[2023] JMSC Civ 02

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2020CV03713

IN THE CIVIL DIVISION

BETWEEN	**KURT DUNKLEY**	**APPLICANT**
AND	**DWIGHT LEVY**	**RESPONDENT**

Ms. Georgia Hamilton instructed by Mrs Kerry-Ann Sewell for the Applicant

Mr. Aon Stewart instructed by Knight, Junor and Samuels for the Respondent

Application for leave to appeal and for stay of proceedings – Relevant considerations – real prospect of success – risk of injustice – factors determining application for leave to apply and grant of stay

Heard: November 29th, 2022 and January 13th, 2023

HUTCHINSON SHELLY, J

INTRODUCTION

[1] On August 30th, 2022 the Applicant filed a notice of application in which he sought the following orders:

1. That he be granted leave to appeal the Order made by Ms. Justice A. Jarrett (Ag) on July 26, 2022.
2. That there be a stay of execution of the Order made on July 26, 2022, and the Assessment of Damages hearing fixed for September 22, 2022, pending the hearing of the Appeal.
3. Any further and other relief as this Honourable Court deems just.

[2] The grounds on which the Applicant is seeking the following orders are as follows:

1. That the learned judge erred when she found that the Defendant had not presented a good reason for permitting the matter to go by way of default.
2. The learned judge erred when she found that the Defendant's delay in filing the application to set aside the default judgment severely prejudiced the claimant.
3. That the learned judge misguided herself on the issue of prejudice and its application in setting aside default judgment.
4. That learned judge erred by failing to give sufficient weight to the fact that the Defendant had a defence with a real prospect of success.

It is in these circumstances that the Defendant now seeks the Court's leave to appeal the order made herein.

[3] The Application was supported by two affidavits sworn to by Kaedeen Davidson. In her affidavits, Ms. Davidson opined that the evidence which had been presented in support of the application to set aside default judgment disclosed a defence with a real prospect of success, as the Defendant alleged that the accident which is the subject of this claim, was caused by the Claimant driving from a minor road onto a major road and colliding with the Defendant's vehicle which was travelling along the major road.

[4] She averred that based on the applicant/ defendant's evidence the delay in filing the Application to set aside default judgment was not inordinate and that the defendant had advanced a good reason why the acknowledgement of service was not filed within the time limited for doing so. Ms. Davidson made reference to the Assessment of Damages which had been scheduled for hearing on September 22, 2022 and indicated that it is her firm belief that if damages are assessed, the Defendant will be liable to pay significant damages in circumstances where he has a defence which has a real prospect of succeeding at trial. She also asserted that

if the stay of execution of the Order made on July 26, 2022, is not granted and the assessment of damages is heard, the appeal would be rendered nugatory.

APPLICANT'S SUBMISSIONS

[5] In very comprehensive submissions, Counsel for the Applicant acknowledged that the application was being made pursuant to **Rule 1.8** of the Court of Appeal Rules (CAR), specifically **1.8(9)** which states the test to be used by the tribunal when considering whether to grant leave to appeal. Counsel submitted that the rule provides that:

> *"The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."*

[6] Counsel made reference to the well-known authorities of ***Swain v Hillman*** [2001] 1 All ER 9 and ***Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Wallace*** [2015] JMCA App 27A in which the test stated above was enunciated. Counsel contended that the learned judge had erred when she found that the delay of 109 days (3.6 months) in filing the application to set aside the default judgment was so prejudicial to the claimant that it outweighed the defendant's right to a trial on the merits of the case as disclosed in his defence. It was also asserted that the learned judge erred when she found that the applicant's reason for permitting the entry of the default judgment was "not a good one" and had also misguided herself on the issue of prejudice and its application to the setting aside of default judgments.

