[2023] JMSC Civ 44

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV03638

BETWEEN	**SONIA BERTRAM – LINTON (REPRESENTATIVE OF THE ESTATE OF THOMAS LINTON)**	**CLAIMANT/RESPONDENT**
AND	**UPIE TAFFE-SMITH**	**APPLICANT/1ST DEFENDANT**
AND	**DWAYNE FRECKLETON**	**2ND DEFENDANT**

IN CHAMBERS

Elizabeth Salmon-James for the Claimant/Respondent

Althea Wilkins instructed by Dunbar and Co for the Applicant

Heard: February 9th, 2023 and March 17th, 2023

Application to set aside Default Judgment – Real Prospect of Success – Importance of Prompt Application and Good Explanation – Question of prejudice against Claimant who is now deceased – Overriding objectives

HUTCHINSON SHELLY, J

INTRODUCTION

[1] This is a Notice of Application for court orders which was filed by the 1st Defendant/Applicant on the 21st day of March 2022 seeking an order to set aside

Default Judgment which was entered on the 19th of January 2021. In her application, the 1st Defendant seeks the following orders:

> 1. *The Default Judgment against the 1st Defendant be set aside;*
> 2. *That the 1st Defendant be permitted to let stand her filed Acknowledgement of Service of Claim Form;*
> 3. *That the 1st Defendant be permitted to let stand her filed Defence;*
> 4. *That this matter be consolidated with Claim No. SU 2020 CV 03062 — Ryan Young v Upie Taffe-Smith & Dwayne Freckleton.*
> 5. *That the 1st Defendant be granted any further and other relief as this Honourable Court deems just.*

The grounds on which the Applicant is seeking the following orders are as follows: -

> 1. *Rule 13.3 of the Civil Procedure Rules allow for a default judgment to be set aside once the Defendant has a real prospect of successfully defending the claim.*
> 2. *Rule 26.1 (c) permits the court to extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;*
> 3. *That the 1st Defendant received the Claim Form and Particulars of Claim sometime in or about December, 2020;*
> 4. *That the 1st Defendant took the said documents to her insurer Advantage General Insurance Company Limited as soon as was possible thereafter;*
> 5. *That the 1st Defendant was advised by a representative from Advantage General Insurance Company Limited that an attorney would be instructed on her behalf.*
> 6. *That the said Advantage General Insurance Company Limited instructed Attorneys-At-Law, Dunbar & Co., to act for and on behalf of the 1st Defendant;*
> 7. *The Defence was not entered in time because the Claim Form and Particulars of Claim had not been sent to the Attorneys-at-Law and the Attorneys-at-Law were trying to obtain copies from both the insurers and the Supreme Court but to no avail.*

8. *The Attorneys-at-Law finally obtained copies of the Claim Form and Particulars of Claim from the Claimant's Attorney-at-Law, Elizabeth Salmon and then they were able to prepare the relevant documents to enter the 1st Defendant's Defence to the claim herein. This process took longer than the 42 days as prescribed by the courts.*

9. *The 1st Defendant has a Defence that has a real prospect of success in that it was the negligence of Ryan Young, the owner and driver of the vehicle that drove through the intersection while the 2nd Defendant was lawfully making his right turn who caused the accident. The 2nd Defendant was proceeding along Mandela Highway heading towards Portmore, on reaching the intersection of Mandela Highway and Portmore stoplight, he proceeded to go into the right filter lane. The right filter green light was showing and the 2nd Defendant lawfully proceeded on the right turn green filter light. Suddenly and without warning a vehicle, in disobedience of the stoplight, collided into the left side of the 1st Defendant's motor vehicle, and the impact of the collision caused the 1st Defendant's vehicle to impact another vehicle that was at the stoplight.*

10. *This application was made as soon as practicable after finding out that default judgment had been entered against the 1st Defendant when Dunbar & Co, Attorneys-at-Law for the said 1st Defendant was advised by the Claimant's Attorney-at-Law, Elizabeth L. Salmon that Case Management Conference for Assessment of Damages was set for hearing on March 23, 2022.*

