IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU 2022 CD 00012

BETWEEN	**WILLIAM TENN**	**CLAIMANT**
AND	**ANDREW MARRIOT**	**DEFENDANT**

IN CHAMBERS

Miss Tamiko Smith instructed by Smith, Afflick, Robinson & Partners Attorney-at-Law for the claimant

Miss Kara Graham for the defendant

Heard: July 17, 28, November 30 and December 11, 2023

Default judgment- Whether default judgment was regularly obtained - Whether there is a real prospect of success - Recovery of rent and possession – Burden of Proof

Civil Procedure Rules 12. 4, 12. 5 & 13.3, 13.4

WINT-BLAIR J

[1] The claimant commenced a claim against the defendant on the 10th of January 2022 for rent and recovery of possession of land situated at 94B Molynes Road Kingston 10, in the parish of St. Andrew. The defendant failed to file either an acknowledgment of service or a Defence and on or about May 3, 2022, judgment in default was entered against him by a judge.

The Application

[2] On the 11th of August 2022, the defendant filed a Notice of Application for Court Orders to have the default judgment entered against him set aside. The applicant is seeking the following orders:

1. *"That Judgment entered against the Defendant be set aside in accordance [with] Part 12.10 (4) & 5 as the Defendant was not personally served with (sic) Claim Form and Particulars of Claim as per Section 5 (5.5) of the Civil Procedure Rules 2006, as amended;*

2. *That the terms of the orders granted on the 3rd day of May 2022 and comprised in Formal Order filed on the 7th day of June, 2022 be stayed;*

3. *That any application for warrant of possession filed on behalf of the Claimant be stayed;*

4. *That the Costs of these proceedings be borne by the Claimant and if not agreed be taxed;*

5. *Further and/or other relief as this Honourable Court deems fit."*

[3] The grounds on which the aforesaid relief is being sought is set out hereunder:

1. *"That the Claimant has failed to serve the Defendant with the Claim Form and Particulars and any such failure on the part of the Defendant to file an Acknowledgement of Service of Claim Form or Defence was not out [of] inadvertence;*

2. *That the Judgment obtained by the Claimant is improper and deemed to be set aside by this Honourable Court as[sic] pursuant to Part 13. 2, 13.3, 13.4 & 13.5 of the Civil Procedure Rules;*

3. *The Defendant is in possession of a Lease & Sale Agreement entered between himself and Alfred Tenn, deceased and has a reasonable prospect of successfully defending these proceedings;*

4. *That the proceedings are a nullity as the Claimant at the time of obtaining the court orders was not in receipt of a Grant of Probate in the Estate of Alfred Tenn;*

5. *It would be unjust not to grant the Orders herein."*

The Evidence

[4] The application was supported by the Affidavit of Andrew Marriott[1] who deponed that himself and Mr. Alfred Tenn ("the deceased") entered into a Lease and Sale Agreement in 2010 for a parcel of land at 94B Molynes Rd., registered at Volume 1540 Folio 446 of the Register Book of Titles (the leased premises). The monthly rental sum was Sixty Thousand dollars ($60,000.00) with a purchase price of Ten Million dollars. ($10,000,000.00). After executing the agreement, the affiant said he cleared the land, reinforced the back wall, increasing its height by 6 feet and erected a concrete fence all around the property with a sliding gate to the front.

[5] He made a total payment of $2,120,000.00 as a deposit on the purchase price and paid one month's rent and security deposit respectively. On or about the 25th of March 2010, he paid the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00) and on the 30th of April 2010, the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00) on the balance purchase price of Five Million Dollars ($5,000,000.00). He then registered his company and began operating at the leased premises. Prior to Mr. Tenn's death, Mr. Marriott said that both had maintained a good relationship and that payments made under the lease to the deceased were on time, in person and in cash.

[6] On or about the 1st of October 2021, Mr. Marriott deposed that he received a letter from Ramsay Smith, attorneys-at-law enclosing a copy of a new lease agreement to be executed by him as tenant in respect of the estate of Alfred Tenn. He deposed that he explained to the claimant that he already had a lease and sale agreement with Alfred Tenn and had paid the sum of Five Million Dollars ($5,000,000.00) pursuant to the its terms. The claimant lodged a caveat on the 19th of January 2022 which is exhibited.

