[2024] JMSC Civ 198

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. SU2020CV03238

BETWEEN	**MELDON MCCOLLIN**	**CLAIMANT**
AND	**BRANCH DEVELOPMENT LIMITED (T/a Iberostar Rosehall Beach Limited)**	**FIRST DEFENDANT**
AND	**EMPLOY LIMITED**	**SECOND DEFENDANT**

IN CHAMBERS

Mr. Ian Davis instruction by I. P. Davis & Co. for the Claimant/applicant.

Mr. Joerio Scott instructed by Samuda & Johnson for the first and second Defendant/respondent.

Heard: March 12, April 25, May 22, and August 12 and 14, 2024.

Application to set aside default judgment – Civil Procedure Rules Rule 13.3 – Whether default judgment should be set aside – Civil Procedure Rules Rule 12.5, Rule 12.7, Rule 12.10(1)(b), Rule 16.2, Rule 18.2(4)(b), Rule 18.9 and Rule 18.11(4) – Whether there is an anomaly in Rule 12.5 and Rule 18.2(4)(b) of the Civil Procedure Rules in providing that default judgment on a counterclaim may be entered administratively, and in not providing that the permission of the court is required where the counterclaim is intrinsically connected to the claim.

N. HART-HINES, J

[1] On August 12, 2024, I delivered an oral judgment in this case and gave lengthy reasons for my decision, and I also made case management orders. A further order was made on August 14, 2024, fixing the case for case management conference on December 6, 2024 at 10am. I promised to provide written reasons. I now do so. The delay in providing these reasons is due simply to other work commitments, but is regretted.

BACKGROUND

[2] The claimant brought a claim against the defendants to recover damages for personal injuries he sustained on the first defendant's premises during the course of his employment as a dancer with the second defendant. His claim was filed by Davis, Robb & Co., Attorneys-at-Law on August 27, 2020 and, according to the Acknowledgement of Service filed on October 28, 2020, the defendants were served with the Claim Form and Particulars of Claim sometime in October 2020. The first and second defendants filed a Defence and Counterclaim for breach of contract on November 3, 2020. This was served on the claimant's Attorneys-at-Law on record, Davis, Robb & Co. on November 5, 2020. Pursuant to Rule 18.8(1) and 18.8(2) of the Civil Procedure Rules (hereinafter "CPR"), the claimant was permitted to file a Defence to the counterclaim within 42 days of the date of service of the counterclaim on him. However, the claimant failed to file and serve a Defence to the counterclaim in the time permitted. On January 5, 2021, the second defendant filed a Request for default judgment in relation to the counterclaim, pursuant to Rule 12.7 CPR, and on December 14, 2021, judgment in default was entered against the claimant in Judgment binder 777 Folio 348 (with effect from July 5, 2021) in respect of the counterclaim.

[3] The notice of application was listed for hearing on March 12, 2024. On that date, the court directed counsel to file submissions on the issue of whether a counterclaim may be based solely on a claim for costs, and whether or not a default judgment may be set aside in such circumstances. The hearing was

adjourned to April 25, 2024. The hearing was further adjourned to May 22, 2024, extending the time in which counsel were to file the said submissions. The ruling was delivered on August 12, 2024.

THE APPLICATION

[4] A Notice of Application (made pursuant to Rule 13.3 of the CPR) was filed on April 20, 2023, on behalf of the claimant/applicant seeking, inter alia, to set aside the judgment in default entered against him on the counterclaim. In the supporting affidavit filed on April 20, 2023, the claimant stated that his address changed but he indicated that his area of residence remained at Rosevale Estate, Montego Bay, St James. The claimant stated that the law firm of Davis, Robb & Co., which was located along Hagley Park Road, Kingston 10, St Andrew, was served with the first and second defendants' Defence and Counterclaim on November 8, 2020. However, the firm was in fact served on November 5, 2020. The claimant further stated that in early 2021, the law firm partnership severed and thereafter he was represented by I.P. Davis & Co. whose office was located along Red Hills Road, Kingston 19, St Andrew. The claimant alleged that his current Attorneys-at-Law (I.P. Davis & Co.) had relocated by November 8, 2020, when his previous Attorneys-at-Law, Davis, Robb & Co., were served with the Defence and Counterclaim. The claimant stated that this relocation, coupled with the fact that his own address and contact information had changed, resulted in him being unavailable to provide instructions to his Attorneys-at-Law to answer the counterclaim within the prescribed time. The claimant further stated that at least six months prior to the severance of the law firm partnership of Davis, Robb & Co., extensive road works were being done along Hagley Park Road, which lasted for more than a year. This, the claimant said, also led to a disruption in communication between himself and his Attorneys-at-Law. The claimant/applicant stated that his Attorney's secretary remained at the office of Davis, Robb & Co. for a very short period to direct clients to the new address. However, documents were still being served on the law office of Davis, Robb & Co., and that it was not until March 27, 2023, when the second defendant's

Attorneys-at-Law served the office with a Notice of Adjourned Hearing, that his Attorneys-at-Law became aware of the default judgment.

[5] It is noted that no mention is made in the affidavit of whether or not a Notice of Change of Attorney was filed and served on the Attorneys-at-Law for the first and second defendants prior to November 5, 2020, to permit proper service of documents to be effected at the offices of the law firm of I.P. Davis & Co rather than that of Davis, Robb & Co. Consequently, the claimant did not proffer an explanation for the failure to file a Notice of Change of Attorney. A review of the case file reveals that the Notice of Change of Attorney was filed and served years later, on June 15, 2023, and after the relevant Notice of Application was filed and served. It is also noted that the applicant's affidavit refers to matters which could not be in the applicant's personal knowledge.