11. *The interest of justly disposing of this case.*

12. *It is in these circumstances that the 1st Defendant now seek the court's assistance in setting aside the default judgment and formally entering her Defence.*

[2] The circumstances outlined in the Particulars of Claim as giving rise to this action are that on the 30th of November 2019, Mr Linton was operating his motor vehicle registered 8557JG when he came to a stop at the traffic light at the intersection of Mandela Highway and Caymanas main road on the Portmore section. While he was in a stationary position, a Toyota Hiace Motor Bus registered PD 7814 owned by the 1st Defendant/Applicant which was being driven from the opposite direction by the 2nd Defendant, collided with a taxi and then with the motor vehicle which was being driven by the Claimant. It is the Claimant’s position that at the time of this collision, the 2nd Defendant was the servant and/or agent of the 1st Defendant and this has not been denied.

[3] As a result of the collision, the Claimant's vehicle was extensively damaged. He also incurred financial expenses in respect of same and in his cause of action seeks damages for negligence, special damages, punitive damages, interests and costs. The Claim against the defendants was filed on the 24th of September 2020 and Notice of Proceedings served on the Insurers, Advantage General Insurance Company (hereinafter "the Applicant" or "AGIC"), insurers for the Applicant/1st Defendant on the 25th of September 2020. On the 18th of November 2020, an Amended Claim Form and Amended Particulars of Claim was personally served on the 1st Defendant on December 5th, 2020. The 2nd Defendant was not served. The 1st Defendant failed to file an Acknowledgment of Service or Defence and Judgment in Default was entered on the 16th of July 2021. Courtesy copies of the perfected judgment along with copies of the Amended Claim Form, Amended Particulars of Claim and Notice of Proceedings were emailed for the attention of Ms Dunbar at Dunbar and Co in September 2021. The Judgment in Default was served on the 1st defendant's attorneys on the 23rd of March 2022 and a Notice of Case Management Conference for Assessment of Damages was served on AGIC on March 14, 2022. The application to set aside was subsequently filed on March 21st, 2022.

APPLICANT'S SUBMISSIONS

[4] In submissions on behalf of the applicant, Ms Wilkins made reference to **Rule 13.3** of the **Civil Procedure Rules** (hereinafter "the **CPR"**) which speaks to the circumstances in which an application can be made to set aside a default judgment. She also made reference to the decision of ***Strachan v Gleaner Company Ltd and Anor*** *[2005] UKPC 33* in which the Court had affirmed that a default judgment is one which has not been decided on its merits. Counsel also cited the decision of **Evans v Bartlam** [1937] A.C. 473 in which the Court had made the pronouncement that a default judgment is not a judgment entered upon its merits but for a failure to follow procedure.

[5] In submissions on whether the defence has a real prospect of success, Counsel argued that this was the primary consideration for a court treating with an application such as this. The decision of ***Swain v Hillman*** *[2001] 1 All ER 91* in which the relevant test of whether the applicant had a real prospect of success was also cited and Ms Wilkins acknowledged that such a prospect must be real as opposed to fanciful. She contended that based on the evidence presented, the applicant has not only met the threshold but surpassed it. Counsel submitted that the case at bar is an appropriate one for the exercise of the Court's discretion as it involves factual issues which would have to be determined on the question of liability. Ms Wilkins argued that on this basis alone, there is sufficient reason to set aside a default judgment and to do otherwise would bring forth an injustice. In this regard, Counsel relied on the remarks of Moore J in ***Smith v Medrington [1997] SC BVI 103/1995*** wherein his Lordship stated that '*the court is invested with the discretionary power to set aside a default judgement in order to avoid injustice to either the claimant or a Defendant.*' Reliance was also placed on the observations of the Learned Judge that the evidence must show '*more than an arguable case'* and it must be provided '*by potentially credible affidavit evidence* 'which '*demonstrate a real likelihood that he would succeed*'.