---

[1] Filed on August 11, 2022

[7] Mr. Marriott's evidence is that he was not aware that a claim had been filed against him for recovery of possession of the property as he received neither the notice to quit said to have been served on him, nor the claim and particulars of claim *inter alia* as alleged in the affidavits of service filed by Ms Verona Wilson.

[8] The applicant admitted in cross-examination that one notice to quit had been received by his employee Ms. Chelsi-Rae Cole on the 20th of April 2021, it was exhibited, as was a copy of the Affidavit of Service filed on the 18th of February 2022. The applicant said he was not in office for a month or two so he did not receive another notice to quit, nor did he respond to the one served on his employee.

[9] Regarding the claim the applicant said that he was not working at the location on Molynes Rd. on January 28, 2022, at the date or time of service and so could not have been served as Ms. Wilson had said in her affidavits of service. He admitted to being served with a perfected formal order on July 5, 2022.

[10] The applicant submits that the claimant has no standing as executor because no grant of probate had been obtained before the court made its order. The first time he saw a process server was on the 5th of July 2022 when he was served with the formal order filed on the 7th of June 2022. Mr. Marriott asserts that he will be prejudiced if the orders sought in the instant application are not granted.

[11] Mr. William Tenn in his affidavit deposed that the application to enter default judgment was granted by a judge on May 3, 2022. The perfected formal order with penal notice was served on the applicant by Ms. Wilson on July 4, 2022. Up to July 28, 2022, there were no steps taken in the proceedings by the applicant. Enforcement actions were taken against the applicant with a writ of possession being filed on August 4, 2022. Thereafter the Bailiff's office was given into possession of the said writ. The affiant and the Bailiff went to the leased premises on August 30, 2022 to execute the writ, however more fees had to be paid to the

Bailiff as a result of the Bailiff's assessment and they returned on September 1, 2022. A stay of proceedings was sought by the applicant.[2]

[12] Mr. Mervyn Hill gave an affidavit in support of Mr. Tenn. He deponed that the pair went to the leased premises looking for the applicant and were told he was to be found at a construction site in Pembroke Hall. They went there, Mr. Hill deposed that he was present for all visits to the applicant with Mr. Tenn and noted the disrespectful conduct of the applicant towards the respondent.

The Defendant/Applicant's Submissions

[13] Ms. Graham submitted that Part 13.3 of the CPR gives the court the power to set aside or vary a default judgment that was entered under Part 12, if the defendant has a real prospect of successfully defending the claim. Counsel relied on **Anwar Wright v Attorney General of Jamaica**[3] in which the court found that the defendant had not provided a good explanation for its failure to file an acknowledgment of service within the time prescribed by the CPR. However, the court found that the failure was not fatal as the primary consideration was whether the defence had a real prospect of success.

[14] Miss Graham relied on **Deny Cummings v Heart Institute**[4] to argue that where the defendant can prove that the claimant did not comply with rule 12.5 then the defendant can successfully have default judgment against him set aside. She cited the case of **Frank I Lee Distributors Ltd v Mullings & Company (A firm) v Frank**

---

[2] Granted by Batts, J on December 1, 2022 and instant application set down for hearing on January 11, 2023.

[3] [2013] JMSC Civ 128

[4] [2017] JMCA Civ 34

I Lee Distributors Ltd[5] in which the Court of Appeal ruled that where the applicant seeks to set aside default judgment on the basis that the claim was never brought to his attention then the court should in the interest of justice and in furtherance of the overriding objective of the CPR, set aside the default judgment.

[15] Counsel contended that in the case of **Sheneka Kennedy v New World Realtors Limited**[6] the paramount consideration for the court was whether the defendant has a real prospect of successfully defending the claim. In order to make such a determination the court had to consider the evidence. That case was also instructive on the point of delay. Even in cases where there is inordinate delay the court may still grant an application to set aside default judgment as the court is required to look at all the circumstances of the case.

