[2016] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 98/2014

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE WILLIAMS JA (AG)

BETWEEN FRANK I LEE DISTRIBUTORS LTD APPELLANT

AND MULLINGS & COMPANY (A Firm) RESPONDENT

AND

SUPREME COURT CIVIL APPEAL NO 99/2014

BETWEEN MULLINGS & COMPANY (A Firm) APPELLANT

AND FRANK I LEE DISTRIBUTORS LTD RESPONDENT

Written submissions filed by Hugh Wildman instructed by Hugh Wildman and Company for Frank I Lee Distributors Limited

Written submissions filed by Ballantyne, Beswick and Company for Mullings and Company (A firm)

12 February 2016

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MORRISON P (AG)

[1] I have read in draft the judgment of my sister P Williams JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

[2] I too have read in draft the judgment of my learned sister P Williams JA (Ag) and I do agree with her reasoning and conclusion.

P WILLIAMS JA (AG)

[3] On 4 December 2014 an application to set aside a default judgment entered on 5 July 2013 was set for hearing before Sykes J. The default judgment had been obtained by Mullings and Company (A firm) (Mullings) against Frank I Lee Distributors Ltd (Frank I Lee) who had failed to enter an acknowledgment of service in the matter commenced against them on 27 March 2013. Mullings, a firm of attorneys-at-law, had successfully represented Frank I Lee in a matter before the Supreme Court and had sued their former clients for fees deemed to be outstanding.

[4] Frank I Lee had contended in its application to have the default judgment set aside that it had never been properly served, hence, its failure to file an acknowledgment of service. At the hearing of the application, Mullings raised a preliminary objection. It was argued that the application should not be heard since there had been no acknowledgment of service filed and therefore the application to set aside was a nullity.

[5] Upon hearing submissions Sykes J made the following orders:-

> "It is hereby ordered that:
>
> 1. This Court determines that an Acknowledgment of Service is a mandatory requirement in Civil Proceedings pursuant to rule 9.2(1) of the Civil Procedure Rules;
>
> 2. Leave to appeal is granted to the Applicant in relation to this court finding on the mandatory nature of filing an Acknowledgment of Service;
>
> 3. Leave to appeal is granted to the Respondent in relation to this Court's finding that the present application is not a nullity and should not be struck out pursuant to the Court's finding at paragraph 1 above;
>
> 4. Costs to date to the Respondent;
>
> 5. Leave to appeal the costs award is granted to the Applicant;
>
> 6. This matter is adjourned pending the determination of the appeals for which leave has been granted."

[6] Hence, there are now two appeals for consideration by this court arising from Sykes J's order since both parties are aggrieved at his ruling. On 12 December 2014 a notice of procedural appeal was filed by Hugh Wildman and Company naming Sonia-Lee Franklyn as appellant and Gillian Mullings as the respondent. Sonia-Lee Franklyn is the managing director of Frank I Lee and Gillian Mullings is a partner in Mullings. They were not named as parties in the original appeal. Following notification from this court through the registrar as to the anomaly on the records concerning the names appearing as parties to the appeal, an application was made by Hugh Wildman and Company on

22 December 2015 for an amendment to the notice of procedural appeal to reflect the name Frank I Lee Distributors Limited as the appellant and Mullings and Company (A Firm), the respondent. No objection to the application was filed by the attorneys-at-law for Mullings and the order was granted amending the notice of procedural appeal in terms of the application.

[7] It needs to be noted that it was upon being granted an extension of time within which to file their skeleton submissions on behalf of Frank I Lee as appellant, that on 13 August 2015, Hugh Wildman and Company filed the requisite submission. The respondents in this appeal had therefore filed no submissions in this matter and hence it was not until the matter was prepared for the hearing that it was recognized that there was the need for separate submissions in the two matters. Thus, on 21 September 2015, Mullings made the following application -

> "1. That the time for service of this application be abridged to date of actual service.
>
> 2. That the Respondent's submissions filed on 16 September 2015 be permitted to stand as filed."

[8] One of the grounds argued in seeking the orders was:-

> "In the circumstances, this court is invited to regularize the submissions so that the positions of the Appellant and Respondent in both appeals can be considered and evaluated before a decision is reached in the matter."

