BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 121 of 2019

BETWEEN:

RUTHLYN SMALL **TERRY SMALL**	**CLAIMANTS**
AND	
ROLAND THOMAS	**DEFENDANT**

Before: The Hon. Madam Justice Margaret Reifer, Judge of the High Court

Dates of Hearing: **2020: 3 June**
21 July

Date of Decision: **2020: 21 August**

Appearances:

Mr. Rudolph N. Greenidge for the Applicant/Defendant.

Ms. Shelley A. Gooding for the Respondents/Claimants.

REASONS FOR DECISION

INTRODUCTION

[1] This is an application dated 14 June 2019, in which the Defendant to this action is seeking an order of this Court setting aside a judgment in default for failure to file an acknowledgment of service.

Procedural Background

[2] The Claim Form together with Statement of Claim was filed on 31 January 2019.

[3] Pursuant to the affidavit of service filed by the Claimant on 14 February 2019, personal service was effected on the Defendant on 13 February 2019.

[4] Judgment in default was given against the Defendant on 10 May 2019 after a request therefor was filed by the Claimants on 4 March 2019.

[5] Judgment was entered administratively by the Registrar of the Supreme Court after evidence of service of the Claim Form and Statement of Claim had been received. Judgment was for a dollar amount plus interest commencing on 11 May 2019. The judgment was entered on 3 June 2019.

[6] This followed a failure on the part of the Defendant to file an acknowledgement of service pursuant to **Part 9** of **CPR** and/or a Defence pursuant to **Part 10** of **CPR**. No application was made by the Defendant to extend the time for filing a Defence.

[7] The Notice of Application to set aside the default judgment was filed on 14 June 2019. The Affidavit in Support of even date was sworn by the Defendant's attorney-at-law. A draft Defence was attached.

[8] A counter-notice seeking the dismissal of the Defendant's Notice of Application was filed on 29 November 2019 by the Claimants together with an Affidavit in Support of even date.

[9] Before the hearing of either application, the Claimants filed a judgment summons on 20 June 2019.

[10] Both parties filed written submissions on 2 March 2020 on the order of the Court of 28 January 2020.

[11] The matter was heard remotely by this Court, after being delayed by the Covid-19 outbreak, on 3 June 2020.

[12] Two documents were filed by the Applicant/Defendant without the leave of the Court. The first was a Defence filed 27 January 2020. Counsel purported to do so on the authority of **Beckles J**, but I am satisfied from the record that no such order was made by **Beckles J**; there is no record of such on the file, on the JEMS system or in the clerk's notebook.

[13] The second is the affidavit of the Applicant/Defendant filed on 3 June 2020 exhibiting a certified copy of the Claim Form and Statement of Claim in Suit No. 0209 of 2019.

[14] What remains is for this Court to determine whether to exercise its discretion under **CPR 26.4** to rectify this procedural error.

[15] On 21 July 2020, I informed the parties that the default judgment was set aside with Reasons to follow.

[16] These are those Reasons.

[17] In view of the fact that the Respondents/Claimants' submissions relied heavily on pre-**CPR** authority and the application of the case of **Ramkissoon v Olds Discount Ltd (1961) 4 WIR 73 (Ramkissoon)**, while Counsel for the Applicant/Defendant argued that the **Ramkissoon** standard is no longer applicable, I propose to start by looking briefly at the "old" law and authorities, together with the **CPR** provisions and post **CPR** authorities.

[18] This approach raises the question of whether the pre-**CPR** authorities still hold true, and in the case of **Ramkissoon,** whether it can be distinguished from the circumstances of the case at bar.

[19] The facts of **Ramkissoon** to some extent mirror some of the circumstances of the instant case in that the Affidavit of Merits (affidavit in support) has been sworn to by the Defendant's attorney at law. In **Ramkissoon**, the defendant argued that the affidavit of his solicitor together with the defence signed by counsel was a sufficient disclosure of merit and dispensed with the need for an affidavit from the defendant personally. The Court disagreed with him, the primary rationalization being that the statements in the defence were not on oath "and it is open to the court to suspect that the object of the defendant, in

the absence of an affidavit, is to set up some mere technical case, or to cause delay." (**McShine CJ (ag)**). The solicitor who deposed to the affidavit in **Ramkissoon** did not purport to testify to the facts set out in the defence, nor did he swear of his personal knowledge as to the matters going to constitute the excuse for the failure. On this basis, it did not amount to an affidavit stating facts showing a substantial ground of defence. The Court of Appeal held that since the facts related in the statement of defence had not been sworn to by anyone, they were not in the court's view an affidavit of merits.

