

- (a) Permission to file his Acknowledgement of Service out of time.
- (b) That the Acknowledgement of Service filed 9th April 2013 stands as filed.
- (c) That the Default Judgment entered by the Honourable Mrs. Justice McDonald-Bishop on the 16th January 2014 be set aside.
- (d) Such further orders as the honourable court deems just.

[4] By affidavit in support of application which was filed on the 31st January 2014, Dr. Ford gives a rather circumlocutious history of the matter. In essence he is saying that although he attended chambers in respect of several applications in this matter, he was unaware that he was obliged to file an Acknowledgement of Service and Defence, see paragraph 17 of the affidavit. He said further that he had instructed Mr. John Graham to represent him in relation to an application to set aside an order for committal but not in relation to the substantive claim. He eventually filed an Acknowledgement of Service on the 9th April 2013. In terms of the merits of the matter he asserts he has a good defence to the claim. The Claim be it noted, is one for Trespass and Damages. At paragraph 21 he categorically denies ever being in possession of the premises 12 Widcombe Crescent and he asserts that the person in possession is one Joyce Reid also known as Apple. He gives an account of his dealings with Joyce Reid stating that he had expressed an interest in purchasing the property. He denies that the persons in occupation were ever his employees or agents.

[5] On the morning of the hearing Dr. Ford brought to my attention that he had filed an affidavit of the said Joyce Reid and that it had been served on the Claimant. The Claimant's attorney acknowledged receiving the said affidavit and indicated that he was prepared to go on with the matter. Having perused the said affidavit it is instructive to note that Miss Joyce Reid states "Dr. Ford started working on the place but after a while he stopped because he told me, the matter was in court" (see paragraph 29 of the said affidavit).

[6] It is necessary in considering this matter to relate a brief history of this litigation. The Claim was filed on the 22nd August 2012, against Dr. Ford claiming damages for trespass including damages to return the property to its original state and making good the alteration and modification to the lands and building thereof. Aggravated damages, exemplary damages and an injunction restraining the Defendant from going onto and carrying out construction were also claimed. The Particulars of Claim filed on the 22nd of August 2012, elaborated on the allegations. A document entitled, Notice of Acting pursuant to Civil Procedure Rules (CPR) 63.3 was filed by John Graham and Company on 19th October 2012. By Notice of Application filed on the 18th January 2013, the Claimant applied for judgment in default claiming possession, a final injunction, damages for trespass, aggravated damages exemplary damages, special damages interest and costs. The basis of the application was that the Defendant had not filed an Acknowledgement of Service or Defence to the Claim. On the 9th of April 2013 the Defendant filed an Acknowledgement of Service in person. The Claimant's application for judgment came on for hearing before the Honourable Ms. Justice McDonald-Bishop on the 16th January 2014.

[7] A Formal Order filed on the 27th January 2014, and signed by the learned judge recites that upon reading the affidavit of Mr. Courtney Williams and upon hearing Mr. William Panton and "upon" the Defendant appearing unrepresented and having filed no Acknowledgment of Service and or Defence. It was ordered that:

- “(1) The Defendant give possession to the Claimant
- (2) The Defendant be restrained from carrying out construction work on the premises.
- (3) Damages be assessed for trespass, exemplary, aggravated and special damages.
- (4) Interest and cost.
- (5) A date was to be fixed for the assessment.”

[8] It is clear to me that my sister judge heard the Defendant and the Claimant prior to making her decision to enter judgment. It is therefore not a decision made ex-parte or in the absence of the Defendant. In consequence this application should

either be brought before her if, she is available or, if there is disagreement with the order it should be the subject of an appeal. If I am wrong and if I do have jurisdiction to consider this matter, it seems to me that the Defendant must fail.