[9] In my view no prejudice will be caused to the appellant Frank I Lee in granting the application to regularize the matter with the recognition that there are two distinct

appeals and they ought not to be considered on the basis of the same submissions. Hence, I would grant the orders in terms of Mullings' application in the matter of appeal No 98/2014. It is however to be noted that the submissions made on behalf of Frank I Lee as respondent in appeal no 99/2014 are substantially the same as those made on their behalf as the appellant in appeal No 98/2014. The submissions made by Mullings as appellants in appeal no 99/2014 were relied on and added to in their submissions as respondents in appeal no 98/2014.

Appeal No 98/2014

[10] The order that was made by Sykes J, as it appears in the signed formal order, against which Frank I Lee now complains, is as follows:-

> "This court determines that an Acknowledgment of Service is a mandatory requirement in Civil Proceedings pursuant to rule 9.2(1) of the Civil Procedure Rules."

[11] In their notice of procedural appeal Hugh Wildman and Company set out the following:-

> "1. The details of the order appealed are:-
>
> That it is a mandatory requirement that in order for an Applicant to set aside a Default Judgment obtained in circumstances where the Applicant was never served with the Claim, or had knowledge of the Claim, the Applicant must file and serve an Acknowledgment of Service for the court to entertain the Application.
>
> 2. The following findings of law are challenged:
>
> <u>Findings of Law being challenged:</u>
>
> i. That it is a mandatory requirement that in order for an Applicant to set aside a

Default judgment obtained in circumstances where the Applicant was never served with the Claim, or had knowledge of the Claim, the Applicant must file and serve an Acknowledgment of Service for the court to entertain the Application.

ii. Costs to the Respondent.

3. The Grounds of Appeal are:

(a) The learned Trial Judge erred in law by holding that in order for the Applicant to apply to set aside the Default Judgment obtained by the Respondent against the Applicant, the Applicant must have filed and served an acknowledgment of service, which is a mandatory requirement.

4. Orders sought:

i. That the Appeal is allowed.

ii. The Order of the Honourable Mr. Justice Sykes delivered on December 4th 2014 be set aside;

iii. Costs in the Court of Appeal and below to the Appellant to be agreed or taxed;

iv. Any further or other relief that this Honourable Court deems fit."

The submissions

For the appellant-(Frank I Lee)

[12] In his written submissions, Mr Hugh Wildman urged that the preliminary objection that the court had no jurisdiction to entertain the application since the filing of an acknowledgment of service was a mandatory requirement and that in its absence,

the application was a nullity was inaccurate and misconceived. He submitted that the rules governing the setting aside of default judgments are clear and do not require the filing of an acknowledgment of service.

[13] In considering the relevant rules as found in the Civil Procedure Rules 2002 (CPR), he noted CPR 9.3(1) which deals with the period for filing an acknowledgment of service and states:

> "The general rule is that the period for filing an acknowledgment of service is the period of 14 days after the date of service of the claim form."

[14] Counsel submitted that it is of paramount importance that service of the claim must mean that the claim has been brought to the attention of the defendant and it is only when the defendant has been notified of the claim by service that the need for acknowledgment of service arises. Thus, he continued, the rules define what constitutes proper service of the claim and recognize that notwithstanding proper service, the court has the jurisdiction to entertain an application to set aside a default judgment secured from a claim which has been properly served but which may have not been brought to the attention of the defendant. He noted that this usually occurs when service has been effected through the post. He continued this aspect of his submissions by arguing that the rules do allow for an application to be made to set aside a default judgment if it is considered to be in the interest of justice that the judgment ought to be so set aside. In addition, he noted, the court has jurisdiction to set aside a default judgment *ex debito justiciae* where the claim has never been served on the defendant.

[15] Another rule found to be relevant to counsel's submissions was CPR 13.4 which deals with the procedure for applications to vary or set aside default judgments and states:-

> "(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."

[16] It was therefore Mr Wildman's submission that these provisions clearly demonstrate that the contention that an acknowledgment of service is a requirement in an application to set aside a default judgment is misconceived. He opined that this contention of the respondent that an application to set aside a default judgment is a challenge to jurisdiction was erroneous.