Affidavit in response to the application

[6] In response to the Notice of Application, the respondent filed an affidavit on June 7, 2023. Therein, the affiant Chevant Hamilton, an Associate employed to the defendants' Attorneys-at-Law, averred that no document was received from the claimant's Attorneys-at-Law after the service of the Defence and Counterclaim, until the Notice of Application was served. The affiant opined that the claimant ought to have filed an Acknowledgement of service by November 23, 2020 and a Defence to the counterclaim by December 20, 2020. However, pursuant to Rule 18.2(5) of the CPR, no acknowledgment of service was required, and, by my count, the defence to the counterclaim was due on December 18, 2020.

[7] Mr Hamilton noted that the Default Judgment which was entered against the claimant on January 5, 2021, was served on Davis, Robb and Co. on November 18, 2022, and this notice of application to set aside in a default judgment was only served on the defendants' Attorneys-at-Law on May 1, 2023, some six (6) months later. The affiant further opined that by virtue of the inordinate delay by the applicant in making the application, a fair trial could not be achieved due to

the passage of time and fading of memories.

ISSUES

[8] The following issues were identified:

1. Whether the applicant has a real prospect of successfully defending the counterclaim.
2. Whether the applicant has satisfied the other criteria set out in Rule 13.3.

[9] In addition to the key issues to be considered when deciding whether to set aside a default judgement, I have also considered the following:

3. Whether the second defendant was in a position to prove the amount of damages, when the claim had not been determined.
4. Whether a default judgment should have been entered administratively in circumstances where the facts alleged in the ancillary claim are closely connected with the facts alleged in the claim.

SUBMISSIONS

The Applicant's Submissions

[10] Counsel for the applicant filed submissions on June 21, 2023 and May 10, 2024. Counsel for the claimant, Mr Davis, submitted that the Defence to the counterclaim has a real prospect of succeeding, having regard to the claimant’s pleadings. It was also submitted that the claim is supported by the contract of employment, medical reports and receipts. Mr Davis further submitted that if the court found that the reason for the delay in filing the Defence to the counterclaim was due to counsel’s inadvertence, the court should then have regard to the other factors, in light of the overriding objective and the interest of justice. As regards the issue of whether the application was made as soon as reasonably practicable after finding out that the default judgment had been entered, it was submitted that although the judgment came to counsel's attention in December 2022, no application was filed until April 20, 2023 as it was necessary to obtain instructions

from the claimant. Alternatively, counsel submitted that the court should set aside the default judgment on the basis that the claimant had a real prospect of success in relation to the counterclaim, notwithstanding any failure to satisfy Rule 13.3(2) of the CPR. Counsel relied on the case of **Nadine Billone v Experts 2010 Company Ltd** [2013] JMSC Civ 150.

[11] In his further submissions filed on May 10, 2024, counsel for the claimant submitted on the issue of whether the second defendant's counterclaim is solely a claim for costs. Counsel relied on rule 65.5 of the CPR and submitted that the principle that "costs follow the event" would apply, and therefore, the counterclaim was unnecessary.

The Respondent's Submissions

[12] The respondent/second defendant filed submissions on March 11, 2024, May 13, 2024 and June 4, 2024. Counsel for the respondent, Mr Scott submitted that the second defendant's counterclaim is based on a breach of contract, negligence and indemnity. Counsel also submitted that the draft Defence to the counterclaim is merely arguable.

[13] On the question of whether the counterclaim may be based solely on the issue of costs, it was submitted that the claimant failed to observe the clause in the employment contract which seeks to indemnify the second defendant against any loss or damage incurred or against liability in a civil suit arising from the claimant's conduct, and, as a corollary, any expenses or costs incurred. Mr Scott further submitted that these expenses are damages in the proper sense. It was also submitted that although the expenses are quantifiable, an Assessment of Damages hearing would be appropriate to assess the damages. Counsel relied on the decision in **Geotechvision Enterprises Limited v E-Learning Jamaica Company Limited** [2023] JMCC COMM 25. In this case, the claimant sought to recover damages for breach of contract which it alleged arose from the defendant's failure to perform the contract as agreed, that is, by the defendant

wrongfully terminating the contract without adhering to the terms. The defendant denied the claim and countersued for damages for breach of contract which it alleged arose from the claimant's refusal to perform the obligations under the contract, namely, the expense incurred in securing legal services to terminate the contract and to re-advertise the contract in newspapers. Justice Palmer-Hamilton dismissed the claim and gave judgment to the defendant on the counterclaim only for the costs incurred to re-advertise the advertisement. At paragraphs 88 and 89 of the judgment, the learned judge said:

> *'[88] In my view, legal services of a different law firm are not recoverable. For a party to recover damages for breach of contract, there must be causation between the breach and the loss sustained, what is known as the 'but for' test. This should be applied in a common sense way to determine whether the damages suffered is attributable to the breach in question. Even though there may be a causal link between the seeking of legal services and the breach of the Contract, I am of the view that this item as claimed ought not to be recoverable by the Defendant Company.*
>
> *[89] I am however satisfied that the Defendant Company had to re-advertise the bid and therefore had to pay to place the advertisement in the newspapers. I find that the sum claimed for the re-advertisement is one which naturally arises from the breach of the contract and they ought to be put in as good a position as they would have been in had the breach of contract not occurred. The total invoice amount was for $181,320.60 and the Defendant Company paid JMD $155,640.00.'*

[14] In further submissions filed on June 4, 2024, on the issue of whether the default judgment should be set aside, it was submitted that the affidavit filed in support of the application was not one of merit and lacked integrity. Counsel observed that the affidavit does not contain any facts or account of the accident to refute liability to the defendant. Counsel also submitted that the affidavit is a "*melage of the affiant's statements and counsel's advocacy*". It was also submitted that the affidavit contained conflicting material (citing specifically paragraphs 5 and 8).

