#### IN THE COURT OF APPEAL OF BELIZE AD 2018

CIVIL APPEAL NO 2 OF 2016

### **BETWEEN**

UNITED INSURANCE COMPANY LTD

ELLIOTT EDWARD BERMUDEZ

**APPELLANTS** 

**AND** 

**BARTHOLOMEW STANLEY** 

RESPONDENT

AND

CIVIL APPEAL NO 10 OF 2016

**BETWEEN** 

UNITED INSURANCE COMPANY LTD

**ELLIOTT EDWARD BERMUDEZ** 

**APPELLANTS** 

**AND** 

**BARTHOLOMEW STANLEY** 

RESPONDENT

**BEFORE** 

The Hon Mr Justice Sir Manuel Sosa
The Hon Mr Justice Samuel Awich

The Hon Madam Justice Minnet Hafiz-Bertram

President

Justice of Appeal Justice of Appeal

E A Marshalleck SC for the appellants.

C Pitts for the respondent.

20 October 2017 and 15 March 2019.

#### SIR MANUEL SOSA P

[1] I am of the opinion that Civil Appeal No 2 of 2016 should be allowed and Civil Appeal No 10 of 2016 dismissed. I concur in the reasons for judgment given and the orders proposed by Awich JA in his judgment ("the judgment"), which I have read in

draft. I state, for the avoidance of doubt, that I consider such reasons for judgment to be those which are to be found in that part of the judgment comprising paras [2]-[72], inclusive. I say nothing as to such reasoning as is contained in the remainder of the judgment, which, in my view, falls to be regarded as *obiter dicta*. I would, however, further order in respect of costs that, in the event that either party should apply for a contrary order within the period of seven days from the delivery of these judgments, the matter of costs shall be determined on written submissions to be filed by the parties in 10 days from the date of the application.

SIR MANUEL SOSA P	

### **AWICH JA**

- [2] The appeals before this Court are cited as: "Consolidated Appeals: Civil Appeal No. 2 of 2016,... and Civil Appeal No. 10 of 2016 ..." They are in substance, one appeal against one court order made on 14 December 2015, comprised of several commands. The order was made upon hearing together, two interim applications. The first was brought by a notice dated 3 November 2015; the second was an upshot application brought in the course of hearing the first, by a notice dated 27 November 2015. The applications were made in claim No. 338 of 2014.
- [3] In the application dated 3 November 2015, the applicants asked for orders that, (1) the default judgment entered on the 8 May 2015 in the claim, No. 338 of 2014, be set aside, and (2) the claim be struck out. In the application dated 27 November 2015, the applicants asked simply for an order that the default judgment be set aside. This application repeated part of the first application.
- [4] The order made on 14 December 2015, included paragraph 1 which stated: "1. Both applications by the second defendant are dismissed with costs being awarded to

the claimant". The two "appeals" are against this dual command court order. It was made by learned trial judge, Shona Griffith, in the Supreme Court below.

- [5] The persons cited as the appellants in, "both appeals", are the same; they are: (1) United Insurance Company Limited, I shall refer to it simply as United Insurance, and (2) Mr. Elliott Edward Bermudez. In the Supreme Court they were cited as joint applicants in the notices of application. They were the defendants in the claim. Although Mr. Bermudez was cited as the second appellant in "these appeals", he did not participate in "the appeals". Also, he did not participate in the applications in the Supreme Court.
- [6] The respondent in the "appeals" is also the same; he is Mr. Bartholomew Stanley. In the Supreme Court he was the respondent in the notices of application, and the claimant in the claim.
- [7] To illustrate my explanation, I set out here the application dated 3 November 2015, the application dated 27 November 2015, and the one court order comprised of several commands made on the applications on 14 December 2015.
- [8] Excluding the citation, the application dated 3 November 2015 is this:

## "NOTICE OF APPLICATION

The Applicant, United Insurance Company Ltd of No. 212 North Front Street, Belize City, Belize, applies to the Court pursuant to Rule 13.4 and 26.3 (1) (b) of the Supreme Court (Civil Procedure) Rules 2005, for an order that:

- 1. The default judgment entered herein on the 8<sup>th</sup> day of May, 2015 be set aside;
- 2. The Claim be struck out; and
- 3. The Claimant pays the Applicant's costs of this Application.

A draft of the order that we seek is attached.

The grounds of the application are –

1. The Claimants and Defendants executed a Deed of Release and Compromise on the 5<sup>th</sup> November, 2014 where it was agreed between

all parties that the Second Defendant would pay the Claimant for and on behalf of itself, the First Defendant and Belize Water Service Ltd the sum of \$25,444.00 in full and final satisfaction of all damages and costs suffered and incurred by the Claimant that gave rise to Claim No. 338 of 2014.

- A condition of the executed Deed of Release and Compromise is that the Claimant, in exchange for the sums provided, covenanted to discontinue in its entirety Claim No. 338 of 2014
- The Claim is and abuse of process as it has already been agreed and settled upon by the parties and the Claimant has failed to honor the terms of the settlement as stipulated by the Deed of Release and Compromise.
- 4. The Applicant has a real prospect of successfully defending the Claim.

Dated 3<sup>rd</sup> day of November, 2015."

[9] Excluding the citation, the upshot application dated 27 November 2015 is the following:

# "NOTICE OF APPLICATION

The Applicant, United Insurance Company Ltd of No. 212 North Front Street, Belize City, Belize, applies to the Court pursuant to Rule 13.3 and 13. 4 of the Supreme Court (Civil Procedure) Rules 2005, for an order that:

- 1. The default judgment entered herein on the 8<sup>th</sup> day of May, 2015 be set aside; and
- 2. The Claimant pays (sic) the Applicant's costs of this Application.

A draft of the order that we seek is attached.

The grounds of the application are –

- 1. Since discovering on the 6<sup>th</sup> day of October, 2015 that judgment had been entered against the Defendants. The Second Defendant has immediately applied to have the judgment set aside;
- The reason why no defence was entered is because all parties to this Claim executed a deed of release and compromise whereby the Claimant, in consideration for the sums of money paid by the Second

Defendant, would discontinue the matter in its entirety against the Defendants;

- 3. It was a term of the deed that the Claimant would discontinue the matter against the Defendants and the Second Defendant expected that the Claimant would fulfill his end of the agreement; and
- 4. The Applicant has a real prospect of successfully defending the Claim.

Dated 27th day of November, 2015."

[10] The one order, the set of commands, made on 14 December 2015, by the learned trial judge, on the above two applications, which order is the subject of, "these appeals", is the following:

# "ORDER

BEFORE THE HONOURABLE Madam Justice Shona Griffith

The 14th day of December, 2015

MR. JARAAD YSAGUIRRE of Barrow & Co. LLP, Counsel for the Second Defendant

MS. CYNTHIA PITTS Counsel for the Claimant

UPON THIS MATTER coming on for Trial
AND UPON HEARING Counsel for the Claimant and the Defendant

#### IT IS HEREBY ORDERED THAT:

- 1. Both applications by the Second Defendant are dismissed with costs being awarded to the Claimant.
- 2. The Claimant is at liberty to put in further Affidavit related to medical evidence by 15<sup>th</sup> January, 2016.
- 3. The Defendants have liberty to file Affidavit evidence in response to the claim until 5<sup>th</sup> February, 2016.
- 4. The Defendant is to file quantification and submissions in response on or before 15<sup>th</sup> February, 2016,

5. The hearing for the assessment of damages is scheduled for the 23<sup>rd</sup> February, 2016.

Dated this 22<sup>nd</sup> day of January, 2016.

BY ORDER,

E O Pennil Deputy Registrar"

[11] The specific items of the above order appealed against in, "these appeals" are the two commands stated together in paragraph 1 of the order. The paragraph states: "Both applications are dismissed ..." By the phrase "both applications", the judge might have referred to the two requests in the application dated 3 November 2015 that: (1) "[t]he default judgment entered ... on 8 day of May 2015 be set aside", and (2) "the claim [No. 338 of 2013] be struck out", or might have referred to the two notices of application dated 3 November 2015, and 27 November 2015.

[12] It was misleading to have filed two appeals founded on two items of complaint against parts of a single court order comprised of several parts. I view the appeals as a single appeal, and the two items of complaint as two separate grounds of the single appeal.