[17] He found support for this submission in the Privy Council decision of **Strachan v Gleaner Company Ltd and Another** [2005] UKPC 33 delivered 25 July 2005. The dicta from this decision, he submitted, clearly demonstrate that an application to set aside a default judgment is not a jurisdictional issue and also reaffirms the long established principle that a judge of the Supreme Court has jurisdiction to set aside a judgment given in default, even up to the stage of assessment of damages.

[18] Mr Wildman ended his submissions by asserting that the pith and substance of an application to set aside a default judgment, as in this case, is that the applicant is asking the court to set aside a judgment given in default on the basis that the claim

was never brought to the attention of the applicant. The court, he urged, is being asked to exercise the jurisdiction that it has, in the interest of justice and in furtherance of the overriding objective of the CPR, to set aside the default judgment. He concluded by opining that the application of the respondent is misconceived, based on a false premise and an incorrect interpretation of the CPR, thus the learned judge was wrong to have entertained the application.

For the respondent (Mullings)

[19] The written submissions filed on behalf of Mullings were settled by Captain Paul A Beswick, Carissa Bryan, Kayode Smith and Georgia Buckley. It was submitted that the notice of application to set aside the default judgment in the present case is a challenge to the court's exercise of its jurisdiction to issue a default judgment. The rules of the CPR which were identified as being relevant to the issue are 9.1, 9.2(1), 9.6(1) and (2). It was urged that it is clear from the rules that for a defendant to dispute the claim, or the court's jurisdiction, he (she/it) must first file an acknowledgment of service.

[20] In direct response to the submission of Frank I Lee, as appellant, it was averred that the following questions had been raised for determination by the court:

> "(a) Is it open to the appellant to argue that the statements of case were not "served"?
>
> (b) What, if any, is the applicability of the **Strachan v Gleaner Company** case to the present proceedings?"

Issue 1 –Is it open to the appellant to argue that the statements of case were not served?

[21] Some other relevant CPR rules which were identified by counsel for Mullings were:

(i) CPR 5.7 which deals with service on a limited company;

(ii) CPR 5.11 which deals with proof of postal service;

(iii) CPR 5.19 which deals with deemed date of service of a claim form;

(iv) CPR 6.6 which deals with deemed date of service of other documents;

(v) 12.1 which outlines the scope of part 12 dealing with default judgments;

(vi) 12.4 which details conditions to be satisfied – judgment for failure to file acknowledgment of service;

(vii) 12.5 which details conditions to be satisfied – judgment for failure to defend;

(viii) 13.1 which states the scope for that part of the CPR as being the procedure for setting aside or varying a default judgment entered under Part 12 (default judgments).

[22] It was then submitted that the rules are in fact clear on the issue which was perceived as being raised by Frank I Lee. It was urged that that company was a limited liability company which can be validly served by prepaid registered post pursuant to CPR 5.7 and this was in fact the method used to effect service. It was noted that an affidavit of service by registered post, which exhibited the post office receipt, had been filed in compliance with CPR 5.11.

[23] It was submitted that the rules committee had contemplated that situations would arise where a party to a claim would argue that they had not physically received

the claim form and CPR 5.19(2) addresses that issue by allowing the claimant to treat the date of service as the date that the acknowledgment of service is filed and/or whatever date is stated in the acknowledgment of service. It was submitted that "it was not in the contemplation of the rules committee that a party to a suit would fail to submit to the jurisdiction of the court by filing an acknowledgment of service and thereafter make an application to set aside a validly obtained default judgment".

[24] It was submitted that if this were the intention of the rules committee, Part 9 of the CPR, which deals with acknowledgment of service and notice of intention to defend, would be otiose. It was then opined that the appellant has failed to appreciate that without filing an acknowledgment of service, it has by analogy indicated to the court and the registrar that it has no intention of contesting proceedings and does not intend to avoid a judgment in default. It was further contended that there is no rule of practice or procedure that allows a defendant to a claim to set aside a default judgment or participate in proceedings before bringing itself under the jurisdiction of the Supreme Court through filing an acknowledgment of service.

[25] It was submitted that part 13 of the CPR which deals with setting aside or varying default judgments is not a free standing section of the CPR but is a part of general procedure, which has been set out for the settlement of civil disputes in the Jamaican jurisdiction. As such, it became their contention that it is not open to an appellant to "cherry pick" CPR 13.4 and attempt to separate it from the remainder of the rules, in particular part 9, which requires that a party who wishes to dispute the

claim or the court's jurisdiction to hear the claim, must file an acknowledgment of service.

