NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2006 HCV 2311

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| BETWEEN | ANDREW ROBERTSON | CLAIMANT |
| AND | TOYOJAM LIMITED | 1ST DEFENDANT |
| AND | EWEN HAUGHTON | 2ND DEFENDANT |

IN CHAMBERS

Jermaine Spence instructed by DunnCox for the claimant
Garfield Haisley instructed by Vaccianna and Whittingham for the first defendant
Simone Jarrett instructed by the Kingston Legal Aid Clinic for the second defendant

August 4 and September 16, 2008

APPLICATION TO SET ASIDE JUDGMENT - NON-AVAILABILITY OF WITNESS TO GROUND DEFENCE - SUMMARY JUDGMENT AFTER JUDGMENT SET ASIDE - RULES 3.2 (2), (3), 9.2 (6), 9.3 (1), (4), 10.2, 10.4 (1), 12.1, 12.4, 13.3, 15.1, 15.2, 15.3, 15.4 (1), 25.1 (i), 26.2 (1), 26.2 (4), 13.3 OF THE CIVIL PROCEDURE RULES

SYKES J.

1. There are two applications, one by each defendant, to set aside judgments obtained by the claimant. The circumstances giving rise to these applications are now stated. Mr. Andrew Robertson, the claimant, and Mr. Ewen Haughton, the second defendant, were employed as mechanics by Toyojam Limited ("Toyojam"). On January 9, 2003, while at work at Toyojam's garage, Mr. Andrew Robertson was effecting repairs to a vehicle. At some point Mr. Robertson asked Mr. Haughton to start the engine of the vehicle. Mr. Haughton did as requested. The vehicle leapt forward pinning Mr. Robertson against a wall. Mr. Robertson received a fracture to the left femur which necessitated the implantation of a K-nail and a four-hole deroration plate. He spent eleven days in hospital followed by two years as an outpatient. He filed a claim form and particulars of claim on July 3, 2006 in which he sought compensation for his injuries.

Eventually, judgments in default of acknowledgment of service were entered against both defendants.

**The case for Toyojam**

2. Mr. Melton Jackson, the process server for the claimant, swore in his affidavit of service that he served the claim form, the particulars of claim, the form of defence and the acknowledgment of service on Toyojam on August 24, 2006, between the hours of 10:00am and 11:00am. He said that he handed the documents to a Mr. Bobby Maxwell, the manager of Toyojam, at 76B Hagley Park Road, Kingston 10, which is Toyojam's place of business.

3. Under rule 9.3 (1) Toyojam had 14 days after the date of service of the claim form to file an acknowledgment of service. Rule 9.3 (4) permits a defendant to file an acknowledgment of service at any time before a request for default judgment is received at the registry from which the claim form was issued. Mr. Robertson made his request for judgment in default of acknowledgment of service on October 24, 2006. Toyojam did not file any acknowledgment of service until October 30, 2006. This means that even though Toyojam did not file the acknowledgment of service within the 14 days stated by rule 9.3 (1), it still did not take advantage of the further window of opportunity created by rule 9.3 (4) to file a defence before the request for default judgment was made.

4. Toyojam's explanation for its lack of response within the stipulated time comes from two affidavits: one by Mr. Haisley, the current attorney at law for Toyojam, and the other by Mr. Kipcho West, the previous attorney at law. Taking Mr. West's affidavit first, Mr. West swore that Toyojam was served on or about September 13, 2006, with the claim form and particulars of claim. He stated that he "having received instruction to act in the matter an acknowledgment of service of claim was filed herein in or about October 2006" (see para. 4 of affidavit filed January 26, 2007). According to Mr. West, Toyojam had relocated operations and this hampered his ability to represent his clients as effectively as he would have liked. He also had difficulty locating the two principals of Toyojam because they were and are full time Air Jamaica pilots and are often outside of the jurisdiction for extended periods. This meant, from Mr. West's point of view, that he was unable to get all the necessary

instructions for filing a defence. By letter dated October 30, 2006, he wrote to Mr. Robertson's attorneys explaining his predicament and sought their consent to file the defence out of time. In a written response dated November 9, 2006, Mr. West received the less than comforting news that his request could not be accommodated because a request for judgment in default of acknowledgment of service had been filed on October 24, 2006, that is to say, six days before Mr. West wrote to the claimant's attorneys.