## The factual foundation of the appeal.

[13] The factual foundation of the appeal at this point remains untested in court so, it is provisional. It is available in the statement of claim filed by Mr. Stanley, his affidavit, and the affidavit of Rose Garcia filed for United Insurance. I summarise the factual foundation below.

[14] On 6 July 2013 when Mr. Bartholomew Stanley walked along a zebra crossing road marking on Constitution Drive in Belmopan, a public road, he was knocked down by a motorcycle. He sustained injuries. Mr. Elliott Bermudez was riding the motorcycle. Mr. Stanley averred that, Mr. Bermudez was insured by United Insurance in respect of

liability which would be incurred by Mr. Bermudez in respect of death or bodily injury to any person, or damage to any property, caused by the use of the motorcycle on a pubic road. It was stated on behalf of United Insurance that, the person insured was Belize Water Service Limited, the employer of Mr. Bermudez. It does not matter, the word, "insured includes a driver, with the permission and consent of the owner". In any case, United Insurance proceeded on the understanding that, it was the relevant insurer in respect to the use of the motorcycle on a public road.

- [15] On 4 July 2014, Mr. Stanley filed a claim, No. 338 of 2014, in negligence in the Supreme Court, against Mr. Bermudez and United Insurance. He claimed damages for negligence. He averred that, he was knocked down by Mr. Bermudez who did not exercise due care and attention when he rode the motorcycle, and as the result Mr. Bermudez knocked down Mr. Stanley and caused bodily injuries to him, which caused him suffering and loss. Mr. Stanley averred further, that Mr. Bermudez owned the motorcycle, and he had insured himself in regard to liability arising from the use of the motorcycle on a public road; United Insurance was the insurer. Accordingly, Mr. Stanley claimed that, both defendants were liable to him for the pain suffered and loss.
- [16] The claim and statement of claim were served on United Insurance on 21 July 2014, and may be also on Mr. Bermudez. No defence or any affidavit has been filed on his behalf. United Insurance accepted that the claim and statement of claim were served on it.
- [17] On 8 May 2015, attorneys for Mr. Stanley informed the court that, the defendants had not filed an acknowledgment of service or a defence to the claim within the 14 days limitation period or at all, and requested and obtained a default judgment dated 8 May 2015, "against the defendants", United Insurance and Mr. Bermudez. The default judgment was entered under *R* 12.1(1)(a) and 12.4 of the Supreme Court (Civil Procedure) Rules, 2005, for damages to be assessed.

- [18] United Insurance admitted that, it did not file an acknowledgment of service of the claim or file a defence, but contended that, it had entered negotiation with Mr. Stanley for settling the claim out of court, the parties reached a settlement on 5 November 2014, signed a "Deed of Release and Compromise", and on the same day United Insurance paid \$25,444.00 to Mr. Stanley in full settlement of the claim against United Insurance, Belize Water Services Limited and Mr. Bermudez. In the deed, Mr. Stanley promised to discontinue the claim, United Insurance stated.
- [19] United Insurance explained its failure further. It stated that, some time after the default judgment had been entered, it was served with a copy of direction orders dated 6 October 2015, regarding assessment of damages, in which it was stated, among others, that Mr. Stanley had obtained judgment in default against Mr. Bermudez and United Insurance. The company stated, that was the time it became aware that Mr. Stanley had not discontinued the claim as agreed in the deed of release and compromise.
- [20] From this point on, the proceedings were beset with much uncertainty and doubt, right up to the appeal proceedings in this Court. The brief outline that I have given at paragraphs [1] to [5] indicates some of the uncertainty and doubt.

The filing and hearing of the two applications dated 3 November 2015, and 27 November 2015.

- [21] On a date, not apparent from the record, but after the default judgment had been entered, United Insurance filed the application dated 3 November 2015, in which it requested the court orders that: (1) the default judgment entered on 8 May 2015 be set aside, and (2) the claim, No. 338 of 2014, be struck out. It also requested an order for costs in its favour. The application was heard on 18 November and 14 December 2015, by Griffith J.
- [22] In the course of hearing the application, the learned judge directed that, counsel for United Insurance split the notice of application dated 3 November 2015, by filing a

separate application requesting only an order setting aside the default judgment. Her reason was that, the application for an order striking out the claim was, "not viable, so set aside is what we are going to be dealing with". She did not at that moment explain what she meant by, "not viable". Counsel obliged and filed the notice of application dated 27 November 2015. He presented and argued only the application for an order setting aside the default judgment. However, in the end the judge made the combined order that, "[b]oth applications by the second defendant are dismissed with costs being awarded to the claimant".

The notice of the first appeal, No. 2 of 2016.

- [23] On 1 February 2016, United Insurance filed a notice of appeal against, "the whole decision", made by Griffith J on 14 December 2015. It was registered as Civil Appeal No. 2 of 2016. It was the first of the two notices of appeal filed by United Insurance. The grounds of the appeal and the relief sought were the following:
  - "1. The learned trial judge erred in law and misdirected herself in applying Civil Procedure Rule 13.3 in finding that the Second Defendant failed to give a good explanation for failing to file an acknowledgement of service or a defence and on that basis dismissing the Second Defendant's application [for an order] to set aside the default judgment.
  - 2. The learned trial judge erred in law and misdirected herself by dismissing the application [for an order] to strike the claim of the Claimant on the strength of the deed of release and compromise executed by the Claimant in favor of the Second Defendant and Belize Water Services Limited.
  - 3. The decision of the trial judge is against the weight of the evidence in particular the settlement comprised within the Deed of Compromise and Release already executed by the Claimant in favor of the Second Defendant and Belize Water Services Limited and/or that the Claimant had no viable cause of action against the Second Defendant.

## **Relief Sought**

The Appellant seeks the following relief:

- 1. That the appeal is allowed, the default judgment is set aside and the claim is struck out;
- 2. Costs to the Appellant.
- Such further or consequential relief as the Court sees fit."

The application for leave to appeal the order refusing to strike out the claim.

[24] Then on a date, again not apparent from the record, but after the first notice of appeal had been filed, United Insurance filed an application dated 4 February 2016, in which it sought, among others, leave to appeal the order made by Griffith J, on 14 December 2015, to the extent that, the order dismissed the application for an order striking out the claim. Attorneys for United Insurance realized that, leave was required to appeal the order dismissing the application for an order to strike out the claim. The order was an interim (formerly interlocutory) order. The application also asked for an order staying all proceedings. It is the following:

## "APPLICATION NOTICE

The Applicant, **United Insurance Company Ltd** of No. 212 North Front Street, Belize City, Belize applies to the Court for orders that:

- If the Court deems it necessary, granting leave to appeal the Order of the Honourable Justice Shona Griffith dated 22<sup>nd</sup> day of January, 2016 [made 14 December 2015] which, inter alia, dismissed the Second Defendant's applications to strike out the claim and set aside the default judgment entered ("the **Order**");
- 2. Further or in the alternative, an order staying all further proceedings herein pending the determination of the appeal against the Order;
- 3. That the costs of the application be costs in the appeal; and
- 4. Granting such further or other relief as may be just.

## A draft of the order sought is attached.

# The grounds of the application are that:

- 1. The appeal has a real prospect of success as appears from the intended grounds of appeal as set out in the Draft Intended Notice of Appeal exhibited to the Affidavit of Rose Garcia filed in support of this application.
- 2. The Court should exercise its discretion to stay the proceedings since, without the stay, the appeal would be rendered nugatory as the Court will likely make a determination of the assessment of damages hearing, scheduled for the 25<sup>th</sup> February, 2016, before the appeal is heard.
- 3. The learned trial judge erred in law and misdirected herself in applying Civil Procedure Rule 13.3 in finding that the Second Defendant failed to give a good explanation for failing to file an acknowledgment of service or a defence and on that basis dismissing the Second Defendant's application to set aside the default judgment.
- 4. The learned trial judge erred in law and misdirected herself by dismissing the application to strike [out] the claim of the Claimant on the strength of the deed of release and compromise executed by the Claimant in favor of the Second Defendant and Belize Water Services Limited.
- 5. The decision of the trial judge is against the weight of the evidence in particular the settlement comprised within the Deed of Compromise and Release already executed by the Claimant in favour of the Second Defendant and Belize Water Services Limited and/or that the Claimant had no visible cause of action against the Second Defendant. If the Second Defendant succeed on appeals on these grounds there will be no need for a trial for the assessment of damages.

