[2023] JSMC Civ 140

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2022CV02006

BETWEEN	**STEWART BROWN INVESTMENTS LIMITED**	**CLAIMANT**
AND	**MORRIS HILL LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Conrad George and Andre Sheckleford instructed by Hart, Muirhead and Fatta for the Claimant.

Mrs. Denise Senior-Smith and Ms. Donetta Franklin instructed by Oswest Senior-Smith and Co for the Defendant.

Heard: May 10 and July 21 2023

Civil Procedure Rules- Request to enter Judgment in Default of Defence – Application to set aside Request for Judgment in Default of Defence- Application for permission to file Defence out of time- CPR 10.2, 10.3(9), 11, 12.5, 13.2, 26.8, 26 (1) (2) (c)

MASTER L. JACKSON (AG.)

INTRODUCTION

[1] The Claimant, Stewart Brown Investments Limited a company duly incorporated under the laws of Jamaica with its registered head office at 105 Red Hills Road, filed a claim against the Defendant, Morris Hill Limited on the 27th June 2022. The claim seeks damages for negligence as a result of a collision involving two trucks owned by the parties that occurred on the 2nd of January 2021 on Noranda Haul Road in the parish of St. Ann.

[2] The Defendant filed an acknowledgement of service on July 13, 2022 which would be within the time frame of 14 days; as the Claimant, in their affidavit of service stated that the claim form, particulars of claim and other relevant forms were served on Ms. Kimoy Hill at the registered office of the Defendant on July 1, 2022. Notwithstanding filing an acknowledgement of service indicating that they intend to defend the whole claim, they did not file a defence within the requisite time frame, that being 42 days.

[3] As a result of this, the Claimant filed a request for Judgment in default of defence to be entered on the 14th of October 2022. On the 18th of October 2022, the Defendant filed an application for court orders for extension of time to file a Defence. The application was accompanied by an affidavit sworn to by Mrs. Senior-Smith, counsel for the Defendant exhibiting a draft Defence. On the 4th of May 2023 an affidavit sworn by a Mr. Kelvin Hill the Managing Director of the Defendant was also filed exhibiting a draft Defence.

[4] On the 10th of May 2023 when the application came up for hearing, the Claimant filed written submissions with a list of authorities in response to the Defendant's application. Having not filed any written submissions and list of authorities, pursuant to Practice Direction 8 of 2020, the Court adjourned the hearing for the Defendant to file and serve its written submissions and list of authorities.

[5] In addition to filing written submissions and a list of authorities, the Defendant on the 19th of June 2023 filed and served an amended application for court orders with supporting affidavit sworn to by Mrs. Denise Senior-Smith attaching a draft Defence. The amended application sought the following orders;

a. That the Default Judgment requested herein be set aside
b. That the Defendant be permitted time to file its Defence within fourteen days of the date of this Order
c. Costs to be cost in the Claim
d. Such further and/or other relief as this Honourable Court deems just

[6] The grounds on which the amended application for Court Orders are sought are as follows;

a. Pursuant to Rule 13 and Part 11 of the CPR 2002 as amended

b. Pursuant to Rule 26.8 of the CPR as amended

c. The Defendant has a good reason for failing to file the Defence within 42 days of the date of service

d. The Defendant has a good Defence with a real chance of success in response to the Claimant's Claim.

e. The failure to file the Defence was not contumelious

f. The Application was made as soon as reasonably practicable

g. There will be no prejudice to the Claimant

h. For the fair and just disposal of the Claimant

i. That the Applicant's failure to file its Defence in time was due to inadvertence on the Part of counsel and was not deliberate and contumelious

j. That the Applicant will be greatly prejudiced if the application is not granted.

K. In the interest of the administration of justice

[7] Counsel in her affidavit in support of her amended application which she amplified in her submissions, indicated that the need to make the amended application is based on the fact that when checks were made, prior to her first application, the Court's Registry did not indicate that a request for Default Judgment was filed by the Claimant. It is after her application was made for an extension of time to file Defence, that she became aware of the request filed by the Claimant for Default Judgment, hence the need to file an amended application seeking the orders as outlined above.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[8] The Defendant submitted that his application was filed four days after the request for default judgment was made. There was no evidence on the Court system of a request for default being made when checks were made at the Registry. As a result, there has been no delay in filing their application.

[9] The failure to file the Defence within a reasonable time is set out in paragraph 5 of the affidavit of Denise Senior-Smith dated October 18, 2022 and paragraph 7 of the affidavit of Kelvin Hill dated May 4, 203. The reason had to do with the attorney for the Claimant experiencing challenges which saw the Defence being overlooked. She cited the authority of **Evans Court Estate Company Limited**

(by original action) and NCB v Evans Court Limited and Design Matrix Limited (by way of counter claim and set off) Supreme Court Civil Appeal No. 109/07 Application No. 166/07 at page 8 of that judgment the court stated *"the reason given for the failure of the applicant's counsel to make the application for leave to appeal orally at the time of the order was made is that counsel "was stunned by the magnitude of the order and was unable to collect his thoughts sufficiently to make the application".* She further cited the following from the judgment. *"The parties are at one that is permission to appeal ought not to be given, it would be futile to enlarge time within which to apply for leave. I would add that, in the circumstances of this case where there was obviously confusion on the part of Counsel for the application for leave in the Court below, if there is a real chance of an appeal succeeding the court should give permission".*

[10] The Defendant posits that he has a case that has a real prospect of success. The Defendant's Director has set out in his affidavit, the Defence of inevitable accident. The Defence of inevitable accident rests with the Defendant the only party to the Claim.