Issue 2-What, if any, is the applicability of the Strachan v Gleaner Company case to the present proceedings?

[26] It was submitted further that **Strachan v Gleaner Company Ltd and Another** is of little to no assistance to Frank I Lee in the present appeal. It was argued that the **Strachan v Gleaner Company Ltd and Another** case was about the orders of another judge of co-ordinate jurisdiction. It was noted that the matter before Sykes J did not involve an order or decision of a judge of co-ordinate jurisdiction as default judgments are entered procedurally by the registry/registrar, once CPR 12.4 and 12.5 are complied with.

[27] The argument was made that the appellant was unable to fall within CPR 13.2(1)(a) as it is unable to point to any conditions of CPR 12.4 which were unsatisfied. It was further submitted that the appellant is unable to bring itself within the provisions of CPR 13.3 as it was opined that no 'good explanation' for its failure to file an acknowledgment of service had been advanced. It was urged that the appellant was attempting to circumvent the clear procedure set out in Part 9 by elevating CPR 13.4 to a free standing procedure wherein any person who is directly affected by the entry of judgment can apply, without more, to have it set aside.

[28] It was accepted that Sykes J did have the power to set aside the default judgment in the present case. However, the point being urged was that the learned judge could not exercise that power where the appellant had not condescended to bring

itself within the jurisdiction of the court by filing an acknowledgment of service. It was submitted that neither judgments in the **Strachan** case from the Judicial Committee of the Privy Council nor the Jamaica Court of Appeal makes it clear whether in that case the defendant, having learned about the judgment in default, at whatever stage it did, had filed an acknowledgment of service or an appearance as it was called under the Civil Procedure Code. It was submitted that it was unlikely that the court would have entertained those respondents' application to set aside the default judgment if that requirement had not been complied with.

Discussion and Analysis

[29] Part 9 of the CPR is a proper place to commence consideration of this matter. CPR 9.1 states:-

> "(1) This Part deals with the procedure to be used by a defendant who wishes to contest proceedings and avoid a judgment in default of acknowledgement of service being obtained.
>
> (2) Where by any enactment provision is made for the entry of an appearance, an acknowledgement of service must be used."

[30] CPR 9.2(1) states:

> "A defendant who wishes -
>
> a. to dispute the claim; or
>
> b. to dispute the court's jurisdiction,
>
> must file at the registry at which the claim form was issued an acknowledgment of service in form 3 or 4 containing a notice of intention to defend and send a copy of the acknowledgment of service to the claimant or the claimant's attorney-at-law."

[31] CPR 9.2(5) states:

> "However the defendant need not file an acknowledgment of service if a defence is filed and served on the claimant or the claimant's attorney-at-law within the period specified in rule 9.3."

CPR 9.2(6) states:

> "Where a defendant fails to file either an acknowledgment of service or a defence judgment may be entered against that defendant if Part 12 allows it."

[32] However, it is useful to bear in mind the provisions of the CPR which must be relevant before the issue of the acknowledgement of service arises. Parts 5 and 6 of the CPR deal with the issue of service of the claim form and other documents within the jurisdiction. Part 7 then considers the issue of service of court process out of the jurisdiction. The provisions of CPR Part 8 then detail how to start proceeding. Thus for Part 9 to be invoked, the defendant must be served in accordance with these provisions.

[33] Pursuant to the CPR, the defendant who is served and does not move expeditiously to indicate his interest in participating in the process commenced against him runs the risk of having a judgment secured against him. The necessary requirement must be that he be made aware of the commencement of proceedings against him by proper service of the claim form on him as required by the rules of court.

[34] It is in relation to the arguments successfully mounted on behalf of Mullings before Sykes J that the question becomes whether one is required to file an

acknowledgment of service before one can be heard in an application to set aside a default judgment obtained because of the initial failure so to file.

[35] It is recognized that Part 12 has to be borne in mind in relation to the consequence of failing to file an acknowledgment of service or defence as required by Part 9. CPR 12.1(1) states:-

> "This Part contains provisions under which a claimant may obtain judgment without trial where a defendant:-
>
> a. has failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9; or
>
> b. has failed to file a defence in accordance with Part 10."