The Applicant will rely on the Affidavit filed in support of this Application.

Dated the 4<sup>th</sup> day of February, 2016."

[25] When the application for leave came for hearing on 3 March 2016, the judge noticed that something was wrong about it. She enquired of learned counsel, Mr. A. Marshalleck SC, for United Insurance, what order was being asked for in the application, and whether a notice of appeal had already been filed. Mr. Marshalleck answered, "yes".

[26] The proceedings continued in the form of questions and answers. The record of the beginning of the proceedings at pages 125 to 137 which disclosed some of the submissions by Mr. Marshalleck is this:

"THE COURT: So it [the application] is not asking for leave?

MR. MARSHALLECK: Yes, it is asking for leave.

THE COURT: If a notice of appeal is filed then I don't understand.

MR. MARSHALLECK: It goes to the scope of the appeal.

. . .

THE COURT: You have conduct of the matter?

MR. MARSHALLECK: I have conduct of the matter.

THE COURT: I had a difficulty with the application because I wasn't

really sure what was being asked for especially in terms of how it was worded. Is it that there is already

a notice of appeal that is filed?

MR. MARSHALLECK: Yes.

THE COURT: All right, help me then.

MR. MARSHALLECK: Yes, Your Ladyship would have recalled that there

was a single hearing in which two applications were

effectively disposed of.

THE COURT: Before we get there was there an order produced?

MR. MARSHALLECK: Yes.

. . .

MS. PITTS: The order saying that we have leave to appeal?

MR. MARSHALLECK: No, there's no leave to appeal yet there is an

application for leave. The order says and have a draft of it here, I'm trying to find the date, it says default judgment is set aside claimant pays the applicant cost of their application. [??] it says order to set

aside default judgment and strike out claim on the

heading.

MS. PITTS: That is an order from this court from you my lady.

. . .

THE COURT: You prepared it? Who prepared it?

. . .

MS. PITTS: I would say that both of us, both parties.

THE COURT: I know, where is the draft?

...

MR. MARSHALLECK: It was sent to Your Ladyship on the 11<sup>th</sup> January,

2016.

THE COURT: Look it's not that it's a problem I'm just trying to trace

back so that I can put myself back in the frame of

mind into all of the steps that were taken.

THE COURT: So I'm just trying to retrace when and where and

what, right. So that was from the 14<sup>th</sup> of December, that was the date of the order this was filed the 22<sup>nd</sup> of

January, right, so from that order you've appealed?

MR. MARSHALLECK: Yes, but the order have couple aspects to it as Your

Ladyship would have seen there is an order refusing to set aside the default judgment and there's also an

order refusing to strike claim.

THE COURT: Right.

MR. MARSHALLECK: In respect of the former, on our reading of the Rules

there's no need for leave. In respect of the latter

there would be.

THE COURT: The application to set aside?

MR. MARSHALLECK: The Application to Set Aside wouldn't require leave.

The Order on the application to strike would require

leave.

THE COURT: Right, so this is where I really wasn't clear in what

was going on in respect of ...

THE COURT: Because it did not make clear the application that in

relation to the order to set aside the appeal in relation to the order refusing the strike-out you are now

seeking leave so really what is before me is an

application for leave to appeal from the order refusing

to - -

MR. MARSHALLECK: To strike, yes, we on the issue of leave, the need for

it, to take Your Ladyship to the beginning, to the Court

of Appeal Act.

THE COURT: Right, now you see Mr. Marshalleck if the application

had said so I really would not have had a difficulty and I said to Mr. Ysaguirre I can't understand where it is that you're coming on this section 14 can you please go back and amend your application so that it then makes it clear. He said he was going to go and

amend it, what happened?

MR. MARSHALLECK: He mentioned that to me and when I looked at it the

substance of the application is really the same so that it would be just language and I thought we could deal

with that on the hearing of the application itself.

THE COURT: No, no, no I disagree right which is why I asked him to

amend it...

THE COURT: It did not tell me you are coming under the 14(1) and

the affidavit coincided the two.

MR. MARSHALLECK: Yes, but one is argument in support, the application is

really the same we're seeking leave.

THE COURT: Well for that one aspect of it.

MR. MARSHALLECK: Yes.

THE COURT: Anyways you were telling, I am unhappy but because

now as far as I am concerned at least you can articulate exactly what it is that you're doing, then I

can deal with it.

MR. MARSHALLECK: Obliged, My Lady we've gone lodge a notice of

appeal in respect of the refusal to set aside. Actually the language is in respect of both; the same draft was used but having looked at the rules we are convinced that leave would be required in respect of the latter

portion as I indicated to Your Ladyship earlier.

THE COURT: Right because the strike, refusal to strike is

interlocutory.

MR. MARSHALLECK: And because the two applications went hand in hand,

we thought it would be better if the appeal deal with

both together.

THE COURT: You mean the ultimate appeal in the Court of Appeal.

MR. MARSHALLECK: Yes.

THE COURT: But tell me, if you have a default judgment - -

THE COURT: You have a judgment, it's a judgment, correct?

MR. MARSHALLECK: Yes, but it's an administrative judgment there is no

adjudication or merits.

THE COURT: Right, I'm not seeing how, we'll go through the

application but I am not seeing how you can then

seek to strike out unless - -

MR. MARSHALLECK: It's set aside.

MR. MARSHALLECK: That's why they were rolled out.

THE COURT: So then why if you're hearing, because I did not

consider the application to strike out on its merits

because you had a default judgment.

MR. MARSHALLECK: Because it followed upon the default judgment yes,

but if the Court of Appeal were to take a different view

then that comes into full play.

THE COURT: If the Court of Appeal said the judge was wrong not to

allow the application to set aside the default judgment

and then what happens?

MR. MARSHALLECK: The considerations on the application to strike come

into full play.

THE COURT: In the Court of Appeal?

MR. MARSHALLECK: Correct, the Court of Appeal is seized with whatever

power the court below had.

THE COURT: Fair enough but - -

MR. MARSHALLECK: We think on that score the decision is really obvious.

THE COURT: What decision is really obvious?

MR. MARSHALLECK: There is no cause of action against the insurer; it's

well established, the fact of settlement.

MR. MARSHALLECK: Puts an end to the matter.

THE COURT: Right, but unless you could have shown me right that

I could properly set aside the default action.

MR. MARSHALLECK: Yes we think that was shown.

THE COURT: Right, I do not see that there is a need for me to hear,

I'm talking it out Mr. Marshalleck I will hear you. I don't see that there is a need for me to hear the

application for the leave against the strike out.

MR. MARSHALLECK: My Lady, we wouldn't advance that, we would

concentrate on the, sorry I'm confused. [??]

THE COURT: So was I quite frankly but.

MR. MARSHALLECK: Yes on the leave for the strike out yes.

THE COURT: Right because at the hearing of the applications

before me was a default judgment right which meant that any question as to the viability of the claim in terms of whether there was a proper cause of action or not to give rise to the striking out did not really arise. I would have first had to have set aside the

default judgment.

MR. MARSHALLECK: Yes.

THE COURT: Right I did not set aside the default judgment; I

refused the application to set aside the default judgment so as far as I am concerned the application to strike out really could not have had any viability

because there was no claim in that regard.

MR. MARSHALLECK:

But My Lady, there was an order made on the application dismissing it and that order is what we seek to appeal against. That puts the entire matter both aspects of it before the Court of Appeal instead of seeking to segregate it and put one limb and not the other. So that before the Court of Appeal would be the very same consideration.

THE COURT:

Does it make any difference that what was actually done was more a matter that the application to set aside not having been granted that the application to strike out really and truly was not considered. In truth and in fact I understand what the order says in truth and in fact.

..."

In addition to the quoted part of the record, I summarize the submissions by Mr. [27] Marshalleck for the application for leave to appeal the part of the order refusing to strike out the claim. He submitted that, because the items of defence of United Insurance based on s.19 of the Motor Vehicles Insurance (Third Party Risks) Act, Cap. 231, Laws of Belize, and on the Deed of Release and Compromise were so strong, leave should be granted to appeal the order dismissing the application for an order to strike out the claim so that the Court of Appeal would decide the application straight away, if it set aside the default judgment. He submitted further that, the application for an order setting aside the default judgment and the application for an order striking out the claim, "went hand in hand...it would be better if the appeal deal (sic) with both"; the applications were "rolled out"; "they were connected, the arguments were connected"; it would, "put an end to the case rather than going back to the court [the trial court]."