[11] The Defendant is therefore the person directly affected by the Judgment and can give the affidavit setting out the merits of his Defence, and has done so through its Director. Reliance was placed on **Erldine Henry Brown v Jamcon Engineering Limited and Rupert Murray Suit No B323 of 1998.**

[12] The Defendant admits to the payment but that was based on without prejudice negotiations and not based on acceptance of liability. The Defendant simply wanted to get rid of this matter as it was a nuisance for the Company and its dealings. The Defendant maintains that his Defence is one grounded in inevitable accident.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[13] Counsel for the Claimant in resisting the application filed by the Defendant asserted in its written submissions that a Defendant that seeks to set aside a Default Judgment must establish that he has a viable challenge to the Claim, as well as an explanation for the dilatory conduct.

[14] In support of its submissions, counsel for the Claimant cited a number of authorities and the following is a summary of the submissions from the Claimant as to why the Defendant's application should fail. These include:

a. There must be an affidavit of merit whereby the affiant discloses that there is a prima facie Defence **(Evans v Bertlam [1937] AC 473)**. The affidavit of Mrs. Senior-Smith or Mr. Kelvin Hill does not disclose any.

b. The affiant to the affidavit of merit must speak from his or her own knowledge or if from information and belief the source of that information must be stated (Rule 30.3 CPR).

c. The affidavit must in any event be "from someone who can swear positively to the facts upon which the Defendant intends to rely" **(Per Morrison JA in B & J Equipment Rental v Nanco [2013] JMCA Civ 2).**

d. It is not enough for the draft Defence to be submitted. The Affiant must speak to the particular facts relevant to the Defence bearing in mind the principle in c above.

e. The draft Defence admits liability with a mere challenge with respect to the quantum of loss suffered. There is therefore no proper purpose to be served in allowing the Defence, but rather proceeding to an assessment of damages.

f. There is no good explanation for the delay. The explanation given is limited to inadvertent overlooking.

[15] Interestingly, in addition, to written `submissions, at the hearing, counsel for the Claimant raised a preliminary objection. His objection in summary is that the Court has no jurisdiction to grant the orders being sought in the amended application. This is based on;

a. The court cannot set aside a request. There is no such thing in law or under the Rules. As far as he is concerned, there was no judgment entered in the matter and that a request is just that, a request

b. Having already filed a Defence in the matter, the Defendant cannot ask the court to ignore that which was already filed. It cannot obtain the orders being sought concerning the time in which to file a Defence.

THE LAW

[16] The following Rules of the Civil Procedure Rules 2002 as amended play a role in addressing this application

The Defendant –filing Defence and the consequences of not doing so

10.2 (1) A Defendant who wishes to defend all or part of a Claim must file a Defence (which may be in form 5)

....

(5) Where a Defendant fails to file a Defence within the period for filing a Defence, judgment for failure to defend may be entered against that Defendant if Part 12 allows it

The period for filing Defence

10.3 (1) The general Rule is that the period for filing a Defence is the period of 42 days after the date of service of the Claim form…

(9) The Defendant may apply for an order extending the time for filing a Defence.

Conditions to be satisfied - judgment for failure to defend

12.5 The registry must enter judgment at the request of the Claimant against a Defendant for failure to defend if –

(a) the Claimant proves service of the Claim form and particulars of Claim on that Defendant; or

(b) an acknowledgment of service has been filed by the Defendant against whom judgment is sought; and

(c) the period for filing a Defence and any extension agreed by the parties or ordered by the court has expired;

(d) that Defendant has not –

(i) filed a Defence within time to the Claim or any part of it (or such Defence has been struck out or is deemed to have been struck out under Rule 22.2(6));

(ii) where the only Claim is for a specified sum of money, filed or served on the Claimant an admission of liability to pay all of the money Claimed, together with a request for time to pay it; or

(iii) satisfied the Claim on which the Claimant seeks judgment; and

(e) there is no pending application for an extension of time to file the Defence

Cases where court must set aside judgment

13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because-

(a) in the case of a failure to file an acknowledgement of service, any of the conditions in Rule 12.4 was not satisfied;

(b) in the case of judgment for failure to defend, any of the conditions in Rule 12.5 were not satisfied; or

(c) the whole of the Claim was satisfied before judgment was entered.

(2) The court may set aside judgment under this Rule on or without an application.

Cases where court may set aside or vary default judgment

13.3 (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 acknowledgement of service or Defence, as the case may be

.....

(3) Where this Rule gives the court power to set aside a judgment, the court may instead vary it.

[17] Rule 13.4 stated that an application to set aside can be made by anyone who is directly affected by the entry of the judgment. The application must be supported by evidence on affidavit and the affidavit must exhibit a draft of the proposed Defence (Rule 13.4(2) and (3)). The substantive test for setting aside a default judgment is, therefore, whether the Defendant has a real prospect of successfully defending the Claim. **See Swain v Hillman and another [2001] 1 All ER 91.**

[18] The Court's general powers of management

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

(2) Except where these Rules provide otherwise, the court may –

…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;

…

Relief from sanctions

26.8 (1) An application for relief from any sanction imposed for a failure to comply with any Rule, order or direction must be –

(a) made promptly; and

(b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that –

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant Rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to –

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown

[19] The application of Rule 26.8 to the applications for extension of time to file Defence was examined by Sykes J (as he then was), in the matter of **Carr and Carr v Burgess CL 130/1997.** He stated that where such an application is made outside of the time period to file the Defence, then this Rule becomes applicable. This is because in reality it is an application for relief from sanction from the automatic stay imposed by the Rules.

