IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Claim No. CV 838 of 2010

BETWEEN:

CARIBBEAN PROPERTY CONTROL SYSTEMS LTD. CLAIMANT

AND

FURZECOM INC. DEFENDANT

Before The Honourable Justice Cecil N. McCarthy, Judge of the High Court

Date of Decision: 2021 March 25

Appearances:

Mrs. Sherry-ann N. Batson of Batson & Co. for the Claimant
Mr. Calvin G. Hope for the Defendant

DECISION

INTRODUCTION

[1] This is an application filed by the defendant on the 22nd day of September 2016 for an order setting aside a default judgment obtained by the claimant on the 10th day of December 2012, and entered on the 15th day of May 2013 in the sum of $13,712.48 plus interest and costs ("the default judgment").

[2] In the application, which first came before me on 25th March 2019, the defendant also requests the Court to grant leave to the defendant to file a defence to the claimant's claim form and statement of claim.

[3] The grounds stated in the application are (1) that the defendant has a good defence to the claim; (2) the defendant has made the application to the Court as soon as reasonably practicable after finding out that the default judgment was entered; and (3) the affidavit in support of the application sets out a good explanation for failing to acknowledge service of the claim and/or failing to file a defence to the same.

The Factual Background and Chronology

[4] The brief facts and chronology of the claim are not in dispute. On 1st July 2010, the claimant filed a claim form and a statement of claim. In the said pleadings the claimant was described as "Caribbean Property Control

Services Ltd." which name was later amended with the permission of the Court to "Caribbean Property Control Systems Ltd."

[5] By the claim form, the claimant claimed the sum of $12,730.49 inclusive of costs representing monies owed to the claimant under a contract between the claimant and the defendant. In the statement of the claim the claimant sets out the full particulars of the claim. The main particulars of the claim are set out at paragraphs 3, 4 and 5 of the statement of claim, which provide:

> *"3. Pursuant to an agreement made on or about May 2008 as evidenced by invoices, consideration and acts of performance by both parties, the Claimant agreed to supply and install and the Defendant agreed to take goods and services from the Claimant in accordance with the terms of the agreement.*
>
> *4. In accordance with the terms of the aforementioned agreement the Claimant provided to the Defendant the supply and installation of audiovisual equipment. These services and goods were provided from May 15, 2008 to June 25, 2008 to the value of $11,732.99 which remains outstanding.*
>
> *5. The Defendant is indebted to the Claimant in the sum of $11,732.99 and court costs."*

[6] By affidavit of service filed 26 November 2012, it was alleged that the claim form and the statement of claim were both served on the defendant on 13th July 2010.

[7] The defendant did not file an acknowledgment of service nor a defence.

[8] On the 26th November 2012, the claimant filed a request for entry of a default judgment in default of acknowledgment of service.

[9] On 10th December 2012, a default judgment was granted by the Deputy Registrar in the sum of $13,712.48 inclusive of interest and costs of $1,468.25 together with interest on the sum of $11,732.99 at the rate of 6% per annum, commencing 11th December 2012 until the judgment debt and interest have been fully satisfied.

[10] On the 15th May 2013, the claimant filed an application for a judgment summons which was served on the defendant on 11th November 2015.

[11] The judgment summons was set down for hearing on January 10, 2016 and adjourned to 10th February 2016, and then 21st April 2016, when counsel for the defendant informed the Court that they would be applying to the Court to have the default judgment set aside.

[12] By an ex parte application filed 23rd July 2013, the claimant applied for and was granted permission by the Court to amend its name to replace the word 'Services' with the word 'Systems'. The order which was made retrospective to 1st July 2010 was filed 30th January 2014.

[13] On the 22nd September 2016, the claimant filed an application for an order setting aside the default judgment.

[14] On 22nd September 2016, the defendant also filed an affidavit in support of the application to set aside the judgment, in which the defendant alleged, among other things, that the defendant was not served with the claim.

[15] On 15th April 2019, the claimant filed an affidavit in response to the defendant's application, and on 22nd May 2019 the claimant filed written submissions.