The Pre-CPR Law on Setting Aside Default Judgments

[20] Prior to **CPR**, the court had wide powers to set aside default judgments on such terms as it thought just under the **Rules of the Supreme Court 1982, Order 19 Rule 9**. The law on setting aside arose in two circumstances as follows: (i) where the judgment had been irregularly obtained; and (ii) where it had been regularly obtained, and the defendant could show a "triable issue" or an "arguable defence".

[21] The setting aside of an irregularly obtained judgment was usually automatic once the irregularity was shown. Common examples of procedural irregularities were, inter alia, (i) where a judgment in default was entered even though an acknowledgment had been filed or the time period for filing an acknowledgment had not yet expired; (ii) where a default judgment was

entered in default of defence, but a defence had been filed or the time limit for filing a defence had not expired; (iii) where an application for summary judgment was made before the default judgment but had not been disposed of; (vi) the claim was satisfied before judgment was entered; and (v) where final judgment was entered for an unliquidated claim instead of an interlocutory judgment. The summons needed only to specify the irregularity.

[22] Where however the judgment was regularly obtained, the exercise became more complex as the court first had to determine whether the case for the defendant showed an "arguable defence" or a "triable issue". In such circumstances, the Court would exercise a discretion. In this regard there were certain well-known authorities that marked the way. There was **Evans v Bartlam [1937] AC 373 (Evans v Bartlam)** and **Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc. The Saudi Eagle [1986] 2 Lloyd's Rep 221 CA (The Saudi Eagle)**, in particular.

[23] In **Evans v Bartlam, Lord Atkin** is famously reported as stating:

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

[24] Locally, we saw these English authorities applied in cases such as **Bico Ltd v McDonald Farms Ltd BB 1996 CA 38; Hawkins v Arthur et al BB 2003**

HC 19 (unreported) and **W H Bryan & Co Ltd v Mildred Caroline Herbert BB 2002 HC 23**, both of which set aside a default judgment on the basis that there were triable issues between the parties.

[25] Two main issues featured largely in these early cases, and that is, the correct test and the Affidavit of Merits.

The Correct Test

[26] The issue surrounding the correct test or proper standard revolved around whether an applicant seeking to set aside a regularly obtained judgment had to do more than show "an arguable case" or a "triable issue", the test used in the **Rules of the Supreme Court (RSC) Order 14**. In later cases, the test applied was a real likelihood of success or real prospect of success or real prospect of successfully defending the claim: see **The Saudi Eagle**. In **ED and F Man Liquid Products Ltd. v Patel [2003] EWCA CW 472**, often cited and adopted in this jurisdiction, the United Kingdom Court of Appeal confirmed that this test is the same as the test for summary judgment and that it is higher than under **RSC, Order 14**. The only difference is in the burden of proof: see also **Swain v Hillman [2001] 1 ALL ER 91**.

[27] In **Clarke v Hinds et al BB 2004 CA 15 (Clarke v Hinds et al), Williams CJ** in a pre-**CPR** ruling, stated the test to be applied in the following terms:

> "[15] The major legal requirement to set aside a regular judgment will generally be whether the defendant has a good defence

> which has a real prospect of success. The principles applicable have been set out by this Court in **Bank of Nova Scotia v Emile Elias & Co. Ltd (1992) 46 WIR 33**. We therefore bear those principles in mind."

[28] A similar approach was seen in the case of **Smith v Medrington (1997) Supreme Court BVI , No 103 of 1995 (unreported)** where **Moore J** stated, on the authority of **The Saudi Eagle** that it was not sufficient for the defendant to show a merely "arguable defence", he had to convince the court that he had a real prospect of success.

[29] Similar approaches were seen in decisions across the region pre-**CPR**.

[30] Thus, the expression of this test foreshadowed the wording of **CPR** discussed below.

The Affidavit of Merits

[31] The Affidavit of Merits referred to the necessary and credible affidavit evidence establishing the real likelihood of success. It was often explained as the determination of whether the defence or proposed defence has merit to which the court should pay heed, not as a rule of law but as a matter of common sense: see **Sir Roger Ormrod** in **The Saudi Eagle** and **Evans v Bartlam**.

[32] In the Commonwealth Caribbean generally, and in Barbados in particular, it became the norm to use the decision in **Ramkissoon** as an almost inflexible rule. In other words, the sufficiency of the Affidavit of Merits would be called

into question. Stated differently, the absence of an Affidavit of Merits would normally be fatal to an application to set aside a default judgment: see **Clarke v Harper (1979) 35 WIR 416; Rollock v Lewis (1978) 13 Barb. LR 1; Bank of Nova Scotia v Emile Elias Co Ltd (1992) 46 WIR 33 (Bank of Nova Scotia v Elias)**. Also, an analysis of the content of the Affidavit of Merits or Affidavit in Support as to its adequacy or sufficiency, also determined whether the default judgment would be set aside.