[16] It was submitted that based on the authorities and grounds, the applicant has a realistic prospect of success and a good reason for failing to file a defence. Further, the applicant applied to the court as soon as practicable after finding out that the default judgment was entered against him. Counsel submits that the principles of natural justice and the overriding objective are all in favour of the applicant and asks that the application be granted as prayed with an extension of time to file the defence.

The Claimant/Respondent's Submissions

[17] Miss Smith for the respondent cited rule 13.4 of the CPR arguing that the application to set aside default judgment must fail as it is not in conformity with the rule. Pursuant to rule 13.4(2) the court does not have a discretion to set aside a default judgment where the affidavit of merit relied upon did not exhibit a draft defence.

---

[5] [2016] JMCA Civ 9

[6] [2017] JMSC Civ 175

[18] Counsel also submits that according to **Richard Merchant v Robert James**[7], the defendant's attorney cannot produce an affidavit of merit in the circumstances as she did not have personal knowledge of the facts concerning the defence. She cited the case of the **Administrator General for Jamaica v Cool Petroleum et al**[8] to emphasize that the issue is not who swears the affidavit of merit but whether the affiant can provide sufficient information from personal knowledge to support the application to set aside default judgment. Further, in **Christopher Ogunsalu v Keith Gardener**[9] the importance of a draft defence being exhibited to an affidavit of merit was made clear. Counsel submitted that in addition, the defendant's affidavit gives any evidence as to what his defence was.

[19] It was submitted that in **Nadine Billone v Expert 2010 Company Ltd,**[10] it is the defendant who has to prove on a balance of probabilities that he was not served with the originating documents. The defendant by his own affidavit has failed to discharge the burden of proof that he was never served with the originating documents. Miss Smith submits that the court should find that the default judgment was regularly obtained and that this application does not fall within the purview of rule 13.2 (1) and as such the default judgment should not mandatorily be set aside.

[20] Miss Smith also submitted that the applicant does not have a real prospect of successfully defending the claim. This is on the basis that the defendant alleges that he entered into a Lease and Sale Agreement with Mr Alfred Tenn. The applicant asserted that all payments for rent were made to the deceased personally and in cash and that he made a deposit of Five Million Dollars ($5,000,000.00) in

---

[77] [2003] JMSC Civ 24

[8] [2019] JMSC Civ 181

[9] [2022] JMCA Civ 12

[10] [2013] JMSC Civ 150

instalments, yet the receipts do not contain the signature of the deceased. There is no evidence that the deceased ever received the monies as the applicant asserts. Therefore, counsel submitted that the applicant has failed to establish that he has a real prospect of defending the claim.

[21] Lastly, the applicant did not file an application to set aside the default judgment until 37 days after it was entered with no good explanation for the delay. Moreover, counsel submits that if the judgment were to be set aside it would cause prejudice to the claimant and as such the court should refuse the orders sought.

[22] Issues:

1) Whether the default judgment entered against the defendant/applicant on May 3, 2022 was regularly obtained.

2) Whether the default judgment entered against the defendant/applicant should be set aside.

Discussion

Whether the default judgment entered against the defendant/applicant on May 3, 2022 was regularly obtained

[23] A judgment in default of acknowledgment of service was entered on May 3, 2022. In order for the defendant/applicant to be successful in his pursuit to have the judgment in default set aside he must prove that judgment was irregularly obtained by providing evidence that the claimant/respondent did not satisfy the requirements outlined in Part 12 of the CPR which is where the court derives the power to enter default judgment.

[24] Rule 12.4 of the CPR states that:

"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;"

[25] Rule 12.5 of the CPR provides that:

"The registry must enter judgment at the request of the claimant against a defendant for failure to defend if –

(a) the claimant proves service of the claim form and particulars of claim on that defendant; or

(b) an acknowledgment of service has been filed by the defendant against whom judgment is sought; and

(c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;

(d) that defendant has not –

(i) filed a defence within time to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under rule 22.2(6))

(ii) where the only claim is for a specified sum of money, filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or

(iii) satisfied the claim on which the claimant seeks judgment; and

(e) there is no pending application for an extension of time to file the defence."