[20] Application for court orders are governed by Rule 11 of CPR. I will not replicate the entire Rules here, but this Rule outlines the procedure for obtaining court orders and that applications must be accompanied by an affidavit. In examining this Rule as it relates to applications for extension of time Master Orr in **Aston Wright v AG [2022] JMSC Civ 25** had this to say *"Rule 11.9(2) requires all notices of application to be supported by affidavit evidence unless a Rule, order or practice direction provides otherwise. Applications are not properly before the court until the supporting affidavit is filed."*

[21] For completeness I will also refer to Rule 30 of the CPR.

> **Contents of affidavit**
>
> *30.3 (1) The general Rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.*
>
> *(2) However an affidavit may contain statements of information and belief –*
>
> *(a) where any of these Rules so allows; and*
>
> *(b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-*
>
> *(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and*
>
> *(ii) the source for any matters of information and belief. (3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit. (4) No affidavit containing any alteration may be used in evidence unless all such*

alterations have been initialled both by the deponent and by the person before whom the affidavit was sworn.

Analysis

[22] In making a determination in relation to the Defendant's application the following documents filed and served by the Defendant have been examined and taken into account.

a. Notice of application for court orders for extension of time to file Defence filed October 18, 2022 and Affidavit of Denise Senior-Smith

b. Affidavit of Mr. Kelvin Hill filed May 4, 2023 with draft Defence

c. Amended Notice of application for court orders to set aside request for default judgment filed June 19, 2023

d. Affidavit of Mrs. Denise Senior-Smith exhibiting "corrected draft Defence" that accompanied amended notice of application for court orders also filed June 19, 2023.

Order 1. Default Judgement Requested be Set Aside

[23] I must admit that when I first saw the amended application on behalf of the Defendant, I found it curious as no judgment was entered. In relation to this curiosity, counsel for the Defendant stated that since the Defendant failed to file its Defence within the requisite time, the Claimant is entitled to have judgment entered in default against the defaulting party. She further stated that the defaulting party has a right to an application to invoke the Court's discretion to have the judgment set aside.

[24] Counsel for the Claimant Mr. George, in his preliminary objection, to the orders being sought by the Defendant, stated that there is no such thing as setting aside a request for default judgment. He stated there was no need to cite any case law, because that was common sense. No judgment has been entered for the Claimant, and thus there is nothing to set aside. Counsel for the Defendant indicated at that stage that she needed time to find the authority that she was relying on. The Court allowed her to provide the authority. When she returned on the subsequent date, she indicated that having read the authority, she has conceded as it relates to counsel's preliminary point and that it appears her submissions were based on the Civil Procedure Code. That authority relied on

by counsel for the Defendant is **Dudley Burgess v Exton Wynter CL B 055/1997, delivered 26 January 2006.**

[25] Although counsel has conceded on that point, I believe that it is still beneficial to examine her position and to see whether she ought to have conceded. The discourse may also be useful for the jurisprudence on the area. I have come to realise that there is a view that where a request for judgment in default of Defence has not been entered there is no need for an application to set aside judgment to be filed. If a Defendant intends to defend the Claim, the application to be filed by the Defendant in this instance, would be permission to file Defence out of time.

[26] Another view (shared initially by counsel for the defendant), is that once the request for judgment in default of Defence is made, that the Claimant is entitled to judgment and thus, the only application that the Defendant can make at this stage, is to set aside. It appears that this position is based on a specific interpretation gleaned from Rule 12.5 of the CPR and a number of judgments that predate the CPR.

[27] Rule 12.5 states that once satisfied, the Registrar must enter the default judgment, unless there is a pending application for extension of time to file Defence. (See Rule 12.5(e)). Thus being a purely administrative process, it does not matter that the judgment was not entered when requested. Once the requirements have been satisfied, the judgment will be entered by the Registrar.

[28] This posture seems to turn on the deemed or effective date for judgments in default. That is, once a request is made, then the default judgment becomes effective on that date, and as such the only application that can be made is to set aside. In **Workers Savings and Loan Bank Limited v Winston McKenzie, Benros Company Limited and Bentley Rose; and Workers Savings and Loan Bank Limited v Macro Finance Corporation Limited, Benros Company Limited and Benros Company Limited and Bentley Rose (1996) 33 JLR 410,** the appeal concerned a ruling by Smith J where the judge stated

that once documents filed for the judgment in default *were in order, the proper course was to apply to set aside. The Court noted that, "Whether Smith J was correct or not about the default judgments itself, was for this court to decide. Once his Lordship recognized their existence and adverted to them, it was the ministerial duty of the Registrar to enter them in the decree register for their due effect."* They went on further to say that *"since the Bank sought an extension of time to file a Defence, when there was in existence a default judgment, it is clear that they have admitted that they were out of time. So the learned judge, as a matter of law, dismissed the summons on a preliminary point of law and he was correct."*

[29] This judgment is Pre-CPR and in the Judicature (Civil Procedure Code) Law section 451 that applies to judgment in default, it stated:

> *"date of entry of other judgment.*
>
> *In all cases not within the last preceding section, the entry of judgment shall be dated as of the day on which the application is made to the Registrar to enter the same, and judgment shall take effect from that date".*

[30] This principle on the effective or deemed date of default judgment and the authority of **Workers Savings and Loan Bank** has been applied in other judgments. See for example **(Sagicor Life Jamaica Ltd v Broadway Import Export and Richard Morgan Claim No CL 1998/LO68).**

[31] I have not been able to find a similar provision to section 451 of the Civil Procedure Code in the CPR. The only Rule I have been able to find in the CPR concerning effective date of judgments is Rule 42.8 that deals with the time when judgment or order takes effect. It states *"a judgment or order takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date".* The wording of this Rule is distinctly different from section 451 in the Civil Procedure Code.

