



[2018] JMCC COMM 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017CD00019

BETWEEN	JENNIFER MESSADO	FIRST CLAIMANT
AND	LANZA TURNER BOWEN	SECOND CLAIMANT
AND	PLANTATION HOLDING LIMITED	FIRST DEFENDANT
AND	PLANTATION DEVELOPMENT COMPANY LIMITED	SECOND DEFENDANT
AND	CHRISTOPHER KERR	THIRD DEFENDANT

IN CHAMBERS

Carol Davis for the claimants

Paul Beswick and Georgia Buckley instructed by Ballentyne, Beswick and Co for the defendants

June 30, 2017 and January 8, 2018

CIVIL PROCEDURE – APPLICATION TO SET ASIDE JUDGMENT

SYKES J

The application

[1] The three defendants have applied to set aside a default judgment entered on September 27, 2016. In the application to set aside the judgment the defendants rely

primarily on the assertion that their defence has a real prospect of success. They also say that they have a good reason for not filing the defence within the time. Issues of abuse of process and material non-disclosure have been raised as additional factors to consider. The application to set aside is refused and these are the reasons.

The controlling legal standard

[2] Rule 13.3 of the Civil Procedure Rules ('CPR') sets out the legal standard for setting aside judgments lawfully obtained. The primary consideration is whether the defendant has a real prospect of successfully defending the claim (rule 13.3 (1)). There are two other factors to consider namely, (a) whether the application to set aside was made 'as soon as is reasonably practicable after finding out that judgment has been entered' and (b) whether the defendant has 'given a good explanation for the delay for the failure to file ...a defence' (rule 13.2).

[3] The court wishes to say a word about rule 13.3 (2) of the CPR. It does not say as soon as practicable after service of the formal order but 'as soon as is reasonably practicable after finding out that judgment has been entered.' This means that there is no legal necessity for the formal order to be served before it can be said that judgment was been entered against a defendant. In this case the defendants rely on the serving of the formal order to mark the time when they received notice of the judgment. The simple point being made is that in this case both the service of and knowledge that judgment had been entered coincide but the rule is framed in way that knowledge may precede service and there are no limits to what evidence may be adduced to prove knowledge provided that the evidence is admissible. The court will now address the legal standards under the rules and then address the issues of abuse of process and non-disclosure.

A. Time within which application to set aside made after receiving notice of judgment

[4] The defendants say that they were served with the default judgment on February 13, 2017 and made their application to set aside the judgment on February 27, 2017. The court concludes that in this case the application was made promptly.

B. *Delay*

[5] The defendants accept that they were served with the claim form and particulars of claim on March 11, 2016. They also accept that they filed an acknowledgement of service on March 23, 2016. The defendants state that they filed their defence on July 11, 2016 which they accept was out of time. The defendants add that the delay was not inordinate.

[6] The reason advanced for the delay is that they had multiple litigations going on and were simply overwhelmed. Their capacity to cope was overloaded. They say they had to undertake extensive research into the matter concerning the history of the matter. The numerous suits 'contributed to confusion in the adequate representation of the defendants and in the receipt of proper instructions for each individual matter including this action.' In their written submissions, the defendants have stated that the delay in filing the defence 'was not due to administrative humbug or inefficiency, nor was it intentional. The delay was a consequence of simply there being more than the defendants could bear at any one time.'