**5.** I note that Mr. West's evidence on the date of service of the relevant documents on his client must necessarily be hearsay and stands in sharp contrast with the affidavit of the process server who gives detailed particulars of the date, time and place of service. The process server also identified the person to whom he gave the documents. No affidavit has come from this person denying this assertion by the process server and Mr. West has not addressed the specific points made by the process server save to speak of service on September 13, 2006, which must be what he was told because he was not instructed in the matter until October 2006, and from all the evidence it seems he received instructions on or after October 24, 2006. I, therefore, prefer the evidence of the process server on this point of service on Toyojam.

**6.** The proposed defence as stated in Mr. West's affidavit and in the draft defence filed with the affidavit was that Mr. Robertson, in breach of standard operating procedures, while standing in front of the vehicle asked Mr. Haughton to start the vehicle. The vehicle leapt forward and Mr. Robertson was injured. This, according to Toyojam, amounts to a complete defence. This is truly a remarkable proposition in this modern day. It is reminiscent of the common employment defence that prevailed until it was abolished in Jamaica by the Law Reform (Common Employment) Act of 1961. Mr. West concludes the relevant part of his affidavit by saying that the omission to file a defence was entirely inadvertent and not intentional.

**7.** I turn now to Mr. Haisley's affidavit. Mr. Haisley, like Mr. West, swears that both directors of Toyojam are full time Air Jamaica pilots and are outside of the country for protracted periods of time. He further stated that on September 8, 2007, a copy of the judgment in default of

acknowledgment of service and a notice of assessment of damages were served on the company. The evidence from Mr. Haisley is consistent with Mr. Melton Jackson, the claimant's process server, that he (the process server) served these documents on Toyojam by handing them to Mr. Bobby Maxwell at 76B Hagley Park Road, Kingston 10. Mr. Haisley goes on to say that these documents only came to the attention of one of the directors of Toyojam in November 2007, that is to say two months after Toyojam had specific knowledge that a judgment was in fact entered none of the directors knew about it. The weak excuse for this lethargy on the part of Toyojam, this time round, is that both directors are pilots and so are out of Jamaica for long periods of time.

8. Mr. Haisley then refers to Mr. West in this manner. Mr. Haisley swears that the failure to file an acknowledgment of service and a defence within the time was not deliberate because Toyojam retained the services of counsel (who could only have been Mr. West) in October 2006 and was under the impression that counsel had taken all necessary steps to defend the claim and it was not until November 2007 that Toyojam realized that a judgment in default had been entered against the first defendant, and thereafter sought to retain services of new counsel to represent the company. Mr. Haisley in his affidavit expressly states that he was advised by Mr. Cecil Sutherland, a director of Toyojam and one of the elusive pilots, that the company retained Mr. West in October 2006 and that "the necessary instructions for defending the matter were given to Mr. West" (see para. 3 of Mr. Haisley's affidavit). I pause to note again that if this retention of counsel took place on or after October 24 as seems to be the case, then it is difficult to see why Mr. West is being accused by his client of not tending to the matter with due dispatch.

9. I make an observation. It is to be regretted that Mr. Haisley has been the instrument by which the name of Mr. West is sought to be tarnished. An analysis of the evidence does not make good the assertion made by the client against Mr. West. The evidence of the process server is that he served the claim form and particulars on August 24, 2006. Since it is now known that Mr. West was retained in October of 2006, then clearly the time for acknowledging service of the claim had passed (14 days from the date of service) and the claimant did what he was entitled to do, namely, seek to get judgment in default of an acknowledgment of service. If Mr.