In her submission, learned counsel Ms. C. Pitts for Mr. Stanley, did not state [28] whether she opposed the application for leave, nor did she put forward a clear and firm proposition. Her submission is at pages 140 to 141 of the record as follows:

"THE COURT:

... Now Ms. Pitts where are you in relation to the application for leave against the order refusing the strike out? Understanding it as I do now in the context in which it was now explained.

MS. PITTS:

I think I now understand what he is...and my understanding is that this application to strike out because it was asked in this court that the matter should have been struck out and it was not and so the appeal Court is being asked to do that or to strike out and we are coming to this court to ask for leave...

THE COURT:

Is there any reason for you to say that, because there is already the substantive appeal against the refusal to set aside which they are entitled to as of right. Is there any reason to say that the process in relation to asking for leave against the refusal to strike out can in any way be separated from what is already before the Court of Appeal? Is there basis to say that?

MS. PITTS:

I have difficulty to really separate the two and I'm trying to think, the default judgment came about because certain things were not done and in the application to have that set aside my understanding is that this Court did not think it would be successful because to have that set aside it is a cumulative thing that you have to prove everything under Rule 13. And my understanding is that Your Ladyship did not see that these matters were there." [??]

[29] Despite the contrary view of the judge put to Mr. Marshalleck in the form of questions during the hearing of the application for leave to appeal, the judge accepted the submissions by counsel, allowed the application of United Insurance and granted

leave to appeal the part of the order made on 14 December 2015, to the extent that it dismissed the application that requested an order to strike out the claim.

The Notice of the second appeal, No. 10 of 2016.

- [30] United Insurance having obtained leave, filed for a second time, an undated notice of appeal on 10 March 2016. The appeal was, this time, restricted to the complaint that, the judge erred when she refused to strike out the claim. It was registered as Civil Appeal No. 10 of 2016. That is how United Insurance ended up with two appeals against the one court order comprised of several parts, made on 14 December 2015.
- [31] I would hold that, the learned judge erred in accepting the submissions by Mr. Marshalleck in support of the application for leave to appeal the part of the order of Griffith J., refusing to strike out the claim. The strong defence reason was not available, unless the default judgment had already been set aside. The procedural reasons given by counsel were not based on any Rules of Court or established practice of court; and counsel did not cite any precedent in support of the reasons.
- [32] However, this Court is no longer concerned with the question regarding granting leave to appeal the part of the order refusing to strike out the claim. The appeal against that part of the order is now before the Court for determination. The Court must decide it. No appeal lies against an order granting leave to appeal.
- [33] So, this Court now has before it "two appeals" against the one court order made by Griffith .J on 14 December 2014. The appeals are:(1) that, the learned judge erred in dismissing the application for an order that the default judgment entered on 8 May 2015, be set aside, and (2) that the learned judge erred in dismissing the application for an order that, the claim, No. 338 of 2014, be struck out.

#### Determination.

The appeal that, the judge erred in dismissing the application for an order to set aside the default judgment.

- [34] I would allow this appeal. My reasons follow.
- [35] There was no issue that, the default judgment was a regular judgment, entered by the authority of *R. 12.4* of the Supreme Court (Civil Procedure) Rules,2005. A trial court judge is authorised to set aside even a default judgment entered regularly. The law is in *R. 13.3(1)*. In the context, I set out *R. 13.3(1)* together with parts of rules *R. 13.1*, *R. 13.2*, *R. 13.4* and *R. 13.5* here:
  - 13.1 The Rules in this Part set out the procedure for setting aside or varying a default judgment entered under Part 12 (default judgments).
  - 13.2 (1) The court must set aside a judgment entered under Part 12 if the judgment was wrongly entered because –

...

- 13.3 (1) Where Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant
  - (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
  - (b) gives a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be; and
  - (c) has a real prospect of successfully defending the claim.
  - (2) Where this Rule gives the court power to set aside a judgment, the court may instead vary it.

13.4 (1) An application may be made by any person who is directly affected by the entry of judgment.

...

- 13.5 If judgment is set aside under rule 13.3, the general rule is that the order must be conditional upon the defendant filing and serving a defence by a specified date.
- [36] It was a common submission by counsel in the court below and in this Court that, all the three requirements in the three subrules (a), (b) and (c) of R. 13.3(1) must obtain for an applicant-defendant to succeed in obtaining an order setting aside a default judgment regularly entered. Ms. Pitts cited the judgment of this Court (Mottley P, Carey and Morrison JJA) in Belize Telecommunications Limited v Belize Telecom Limited Civil Appeal No. 13 of 2007 in support. Counsel for United Insurance accepted. That is the law.
- [37] Furthermore, it was common ground in the court below and in this Court that, United Insurance applied to the court below for an order setting aside the default judgment, "as soon as reasonably practicable after finding out that judgment had been entered", against it. So, *R.* 13.3(1)(a) was met by the applicant-defendant United Insurance.
- [38] United Insurance had only the remaining two requirements in *R.* 13.3(1)(b) and (c) to meet in the court below. However, when learned counsel Mr. J. Ysaguirre for United Insurance, commenced his submissions, the learned trial judge said that, the court would proceed on an assumption that, United Insurance had a good defence. At page 101 of the record of proceedings the judge stated:

"All right, so presuming, you say, you applied as soon as you were notified, no problem with that, assuming for argument sake that, you have a good defence to the matter, no problem with that...take me to the second ground which is that, you have a good reason for failing to file the acknowledgment or defence".

By that, the judge took it that the requirement in **R. 13.3(1)(c)**, that the defendant-applicant must have a real prospect of successfully defending the claim, was also met.

[39] So, at the direction of the trial judge, United Insurance had to satisfy the judge only that, the requirement in *R.* 13.3(1)(b) was also met, namely that, United Insurance furnished a good explanation for the failure to file an acknowledgment of service of the claim or a defence.

[40] What followed was not much of a submission by counsel. The judge put her views to counsel, and concluded that, counsel did not persuade her otherwise. Ms. Pitts for Mr. Stanley was not called upon to make her submission. No prejudice resulted to Mr. Stanley, however, because the judge ruled that, United Insurance failed to give a good explanation for failing to file an acknowledgment or a defence, she dismissed the application dated 27 November 2015 (which was the same as part of the application dated 3 November 2015) that requested an order setting aside the default judgment entered on 8 May 2015.

[41] Part of the discussion between the judge and counsel was the following:

"THE COURT: You have four grounds? There are three grounds in

the rule.

MR. YSAGUIRRE: I apologize, My Lady, what I am saying is that we

believe that we have satisfied the three grounds to set

aside the default judgment entered.

THE COURT: All right so presuming, you say, you applied as soon

as you were notified, no problem with that, assuming for the sake of argument, that you have a good defense to the matter no problem with that. For

defense to the matter no problem with that.

argument sake - -

THE COURT: Take me to the second ground which is that you have

a good reason for failing to file the acknowledgment

or the defense.

MR. YSAGUIRRE: My Lady, the failure to file the acknowledgment of

service and the defense stems from the fact that - if I would take your Ladyship through the chronology of

the matter we would note that on the 6th day of

October, 2014. This is the chronology given by My

Learned friend in her submission.

THE COURT: We don't we start with the chronology that is relevant

which is when the action was actually filed [??]

MR. YSAGUIRRE: The action was filed on the 4<sup>th</sup> of July, 2014 My Lady.

. . .

THE COURT: So fourteen days within which you have to enter an

acknowledgment of service takes you to what?

MR. YSAGUIRRE: That would be about the twentieth.

THE COURT: Even if you say a couple days ahead of that, second

or third, fourth, fifth of August whats going on then in relation to the failure to have filed an acknowledgement, whats the good reason in relation

to that?

MR. YSAGUIRRE: My Lady, the failure to file is from the fact that the

parties were in negotiation in dealing with the matter.

THE COURT: What does that have to do with filing an

acknowledgement of service in relation to a claim that

you've received? You've read around in relation to

cases that deal with this particular application to satisfy?

MR. YSAGUIRRE: Yes My Lady.

THE COURT: You have seen the kinds of examples that suffice as

good reason?