[7] Counsel highlighted the rules at **Rule 13.3** of the CPR and the authorities of ***Victor Gayle v Jamaica Citrus Growers etal*** 2008HCV05707 and ***Administrator General for Jamaica v. Cool Petroleum Limited et al*** [2019] JMSC Civ 181 which examined the approach that should be taken by a Court to applications to set aside default judgment. Reference was also made to ***Blossom Edwards v. Rhonda Bedward*** [2015] JMSC Civ 74 in which the Court opined that a "*judge*

cannot make a moral judgment on the conduct of the defendant and use that as a basis for refusing to set aside the judgment.

[8] Counsel argued that the application to set aside the judgment should only be refused where the delay is so gross or egregious as to result in an injustice to the claimant or to third parties. She again made reference to the ***Victor Gayle*** decision and submitted that in that case, the delay in making the application to set aside was more than one year yet despite finding that the defendant had not acted promptly and "*was in fact very tardy in applying to set aside the default judgment"* the learned judge found that the *"delay was not so manifestly excessive.'*

[9] In respect of the relevant timelines, Counsel highlighted that the default judgment was served on the defendant's counsel on December 2, 2021. The matter was fixed for Case Management Conference on March 8, 2022, at which point the defendant indicated his intention to amend his application for extension of time to file its defence to include an application to set aside the default judgment. The defendant's application was subsequently filed on March 21, 2022. Counsel contended that these events occurred in less than a 4-month period and as such the delay was not egregious.

CLAIMANT'S SUBMISSIONS

[10] In submissions made on behalf of the Claimant, Mr. Stewart helpfully outlined the chronology of events which he accepted required careful consideration.

- On the 30th of September 2020, the claimant filed a claim against the defendant seeking damages for negligence. The claim form and particulars of claim along with supporting documentation were served on the defendant on the 3 November 2020 (this date is disputed by the Defendant who states that service occurred on December 23rd, 2020).

- The claimant thereafter applied for Judgment to be entered against the defendant on the 4th of January 2021. On the 18th of February 2021, the

defendant filed an acknowledgement of service indicating an intention to defend the claim.

- On the 15th of March 2021, the defendant's Attorneys-at-Law filed a Notice of Application for Court Orders to set aside Default Judgment along with an Affidavit in Support.
- On the 27th of September 2021, the Court refused the defendant's application on the basis that a default judgment had not been entered by the Registrar, therefore the application to set aside the default judgment was premature.
- The defendant subsequently amended the application on the 21 March 2022 seeking an extension of time to file their defence. The application was supported by affidavit evidence. (This application was not given a date and the matter proceeded to a case management hearing for assessment when it was subsequently listed for the hearing of this application).
- The application came on for hearing on the 9 June 2022 and 26 July 2022 when it was refused. It is from this ruling that the defendant makes the application before the Court.

[11] Mr. Stewart agreed that Court of Appeal Rule ("CAR") 1 .8 (7) outlines the applicable threshold for permission to appeal in civil cases. He also made reference to the decisions of ***Donovan Foote v Capital and Credit Merchant Bank*** [2012] JMCA App 1 and ***Swain v Hillman*** **(supra)** which examined the term, 'real prospect of success.'

[12] On the issue of whether there should be a stay of proceedings, Mr. Stewart submitted that the Court's jurisdiction to stay proceedings can be identified in the Civil Procedure Rule and in particular **rule 26. 1 (2) (e)** which provides;

> *26.1 (1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any enactment*
>
> *(e) stay the whole or part of any proceedings generally or until a specified date or event;*

[13] Counsel made reference to the decision of ***Watersports Enterprises Limited v Jamaica Grande Limited, Grand Resort Limited and Urban Development Corporation, (*****unreported*****),*** Court of Appeal, SCCA No. 1 10/2008 Application No. 1 59/2008, delivered 4 February 2009, where Harrison J.A at para. [7] restated the established principle that unless the appellant can show that the appeal has some prospect of success, the Court should not grant a stay of execution pending the hearing of an appeal.