[16] On 24th May 2019, counsel for the defendant filed written submissions.

[17] On 17th February 2020, oral evidence was heard with respect to the service of the claim form and statement of claim.

[18] On 18th March 2020, counsel for the defendant filed further written submissions.

[19] On 8th May 2020, counsel for the claimant filed submissions with respect to the oral hearing on the service of the claim form.

The Applicant's Evidence

[20] The application to set aside the judgment was supported initially with an affidavit, also filed on 22nd September 2016 by Lee Robert Johnson (Mr. Johnson), a director of the defendant.

[21] In the affidavit Mr. Johnson alleged that he had "no record or recollection of being served with the Claim as alleged."

[22] He further alleged that when he was served with the judgment summons his attorneys-at-law at the time provided him with copies of the claim and the invoices referenced in the claim and he was then in a position to determine that the defendant had a good defence to the claim.

[23] Mr. Johnson cites the late receipt of the claim as evidence that the application to set aside the judgment was made as soon as reasonably practicable after being aware of the claim and supporting documentation.

[24] Additionally, Mr. Johnson at paragraph 16 of the affidavit, denied that the defendant was in breach of the agreement, and set out the details of the defence.

[25] He stated as follows:

> "*a. The said agreement was made in or around March/April, 2008 with an agreed completion date for the said installation by May, 2008.*
>
> *b. The Claimant failed to provide the Audiovisual equipment as agreed;*
>
> *c. The Claimant failed to install the Audiovisual equipment by the agreed completion date. In particular the Claimant was at all material times aware that the Defendant required the said equipment to be installed for a function to be held at the Defendant's property in May, 2008. The Claimant attended the Defendant's property the night before the said function and was unable to complete the installation as agreed;*

d. *Further in any event, the Audiovisual equipment which was provided by the [Claimant] did not work correctly. By way of example, a television installed by the Claimant stopped working approximately 5 months after being installed;*

e. *Audiovisual equipment was installed which was not needed and not agreed upon between the parties;*

f. *I do verily believe that the claimant failed to provide invoices, manuals or warranty documentation despite repeated requests by the Defendant for the same;*

g. *I do verily believe that certain of the Audiovisual equipment provided was second-hand;*

h. *By reason of the foregoing the Defendant was compelled to incur further expense in attempts to fix and/or complete the defective installation of the audiovisual equipment. Notwithstanding the said attempts the audiovisual equipment could not be put into a functioning state;*

i. *The Claimant did not install any "Security and Control Equipment" as alleged by virtue of Invoice 1375 referenced in the Claim*

j. *In the circumstances I state that the Defendant denies that it has refused and/or neglected to pay the Claimant and that no sums remain due and owing as alleged. I further state that the Defendant made attempts to return the Audiovisual equipment which was not functioning to the Claimant for a refund which the Claimant refused.*

k. Further and in the alternative, I state that the sum of $14,004.24 which was paid to the Claimant represents more than adequate compensation for the works which the Claimant carried out."

[26] On behalf of the defendant, Mr. Johnson filed another affidavit on 7th October 2019, in which he alleged that the agreement referred to in the claim was an agreement between the claimant and himself, Mr. Johnson, in his personal capacity, and not one between the claimant and the defendant company.

[27] The claimant swore an affidavit which was filed on 15th April 2019, which responded to the defendant's affidavit of 22nd September 2016. The affidavit was sworn by Richard Perkins, one of its directors.

[28] The claimant deposed that the defendant was fully aware of the claim which was served on him on 13th July 2010 and evidenced by an affidavit of service filed with the Court on 26th November 2012.

[29] In the claimant's affidavit, a letter dated 22nd September 2010 was exhibited from the then attorney-at-law of the defendant company, Mr. Jomo Hope, in which he stated in the second paragraph:

"*My client has recently handed to me a Claim Form pertaining to the subject suit in which your client, Caribbean Property Control Services Ltd is claiming the sum of $11,732.99 together with costs with respect to the non-payment by my client of certain audiovisual equipment supplied and installed.*"

[30] The claimant is therefore contending that the defendant was fully aware of the claim, which is valid.