[6] The decision in ***Alpine Bulk Transport Company Inc v Saudi Eagle Shipping Company Inc [1986] 2 Lloyds L.R. 221*** was also commended for the Court's attention wherein it was stated by Sir Roger Ormrod that the purpose of this discretionary power (to set aside a default judgment) is to avoid injustice which might be caused if judgment followed automatically on default. Ms Wilkins made reference to paragraph 18 of the affidavit of the Applicant, where she indicated that Ryan Young (a 3rd party) was the cause of the accident when he disobeyed a stoplight and collided with the Applicant's vehicle which then collided with another vehicle.

[7] On the issue of delay, Ms Wilkins submitted that although documentation in respect of the Claim may have been emailed by Mrs Salmon-James to Ms Dunbar, there was nothing to indicate that Ms Dunbar had in fact been on the record for

Mrs Taffe-Smith or instructed by AGIC to represent her at the relevant time. Counsel argued that it is also highly doubtful that at the time when she was instructed that Ms Dunbar would have recalled that Mrs Salmon-James had sent correspondence to her in order for her to follow up and obtain copies. Ms Wilkins submitted further that at the point when Ms Dunbar was actually instructed by AGIC to act for the applicant, she would have been in the dark as to the name of Counsel on the record for the Claimant and in those circumstances would not have thought to make contact with Mrs Salmon-James, hence the checks by the Firm being confined to the Supreme Court and the insurance company.

[8] In addressing the gap between the date of service of the documents on the Applicant in December 2020 and the filing of the application in March 2022, Ms Wilkins conceded that the affidavit of the Applicant lacked details on what had happened in the interim. She asked the court to take judicial notice of the fact that the country had been in the middle of a pandemic and as such a number of things would have been disrupted in terms of the internal proceedings of AGIC. In respect of the fact that the affidavit addressing the collision had not been filed by Mr Freckleton, Ms Wilkins submitted that the rules allow for hearsay evidence to be provided in interlocutory proceedings once it has been attributed to the relevant individual. She submitted that the applicant would have been vicariously liable and as such, she was in an appropriate position to swear to the affidavit which she did. Counsel highlighted that based on the evidence provided in the affidavit, there would be an issue of liability to be resolved between the Applicant and Mr Ryan Young as this was a three vehicle collision and not two.

[9] Ms Wilkins submitted further that while the passage of time is a relevant consideration, delay in and of itself cannot defeat the application to set aside. She argued that if the Court is of the view that there was delay on the part of the Defendant, there is good explanation for same. On this issue, Counsel highlighted the contents of the Applicant's affidavit wherein she stated that '*upon being served with the documents, she took them to her insurers who later appointed Dunbar and Co to act on her behalf, but her Defence and Acknowledgement of Service were*

not filed as there were no Particulars of Claim'. Ms Wilkins argued that any delay in filing the defence was not the fault of the applicant as she had acted appropriately by bringing the documents to her insurers and relied on their assurances that legal representation would be found to protect her interest. Ms Wilkins cited the decision of ***Merlene Murray Brown v Dunstan Harper and Winsome Harper 2010 JMCA App 1*** wherein a similar position had been considered and the Court pronounced that '*in the interest of justice and based on the overriding objective, the peculiar facts of a particular case and depending on possible prejudice…..the court must …. protect the litigant when those he has paid to do so have failed him*'. Reliance was also placed on the decision of ***Law v St Margarets Insurance Ltd (2001) LTL 18/1/2001*** in which the court allowed judgment to be set aside despite the defendant solicitor's procedural errors in failing to file an acknowledgement of service.

[10] On the question of whether the application was made as soon as reasonably practicable, Ms Wilkins submitted that Counsel for the applicant had been served with the Judgment in Default on the 23rd of March 2022 but had filed the application to set aside two days prior on the 21st of March 2022. She submitted that the application was made promptly but also relied on the decision of ***Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy 2008 HCV05707*** in which the court stated that while the defendant had not acted promptly and was in fact very tardy in applying to have the judgment set aside, emphasis must be placed on the primary consideration of whether there is a defence on the merits with a real prospect of success. The Learned Judge took the view that while a delay had occurred, it was not manifestly excessive neither did it have the ability to diminish the applicant's chances of success on the application.