[15] As regards the delay by the applicant in filing the application, it was submitted that the reason outlined (that is, the breakdown in communication between the claimant and his Attorneys-at-Law) was insufficient to allow the court to exercise its discretion to set aside the default judgment. Counsel relied on the Court of Appeal decision of **City Printery v Gleaner Co. Ltd** (1968) 13 WIR 127 to

support his submission that the reasons for not filing a Defence to the counterclaim, were inexcusable where the claimant's counsel had a duty to file a Notice of Change of Attorney, which was done belatedly and only after disclosure in second defendant's affidavit.

THE LAW

RULE 13.3 OF THE CPR

[16] The application was made pursuant to Rule 13.3 of the CPR**.** Rule 13.3 sets out the parameters within which any application to set aside default judgment should be considered. The court may judiciously exercise its discretion to set aside a regularly obtained default judgment, guided by the factors listed in rule 13.3 and guided by legal principles enunciated in case law. Rule 13.3 reads as follows:

> *"(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 a 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] The authority of **Evans v Bartlam** [1937] 2 All ER 646 has been applied by this court. This case fortifies the court's authority to exercise its discretion to set aside a default judgment. The principle espoused from the case is that "*unless and until the Court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been to obtained only by a failure to follow any of the rules of procedure*."

Real prospect of successfully defending the claim

[18] Rule 13.3(1) is a material limb for the court's consideration. This limb has been interpreted as requiring that the court first be satisfied that the applicant has a real prospect of successfully defending the claim. If the applicant fails on this

limb, then the entire application fails. Edwards JA in **Russell Holdings Limited v L&W Enterprises Inc and ADS Global Limited** [2016] JMCA Civ 39, discussed the matter of the real prospect of successfully defending the claim. She said:

> *"[82] For there to be a real prospect of success the defence must be more than merely arguable and the court, in exercising its discretion, must look at the claim and any draft defence filed. Whilst the court should not and must not embark on a mini trial, some evaluation of the material placed before it for consideration should be conducted. The application must therefore be accompanied by evidence on affidavit and a draft of the proposed defence.*
>
> *[83] A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the factors in rule 13.3(2)(a) and (b) are considered against his favour and if the likely prejudice to the respondent is so great that, in keeping with the overriding objective, the court forms the view that its discretion should not be exercised in the applicant's favour. If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the end of the matter. If it is considered that there is a good defence on the merits with a real prospect of success, the judge should then consider the other factors such as any explanation for not filing an acknowledgement of service or defence as the case may be, the time it took the defendant to apply to set the judgment aside, any explanation for that delay, any possible prejudice to the claimant and the overriding objective.*
>
> *[84] The prospect of success must be real and not fanciful and this means something more than a mere arguable case. The test is similar to that which is applicable to summary judgments (see Blackstone's Civil Procedure 2005, paragraphs 20.13 and 20.14 and the case of* ***International Finance v Utexafrica SPRL*** *[2001] All ER (D) 101 (May). (See also* ***ED&F Man Liquid Products v Patel & another*** *(2003) Times, judgment delivered on 18 April 2003.)*
>
> *[85] In Blackstone's Civil Procedure 2004 paragraph 34.13 the learned editors in reference to summary judgment applications argued that a defendant could show that the defence had a real prospect of success by:*
>
> *(a) showing a substantive defence, for example volenti non fit injuria, frustration, illegality etc;*
> *(b) stating a point of law which would destroy the claimant's cause of action;*
> *(c) denying the facts which support the claimant's cause of action; and*
> *(d) setting out further facts which is a total answer to the claimant's cause of action for example an exclusion clause, agency etc.*
>
> *[86] Accepting that the principles to be applied regarding a defence on the merits in summary judgment applications are similar to that in an application to set aside a default judgment regularly obtained, a defence with a real prospect of success in such an application may therefore involve a point of law, a question of fact or one comprising a mixture of fact and law.* A defence will have little prospect of success if it is weak or fanciful

and lacking in substance or if it is contradicted by documentary evidence or any other material on which it is based. *A defence consisting purely of bare denials may have little prospect of success (see* ***Broderick v Centaur Tipping Serv****ices (2006) LTL 22/8/06 as cited in Stuart Simes' "A Practical Approach to Civil Procedure", 15th edition at page 272, paragraph 21.21).*

[87] In ***Swain v Hillman*** *[2001] 1 All ER 91 Lord Woolf said that:*

> *"The words, "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or,... directed the court to the need to see whether there was a "realistic" as opposed to a "fanciful" prospect of success."*

[19] Without conducting a "mini trial", the court must consider whether the applicant has a real prospect of success by having regard to his draft Defence to the counterclaim as well as the Defence and Counterclaim.