Can Ramkissoon be distinguished?

[33] However, there were and can be exceptions to **Ramkissoon**, contemplated by **McShine CJ (ag)** in the said judgment, when he stated:

> "The case of **Farden v Ritcher (1889) 23 QBD 124** is sufficient authority for holding that before a judgment which had been regularly obtained and properly signed could be set aside, an affidavit of merit was required as an almost inflexible rule and, when such an application to set aside the judgment is not thus supported, it ought not to be granted except for some very sufficient reason."

[34] Such a reason was found in **Johnson v Arawak Homes Ltd [1989] 1 LRB 37,** where there was a judgment in the defendant's favour which supported the soundness of his defence. In the case of **The Jamaica Record Ltd v Western Storage Ltd Court of Appeal of Jamaica, Civ App No. 37 of 1989 (unreported)** in a judgment written by **Campbell JA**, **Ramkissoon** was distinguished and the court held that the affidavit of the defendant's in-house

attorney and secretary was a sufficient affidavit of merit as, unlike **Ramkissoon** where the solicitor had no personal knowledge of the facts stated in the defence, the facts constituting the defence were within the personal knowledge of the deponent. **Campbell JA** rationalised his court's position in the following terms:

> Dealing with this second limb, the substratum of Mr. Goffe's submissions is destroyed by the fact that unlike the **Ramkissoon** case where the affidavit was sworn to by a solicitor who had no personal knowledge of the facts stated in the defence and the latter was signed by counsel, in the instant case the facts relative to the delay in filing the defence and the facts constituting the defence were within the personal knowledge of the deponent who was the "in-house" attorney and secretary of the first appellant and he was authorized by all the appellants to swear the affidavit. The said affidavit was then the Affidavit of Merit of the appellant ..."

[35] In **Avadawn Francis v Audley Malcolm et al [2019] JMSC Civ 13** (a post-**CPR** decision), **Rattray J** distinguished **Ramkissoon** on the basis that counsel in that case had outlined the facts which she contended would constitute her client's defence with a realistic prospect of success in her affidavit and she also deposed that knowledge of the facts outlined were within her personal knowledge by virtue of being her client's attorney-at-law. Moreover the defence exhibited was signed by her client. Nonetheless, the court did not exercise its discretion, being of the view that the Defendant failed to apply to the Court as soon as was reasonably practicable (almost 14 years

later) and had not provided any explanation for his failure to file his defence in time. The Court concluded that the prejudice to the Claimant would be too great were the application successful.

The Issue of Delay

[36] Delay was, and still is, an important consideration in the determination of whether to set aside a default judgment. A defendant is expected to act promptly in applying to set aside a default judgment. Such an explanation ought to be provided in the Affidavit of Merits. Thus the court would as a matter of course take into account any explanation as to how it came about that the defendant found himself bound by a judgment regularly obtained to which he could have set up some serious defence in proper time.

[37] But what was important, was that an acceptable explanation of the delay was not a condition precedent to the setting aside of the default judgment. The importance of this consideration was a matter for the determination of the trial judge in the circumstances of each case. It was a discretion exercised by the trial judge. However, inexcusable and inordinate delay would most likely lead to the exercise of the discretion to deny the application.

[38] In **Clarke v Hinds et al** the Court of Appeal made several observations on the consideration of delay at paragraph [18] of the judgment. It adverts in

particular to a consideration of the prejudice to the opposing side as a result of the delay.

[39] In **Colmenares v Fields No. 208 of 1998 (decision delivered on 10 October 2005)**, delay featured prominently in circumstances where the applicant waited 7 years before applying to set aside the default judgment. The application to set aside was denied.

[40] In **Wismar Gibson v The Board of Management of the Lodge School and the Principal of the Lodge School Civil Suit No. 1019 of 2010 (unreported decision delivered on 26 April 2019)**, a **CPR** case, the court considered an application made in 2014 to set aside a default judgment given in 2010. On a consideration of the Overriding Objective, **Beckles J** refused to exercise her discretion to set aside the judgment.

[41] In **Worme v Whitney BB 2014 CA 3, Gibson CJ** held that a period of delay of seven years, was "inexcusable and inordinate" and warranted a dismissal of the application to set aside the default judgment in that case.

The Law under CPR

[42] The parties' submissions, as stated above, raise the question of whether **CPR** has changed the law on setting aside default judgments. This is considered below.

