less Five Thousand Dollars ($5,000.00) which is payable on the production of the registered title in his and his wife's name.*
c) *That the judgement entered was irregular as in the Affidavit of Search of Jhenell Allen it was stated that no Acknowledgment of Service was filed when in fact one was filed by the Defendant/Applicant himself on July 12, 2016."*

[10] It seems from the grounds, that the applicant seeks in the alternative, an order setting aside the default judgment pursuant to **rule 13.3** of the CPR on the basis that he has a real prospect of successfully defending the claim, on the basis that he has an interest in the land. In his affidavit in support of the application, the Applicant/defendant explained that his reason for failing to file the defence was that he believed (based on his experience in the Parish Court) he would have been contacted by the Supreme Court Registry or by the Claimant and informed of a trial date for him to present his defence.

[11] Since filing his written submissions, counsel Mr. Goulding has filed an Amended Notice of Application on July 26, 2019 clearly indicating that the application is made pursuant to **rule 13.2** of the CPR. The Amended Notice of Application for court orders indicates that the application is made on the basis that the judgment was irregularly entered.

SUBMISSIONS

[12] A further basis for challenging the default judgment was raised in written submissions filed on behalf of the defendant, namely, that the claim form is invalid. Counsel Mr. Golding filed written submissions on July 10, 2019, which contended that the default judgment was irregularly obtained as the claim did not comply with the CPR in respect of its issuance and service. Counsel contends that the wrong originating documents were issued and served and that the default judgment must be set aside as a right. It seems prudent to quote the salient points of his submissions rather than to summarise them. These are as follows:

> *"Pursuant to Part 8(I)(4)(b) of the CPR any matter dealing with the possession of land must have as its originating document as a Fixed Date Claim Form. This defect cannot be cured by a judge due to the mandatory nature of the rule. It is therefore my respectful submission that Claim Form is a nullity and it is impossible for the judge to cure such a defect as the judge can only apply a rule so far as he/she is permitted.*
>
> *The Claim at Bar, the proceedings commenced by way of Particulars of Claim and Claim Form. The matter is therefore improperly before the Court and as such everything that flows from the claim is null and void. The law dictates that while an irregularity can be waived a nullity cannot….*
>
> *The Default judgment was entered on the basis that the Defendant failed to file a defence. It is important to note that if the correct originating documents were filed there would be no need for a Defence but an Affidavit in response to the Fixed Date Claim Form, which there is no particular time period to file unless it is so ordered by the judge upon the attendance of the 1st Hearing of the Fixed Date Claim Form. It is therefore submitted that the Default judgment must be set aside as a right as the failure to file a defence is not in keeping with the rule of the CPR as based on the claim before the Court the correct document to be filed is an affidavit and not Defence….*
>
> *The weight of the argument therefore lies in the fact that the Default Judgment was irregularly obtained and the originating documents were not served on the Defendant and as such default judgment must be set aside as a right….*
>
> *Finally, it is clear from the Affidavit of Geoffery Johnson that he has a good defence to the claim and indeed he has filed a Draft Defence. Both from his Affidavit and Draft Defence it is clear that he paid the Testator Albert Higgins the full purchase price of the land and that he is a purchaser in possession. It therefore means that he has an excellent prospect of succeeding both in law and on the facts at trial. In the circumstances the default judgment should be set aside."*

[13] The claimant filed written submissions on June 12, 2019. Therein he submitted that as the defendant was represented in June 2016, he ought to have filed his defence on time and he has no good explanation for failing to do so.

Further, it is submitted that the defendant's affidavit does not set out enough detail in relation to the alleged purchase of land, and does not exhibit the alleged sale agreement and other relevant documents which ought to be relied on as part of the defence. Further, I am urged to disregard the affidavit sworn to by the defendant's wife which contains hearsay.

ISSUES

[14] One issue raised by the defendant for the court's consideration is whether or not the default judgment was entered only on the basis that he failed to file an acknowledgment of service. The claimant's application for default judgment filed on June 22, 2018 stated at paragraphs 1, 9, 10 and 11:

> *"1. Pursuant to Rule 12.4 of the Civil Procedure Rules ("CPR"), the Court must enter Judgment against a Defendant for failure to file an Acknowledgement of Service if the Claimant proves service of the Claim, that the period for filing the Acknowledgement of Service under Rule 9.3 has expired, that the Defendant has not filed an Acknowledgement of Service* ***or a Defence to the Claim****, and that the Defendant has not satisfied the Claim on which the Claimant seeks Judgment….*
>
> *9. The Claim Form and Particulars of Claim were personally served on the Defendant on June 01, 2016, with proof of Service set out in the Affidavit of Service filed on August 02, 2016.*
>
> *10. The Defendant's deadline for filing his Acknowledgement of Service was June 16, 2016.*
>
> *11. To date, the Defendant has not filed or served an Acknowledgement of Service* ***or Defence to the Claim****, on the Claimant or his Attorneys-at-Law."* (My emphasis)

[15] In light of the above references to the defendant's failure to file a defence, I am satisfied that the judge also considered that the fact that no defence had been filed and that the default judgment was entered on that basis. I need not address this issue further.