[32] The difference in the two Rules and the applicability of section 451 was discussed by Sykes J (as he then was), in the matter of **Dudley Burgess v Exton Wynter CL B 055/1997, delivered 26 January 2006.** Counsel for the

Claimant relied on the **Workers Savings and Loan Bank** for the proposition that the judgment should take effect on the date of the request for judgment in default. Counsel argued that this principle was carried over from the old Rules and is embedded in Rule 12.5 of the CPR that says the registry must enter judgment at the request of the Claimant against the Defendant once the conditions are met. In response to those submissions by counsel, Sykes J said "*If I am to get to Mr. Jones' conclusion on the date of the judgment, it cannot be by this route because the Workers Bank case turned on a specific provision in the CPC (see section 451). I have not found an equivalent provision in the CPR."* He went on to say that *"Rule 42.8 states when a judgment takes effect".*

[33] I also share the same view that the Workers Bank Authority on the deemed or effective date of the default judgment being at the date of the request, is limited to a specific interpretation of section 451. This too is confirmed by the reasoning of Morrison JA **in Conrad Graham v National Commercial Bank Jamaica Limited SUPREME COURT CIVIL APPEAL NO. 37/2009.** In that case, the appellants appealed the judgment of Williams J (as he then was), on a number of issues including his ruling that stated that the default judgment against the appellant "took effect from the date of first filing in March 2000…" and that "The subsequent filing of a new document in 2004 amounted to a 'mere' amendment".

[34] In examining whether the request for default judgement took effect from March 2000 or not, Morrison JA stated *"the Workers Savings & Loan Bank case is therefore clear authority for the proposition that the effect of section 451 of the CPC was that once a judgment in default was filed supported by the documentation required by section 70 of the CPC (affidavits of service, search and debt and final judgment) and that documentation was in order, the Registrar was under a duty to enter the judgment, which therefore took effect from the date of filing".* In disposing of the appeal on that ground, he further noted that the Workers Savings & Loan Bank case was clearly distinguishable from the instant case and that, as at 31 December 2003, there was no judgment in place against the appellant. This was based on the determination that the 20 March

2000 request for judgment was not in the proper form, requesting as it did the entry of judgment with interest beyond the date of judgment.

[35] I am also of the view that, any interpretation of the effective date of any judgment (to include default judgments) or order, post CPR, should be based on Rule 42.8 of the CPR rather than section 451 (which is pre-CPR), as amplified in the authorities such as **Workers Savings and Loans Bank** and **Sagicor Jamaica Life Limited.** This view is grounded on the rules of statutory interpretation. That is, since the CPR replaced the Civil Procedure Code, section 451 of the Civil Procedure Code would only apply if that intention was expressly stated. I have not seen any such intention in the Rules. Moreover, Rule 73.2 of the CPR says that these (new) Rules apply to all proceedings commenced on or after the commencement date. The commencement date is 1st January 2003. I will even go further and add that the formal approval text before the preface of the CPR, which perhaps one could call the citation or revocation clause for these purposes at number two states:

> *"All Rules of Court relating to the procedure in civil proceedings in the Supreme Court, save for those relating to insolvency (including winding up of Companies and bankruptcy), and matrimonial proceedings are hereby revoked".*

It is evident from this, that the Civil Procedure Code, being revoked, the CPR now in effect, section 451 of the Civil Procedure Code, would no longer be applicable. It would also be incorrect to rely on the Worker's Bank case post CPR to define the effective or deem date for judgment in default.

[36] Even if I am wrong on what is the effective date of a default judgment, it is my considered view that no application to set aside a request for judgment in default of Defence can be made or that such an order can be granted by this Court. This position is based on my reading and interpretation of the Rules governing setting aside of default judgments. Rule 13.1 reads, *"The Rules in this Part set out the procedure for setting aside or varying a default judgment entered under part 12 (default judgment)."*

[37] As the wording suggests, Rule 13.1 speaks to setting aside or varying default judgment **entered** under part 12 (emphasis mine). The question that must first be answered is how is a judgment in default of defence entered and what constitutes the entering of such a judgment. Sykes J (as he then was) in examining Rule 12.5 of the CPR in **Issa v Jamaica Observer etal Claim No HCV 0765 of 2005** had this to say;

> *"Once the conditions, both positive and negative, have been met, the Registrar must enter judgment on the application of the Claimant. There is no discretion here. It is simply a box-ticking exercise". "The design of the Rule was deliberate. It eschewed any application of discretionary power with all the potential difficulties that that can entail. The Rules Committee did not wish the Registrar to become embroiled in controversy over whether the discretion should be exercised in this way or the other."*

[38] Author Stuart Sime in his book a Practical Approach to Civil Procedure, in examining default judgments in the UK which are similar to how such judgments are dealt with in Jamaica noted:

> *"…actually entering a judgment in default is purely administrative matter, and involves no consideration by the court of the merits of the Claim. All the Claimant usually has to do, once the time for responding the Claim has elapsed, is to return a request form to the court asking for judgment to be entered. This will be acted upon by the administrative staff at the court, and a judgment will be entered. Such a judgment binds the Defendant just as much as if it had been entered after a contested trial, and may be enforced in the normal way. However, it may be set aside if the Defendant can show a real prospect of defencing the Claim".*

[39] Once the request is made and if the criteria are met under Rule 12.5, then the judgment in default of Defence must be entered by the Registrar. If the Claimant does not meet the requirements outlined in Rule 12.5 then his request for judgment to be entered will be denied or if there is an application for extension

of time to file Defence, then the Registrar's hand will be stayed (see Rule 12.5(e)). So the request is just that, a request and does not equate to the entering of the default judgment itself.

[40] How then is the default judgment entered? Simple, the default judgment is entered in the relevant binder and folio. One will know that it is entered, as the numbers for the binder and folio where the default judgment is entered is written on the request for judgment in default of Defence filed by the Claimant.