[43] Whether a judgment has been irregularly or regularly obtained, remains the first question to be asked and answered whenever a court confronts an application to set aside a default judgment.

[44] The pre-**CPR** and **CPR** position remain the same, which is that there is no discretion where the judgment is incorrectly obtained and it may be set aside "as of right", whether or not an application has been made to the Court. In short, there is no judicial discretion. Thus **Part 13.2 (1)** provides:

> "13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of
>
> (a) a failure to file an acknowledgement of service - any of the conditions in rule 12.4 was not satisfied; or
>
> (b) judgment for failure to defend - any of the conditions in rule 12.5 was not satisfied.
>
> (2) The court may set aside judgment under this rule on or without an application."

[45] If the default judgment has been regularly obtained, the court has a discretion to set aside or vary the judgment and this is provided for by **CPR 13.3**. In this regard, I am in agreement with the interpretation of this provision by my brother **Alleyne J** in the recent decision of **Bibi Sandiford v Barbados Port Inc No. 285 of 2015 (unreported decision of 8 July 2020) (Bibi Sandiford)** in which he states as follows at paragraph [9] :

> "[9] In **Cadogan v Grantley Adams International Airport Inc. (GAIA Inc.) (High Court Suit No. 2107 of 2008, date of**

> **decision 15 July 2013)**, a case to which Mr. Denny referred me, **Beckles J (Ag)**, as she then was, opined, at paragraph [3], that an applicant must establish the **CPR 13.3 (2)** factors as pre-condition to the grant of an order. I disagree. **CPR 13.3 (1)** stipulates one condition and **13.3 (2)** two mandatory considerations."

[46] In short, it exemplifies the pre-**CPR** position of the primacy of a good defence: see **Evans v Bartlam** and others (supra).

[47] Thus, **Alleyne J** analysed in detail the facts of the case before him to find that the defendant had not demonstrated that it had a defence with a real prospect of success. And most significantly, that having reached that conclusion, it was unnecessary for him or the court generally to consider the factors set out under **CPR 13.3 (2)** or any other factors that may be relevant in the exercise of its discretion.

[48] This is the position taken by **Sykes J** (as he then was) in **Saunders v Green [2007] 2 JJC 2702, JM 2007 SC 20 (Saunders v Green)**. It is noted that Jamaica's 2006 amended **Rule 13.3** is *'in pari materia'* with **Barbados' CPR Rule 13.3**. This is, unlike the wording of the OECS and Belize's CPR which like Jamaica's before amendment, have been interpreted as conjunctive that is to say, each consideration must be satisfied before the court may set aside the default judgment. See **Caribbean Civil Court Practice 2011, Second Edition**, at page 138 and **Kenrick Thomas v RBTT Bank Caribbean Ltd. (St. Vincent and the Grenadians) (Civil Appeal No. 3 of 2005) (decision**

delivered on 13 October 2005) (Kenrick Thomas) and **Belize Telecommunications Ltd. et al v Belize Telecom Ltd. et al BZ 2008 CA 3 (Belize Telecommunications)**.

[49] A real prospect of successfully defending the claim was the test applied by **Kentish J** in **Olympiad Incorporated and Chandler v RBTT Bank (Barbados) Limited High Court Suit No. 1679 of 2011 (unreported decision of 10 April 2014) (Olympiad)**. In **Olympiad**, **Kentish J** heard an application to set aside a default judgment obtained by the claimants in the face of the defendant's failure to file a defence within 28 days of the service of the claim form and statement of claim as required by **CPR 10.3 (1)**. The issues addressed by the judge in the context of the case were: (i) was the default judgment regularly entered or was it entered in breach of **CPR**; (ii) were the claimants entitled to claim default judgment for a sum that included interest; (iii) when can the court vary or set aside a default judgment; (iv) has the defendant shown a real prospect of successfully defending the claim; (v) whether there was any undue delay in bringing the application; and (vi) whether the defendant provided a good explanation of its failure to file a defence.

[50] At paragraph [86] **Kentish J** observed that whether there was a real prospect of successfully defending the claim, was the sole ground to be taken into

account by the Court and two other factors, namely, an explanation for the default and delay (if any) was for the Court to consider.

[51] **CPR 13.3** settled any pre-**CPR** dispute about the correct test to be applied to applications to set aside regularly obtained judgments by providing as follows:

> "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 reasonably practicable after finding that the judgment has been entered; and
>
> (b) given a good explanation for the failure to file an acknowledgement 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."