[31] The claimant further contends that if the defendant was only made aware of the claim at the time alleged by Mr. Johnson, the six months that would have elapsed since that time would have been too long a delay before he made an application to set aside the judgment.

The Oral Evidence

[32] Having discerned that there was a conflict of evidence with respect to the service of the claim form, I ordered an oral hearing with respect to the issue of service of the claim form, which was held on 17th February 2020.

[33] At that hearing Mr. Robert Charles, process server and Mr. Johnson gave sworn testimony. Mr. Charles identified Mr. Johnson as the person on whom he served the claim form on 13th July 2010.

[34] Mr. Johnson also gave oral testimony.

[35] Having reviewed the testimony of the witnesses I have concluded that Mr. Charles was a truthful witness, and Mr. Johnson was not.

[36] The evidence was clear that Mr. Johnson was aware of the claim form. The extract from Mr. Jomo Hope's letter mentioned above, would only have been written on his instructions and on the basis that Mr. Johnson provided him with the claim form.

[37] In the said letter, Mr. Hope said that Mr. Johnson was refusing to pay the claimant because he wanted a clear itemized invoice so that he could make a claim for VAT. However in his testimony Mr. Johnson admitted that he was not a VAT registrant but the defendant was.

[38] I have therefore determined that as early as 13th July 2010, not only was the defendant aware of the claim form but it had accepted that the debt claimed was valid.

[39] Moreover, based on the evidence presented to the court, I am of the view that the agreement on which the claim was based, was in fact made between the claimant and the defendant company and not between the claimant and Mr. Johnson, personally.

The Defendant's Written Submissions

[40] Two sets of written submissions were filed by the defendant in this matter. On 24th May 2019, Mr. Alvin D Bryan, attorney-at-law prepared and filed written submissions with respect to the setting aside of the judgment ("the Bryan Submissions").

[41] In the Bryan Submissions the Court was referred to CPR 13.3 which provides that the court may set aside or vary a judgment entered under CPR Part 12 if the defendant has a real prospect of defending the claim.

[42] Mr. Bryan referred the Court to the unreported case of **Smith v Medrington (1997) Supreme Court, BritishVirgin Islands, No. 103 of 1995** in which Moore J made the following statement:

> "*This is a case of a regular judgment signed in default from which the plaintiff's rights of property have been established subject to the discretionary power of the court to set that judgment aside. The court is invested with that discretionary power to order to avoid injustice to either the plaintiffs or the defendant. In considering the exercise of its discretion, the court must determine whether the defendant has merit to which the court should pay heed, not as a rule of law but as a matter of common sense. The court will also take into consideration, though not making it a condition precedent, 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. The court must also bear in mind that an applicant seeking to have a regular judgment set aside must so more than show that he has 'an arguable case' as the expression is used in relation to RSC Ord 14, as indicating the standard to be met by the defendant seeking to leave to defend. The applicant seeking to set aside a judgment regularly obtained must, by potentially credible affidavit evidence, demonstrate a real likelihood that he will succeed.*"

Mr. Bryan submitted that the court must form a provisional view of the probable outcome of the action, which in this case favoured the defendant.

[43] Mr. Bryan also submitted that the affidavit filed by the defendant in support of the application to set aside the default judgment was made as soon as reasonably practicable. He also contended that the affidavit "clearly sets out reasons for his failure to file the acknowledgment of service and/or defence."

[44] Significantly, at no time did Mr. Bryan challenge the regularity of the default judgment.

[45] Within a few days of the filing of "the Bryan Submissions" the defendant changed its legal counsel to Mr. Calvin Hope, who submitted that the defendant was never served with the claim form or other documents required by the CPR.

[46] The Court having decided to hear oral testimony on the issue of service of the claim form and statement of claim, permitted the parties to file further written submissions. On 18th March 2020, Mr. Hope filed written submissions.