The provisions of CPR 12.1(1) presuppose knowledge, on the part of the defendant, of the existence of a matter that he may wish to defend.

[36] CPR 12.4 states:-

> "The registry at the request of a 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;

d. where the only claim is for a specified sum of money apart from costs and interest, that defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;

e. that defendant has not satisfied in full the claim on which the claimant seeks judgment; and

f. (where necessary) the claimant has permission to enter judgment."

[37] The entering of the default judgment is regarded as a purely administrative procedure. The attitude of the courts has always been not to easily deprive a party of the right to having their matter heard and thus the need for the court to have the power to set aside judgments entered without a full consideration of the merits of the claim. It is therefore, to my mind, even more evident that the rules which deal with service and default judgments cannot be considered independent of the part that deals with the setting aside of said judgments.

[38] It is necessary however, to bear in mind some other aspects of the acknowledgment of service as detailed in the rules. Firstly, it is noted that the acknowledgment of service form must be served along with the claim form. This is expressly stated at CPR 8.16(1) and is a mandatory requirement. Thus the document served calls for the party to indicate what date the claim form was received by the defendant (see CPR 9.4(1)(a)). In the acknowledgment of service form itself the defendant is requested to indicate if the claim form with the stated claim number was

received. Where the defendant has not been served at all, the question arises how it can be expected for them to acknowledge receipt or non-receipt.

[39] Another significant rule to be borne in mind is CPR 9.3 which provides for the period for filing the acknowledgment of service.

CPR 9.3(1) states:-

> "The general rule is that the period for filing an acknowledgment of service is the period of 14 days after the date of service of the claim form."

CPR 9.3(4) states:-

> "A defendant may file an acknowledgment of service at any time before a request for default judgment is received at the registry out of which the claim form was issued."

[40] It is evident that the service of the claim form is what must dictate the filing of an acknowledgment of service of that form. Furthermore, the rule specifically states, an acknowledgement of service may be filed before the request for default judgment. The rules contain no requirement for the filing of an acknowledgement of service after the default judgment has been entered. Any acknowledgment of service filed thereafter would be invalid because it would have been filed out of time and without any legal basis to do so.

[41] The position is that after judgment has been entered, a defendant can no longer defend the claim unless the judgment is set aside and the court grants leave to defend. So a defendant who is asserting that he was never served with the claim form and wishes to have the default judgment set aside will have to make an application pursuant to CPR 13.4.

[42] CPR 13.4, already noted at paragraph [15], sets out the procedure for applications to vary or set aside a default judgment. There is no mandatory requirement expressed in those provisions that an acknowledgment of service is required in making the application to set the judgment aside. In fact, the rule specifically states that "an application may be made by any person who is directly affected by the entry of the judgment". This provision is wide enough to encompass persons who are not defendants to the claim. Those persons could not be required to file an acknowledgment of service as the rules pertinent to acknowledgment of service would not apply to them. Had the framers of the rules intended that defendants should be treated differently from other affected persons for the purposes of an application to set aside a default judgment, then specific provisions would have been made in relation to them and a provision made that they should file an acknowledgment of service as a condition-precedent. This is absent from the CPR. There is, therefore, no need or basis to import such a requirement into the rules.

[43] Also, the mere fact that the rules stipulate the latest stage that an acknowledgment of service may be filed by a defendant before judgment is entered, being before request for judgment, is taken to mean that there was no intention on the part of the framers to require one to be served after judgment had been entered.

[44] Counsel for Mullings relied on the unreported judgment of Sykes J in the case of **Janet Edwards v Jamaica Beverages Limited** Suit No CL 2002/E-037 delivered 23 April 2010, in particular paragraphs 17-21. At paragraph 17, Sykes J stated:-

> "The significance and importance of the acknowledgment of service cannot be overstated. Rule 9.2(1) states that any

> defendant who wishes to dispute the claim or the court's jurisdiction must file an acknowledgment of service. Indeed rule 9.1 goes even further and specifically prescribes that in any enactment which an appearance could be entered, the defendant **must** file an acknowledgment of service. There is no escape from this requirement. Must mean what it says."