[11] Counsel also made reference to the decision of ***Blossom Edwards v Rhonda Bedward [2015] JMSC Civ 74*** wherein Sykes J, as he then was, expressed the view that while there was delay, it was impossible to say that the defence had no real prospect of success and in those circumstances, the applicant was allowed to have the judgment set aside. Ms Wilkins argued that if the default judgment is set

aside, no greater prejudice would accrue to the Claimant as he would still have the opportunity to present his case before the court; whereas a refusal of the order would occasion great prejudice to the Applicant as she would be unable to have the matter determined on its merits. Counsel also contended that the existence of a related claim means that it would be in the best use of the court's time to try the cases together and this factor justifies an order to that effect.

RESPONDENT'S SUBMISSIONS

[12] The application set out above *in extenso* is strenuously opposed by the Claimant who highlighted the importance of the judgment and raised questions as to the likelihood of success on the part of the 1st Defendant in defending the matter. Counsel also asked the Court to carefully consider the period of '*delay*' which had elapsed prior to the application being made. In addressing the relevant rules, Mrs Salmon-James agreed that an application to set aside a regularly obtained judgment is governed by **rules 13.3** and **13.4** of the **CPR**. Counsel noted that **Rule 13.3(1)** permits the court to set aside a regularly obtained default judgment if the defendant has a real prospect of successfully defending the claim. She also acknowledged that in determining whether to set aside this judgment, rule **13.3(2)** is relevant as it sets all the other factors that the court must consider which are **(a)** whether the individual has applied to the court as soon as is reasonably practicable after finding out that judgment has been entered and **(b)** given a good explanation for the failure to file an acknowledgement of service or defence. **Rule 13.4** was also highlighted by Counsel as addressing the fact that the application must be supported by evidence in an affidavit and a draft of the proposed defence exhibited.

[13] Mrs Salmon-James asserted that it is the Applicant who has the burden of satisfying the Court as '*he who asserts must prove*' and it is for her to show on the balance of probabilities that said default judgment should be set aside. Counsel made reference to the decision of ***Marcia Jarrett v The South East Regional Health Authority 2006HCV00816*** and submitted that this decision provides useful

guidance on the relevant principles which should be considered, such as the fact that there needs to be an assessment of the nature of the quality of the defence, the period of delay between the judgment and application to set it aside, the reasons for the applicant's failure to comply with the provisions of the rules in terms of filing a defence and the overriding objective which would necessitate consideration as to any prejudice the Claimant is likely to suffer if the default judgment is set aside.

[14] Counsel also made reference to the decision of ***Swain v Hillman*** *supra*. Mrs Salmon-James submitted that applying the principle of law enunciated in that decision, the defendant must show that she has a defence on the merits. Counsel asserted that in these circumstances it would mean that the affidavit of merit must be made by someone who can swear to the facts. Reliance was also placed on the decision of ***Joseph Nanco v Anthony Lugg and An'or [2012] JMSC Civ 81*** in which McDonald's Bishop J, as she then, highlighted the importance of an application to set aside for judgment being accompanied by an affidavit of merit setting out a defence. Counsel argued that it is a long established principle that an affidavit of merit must be attested to by someone who can speak positively to the facts and in this situation, the affidavit submitted is not based on the 1st Applicant's personal knowledge, neither does it purport to be as she was not an eyewitness to the incident and there is nothing to suggest that she was even present at the time.

[15] Mrs Salmon-James submitted that the Applicant must be able to show the court that there are serious issues to be tried. She highlighted paragraph 5 of the Applicant's defence where it was stated that the impact of the collision with another vehicle caused the 1st defendant's vehicle to impact another vehicle that was at the stoplight. Counsel contrasted this statement with paragraphs 11(a) to 11(e) of the defence where the 1st defendant neither admitted nor denied that the Claimant was operating his motor car registered 8447JG, had come to a stop at the intersection of Mandela Highway and Caymanas main road, was stationary at the time of the collision between the 1st defendant's vehicle and a taxi and was impacted by the 1st defendant's vehicle after the original collision. Mrs Salmon-

James contended that these conflicting positions raised questions as to whose vehicle the 1st defendant's had in fact come into contact with as this was not stated in the defence. Counsel argued that the 1st defendant's defence was not only lacking in specifics but fails to show that there are serious issues to be tried between the parties.