[16] The primary issue in this case is whether or not the default judgment was properly entered in respect of the claim form filed on June 30, 2016, when in fact the claim previously was commenced by way of fixed date claim form filed on September 24, 2015. As a precursor to my consideration of this issue, I must consider the point raised by counsel Mr. Golding in his written

submissions, that this claim for recovery of possession of land should only be commenced by fixed date claim form. At this juncture I must indicate that counsel has erred in his assessment of the facts in this case. Counsel Mr. Golding has mistakenly stated in his written submissions "*the proceedings commenced by way of Particulars of Claim and Claim Form*". In fact, the proceedings commenced by fixed date claim form, but somehow a claim form was subsequently sealed and issued with the same claim reference number and served. The fixed date claim form was never served though it remained valid for service until September 24, 2016. Instead, the claim form and particulars of claim were served on July 8, 2016 and the default judgment was entered in respect of the claim form on June 25, 2018.

[17] In light of the foregoing, I will give consideration to the following issues:

1. Was it correct to commence the proceedings by fixed date claim form?
2. Is the subsequently issued claim form valid?
3. Is the default judgment irregular and should the default judgment be set aside as of right pursuant to **rule 13.2**?
4. Alternatively, should the default judgment be set aside pursuant to **rule 13.3**?

THE LAW AND ANALYSIS

Was it correct to commence the proceedings by fixed date claim form?

[18] **Rule 8.1(4)(b)** of the Civil Procedure Rules states that the fixed date claim form "*must be used … in claims for possession of land*". However, where the claim involves a dispute as regards whether or not the claimant is entitled to possession of the land in question, case law suggests that the proceedings ought properly to be commenced by way of claim form. If the proceedings are commenced by fixed date claim form, it may be ordered that the proceedings continue as if begun by claim form, depending on the nature of the claim, and the fact that there may be significant disputes as to fact.

[19] The practice under the Civil Procedure Code was that the originating summons procedure was unsuitable in cases where there was likely to be a substantial

dispute of fact. In ***Melville and others v Melville*** (1996) 52 WIR 335 at pages 339-340, Patterson JA said:

> *"The Rules of the Supreme Court in England provide for the continuation of proceedings begun by originating summons as if begun by writ in cases where it appears to the court at any stage of the proceedings that they should for any reason have been begun by writ. It is a very useful provision that was introduced in England for the first time in 1962. The Civil Procedure Code does not have such an express provision, but, by virtue of section 686, the procedure and practice that obtains in England is followed in the court below. Consequently, even where proceedings could not have been properly commenced by originating summons, the court below, in the exercise of its discretion, may order that the proceedings continue as if begun by writ instead of striking out the matter."* (My emphasis)

[20] In the Privy Council decision of ***Eldemire v Eldemire*** [1990] 38 WIR 234, Dr. Arthur Eldemire commenced proceedings by writ against his brother Dr. Herbert Eldemire, seeking that the latter, as personal representative of their late mother's estate, give an account in respect of the estate. Dr. Herbert Eldemire in turn commenced proceedings against his brother by originating summons seeking, *inter alia*, a declaration that he was entitled to lands remaining in their parents' estate, and in response to his brother's action, he filed a defence and counterclaim, seeking the same relief in the writ action. The Privy Council considered both suits. In delivering the judgment, Lord Templeman stated at page 238 that "*[a]s a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts*".

[21] Guidance from the Court of Appeal indicates that the Pre-CPR practice is still applicable. In ***Georgia Pinnock v Lloyd Property Development Ltd and others*** [2011] JMCA Civ 9, the claim involved the determination of the priority of interests in land, and Phillips JA said at paragraph 40 that the fixed date claim form is an inappropriate method to be adopted if the questions for the court's decision are likely to involve a substantial dispute as to fact.