[47] Mr. Hope invoked CPR 13 2(1) which provides that the court must set aside a judgment entered under Part 12 if judgment was wrongly entered because, among other things, there was no proof of service of the claim.

[48] Mr. Hope referred the Court to the Jamaican case of **Graham et al v Dillon et al, Suit 27 of 2002, date of decision 12th January 2004, (unreported)** in

which a similar issue of service of a claim arose and the High Court set aside the default judgment entered by the Registrar because the process server on cross-examination was deemed not to be credible. The Court held that the Registrar was misled into believing that Rule 12.4 of the Jamaican Civil Procedure Rules, was satisfied but there was no service on the second defendant. The judgment was therefore, wrongly entered and the judge ordered that it should be set aside.

[49] Mr. Hope argued that since Mr. Johnson continues to maintain that he was never served with a claim form and other particulars as deposed by the process server, the default judgment should be set aside.

[50] Having acknowledged that the process server also maintained that he effected service on the defendant by giving the documents to Mr. Johnson, this is how Mr. Hope's proposes that the Court resolve the issue of service. He states at paragraph 25 of his written submissions:

> "25. *The court therefore is now tasked with determining whose evidence it prefers on this issue and whether or not service was properly effected on a balance of probabilities. It is submitted that the evidence of the Defendant through Mr. Johnson ought to be accepted especially in light of the fact that since the date of his knowledge of the matter, he has acted to address the issues. His conduct is such that he would be more likely to immediately respond to the*

service of a writ knowing that the named Defendant in the matter did not engage in any contract with the Claimant."

[51] Mr. Hope submitted therefore that the default judgment should be set aside for failure of service of the claim form on the defendant.

[52] Mr. Hope submitted that the defendant has a real prospect of successfully defending the claim. In this regard Mr. Hope drew the court's attention to a number of cases, including **Rayner v Republic of Brazil 1999 2 Lloyd's Report 250**, to support his contention that if there is a defence on the merits which carries some degree of conviction, the court should set aside the default judgment.

[53] Counsel specifically requested the Court to consider that **Rayner** specifically dealt with the issue of time, and it referred to the case of **Oilike v Reid** in which the Court of Appeal set aside a judgment despite a delay of 5 years.

[54] Mr. Hope emphasized his client's contention that the proper defendant is not before the Court because the contract was entered into with him and not the company.

[55] Mr. Hope also submitted that the defendant company was unaware of the action until January 2016 when its attorneys-at-law who had been consulted when it received a judgment summons on 11th November 2015, got the

copies of the documents from the court file. In the circumstances, it is argued that the defendant applied to the Court as soon as reasonably practical.

The Claimant's Written Submissions

[56] Counsel for the claimant, Mrs. Sherry-ann Batson filed written submissions on the 22nd May 2019, and the 6th day of May 2020, respectively.

[57] Mrs. Batson contended that the defendant's affidavit in support of the application to set aside the default judgment must disclose a defence that is more than an arguable defence but one that shows a real prospect of success to the action on the merits.

[58] Mrs. Batson drew the Court's attention to a statement from Atkins Encyclopedia of Court Forms In Civil Proceedings, Second Edition Volume 14, 2003 Issue page 212, paragraph 290 which states:

> *"that the application [to set aside] is used not to decide between two differing versions of events contended for by the party seeking to set aside the judgment is credible. The court will take into account any extraneous evidence which renders the defendant's account improbable Espirit Telecoms UK Ltd v Fashion Gossip Ltd (2000) LTL 27, CA)"*

[59] Mrs. Batson submitted that the evidence given by Mr. Johnson on behalf of the defendant is not credible. Counsel contends that Mr. Johnson's inability to recall how Mr. Jomo Hope received instructions to write to the claimant's

counsel about information contained in the claim form that he alleged was not served on him, was not believable.

[60] Mrs. Batson argued that the evidence of Mr. Robert Charles, process server, that he had served the claim form on Mr. Johnson was credible.

[61] Counsel also submitted that the claimant's inability to enforce a regularly obtained judgment has caused extreme prejudice to the claimant.