[45] The bald assertion expressed in the order of Sykes in the instant case that an acknowledgment of service is mandatory in all civil proceedings pursuant to CPR 9.2(1), cannot gain support from any dictum in that case so as to be held as being unassailable. CPR 9.2(1) must be taken as applying to a defendant who has been served with the claim form following the commencement of the proceedings and not one who has not been served as is being contended by Frank I Lee in the case at bar.

[46] CPR 9.1(2), the other provision noted by Sykes J in **Janet Edwards v Jamaica Beverages Limited**, would apply where by virtue of an enactment, an appearance **"is"** required to be entered. Sykes J had stated that an acknowledgment of service must be filed where by virtue of an enactment it "**could be**" entered. Counsel for Mullings seem to have used this to strengthen their position to say that an acknowledgment of service is analogous to the entry of appearance that was required under the Civil Procedure Code (the CPC) and so to set aside the default judgment, an acknowledgment of service must first be filed.

[47] While the acknowledgement of service bears similarity to the concept of entry of appearance under the CPC, the CPC is no longer law. Based on the use of the word "is" in CPR 9.1(2) and not "could be" (as used by Sykes J), it would mean that the

requirement for an appearance to be entered must be contained in an existing enactment and not a repealed one. The CPC, as a repealed enactment, would have no relevance to the question whether, under the CPR, an acknowledgment of service is required to be filed before an application to set aside a default judgment can be made. It is clear that this matter does not concern any enactment with a provision requiring the entry of an appearance before an application is made for default judgment to be set aside and therefore CPR 9.1(2) would not apply.

[48] Sykes J by stating, in the order he made in this case, without any qualification, that it is a mandatory requirement that an acknowledgment of service is filed "*in all civil proceedings"* would have failed to make it clear that an acknowledgment of service can only be expected from a defendant who has been properly served with the claim form and who intends to contest the claim and avoid a judgment in default being entered against him (see CPR 9.1(1)).

[49] The submission on behalf of Mullings also goes on to ground the need for an acknowledgment of service in the requirement by the rules, that one should be filed if a defendant is disputing the court's jurisdiction. It is in reliance on CPR 9.6(1) and (2) that this is urged. CPR 9.6(1) and 9.6(2) provides as follows:

> "9.6 (1) A defendant who:-
>
> (a) disputes the court's jurisdiction to try the claim or
> (b) argues that the court should not exercise its jurisdiction may apply to the court for a declaration to that effect

> (2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service."

[50] To my mind, an application to set aside a default judgment is not disputing the court's jurisdiction to try a claim nor is it one arguing that the court should not exercise its jurisdiction. On the contrary, it is more by nature, an invoking of the court's jurisdiction to exercise its discretion to set aside the default judgment already entered so that the claim may be tried. By filing the notice of application for court orders, without more, the defendant would have been surrendering to the jurisdiction of the court. Therefore these provisions of the CPR cannot be relied upon to prove any mandatory requirement for the filing of an acknowledgment of service for an application to set aside a default judgment.

[51] Furthermore, a defendant who was not served and had a default judgment entered against him for failing to acknowledge service could hardly be expected to file an acknowledgment of service while seeking to explain the failure in an effort to have the judgment set aside. The position will be different for a defendant who has failed to acknowledge service yet has filed a defence after the expiration of the time allowed for its filing. This was the position of the defendant in **Bar John Industrial Supplies Limited v Honey Bee Fruit Juice Limited** [2011] JMCA Civ 7. This was an authority relied on by counsel for Frank I Lee.

[52] In that case the defendant had failed to file an acknowledgment of service or a defence as stated in CPR 9.2(1) or CPR 9.2(5) within the stipulated 14 days. They did

however file a defence within the 42 days stipulated for filing of the defence. Hibbert JA (AG) (as he then was) stated:

> "[16] The court agrees that where a defence is filed in the absence of an acknowledgment of service, as is permitted by rule 9.2 of the CPR the time for filing the defence is not within 42 days after service of the claim form as is stated in rule 10.3. Instead the period for the filing of the defence is within 14 days of the service of the claim form as stated by rules 9.2(5) and 9.3(1). Since the defence was filed out of time, we agree that the judgment in default of an acknowledgment of service was regularly and properly entered."