West was retained after October 24, 2006, what more could he have done other than what he did which is now outlined? Mr. West has filed an affidavit in this matter to which is attached correspondence passing between himself and the claimant's attorney. In the first letter dated October 30, 2006, Mr. West wrote explaining that he had just received instructions to act for both defendants and he was asking that the claimant consents to the defence being filed out of time. By letter dated November 9, 2006, the claimant's attorney responded by saying that in respect of Toyojam, it could not accommodate the request because the request for default judgment was already file but nonetheless they would seek instructions from their client to see if an accommodation was possible. In respect of Mr. Haughton, the claimant's attorneys indicated that all that needed to be done was to file the acknowledgment of service within the time required because Mr. Haughton was only recently served. This conduct by Mr. West does not show any dereliction of duty. It appears that he acted promptly, once instructed and was seeking to extricate Toyojam from the difficult position it was in. This predicament was solely the creation of Toyojam because they were served on August 24 by the process server and did nothing for two months. Additionally, Mr. Haisley's affidavit does not indicate the specific date Toyojam instructed Mr. West. I also note that Mr. Haisley made the same complaint that Mr. West did, namely, the inability to get instructions because of the frequent and prolonged absences of both principals of Toyojam. In light of this, it is to be lamented that counsel thought it prudent to accuse a fellow professional of unprofessional conduct without the proper factual basis to make such an allegation. Indeed it is too plain for argument that Mr. West did all that he could have done given that the client took over eight weeks after service to retain Mr. West. It is to be noted as well that the time for filing a defence had also passed by the time Toyojam instructed Mr. West. Given the difficulty Mr. West said he had in communicating with his client, it is not surprising that the application to set aside the judgment was not filed until November 20, 2006. Having filed the application the obligation was then on the Registrar to set a date for the hearing of this application which, based on the state of the records, sat in the registry for over one year and is only now being heard. How can Mr. West be blamed for this kind of inefficiency on the part of the Supreme Court? While Mr. West waited for the machinery of the Supreme Court to get into operation, the

claimant was busy seeking to secure his judgment. On October 24 he applied for judgment in default of acknowledgment of service. This process does not involve the defendants. The request for judgment in default of acknowledgment of service against Toyojam was finally entered on January 9, 2007. It is this judgment Toyojam wishes to have set aside.

**10.** Mr. Haisley's affidavit sets out the proposed defence at paragraph 12. There is also a draft defence attached which covers the same ground as paragraph 12 of the affidavit. The defence is that the claimant was standing in front of the vehicle when he asked Mr. Haughton to turn on the ignition. Mr. Haughton did this and because the vehicle was left in gear by the claimant, it "jumped forward and pinned him against the wall" (see para. 3 of proposed defence). The source of this proposed defence is said to be Mr. Haughton; the same Mr. Haughton that no one, not even his counsel, has been able to locate for the past eleven months. Indeed Miss Simone Jarrett, counsel for Mr. Haughton, quite properly, disclosed to the court that she has been unable to contact her client since September 2007. I cannot help but note that the defence proffered by Mr. Haisley hardly differs from that put forward by Mr. West. In other words, the additional time available to Mr. Haisley has not resulted in any material difference between the defence put forward by Mr. West and that put forward by Mr. Haisley.

**11.** Let me state unequivocally that the submission that the pilots were out of Jamaica for extended periods of time and so were unavailable is not countenanced. This explanation is unacceptable. If clients choose not to make themselves available to their lawyers, then they have to live with the consequences of their decision. This is the modern age. The days of the Niña, the Pinta and the Santa Maria have long left us. We are now in the age of microchips, fibre optic cables, wireless transmissions, computers, emails and portable handheld devices, all of which, when used effectively, provide first-rate communication services. If Toyojam had communicated with its attorney then that attorney under rule 9.4 (3) was authorised to sign the acknowledgment of service. Rule 3.12 makes provision for attorneys to sign the certificate of truth of a defence if it is impracticable for the client to do so. The excuse put forward is, in a word, nonsense. If the principals of Toyojam were unavailable then surely, before they left the island they could have authorised those in charge of

the company in their absence either to instruct counsel or take legal advice in the event that a matter such as this arose. I now turn to the second defendant.

**The case for Mr. Ewen Haughton**

**12.** Mr. Haughton's role in the accident has been outlined. The claimant and both defendants agree that it was he who turned on the engine of the car which pinned the claimant to the wall. According to the process server he served Mr. Haughton on November 4, 2006. He did not file his acknowledgment of service until November 17, 2006. In the acknowledgment of service, Mr. Haughton agreed with the process server that he was served on November 4, 2006. He also filed a defence on November 17, 2006. The claimant applied for judgment in default of acknowledgment of service on November 28, 2006, some 11 days after Mr. Haughton filed both his acknowledgment of service and defence. Judgment was entered on January 9, 2007. Mr. Haughton has applied to have this judgment set aside.

**13.** From an examination of the record it appears that something has gone wrong in respect of Mr. Haughton's case. Since it agreed that Mr. Haughton was served on November 4, 2006 and it is also agreed that he filed an acknowledgment of service and a defence on November 17, 2006, it is not entirely clear why judgment in default of acknowledgment of service was entered against him.