[62] Counsel also expressed the view that there was unjustifiable and inexcusable delay in making the application to set aside the default judgment. She submits that in all the circumstances of the case, the defendant has not shown a defence that justifies the Court setting aside the default judgment.

THE ISSUES

[63] Based on the application to set aside the default judgment; the written and oral evidence before the Court; and the written submissions of the parties, two issues must be considered by the Court. These are:-

(1) Was the default judgment regularly entered?

(2) If the judgment was regular, has the defendant satisfied the requirements for the Court to set aside the judgment entered in default of acknowledgment of service?

ISSUE I – Was the default judgment regularly obtained?

[64] Part 12 of the CPR permits the Registrar to enter a default judgment against a defendant either for its failure to acknowledge service of a claim or its failure to file a defence within time specified by the CPR.

[65] Under CPR 13 the Court must set aside the default judgment if the claimant has failed to fulfil all the conditions set out in CPR 12. 4, which reads as follows:

"The Registrar may, at the request of the claimant enter judgment for failure to file an acknowledgment of service where:

(a) the claimant proves service of the claim form and statement of claim;

(b) the period for filing an acknowledgment of service has expired;

(c) the defendant

(i) has not filed an acknowledgment of service;

(ii) has not filed a defence to the claim or any part of it;

(iii) where the only claim, apart from costs and interests, is for a specified sum of money, has not 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; and

(iv) has not satisfied the claim on the permission of the court to enter judgment."

[66] In the instant case the defendant alleges that it has not been served with the claim form and statement of claim. If this allegation is true then pursuant to

an application made under CPR 13.2 the court must set aside the default judgment, which would have been wrongly entered.

[67] **CPR 13.2(1)** provides:

"The court must set aside a judgment entered under part 12 if the judgment was wrongly entered because in the case of

(a) a failure to file an acknowledgment of service – any of the conditions in rule 12.4 was not satisfied."

Moreover, CPR 13.2(2) states:

"The court may set aside judgment under this rule on or without an application."

[68] In the case at bar, although the defendant asserts that there was no service of the claim form and statement of claim, in its application to set aside the default judgment it does not rely on the failure to serve the claim form and statement of claim as one of the grounds of the application.

[69] This is very surprising because if the defendant can prove, on a balance of probabilities, that it was not served, then the Court must set aside the default judgement.

[70] Having heard oral evidence with respect to the service of the claim and statement of claim, I have been persuaded that Mr. Johnson, a director of the defendant company was served with the claim form and statement of claim and therefore the Registrar could rely on the affidavit of service sworn by

the claimant's process server to the effect that the defendant company was served with the claim form and statement of claim.

[71] I have therefore, determined that there is no basis to set aside the default judgment under section **13.2** of the **CPR**.

ISSUE II – Has the defendant satisfied the requirements for the Court to set aside the default judgment?

[72] **CPR 13.3(1)** and **(2)** make provision for setting aside a default judgment. They provide:

> "*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 out that judgment had been entered; and*
>
> *(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."*

[73] Based on the above rules it is evident that the sole ground for setting aside a default judgement is if the court finds that the defendant has a real prospect of successfully defending the claim.

[74] However, in considering how to exercise its discretion, the court must consider whether the defendant has:

(a) applied to the court as soon as reasonably practical after finding out that judgment had been entered; and

(b) given a good explanation for failure to file an acknowledgment of service or defence as the case may be.

What is A "Real Prospect of Success"?

[75] The extensive case law on the subject has defined a "real prospect of success" as used in **CPR 13**, to mean one that has a realistic as opposed to a fanciful chance of success, one that is better than merely arguable, and one that carries some degree of conviction. Some of the cases in which this term has been discussed are:

: **Swain v Hillman [2001] ALL ER, 91**;

: **International Finance v Utexafrica Sprl [2001] ALL ER 101**;

: **Three Rivers District Council v Bank of England (No.3) [2003 AC 1**;

: **ED&F Man Liquid Products Ltd v Patel and ANN [2003] ALL ER 75**;

: **Olympia Incorporated and Chandler v RBTT Bank Barbados Limited (Suit: 1679 of 2011, date of decision March 28, 2014)**;

: **Clarke v Hinds et al (Civ. Appeal No. 20 of 2003, date of decision June 2004)**.