[41] I have examined the file and whilst I see that a request has been made for judgment in default of Defence, there is no such binder and folio number contained on the request filed by the Claimant, and as such, one can conclude that no judgment was **entered** as per the Claimant's request dated October 14, 2022.

[42] As a result of the foregoing analysis, counsel was correct to concede on the preliminary point concerning order one. The only application that could be made by the Defendant in these circumstances is an application to extend time to file Defence which is permissible pursuant Rule 10.3(9) of the Rules and 26.1(2)(c) of the CPR. Such an application should be made under Rule 11 of the Rules which addresses application for court orders. Given that order 2 of the Defendant's amended application is permission to file its Defence within 14 days which is what Rules 10.3 (9) and 26.1(2) (c) contemplate, I will now move on to address this below.

Order 2. That the Defendant be permitted time to file its Defence within fourteen days of the date of this Order

[43] A preliminary objection raised by Counsel for the Claimant concerns order 2 of the amended application being sought. Counsel contended that since the Defendant filed a Defence October 18, 2022, they could not now seek an order to extend time to file "another Defence" as a Defence has been filed. I will only say briefly, that the Defence filed October 18, 2022 was filed out of time and thus not properly before the court. Unless and until an extension has been granted, a document purporting to be a Defence or which has been filed out of

time, is not in fact a Defence for the purposes of Rule 10 of the CPR. There are thus two options available to the Defendant. They can ask for any Defence filed out of time to stand as properly filed in time or to obtain time to file a Defence. The order being sought as per the amended application dated June 19, 2023 is that the Defendant be permitted time to file its Defence within 14 days of the order being made by the Court. Such an amendment may be granted pursuant to Rules 26.1(2) (c) and 10.3(9) of the CPR.

[44] Rule 10.3(9) of the CPR allows the court to extend the time to file a Defence. CPR 26.1(2)(c) enables the court to extend the time to comply with an order, direction or Rule of the court after the prescribed time for compliance has expired. None of the two Rules provide the court with any guidance in the exercise of its discretion to extend time. However, a number of authorities have provided the necessary guidance on what the court should consider when determining whether to grant or refuse the application to extend the time to file a Defence.

[45] The principle governing the court's approach in granting or refusing an application for an extension of time was summarized by Lightman, J in **Commissioner of Customs & Excise v Eastwood Care Homes (Ilkeston) Limited and Others [All England Official Transcripts (1997-2008) delivered 19 January 2000]** where he stated that, *"It was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice."* The courts in this jurisdiction have endorsed and adopted these principles, in a number of cases to include the often cited **Fiesta Jamaica Limited v National Water Commission [2010] JMCA Civ 4 and The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Senior (his father and next friend) [2013] JMCA Civ 16.**

[46] Most recently, in **Green v Green etal [2023] JMCA Civ 5** Dunbar-Green JA at paragraph 81 in examining the established principles from a number of authorities including **Fiesta Jamaica Limited and Rashaka Brooks**, in dealing with an application of this nature had this to say:

> ***"****There is no rigid formula and the overriding objective should be paramount in the judge's exercise of discretion whether to grant the application for extension of time to file a Defence"*

She also stated at paragraph 101 that;

> *"It is well-established that in considering whether to grant an extension of time in which to file a Defence, the court should be guided by the overriding objective to deal with cases justly, in the context of settled factors among which are the length of the delay, the explanation for the delay, the merits of the Defence, the prejudice occasioned by the delay to the other party, the effect of the delay on public administration and the importance of compliance with time limits. Dealing with cases justly involves having regard to the appropriate allocation of the court's resources, saving expenses and ensuring that cases are dealt with expeditiously and fairly (Rule 1 of the CPR). The general Rule is that a Defendant who has been dilatory in the filing of a Defence must provide an acceptable explanation for that conduct as well as evidence of a viable challenge to the Claim".*

[47] It is therefore important, that in dealing with the application by the Defendant, I must examine the delay in applying to extend the time to file a Defence, the explanation for the delay, the merits of the application/Defence, the importance of complying with time limits, the prejudice to the other party and the delay on public administration.

The Delay

[48] The first issue the court must address is having regard to the facts in the matter, whether the delay in filing the application was inordinately long. The Claimant served the Defendant the Claim and particulars of claim on July 1, 2022. The acknowledgment of service was filed July 13, 2022 and the Defence was due 42 days after the Claim was served on them (that is October 4, 2022). The Defence was not filed.

[49] The Claimant filed an application to enter Default Judgment on October 14, 2022 and the Defendant filed an application for extension of time to file Defence October 18, 2022 with an affidavit from Mrs. Senior-Smith and a draft Defence. On the May 4, 2023 another affidavit was filed which was sworn to by the Director Mr. Kelvin Hill (of Morris Hill Limited) also exhibiting a draft Defence.

[50] It is to be noted that the affidavit of Mr. Kelvin Hill was filed about 6 months after the application and affidavit from Mrs. Senior-Smith that accompanied the application were filed. Whilst any delay is unacceptable, the delay in this case is not long. Considering the many decisions from both this court and the Court of Appeal, applications have succeeded in cases where the delay was far greater. In this case the delay was just 14 days, that is from the date the defence was due to the date the Defendant's application was filed.