[26] The cases cited have all been considered however only those which affect the issues will be cited here. In **Denry Cummings**, the Court of Appeal decided that if there was a conflict on the evidence as to the date of service of the claim and particulars such that a decision could be made as to whether the acknowledgment of service had been filed in time. This impacted the entry of the default judgment and the question as to whether it would have had to be set aside as of right.

[27] At paragraph 54 of the judgment, it says Rule 12.5 requires the claimant to prove service of the claim form and particulars on the defendant. The burden of proof is therefore on the claimant/respondent. This would go against the submission of Ms. Smith, that in reliance on **Nadine Billone v Expert 2010 Company Ltd.,** it is the applicant/defendant who has to prove on a balance of probabilities that he was not served with the originating documents, in effect reversing the burden of proof. **Nadine Billone** is distinguishable as in that case there was a promptly filed acknowledgement of service demonstrating a clearly stated intention to defend the claim. The default was, therefore, not in relation to service but in relation to the failure to file a defence. Accordingly, the court in **Nadine Billone** was not concerned about the issue of service of the claim form because by filing the acknowledgement of service, in that case, the 2nd defendant had acknowledged that he had received the claim form and particulars of claim. The binding authority is **Denry Cummings**.

[28] **Denry Cummings** goes on to set out the importance of cross-examination where there are disputed facts and this was particularly so where the dispute was whether there had been personal service as was in the instant case. In that case, there were other issues raised which required a determination of credibility and cross-examination would have been important for the resolution of those issues as well. The Court of Appeal found that there was a real prospect of success on the evidence presented to the court.

[29] In **Frank I Lee Distributors Ltd v Mullings & Company (A Firm)**[11], the Court of Appeal considered an appeal from the refusal of an application to set aside default judgment. The refusal was based on improper service leading to the applicant being unable to file its acknowledgment of service. The court found that a defendant who had not been served with a claim form has an unfettered right to have judgment entered against him set aside. This being part of the rules of natural justice, such a defendant ought not to be barred from approaching the court by technical rules of procedure, applying **Strachan v Gleaner Company Limited and Another**[12]at paragraph 21.

Service

[30] The process server, Ms. Veronia Wilson, filed an affidavit on February 18, 2022[13] stating that she served the claim form inter alia on January 28, 2022 at 1:30pm at the leased premises. She did so personally and the applicant accepted them from her. Ms. Wilson filed an affidavit of service on July 13, 2022 setting out service on the applicant on July 4, 2022 at the leased premises of the perfected formal order[14]. She said she knew him for a couple months, having served documents on him previously. She filed a supplemental affidavit on September 16, 2022 referring to her affidavit filed on February 18, 2022 and stated that on January 28, 2022, the defendant was served at the same address. She had served him the previous year with a notice to quit and he was known to her. She exhibited the correct notice to quit deponing that the notice to quit previously exhibited was one served by Mr.

---

[11] [2016] JMCA Civ 9

[12] [2005] UKPC 33

[13] Filed on February 18, 2022

[14] Filed June 7, 2022.

Leonard Samaru and not herself. The notice to quit she had served bears her signature and was served on October 26, 2022.

[31] Ms. Wilson's affidavit refers to the date in the particulars of claim which is the same date given in evidence by the applicant which is that Ms. Wilson served the notice to quit on October 26, 2021. The particulars of claim says service was on October 26, **2021** while the affidavit of William Tenn filed on September 15, 2022 says service was by Ms. Wilson on October 26, **2022,**[15] it attaches the notice to quit as an exhibit. It is the identical notice to quit referred to by Ms. Wilson which is dated October 26, **2021** and endorsed as having been served on even date.

[32] All other documents save for the notice to quit dated October 26, 2021 and the claim and particulars of claim were served at the leased premises on the applicant. There is no complaint about any of those.

[33] Facts found related to service

1) The notice to quit bearing the date of October 26, 2021 was not before Palmer-Hamilton, J as an exhibit to the affidavit of Ms. Wilson filed on February 18, 2022, when she made the entry of judgment.