MR. YSAGUIRRE: Yes My Lady.

THE COURT: You would know that being in negotiation for

settlement is not a good reason because that has absolutely nothing to do with your abiding by the rules and taking whatever precautions you need to do. So whats the good reason that a company would receive a claim and not file an acknowledgement of service, you can't even reach to the defense because you

didn't file an acknowledgement of service.

MR. YSAGUIRRE: My Lady it was on the request of counsel representing

the claimant that the parties at the time would have

tried to settle the matter out of court.

THE COURT: Does settlement talks out of court affect the progress

of the matter in court?

MR. YSAGUIRRE: No, My Lady.

THE COURT: All right.

MR. YSAGUIRRE: But it does not affect the progress in court but what I

would like to impress upon Your Ladyship is that it is

not until the 6<sup>th</sup> of October, 2014.

THE COURT: Yes, when the time for a defense had long gone.

MR. YSAGUIRRE: It had long passed My Lady, but that is the time when

the first defendant in the matter had finally been

served as well.

THE COURT: What that have to do with you?

MR. YSAGUIRRE: I am saying between all parties to the claim.

THE COURT:

You're speaking for the second defendant it don't have anything to do with you, your timeline don't depend on when the first defendant is served. I am going to tell you, I decided not to, but you are fighting an uphill battle, steep, no traction, let me tell you why: do you know that as far as the authorities go in the first instant there is no room in relation to the fact that the three grounds of the set aside application are cumulative so it's not you can satisfy two and be shaky on one and still get by the cumulative right. That is decided on many occasions there is no room, there is no spoke for that I mean outside of that every single one and do you know that the authorities also indicate that even negligence on the part of counsel cannot excuse because a defendant is said to have the responsibility to go and see about his own matter so if a defendant says well I gave the claim to my attorney at law and it is my - it is my attorney at law who never did anything and the attorney comes to court and says yes, yes, yes My lady, I did receive the claim, it was my fault it was simply inadvertence on my part, it doesn't excuse it, it has been decided. Cases are held on more than one occasions with counsel in this same position and worse of having

even to change counsel because one counsel was so poor in responding to the claim and downright negligent in response and that did not excuse it, it's a harsh provision, it's very harsh. The only thing that might have given me pause but in your affidavit you have answered it to your detriment but you have to be honest with the court, is the fact where I have the attorney for the claimant who filed an affidavit of service saying that I served the claim on the defendant and this is especially in relation to the second defendant and at no point in time will I ever say if a defendant comes to court and says I wasn't served and it is the attorney who filed the affidavit of service I am going to take the word of the defendant and that's for obvious reasons but in your application right you basically acknowledged that you receive the claim and your reason was that, well, you don't answer it from the time the claim was filed and served vou answered it from later down when the time was already passed o.k. but you in no way case doubt on the fact that the claim was received and the timeline is,... I don't have any room to work with, right so this was not an application that I saw any rule to exercise; but, I don't have a discretion.

MR. YSAGUIRRE:

Yes, Ma'am.

THE COURT:

Because you have not satisfied me in relation to having that good reason for failing to file. The fact that you were under negotiation, the fact that you were engaged in settlement talks, that does not excuse you doing what you're supposed to do and

allowing your settlement process to work outside the court, right. There was a failure to abide by the rules of the court and that is to the detriment of the second defendant all right.

MR. YSAGUIRRE: Guided, My Lady.

THE COURT: O.k., so that application must fail which leaves me

with the assessment ..."

[42] In the end the learned judge decided as mentioned above that, the reqirement in R. 13.3 (1) (b) was not met, United Insurance did not give a good explanation for failure to file an acknowledgment of service or a defence; all the three requirements were not met. The judge dismissed the application for an order to set aside the default judgment.

The proceedings in the Court of Appeal.

[43] In this Court, Mr. Marshalleck repeated the common submission of the parties that, the law was that, all the three requirements in subrules (a), (b) and (c) of R. 13.3(1) must be satisfied in an application for an order setting aside a default judgment entered regularly. At page 5 of the transcript he stated: "... the trial judge and everybody relied on section (sic) 13.3 of the Supreme Court Rules which gives the court discretion to set aside default judgment where three conditions are satisfied". Then at page 10 he stated: "... all three conditions having been satisfied, the default judgment ought properly to have been set aside..."

**R.13.3(1)** (a) – making the application as soon as reasonably practicable.

[44] After noting that it had been conceded on behalf of Mr. Stanley that, United Insurance applied to the court as soon as reasonably practicable for an order to set aside the default judgment, Mr. Marshalleck proceeded to submit that, the requirements in subrules (b) and (c) of R.13.3 (1) were also met.

R.13.3(1) (c)- real prospect of successfully defending the claim.

- [45] Regarding the requirement in R.13.3(1) (c) that, there was a real prospect of successfully defending the claim, counsel submitted that, there were two very strong defences which provided United Insurance with a real prospect of successfully defending the claim. The first strong defence was that, a third party such as Mr. Stanley, had no claim against the insurer, such as United Insurance, except under s. 19 of the Motor Vehicles Insurance (Third Party Risks) Act. I shall refer to it as MVI (Third Party Risks) Act. Under the section, a third party had no direct cause of action against the insurer. In the claim in which the order appealed was made, the insured was Belize Water Service Limited; the claim should have been made and judgment obtained against Belize Water Services Limited in the first place; it was not even made a party to the claim, and no judgment was obtained against it, counsel argued.
- [46] Counsel submitted further that, in making a claim under *s. 19* against an insurer, there were, "three steps" to be complied with in order for the court to entertain the claim. He stated them as follows: (1) a notice of the claim must be served on the insurer and a copy must be filed at the court registry; (2) the Registrar must issue a certificate; and (3) a judgment must have been obtained against the insured. Mr. Stanley's claim did not comply with the three steps so, the claim was not a good claim, Mr. Marshalleck submitted.
- [47] The second strong defence, counsel submitted, was that, United Insurance and Mr. Stanley reached a settlement out of court, and executed a, "Deed of Release and Compromise", under which United Insurance paid \$25,444.00 to Mr. Stanley in full settlement of the claim, and Mr. Stanley promised to discontinue the claim. All that was stated in an affidavit. No defence was filed. The two defences were intended defences.
- [48] Ms. Pitts opposed the interpretation of s. 19 of the MVI (Third Party Risks) Act put forward by Mr. Marshalleck. Her reason was rather philosophical, and not based on principles of interpretation of statute or precedent. She submitted that, if a court claim were to be brought and a judgment be obtained first against the insured, should the proceedings take long to conclude, the third party would suffer greatly, especially if he

needed medical attention as Mr. Stanley needed. Ms. Pitts said nothing regarding the many case precedents on the point of law.

- [49] The response by Ms. Pitts to the second defence was that, the deed of release and compromise was obtained by United Insurance by undue influence. Counsel outlined what she said were the facts of the undue influence. She submitted that the law was that, an injured party such as Mr. Stanley would not be stopped from resorting to a court of law by any purported release given by him upon receipt of benefit so, the defendant had no real prospect of successfully defending the claim on that ground. She relied on s. 23(3) of the MVI (Third Party Risks) Act.
- [50] In our law, every court claim must be founded on a cause of action. On the face of it, Mr. Stanley's claim was founded on the tort of negligence in respect to the part of Mr. Bermudez, and on a third party insurance policy in respect to the liability of United Insurance, the insurer. The claim founded on the third party insurance policy is a creation of statute, the Motor Vehicle Insurance (Third Party Risks) Act Cap. 231 Laws of Belize. I shall continue to refer to the Act as MVI (Third Party Risks) Act. The duty to insure a user of a motor vehicle on a public road and a person who authorizes a user, against the risk of death or bodily injury to any person ( a third party) or damage to property, caused by or arising out of the use of the vehicle is created by SS.3 and 4 of the Act.
- [51] Mr. Stanley did not state that his claim was made under the Act, but his averment at paragraph 4 of the claim sufficiently identified the foundation, the cause of action. He stated that, the motorcycle that Mr. Bermudez was riding was his property, and was insured with the second defendant (United Insurance Company Limited). For the purposes of "these appeals," it does not matter whether Mr. Bermudez or Belize Water Services Limited owned the motorcycle.
- [52] The liability to indemnify a third party is created by **s.19 of the Act**. I accept the submission by Mr. Marshalleck. Without **s. 19 of the Act**, Mr. Stanley's claim would have no cause of action. Legislations of other common law jurisdictions similar to **S 19**

of the Belize Act have been interpreted that, they did not create direct liability of the insurer to the third party.