[76] It is also important to note that the cases have defined real prospect of successfully defending the claim in the context of a CPR 13 application to set aside, in a similar manner as in an application for summary judgment.

[77] Of course, there is the difference that in the Part 13 application it is for the defendant to show that his defence has a real prospect of success while in a summary judgment application it is for the claimant to show that the defence has no real prospect of success.

[78] In carrying out the exercise of determining whether to set aside the judgment, I am not permitted to carry out a mini-trial.

[79] In considering the meaning of real prospect of success, in the context of the instant case, I have found the following extract from the decision of **Sykes J** (as he then was) in the Jamaican case of **Sasha-Gaye Saunders v Michael Green et al (Claim No. 2005 HCV 2868, date of decision February 27, 2007, unreported)** at paragraph 22 and 23, to be insightful.

Sykes J said:

> *"22. In the new rule 13.3 the sole question is whether there is a real prospect of successfully defending the claim. This test of real prospect of successfully adefending the claim is certainly higher than the test of an arguable defence (see **ED&F Man Liquid Products v Patel & ANR** [2003] C.P. Rep 51). Real prospect does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the court, where available, to look at*

contemporaneous documents and other material to see if the prospect is real. The court pointed out that while a mini-trial was not to be conducted that did not mean that a defendant was free to make any assertion and the judge must accept it. This, in my view, is good sense and good logic. Lord Justice Potter said at paragraph 10:

> *"However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable…"*

23. *This passage should be noted with great care. It is clearly suggesting that the judge must conduct some evaluation of the proposed defence and decide whether it has a real prospect of success. If the defence has substantial contradictions then that may be an indication that the prospect of success is not real. In another case, documentary evidence may make it very difficult for the defence to succeed. So too may expert evidence. Thus in spite of the greater relaxation of the rules it would be grave mistake to think that a defendant, without much thought, can asimply cobble a defence and all will be well."*

[80] Part 13.3 of the Jamaica Civil Procedure Rules are identical to the Barbados CPR 13.3 reproduced at paragraph 72 hereof. I agree entirely with the sentiments of Sykes J., which I found to be particularly appropriate to facts of the instant case.

[81] When the application to set aside the default judgment was filed on 22nd September 2016, the defendant company was represented by Clarke, Gittens and Farmer, attorneys-at-law and Mr. Johnson swore an affidavit in which he began by saying:

> *"I am a Director of the Defendant and I am duly authorised to make this affidavit on its behalf."*

[82] Although Mr. Johnson did aver in the affidavit that prior to being served with a judgment summons (on 11th November, 2015) he had "no record or recollection of being served with the Claim as alleged", at no time in the said affidavit did he allege that the contract on which the claim was based, was made between the claimant and himself in his personal capacity, rather than between the claimant and the defendant company.

[83] Indeed, Mr. Johnson admitted the very opposite, when in the third paragraph of the defendant's draft defence it is pleaded as follows:

> *"Paragraph 3 of the Statement of Claim is admitted insofar as there was an agreement between the parties for the installation by the Claimant at the*

Defendant's property of certain audiovisual equipment ('the Audiovisual equipment').

[84] Mr. Johnson at paragraph 16 of his affidavit, reproduced at paragraph 25 of this judgment, details what he refers to in paragraph 4 of the draft defence as the 'Particulars of Breach' of the agreement.

[85] In summary, Mr. Johnson alleges in his affidavit and draft defence, that the claimant was paid the sum of $14,004.24 which is adequate compensation for the works that it actually did. And in that work he committed several breaches of the agreement between the parties which caused the defendant to incur expense in attempts to fix and/or complete the defective audiovisual equipment.