[16] On the issue of the promptness of this application to set aside the default judgment, Mrs Salmon-James submitted that while the 1st defendant's position is that the default judgment was served on her attorneys on March 23, 2022 and her Notice of Application had been filed 2 days prior to same, the matter should be carefully scrutinised as on September 22, 2021, the Claimant's attorney had provided a courtesy email with the Claim Form and Particular of Claim documents attached to Dunbar and Co who act as Counsel in this application. Counsel asked the Court to note that in these circumstances, for a period of six months before the application, the Applicant's attorneys though not yet on record, would have been put on notice that a default judgment had been entered and could have taken instructions from AGIC and the Applicant on same. The decision of ***Joseph Nanco*** **(supra)** was again cited specifically the remarks of the learned judge that '*once the court is to take into account the time the application is made it means the court must weigh the question of time in the balance and to determine what effect it has on the scales of justice between the parties*'.

[17] Mrs Salmon-James submitted that in respect of the delay between December 2020 and March 2022, she had been advised by personnel at AGIC that Dunbar and Co would have conduct of the matter. She also stated that she was specifically provided with Ms Dunbar's name as relevant Counsel. It was in those circumstances that the documents were forwarded to Ms Dunbar for the attention of AGIC, but no response had ever been received and no request had ever been made of her to provide the necessary documents.

[18] On the question of whether there is a good explanation provided for failing to file an acknowledgment of service, Mrs Salmon-James made reference to the decision

of ***Sasha-Gaye Saunders v Michael Green and others 2005HCV2868*** where the Honourable Justice Sykes, as he then was, stated that '*in the absence of some explanation for the filing of the acknowledgement of service or the defence the prospect of successfully setting aside a properly obtained judgement should be diminished somewhat*'. Counsel submitted that while the 1st defendant averred at paragraph 11 of her affidavit that she had been advised by her attorneys that they were unable to prepare the documents to enter her defence because they were unable to obtain copies of the Claim Form and Particulars of Claim. This was curious given the fact that prior to coming on the record, said attorneys has been provided with courtesy copies by her.

[19] Mrs Salmon-James argued that if the sequence of events is strictly followed, the 1st defendant has accepted that she was served in December 2020, took the documents to her insurance company and was advised that she would be provided with legal representation, but was later informed by the attorneys that they were trying to obtain copies of the documents. Counsel asked the Court to note that although this assertion was made, no dates were provided by the affiant as to when the documents were submitted to AGIC, the date of their indication or the date of the communication by the Attorneys.

[20] Mrs Salmon-James also highlighted paragraph 15 of the Applicant's affidavit where she stated that she was informed that a default judgment had been entered against her because her defence had been filed late and this was only brought to her attention when she was served with a copy of the Notice of Case Management Conference for Assessment of Damages. Counsel submitted that the thrust of this assertion is an attempt to convince the court that the service of the notice was the first time that the Applicant or her attorneys were becoming aware of the Judgment in Default. Mrs Salmon-James argued that this assertion ought not to be accepted by the Court in light of the evidence presented to the contrary.

[21] Counsel contended that the application should be dismissed as not only had the applicant fallen short of the threshold of a real prospect of success, she had also

failed to provide a good explanation for her failure to file an acknowledgement of service and the application had not been promptly made. Mrs Salmon-James asserted further that careful consideration of the overriding objectives and the interest of justice would weigh heavily in favour of the application to set aside being refused as to do otherwise would cause significant prejudice to the Claimant who had died before he was able to give a witness statement and there would be no evidence before the court on his behalf on a trial of liability.