[14] Mr. Stewart argued that in deciding whether to grant or refuse a stay the Court must consider, where the interests of justice lie, and that the holder of a judgment must not be lightly deprived of the fruits of his judgment. On the question of where the interests of justice lies, Counsel contended that the court must consider the real risks of injustice to one or both parties in recovering or enforcing the judgment at the determination of the appeal and the financial hardship to be suffered by the applicant if the judgment is to be enforced per the dicta of Brooks JA at paras [19]-[21] in ***United General Insurance Company v. Marilyn Hamilton*** [2018] JMCA App 5 and Phillips JA in ***Peter Hartigay v Ricco Gartmann*** [201 5] JMCA App 44, 60. Mr Stewart highlighted that careful consideration of these factors remained relevant as seen in the recent decision of ***Anika Brown v Marlon Pennicooke & Anor*** [2022] JMCA App 1***,*** where the applicable test was restated by McDonald-Bishop JA.

[15] Mr. Stewart also made reference to ***The Attorney General of Jamaica v John McKay*** [201 2] JMCA App 1***,*** where Morrison JA (as he then was) cautioned himself applying the dicta of Lord Diplock in the House of Lords decision of ***Hadmor Productions Limited & Ors. v Hamilton & Ors*** [1982] All ER 1 which addressed the power of an appellate judge to interfere with a trial judge's discretion, a situation which would not quite arise in these circumstances but careful note was nonetheless taken of the useful guidance provided in these cases.

[16] Mr. Stewart rejected the Applicant's contention that the Court erred in refusing his application to set aside. He highlighted the Court's careful consideration of the

applicable rules and case law and argued that the Learned Judge had also given due consideration to the Applicant's evidence and found it lacking in respect of the issues of delay and good explanation. He also submitted that the Judge rightly considered the prejudice which could be suffered by the Claimant and relied on the Court of Appeal decision of ***Russell Holdings Limited v LLW Enterprises Inc. and ADS Global Limited*** [2016] JMCA Civ 39 at para 83, where Edwards JA (AG) [as she then was] made the point that:

> *"[83] A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the factors in rule 13.3(2)(a) and (b) are considered against his favour and if the likely prejudice to the respondent is so great that, in keeping with the overriding objective, the court forms the view that its discretion should not be exercised in the applicant's favour. If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the end of the matter. If it is considered that there is a good defence on the merits with a real prospect of success, the judge should then consider the other factors such as any explanation for not filing an acknowledgement of service or defence as the case may be, the time it took the defendant to apply to set the judgment aside, any explanation for that delay, any possible prejudice to the claimant and the overriding objective.*

[17] Mr. Stewart submitted that it is clear on the evidence before the Court that there was sufficient evidence for the Learned Judge to make the finding of fact that she did on the issue of prejudice and that it would weigh heavily in favour of the Claimant. On the questions of whether the defendant applied to set aside the default judgment as soon as reasonably practicable and, whether he had provided a good explanation for failing to file his defence on time, Mr Stewart argued that these are essentially questions of fact which the authorities remind us, fall to be decided based on evidence. Counsel submitted that on a perusal of the evidence, there was sufficient basis for the learned judge to make a finding that the explanation provided was not a good one.

[18] In further submissions in respect of the Court's finding on prejudice, Mr. Stewart highlighted that the Claimant had given evidence that he sustained very serious

physical injuries and significant financial hardship. Counsel insisted that there would be a greater risk of injustice to the Claimant if the stay is granted as his ability to receive a timely resolution of the matter by way of an assessment of damages hearing would be pushed into the distant future, whilst his injuries continued to deteriorate and his financial situation worsen.

[19] Counsel asserted that in contrast, there is no likely injustice that the Defendant would be exposed to as he gave no evidence, by way of affidavit, of being exposed to any prejudice and/or financial hardship.

ISSUES

a. Whether the Appeal has a real prospect of success?
b. Is this an appropriate case for a stay to be granted?

