



- [3] Having carefully considered the application, the affidavits and the submissions I have in the exercise of my discretion decided to set the judgment aside and to extend time for the filing of an Acknowledgment of Service and Defence.
- [4] My reasons will be shortly stated with reference where necessary to the facts and the salient cases.
- [5] It is still the law in this country that a litigant is not to be driven or excluded from the seat of judgment without an opportunity to be heard, save and except where there is good reason for so doing **Evans v Bartlam [1973] 2 All ER 646**. The new Civil Procedure Rules have not repealed that common law position. Indeed the necessity for fairness is underlined (see Order 1.1(1) and (2)). “Fairness” implies among other things that a hearing should be afforded on the merits provided to do so does not wreak injustice upon the other party. This is why in the modern authorities the courts emphasize that the circumstances must be looked at “in the round” wherever such a discretion, such as I am called upon to exercise today, is exercised, see for example **per Anderson J para 22 Bennett v Williams [2013] JMSC Civ 195 unreported judgment dated 22 November 2013** and **Haddad v Donald Silvera SCCA 31/2003 unreported judgment delivered 31 July 2007 per Smith JA at para 12** (in the context of an application to extend time to appeal),

*“As has already been stated the absence of a good reason for delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension. But some reason must be proffered. The court in **Hancock’s** (supra) case did not think it prudent to produce a checklist of relevant factors in relation to applications for extension of time. The guiding principle which can be extracted from that case is that the court in exercising its discretion should do so in accordance with the overriding objective and the reason for the failure to act within the prescribed period is a highly material factor.”*

- [6] What therefore are the circumstances of this case? These are stated in the affidavit of Pierre Rogers filed on the 28<sup>th</sup> July 2014 in support of the application; as well as from perusal of the court’s file. Mr. Rogers being the attorney-at-law with conduct of the matter. The facts may be summarized thus:
- a) On the 22<sup>nd</sup> May 2014 the Defendant retained his services and handed to him a Claim Form and Particulars of Claim in this suit.

- b) He was instructed that the money claimed was not owed and that the Defendant ought not to have been sued in his personal capacity. The business having been transacted with a limited liability company Madd Deal Wholesale and Retail Ltd.
- c) Mr. Rogers exhibits to his Affidavit, invoices in the name of that company. Mr. Rogers also points to invoices attached to the Claimant's Particulars of Claim in support of that assertion.
- d) Mr. Rogers attached a Draft Defence.
- e) Mr. Rogers prepared an Acknowledgement of Service however because of oversight it was not filed until the 18<sup>th</sup> July 2014.
- f) Mr. Rogers states that he requested certain further documentation and instructions from the Defendant, however his client fell ill. He attached a medical report dated the 18<sup>th</sup> July 2014 which indicates that his client underwent surgery on the 7<sup>th</sup> July 2014. He was given 3 weeks sick leave.
- g) Mr. Rogers wrote a letter to the Claimant's attorney-at-law to which there was no written response. In that letter he requested consent to file both Acknowledgement of Service and Defence out of time.
- h) A Defence was filed out of time on the 18<sup>th</sup> July 2014.
- i) The Claimant applied for Judgment in Default on the 11<sup>th</sup> June 2014 and again on the 17<sup>th</sup> July 2014.
- j) Neither Judgment in Default has yet been entered by the Court.
- k) A Notice of Application to set aside Judgment and to Extend Time to File Acknowledgment of Service and Defence was filed on the 18<sup>th</sup> July 2014.

**[6]** The Defendant applies pursuant to Order 10.3(9) and Order 13.3(2) and Order 26.1(2)(c). Order 10.3(9) gives express jurisdiction for the Defendant to apply for an Order extending the time for filing a defence.

Order 13.3 provides that the Court "may" set aside or vary a judgment entered in default if the Defendant has a "real prospect of successfully defending the claim". Further that in considering whether to set aside or vary a judgment the court "must" consider whether the Defendant has applied as soon as is reasonably practicable after finding out that judgment has been entered and given a good explanation for the failure to file an acknowledgement of service or a defence.