[22] In respect of the consolidation of this matter with the claim between the Applicant and Ryan Young, Mrs Salmon-James indicated that the Claimant had already waited for some time to get his default judgment and if this order is granted, it would be prejudicial to him as he has already passed on and would not be able to provide evidence in a trial. Counsel made reference to the decision of ***International Finance Corp v Utexafrica*** *[2001] CLC 1361**,*** specifically paragraph 28 and asked the Court to give careful consideration to the dicta of Moore-Bick J, where he made it clear that the overriding objectives and question of prejudice to a party would be considered by a Court on an application such as this. Mrs Salmon-James submitted further that the Claimant is not a party to the claim between the Applicant and Mr Young and in those circumstances, there is no basis for the matters to be consolidated.

DISCUSSION AND ANALYSIS

[23] It is an established fact that the framework which governs applications to set aside a default judgment is found at **Rule 13.3** which provides as follows;

> *13.3 (1) The court may set aside or vary a judgement entered under Part 12 if the defendant has a real prospect of successfully defending the claim.*
>
> *(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:*
>
> > *(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.*

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

[24] For a defendant to set aside a default judgment regularly entered, the primary consideration is whether he has a real prospect of successfully defending the claim. In ***Merlene Murray-Brown v Dunstan Harper and Winsome Harper*** [2010] JMCA App 1, Phillips JA opined:

> *"[23] Rule 13.3 of the CPR governs cases, as its sub-title suggests, where the court may set aside or vary default judgments. In September 2006, the rule was amended, and there are no longer cumulative provisions which would permit 'a knockout blow' if one of the criteria is not met.* ***The focus of the court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the claim, but the court must also consider the matters set out in 13.3 [2] [a] & [b] of the rules****." (My emphasis).*

[3] This issue was also considered by McDonald –Bishop JA in ***Flexnon Limited v Constantine Mitchell and Others*** [2015] JMCA App 55 where she commented at paragraph 15 of her judgment as follows:

> *"the primary test for setting aside a default judgment regularly obtained is whether the defendant has a real prospect of successfully defending the claim. The defence must be more than arguable to be such as to show a real prospect of success."*

[26] Having made these pronouncements, the Learned Judge then outlined some relevant considerations for a Court at paragraphs 16 and 27 of her judgment where she stated:

> *[16] "Based on the provisions of the CPR and the relevant case law, the considerations for the court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence; the period of delay between the judgment and the application made to set it aside; the reasons for the defendants' failure to comply with the provisions of the rules as to the filing of a defence or an acknowledgement of service, as the case may be, and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside."*
>
> *[27] " It is clear from rule 13.3(2)(a) and (b) that it is incumbent on the court to consider whether the application to set aside was made as soon as was reasonably practicable after finding out that judgment had been entered and that a good explanation is given for the failure to file an*

> *acknowledgement of service and or a defence as the case may be. So the duty of a judge in considering whether to set aside a regularly obtained judgment does not automatically end at a finding that there is a defence with a real prospect of success. Issues of delay and an explanation for failure to comply with the rules of court as to time lines must be weighed in the equation."*

[27] The case of ***Victor Gayle v Jamaica Citrus Growers and Anthony McFarlene* 2008HCV05707** also highlights the fundamental importance of the Applicant having a real prospect of success. The importance of the first limb of the rule was illustrated by Edwards J, as she then was, where she stated: -

> *'… in an application to set aside a default judgment entered under part 12 of the CPR, in applying rule 13.3, the primary consideration is whether the defence has any real prospect of success…However in exercising the discretion whether or not to set aside the judgment regularly obtained, the court must also consider the matters set out in rule 13.3(2). (emphasis supplied).*

[28] It is not in dispute between the parties that in order for a party to succeed on an application to set aside default judgment, he must establish that he has a real prospect of success, this means that the evidence presented should reveal more than a merely arguable case.