DISCUSSION AND ANALYSIS

Whether the Appeal has a real prospect of success?

[20] The Application is also being made pursuant to **Rule 1.8** of the Court of Appeal Rules, 2002 (hereinafter referred to as 'the CAR"). **Rule 1.8 (1)** of the Court of Appeal Rules 2002 provides:

> *"Where an appeal may be made only with the permission of the Supreme Court or the Court of Appeal, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought. '*

[21] **Rule 1.8 (2)** provides that this application must first be made to the Court below. **Rule 1.8(7)** of the CAR sets out the considerations for the Court in determining whether it should grant an application for permission to appeal. **Rule 1.8(9)** states the basis on which permission will be given.

[22] Practical assistance on the interpretation and application of these rules is provided in ***Garbage Disposal v Noel Green*** **etal** [2017] JMCA App 2. In that case, the

Court of Appeal considered an application for leave to appeal orders made by Campbell J. Williams JA enunciated the relevant considerations at paragraphs 28 and 29 of the judgment where he stated:

> *"28. The terms 'real' and 'realistic' were defined in Swain v Hillman and another [2001] 1 All ER 9, per Lord Woolf, at page 92 where he addressed the meaning of the phrase 'no real prospect' in the context of an application for a summary judgement. He opined that:*
>
> > *"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success…they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*
>
> *29. Morrison JA (as he then was) in Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Wallace [2015] JMCA App 27A, observed at paragraph [21] of that judgment that this court has long accepted that the words "real chance of success" in rule 1.8(9) of the CAR were synonymous with the words "realistic prospect of success" used by Lord Woolf in the case of Swain v Hillman and so Lord Woolf's formulation was therefore applicable to the said rule 1.8(9)."*

[23] Additional guidance is found in the ratio of Harrison JA in **Gordon Stewart et al v Merrick Samuels** SCCA no. 2/2005, where he stated: -

> *"The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a real prospect not a "fanciful one". The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning."*

[24] In analysing whether the Applicant has met the threshold for his application to be granted, I found it useful to examine a number of paragraphs of the judgment in which the reasoning of the court on the prior application was laid out.

[25] At paragraph 3 of the judgment, the Learned Judge considered the applicable case law and rules which were relevant to the application before her and observed as follows:

> *The burden is on the defendant to prove that his defence meets this test. (Merlene Murray Brown v Dunstan Harper and Winsome Harper [2010 JMCA App l). The authorities make it plain, that if I find that the threshold test has been met, I must go on to consider the matters in CPR 13.3(2)(a) and 13.3(2(b). (June Chung v Shanique Cunningham [2017] Civ 22). The provisions of CPR 13.3(2) require that consideration be given to whether the defendant has shown that he filed his application to set aside the default judgment as soon as reasonably practicable after becoming aware of it. The consideration under CPR 13.3(2)(b) is whether the defendant has a good explanation for not filing his acknowledgement of service or defence (as the case may be) within the period limited by the CPR. If I find however that the threshold test has not been met and therefore that the defence does not have a real prospect of success, I need not give any consideration to the provisions of CPR 13.3(2)(a) or 13.3(2)(b).*

[26] Jarrett J (Ag) then examined the Defendant's affidavit of merit which made reference to his defence. She also reviewed the affidavit of the Respondent, wherein he took issue with the Applicant's explanation for the delay in filing his acknowledgment of service and questioned the veracity of same based on the close proximity of the Applicant's workplace to the location of his brokers.

[27] The Learned Judge then reviewed the submissions made on behalf of the respective parties along with the relevant law and evidence and on the question of whether the Applicant had satisfied the requirements of **Rule 13.3(1)**, found as follows:

> *"the defendant's account cannot be defeated at this stage. There are disputed facts which need to be resolved. The fact that the defendant did not file a further affidavit disputing the claimant's account is not fatal to his application. Even if he had done so, there would still be the question of where the truth lies. I am not at this stage to conduct a mini trial. The place for the resolution of these factual disputes is at a trial, where all the evidence is in, and the parties subjected to*

cross examination. I therefore find that the defence has a real prospect of success."