[86] In a further affidavit sworn by Mr. Johnson and filed on 7th October 2019, Mr. Johnson makes two further allegations. First, he alleged that the agreement referred to in the claimant's statement of claim was made between the claimant and him personally and not the claimant and defendant company. He also submitted for the first time that an amendment to the claimant's name required that an amended claim be filed and served in accordance with CPR 19.3, which deals with the procedure for adding and substituting parties.

[87] On the 14th January 2014, in response to an ex parte application of the claimant, Cornelius J made an order, (filed on 30th January 2014), which granted the claimant leave to delete 'Services' from the name of the claimant company and substitute 'Systems'. The order provided that it should have retrospective effect from 1st July 2010.

[88] As a result of the order, the claimant's name was changed to "Caribbean Property Control Systems Ltd." instead of "Caribbean Property Control Services Ltd."

[89] Mr. Johnson's statement that the agreement was made between the claimant and him in his personal capacity, conflicts with his earlier affidavit evidence in the case. It also conflicts with a letter from Mr. Jomo Hope dated 22nd September 2010 in which Mr. Hope says that he is acting for Furzecom Inc, and acknowledges receipt of the claim and intimates that they will settle the bill provided the claimant supplied the relevant instruction manuals on the equipment supplied, an itemized bill to permit them to reclaim VAT, and the warranties on the said equipment.

[90] The conflict in Mr. Johnson's sworn evidence before the court has shattered his credibility as a witness.

[91] In conducting my evaluation of the defence and the evidence before the court, and not attempting to carry out a mini-trial, the factual assertions

made by Mr. Johnson are contradicted by his own sworn evidence and the documentary evidence before the court.

[92] In these circumstances it is my considered opinion that the instant case is one which Potter LJ regarded in **ED&F Man Liquid Products** as "susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable."

[93] As a result of the unsatisfactory quality of the evidence before the court I have therefore concluded that there is no real prospect of the defendant successfully defending the claim.

[94] Furthermore, the draft defence that the defendant wishes to place before the court must be annexed to the affidavit or filed with the affidavit of merit.

[95] In the instant case the only draft defence which was submitted was filed in 2016 and contradicts the assertions made in the defendant's 2019 affidavit.

[96] Similarly, the attack on the name of the claimant comes after the defendant has filed documents in the new and correct name of the claimant since 2016 without objection.

[97] The overriding objective of the CPR cannot be advanced by permitting a party to make a technical objection to the name of another party where the evidence is demonstrably clear that the initial name used by the claimant was a genuine mistake, which in no way misled the defendant.

[98] Having regard to the foregoing, I do not think that it is necessary to consider CPR 13.2 which requires the court to consider whether the defendant has:-

> *"(a) applied to the court as soon as reasonably practicable after finding out that judgment had been entered; and*
>
> *(b) given a good explanation for the failure to file an acknowledgment of service or a defence as the case may be."*

[99] However, I will still make a brief comment on the two factors above, that must be considered on an application to set aside a default judgement.

[100] First, there is no evidence in the affidavits before the court by either party as to when the defendant found out that the default judgment was entered. I have therefore decided that the defendant has applied as soon as reasonably practicable.

[101] However, in respect of CPR 13(2)(b) I regard the reason given for the defendant's failure to file an acknowledgment of service as false since I have concluded that the defendant was served with the claim form and statement of claim in 2010.

[102] Having reviewed the evidence before the Court I have considered that the defendant was untruthful with respect to its allegation that the defendant was not served with the claim form. The failure to file a defence is consistent with the letter written by its then counsel, Mr. Jomo Hope, to the effect that

he was aware of the claim and was prepared to make payment, provided the requested information was supplied.

[103] In these circumstances it would be inconsistent with the overriding objective of the CPR to hear cases justly and expeditiously, to permit the defendant to further frustrate the claimant in its pursuit of the fruits of its judgment.

DISPOSAL

[104] I therefore make the following orders:

(1) the defendant's application to set aside the default judgment is refused;

(2) costs are awarded to the claimant to be assessed, if not agreed.

Cecil N. McCarthy
Judge of the High Court