[22] The instant claim involves a dispute regarding whether or not the claimant is entitled to possession of the land in question, and the claim is therefore likely to involve a substantial dispute as to fact. The procedure following the issuance of claim form is most appropriate in a case such as this, where the nature of

the dispute necessitates that there be a trial in open court. Despite the wording of **rule 8.1(4)(b)**, a court may exercise its discretion to convert the proceedings, based on the nature of the claim and the likely or apparent disputes as to fact. It would therefore have been appropriate for a judge, pursuant to his/her judicial case management powers, to make an order converting these proceedings to claim form proceedings. However, such an order was not made in this case, and it was not open to the claimant to file and serve a claim form and particulars of claim of his own volition, which he did.

Is the subsequently issued claim form valid?

[23] The Supreme Court Registry ought not to have accepted the claim form and particulars of claim from the claimant and sealed same, when there was already a fixed date claim form issued with the exact same claim reference number. As it is the Registry which allocates a claim number at the time of sealing a claim from or fixed date claim form, a new claim number ought to have been allocated when the claimant presented the claim form and particulars of claim for sealing. It should never be possible to have a fixed date claim form and a claim form issued with the same claim number unless an order was made by the court permitting the fixed date claim form to proceed as if begun by claim form. As the proceedings were not ordered converted by a judge, the validity of the claim form itself is dubious as the steps taken by the claimant would not be in accordance with Part 8 of the CPR. **Rule 8.2** states that "*proceedings are started when the claim form is filed*". However, as a fixed date claim form with the same reference number was previously filed on September 24, 2015, the claim form filed on June 30, 2016 could not be regarded as "starting" the proceedings or starting them afresh. While the fixed date claim form was still valid, the claim form and particulars of claim were invalidly filed and issued in the absence of a court order permitting same. The service of the claim form on July 8, 2016 was therefore defective.

Should the default judgment be set aside as of right under rule 13.2?

[24] The facts in the instant case are unlike the facts in ***B & J Equipment Rental Limited v Joseph Nanco*** [2013] JMCA Civ 2 where the Court of Appeal held

that the claim form was valid despite the requisite documents not being served along with it, and unlike the facts in ***Rohan Smith v Elroy Hector Pessoa and another*** [2014] JMCA App 25 where the Court of Appeal held that the claim form was valid despite the failure to ensure that the claim reference number was endorsed on the claim form (in compliance with **rule 8.16(2)**). In the instant case, the claim form appears to be invalid. In my opinion, the filing of an acknowledgment of service by the defendant could not cure this defective process or service, even if the defendant did not seek to challenge the jurisdiction of the court pursuant to **rule 9.6** at the time of filing the acknowledgment of service. As there is no proof on file that the fixed date claim form was ever served, and since the proceedings were not ordered by a judge to proceed as if begun by claim form, the default judgment which was entered in respect of the claim form should be set aside *debito justitiae* under **rule 13.2** on account of the irregular service of the claim form.

[25] At this juncture I feel it necessary to observe that this state of affairs could perhaps have been avoided in the claimant sought legal advice and assistance at the outset before instituting proceedings. The CPR is clearly written to assist litigants in person, but there are clear advantages to having counsel's advice particularly when deciding whether to commence the proceedings by claim form or fixed date claim form. In light of all the cases considered above, the procedure utilising the fixed date claim form is only suitable if the proceedings involved the construction of an Act, contract or other document or involved some other question of law, or, if the facts of the case were largely agreed and the parties sought a decision from the court on a question of law arising from the agreed facts, or, if the proceedings arose under an Act of Parliament, Rule or Practice Direction.

[26] It must be stressed that as the claim progresses to trial, a claimant such as Mr. Higgins, who does not reside within the jurisdiction, would be best served by instructing counsel to ensure that future applications are appropriately and accurately made, and court directions are complied with in a timely manner. However, it is a matter for Mr. Higgins whether or not he instructs counsel.

Should the default judgment be set aside under rule 13.3?

[27] Having ruled that the default judgment should be set aside under **rule 13.2**, it is unnecessary to give consideration to **rule 13.3**. Further, in light of the wording of the Amended Notice of Application filed on July 26, 2019, it now seems that the defendant is not relying on **rule 13.3**. However, for the sake of completeness I will briefly address this.

[28] **Rule 13.4** indicates the procedure to be followed when making of an application to set aside a default judgment. Rule 13.4 states:

> ***"13.4 (1)*** *An application may be made by any person who is directly affected by the entry of judgment.*
> ***(2)*** *The application must be supported by evidence on affidavit.*
> ***(3)*** *The affidavit must exhibit a draft of the proposed defence."*

[29] The defendant's affidavit filed on October 12, 2018 in support of the application did not exhibit a draft of the proposed defence. It therefore did not comply with the provisions of **rule 13.4(3)** of the CPR. However, on June 5, 2019, a supplemental affidavit was filed in support of the application exhibiting a draft defence. Consequently, by the time the application came to be heard, the defendant had complied with **rule 13.4(3)** of the CPR.