[53] It must be recognized that there was an effort to engage the court in a consideration of the issue of whether the statement of case was not served. However, it is not relevant to the question of whether there is a mandatory requirement for an acknowledgment of service to be filed to have an application for the setting aside of a default judgment properly before the court. The question becomes material upon the hearing of the application when it would become incumbent on the applicant to seek to prove to the court that all conditions of CPR 12.4 had not been satisfied or that there was a good explanation for the failure to file the acknowledgment of service.

Disposition

[54] A careful consideration of the rules do not support the contention that it is a mandatory requirement that in order for a defendant to set aside a default judgment obtained in circumstances where he is alleging that he was never served with and had no knowledge of the claim, the applicant must file an acknowledgment of service for the court to entertain the application to set aside. A defendant who has not been

served with a claim form has the unfettered right to have judgment entered against him set aside. That is not only captured in the relevant provisions of the CPR but is part and parcel of the rules of natural justice. He ought therefore not to be barred from approaching the court by technical rules of procedure. Such an approach would not accord with the interests of justice. The overriding consideration in matters such as these remains that as expressed by **Strachan v Gleaner Company Limited and Another** by Lord Millett at paragraph 21:-

> "… A default judgment is one which has not been decided on the merits. The Courts have jealously guarded their power to set aside judgments where there has been no determination on the merits, even to the extent of refusing to lay down any rigid rules to govern the exercise of their discretion: see **Evans v Bartlam** [1937] AC 473 where Lord Atkin (discussing the provisions of English rules in substantially the same terms as Section 258) said at p 480:
>
> > 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."

[55] The bald assertion in the terms contained in the formal order of Sykes J is considered to be too wide a statement and cannot be taken as completely accurate since it fails to recognize the need for the defendant to be served. Thus the requirement to file an acknowledgment of service is mandatory for any defendant who has been served and who wishes to dispute the claim or dispute the court's jurisdiction pursuant to CPR 9.2(1). Although this requirement is mandatory, a party who is able to satisfy the conditions set out in the CPR, may still be able to have a default judgment

entered due to his failure to adhere to this requirement set aside and his matter considered on its merits. However, there is no such mandatory requirement for Frank I Lee, as a defendant, who alleges that it has not been served and wishes to have a default judgment entered against it for that failure, set aside.

[56] This aspect of the procedural appeal should be allowed with costs to the appellant, Frank I Lee, to be taxed if not agreed.

Appeal No 99/2014

[57] The order of Sykes J being appealed by Mullings is:

> "Leave to appeal is granted to the respondent in relation to this court's finding that the present application is not a nullity and should not be struck out pursuant to the court's finding at paragraph (11) above."

[58] On behalf of Mullings, it was submitted that the following are the issues for this court to determine:-

> "(a) If the learned judge was correct that an acknowledgment of service is a mandatory requirement in civil proceedings before the filing of an application under CPR 9, was it then open to the learned judge to rule that the application to set aside the default judgment was not a nullity in the circumstances of this case?
>
> (b) Was the learned judge correct to rule that the decision of this court in **Saddler v Saddler** [2013] JMCA Civ 11 is applicable to the circumstances of the present case?"

[59] It is apparent that having successfully argued that the defendants had failed to comply with a mandatory requirement to have an acknowledgment of service filed

before they could be heard, the question became what was to become of the application to set aside the default judgment. The learned judge resisted the submission that this failure meant that the entire application must be a nullity. Having now found that the judge was incorrect in holding that there was a mandatory requirement for the filing of an acknowledgment of service in these circumstances, the issue of whether the application to set aside was a nullity is now redundant.

[60] The appeal of this aspect of the judge's order must be dismissed with costs awarded to the respondents, Frank I Lee. In the circumstances, there should be a hearing of the application to set aside the default judgment.

MORRISON P (AG)

ORDER

On Appeal No 98/2014

1. The appeal of Frank I Lee Distributors Ltd against the order of Sykes J is allowed.

On Appeal No 99/2014

2. The appeal of Mullings & Company (A Firm) against the order of Sykes J is dismissed.

Costs of both appeals and in the court below to Frank I Lee Distributors to be taxed if not agreed.