[53] In Bradley v Eagle Star Insurance Co. Ltd. [1989] AC 957 (England and Wales), the appellant, an intending claimant was diagnosed to be suffering from byssinosis, a respiratory disease caused by inhaling cotton dust at the employer's mill. The employer company was wound up and dissolved before the appellant could bring a claim against it. The appellant then intended to bring a claim against the respondent, an insurer of the employer against the risk of injury and illness caused to employees (third parties) under an Act, the Third Parties (Rights against Insurers) Act, 1930 (UK). The appellant applied to the Registrar of the trial court and obtained a pre-action discovery order requiring the respondent to disclose the terms of the insurance policy with the defunct employer. On appeal, the order was set aside on the ground that, the employee did not have a direct claim against the insurer, and that the employer having been dissolved, there was no way to bring a claim against the insurer, the respondent. On appeal by the intending claimant, the Court of Appeal dismissed the appeal. On further appeal to the House of Lords, their Lordships, by a majority of four to one, dismissed the appeal.

[54] In the judgment of Lord Brandon to which the majority agreed, he stated at page 966 this:

"In my opinion the reasoning of Lord Denning M.R. and Salmon L.J. contained in the passages from their respective judgments in the Post Office case set out above, on the basis of which they concluded that, under a policy of insurance against liability to third parties, the insured person cannot sue for an indemnity from the insurers unless and until the existence and amount of his liability to a third party has been established by action, arbitration or agreement, is unassailably correct. I would, therefore, hold that the Post Office case was rightly decided, and that the principle laid down in it is applicable to the present case."

[55] In the judgment, their Lordships approved the judgment of the Court of Appeal in **Post Office v Norwich Union Fire Insurance Society Limited [1967] 2 Q.B. 363.** In that case, Lord Denning M.R. stated at pages 373 and 374 of the judgment, the following:

"Under that section the injured person steps into the shoes of the wrongdoer. There are transferred to him the wrongdoer's rights against the insurers under the contract. What are those rights? When do they arise? So far as the 'liability' of the insured is concerned, there is no doubt that his liability to the injured persons arises at the time of the accident, when negligence and damage coincide. But the 'rights' of the insured person against the insurers do not arise at that time. The policy says that 'the company will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of or damage to property. It seems to me that, the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement. Until that is done, the right to an indemnity does not arise. I agree with the statement by Devlin J. in in West Wake Price & Co. v. Ching [1957] 1 W.L.R 45, 49..."

- [56] The above proposed defence based on *s.19 of MVI (Third Party Risks) Act* is a very strong one. Without more, I am able to say that, United Insurance showed that, it had a real prospect of successfully defending the claim of Mr. Stanley.
- [57] For the standard of assessing a real prospect of success, see *ED & F Man Liquid Products LTD. v Patel and Anr [2003] EWCA Civ. 472,* in which it was stated that, the proposed defence, "carried some degree of conviction," and was accepted as a defence on which the defendant could rely in showing that it had a real prospect of

successfully defending the claim. Also see **Swain v Hill and Anr [2001] All ER 91**, a summary judgment case which shares the "real prospect of success" expression. In the case, Lord Woolf M.R. stated:

"The words 'no real prospect of succeeding', do not need any amplifications, they speak for themselves."

[58] I conclude that, the requirement in *sub-rule (c) of R. 13. 3 (1)*, one of the three requirements for setting aside a default judgment was also met. I need not consider the proposed defence that, the parties had reached a settlement agreement and executed a deed, I shall do so only briefly.

[59] Whereas Mr. Stanley has, in an affidavit, deposed that, the deed of release was obtained by undue influence, the strength of the deed which was exhibited, was not diminished yet at that point. There was no credible contrary evidence. The evidence thus far showed that, United Insurance had a real prospect of successfully defending Mr. Stanley's claim by relying on the "Deed of Release and Compromise" as well. In my view, United Insurance has also met the condition in *subrule (c) of Rule 13.3 (1)* for setting aside the default judgment, by putting forward the proposed defence that, the parties had executed a deed settling the claim out of court.

R.13.3(1) (b)- a good explanation for the failure to file acknowledgement or defence

**[60]** The requirement in *subrule* (b), that the defendant had a good explanation for the failure to file an acknowledgment of service of the claim or a defence was not argued much in the court below. Counsel commenced by stating, "My Lady, the failure to file is from the fact that, the parties were in negotiation in dealing with the matter." He added that it was at the request of the attorneys for Mr. Stanley. The learned judge interjected. She said, that had nothing to do with filing an acknowledgment of service of the claim, and that, a long time had passed after 14 days before Mr. Stanley requested a default judgment. She stated that, there had been many cases in which it had been decided that, negotiation was not a good reason for failing to file an acknowledgment or defence. The judge concluded, "...you are fighting an uphill battle, steep, no traction, let me tell

you why: do you know that as far as authorities go, in the first instance there is no room in relation to the fact the three grounds of set aside application are cumulative..."

[61] In this Court, regarding the requirement in subrule (b), Mr. Marshalleck submitted that, the mere production of the deed of release was a good enough explanation for failing to file an acknowledgment of service of the claim or a defence. He cited, the Attorney General of Trinidad and Tobago v Universal Projects Limited [2011] UKPC 37, and also Slymord Trade Incorporated v Inteco BVIHC 2013/0003 in support of his submission. He stated that: "the test for a good explanation was: whether or not an account of what has happened since the proceedings were served satisfied the court that the reason for the failure to file an acknowledgment of service of claim or a defence was something other than mere indifference to the question whether or not the claimant obtained his judgment." Counsel argued that, there was no indifference by United Insurance, because it relied on the deed of release so, United Insurance's explanation was a good one.

[62] Ms. Pitts for Mr. Stanley, made a long submission regarding the requirement in subrule (b) of R. 13. 3 (1). Her submission was that, the evidence showed that, United Insurance did not have a good explanation for failing to file an acknowledgment of service within time. Counsel gave several reasons. 1. She said that, after the defendants were served on 21 July 2014, a long time passed before the default judgment was entered on 8 May 2015, the defendants had a long time to comply with R 9.3 (1). 2. Even if the defendant thought that the claim should not have been brought, they had to comply with the Rules, "they abused the Rules of Court." 3. There was no negotiation for settlement out of court, and negotiation was not a good explanation for failure to file acknowledgment. 4. The defendants were indifferent whether default judgment was entered. 5. The deed of release was obtained by undue influence, and signed long after the time for filing acknowledgment of service of the claim had passed.

[63] In my view, a long time that may have passed after service of the claim before the default judgment was entered was of no consequence until the default judgment was entered. However, it was possible that it could be evidence of lack of good

explanation. In this case, however, it has to be considered against the deed of release and compromise. A defendant is authorized by *R. 9. 3(3)* to file an acknowledgment of service of a claim at any time even when the time limitation has expired, provided it is done before a request for a default judgment has been made. There may be risk in delaying, but there is no consequence so long as the delay ends before a request for judgment. Further, in my view, the submission about abuse of the Rules is not warranted.

[64] In Attorney General of Trinidad and Tobago v Universal Projects Limited [2011] UKPC 37, their Lordships of the Privy Council pointed out at page 8 that, if the failure to serve a defence in that case connoted real or substantial fault on the part of the defendant, then the defendant did not have a good explanation for the failure. They pointed out further that, oversight could be excusable in certain circumstances (and I might add, therefore could be a good explanation for failure to comply with the unless order). They pointed out furthermore that, inexcusable oversight could never be a good explanation, and similarly administrative inefficiency could not.

[65] Both Counsel invited this Court to apply what they describe as "a test" for good explanation or lack of it, suggested in *Slymord Trade Incorporated v Inteco BVIHC* 2013/000. In the case, a good explanation was said to be: "an account of what has happened since the proceedings were served which satisfies the court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment."