[20] Once the first limb is satisfied, the court may go on to consider the second limb and its subcategories. In **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, Phillips JA opined that the court must also give weight to the matters set out in Rule 13.3 (2)(a) and (b), that is, the reason for not filing a defence/acknowledgement of service and how soon was an application to set aside default judgment made when exercising its discretion. McDonald-Bishop JA (as she then was) in **Flexnon Limited v Constantine Michell and others** [2015] JMCA App 55 further stated that while a defence having a real prospect of success is the primary consideration it is not determinative of whether a default judgment should be set aside. She said the following at paragraphs 27 and 28 of that judgment:

> *"[27] It is clear from rule 13.3(2)(a) and (b) that it is incumbent on the court to consider whether the application to set aside was made as soon as was reasonably practicable after finding out that judgment had been entered and that a good explanation is given for the failure to file an acknowledgement of service and or a defence as the case may be. So the duty of a judge in considering whether to set aside a regularly obtained judgment does not automatically end with a finding that there is a defence with a real prospect of success. Issues of delay and an explanation of failure to comply with the rules of court as to time lines must be weighed in the equation.*
>
> *[28] While it is accepted that the primarily consideration is whether there is a real prospect of the defence succeeding, that is not the sole consideration and neither is it determinative of the question whether a default judgment should be set aside. The relevant conditions specified in rule 13.3(2) must be considered and such weight accorded to each as a judge*

would deem fit in the circumstances of each case, whilst bearing in mind the need to give effect to the overriding objective."

Promptness of the application

[21] As regards whether the application was made promptly, it is important to consider whether the claimant had applied to set aside default judgment as soon as was reasonably practicable after finding out judgment was entered against him. The importance of making the application promptly was explained by Field J in **Standard Bank PLC & Anor v Agrinvest International Inc & Others** [2010] EWCA Civ 1400. He stated:

> "*22. The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objective expressly recognized for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one. However, promptness will always be a factor of considerable significance, as the judge recognised in paragraph 27 of his judgment, and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial.*"

[22] The law is clear that applicants must file application as soon as reasonably practicable after finding out that judgment has been entered. However, what is to be considered "prompt" is determined on a case-by-case basis. In the case of **Roger Lorde v Lisa-Ann Edwards & anor** [2019] JMSC Civ 97, the applicant was not served with the default judgment and so the court found that the delay of one month to apply to set aside the default judgment was not inordinate. In **Russell Holding Limited v L&W Enterprises Inc & ADS Global Limited** (supra) the Court of Appeal stated that the delay of one year was inordinate but not decisive, and that the Attorney-at-Law's error could not be regarded as grossly negligent. At paragraph 121, the Court of Appeal said that "based on the circumstances of this case and in the light of the fresh evidence which was not

before the learned judge in the court below… the delay, although significant, should not determine the outcome of this matter". The application was allowed.

Good explanation for a delay in filing the defence

[23] In **Attorney General v Roshane Dixon and Attorney General v Sheldon Dockery** [2013] JMCA Civ 23 the court found that an unsatisfactory reason for delay was enough to dismiss the application to set aside the default judgment.

OTHER RELEVANT RULES OF THE CPR

[24] At this juncture, I believe that it is important to refer to some other Rules of the CPR, including Rule 18.9. There seems to be an anomaly in the CPR in that it does not appear to have been envisaged that the Registrar should have the discretion to decline to enter a default judgment, even if there is a close connection between the claim and counterclaim and even if they should be tried together. The wording of Rules 12.5 and 18.2(4)(b) suggests that the Registrar does not have a discretion to refuse to enter default judgment once the criteria is met and the Request is filed. However, Rule 18.9 indicates that where the court is considering three situations in relation to ancillary claims, the court should consider whether the claim should be dealt with separately from the counterclaim[1]. I will address this further in paragraphs 59 to 66 below.

[25] Rule 18.1(2) indicates that an "ancillary claim" is "*any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes (a) a counterclaim by a defendant against the claimant ….*".

[26] Rules 18.2(1), 18.2(4) and 18.2(5) state as follows:

> *(1) An ancillary claim is to be treated as if it were a claim for the purposes of these Rules, except as provided by this Part.* ***…***
> *(4) The following rules do not apply to ancillary claims –*
> *(a) rules 8.14 and 8.15 (time within which a claim may be served);*

[1] This seems to be a matter for the Rules Committee to address. It might be that an ancillary claimant or defendnant with a counterclaim ought to indicate in Form 8 whether the facts in the ancillary claim/counterclaim are substantially the same, or closely connected with, the facts in the claim.

(b) Part 12 (default judgment) applies to an ancillary claim only if it is a counterclaim

(5) Where the ancillary claim is a counterclaim by the defendant against a claimant (with or without any other person) the claimant is not required to file an acknowledgment of service and therefore Part 9 (Acknowledgment of Service) does not apply to the claimant. (My emphasis)

[27] Rule 12.5 sets out the conditions to be satisfied to obtain a default judgment on account of a failure to file a Defence:

*"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*.

(My emphasis)

[28] Rule 18.3 deals specifically with an ancillary claim by one defendant for contribution or indemnity against another defendant. No mention is made of an ancillary claim for contribution or indemnity against the claimant. It might be that the drafters of the CPR did not envisage this type of scenario.