[29] In the case of **Sasha-Gaye Saunders (supra)**, useful guidance was also provided on this point by Sykes J where he stated:

> *"**If the defence has substantial contradiction then that may be an indication that the prospect of success is not real**. In another case documentary evidence may make it very difficult for the defence to succeed".(emphasis added)*

The Affidavit of Merit

[30] In the seminal case of ***Evans v Bartlam*** [1937] AC 473, at page 480, Lord Atkins noted that one of the rules laid down to guide the courts in exercising its discretion to set aside a regularly obtained default judgment is:

> ***"…where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence."*** *(emphasis supplied).*

[31] At page 489 of the judgment, Lord Atkins explained:

> *"The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication… The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."*

[32] Therefore, in determining whether the test of a real prospect of successfully defending the claim has been satisfied, the Court must find that there is a defence on the merits to the requisite standard.

[33] It is the Applicant's contention that she has not only satisfied this requirement but surpassed same. The basis for this indication is found in her assertion that the actions of the 3rd party were wholly to blame for the collision. In my examination of this argument, I am mindful of the fact that the Applicant was not present at the time of the collision but the rules allow for the provision of hearsay evidence in support of an interlocutory application.

[34] It is noteworthy however that while the Applicant was specific as to the collision being caused by the actions of Mr Young, her affidavit lacked detail in a number of important respects such as which vehicle her car came into contact with. There were also no details provided as to the position or direction of travel of the taxi or Claimant's vehicle at the time of the collision; factors which would be relevant to addressing the dynamics of the collision and whether she would have a real prospect of success at trial.

[35] While the Court recognises that the final determination as to liability is a matter for a tribunal of fact upon hearing all the evidence and acknowledges that the hearing of the application does not constitute a mini-trial; there is still the requirement for the evidence being relied on to present more than an arguable case or fanciful prospect of success. It is my considered view that it had failed to achieve. The absence of key information takes on even greater significance when the Defence

is examined against the pleadings of the Claimant which specifically address the position of his vehicle, the taxi and the 1st Defendants vehicle. Details have also been provided to show the respective traffic lights which would have been displayed to each motorists, the direction of travel and the actions of the 2nd Defendant which the Claimant stated were taken in disobedience of same.

[36] Additionally, while it is accepted in her defence that there was a collision between her vehicle and another vehicle which was at the stoplight, it is subsequently stated by the Applicant that she neither admits or denies that this vehicle was that of the Claimant or that he was stationary at the stoplight. These conflicting positions also raised questions in respect of the real prospect of success of the Applicant's defence. In light of the foregoing, I was unable to agree with Ms Wilkin's contention that the Applicant has met and surpassed the test.

Has the Defendant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered

[37] It is not in issue between the parties that a period of over 7 months elapsed between the default judgment being entered and the filing of this application. It is also accepted that a period of approximately 6 months would have elapsed between the provision of courtesy copies of the Judgment, Claim Form and Particulars of Claim to Dunbar and Co. In respect of this period, the Applicant has submitted that this is not an inordinately long time and she has sought to persuade the Court that efforts had been made during this period to obtain the relevant documentation in order to file the application to set aside.

[38] The Claimant, on the other hand, while agreeing that the period between judgment and application was not a long one, has asked the Court to consider the fact that the delay would have been prejudicial to the Claimant who had in hand a judgment on which he had hoped to act and efforts had been made to advise the Applicant of this situation within short order of the judgment being entered.

[39] The importance of an Applicant satisfying the requirements of **Rule 13.3(2)(a)** and **(b)** was acknowledged by Edwards J in the ***Victor Gayle*** decision when she stated as follows:

> *10.<u>Although the primary consideration is the prospect of success, the factors in rule 13.3 (2) are not redundant. The rule states that the court •must consider them and the question remains that having considered them what is to be done about them. Sykes J took the view in the case of Sasha-Gaye Saunders', at paragraph 24, that, in the absence of some explanation for the failure to file a defence or acknowledgment of service, the prospect of succeeding in having the judgment set aside should diminish. Also if the delay is quite gross then that ought to have a negative impact on successfully setting aside the judgment. (emphasis added)</u>*
>
> *11. This approach means that a defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the court considers the factors in 13.3 (2) against his favour and in going on to consider the overriding objective and any likely prejudice to the accused it comes to the conclusion that the judgment ought not to be set aside. See also the case of Salfraz Hussain v Birmingham City Council, Coral George Coulson, Governors of Small Heath. Grant Maintained School (2005) EWCA Civ 1570 (delivered February 25, 2005) for a discussion on the approach the court ought to take in the case of multiple defendants.*