This rule changes the approach at common law only to the extent that it sets the bar for the quality of the intended defence higher. It used to be that an “arguable” defence would suffice. Now the intended defence must have a real prospect of success. It mandates consideration of the reason for the failure to file which caused a judgment to be entered and whether or not the application has been made as soon as reasonably practicable. The rule does not mandate refusal if either of these is not satisfactory to the court, however they are factors that must be considered. Clearly if an application is not made as soon as is reasonably practicable or if the explanation is not “good” then the chances of a successful application reduces significantly. See per Master Simmons (as she then was) in **Anwar Wright v Attorney General of Jamaica Claim 2009 HCV 4340 unreported judgment 10<sup>th</sup> June 2010 at para 24.**

[7] It is worth noting that although filed neither Judgment in Default has as yet been entered by the Registrar. Part 12 of the Civil Procedure Rules details the procedure to obtain a Judgment in Default. However as these Rules (12.4 and 12.5) say the Registrar “must” enter judgment upon certain things being satisfied, and as there is nothing before me to suggest that the Claimant has not satisfied these requirements, I will assume in this judgment that the default judgment filed has been entered.

[8] It is however, and as I have stated above, a matter for my discretion whether the judgment is to be set aside and time given to file Defence. Applying the principles stated above I find:

- a) The explanation for the delay is adequate. Simply put, it was an oversight by the attorney. The Acknowledgment of Service was prepared but was not filed. These things will happen. Consideration of the explanation cannot be divorced from the extent of the delay. It was not such a delay as to cause prejudice to the Claimant. It lay on his file from the 22<sup>nd</sup> May to the 18<sup>th</sup> July when it was filed.
- b) There is evidence of a Defence with real prospects of success. The invoices in the name of the company are attached. This demonstrates support for the contention that the wrong party has been sued. The Claimant urged that the attorney ought not to swear, the Defendant ought to swear the Affidavit personally, relying on **Ramkisoan v Olds Discount (1964) 4 WIR 73**. In that case the attorney swearing the Affidavit did not speak to the facts of the case but merely exhibited a Draft Defence; nor did the attorney purport to verify

the facts stated in the Defence. The attorney did not even explain why his client had not sworn to an affidavit. This case is quite different. Mr. Rogers has detailed the instructions he received and has exhibited documentary support for the Defence which Defence he has also attached. Furthermore he explains that at the critical time when this application was to be made, his client fell ill. A medical report is attached in support. In all these circumstances I accept that the affidavit as filed suffices and indeed the evidence in the form of company invoices demonstrates a defence with a real prospect of success.

- c) There is no evidence that the Claimant will suffer prejudice if judgment is set aside. Indeed the Defence was filed as well as the acknowledgment of service albeit out of time. To allow the judgment to stand where the Defence has a real prospect of demonstrating that the relevant contract was with someone else, would be to give a benefit not to create prejudice.
- d) The Defendant applied as soon as reasonably practicable after discovering that his acknowledgement had not been filed. The letter written to the Claimant's attorney evidences that fact when it is juxtaposed with the date the application to set aside and extend time was filed.
- e) Finally the illness of the client cannot be divorced from the matter of delay in filing, its explanation and whether the Defendant has acted with alacrity.

**[9]** The entire circumstances of this matter support the conclusion that the just and fair result is for the judgment to be set aside and time given for the filing of the Defence.

**[10]** I therefore make the following Orders:

- a) The Judgments in Default of Acknowledgement of Service filed on the 11<sup>th</sup> June 2014 and 17<sup>th</sup> July 2014 are set aside.
- b) Time is extended for the filing of Acknowledgement of Service and Defence to the 18<sup>th</sup> July 2014.
- c) The Acknowledgement of Service and the Defence both filed on the 18<sup>th</sup> July 2014 do stand.
- d) Costs of this application and costs thrown away to the Claimant to be taxed or agreed. Such costs to be paid by Counsel for the Defendant personally.
- e) Leave to Appeal granted.

I am prepared to make Case Management Orders for the further conduct of this matter.

**David Batts**  
**Puisne Judge**