2) The supplemental affidavit of service corrects the date of the notice to quit attaching an entirely different notice to quit after the entry of default judgment. The affiant, Ms. Wilson, states that it bears her signature and that it was served on October 26, **2022** which is the date in the particulars of claim. The notice to quit exhibited to the said supplemental affidavit bears the date of October 26, **2021** and the particulars of claim refers to the applicant being served with a notice to quit on October 26, **2021**. The process server explained in the body

[15] Para 11

of this second affidavit that she had personally served the applicant at the leased premises in the previous year with a notice to quit.

3) There was no attempt to explain the date of the Notice to Quit to October 26, **2021** during the hearing when the witness was present for cross-examination. The respondent's affidavit filed on September 15, 2022 faces this same issue. During the hearing, it also relied on a notice to quit served in **2022** rather than **2021**.

4) This would mean that the sworn affidavits which were ordered to stand as the evidence in chief of the witnesses remains with the date of service of the notice to quit as October 26, 2022, while exhibiting documents which were purportedly served a year before.

5) The only affidavit of service which was before the learned judge on the date of the entry of default judgment was the affidavit of service filed on February 18, 2022 stating that the process server served the claim form inter alia on January 28, 2022 at 1:30pm at the leased premises. She did so personally and relied on the fact that she had served the applicant before.

6) It is found that the discrepancies in the evidence of service of the notice to quit can be resolved as errors in the year in the typing of the affidavits as the physical copy of the notice to quit says **2021** not **2022** for the date of service. Where it says the year is 2022, that is more consistent with the sequence of events.

[34] Mr. Marriott's evidence is that he was not aware that a claim form and particulars of claim were filed against him for recovery of possession of the property as he was not served. His evidence is that he only became aware of the claim against him when he was served with the Formal Order on the 5th of July 2022 which was the first time he saw the process server. The question is not one of the filing of a defence at this stage, it is one of proper service.

[35] Ms. Verona Wilson in her Affidavit of Service filed on the 18th of February 2022 gave evidence that she served the defendant/applicant personally with the Claim Form with prescribed notes, the acknowledgment of service Form, Defence and Counterclaim Form and the Particulars of Claim. She said she knew him and served him personally on the 28th of January 2022 at 1:30pm at the leased premises.

[36] Mr. Marriott in his affidavit maintains that he was not at the address on the 28th of January 2022 when the relevant documents were served. According to his evidence, he was working in Pembroke Hall. The affidavit of Mr. Hill says that that was the location where they found the applicant in March 2021. The applicant received one notice to quit in April 2021 at the leased premises through Chelsi-Rae Cole, but not that of October 26, 2021. He also received the letter from Ramsay Smith with the new lease agreement. He did not receive the claim and supporting documents but he did receive the formal order all again at the leased premises.

[37] While the burden of proving service is on the respondent, there was no evidence from the process server that she went to the leased premises to serve the claim form and was met with a closed business place or staff that directed her to the construction site in Pembroke Hall as was the case when the respondent and Mr. Hill went to the leased premises looking for the applicant. There is no evidence of attempted service and service on another day as a result of the absence of the applicant. The evidence accepted by this court after cross-examination on this issue is that the applicant was served with the claim and particulars of claim at the leased premises.

[38] The court must next embark upon a consideration of rule 13.3 which states:

> *"13.3 (1) The court may set aside or vary a judgement 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."

Whether the default judgment entered against the defendant/applicant should be set aside.

[39] Having found that the default judgment was regularly entered, the issue of whether the applicant can successfully have it set aside will now be resolved. The court's power to set aside default judgment is derived from Part 13 of the CPR. Rule 13. 3 of the CPR provides:

"(1) The court may set aside or vary a judgement 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 acknowledgement of service or a defence, as the case may be."

[40] In **Flexnon Limited v Constantine Michell and others**[16], Straw J at paragraph 16 said:

"Based on the provisions of the CPR and the relevant case law, the considerations for the court, before setting aside a judgment regularly

[16] [2015] JMCA App 55

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."