[28] Having found that the Applicant's case had a real prospect of success, Jarrett J (Ag) then examined the application of **rules 13.3(2)(a) and (b)** and stated;

"At the time of the March 21, 2021 application, there was no default judgement and therefore any analysis of the defendant's promptitude for purposes of CPR 13.3(2)(a) can only properly be made after the judgment came into being. With service of the default judgment being on December 2, 2021, his amended application was made one hundred and nine (109) days later, on March 21, 2022. In the affidavits filed by the defendant in this matter, not one of them attempts to provide any evidence explaining why it took that long to seek to set aside the default judgment. In what context then, must I place these 109 days? Determining whether a litigant has acted as soon as reasonably practicable is not a quantitative analysis, but a contextual one. What are the facts and circumstances in this case that would make 109 days between service of the default judgment and the filing of the application to set it aside, reasonably practicable? There is no evidence to assist me with the exercise of my discretion in this regard. In the absence therefore of any evidence explaining why it took that long to make the application, I cannot find that the defendant has applied to set aside the default judgment as soon as reasonably practicable. I therefore find that he has not done so."

[29] The Learned Judge then considered whether the defendant/applicant had provided a good explanation for failing to file an acknowledgement of service on time and observed as follows:

"[22] The defendant's evidence is that he was served with the claim form and accompanying documents on December 23, 2020, in the heart of the Christmas holidays and he had difficulties making telephone contact with his insurance brokers. He says further that he forgot about the documents and it was not until early February 2021, that he was able to reach his brokers. On February 19, 2021, he heard from counsel Mrs. Sewell who informed him that she was retained by his insurers to represent him and that she had filed an acknowledgment of service on February 18, 2021. He blames his work schedule as well as other personal obligations, for his failure to file an acknowledgement of service. He says he was "very busy". Although he states that he was served with the claim on December 23, 2020, the unchallenged affidavit evidence of the process server

is that he was actually served on November 3, 2020. A defence to the claim should have been filed forty-two days after service. One was filed out of time on April 8,2021, one hundred and fifty-six days later.

The defendant's evidence suggests that for an extended period after he was served, he was unable to reach his brokers by telephone. But he gives no details of his attempts. This evidence is less than satisfactory. Besides, why would he rely only on telephone contact? Given the importance of the court documents, which as a bailiff he ought to fully appreciate, why did he not go into the physical office of his brokers and hand the court documents to them? The notes to defendants which accompanied the claim form and the particulars of claim are written in lay man's language and they make very clear the consequences of a defendant's failure to file an acknowledgement of service and a defence within the time stipulated. To state, somewhat blithely, that he was busy; got caught up with unspecified personal obligations; forgot about the claim, and as a consequence did not get around to dealing with it on time, is not in my view a good explanation. The defendant's evidence displays a casual lack of regard for the court and its processes. I am surprised at this type of evidence coming from a bailiff. I find that the defendant's explanation for not filing an acknowledgement of service and a defence on time, is not a good one."

[30] On the question of prejudice, Jarrett J (Ag) stated;

"I must consider the likely prejudice to the parties if the application is granted as against if it is not. This weighing exercise must be done within the context of the overriding objective of the CPR which is to do justice between the parties. The claimant's evidence is that he will suffer significant prejudice if the default judgment is set aside. He has provided evidence of the serious injuries he says he has suffered as a result of the accident and that these include losing his eye sight. He speaks to the financial difficulties this has wrought on him and his family. He says he has had to borrow to finance the cost of surgeries and medication. I believe that any further delays in this matter will only bring further prejudice to him. Although the defendant has not given any evidence of prejudice, I recognise that he may well experience prejudice by not being able to defend the claim, since this will lead to him being liable to pay the claimant's damages which are assessed. I believe however that that prejudice is far outweighed by the significant prejudice that the claimant will suffer if the judgment is set aside. It has now been five years since the accident. The injuries he has pleaded and of which he gives evidence are serious. He says he has lost his sight and has been unable to work ever since. A trial