[30] The court may set aside a default judgment if the defendant has a real prospect of successfully defending the claim. **Rule 13.3** of the CPR 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."*

[31] Prior to the 2006 amendment to the Jamaican CPR, the old rule 13.3(1) previously provided that a Court might set aside a default judgment "*only if*" all three conditions in that rule were met, namely, that a defendant had a real

prospect of successfully defending the claim, that he applied to the court as soon as is reasonably practicable and that he gave a good explanation for the failure to file a defence. In ***Kenneth Hyman v Audley Matthews and Another*** SCCA No. 64/2003 and ***The Administrator General for Jamaica v Audley Matthews and Another***, SCCA No. 73/2003, delivered on November 8, 2006, Harrison P said the three conditions were to be read cumulatively. That is not the position today, following the 2006 amendment. The Court of Appeal has since emphasised that in determining whether to set aside the default judgment, the "*foremost consideration*" is the defendant's prospects of success (see ***Denry Cummings v Heart Institute of the Caribbean Limited*** [2017] JMCA Civ 34 at paragraph 66 per McDonald-Bishop JA).

[32] In ***Swain v Hillman*** [2001] 1 All ER 91 at 92, Lord Woolf MR said "*the words '… real prospect of succeeding' ... direct the court to the need to see whether there is a "realistic" to as opposed to a fanciful prospect of success*". It must be more than a merely arguable case. It must be a good defence in fact or in law, or both. It is well settled 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. However, in considering the issues of the case while hearing the application, the court is not to conduct a mini trial.

Does the defence show a real prospect of success?

[33] I have carefully considered the affidavits filed by the claimant and defendant. Mrs. Johnson ought not to have filed an affidavit in support of the application where most of the matters sworn to are not within her personal knowledge. However, where she was relying on information received, she is permitted to state the source of the information in compliance with **rule 30.3**.

[34] Having considered the affidavits of the defendant and the draft defence, as well as the claimant's extensive affidavit and written submissions, it seems to me that the following issues are to be determined by a judge at trial:

1. Whether there existed a sale agreement between the late Mr. Albert Higgins and the defendant, or, between Albert Higgins and the defendant's father and predecessor Bishop Geoffrey W. Johnson.
2. Whether the said agreement for sale was cancelled and whether a refund was issued in respect of monies paid pursuant to the sale agreement.
3. Whether the defendant was permitted to enter possession of the land by Albert Higgins, or whether the defendant and/or his father squatted on the land, and if so, from when.
4. Whether sub-division approvals have been obtained from the St. Ann Parish Council lawfully or fraudulently, and whether there is any evidence of fraud in relation to alleged sale generally.

[35] There are clearly issues in the case which require a determination at a trial, and the defence has a real prospect of success. I have noted Mr. Higgins submissions that the defendant has not relied on any written sale agreement or tax receipts to substantiate his claim to an interest in the property. Pursuant to **rule 10.5(6)**, the applicant is required to exhibit documents he intends to rely on to his defence or which he considers necessary to his defence. It is alleged that there was an agreement for the sale of a portion of the land registered at Volume 621 Folio 32 of the Register Book of Titles. I have noted however that no sale agreement has been exhibited to the draft defence. An explanation is offered for this, and it is that the signed sale agreement was allegedly kept by Mr. G. W. Thompson, Attorney-at-law, and Mr. Marlon Higgins allegedly assaulted Mr. Thompson and took the file containing the said sale agreement. The defendant relies on receipts to establish that sums were paid towards the purchase of the property. In contrast, the claimant relies on a letter which purports to show that the alleged sale agreement was cancelled by his father and the sums paid by the defendant (and/or his predecessor) were said to be returned. I believe that these are issues of credibility which will need to be determined at a trial.

The explanation for the delay and the length of the delay

[36] In essence the defendant stated that he misunderstood what was required of

him, because in the Parish Court he did not have to file a defence. The claimant has asked that I note that the defendant was represented at the hearing in June 2016 and therefore had the benefit of legal advice and representation at some point since the commencement of proceedings. The court file does not reflect that there was a hearing in June 2016. Though the defendant was represented at the hearing on April 20, 2016, I note that that hearing was before the claim form was served on the defendant in July 2016. It is not apparent from the file when the defendant ceased to be represented. Notwithstanding, it seems to me that if the defendant was astute enough to appreciate (from the documents he was served with) that he ought to file an acknowledgment of service, then similarly, he ought to have appreciated the need to file a defence. Also, the length of the delay in filing the defence is long.