[52] It is noted that **CPR**, while introducing certainty as to the test to be applied, that is a "real prospect of successfully defending the claim", does not on its face clarify the inflexible **Ramkissoon** approach to the Affidavit of Merits, but a look at a cross-section of decided cases across the region have shown courts routinely applying **Ramkissoon** post-**CPR**: see **Georgette Smith v Jamaica Defence Force Co-operative Credit Union [2018] JMSC Civ 29** and **B&J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2**;

Belize Telecommunications Ltd. v Belize Telecom Ltd. et al BZ 2008 CA 3.

[53] **CPR 13.4** in addressing the applicable procedure in setting aside a regularly obtained default judgment provides:

> "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."

[54] In short, the above provision has been interpreted to refer to an 'old style' Affidavit of Merits: see **Morrison JA** at paragraphs 43, 44 and 47 of **B&J Equipment Rental Limited v Joseph Nanco.**

The Third Consideration

[55] As concluded by **Alleyne J** at paragraph [7] of **Bibi Sandiford**, even where the condition is met, an applicant is not entitled as of right to have a default judgment set aside. "The Court must consider whether it is just to make the order in all the circumstances of the case." See a similar expression of views by **Sykes J** in **Saunders v Green** at paragraph [28].

[56] This is to my mind a reference to the Overriding Objective of the **CPR** as a third consideration in determining whether to set aside or vary a default judgment. Thus, a court in the exercise of its discretion must always pay heed

to the Overriding Objective of dealing with cases justly, and in so doing and as far as practicable consider the equal footing of the parties, saving expense, observing proportionality, ensuring that matters are dealt with expeditiously and fairly and that an appropriate share of the court's resources are allotted to it: **CPR 1.1 (1)** and **(2)**. Some persons have described this as a balancing exercise taking place against the backdrop of the Overriding Objective.

[57] It is however important to be aware of the limitations of the Overriding Objective. In particular it is important to always bear in mind, that where the Rules are abundantly clear on a particular area under consideration, the clear meaning of the Rule is paramount. Stated differently, the Overriding Objective, while it must be borne in mind, will not supercede clear rules: Thus, the court cannot assume a discretion in order to assist a deserving case where there is no jurisdiction to make an order, even by resorting to the Overriding Objective: see **Barrow JA** (as he then was) in **Kenrick Thomas** and **Phillips JA** in **Charmin Blake v Alcoa Minerals of Jamaica Inc., Civil Appeal No. 57 of 2010** at paragraph [19].

[58] This approach and interpretation is reflected in the discussion of the authors of **Commonwealth Caribbean Civil Procedure Third Edition** by **Kodilyne and Kodilyne** in Chapter 7 dealing with Default Judgments, under the rubric "**Real Prospect of Success**", where they observe as follows:

> "In **Thorn plc v MacDonald [1999] CPLR 660, CA**, it was stated that, in deciding whether to set aside a default judgment, the primary considerations for the court were whether there was a defence with a real prospect of success, and that justice should be done."

How does CPR differ from Order 19?

[59] **Kodilyne and Kodilyne** express the opinion that the "real prospect of success test", which is the same as that applicable to summary judgment under **CPR**, prima facie makes the setting aside of a default judgment more difficult for a defendant under **CPR** than under **RSC**, where previously a defendant was mostly required to show "an arguable case", or "some triable issue". But as already observed, before the passing of **CPR** the courts have been applying the "real prospect of success" test as established in the **The Saudi Eagle** case. But nonetheless, it is noted that the test of "real prospect of success" is higher than that of "an arguable defence" or a "triable issue".

[60] **Kodilyne & Kodilyne** also posit that "in view of the need under the **CPR** for the defendant to show not merely an arguable case but a real prospect of success, it seems that the affidavit of merit should be even more essential under the **CPR** regime."

[61] On the issue of delay post-**CPR**, they posit that "Under the **CPR** regime, it is to be expected that the courts will be even less tolerant of delay than they are under RSC, and indeed **Rule 13.3** specifically provides that the court must

consider whether the defendant has applied to the court as soon as reasonably practicable after finding out that judgment has been entered."

CONCLUSION

[62] On a review of the authorities and their interpretation of **CPR 13.3**, I am satisfied that a **CPR 13.4 (2)** Affidavit in Support, does not differ from the pre-**CPR** Affidavit of Merits: see **Morrison JA** in **B & J Equipment Rental Limited v Joseph Nanco**; and in Belize, **Belize Telecommunications (Supra)**; and in Trinidad, **Jamadar JA** in **Ramkissoon v Bhagwansingh TT 2013 CA 53**; **Donaldson Honeywell J** in **Mootilal Ramhit & Sons Contracting Limited v Education Facilities Company and the Attorney General TT 2018 HC 38** and **Mendonca JA** in **Shah v Barrow TT 2008 CA 48**; and in Barbados, **Nigel Worme v Nolan Whitney Magisterial Appeal No. 9 of 2012 (decision delivered on 3 March 2014)**; **David Sealy v Caribbean Consolidations Civil Appeal No. 224 of 2000 (date of decision 30 June 2004)** applied in **Worme v Whitney**.