[51] Even if one were to argue that the time frame from the filing of the application to the second affidavit by Mr. Kelvin Hill with the draft Defence is long, the length of the delay is only one factor the court should consider in determining whether to grant the application. Rattray J stated in **Devon Davis v Karen Marajah [2019] JMSC Civ. 7** that:-

> *"The length of the delay is a consideration that strongly goes against granting the Application for an extension of time, without some valid and/or reasonable explanation being advanced for the delay. However, the mere fact of a delay ought not to be the determining factor*

The Explanation for the Delay

[52] In **Peter Hadadd v Donald Silvera unreported SCCA No 31/2003 delivered on July 31, 2007** the court said that *"in order to justify a court in extending time during which to carry out a procedural step, there must be some material on which the court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the Rules."*

[53] The authorities in dealing with the explanation for the delay have all stated that that there must be "sufficient material which could provide a good reason for the delay in failing to comply with Rule 10.3(1) of the CPR" **(Philip Hamilton v Frederick Flemmings and Gertude Flemmings [2010] JMCA Civ 19). See also Thamboo Ratnam v Thamboo Cumarasamy [1965] 1 WLR 8, at page 12**, and the exceptional case, **Rashaka Brook** it is imperative that the party that wishes the court to exercise its discretion, must explain the reason for the delay. The explanation must be acceptable and reasonable in the

circumstances. In **Rashaka Brooks,** often cited as an exception to the Rule, the explanation for the delay in filing a Defence to the Claim was that it was awaiting a scientific report that was germane to the issues in the case. The deponent for the Attorney General's Department had also explained to the court's satisfaction, "the efforts made to secure the evidence concerning the elements of merit and the reason for its absence".

[54] In **Attorney General of Jamaica v Roshane Dixon & Attorney General of Jamaica v Sheldon Dockery [2013] JMCA Civ23**, Harris JA stated that *"the court in Fiesta, and Haddad v Silvera, pronounced that some reason for the tardiness must be given, even if it is insufficient. The proposition that the inadequacy of a reason does not in itself prevent the court from assisting a tardy applicant does not mean that the court will look with favour upon such an applicant in all cases. Failure to act within the requisite period is a highly material criterion, as Smith JA stated in Haddad v Silvera. The weaker the excuse, the less likely the court will be inclined to countenance a tardy applicant who seeks the court's aid to extend time".*

[55] Rule 11.9(2) of the CPR requires all notices of application to be supported by affidavit evidence unless a Rule, order or practice direction provides otherwise. Master Orr (as she then was), in the matter of **Aston Wright v AG [2022] JMSC Civ 25** in examining this Rule in relation to application to extend time had this to say *"applications to extend the time to file a Defence have a further requirement that the supporting affidavit must include evidence outlining the Defence to satisfy the requirement of a Defence of merit and exhibit the draft Defence. The "affidavit must also explain any delay. While the required evidence need not be in one affidavit, all of the evidence must be before the court for the application to be properly before the court for the application to be heard".*

[56] There are three affidavits filed in this matter. Two from Mrs. Denise Senior-Smith dated October 18, 2022 and June 19 2023 respectively and an Affidavit from Mr. Kelvin Hill the Director for the Defendant dated May 4, 2023. In Mrs. Senior-Smith's first affidavit that supported the Defendant's application in the instant case she stated that *"at all material times the Affiant was responsible for*

filing the Defence in this matter but due to circumstances beyond the control of the Affiant the time with which to file the Defence was inadvertently overlooked and hence the same was not filed". In seeking to explain further, Mrs. Senior-Smith in her affidavit went on to say "*that my office meant no disrespect to this Honourable Court and the failure is not in any way contumelious. That at all times the Defendant has shown that he intends to defend this matter vigorously and this position was known to the Claimant as the parties have attempted to resolve same".* This does not appear to be a matter where counsel did not have the requisite instructions or needed time to ascertain same.

[57] Mr. Hill in his affidavit stated that the delay in filing the Defence was not contumelious nor disrespectful. He repeated in similar fashion as Mrs. Senior-Smith, that his attorney-at-Law with conduct of the matter, had inadvertently overlooked the time within which to file the Defence and it was not sent in time for him to sign same. As soon as his attorney realised that the time had passed, they immediately sought to get consent from the Claimant which was not forth coming and thereafter the application for extension of time was filed.

[58] As it relates to inaction by counsel that results in delay, there are two positions. There are cases which would indicate that a litigant should not suffer because of the mistake of his attorney. In the case of **Jamaica International Insurance Company Limited v The Administrator General of Jamaica (administrator of the estate of Rohan Wiggins [2013] JMCA App.2**, several such cases were cited. **Salter Rex and Co. v Ghosh [1971] 2 All ER 865** being one of them. In that case, Lord Denning MR said at page 866 of judgment:

> *"so the applicant is out of time. His counsel admitted that it was his, counsel's mistake and asked us to extend the time. The difference between two weeks and four weeks is not much. If [the applicant] had any merits which were worthy of consideration, we could certainly extend the time. We never like a litigant to suffer by the mistake of his lawyers. I can see no merit in [the applicant's] case. If we extended his time it would only mean that he would be throwing good money after bad. I would therefore refuse to extend the time. I would dismiss the application".*

[59] On the other hand, there are other authorities for example the **Commission of Lands v Homeway Foods Limited and Stephanie Muir [2016] JMCA Civ 21** where McDonald-Bishop JA stated

> *"normally, it will not assist the party in default to show that noncompliance was due to the fault of the lawyer since the consequences of the lawyer's acts or omissions are, as a Rule, visited on his client."*

[60] Most recently, in **Green v Green et al** Dunbar-Green JA stated *"that the explanation of an administrative oversight in the Attorney's office is questionable and noticeably absent from the affidavit of the Attorney Mrs. Brown, was any established protocol in her office that was breached by the then associate".* She went on further and stated that *"there was also no good reason provided for the late filing of the Defence. It is not good enough to blame a 'derelict' former junior attorney-at-law, without more."*

[61] At this junction I also wish to refer to the affidavit of Mr. Kelvin Hill the Managing Director of the Defendant was filed May 4 2023, almost 6 months after the application was filed. There is no explanation as to the late filing of his affidavit. The aspect of his affidavit that spoke to seeking the consent of the Claimant appears as though the blame is being placed at the feet of the Claimant for failing to consent and hence the late filing being made when the consent was not forth coming. Rule 10.3(5) states that the parties may agree to extend the period for filing a Defence. There is no obligation on the Claimant to consent and therefore stating that they were hoping to get the consent which was not2forth coming is not a good explanation.