[41] Based on the guidance from **Flexnon Limited (supra)** and the requirements outlined in **rule 13.3 of the CPR** for setting aside default judgment, this issue will be resolved under three headings.

1) Does the defendant have a real prospect of successfully defending the claim?

[42] Rule 13.4 of the CPR provides that:

(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."*

[43] **Flexnon Limited (supra)** outlines the primary test for setting aside default a judgment that was regularly obtained. The test is to determine if the defendant/applicant has a *'real prospect of successfully defending the claim'*. This means that in the case at bar Mr. Marriott has to prove that he has more than an arguable case. What he needs to prove is that his defence has a 'real' as opposed to a 'fanciful' prospect of success (see **Swain v Hillman and Another**[17]). This means something more than a mere arguable case. The test is similar to that which is applicable to summary judgments (see Blackstone's Civil Procedure 2005,

[17] [2001] 1 All ER 91

paragraphs 20.13 and 20.14 and the case of **International Finance v Utexafrica SPRL** [2001] All ER (D) 101 (May). (See also **ED&F Man Liquid Products v Patel & another** (2003) Times, judgment delivered on 18 April 2003.)

[44] 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] Accepting that the principles to be applied regarding a defence on the merits in summary judgment applications are similar to that in an application to set aside a default judgment regularly obtained, a defence with a real prospect of success in such an application may therefore involve a point of law, a question of fact or one comprising a mixture of fact and law. A defence will have little prospect of success if it is weak or fanciful and lacking in substance or if it is contradicted by documentary evidence or any other material on which it is based.

[46] A defence consisting purely of bare denials may have little prospect of success. (see **Broderick v Centaur Tipping Services**[18] as cited in Stuart Simes' "*A Practical Approach To Civil Procedure*", 15th edition at page 272, paragraph 21.21).[19]

[47] While the court is expected to consider the evidence before it to determine whether the applicant has a real prospect of defending the claim, it must be careful not to engage in a mini trial at this stage.

---

[18] (2006) LTL 22/8/06

[48] Additionally, the rule provides that if this court considers to set aside or vary the default judgment, it must examine:

> ***2) The length of the delay between the time the applicant became aware of the judgment and the filing of the application to set it aside;***
>
> ***3) The reason for failing to comply with the rules, which in this case is the failure to file the defence within time.***

[49] The matter must be considered through the lens of the overriding objective and, therefore, this court must also have regard to any prejudice a claimant may suffer if the default judgment is set aside (see paragraph [16] of **Flexnon Limited v Constantine Michell and others** and paragraph [13] of **Brian Wiggan v AJAS Limited**[20]).

[50] All these ingredients are essential, but, the two most important are whether the defence has a real prospect of success (see paragraph [15] of **Flexnon Limited v Constantine Michell and others**) and ensuring that justice is done (see Stuart Sime's A Practical Approach to Civil Procedure, 15th edition at page 159). The court must also consider the matters set out in 13.3 (2) (a) & (b) of the rules. The need for consideration of the matters set out in rule 13.3(2)(a) and (b) only arises, if the court finds that the defendant has a real prospect of successfully defending the claim (see **Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited**[21])

The Draft Defence

[51] The claim is for recovery of possession of the leased premises and for the arrears of rent in the sum of $1,160,000.00 and continuing. Mr. Marriott did not exhibit a

---

[20] [2016] JMCA Civ 32

[21] [2016] JMCA Civ 39.)

draft defence along with his affidavit in support of his application to set aside default judgment filed on August 11, 2022, as is required by rule 13.4.

[52] The draft defence was exhibited to an affidavit of urgency sworn to by his attorney, Ms. Kara Graham and filed on the 30th of August 2022, pursuant to an application for stay of execution by counsel for the applicant appearing in this matter. In my view this court cannot examine it to determine whether the applicant has a real prospect of successfully defending the claim as this is impermissible, she being both affiant and advocate in the same matter.

[53] The draft defence before the court was not filed with the affidavit of merit from the applicant which had been filed on August 11, 2022, in support of the application at bar but 19 days after with the affidavit of counsel. Rule 3.14 prescribes separate requirements. The affidavit of counsel does not provide a defence on the merits as required, and the affidavit of merit does not comply with rule 13.4 in that it "must exhibit a draft of the proposed defence." I find that in the circumstances there is no draft defence before the court.