[7] The court does not accept the reason of overload. The defendants filed the acknowledgement of service on time which is an indication that they were fully aware of the deadlines. The court respectfully adopts the following paragraphs from the judgment of Lord Dyson MR in **Mitchell v News Group Newspapers Ltd** [2014] 2 All ER 430. His Lordship was speaking about the reforms suggested by the report of Lord Justice Jackson. The reforms were implemented in April 2013. The issue being addressed was costs but in the context of delivery of justice and that delivery being guided by the overriding objective. The Master of the Rolls observed at paragraphs 38 to 41:

[38] In the 18th Implementation Lecture on the Jackson reforms delivered on 22 March 2013, Lord Dyson MR said in relation to r 3.9 that there was now to be a shift away from exclusively focusing on doing justice in the individual case. He said:

'25. In order to achieve this, the Woolf reforms and now the Jackson reforms were and are not intended to render the overriding objective, or rule 3.9, subject to an overarching consideration of

securing justice in the individual case. If that had been the intention, a tough application to compliance would have been difficult to justify and even more problematic to apply in practice. The fact that since 1999 the tough rules to which Lord Justice Brooke referred have not been applied with sufficient rigour is testament to a failure to understand that that was not the intention.

26. The revisions to the overriding objective and to rule 3.9, and particularly the fact that rule 3.9 now expressly refers back to the revised overriding objective, are intended to make clear that the relationship between justice and procedure has changed. It has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case. It has changed because doing justice is not something distinct from, and superior to, the overriding objective. Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of the CPR consistently with the overriding objective.

27. The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so.'

[39] *We endorse this approach. The importance of the court having regard to the needs and interests of all court users when case managing in an individual case is well illustrated by what occurred in the present case. If the claimant had complied with para 4 of PD 51D, the master would have given case management and costs budgeting directions on 18 June and the case would have*

proceeded in accordance with those directions. Instead, an adjournment was necessary and the hearing was abortive. In order to accommodate the adjourned hearing within a reasonable time, the master vacated a half-day appointment which had been allocated to deal with claims by persons who had been affected by asbestos-related diseases.

[40] *We hope that it may be useful to give some guidance as to how the new approach should be applied in practice. It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle 'de minimis non curat lex' (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.*

[41] *If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that*

solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event.

[8] Thus the English judiciary have come to recognise fully and completely that non-compliance with deadlines, orders, practice directions is inimical to the proper administration of justice. It increases costs to all concerned. The case that does not properly utilise the slot of time and resources allocated it so that it can move forward to resolution imposes a costs on other court users because that case is now utilising another time slot which could have been used by another litigant. Time lost can never be regained.

[9] The Master of the Rolls has signalled a less tolerant approach to missing time lines. The Jamaican CPR does not need to be amended to lead to the same conclusion. The breach of the time limit here was not trivial. Coupled with this there was no application to extend time within which to file the defence.

[10] So far as this court can determine, in this particular case, the defendants were not self-represented. The acknowledgement of service was filed by counsel. Unless there is evidence to the contrary the court must assume that counsel indicated to the defendants that they needed to provide instructions so that a proper defence could be filed by the stipulated date. In addition, the notes accompanying the claim form would have told the defendants about the risk of not filing a defence. This means that the court

starts on the premise that the defendants had full knowledge of the consequences of not putting counsel in a position to file a defence. One of those risks is that an application for judgment in default of defence and that risk, in this case, became reality.

[11] The defendants say that there is no prejudice to the claimant if the judgment is set aside. The court cannot agree. A judgment is a significant step on the way to enforcement should that become necessary. To deprive a litigant of a properly obtained default judgment is to put that litigant very far back in the litigation process. A properly obtained judgment that is set aside increases costs because in all likelihood the case will now go through mediation, case management, discovery, preparation of witness statements and other connected matter which have a cost and which the judgment in default of defence obviated. Generally, attorneys bill at an hourly rate. Each part of an hour is often treated as a whole hour. This is not a criticism but simply recognising a fact of practice in Jamaica. When a properly obtained judgment is set aside it means that money that the litigant thought would not be expended on litigation now has to be allocated to funding a stage in the litigation that the default judgment made no longer necessary. Expending money because of the inefficiency of another is always prejudicial to the timely litigant.

[12] There is also prejudice to the administration of justice because additional time and resources now have to be allocated to the case because of the tardiness of the litigant. Other litigants necessarily will be subjected to delay and necessarily increased expense.