[63] The issue of whether **CPR 13.3** differs from **Order 19** may very well be a purely academic exercise.

[64] I turn next to the case at hand.

The Applicant/Defendant's Submissions

[65] In his written submissions, counsel argued a triable defence and that it was in the interests of justice that the default judgment be set aside and the matter fully ventilated. While referring to **Rule 13.3** he did not expressly articulate the test therein. He addressed the two considerations of **CPR 13.3 (2)** by submitting that the Applicant/Defendant applied to the court as soon as reasonably practicable after finding out that judgment had been entered and that he had a good explanation for the failure to file an acknowledgment of service or a defence.

[66] The reason advanced for the Applicant/Defendant's failure to file an acknowledgement of service or defence was part and parcel of the factual matrix constituting his client's meritorious defence. It was his explanation that both sides filed suit almost simultaneously: the Claimant in Suit No. 121 of 2019 on 31 January 2019, the defendant as Claimant in Suit No. 209 of 2019 on 14 February 2019 after an exchange of correspondence between the parties.

[67] Thus, the Respondents/Claimants in Suit No. 121 of 2019 were well aware of the second action and the fact that there was a meritorious defence or triable issue when the default judgment was obtained. It had been his intention as expressed at paragraph [10] of the Affidavit filed on 14 June 2019, to consolidate both actions. At paragraph [11] counsel deposed that "The fact

that a Defence to the Claimant's claim should have been filed was inadvertently overlooked and is deeply regretted."

[68] The lack of delay in filing this application is expressed in the Affidavit in Support (Affidavit of Merits). In this affidavit he deposes that he was served with the default judgment on 4 June 2019 and the Notice of Application was filed 10 days later on 14 June 2019. In short, he submitted that he responded without delay.

[69] In his oral submissions in response to the Respondents/Claimants, the main thrust of his argument was to distinguish the **Ramkissoon** authority. He argued that the standard of **Ramkissoon** is no longer applicable. The applicable standard is the Overriding Objective of **CPR**. Counsel argued that he was the Applicant/Defendant's agent and the person better suited than his client to argue a meritorious defence.

[70] In addition, he argued that the Applicant/Defendant had signed the Certificate of Truth in the Defence filed by him on 27 January 2020. He had signed the Affidavit filed on 3 June 2020 which exhibited certified copies of a Claim Form and Statement of Claim in Suit No. 209 of 2019 filed on 14 February 2019 both of which carried a Certificate of Truth signed by the Applicant/Defendant.

The Respondents/Claimants' Submissions

[71] Counsel for the Respondents/Claimants argued that her clients satisfied the conditions for obtaining a default judgment as the Applicant/Defendant failed to file an acknowledgment of service in accordance with the requirements of **CPR 12.4**. **CPR 9.3 (1)** requires a Defendant to file an acknowledgment within 14 days of the service of the Claim Form and statement of claim and he did not. Neither did he do so in the interim before the request for default judgment was filed as provided by **CPR 9.3 (3)**.

[72] Counsel's major argument thereafter was the absence of a **Ramkissoon** style Affidavit of Merits; and that he failed to satisfy the procedure stipulated by **CPR 13.4**. In short, she submitted that the Defendant must himself depose an Affidavit of Merit to show his defence. Counsel relied on the following authorities in support of her argument: **Evans v Bartlam (Supra); The Saudi Eagle (Supra); Bank of Nova Scotia v Elias (Supra)** and **Saunders v Green (Supra)**.

[73] It was her submission that the affidavit filed by the Applicant/Defendant's attorney-at-law does not give rise to a good explanation for the Applicant/Defendant's failure to file an acknowledgment of service.

[74] She also argued that the draft defence filed 14 June 2019 and the defence filed 27 January 2020 failed to provide cogent documentary evidence to convince the court that he had a real prospect of successfully defending the claim.

[75] Counsel relied on the authority of the Overriding Objective and **Saunders v Green** to make the point that the court seeks to ensure that cases are dealt with expeditiously and fairly.

[76] Counsel submitted that the absences of the Applicant/Defendant and his attorney-at-law at the dates of hearing of the Notice of Application, have caused inexcusable delay in the hearing of the application and incurred costs to the Respondents/Claimants who attended each hearing as required. Counsel argued that the absences of the defendant and his attorney at law negate the effect of the Overriding Objective which further seeks to save on time, the court's resources and saving expense. She submitted that the effect of the Overriding Objective may be generously interpreted to encompass **CPR 26.2 (1)**, the court's power to make orders and supports the court's inherent jurisdiction under **section 12** of the **Supreme Court of Judicature, Cap. 117A**, to dismiss the Applicant/Defendant's application.