[62] Furthermore, it would appear from Mrs. Senior-Smith's second affidavit dated June 19 2023, that she was aware of the Defendant's Defence from the get go and thus, this is not a situation where instructions were not forth coming. Thus, the explanation of inadvertence on behalf of Counsel, in the circumstances, is insufficient.

[63] Notwithstanding this, I take note of the fact that having realised their inadvertence, counsel for the Defendant acted with alacrity in seeking to have

the application filed within a short space of time. Moreover, the authorities have shown that on an application to enlarge time to file a Defence, the salient issue is whether, on the evidence relied on by the party at fault, the court can, at the very least, form a preliminary view on the likely outcome of the case. This will be examined below.

The Defence

[64] Morrison JA, as he then was, in **B & J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2** noted that the affidavit of merit must demonstrate a 'prima facie Defence.' This position was followed in **Kimaley Prince v Gibson Trading & Automotive Limited (GTA) [2016] JMSC Civ 147**. There, McDonald J placed reliance on **B & J Equipment Rental Limited v Joseph Nanco, supra**, then stated the following at paragraph 22: *'Having regard to the foregoing, it is apparent that the affidavit of merit ought to disclose facts which constitute the Defence and in my view this obligation is not met by exhibiting a draft of the proposed Defence…'*

[65] Having regard to the judgments set out above, I am duty bound to examine the evidence contained in the affidavits in support of the Defendant's application, to consider the merits of the proposed Defence. It is to be noted that the affidavit filed by counsel Mrs. Senior-Smith filed October 18, 2022 at paragraph 7 outlined why the Defendant has a real prospect of success. She stated "the Defendant has a real prospect of success in that on the day of the collision, the collision was as a result of an inevitable accident…"

[66] In **Green v Green et al** the Court of Appeal examined the affidavit from the attorney Mrs. Brown that was filed with the application for extension of time to file Defence. Dunbar-Green JA had this to say *"Although hearsay evidence is admissible in interlocutory applications (Rule 30.3 of the CPR), the affidavit from Mrs Brown was bereft of any evidence dealing with the merits of the Defence and, therefore, would not have disclosed a real prospect of the respondents successfully defending the Claim or a "sufficiently meritorious case" for the learned master to consider. Counsel only made a bald assertion at para. 11 to the effect of having a belief that the respondents had a good prospect of successfully defending the Claim, and that the interests of justice*

required that the case be decided on the merits. Furthermore, it had not been shown that, whether based on personal knowledge or information and belief, "she could swear positively to the facts on which the [respondents relied]" (see Attorney General of Jamaica v John Mackay). And, there was nothing in the affidavit to suggest exceptional circumstances that would justify a grant of the order, in the absence of evidence of merit"

[67] A similar situation confronted Master Orr in the matter of **Aston Wright v AG.** In that matter the Defendant's affidavit states the source of the information on which the Defendant intends to rely as being information taken in her review of the file in the Attorney General's Chambers. In rejecting the affidavit as not being one of merit Master Orr had this to say *"a reasonable inference is that the information in her affidavit which speaks to how the accident happened is not within her personal knowledge. Who then did this information come from as she simply states that it came from the Defendant's file? How then does the court properly assess the Defendant's Defence if the source of this evidence is unknown? There is no identifiable source of this information."*

[68] Justice Kirk Anderson in examining the affidavits filed in the matter of **Smith v Jamaica Defence Force Co-operative Credit Union [2018] JMSC Civ 29** and whether they constituted affidavits of merit stated *"…the Defendant, by its two affiants, has opted to simply exhibit a copy of a draft of the proposed Defence, deny the allegations outlined in the Claimant's Claim, and state that the proposed Defence has a good prospect of success. That was insufficient as the evidence adduced on behalf of the Defendant ought to have disclosed facts which constitute a prima facie Defence in support of the Defendant's application for the Defence which was filed out of time, 'to stand,' and that obligation has not been met by the Defendant merely exhibiting a draft of the proposed Defence to those affidavits and having stated in the affidavit evidence that that proposed Defence has a good prospect of success".*

[69] In the instant case, I find that the affidavit of Mrs. Senior-Smith dated October 18, 2022 is lacking in two respects. First she did not state how she is able to swear to the merits of the Defendant's case and second she has not stated the source of her information. Whilst there have been cases where the court has

accepted affidavit of merits from attorneys, based on the circumstances of this matter, Mrs. Senior-Smith's affidavit of October 18, 2022 would not suffice.

[70] The second affidavit to examine in support of the Defence's application, is that of Mr. Kelvin Hill filed May 4, 2023. The affidavit states that he is the Managing Director of the Morris Hill Limited (the Defendant in the Claim). It is to be observed, that it is the Defendant alone that was sued and not the driver of the truck owned by the Defendant. The particulars of claim have not named the driver of either trucks. I am mindful of the fact that the Rules allow for the provision of hearsay evidence in support of an interlocutory application. I am also mindful of the authority of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Limited and ors [All England Official Transcripts (1997-2008) delivered 19 January 2000**], wherein it was stated *"it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice".*

[71] As the Managing Director of the named Defendant in the Claim, in circumstances where no other person has been named as Defendant, I believe he is the proper person to swear to the affidavit. The Claimant in his particulars of claim states that the Defendant was negligent and that the driver of the Defendant's truck stopped and whilst the truck was rolling back jumped from the truck. Mr. Hill's affidavit states that the collision was as a result of an inevitable accident in that whilst the Defendant was ascending the hill at Noranda premises the said truck suddenly developed mechanical problems without warning and failed to operate as it should so that the Defendant's servant and/or agent was unable to avoid collision notwithstanding the exercise of all reasonable care and skill on his part.