[13] The application for judgment in default of defence was heard on June 14 and 20, 2017. Judgment was delivered on September 27, 2016. The reasons advanced for the delay are not good ones.

C. *Whether the defendants have a real prospect of successfully defending the claim.*

[14] The court has examined the claim for which judgment was entered. The claim alleged that the defendants breached the terms of a settlement agreement. The specific terms breached were stated to be that the defendants:

(a) failed to present the documents to the accountants challenging the fees charged by the claimants;

(b) failed and refused to pay their half share of the accountant's fees.

[15] The claim sought a declaration that the defendants owe them money. In addition, the claimants were seeking an order that the defendants pay half the fees of the accountant in order that the accountant may determine the fees, bills and disbursements owed to the claimant. The claimants have also sought an order directing the defendants to present all the relevant documents to the accountants within seven days of the summary judgment and finally, an order that the defendants authorise the law firms of Gordon McGrath and Clough Long and Co to pay fees due to the claimants as determined by the accountants.

[16] The defendants in their defence filed July 11, 2016 say:

(a) they had an attorney client relationship with Mrs Messado but not Mrs Bowen;

(b) Mrs Messado was handling a real estate development at 54 Norbrook Drive, Kingston 8 on behalf of the second and third defendants;

(c) arrangements were made for Mrs Messado to be paid but she insisted that she was owed legal fees in the amount of JA\$33,000,000.00;

(d) Mrs Messado retained possession of a duplicate certificate of title without the defendants' consent and that frustrated their effort to find funding to complete the project;

(e) in an effort to resolve the situation the defendants entered into an agreement with Mrs Messado on March 10, 2015;

(f) Mrs Messado was paid JA\$12,500,000.00;

(g) speaks of alleged breaches by Mrs Messado of terms of the agreement;

[17] The court notes that the agreement dated March 10, 2015 bears a signature purporting to be that of Mr Christopher Kerr. Mr Kerr has not denied that the signature is his and the defence makes explicit reference to the document as the agreement he entered into.

[18] The recital in the document states this:

This fee settlement agreement dated the 10th day of March 2013 is made between Jennifer Messado & Co...

Whereas Jennifer Messado & Co previously acted in the capacity of attorneys at law for [3rd defendant], [2nd defendant] and [3rd defendant]

Whereas [law firm] has tendered bills for fees and has therefore exercised a solicitors' lien over, the files, documents ... for the unpaid fees, ...

And whereas after discussion and negotiation between [law firm] and the clients, the parties have agreed to settle the disputeon the terms and conditions set out and outlined below

NOW THEREFORE IN CONSIDERATION of the clients paying the sum of \$12,500,000.00 to Jennifer Messado & Co, it is acknowledged, understood and agreed as follows: -

- 1. The clients will pay the sum of \$12,500,000.00 by a managers cheque made payable Jennifer Messado & Co, as an immediate payment on account of the fees, bills and disbursements as presented, which have been*

disputed, which said payment shall be made on the execution of this agreement.

- 2. The manager's cheque in the sum of \$12,500,000.00 made payable Jennifer Messado & Co shall be delivered to Clough, Long & CO which amount shall be held by the said firm and delivered to Jennifer Messado & Co on the receipt by Gordon/McGrath of the documents mentioned paragraphs 8, 9, 10, 11 and 12 hereunder.*
- 3. A letter of undertaking will be given by Gordon/McGrath, secured by \$20,500,000.00 held in a joint account between Clough, Long & Co. and Gordon/McGrath in National Commercial Bank Jamaica Ltd, to pay the balance of fees, bills and disbursements as shall be determined, by the procedure suggested by the attorneys at law, that the fees, bills and disbursements with clients' objections and disputes be reviewed by the firm of accounts BDO of 28 Beechwood Avenue, Kingston 5, in the parish of St. Andrew.*
- 4. The parties agree that the said accountants will review the fees, bills and disbursements presented by Jennifer Messado & Co which said accountants shall examine the fees, bills, disbursements along with any objections raised by the clients, and determine the amount owing to Jennifer Messado & Co.*
- 5. The parties agree to pay the fees and costs said (sic) accountants in equal shares.*
- 6. The parties shall present all papers, documents, bills, receipts and evidence to the said accountants within (30) days of the date of this agreement and shall be binding on the parties.*
- 7. The review procedure referred to in paragraphs 3 and 4 (above) shall be completed within forty-five (45) days of the date of this agreement and shall be binding on the parties.*