Issues Arising

[77] The issues arising from this application to set aside are: (i) whether the default judgment herein was regularly obtained in accordance with **CPR 12.4**; (ii) if

yes, whether the Applicant/Defendant has a real prospect of successfully defending the claim pursuant to **CPR 13.3**; (iii) whether in accordance with **CPR 13.3** [1] the Applicant/Defendant has a good explanation for failing to file an acknowledgment of service and [2] whether the Applicant/Defendant applied to the court as soon as reasonably practicable after finding out that judgment had been entered; (iv) whether the Respondents/Claimants have been prejudiced by the actions of the Defendant.

Issue (i)

[78] On a review of the requirements of **CPR 12.4** and **CPR 9.3**, I am satisfied that the subject default judgment was regularly obtained.

[79] It is clear on the record that the Respondents/Claimants proved service of the claim form and statement of claim by the filing of an affidavit of service on 14 February 2019. No acknowledgement of service was filed within 14 days as required by **CPR 9.3 (1)**. No acknowledgement of service was filed before the request for default judgment pursuant to **CPR 9.3 (3)**.

[80] I have dealt above with the filing of the Defence and further affidavit without the leave of the court.

Issue (ii)

[81] This deals with whether the Applicant/Defendant has a real prospect of successfully defending the claim.

[82] The burden of proof rests on the Applicant/Defendant to show that his defence has a real prospect of success: see paragraph [28] of **Belize Telecommunications Limited v Belize Telecom Limited & Ors. Civ App. No 13 of 2007 (date of decision 13 March 2008)** per **Morrison JA**, cited by **Alleyne J** at paragraph [22] of **Bibi Sandiford**.

[83] Such a defence may be one of law, one of fact or one comprising a mixture of facts and law.

[84] This case, in my opinion is distinguishable from **Ramkissoon** on its peculiar facts. While the Affidavit in Support of the Notice of Application is somewhat deficient, there is evidence on file, some of it corroborated by the filed evidence of the Respondents/Claimants, themselves, which demonstrates that the Applicant/Defendant has a defence with a real prospect of success; similar in some respects to the facts of **Johnson v Arawak Homes Ltd.** (above) where there was a judgment in another action which supported the soundness of the defence. In this regard, I have accepted the Applicant/Defendant's affidavit of 3 June 2020 evidencing the pleadings in Suit No. 209 of 2019.

[85] This circumstance weakens the argument of counsel for the Respondents/Claimants of the failure of the Applicant/Defendant to himself depose to the Affidavit of Merits setting out his defence. On the other hand, it gives credence to the argument that counsel for the Applicant/Defendant

had personal knowledge of the facts and circumstances surrounding the defence.

[86] The genesis of this dispute is a fixed price contract for the construction of a home by the Applicant/Defendant for the Respondents/Claimants. It was a contract for a fixed price. After commencement of construction the parties orally agreed and priced extras/additional works. The case for the Applicant/Defendant relates to the fixed price contract and appears to be that the specifications for the floor area of the home were provided by a qualified quantity surveyor appointed by the Respondents/Claimants. The Applicant/Defendant avers that the said quantity surveyor made an error in computing the floor area of the Respondents/Claimants' home. The Applicant/Defendant alleges through his attorney that the said quantity surveyor admitted that he had made an error and advised the Applicant/Defendant to secure an independent contractor of his own. The Applicant/Defendant alleges that this second quantity surveyor confirmed the error, although, as pointed out by the Respondents/Claimants, the report of the second quantity surveyor has not been exhibited. The Applicant/Defendant's pricing was based on a calculated floor area of 2,103 square feet at $227.91 per square foot, when the actual square footage was 2,302 square feet, a difference of 199 square feet. The quoted price on the

incorrect square footage was $479,220 as opposed to $555,831.34 if computed on the correct square footage, plus additions/variations.

[87] In Suit No. 209 of 2019, the Claimant (Defendant in this action) therein, claims the difference in the sum of $39,331.34.

[88] While the Defendants/Claimants defence to Suit No. 209 of 2019 has not been exhibited, the documents filed in support of their claim in No. Suit 121 of 2019 support the fact that this has been the Applicant/Defendant's position from the time of discovery of the error and that the Respondents/Claimants' themselves have advanced to little beyond a formalistic challenge to this claim. They have noticeably not denied that the square footage is 2,302 square feet as opposed to 2,103 square feet.