[72] The case of **Lloyd Wisdom v Janet Johnson Suit No: C.L. 1996/W – 240 jud. Del. June 11, 2002,** established that for the Defence of Inadvertence to succeed, the Defendant has to prove that something happened over which he had no control, and the effect of which could not have been avoided by the exercise of care and skill. Whether the failed actions or precautions taken by the Defendant to prevent or avoid the accident were reasonable in all the

circumstances of the case, whether the Defendant exercised sufficient care, caution and skill to prevent the accident having regard to the circumstances? Were there mechanical issues with the truck unforeseen by the driver? These are arguable and best suited to be explored at trial. The outcome of which will all depend on the credibility of the witnesses and any other relevant evidence adduced at the trial by either party.

[73] The further affidavit of Mrs. Senior-Smith dated June 19, 2023 is also of value in examining the issue of the merit of the Defence in addition to Mr. Hill's affidavit. Mr. Hill's affidavit speaks to an inevitable accident and denies negligence. He admits to payments being made as it relates to property damages but denies loss of earnings. The affidavit of Mrs. Senior-Smith becomes relevant, as at first, I must admit, I could not understand the payments to property damage being made. She indicates in that affidavit that she is counsel for the Defendant and that based on her initial instructions they were to settle "without prejudice" to just get rid of the matter as quickly as possible but at no time did he admit negligence or accepted liability. She indicates any payments made to the Claimant were done "without prejudice".

[74] Counsel for the Claimant in his oral submissions on this point, indicated that this aspect of the affidavit is plagued with issues. He stated that this is not a without prejudice matter as it is clear from the tone of the affidavit that the payment was made to get rid of a nuisance. He states that what has been presented before the court is akin to accord and satisfaction. He went on further to indicate that even if counsel for the Defendant believed that this is without prejudice, then the proper course is to indicate in the Defence that they intend to apply for that portion of the particulars of claim to be struck out.

[75] As it concerns whether the payments were made by the Defendant pursuant to without prejudice letters, I am guided by a number of authorities on the area such as **Chocoladefariken Lindt & Sprungli AG v Nestle Co Ltd [1978] RPC**, **Buckinghamshire County Council v Moran [1990] CH 623** and **Ofule v Bossert [2009] AC 990**. The importance of a without prejudice letter is that it safeguards the party writing it against the contents of settlement negotiations being used in open court.

[76] As it concerns accord and satisfaction, the learned authors of **Halsbury's Laws of England Volume 22 (2019)** state that ***"****accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, by means of any valuable consideration, not being the performance of the obligation itself. The accord is the agreement by which the obligation is prima facie discharged: it no longer needs to be in any particular form".*

[77] Subject to any question of illegality, parties are free to negotiate and to compromise their disputes as they wish. This compromise can be in the form of a release and discharge. Whether or not it is a term of the compromise that the original obligation will be discharged upon performance of an obligation will normally be a matter of the construction of the compromise into which the parties have entered, to which the normal rules of interpretation of contracts will apply.

[78] I have not seen any communication between the parties and thus, I am unable to confirm whether or not what was done amounts to accord and satisfaction or without prejudice. It is evident, that the parties are in dispute as to what the payments constitute. This too is an issue to be left to a trial Judge to determine the interpretation to be given to whatever documents that maybe adduced at trial on this aspect.

Prejudice To The Other Party

[79] As it concerns the issue of prejudice, the Defendant's affidavit states that if the court were to grant the orders sought in this application, it is unlikely that the Claimant will suffer any real prejudice and the due administration of justice would not have been done.

[80] The Claimant's Claim is based on an incident that occurred January 2, 2021. The Claim was filed June 27, 2022 and the Defence was due October 4 2022. The Defendant has acted so far up until the filing of the Defence within the confines of the CPR. Even when they did not file the Defence within the requisite time frame, they filed the necessary application within a reasonable time frame. I do not believe there is any prejudice to the Claimant. This is not a matter where the incident occurred long ago, this is a fairly recent matter, if

the matter should proceed to trial, such a date can still be met and any issue of prejudice can be cured with costs to the Claimant.

Conclusion

[81] In closing, I believe that the Defendant acted in a timely manner in making its application for an extension of time within which to file its Defence. The explanation for the delay although not reasonable, it is evident that counsel for the Defendant took steps to file the application within a short space of time, after realising their error in not filing the Defence within the time frame. I do not believe that the Defendant should suffer for his attorney's inadvertence. The affidavit of Mr. Hill dated May 4, 2023 and Mrs. Senior-Smith's affidavit of June 19, 2023 puts forward a Defence of merit. The Defence is not fanciful and the issues raised therein, are triable. As a result, the Defendant will be granted the extension of time to file its Defence.

Orders

1. The Defendant is to file and serve a Defence to the Claim within 14 days of this order.

2. The Claimant's application for judgment in default of Defence to be entered against the Defendant is refused.

3. The parties are to attend mediation on or before October 20, 2023.

4. All relevant parties, are to be in attendance at the prediction.

5. Should mediation be unsuccessful, the parties are to attend Case Management Conference on December 14, 2023 at 11:00am for 1 hour.

6. The Defendant is to pay the Claimant's costs in the Defendant's application to extend time to file Defence. Cost to be agreed or taxed.

7. Leave to appeal is granted.

8. The Defendant's attorney-at-law is to prepare, file and serve the Formal Order.