[40] I have examined the timing of this application and while I am prepared to accept that the Applicant would have formally been put on notice of the Interlocutory Judgment at the time when the Notice of Assessment Hearing was served, I believe that through the service of the courtesy copies of the documents on Ms Dunbar, AGIC would have become aware of the situation prior to March 2022 and could have acted before then. It is clear from the evidence and submissions of Ms Wilkins that Dunbar and Co have in the past acted for AGIC and were retained by them to address the current matter. It was also accepted that the documents in respect of this claim were sent by email to Senior Counsel at this firm.

[41] Although the Firm had not entered an appearance on behalf of the Insured, it would not be unreasonable/unlikely that this documentation would nonetheless have been brought to the attention of AGIC and ultimately the Applicant. This was of particular importance and urgency as on the Applicant's evidence, she had personally delivered the documents received in December 2020 to AGIC and had

been assured by them that Counsel would be retained to protect her interest. In the face of an order which was adverse to those interests, I am of the view that the situation would have been sufficiently urgent to move the Applicant to file the application to set aside at an earlier opportunity. As such, while the passage of time would certainly not be classified as egregious, it is clear that it was not done at the earliest opportunity afforded to do so.

Has the Applicant given a good explanation for the failure to file an acknowledgement of service or a defence

[42] In addressing rule **13.3(2)(b)** of the **CPR**, Ms Wilkins acknowledged that while the Applicant's affidavit stated that she had submitted the documents received to AGIC, there was no other information provided as to what had occurred between December 2020 to March 2022. In submissions on the point, Ms Wilkins asked the Court to take judicial notice of the fact that the country was dealing with the effects of the Covid-19 pandemic during this period and the internal workings of AGIC were likely affected.

[43] While this may have been the case, the Court was not provided with any evidence whether from the Applicant or a representative from AGIC in which this was affirmed as having impacted the urgency with which this claim treated. What is clear however, is that there is no evidence that the Applicant or her Insurer did anything for more than 12 months after service, even though they would have been put on notice that court proceedings had been initiated and timelines engaged for a defence to be filed. Accordingly, I was not able to agree that a good explanation has been provided for this failure.

Possible prejudice to the Claimant/Overriding objective

[44] Before concluding my analysis of this matter, I also considered the question of prejudice to the respective parties if the application is granted or denied. In submissions on this point, Mrs Salmon-James asked the Court to note that subsequent to the entry of default judgment in his favour, Mr Linton had passed on

and any decision to set aside the default judgment at this stage would be highly prejudicial to him as his death would deprive him of the opportunity to actively participate in a trial on the issue of liability. While Ms Wilkins submitted that the Applicant would be prejudiced by the matter proceeding to assessment, the Applicant's affidavit is silent as to the nature and extent of this prejudice.

[45] Upon careful consideration of this issue, it is evident that an order to set aside default judgment would occasion greater prejudice to the Claimant who I accept would be deprived of the opportunity to actively participate in a trial on liability and provide evidence as to the cause of the collision. On the other hand, the Applicant would still be able to cross examine witnesses and/or make submissions on the issue of quantum if the matter were to proceed to assessment.

[46] In circumstances where the overriding objectives include the requirement that justice be done between the parties, I am satisfied that application to set aside the default judgment should be refused as the Applicant has failed to satisfy the requirements of 13.3. In those circumstances, the application to consolidate the matters would likewise be refuse.

CONCLUSION

[47] Accordingly, it is my ruling that:

a. The application which was filed on the 21st of March 2022 is refused.

b. Costs are awarded to the Claimant to be taxed if not agreed.

....

Hutchinson Shelly, J