[89] What is clear is that conflict erupted and the Applicant/Defendant was either ordered off or walked off the job in the latter half of 2018. His letter, as exhibited by the Respondents/Claimants, requested a settled agreement between the parties before continuation of work on the residence. The Respondents/Claimants took the position that the Applicant/Defendant walked off the job and, by later letter, terminated the contract.

[90] The Respondents/Claimants in the matter at bar, have grounded their action in a different aspect of the construction contract between the parties. They claim the sum of $46,471.56 consequent on the Applicant/Defendant's failure

to complete the construction of their residence and for the cost of building materials allegedly removed from their residence by the Applicant/Defendant between September 2017 and August 2018. A reading of the Statement of Claim attached to the Claim Form suggests that the core complaint is largely grounded in the oral agreement for further and/or additional works to the residence to be constructed, materials removed by the Defendant when the contract was terminated on 4 September 2018 and the cost occasioned by completing the work left unfinished by the Applicant/Defendant.

[91] In the documents filed in support of the Respondents/Claimants' action, there is no indication that the Applicant/Defendant's core claim is disputed, just its timing. Thus Exhibit RTS 21 to the Statement of Claim alleges the Applicant/Defendant's deficiencies in documenting this error and an issue with the computation of the monetary shortfall identified by the Applicant/Defendant. The position taken by the Respondents/Claimants as set out therein is:

> "... I wish to remind your client that he and my clients signed a contract prepared by him with his quotation attached to construct a home for my clients at Lot 165 Atlantic Park, Belair, St. Philip, Phase 1 for the sum of $479,281.00. My clients put him to strict proof regarding his assertion that there is a definite shortfall of $76,550.34 in relation to building costs."

[92] It is unclear from the limited filings of the parties whether the Respondents/Claimants in the case at bar will dispute the

Applicant/Defendant's claim as it relates to mis-pricing and what the Applicant/Defendant's position is on the cost of the non-completion of the additional works, (as he had indicated his willingness to complete these works), what is owed (if anything) in that regard, and his response to the allegations that he removed items from the construction site. However, the second action in Suit No. 209 of 2019 raises a defence with a prospect of success to the first action or at the worst the prospect of a counterclaim and set-off.

[93] The very special facts of this case suffice, in my opinion, to bring it within the exceptional category of cases foreshadowed by **McShine CJ (ag.)** in **Ramkissoon** itself.

[94] Common sense and efficiencies of time and resources dictate that these two substantive actions arising out of the same event, should be dealt with together, and that an administrative judgment obtained in one without giving voice to the merits of the claims on both sides would wrought a serious injustice.

[95] There are triable issues with a real prospect of success that should be ventilated by way of a hearing. Rules of Court are meant to be used to foster justice and not to obtain an unfair advantage over an opponent.

Issue (iii)

[96] The Applicant/Defendant's explanation for the failure to file an Acknowledgement of Service and/or Defence is not watertight and his counsel does admit that the failure to file an Acknowledgement of Service in the instant case was due to his inadvertence which "is deeply regretted". What is clear, however, was that there was no indifference to whether or not a judgment was obtained by the Respondents/Claimants; it was not intentional. It is clear that both parties were caught up in seeking redress for their perceived grievances. The Applicant/Defendant ought to have moved with more dispatch to address the action filed against him and/or to consolidate the two actions. There was no hearing of the matter and judgment was given administratively. There is no merit in counsel's complaint that he was not informed of the hearing except that in a different time, as a matter of professional courtesy, parties would inform each other, however briefly before taking this type of action. However, when informed of the judgment he acted with sufficient promptness in filing his Notice of Application.

Issue (iv)

[97] There is no prejudice to the Respondents/Claimants in this matter that cannot, in the opinion of this Court, be addressed by an appropriate costs order, early case management and potentially, an order for the mediation of this matter.

It is a significant circumstance, in my opinion, that the Respondents/Claimants have a default judgment, and the Applicant/Defendant an existing action, in a matter arising out of the same subject matter.

DISPOSAL

[98] In view of the premises, final orders in this application are as follows:

1. The judgement obtained 10 May 2019 is set aside;
2. There shall be a stay of execution of the judgment summons filed 20 June 2019 until the trial and/or final resolution of this matter;
3. The Defence filed 27 January 2020 is saved;
4. The Respondents/Claimants shall have their costs of this application to be agreed, if not assessed. If the parties fail to agree, written submissions on quantum of costs shall be received before the scheduled case management in this matter;
5. This matter is set down for case management on 30 September 2020.

MARGARET REIFER
Judge of the High Court