8. *In consideration of the immediate payment of the sum referred to in paragraph 1 Jennifer Messado & Co will release all caveats that it has lodged against all the certificates of title of the development scheme.*
9. *Jennifer Messado & Co will also release all other liens registered or held, against property (real and personal) owned by Messrs Christopher & Donald Kerr, Pauline James as well as the clients.*
10. *Jennifer Messado & Co will deliver all duplicate certificate of title in its possession to Gordon/McGrath, attorneys at law for each unit (in the development scheme) along with a vendors and purchasers statement of account for each unit as was sold.*
11. *Jennifer Messado & Co will deliver to Gordon/McGrath, attorneys at law, the said documents in paragraph 8 and all originals of the signed instruments of transfer in relation to purchasers of the units in the development scheme.*
12. ...
13. ...
14. ...
15. ...

[19] The defence in this case is interesting. The defendants say that an arrangement was made for Mrs Messado to be paid by deducting legal fees from the clients' trust account. They say that despite the arrangement, Mrs Messado insisted that she was owed money. Nowhere in the defence does it say that Mrs Messado or the firm was not owed money. The defendants in effect admit signing the agreement because they say that they will ask the court about it because they are relying on it for its full effect and meaning. The defendant quotes paragraphs 1, 2, 8, 9, 10 and 11 of the agreement but remarkably makes no reference to paragraphs 4, 5 and 6 which are the paragraphs on which the claim and judgment are based. The defendants plead the alleged sins of Mrs Messado. Even assuming that Mrs Messado has committed the various breaches

attributed to her those breaches respectfully are not a defence to (a) whether she or the law firm is owed money; (b) not presenting the papers to the accountants in accordance with the March 2015 agreement and (c) not paying the accountants.

[20] The defence does not challenge the legal validity of the March 10 agreement. Mr Kerr's signature appears in three places. He signed in his personal capacity and as a director of both companies. There is nothing to suggest that when he signed there were circumstances that could call the agreement into question. There is an absence of realism about the defendant's case. The court does not see how the defendants can succeed on their pleaded case when the essence of the claimants' case has not been denied.

[21] The agreement was between the law firm of which Mrs Turner Bowen is a part and so she is a proper party to the claim. The recitals and signature of Mr Christopher Kerr make it plain that he has accepted that the defendants owed money, the attorney exercised the solicitor's lien and both sides agreed for payments to be made.

[22] The agreement had set up a mechanism by which the fees were to be determined. It was agreed that both sides were to pay the accountant in equal shares and that both sides were to submit all their documentation to the accountant within thirty days of the agreement. The claim is about compelling the defendants to pay their share of the accountant's fees and turn over the documents they have to the accountants so that the accountants, in accordance with the terms of the agreement, can take account of any objections raised by the defendants and then determine the amounts due and owing to the law firm.

[23] It is to be noted that the most important expression in rule 13.3 (1) is 'real prospect of successfully defending the claim.' This expression is the same as that used under rule 15.2 of the CPR which deals with summary judgment applications in respect of defendants who have no 'real prospect of successfully defending the claim.' In rule 13.3 (1) the expression is framed positively, that is, if there is a real prospect of successfully defending the claim then the default judgment may be set aside which also can be understood to mean that if there is 'no real prospect of successfully defending