**14.** I have already referred to rule 9.3 (1) of the CPR. Mr. Haughton has complied with this rule. He also complied with rule 10.3 (1) which gives the defendant 42 days from the date of service of the claim form to file his defence. The problem seems to have arisen in the counting of clear days from the date of service. Rule 3.2 (2) tells us that "all periods of time expressed as a number of days are to be computed as **clear days**" (my emphasis). According to rule 3.2 (3), including the examples given to illustrate the rule, if Mr. Haughton was served on November 4, 2006, then the counting begins on November 5. November 5 is then the first day of the 14 day period within which the acknowledgement of service can be filed and also the first day of the 42 day period within which to file a defence. Thus in counting the 14 or 42 days, November 4 is excluded from the count. Therefore, 14 **clear** days, beginning the count on November 5,

ends on November 18. Thus the earliest date on which a judgment in default of acknowledgment of service could be entered against Mr. Haughton would have been November 19, 2006. Based on this, Mr. Haughton actually filed his acknowledgment of service and defence within the time permitted by the rules. He was well within the 42 days to file his defence.

**15.** What Mr. Haughton failed to do was to serve his acknowledgment of service and his defence on the claimant. He therefore failed to comply with rule 10.4 (1). However, I have not seen anything in the rules that suggests that failure to serve the acknowledgment of service and defence on the claimant, even if filed in the registry, is the same as failing to file an acknowledgment of service or defence within the time frame set by the rules 9.3 (1) and 10.3 (1). What rule 9.2 (6) provides is that where a defendant fails to file either an acknowledgment of service or defence (it does not say fails to serve the other parties), judgment may be entered against the defendant. This is supported by rule 12.1 which permits entry of judgment without trial if the defendant has failed to do either of the things required by that provision once the claim is one in which a default judgment may be obtained.

**16.** Rule 12.4 sets out what the claimant is required to establish if he wishes to obtain judgment in default of acknowledgment of service. He must establish that the time for filing the acknowledgment of service has passed and the defendant has failed to do so. He also needs to prove service of the claim form and particulars of claim. From an examination of the time line, it is clear that the claimant has not proved that Mr. Haughton has failed to file his acknowledgment of service within the time. On the face of it, it would seem that the judgment was irregularly obtained and therefore should be set aside. There is no evidence before me that the file was examined by the claimant and he found that none of the relevant documents was filed. Admittedly, the CPR does not require this but this case shows that it is always a prudent step to take. Had this been done then this application by Mr. Haughton would have been unnecessary.

**17.** The defence filed by Mr. Haughton is tersely stated and may be stated in full:

*That I Ewen Haughton did not neglect or expose Andrew Robertson to any danger, and was at all time responding to request for aid made by the claimant. I was acting within the confines of my duties.*

18. I should indicate that Mr. Haughton's defence filed on November 17, 2006, was done when he did not have the benefit of counsel. He now has that advantage and he is still relying on the same defence in 2006.

**The relevant principles**

19. The relevant rule is rule 13.3 which reads:

> *(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.*
>
> *(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:*
>
> *(a) applied to the court as soon as 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.*
>
> *(3) Where this rule gives the court power to set aside a judgment, the court may vary it instead.*

**Resolution**

20. At first I was not attracted to Mr. Spence's submission that Mr. Haughton's defence did not raise any defence at all. However, having reflected on the matter, I agree that Mr. Haughton's defence does not raise a viable defence. Mr. Haughton seems to be labouring under the mistaken impression that as long as he is acting within his duties he cannot be negligent. This, sadly, is not a correct view of the matter. The fact that one is acting within one's duties does not mean that one cannot be negligent. What he was required to do was to carry out his duties in a non-negligent manner. His defence then is not that he was not negligent

but he did what Mr. Robertson asked and therefore cannot be held liable. The request made of him was to start the vehicle. He is required to do this in a non-negligent way. He is not denying that he was requested to start the engine. He is not denying that he in fact started the engine. He is not denying that the vehicle leapt forward which can only mean that the vehicle was not properly secured in order to prevent the very thing that happened. This is negligence. In short his defence does not deny any of the material parts of the claimant's statement of case. Toyojam's case, while stated differently, was admitted by Mr. Haisley to rest on the evidence of Mr. Haughton should it become available. Toyojam has no evidence independent of Mr. Haughton to put forward in its defence.