> *on the merits may not take place for several years. I find in the circumstances that his prejudice is substantial and outweighs that of the defendant."*

[31] On a review of the foregoing extracts of the judgment, it would not be accurate to assert that the Learned Judge had failed to identify and examine the relevant considerations on the application to set aside default judgment. The complaint as I understand it appears to be that she failed to attribute the appropriate weight to her finding that the Applicant had satisfied the requirements of **Rule 13.3(1)** and had elevated, the application of **13.3(2)(a) and (b)** as having greater significance on the outcome, contrary to recent authorities on the point. It was also contended that the Court had failed to properly consider the possible prejudice that an adverse ruling could have on the Defendant if called on to face an assessment where an award in excess of $11 million is being sought.

[32] 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 had a real prospect of success. If this is not established, the Court is not required to undertake any examination of **13.3(2)** of the CPR. The importance attributed to the respective limbs of the requirements of **13.3** was identified by the Court in ***Victor Gayle v. Jamaica Citrus Growers Association and Anthony McCarthy*** 2008HCV05707, where Edwards J. (Ag), (as she then was), cited with approval the dicta in **Dipcon Engineering Services Limited v. Bowen** (2004) No. 79 of 2002, where at paragraphs 28-30 of the judgment, Lord Brown stated:

> *"Of course, the merits of the proposed defence are of importance, often perhaps of decisive importance, upon any application to set aside a default judgment. But it should not be thought that it is only the merits of the proposed defence which are important. The defendants' explanation as to how a regular default judgment came to be entered against them, in particular where, as here, it followed their failure to comply with the peremptory order, will also be material. That is not to say that there must necessarily be a reasonable explanation for this: as Lord Atkin said in Evans v. Bartlam [1937] AC 473.480: there is no rule that the Court must be satisfied that a reasonable explanation exists. adding:*

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

[33] The decision in ***Rohan Smith v Pessoa and Samuels*** case [2014] JMCA App 25 is also instructive as in considering an appeal from a decision in which the Court had granted an order setting aside the default judgment, Phillips JA had enunciated the relevant considerations on **13.3** of the CPR at paragraphs 25, 26 and 39 as follows:

> *"[25] Rule 1.8(9) of the Court of Appeal Rules (CAR) provides that, generally, leave to appeal will only be granted where the appeal will have a real chance of success. In this case, the proposed appeal concerns the correctness of the learned judge's decision to set aside the default judgment. Rule 13.3 of CPR governs the setting aside of a default judgment regularly entered. The rule provides thus: "(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim. (2) In considering whether to set aside or vary a judgment under the 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 acknowledgment of service or a defence, as the case may be."*
>
> *[26] The wording of the rule is clear: although there are three considerations mentioned,* ***the primary consideration is whether the defendant has a real prospect of successfully defending the claim or, put another way, whether there is a defence that has merits.***
>
> *[39] There is, as Mr Reitzin has pointed out, no reason proffered by the respondents for what, on my calculation, was a four-month delay. There is no requirement expressed in rule 13.3(2) for an explanation to be given for the delay, but, it seems to me that a defendant who has failed to apply for relief against the default judgment obtained against him as soon as is reasonably practicable after finding out about it, should proffer an explanation for failing to do so. There are authorities to the effect that if there is no explanation for the delay, then no indulgence or relief should be granted, in which case, it would seem that Mr Reitzin would have a real chance of success on this proposed ground of appeal.* ***However, the overriding factor is***

> ***whether the defendants, in this case the respondents, had a real prospect of successfully defending the claim, and the consideration of whether the application was made timeously is merely a factor to be borne in mind, and ought not by itself to be determinative of the application."***

[34] In the instant case, the Learned Judge had determined that the Defendant/Applicant had established on the evidence that he had a real prospect of successfully defending this case. She had concluded however that he had failed to apply as soon as reasonably practicable after learning that judgment had been entered and that there was no good explanation for his delay in filing his acknowledgment of service or defence.