[29] Rule 18.11 states:

*(1) **This rule applies to an ancillary claim other than a counterclaim** if the ancillary defendant fails to file a defence in respect of the ancillary claim within the permitted time. (Rule 18.8(2) deals with the time for filing a defence to an ancillary claim.)*

*(2) **The ancillary defendant is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim**; and*

*(3) Subject to paragraph (4), **if judgment under Part 12 is given against the ancillary claimant, he or she may apply to enter judgment against the ancillary defendant in respect of the ancillary claim**.*

(4) The ancillary claimant may not enter judgment under paragraph (3) without the court's permission if the ancillary claimant *–*

(a) has not satisfied the default judgment under Part 12; or

(b) ***wishes to obtain judgment for*** *–*

(i) ***any remedy other than a contribution or an indemnity****; or*

(ii) a sum exceeding that for which judgment has been entered against the ancillary claimant

(5) The court may at any time set aside or vary a judgment entered under paragraph (2) if it is satisfied that the ancillary defendant-

(a) applied to set aside or vary the judgment as soon as reasonably practicable after finding out that judgment had been entered;

(b) gives a good explanation for the failure to file a defence; and

(c) has a real prospect of successfully defending the ancillary claim. (My emphasis)

[30] Rule 18.9 states:

(1) ***This rule applies when the court is considering whether to*** *–*

(a) permit an ancillary claim to be made;

(b) dismiss an ancillary claim; or

(c) ***require the ancillary claim to be dealt with separately from the claim****. (Rules 26.1(f) and (i) deal with the court's power to decide the order in which issues are to be tried or to order that part of the proceedings be dealt with separately.)*

(2) The court must have regard to all the circumstances of the case including-

(a) the connection between the ancillary claim and the claim;

(b) whether the ancillary claimant is seeking substantially the same remedy which some other party is claiming from the ancillary claimant;

(c) whether the facts in the ancillary claim are substantially the same, or closely connected with, the facts in the claim*; and*

(d) whether the ancillary claimant wants the court to decide any question connected with the subject matter of the proceedings –

(i) not only between the existing parties but also between existing parties and the proposed ancillary claim defendant; or

(ii) to which the proposed ancillary defendant is already a party but also in some further capacity. (My emphasis)

[31] By virtue of Rule 12.7, a claimant may obtain a default judgment upon filing a Request (Form 8) with the Civil Registry. Where the claim is for an unspecified sum of money, the claimant must set out in the Request for Default Judgment, the additional information required in Rule 16.2, namely whether the claimant/ancillary claimant is in a position to prove the amount of the damages and the estimate of the time required to deal with the assessment of damages.

[32] Rule 12.10(1)(b) states that a default judgment "*on a claim for an unspecified*

sum of money, shall be judgment for the payment of an amount to be decided by the court". Rule 16.2 deals with the procedure for assessment of damages where judgment is entered under 12.10(1)(b) and states:

> *(1) An application for a default judgment to be entered under rule 12.10(1)(b), must state-*
>
> *(a)* ***whether or not the claimant is in a position to prove the amount of the damages****; and, if so*
>
> *(b) the claimant's estimate of the time required to deal with the assessment.*
>
> *(2) Unless the application states that the claimant is not in a position to prove the amount of damages, the registry must fix a date for the assessment of damages and give the claimant not less than 14 days notice of the date, time and place fixed for the hearing.*
>
> *(3) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.*
>
> *(4) The registry must then fix:*
>
> *(a) The date for the hearing of the assessment;*
>
> *(b) A date by which standard disclosure and inspection must take place;*
>
> *(c) A date by which witness statements must be filed and exchanged; and*
>
> *(d) A date by which a listing questionnaire must be filed.* (My emphasis)

[33] The conditions to be satisfied in Rule 12.5 to obtain a default judgment have been indicated above. Reading that rule, Rule 16.2 and Rule 18.2(4)(b) together, an ancillary claimant is entitled to a default judgment on a counterclaim merely by proving service of the ancillary claim/ counterclaim and stating that the ancillary defendant has failed to file a defence in time (and no application for an extension of time to file the defence is pending), and by stating that the ancillary claimant is in a position to prove the amount of the damages (in relation to a claim for a unspecified sum of money). Therefore, a defendant who files an ancillary claim which is a counterclaim, may obtain a default judgment on that counterclaim without the court's permission, *irrespective* of whether the counterclaim and claim are inextricably connected and should be tried together [2]. However, **Rule 18.9** lists matters which are relevant to the question of whether an ancillary claim should be dealt with separately from the main claim, and two such considerations are "*the connection between the ancillary claim and the claim*" and "*whether the facts in the ancillary claim are substantially the same, or closely connected with, the facts in the claim*". I doubt that the drafters of our CPR intended to create

[2] In contrast however, Rule 18.11(4) seeks to bind any ancillary defendant to whatever judgment is entered against the ancillary claimant only if there is a link between the claim and the ancillary claim.

such a position wherein a default judgment could be entered on a counterclaim without consideration of whether the counterclaim and claim are closely connected.

ANALYSIS

Real prospect of success

[34] In determining whether the defendant has a real prospect of success the court must look at the evidence before it, without conducting a "mini-trial". The court must look at the affidavit evidence of the claimant as juxtaposed to the defendant's counterclaim. However, before this weighing exercise can take place, case law dictates that the "value" of the applicant's affidavit must first be determined. In doing so, the court must decide whether the affidavit is one of merit. Guidance can be gleaned from the judgment of McDonald-Bishop J (Ag.) (as she then was) in **Marcia Jarrett (Admin of the Estate of Dale Jarrett) v SERHA & Robert Wan & Attorney General** (unreported) Supreme Court, Jamaica, claim no. 2006HCV00816 judgment delivered 3 November 2006. At paragraphs 25 and 26 of that judgment, the judge stated:

> *'25. **Funival v Brooke** (1883) 49 L.T. 134 is still good authority on the point that where the judgment is regular, the court has a discretion in the matter and the defendant must, as a rule, show by an affidavit that he has a defence to the action on the merits. It has been established as far back then that before a judgment which is regularly obtained could be set aside, an affidavit of merit was required and when an application to set aside a judgment is not so supported, it ought not to be granted except for some very sufficient cause (see also **Evans v Bartlam** [1937] A.C. 473). This principle has resounded with settled acceptance by the courts within our jurisdiction. Consequently, an affidavit of merit is a fundamental requirement in all application of this sort.*
>
> *26. Within this context, it is worthy to note Lord Atkin's dictum in **Evans v Bartlam** (supra):*
>
> > *"But in any case, in my opinion, the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merit could, in no doubt, in rare but appropriate cases be departed from."*
>
> *This is clearly suggestive that the courts, while requiring as a rule that there must be an affidavit of merit may, nevertheless, in rare but appropriate cases, depart from its own rule in order to deprive itself of jurisdiction to "revoke the expression of its coercive powers". It follows then that the absence of an affidavit of merit, in rare and exceptional circumstances, may not be fatal to an application to set aside.*'

[35] In the recent Court of Appeal decision of **Barrington Green and Anor v**

Christopher Williams and Ors [2023] JMCA Civ 5, the respondents/defendants were sued in the court below for breach of contract but failed to file a defence within the stipulated time. The appellants/claimants then applied for default judgment. Shortly thereafter, the respondents filed a defence, but filed a notice of application seeking permission to file their defence almost a year later. That application was supported by affidavit evidence from their Attorney-at-Law who explained the reasons for the failure. However, no proposed defence was exhibited. An affidavit in opposition to the application was filed. The learned Master granted the application and the claimants appealed. In setting aside the lower court's decision, Dunbar Green JA stated at paragraph *81* that *"the requirement for some evidence of merit must mean that there should be some facts or material to make even an iota of difference by challenging the appellants' claim. 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…".*

The applicant's response to the counterclaim

[36] In the instant case, the claimant's affidavit sworn to and filed on 20 April 2023 does not set out any facts in defence of the counterclaim but exhibits a draft defence. In the draft defence, the claimant avers that he acted professionally and observed all business practices and standards of the workplace, and he therefore denies a breach of contract. The claimant also asserts that the incident which resulted in the claim was caused or contributed to by the second defendant's negligence. He also puts the defendant to strict proof for special damages particularized.

The defence and counterclaim

[37] It seems useful to set out the Defence and the second defendant's Counterclaim at this juncture. The Defence states as follows:

1. *"Save that the First and Second Defendants admit that the Claimant was at the material time a dancer employed to the First Defendant on the premises of the Second Defendant, paragraph I of the Particulars of Claim is not admitted.*

2. *The Defendants admit paragraph 2 of the Particulars of Claim.*
3. *The Defendants admit paragraph 3 of the Particulars of Claim.*
4. *The Defendants admit paragraph 4 of the Particulars of Claim and will hereafter rely on certain provisions of the contract of employment between the Claimant and the Second Defendant in defence of the claim.*
5. *... the First Defendant was at the material time the occupier of the hotel ....*
6. *The Defendants ... at all material times they discharged their common law and statutory duty of care to the Claimant in providing a safe and risk-free environment, system of work, plant and equipment ... and assert that the Claimant was negligent and in breach of the contract of employment in relation to the act performed by him or the circumstances in which he performed the same and in respect of which he alleges the negligence of the Defendants.*
7. *Save that the Defendants admit that on or about the day mentioned in paragraph 7 of the Particulars of Claim and while the Claimant was working on the First Defendant's property the incident occurred, paragraph 7 of the Particulars of Claim is not admitted and the Defendants will rely on the fact that the Claimant, prior to the execution and during the performance of the contract of employment, represented and held himself out to be a trained, experienced and professional dancer and choreographer versed in a suite of original and imitated dance routines of which he was capable of executing.*
8. *....*
9. *....*
10. *....*
11. *....*
12. *The Defendants in relation paragraph 12 and 13 of the Particulars of Claim, deny that the alleged incident was caused or contributed to by their negligence and/or breach of contract and/or breach of a statutory duty and/or the negligence or breach of duty of their employees or agents and specifically refute the particulars of negligence and/or breach of statutory duty indicated therein.*
13. *The Defendants aver that **the incident was caused solely or alternatively contributed to the negligence of the Claimant**, the particulars of which appear hereunder.*

    PARTICULARS OF NEGLIGENCE
    - *(a) Failing to take any or any special care or to have any or any due regard for his own safety and the safety of others*
    - *(b) Executing the dance routine or movement in circumstances where he knew or ought to have known would have presented a risk to himself and others*
    - *(c) Assuming the risk when he knew or ought to have known that he would likely have suffered injury in so doing*
    - *(d) Failing to take any or any proper steps so as to avoid the alleged incident and the injuries he allegedly suffered.*

14. *Further or in the alternative, the Defendants maintain that pursuant to the contract of employment between the Claimant and the Second Defendant, **the Claimant agreed and warranted that at all times the Claimant would carry out his duties and responsibilities professionally and effectively and that the Claimant was guilty of a breach thereof**.*

    PARTICULARS OF BREACH
    - *(a) Failing to execute his work in a professional and workman-like manner*
    - *(b) Representing that he was a trained, experienced and professional dancer and choreographer when he knew that he did not have any such credentials*
    - *(c) Executing a dance routine or movement which he knew or ought to have known would have exposed him and others to a risk of injury*

15. ***The Defendants will also maintain that the Claimant was in breach of Clause 5(f) of the contract of employment between the Claimant and the Second Defendant,***

wherein the Claimant agreed to use the property and facilities of the First Defendant properly and professionally, observing all practices and standards of the workplace and the directives, policies and rules of the Second Defendant which enjoined him to exercise due care in executing his work

PARTICULARS OF BREACH

(a) Failing to adhere properly or at all to the safety directives, policies and protocols of the Second Defendant

(b) Intentionally disregarding the directives of the Second Defendant as to the steps to be taken for his own safety and the safety of others in performing dance routines or movements or at all;

(c) Choreographing a dance routine or movement which he knew or ought to have known was beyond his capabilities and would have placed himself and others at risk.