[37] It must be reiterated however, that the main consideration for the court, as stated in **rule 13.3(1)** of the CPR, is that the defendant has a real prospect of successfully defending the claim. The defendant has satisfied the main consideration in **rule 13.3**. Having regard to all the circumstances in this case, even if I am incorrect in relation to what I perceive to be a defect in the issuing and serving of the claim form, necessitating the setting aside of the default judgment pursuant to **rule 13.2**, I believe that the default judgment would nonetheless be set aside pursuant to **rule 13.3**.

Is there any likely prejudice to the claimant?

[38] In ***Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Fredrick Flemmings & Gertrude Flemmings*** [2010] JMCA Civ 19, at paragraph 41, Phillips JA accept the views expressed in ***Finnegan v Parkside Health Authority*** [1998] 1 W.L.R. 411, that a litigant ought not to be denied access to justice on account of a procedural default,

> *"even if unjustifiable, and particularly where no prejudice has been deponed to or claimed."*

Delay may cause prejudice to a claimant because with the passage of time, memories fade, or it might be difficult to locate witnesses, or a witness might have died. The claimant has the burden of proving prejudice. However, no

actual prejudice has been proven. Though Albert Higgins and G. W. Thompson have died, it seems their deaths preceded the commencement of the claim in any event. I do not find that there is any prejudice to the claimant. The property dispute in this matter ought to be determined on its merits.

The overriding objective

[39] The overriding objective of the CPR requires that the court dispense justice by resolving issues between the parties in a manner which saves time and expense. In ***Villa Mora Cottages Limited and Monica Cummings v Adele Shtern***, SCCA No. 49/2006, judgment delivered on the 14th December, 2007, at page 10 Harris JA said:

> *"It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation.* ***This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits****. As a consequence, a litigant ought not to be deprived of the right to pursue his case."* (Emphasis mine)

Is it appropriate to dispense with the service of the fixed date claim form?

[40] Having regard to all the circumstances, I do not believe that the claimant's failure to follow the correct procedure in serving the correct documents and then seeking to convert proceedings to a claim form should be fatal to his claim. In light of the amount of time that has elapsed since the fixed date claim form was filed (in 2015), and having regard to the fact that the defendant was aware of the proceedings and filed an acknowledgment of service on July 13, 2016 without challenging the court's jurisdiction, I believe that the issues can be fairly resolved despite the irregularity in procedure. No real benefit would be achieved by directing the claimant to refile or re-serve a claim form.

[41] Applying ***Anderton v Clwyd County Council (No. 2)*** [2002] EWCA Civ 933, this would seem to be an exceptional case in which to make an order dispensing with the service of the claim form, pursuant to **rule 6.8**. Dispensing with the service of the claim form will not cause an abuse of the principle that a defendant is entitled to effective notice of the proceedings against him, since the defendant would have given consideration to the claim form and

understood the nature of the claim at the time he filed his acknowledgment of service and when he filed his application to set aside the default judgment.

DISPOSITION

[42] In light of the foregoing, I make the following orders:

1. The Judgment in Default of Defence entered against the applicant is set aside on the ground that the applicant was never served with the fixed date claim form and no order was made by the Court that the claim proceed as if begun by claim form.
2. The Writ of Possession dated July 24, 2018 is stayed until there is a final determination of this claim by the Court.
3. The claim initially commenced by fixed date claim form filed on September 24, 2015 is to proceed as if begun by claim form.
4. The Court now orders that the claim form and particulars of claim filed on June 30, 2016 be permitted to stand.
5. The Court now orders that service of the claim form and particulars of claim be dispensed with in the interest of justice.
6. The acknowledgment of service filed on July 13, 2016 is permitted to stand.
7. The applicant/defendant is permitted to file and serve his defence within fourteen (14) days hereof.
8. Mediation is ordered dispensed with.
9. As it is not possible to make the usual case management orders at this time, the Case Management Conference is fixed for hearing on December 20, 2019 at 10:30 a.m. for half hour.
10. The parties are to attend the Case Management Conference.
11. The Attorneys-at-Law for the applicant/defendant are to prepare, file and serve this order.
12. Permission is granted for the defendant to serve his defence and this Court order on the claimant electronically at marlan.higgins999@gmail.com.
13. No order as to Costs.
14. The Registry is asked to email this written judgment to the claimant.