The Balancing Act

[54] In **Russell Holdings Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited** [22]at paragraph 83, the court of appeal set out the approach to be taken by this court:

> *"A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the factors in rule 13.3(2)(a) and (b) are considered against his favour and if the likely prejudice to the respondent is*

[22] [2016] JMCA Civ 39

so great that, in keeping with the overriding objective, the court forms the view that its discretion should not be exercised in the applicant's favour. If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the end of the matter. If it is considered that there is a good defence on the merits with a real prospect of success, the judge should then consider the other factors such as any explanation for not filing an acknowledgment of service or defence as the case may be, the time it took the defendant to apply to set the judgment aside, any explanation for that delay, any possible prejudice to the claimant and the overriding objective."

[55] The failure to exhibit the draft defence to the affidavit of merit is fatal to the application, however, this is not the fault of the applicant. This court ought not to visit the errors of counsel on their client. The Court of Appeal puts it this way in the case of **Merlene Murray-Brown v Dunstan Harper and another**[23] where Phillips, JA said at paragraph 30:

"The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys errors made inadvertently, which the court must review. In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended."

[56] *Phillips, JA continued at paragraph 26:*

"I do not accept counsel for the applicant's position that the applicant is not required to put her full case before the court at this stage, that the

[23][2010] JMCA App 1

information with regard to the driver can be supplied at discovery, and that she is only required to put forward such information as she believes is necessary to defend herself. In my view, those days of filing statements of case which are obscure and vague are long gone. Under the new regime, a defendant must set out all the facts on which she relies to dispute the claim - (Rule10.5 (1)). The rules also require that where the defendant denies any allegation in the claim or particulars of claim, she must state her reasons for doing so and if she intends to prove a different version of events from that of the claimant then her own version must be set out in the defence. (Rule10.5 (a) & (b)). The rules also state that the defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been, unless the court gives permission. (Rule10.7). Further the applicant was before the court trying to set aside a judgment that had already been entered against her. The burden was on her therefore to convince the judge that she had a real prospect of successfully defending the claim. The question one must ask is how could she expect to do so by withholding information from the court, or failing to endeavour to obtain information which was relevant to her application and to her case."

[57] Having said that, is there material before the court in the affidavits of the applicant which would make out the defence and upon which to exercise discretion to further consider the application aside the default judgment**.**

[58] The application at bar as well as the application for stay of execution were both before Batts, J on September 2, 2022. The complaints being made now were not reflected in the orders of the learned judge who adjourned the hearing of the instant application and made orders for a stay of execution of the writ of possession until December 1, 2022.

[59] Mr. Marriott stated in his affidavits that he entered a lease and sale agreement with Mr Alfred Tenn (the deceased) on or about the 25th of February 2010 for the parcel

of land registered at Volume 1540 Folio 446 for the sum of $60,000.00 monthly for rent subject to a purchase price of Ten Million dollars. Once the agreement was executed he said he cleared the land and made other improvements. The defendant/applicant said he made a total payment of $2,120,000.00 to the deceased for the deposit and the purchase price and one month rent and security deposit respectively. Subsequently, on or about the 25th of March 2010, he paid the sum of 1,500,000.00 and on the 30th of April 2010 the sum of 1,500,000.00 to meet the $5,000,000.00 purchase price outlined in the agreement. He also admitted that all these payments were made to the deceased in cash. He exhibited a document which purports to be the lease and sale agreement and the receipts documenting the payments made to the deceased.