16. ***Further or in the alternative, the Second Defendant in relation to the claim will further rely on Clause 5(k) of the contract of employment between the Claimant and itself wherein the Claimant agreed to indemnify and keep the Second Defendant indemnified from and against any or all loss and damage or liability whether criminal or civil suffered and legal fees and cost incurred by the Second Defendant which directly or indirectly results from a breach by the Claimant of the said contract*** *which shall include but which is not limited to any act, neglect or default of the Claimant and/or breaches committed by the Claimant in respect of any matter arising from the Claimant's employment.*

PARTICULARS OF FEES COSTS, EXPENSES, LOSS AND DAMAGES

(a) ***Legal fees: JMD 300,000.00 (and continuing);***

(b) ***Administrative costs: JMD 80,000.00 (and continuing).***

The Second Defendant will accordingly seek at the trial in the event the Claimant is found to be contributory negligent to set off the fees, costs and expenses incurred *by it or so much of the amount incurred by it in partial or entire satisfaction of any damages found due to the Claimant.*

17. *The Defendants do not admit the Particulars of Injury, Particulars of Special Damages, Loss and Damage allegedly suffered by the Claimant and indicated in paragraph 14 of the Particulars of Claim and will put the Claimant to strict proof thereof.*

18. *Save for the express admissions made herein, the Defendants join issue with the Claimant upon the allegations made in the Particulars of Claim and deny each and every allegation as if the same were set out herein and traversed seriatim.* (My emphasis)

[38] The Counterclaim states the following at paragraphs 19 and 20*:*

19. *By way of counterclaim, the Second Defendant repeats paragraphs 1 to 18 particularly paragraph 16 hereof and avers that* ***the Claimant was in breach of the contract of employment for which the Second Defendant is entitled to damages****.*

20. *Further or in the alternative, the Second Defendant maintains that* ***in the event the claim fails entirely or partially it is entitled to and seeks damages from the Claimant in the amount of fees, costs and expenses incurred in defending the present proceedings*** *the particulars of which appear hereunder*

PARTICULARS OF FEES COSTS EXPENSES LOSS AND DAMAGES

(a) ***Legal fees: JMD 300,000.00 (and continuing);***

(b) ***Legal fees Administrative costs: JMD 80,000.00 (and continuing).”***

(My emphasis)

[39] As aforementioned, the second defendant’s counterclaim for indemnity arises

from the signed employment contract dated July 25, 2013. Under the heading "*The Employee's Agreements/Warranties*" at number 5 the contract provides:

> *"The Employee agrees or warrants:*
>
> *…*
>
> *(k) to indemnify and keep indemnified the Employer from and against any and all loss and damage or liability (whether criminal or civil) suffered and legal fees and costs incurred by the Employer which directly or indirectly results from a breach of this Agreement by the Employee which includes, but which is not limited to, any act, neglect or default of the Employee and/or breaches in respect of any matter arising from the employment and the deployment*;"

[40] This clause seeks to make the claimant or other employees personally responsible to indemnify his employer for any loss, damages, fees and costs incurred by the second defendant as a result any tortious or criminal actions of that employee, where such actions amount to a breach of the employment contract or arise from the employee's negligence.

Concerns with the counterclaim

[41] I have observed that the second defendant has not indicated (at paragraph 19) the nature and extent of its entitlement to damages resulting from the alleged breach of contract by the claimant. For example, the second defendant has not pleaded that it lost profits or suffered property damage or other loss because of the alleged breach of contract by the claimant. Neither has it pleaded at paragraph 19 that another employee was injured because of the alleged breach of contract and that this resulted in a financial loss to the second defendant. It seems from the pleadings that the costs involved with the suit are the only losses suffered by the second defendant. Based on my observation, counsel for the parties were directed to file submissions as regards whether there may be a claim solely for costs.

[42] If the claimant was the only person injured in the incident, it is hard to fathom how the claimant's injury could amount to a breach of contract by the claimant, even if the claimant was negligent in carrying out his duties. The second defendant would not be entitled to damages for breach of contract, having not pleaded any lost profits or other losses. If the claimant is unsuccessful, judgment would be

entered for the second defendant and costs awarded to the second defendant on the claim. It is questionable whether there would even be a need to enter judgment on the counterclaim in relation to paragraph 20, since costs would be awarded on the claim in any event. To that extent, the counterclaim may be superfluous.

[43] Further, save and except for the sums referred to as "legal fees" ($300,000 and continuing) and "administrative costs" ($80,000 and continuing), no other consequences of the alleged breach are particularized. The defendant does not specifically state how it incurred the pleaded expenses, but it is assumed that these fees and costs arose from defending the case up to the point of filing the pleadings.

[44] Having considered the draft defence as well as the nature of the counterclaim, and the fact that there is no loss pleaded aside from legal fees and costs (which are to be determined after the disposal of the claim), I am of the view that the claimant has a real prospect of success in defending the counterclaim.