[9] The Defendant's defence has no real prospect of success. He has no arguable defence and there is not a serious question for trial. There is therefore no basis to have the judgment set aside. The jurisdiction to set judgment aside is dealt with in Rule 13.3 of the Civil Procedure Rules. These provide that:

- (a) 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) In considering whether to set aside or vary a judgment under this rule the court must consider whether the Defendant has
 - i. applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.
 - ii. Given a good explanation for the failure to file an Acknowledgement of Service or Defence as the case may be.
- (c) Where this Rule gives the court discretion to set aside a judgment, the court may instead vary it.

[10] Part 12 treats with default judgments, and states that the Claimant may obtain judgment without trial where a Defendant has failed to file an Acknowledgement of Service, given Notice of Intention to Defence but has failed to file a Defence. Such a judgment is called a Default judgment. Part 12 contemplates that it would be the registry which would enter such a judgment, provided there is proof of service of the Claim and proof that the Defendant has failed to file an Acknowledgment among other things. In this case the Claimant adopted the unusual practice of applying to the court for default judgment to be entered. This was no doubt because a final injunction was part of the relief being sought.

[11] The evidence placed before me by the Defendant suggests that he has no real prospect of successfully defending the claim. Indeed his own witness asserts that the Defendant started work on the premises and this in a context where he was contemplating purchasing the premises. It means therefore that he had to have been in possession if only for the purpose of constructing the wall. The extent of his possession is an issue to be dealt with at an assessment of damages. The damages payable for trespass will correlate to the extent of the possession proved. I am also not satisfied that any good reason for failing to enter an Acknowledgement of Service or file a Defence is demonstrable. The Defendant alleges that he was unaware that he had to file an Acknowledgment and Defence when he was attending chambers. However, he is a doctor and literate and therefore ought to have seen the very clearly printed notices attached to the Claim served upon him. Those notices make it clear that he is to file an Acknowledgment and Defence. Indeed, the Notice to Defendant says **“if you do not complete the form of Acknowledgment of Service served on you with this Claim Form and deliver or send it to the registry so that it is received within 14 days of service of the Claim Form on you, Claimant will be entitled to apply to have judgment entered against you”**. This notice is followed with prescribed notes for the Defendant giving in greater detail his obligations and it is stated in bold letters **“remember if you do nothing, judgment maybe entered against you without any further warning.”**

[12] It is true that the Defendant’s application to set aside default judgment was filed promptly on the 31st January 2014, Justice McDonald-Bishop’s Formal Order was made on the 16th day of January 2014. It is also true that, another judge sitting in the shoe of Justice McDonald-Bishop, may have decided against entering a judgment given that there was an Acknowledgement of Service filed on the 9th April 2013, all be it out of time. This is because where a litigant appears in person, it may seem rather harsh to enter a Default judgment on the basis that no Acknowledgment had been filed; In fact one was filed but what was required was an application to extend time to regularize the late filing. However, judges

differ on matters of discretion. I am not here sitting as a judge of appeal. It is not for a judge of coordinate jurisdiction to say whether another was right or wrong. It is not appropriate to substitute my discretion for hers.

[13] There being no merit in the Defence, I respectfully decline the invitation from the Defendant to review the decision of Justice McDonald-Bishop.

[14] In the result and for the reasons stated above I dismissed the Defendant's application to set the judgment aside. I thereafter proceeded to make Case Management Orders with a view to ensuring that the Defendant has a fair hearing at the pending assessment of damages, which is his constitutional right. I made the following orders:

1. Application filed 31st January 2014 is dismissed
2. Costs of today will be awarded to the Claimant and are to be taxed if not agreed.
3. The date for the assessment of damages fixed for the 8th July 2015 is to stand.
4. There will be standard disclosure of documents on or before the 8th May 2015.
5. There will be inspection of documents on or before 22nd May 2015.
6. Witness statements to be filed and exchanged on or before 26th June 2015.
7. An expert report on the property is to be agreed if possible and if not expert evidence is to be limited to one expert witness to each party and this is to be filed and served on or before 26th June 2015.
8. Leave to appeal granted to the Defendant.
9. This Formal Order is to be prepared, filed and served by the Claimant's Attorney-at-Law on or before the 1st day of May 2015.

David Batts
Puisne Judge