the claim' then the judgment should not be set aside. By parity of reasoning rule 15.2 should be understood in the same way because the phraseology is the same except that it is framed negatively, that is, if 'the defendant has no real prospect of successfully defending the claim' then summary judgment should be entered which can be understood to mean that 'if the defendant has a real prospect of successfully defending the claim' then summary judgment should not be entered. Since the phraseology under both rules is the same then the explanation of the phrase under one rule has to be the same under the other rule unless there is some reason in the immediate context of the rule or some other factor that suggests that it should have a different meaning under each rule. The court has not been able to identify any factor that produces a different meaning and effect under either rule 13.3 (1) or rule 15.2 and therefore the judicial understanding of the phrase 'real prospect of success' under the summary judgment rule applies equally to the setting aside rule.

[24] It is my respectful view then that the observations of Lord Hobhouse in **Three Rivers District Council and others v Governor and Company of the Bank of England (No 3)** [2003] 2 AC 1 are applicable. His Lordship said at paragraph 158:

...under CPR Part 24, the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the "bottom line" is what ultimately matters.

...

The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality. The majority in the Court of Appeal used the phrases "no realistic possibility" and distinguished between a practical possibility and "what is fanciful or inconceivable" (ante, p 83h). Although used in a slightly different context these phrases appropriately express the same idea. Part 3 of the CPR contains similar provisions in relation to the court's case management powers. These include explicit powers to strike out claims and defences on the ground, among others, that the

statement of case discloses no reasonable ground for bringing or defending the claim. (emphasis added)

[25] The court is required to make an overall assessment not to identify each species of tree in the wood though some trees may require some close degree of examination. If there is an absence of reality regarding the prospect of success then the judgment should not be set aside.

[26] There is a pleading issue that must be taken into account on this application. Rule 10.5 of the CPR tells the defendant how he may respond to a claim. Under that rule there are four and only four responses permitted by law. Three of the four are stated here. These are say which are:

(a) admitted;

(b) denied;

(c) neither admitted or denied.

[27] In respect of (c) there is an even greater restriction. The defendant must say that he neither admits nor denies **because he does not know whether the assertions are true but wishes the claimant to prove them** (emphasis added). There is now no such thing as a naked denial. Every single denial must be accompanied by a reason. As shall be shown the reasons for the denial are reduced to three and only three possibilities.

[28] The rule goes further to say that where the defendant denies any allegation he **must** give reasons **and** if he intends to prove a different version of events from that given by the claimant he **must** set out his version (rule 10.5 (4)). But it does not end there. The defendant is placed under pressure even further by being told that where he does not admit, or deny **and** put forward a different version, **the defendant must state the reasons for resisting the allegation** (rule 10.5 (5)).

[29] The effect of these **mandatory** pleading rules is as follows:

- (a) there is no such thing as naked denial. Reasons for the denial are its garb;
- (b) there must be a reason for the denial;
- (c) the reasons can only be:
 - (i) he does not know whether the claimant's assertions are true;
 - (ii) the assertions are not true **and** (a mandatory conjunction) the defendant sets out his version;
 - (iii) any other reason for resisting the allegation.
- (d) there are now four and only four lawful responses that a defendant is permitted to make. These are:
 - (i) admission of the allegation;
 - (ii) denial of the allegation and wants the claimant to **prove because the defendant does not know whether the allegations are true** (called the denial because of ignorance – ignorance denial);
 - (iii) **where there is denial, reasons must be stated** and if a different version is to be advanced then it is set out in the defence **not in any witness statement or any accompanying document** (called the denial because the allegation is false – false allegation denial);
 - (iv) where the defendant does not admit or deny and then advance a different reason **he must give reasons for not admitting the allegation** (called denial for some reason other than ignorance or falsity – other reason denial).

[30] What this means is that there no place for this archaic formulation.

Save as expressly admitted herein, the defendants deny each allegation in the particulars of claim as if the same were set out here and traversed seriatim.