[66] I consider it unwise to formulate a fixed definition or "a test" for a good explanation for failure to file an acknowledgment of service of a claim or a defence. Good explanations will be numerous and as diverse as human conducts and circumstances are. They will not all have the same characteristics as a group of scientific matters do. A fixed test, could erroneously be regarded as an equivalent of the scientific litmus test, and in that event, it may not help in deciding fairly a good explanation in some circumstances. For example, a good explanation may be of a high or merely satisfactory quality, and both will invite a sense of fairness in the particular

circumstances. It must be remembered that, an expression in common words such as, "a good explanation for the failure to file an acknowledgement of service or a defence," should not be unnecessarily obfuscated; it does not need amplification.

[67] It is my view that, the content of the deed of release and compromise signed on 5 November 2014, before the default judgment was entered, provided a good reason and explanation for United Insurance and Mr. Bermudez failing to file an acknowledgment of service of the claim or a defence. In the deed, Mr. Stanley promised (undertook) to discontinue the claim. He did not do so. In the minds of the attorneys for United Insurance, the claim was settled out of court and would undoubtedly be discontinued by Mr. Stanley. Their honest belief induced by the promise of Mr. Stanley, that Mr. Stanley would proceed to discontinue the claim was a good explanation for the failure to file an acknowledgment of service of the claim or a defence. The subsequent entering of a default judgment by Mr. Stanley without re-opening discussion with United Insurance smacks of dishonesty. It is my respectful view that, the learned judge erred in that she considered the negotiation out of court other than the promise to discontinue the claim itself as the explanation for the failure.

[68] All the three requirements in *R.13.3 (1)* have been shown to obtain. I would allow the appeal against the order made by Griffith J, to the extent that, she dismissed the application dated 27 November 2015, and thereby refused to set aside the default judgment entered on 8 May 2015 against United Insurance and Mr. Bermudez. Accordingly, I would set aside the default judgment, on the condition that, the appellants file a defence or defences within 7(seven) days of the date on which this judgment is handed down.

[69] Despite the fact that, the law that all the requirements in subrules (a), (b) and (c) of R. 13.3(1) must be met if a default judgment is to be set aside was never an issue in the court below, the trial judge in her ruling stated that, it was the reason for her granting leave to appeal the order refusing to strike out the claim. At page 84 of the transcript she stated: "The grounds on which the appeal against the strike out is sought, in the court's view, supports a finding that there is a question of sufficient importance to be

determined by the Court of Appeal, namely, the question of whether or not the need to satisfy all three grounds for an application to set aside a default judgment; whether there is any room and the extent to which they must be proven when faced with what is said by the defendant to be a claim that was wrong on its face and there being a question of a very strong defence..."

[70] The point raised *mero motu* by the judge in the above utterance was not even relevant to the question whether leave could properly be granted to appeal the order refusing to strike out the claim. Moreover, none of the parties challenged in the court below the law as it was, and none challenged it in this Court. The law in Belize has been settled in the *Belize Telecommunications case* cited above. It would be improper for this Court to subject it to reconsideration without it having been raised directly in a ground of appeal by a party to an appeal, or in a case stated by a trial judge under *Part 61 of the Supreme Court (Civil Procedure) Rules, 2005.* I must regard the interpretation of *Rule 13.3(1) (a), (b) and (c)* made in the *Belize Telecommunications case*, as *de lege lata*, until it is properly changed, if ever.

The appeal against the dismissal of the application for an order to strike out the claim.

[71] I have decided that, I would allow the first appeal against the order dismissing the application for an order to set aside the default judgment. As the result, I have proposed an order setting aside the default judgment entered on 8 may 2015. The order would be conditional upon the defendants filing a defence or defences. That was required by *R.13.5*. It would follow that, the claim would be restored. From that point on, the Supreme Court (Civil Procedure) Rules would begin to apply again. The proceedings would be returned to case management conference stage, and the operation of the Rules.

[72] The overall consequence would be that, the second appeal against the order dismissing the application for an order to strike out the claim would became redundant. Upon filing their defences the appellants-defendants would have opportunity to make a fresh application for an order to strike out the claim. So, following from the order that

would allow the first appeal and set aside the default judgment, I would make an order dismissing the second appeal.

- [73] As a matter of deference to counsel for their submissions, I shall consider their submissions in the appeal against the order dismissing the application for an order to strike out the claim.
- [74] The law that guides the exercise of a trial judge's discretion to strike out a statement of case (a claim or defence) of a party is *R. 26.3 (1)*. It states:
  - 26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
  - (a) that there has been a failure to comply with a Rule or practice direction or with an order or direction given by the court in the proceedings;
  - (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
  - (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
  - (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.
- [75] Mr. Marshalleck did not cite *R. 26.3(1)(c)* in his submission but, he seemed to have grounded his submission on the principle in the provision of the rule, except that in his written submission at paragraph 22 and oral submission, he used the phrase, "no prospect of success", stated in *R. 15.2 (a)* applicable to summary judgment, instead of the expression, "no reasonable grounds for bringing the claim", stated in *R. 26.3(1)(c)*, the applicable rule. Ms. Pitts did not make any direct submission based on *R. 26.3(1)(c)*. She may have assumed that her submission urging that, an order setting

aside the default judgment be refused based on **R. 13.3(1)(c)** would be applied to the application for an order that the claim be struck out.

- [76] It must be borne in mind that, the heading of *Part 26 of the Rules* is: "CASE MANAGEMENT THE COURT'S POWERS". The entire rules in *Part 26*, that is, *R. 26.1* to *R. 26.9*, are rules that apply when a trial judge, sitting in the Supreme Court, exercises his case management jurisdiction. The power of the judge to strike out a statement of case, a claim in this matter, provided for in *R. 26.3(1)(c)* is a case management power, it must be applied bearing in mind the objectives of case management in *Part 25 of the Rules*, and case management procedures in *Part 27 of the Rules*.
- [77] In this appeal, the application dated 3 November 2015, requested, among others, an order that, "the claim be struck out". So, absent any valid reason preventing the trial judge, she was required to apply *R. 26.3 (1) (c)* to the claim of Mr. Stanley, and decide whether *the claim disclosed no reasonable ground for bringing it*. If on the facts averred the judge came to the conclusion that, no reasonable ground for bringing the claim was disclosed, she would order that, the claim be struck out, otherwise, she would dismiss the application.
- [78] But the learned judge said, albeit implicitly, that there was a valid reason preventing her from hearing the part of the application that asked for an order to strike out the claim. Because of that, the judge did not, on 18 November 2015, hear the merit of the submissions for and against striking out the claim. Both counsel agreed that was what happened. The judge did not apply *R.* 26.3(1) (c) to the claim. She simply mentioned that, that part of the application was, "not viable". She did not, at that moment, explain what she meant by, "not viable".
- [79] Despite her view, or may be because of her view, the judge, in the end, made an order in respect to that part of the application as well. She dismissed it. She stated in her ruling: "so, the orders of today are that, the application to strike out is dismissed, it is not viable; the application to set aside the default judgment is dismissed". Then came the appeal against the court order.

- [80] As a first step in deciding the appeal point, this Court must identify and interpret the reason described as, "not viable", on which the judge based her decision to dismiss the request to strike out the claim. The Court will then be able to examine it and decide whether the judge erred in that reason on a principle of law, or on a question of fact, to the extent permitted on appeal.
- **[81]** Regrettably, in arguing the appeal in this Court, both counsel did not focus on the reason on which the judge based her decision, and so they did not focus their submissions on the reason. This is in spite of the complaint by the appellants that the judge erred.
- [82] This is how I have identified and interpreted the reason which the judge acted on. In the last part of the proceedings in the court below when Mr. Marshalleck presented the application for leave to appeal the part of the order which dismissed the application that sought a strike out order, the judge's view expressed in the words, "not viable", crystalized. She explained that, because she had refused the application for an order setting aside the default judgment, the application for an order to strike out the claim, "could not have had any viability because there was no claim in that regard". This then is the judge's full reason on which she made the order refusing to strike out the claim. It was not a reason that had any bearing to the requirement that, the claim should disclose a reasonable ground for bringing the claim. It was not a reason obtained from *R. 26.3(1)(c)*.

The submissions on appeal regarding the order refusing to strike out the claim.