**21.** It will be recalled that no one has seen Mr. Haughton for the past eleven months. His own counsel has no leads on him and neither does Toyojam. It means that Mr. Haughton is unlikely to be available at any subsequent trial of the claim. Toyojam's success depends on the availability of Mr. Haughton. Its defence has no prospect of success without Mr. Haughton's testimony. What Toyojam asserted in its defence, was said to have come from Mr. Haughton before his unavailability.

**22.** Although Miss Jarrett said that she cannot find her client and has not heard from him since September 2007. She submitted that she wished to file an amended defence but in my view I am not sure on what basis she would do this given that he has not instructed her beyond what he stated in his defence filed. He actually swore an affidavit filed on September 24, 2007 in which he refers expressly to his defence set out in the defence filed on November 17, 2006 and is still relying on what he stated there. Therefore even after nearly a year after filing the defence and having retained counsel his position remained as stated in the defence filed in 2006. That being so, how could Miss Jarrett file an amended defence in the absence of further instructions which she cannot now get since her client cannot be found?

**23.** From what has been stated so far, it is clear that the judgment against Mr. Haughton was irregularly obtained. I have decided to resolve this specific case in this way. I decided to set aside the judgment against Mr. Haughton as having been irregularly obtained but to enter summary

judgment against him exercising my initiative to make an order against the defendant.

**24.** In respect of Toyojam's application I have decided not to set aside the judgment because Toyojam has no real prospect of successfully defending the claim since it has no evidence to put before the court in support of its defence and also I have decided to enter summary judgment against Mr. Haughton which would make Toyojam vicariously liable for Mr. Haughton's negligence.

**25.** The test of having a "real prospect of success", which has the same meaning under rules 13.3 (1) and 15.2, is not met by simply pleading a legally cognisable defence but also extends to whether there is evidence to support the defence. Toyojam has no evidence and so there is no prospect of defending the claim. In any event, the defence advanced by Mr. Haughton is a confession of negligence. Therefore rule 13.3 (2) does not arise for consideration.

**26.** I now explain the basis on which I have entered summary judgment against Mr. Haughton after deciding to set aside the judgment against him as having been irregularly obtained. Part 15 of the CPR deals with summary judgments. Rule 15.1 states quite boldly that "this part sets out a procedure by which the court may decide a claim or a particular issue without a trial." Rule 15.2 empowers the court to give summary judgment on a claim or a particular issue if the court considers that "the defendant has no real prospect of successfully defending the claim or the issue." Rule 15.3 provides that the court may grant summary judgment in all cases except those listed in that particular rule. This is a case in which summary judgment may be entered. Rule 15.4 (1) states that except in counter claims a claimant may not apply for summary judgment until the defendant against whom summary judgment is sought has file an acknowledgment of service. Under rule 15.6, the court is permitted to "give summary judgment on any issue of fact or law whether or not such summary judgment will bring the proceedings to an end."

**27.** It is important to note what rule 15.4 (1) does not say. It does not say that a court cannot grant summary judgment on its own initiative. The restriction is placed on the claimant, not the court. Rule 26.2 (1) expressly

empowers the court to exercise its powers either on an application or on its own initiative. Where the court proposes to act on its own initiative, rule 26.2 (4) requires the registry to give the party likely to be affected 7 days notice of the date, time and place of the hearing. This restriction on the court's power is a natural justice requirement giving the party likely to be affected a reasonable opportunity to make representations. In my view, the letter of rule 26.2 (4) does not apply where the parties are before the court at a case management conference or on some application that causes the matter to be before the court and the judge raises the issue and the parties have given a full response. It would be ludicrous if the parties are before the court and are prepared to deal with the issue raised by the judge for there to be literal compliance with rule 26.2 (4). To do otherwise would be contrary to rule 25.1 (i) where the court is mandated to manage cases actively by, among other things, dealing with as many aspects of the case as is practicable on the same occasion.

**28.** It may be asked, why set aside the judgment in Mr. Haughton's case if summary judgment was to be entered in any event? The answer is that it is still a fundamental rule that no defendant should be deprived of the time provided for him to file an acknowledgment of service or a defence in accordance with the rules unless the time is abridged in accordance with the CPR. The rules permit him to delay to the last minute and as long as he is within the time he is protected. I do not think that the new flexibility of these rules have eroded that principle.