[31] This is purporting to do what the rules now say is legally impossible, not just undesirable. It is now a meaningless expression. Each allegation must be addressed. The allegations can only be addressed in one of the four ways identified. There are no other possibilities under the CPR.

[32] The defence in this case has no realistic prospect of success because it has not controverted the main claims on which the judgment is based. The defendants have not said:

(a) no money is owed to the claimants;

(b) they did not sign the agreement;

(c) that they have turned over the documents to the accountant as agreed;

(d) that they have paid the accountant their portion of the money.

[33] This means that there is no real prospect of success because they have not joined issue with the claimants on the matters relied on to secure the summary judgment.

D. *Abuse of process*

[34] It is said that the present claim is the same claim made in Claim No 2015CD00077 (**Jennifer Messado (t/a) Jennifer Messado & Co) v Plantation Holdings Limited, Plantation Development Company Ltd, Christopher Kerr**). It is also said that the 2015 claim sought to enforce the very same agreement that is the subject of the present claim. From the evidence the 2015 claim was still extant when the present 2016 claim as filed. The 2015 claim was discontinued on June 8, 2017, six days before the application for judgment in default of defence was heard on June 14, 2016.

[35] In considering this abuse of process the court bears in mind the decision of Morrison JA (now President of the Court of Appeal) in **Andrew Hamilton and others v The Assets Recovery Agency** [2017] JMCA Civ 46. Morrison JA noted that the power to shut out a subject of litigation is not one that should be exercised against a person without the most careful and anxious consideration (paragraph 77). His Lordship endorsed the House of Lords' decision in **Johnson v Gore Wood & Co (A firm)** which has been applied by the Court of Appeal of Jamaica in **S & T Distributors Limited and another v CIBC Jamaica Limited and other** SCCA 112/2004 (unreported) (delivered July 31, 2007); **The Hon Gordon Stewart OJ and others v Independent Radio Company Limited and another** [2012] JMCA Civ 2.

[36] The effect of all these decisions of the Court of Appeal is that:

- (a) the decision to stop a case going forward in circumstances where it has not been adjudicated upon is not to be lightly exercised;
- (b) stopping the case going forward on the basis that there was a previous case raising the same issue is a factor to be taken into account but by itself is not decisive;
- (c) there may be an abuse of process even if the first case did not end in judgment or a settlement;
- (d) there is no default presumption that the fact of bringing successive actions without more means an abuse of process even if the successive action is based on the same material as the previous claim(s);

[37] In this particular case the court observes that Mrs Lanza Turner Bowen was not named as a party to the 2015 claim. The remedies sought were not identical. Having regard to the cases cited above the factors named in this paragraph the court declines to exercise its discretion to strike out the claim on the basis of abuse of process. In any event, the exercise of this power would depend on whether the judgment is set aside.

E. *Non-disclosure*

[38] The defendants submit that the claimants' failure to notify the court that a defence was filed in July 2016 – albeit well outside of the time permitted by the rules for filing a defence – was a failure to disclose and therefore the judgment should be set aside. Mr Beswick sought to draw a parallel between this case and that of non-disclosure in injunctions.

[39] The court does not agree that the failure to bring to the attention of the court the filing of the defence can and should have the consequence contended for. The application for default judgment was properly made and the filing of the defence after the time permitted for filing the defence is of no moment. The defence being out of time, in the absence of an application for an extension of time within which to file defence, cannot delay the application for judgment in default of defence or the grant of it. The court is unable to accept the proposition that a litigant who is late and does not apply for an extension of time can delay a legitimate application for judgment in default of defence. The court will not say such a late filing has no legal significance but one which it cannot have is to precipitate a setting aside of a lawful default judgment in circumstances where no application for extension of time within to file a defence is before the court. Therefore the submission that this non-disclosure without more is sufficient to set aside the judgment on the basis of being irregularly obtained has no legal foundation in this court's view.

Disposition

[40] The application fails and is dismissed. Costs to the claimants to be agreed or taxed. Leave to appeal granted.