[35] The authorities of ***Victor Gayle*** and ***Rohan Pessoa*** **(supra)** make it clear however that the primary consideration is whether the Applicant has a real prospect of success. These decisions also emphasise that an application can succeed even in the absence of a good explanation and the failure to act timeously is not by itself a bar to such an order being granted.

[36] In respect of the Applicant's contention, that the Learned Judge did not give adequate consideration to the efforts of this Defendant to defend this matter, I agree that while she took note that he had sought to be engaged in this matter from February 2021 and again in March 2021 when an application to set aside default judgment was filed on his behalf, which was later amended, it is clear that she did not believe that she could have considered these factors in respect of the delay or good explanation. I am of the view however, that these were positive acts of the Defendant which were made in an effort to be let in to the proceedings within a three to four-month window after the claim had been served and 10 months before the default judgment had been entered. I believe that it would have been open to the Learned Judge, in keeping with the overriding objectives, to consider this chronology of events when considering the provisions of **13.3(2)(a) and (b)** and she was not restricted to the period between the entry of judgment and the filing of the application to set aside.

[37] In relation to the delay of 109 days, a review of the authorities reveals that in circumstances where there is a good defence, the application to set aside the judgment should only be refused where the delay is so gross or egregious as to result in an injustice to the claimant or to third parties. In the ***Victor Gayle*** case, the delay was more than one year. Despite finding that the defendant had not acted promptly and "*was in fact very tardy in applying to set aside the default judgment",* the learned judge found that the "*delay was not so manifestly excessive'.* It is noteworthy that the Judge arrived at this conclusion despite the claimant's evidence that he was significantly prejudiced by the injuries sustained due to the defendant's alleged breach of duty, contract and negligence.

[38] In respect of the finding that the Applicant failed to provide a good explanation and was nonchalant in having his acknowledgment of service and/or defence filed, the ***Victor Gayle*** decision also makes it clear that the absence of a good explanation is not in itself a bar to the Applicant obtaining the requisite relief. In ***Blossom Edwards v. Rhonda Bedward [2015] JMSC Civ 74***, Sykes J, (as he then was), citing ***Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co. Inc***. *[1986] EWCA Civ J0701-8* opined that a:

> *"judge cannot make a moral judgment on the conduct of the defendant and use that as a basis for refusing to set aside the judgment."*

[39] In ***Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co. Inc*** **(supra)** it had been observed that *the "defendants treated the Court... with contempt and therefore, the defendants are not deserving of the court 's exercise of its discretion in their favour."* The Court of Appeal held that this was not a valid consideration because the judge had made a moral judgement of the defendant's behaviour rather than "*an assessment of the justice of the case as between the parties".*

[40] Applying these principles to the instant case, it is clear that although the Court may have formed the view that the Applicant was nonchalant in his approach, a finding

which was adverse to his position, this could not form the basis for refusing his application where there existed a real prospect of success at trial.

[41] In arriving at her decision, I note that the Learned Judge had given careful consideration to the possible prejudice that would likely be suffered by the Claimant and resolved this issue in his favour. It is the complaint of the Applicant that the judge erred in elevating the claimant's evidence of his prejudice above that of the defendant and at the time of the hearing of the defendant's application before Jarrett J., the claimant had not yet filed and/or served his medical reports. The Applicant contended that the result of this was his evidence of the injuries he allegedly sustained were uncorroborated by any medical report. It was also asserted that the failure to attach a medical report to the claim form is a breach of **rule 8.11 (3)** of the Civil Procedure Rules and at the time of the application to set aside, the claimant was not in a position to advance his claim or assess damages and the setting aside of the default judgment in these circumstances would not prejudice him.