[83] Mr. Marshalleck's main submission on the ground of appeal was that, the claim should be struck out because, "the claim against the appellant insurer had no prospect of success". I took the phrase, "no prospect of success", to mean that, Mr. Stanley's claim, "disclosed no reasonable grounds for bringing the claim," the expression used in R. 26.3 (1) (c). Mr. Marshalleck then repeated his submissions regarding strong defences for which an order to set aside the default judgment could be made. Briefly, counsel explained that, a third party such as Mr. Stanley, had no claim against an insurer, such as United Insurance, except under s. 19 of the MVI (Third Party Risks)

Act. He stated that, under the section, a third party had no direct cause of action against the insurer. In the claim in which the order appealed was made, the insured was Belize Water Service Limited who the claim should have been made against in the first place, he was not even made a party to the claim, counsel argued.

- **[84]** The other submission by counsel was that, Mr. Stanley's claim also, "had no prospect of success" (meaning did not disclose reasonable ground for bringing the claim), because United Insurance and Mr. Stanley reached a settlement out of court agreement, and executed a, "Deed of Release and Compromise" under which United Insurance paid \$25,444.00 to Mr. Stanley in full settlement of the claim, and Mr. Stanley promised to discontinue the claim.
- [85] Ms. Pitts opposed the interpretation of s. 19 of the MVI (Third Party Risks) Act put forward by Mr. Marshalleck for the same reason she gave in opposing the application for an order to set aside the default judgment.
- [86] The response by Ms. Pitts to the second submission by Mr. Marshalleck was also the same. Her submission was that, the deed of release was obtained by United Insurance by undue influence. She submitted that the law was that, an injured party such as Mr. Stanley, would not be stopped from resorting to a court of law by any purported release given by him upon receipt of benefit so, Mr. Stanley's claim should not be struck out. She relied on s. 23(3) of the MVI (Third Party Risks) Act.

The decision on appeal against the order refusing to strike out the claim.

[87] It must always be borne in mind that, the basis of an appeal is that, a trial judge erred. In the court below a preliminary point arose which the judge considered and decided that because of it, she was prevented from hearing the application for an order to strike out the claim on the merit. This is what she meant by describing the application for the strike out order as not viable. In this Court the point must be considered ahead of considering the points of law on which counsel made their submissions, in order to ensure that, when the application dated 3 November 2015, proceeded on 18 November 2015, to a hearing by the judge, an error had not been made, and the application

proceedings were not pointless and made in vain, and any order dismissing the application for an order to strike out the claim was not made in error.

[88] When the application in which, among others, the request for an order to strike out claim No, 338 of 2014 was presented, the trial judge said that, "the application, for a strike out order, was not viable". Later on she explained that, because she had dismissed the application for an order setting aside the default judgment, the application for an order to strike out the claim, "could not have had any viability because there was no claim in that regard".

[89] If the trial judge did not err in her statement that, the application was "not viable", because there was no claim at that point, then it was indeed pointless for the judge to proceed with the application and hear the submissions by both counsel on *s. 19 of the MVI (Third Party Risks) Act*, and on the deed of release, in order to decide whether or not there was reasonable ground for bringing the claim. The application would have been a futile proceeding because there would have been no claim to strike out. The appeal against the dismissal of the application requesting a strike out order would have been misconceived and made in vain. The appeal would be dismissed for the reasons that, the application should not have been made and should not have been decided. But the appellants would lose nothing because I have allowed the first appeal and ordered the default judgment set aside on the condition that the appellants-defendants file defences. They would have the opportunity to file again an application for an order to strike out the claim, if they wish.

[90] If, on the other hand, the trial judge erred in her statement that, the application was not viable because there was no claim, then in my respectful view, the appeal would be allowed without deciding the question whether the claim disclosed a reasonable ground for bringing the claim. The simple reason for that would be that, the trial judge, as a matter of fact, did not consider the law in *R. 26.3(1)* particularly in *(c)*, of the Supreme Court (Civil Procedure) Rules, 2005, and decided the application on a consideration outside the law applicable. However, the order to be made would not be that the claim be struck out. I have already ordered that, the default judgment entered

on 8 May 2015 be set aside. The appellants- defendants could, if they wished, make a fresh application for an order to strike out the claim.

- **[91]** So, whether the appeal be allowed or dismissed, the order to be made about the fate of the application to strike out the claim would be the same, namely that, the application may be made again should the appellants-defendants wish, because the claim has been restored to the case management conference stage.
- [92] It is my view that, the learned judge did not err on a point of law or of fact in holding that, because she had refused to set aside the default judgment, "there was no claim in that regard". She obviously meant no claim to strike out. A default judgment is a final judgment see *Meyer v Baynes* [2019] *UKPC* 3. That much was common ground of both counsel. Whether one applies "the order test" or the preferred "application test", a default judgment disposes of the claim, ends the claim, subject to the right of the defendant to apply for an order setting it aside, and thereafter if need be, the right to appeal. For the application test, see *Salter Rex & Co. v Gosh* [1971] 2 *Q.B. 597 CA*, the judgment of Lord Denning M.R. After the default judgment was entered on 8 May 2015, the claim ended, there was nothing to strike out. There was no claim to apply *R. 26.3(1) (c)* to. The judge was right. She was also right in dismissing the application which was misconceived, "not viable," to use her expression.
- [93] An interim judgment (formerly an interlocutory judgment) decides a particular issue in the course of the proceedings, and does not end the claim. Generally an appeal against an interim order is by leave of the trial court, and if the trial court has refused leave, an application may be made to this Court, an appellate court. This is the reason for the application for leave dated 4 February 2016, made by United Insurance to Griffith J. She granted leave to appeal.
- [94] The operation of the Rules also supports the view of Griffith J. that, there was no claim to strike out. I mentioned this earlier. *R. 26.3(1) (c)* is a case management rule; it sets out one of the powers that a trial judge *may exercise in the course of case management*. The heading to *Part 26 of the Rules* is: 'CASE MANAGEMENT THE COURT'S POWERS". Unless the default judgment entered on 8 May 2015, had been

set aside, there was no claim anymore to strike out; no case for Griffith J. to manage; no occasion on which the judge would exercise the case management power in **R. 26.3(1)(c)** to strike out a claim.

- [95] The submission by Mr. Marshalleck put the cart before the horse. United Insurance had to obtain first, an order setting aside the default judgment in order to revive the claim and return it to a pending claim, and then the claim could be challenged at case management conference stage, on the ground that it did not disclose any reasonable ground for bringing it.
- [96] R. 13.5 requires that, in the event that a trial judge orders that a default judgment be set aside, "the order must be conditional upon the defendant filing and serving a defence by a specified date". Of course, thereafter, the provisions of the Rules apply. It would therefore be after the defence had been filed, that United Insurance would file its application for an order striking out the claim.
- [97] The first rule of court that would apply after a defence has been filed would be *R*. 11.3(1) regarding the making of an application to the trial court in a pending matter. The rule states:
  - 11.3(1) So far as is practicable, all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review.
- [98] Then *Parts 25, 26 and 27* concerning case management would apply. *R. 27.3* presuppose that, a defence has been filed before an application such as the application for an order to strike out a claim is listed for hearing at a case management conference. The rule sates:
  - 27.3(1) The general rule is that the court office must fix a case management conference *immediately upon the filing of a defence to a claim*, other than a fixed date claim.

[99] I would dismiss appeal No, 10 of 2016 for the reason that, Griffith J did not err when she decided that, there was no claim for the trial court to strike out while the default judgment entered on 8 May 2015 remained in place; and ordered the application dismissed.

## The Orders on appeal.

[100] The orders that I propose to make are the following:

- Appeal No. 2 of 2016 is allowed, the default judgment entered on 8 May 2015, is set aside on condition that the defendants file a defence or defences within 7 (seven) days of the date on which this judgment is handed down.
- 2. If the appellants-defendants fail to file a defence or defences within seven days, the default judgment will be revived automatically.
- The appellants-defendants may make an application to strike out the claim again after they will have filed a defence or defences, should they wish.
- 4. Appeal No. 10 of 2016 is dismissed.
- 5. Because the appeal is partly allowed and partly dismissed, parties shall bear own costs of the appeal, and shall bear own costs of the applications in the court below; the orders for costs are provisional, to become final in 7 (seven) days, unless an application is made for a different order.

AWICH JA			

# **HAFIZ-BERTRAM JA**

**[101]** I have read in draft, the judgment of Awich JA, and I concur in the reasons for judgment given and the orders proposed by him in the judgment. In respect of costs, I agree with the President on the expansion of the costs order as stated in his non-substantive judgment.

HAFIZ-BERTRAM JA	