[60] I find it interesting that Mr Marriott said that he entered the lease and sale agreement in 2010 yet up to this point he still has a balance of $5,000,000.00 on the purchase. The last time he made any payments in relation to the purchase of 94B Molynes was in 2010 and since then there has been no indication that any further steps were taken by him to acquire the property. Clause 3 of the lease agreement states that: *"It is agreed between the parties that the purchase price within ten (10) years of this lease should be Ten Million Dollars ($10,000,000.00)."* In his affidavit Mr Marriott interpreted this to mean that the purchase price should be paid in full after ten years commencing in 2010. Therefore, the applicant ought to have paid for the property in full before the first notice to quit was served on him. He has not demonstrated by documentary evidence that he made any other payments after the first three allegedly made in respect of the purchase price. The applicant asserts after receiving the first notice to quit that he estimated that the sum of Forty Million dollars would have to be paid to him for improvements he made to the structure, the claimant ignored him. He also wished to honour the terms of the agreement with Alfred Tenn. Notably, the applicant deponed[24] that he was

[24] Affidavit in response filed November 30, 2022

advised by his attorney that once a notice to quit is served and no payment is made by the lessor to the lessee, that the notice remains valid and there would be no need for a further notice to quit.

[61] The applicant has not demonstrated by affidavit or documentary evidence that he made any other payments after the first three allegedly made in respect of the purchase price. The applicant asserts after receiving the first notice to quit that he estimated that the sum of Forty Million dollars would have to be paid to him for improvements he made to the structure, the claimant ignored him. He also wished to honour the terms of the agreement with Alfred Tenn. Notably, the applicant deponed[25] that he was advised by his attorney that once a notice to quit is served and no payment is made by the lessor to the lessee, that the notice remains valid and there would be no need for a further notice to quit.

[62] In fact, it is the applicant's evidence that when he received the letter from Ramsay Smith setting out the terms of a new lease agreement, he explained to the respondent that he had the balance purchase price of $5,000,000.00 to pay. This underscores that the applicant had taken no steps pursuant to what he asserts to be a purchase of the property since 2010.

[63] The applicant admits to remaining on the property despite the expiry of the lease agreement in 2020. The landlord's right of re-entry was therefore triggered. What is plain is that there have been no payments as rental on the leased premises based on the documentary and written evidence placed before the court by the applicant. The vendor, by law, retains possession of the property until all the purchase money is paid, and would be entitled to all rents and profits until the date of completion. The respondent is entitled to an equitable lien on the property for the unpaid purchase money after the expiry of the lease on February 25, 2020, (as the agreement has been interpreted by the applicant.)

---

[25] Affidavit in response filed November 30, 2022

[64] The agreement exhibited to the affidavit of the applicant is described as "Lease and Sale", the parties are named without any other identifiers such as addresses or occupations. The premises is registered however, the agreement does not depict its volume and folio number. The boundaries of the land have not been described and no survey diagram is before the court. The land is only described as 94B Molynes Road, Kingston 10 in the parish of St. Andrew.

[65] The respondent agreed to continue the tenancy of the applicant by sending a new lease agreement through his attorneys. This is not in dispute.

[66] The applicant also raises an equitable interest in the property as well as improvements he made to the leased premises. The terms of the lease indicated that the lessee is responsible for setting up the infrastructure he will need to operate. The evidence of the respondent is that when the Bailiff went to execute the writ of possession there was far more on the premises than originally anticipated.

[67] Lastly, the applicant raises the question of standing on the part of the respondent to bring this claim as the executor of the estate of Alfred Tenn. It is settled law that an executor is entitled to institute legal proceedings in the capacity of a personal representative of a deceased, not from the grant of probate, but by virtue of the will. An administrator is however so authorised by the grant of letters of administration. (See **Chetty v Chetty**[26] at page 608 and 609 and **Ingall v Moran**[27].)

[68] There are triable issues raised in the affidavit of merit which are not before the court to support the applicant's assertions and do not satisfy the threshold of a realistic prospect of success.

---

[26] [1916] 1 AC 603

[27] [1944] KB 160

[69] Having decided that the threshold test has not been made out there is no need to decide the remaining issues. As a consequence, the court makes the orders set out below:

Orders

[70] It is hereby ordered that:

1. The defendant/applicant's application for court orders filed on August 11, 2022 to set aside the Judgment in Default entered on May 3, 2022 by Palmer-Hamilton, J is refused.

2. Costs of the application to the claimant/ respondent in the claim to be agreed or taxed.