[42] While, the Claimant's evidence of injuries was uncorroborated, I do not believe that this would have operated as a bar to the Court taking into account the injuries outlined in his affidavit on this interlocutory application. It is evident however, that although the Defendant had not advanced any evidence of hardship he would face grave prejudice if the default judgment was not set aside. Based on her remarks, the Learned Judge was fully aware that an adverse outcome could result in him facing a large assessment award. In reviewing her findings on this point, it does appear that when considering the prejudice experienced by the claimant she factored in the time prior to the commencement of the claim which would be contrary to the decision of **Thorn *PLC v. MacDonald and another*** [1999] CPLR 660, CA where the court held that pre-action time was irrelevant for this purpose, and must be disregarded. In any event, the prejudice likely to be suffered by the Claimant could not in and of itself tip the scales in favour of the application being denied, particularly in circumstances where the primary consideration had been made out.

[43] In light of the foregoing discussion and conclusions, it is my opinion that the Applicant has a real prospect of succeeding on this appeal.

[44] Having arrived at this finding, it must now be determined if this is an appropriate matter for a stay to be granted. In the decision of ***Albertha Dewdney etal v Enid Louise Brown-Parson and An'or*** 2004 HCV 421, after an extensive and comprehensive review of a number of authorities as well as the relevant rules on the area, Brooks J (as he then was) concluded that there is an '*inherent power which this court possesses and which I may exercise, to stay execution of a judgment in an appropriate case*'. Having arrived at this conclusion, he then went on to state as follows;

> *"Traditionally, there have been two principles which must be borne in mind at all times, when considering a stay of execution. The primary one is that a successful litigant should not be deprived of the fruits of his judgment (The Annot Lyle (1886) 11 P. 141 at p. 146). The second is that the court ought to see that a party exercising his right to appeal does not have his appeal, if successful, rendered nugatory. (See Wilson v Church (No 2) (1879) 12 Ch. D 454 at p.458-9)".*

[45] Having stated thus, the Learned Judge continued:

> *"In recent years the approach of the court, has been more holistic. In* ***Winchester Cigarette Machinery Ltd. v. Payne and Anor****. (No 2) TLR (15th January 1993), it was held that it is now a matter of applying common sense and the balance of advantage. The starting point, however, will be the first traditional principle stated above. In Hammond Suddard, cited by Miss Archer, the English Court of Appeal stated, at paragraph 22, that in approaching the issue, the court should look at all the circumstances of the case and make a decision which will avoid injustice... Clarke, L.J. said:*
>
> ***"Whether the court will exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment. On the other hand, if a stay is refused and the appeal***

> ***succeeds and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent '****(emphasis added)*

[46] I have already concluded that the Applicant in this matter has a real prospect of success in prosecuting this appeal. If the matter was allowed to proceed to assessment, he would be faced with the possibility of a multi-million dollar award which he may be forced to honour pending the outcome of his appeal. On the other hand, the Claimant having obtained judgment in December 2021 would be further delayed in obtaining the full relief sought in these proceedings if the appeal was determined in his favour. Taking into account the relevant principles enunciated above, I am persuaded that the risk of injustice to the Applicant would be greater, particularly if he were to be successful on his appeal. Any delays suffered by the Claimant could be addressed by the fact that the Assessment division now has its own docket within which assessment matters can be heard within 6 to 8 months of a case management hearing and if the matter is to be tried, the trial can also be accommodated within this division which also operates as a fast track court for simple negligence matters.

CONCLUSION

[47] Accordingly, it is my ruling that;

a. The Applicant is granted leave to appeal.
b. The proceedings are stayed pending the outcome of the appeal

…….
Hutchinson Shelly, J