**29.** What all this means is that a court is required to address its mind to as many aspects of the case as possible. Thus on an application to set aside a judgment, the court is empowered to look down the road and ask, 'What happens if the judgment is set aside?" If the defendant has no evidence to put before the court to resist the claimant's case, or to establish his own case, or if the defence pleaded amounts to an admission of the cause of action pleaded by the claimant, then it would be very difficult to justify setting aside the judgment other than in cases where a judgment has been irregularly obtained. If the judgment has indeed been irregularly obtained and it turns out that the defendant has no evidence to support his case and the defence as pleaded does not provide a defence to the claim, then it seems to me that the court should address its mind to the issue of whether summary judgment can be granted or

some other appropriate order if the case is not one in which summary judgment can be granted. This is what is happening here in respect of Mr. Haughton. Judgment was irregularly obtained but there is no evidence to support the defence or challenge the claimant. This can only mean that there is no real prospect of successfully defending the claim. Setting aside a judgment under the new litigation culture is not an end but the means to an end which is to permit the affected party to mount a challenge provided that there is evidence that he has a real prospect of success. We are past the days of barren procedural points that only serve to delay the conclusion of the claim.

**30.** During the hearing I did canvass counsel's views on the impact that Mr. Haughton's non-availability ought to have on this application. Counsel for the defendants suggested that I should set aside the judgment because there was the possibility that Mr. Robertson was contributorily negligent and the defendants should be presented with an opportunity to try to establish this by cross examination. Having considered the matter, I decided against this course of action since in my view, based on the proposed defence, it is very difficult to see how contributory negligence could be established and to permit cross examination on a speculative possibility would not be using the court's resources appropriately.

**31.** It was Saunders CJ (Ag) (as he then was) ***Bank of Bermuda Ltd v Pentium*** (BVI Civil Appeal No. 14 of 2003) (delivered September 20, 2004) at para. 18 said:

> *A Judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim.*

**32.** This method of dealing with Mr. Haughton's case as an application for summary judgment is justified by the decision of the House of Lords in ***Three Rivers District Council v Governor and Company of the Bank of England (No. 3)*** [2003] 2 A.C. 1. All their Lordships agreed that under the rules, summary judgment may be given in appropriate cases where the case pleaded by the party has no realistic prospect of success. Lord Hobhouse (dissenting on application of law to fact but there was no disagreement with his legal analysis by the majority) went further to state at para. 161:

> *The judge's assessment has to start with the relevant party's pleaded case but the enquiry does not end there. The allegations may be legally adequate but may have no realistic chance of being proved.*

**33.** It is clear, then, that a judge is required to conduct an assessment of the prospect of success. It is not a trial and neither does the judge make findings of fact. The assessment process may give the impression that the judge is making findings of fact but that is not the case. He is taking a global view of the matter. Also in the case before me, in light of the fact that Mr. Haughton had the benefit of counsel when he filed his affidavit on September 24, 2007 in which he adopted the defence he filed when he did not have the advice of counsel, I take it that what has been pleaded is the best case he can make. The test to be applied on summary judgment application is not possibility of success. The test is an absence of reality. It would seem to me that if the chief witness to support the defence cannot be found then there is not just an absence of reality but an impossibility.

**34.** From what has been said, Mr. Haughton was negligent when he switched on the ignition without checking to see that it was safe to do so. Toyojam alleged that Mr. Haughton was not acting within the scope of his employment because he disobeyed the safety instructions given to him and so too did the claimant. This defence - a legal dinosaur - has much in common with it flesh and blood counterpart; it once walked the face of the legal earth but is now extinct. The company would be vicariously liable for Mr. Haughton's negligence (see ***Lister v Hall*** [2002] 1 A.C. 215; ***Attorney General of the BVI v Hartwell*** (2004) 64 W.I.R. 103; ***Clinton***

*Bernard v The Attorney General of Jamaica* (2004) 65 W.I.R. 245; *Gravill v Carroll* [2008] All ER (D) 234).

**Conclusion**

**35.** Toyojam's application to set aside judgment is dismissed. Mr. Haughton's application to set aside judgment succeeds on the basis that it was irregularly obtained but summary judgment is entered against Mr. Haughton because he has no real prospect of successfully defending the claim for the reasons that (a) he is not available to give evidence and (b) the proposed defence is no defence in fact or law. The matter is to proceed to assessment of damages. Costs of these applications to the claimant and to be agreed or taxed on the conclusion of the assessment of damages.