Promptness of the application and good explanation for the delay

[45] The claimant's attorneys were served with the default judgment on November 18, 2022 and filed his application to set aside the same on April 20, 2023, a delay of five (5) months and two (2) days. The application cannot be said to be prompt, despite the communication challenges outlined. However, the delay is not inordinate.

[46] The explanation proffered in the claimant's affidavit for the five-month delay in filing an application to set aside the default judgment entered is deficient because there is little evidence regarding the nature of all the attempts made to reach the applicant. Was a letter sent? Was a process server dispatched to try to find the claimant? It is also important to note that there are inconsistencies in the counsel's submission and the claimant's evidence as to the reason for the delay.

The claimant stated that his attorney learnt of the default judgment in March 2023 when the notice of adjourned hearing was served. However, Mr Davis' submission indicated that the firm was served with the default judgment in December 2022.

[47] The coming into effect of the CPR in January 2003 was expected to herald the end of an era of delay in litigation, through judge-driven case management. In ***Alcan Jamaica Company v Herbert Johnson & Idel Thompson-Clarke*** SCCA 20 of 2003 (delivered 30th July 2004) at pages 15 and 16, Cooke JA cited Panton JA (as he then was) in ***Port Services Limited v Mobay Undersea Towns*** SCCA No 18/2001 (delivered March 11, 2002) where he said at pages 9 and 10:

> *"In this country, the behaviour of litigants, and, in many cases, their attorneys-at-laws, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions…. "*
> *For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."*

[48] Although the CPR is aimed at achieving greater efficiency in the administration of justice, Courts must always bear in mind the overriding objective of achieving fairness. Consequently, it has been repeatedly said in cases both here and in England, that Courts must be reluctant to deprive a litigant of the opportunity of having the case determined on the merits. Blackstone's Civil Procedure 2014: The Commentary at paragraph 1.27 states:

> *"The main concept in the overriding objective (CPR, r. 1.1) is that the primary concern of the court is to do justice. Ultimately the function of the Court is to resolve issues between the parties…. Shutting a litigant out through some technical breach of the rules will not often be consistent with this, because* ***the primary purpose of the civil courts is to decide cases on their merits****, not to reject them for procedural default."*
> (My emphasis)

[49] In ***Cynthia Smith v Movac Protection Limited*** [2016] JMSC Civ. 75, Straw J (as she then was), considered an application to set aside judgment in default which was delayed by about eight (8) months after the receipt of a copy of the judgment in default. At paragraph 15, Straw J said "*[w]ithout more, this delay*

could easily be described as inordinate and protracted." However, Straw J indicated that while she "*found that the delay in relation to the application to set aside is inordinate and without a good explanation*" she had to bear in mind the overriding objective in the CPR. Having found that the proposed defence had a real prospect of success and that there was no specific allegation of any prejudice to the claimant, the learned judge granted the orders requested by the applicant.

Prejudice to Defendant

[50] I am mindful of Mr Scott's submissions that delay may cause prejudice to the second defendant because, with the passage of time, memories fade. Notwithstanding, I have noted that there is no assertion of any real prejudice, for example, that a witness cannot now be found.

[51] In ***Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Fredrick Flemmings & Gertrude Flemmings*** [2010] JMCA Civ 19, at paragraph 41, Phillips JA accepted the views expressed in ***Finnegan v Parkside Health Authority*** [1998] 1 W.L.R. 411, that a litigant ought not to be denied access to justice on account of a procedural default, "*even if unjustifiable, and particularly where no prejudice has been deponed to or claimed*".

[52] In my opinion, there will be no prejudice to the defendant if the default judgment is set aside. Damages have not been assessed in relation to the counterclaim and the defendant will continue to incur expenses until the determination of the claim. However, there would be prejudice to the claimant in not being allowed to answer the counterclaim against him in circumstances where the claim and counterclaim are closely connected and should be tried together.

[53] Notwithstanding the length of the delay and brief explanation, this is an appropriate case to set aside the default judgment for the reasons discussed above. The overriding objective and whether the applicant has a real prospect of

successfully defending the claim/counterclaim are the paramount considerations in a judge's exercise of discretion in such applications and I have given due weight to these in my consideration of the application in this case. Although the application is determined based on Rule 13.3, I believe that it is necessary to address two other issues in this case.

Was the second defendant in a position to prove the amount of the damages?

[54] In the Request for the default judgment filed on January 5, 2021, the second defendant certified that it was in a position to prove the amount of the damages. However, that statement could not be accurate for the two reasons. First, the second defendant has not indicated in its pleadings the consequences of the alleged breach of contract which would warrant an award of damages. Second, the legal fees and administrative costs referred to would continue to accrue until the determination of the claim. Therefore, there could be no assessment of damages on the counterclaim while the claim itself remained untried or where the claim had not been struck out or discontinued.

[55] In **Renewable Power & Light Ltd v McCarthy Tetrault & Ors** [2014] EWHC 3848 (Ch) Justice Morgan held that a defendant was entitled to indemnity costs when a claimant discontinued a claim midway through the trial. The right to indemnity costs arose from a contractual term, worded similarly to that at 5(k) of the employment contract in the instant case. That contractual term was pleaded at paragraph 120 of the counterclaim as follows:

> *"if Grant Thornton is found not liable to RPL in negligence it is entitled to and seeks damages in the amount of its costs, fees and expenses in defending the present proceedings assessed on the indemnity basis pursuant to clause 6.1 of the Grant Thornton Contract and clauses 8.3 and 8.7 of the Placing Agreement*".

[56] The judge observed that technically Grant Thornton was found not liable to RPL in negligence as there had not been a finding either way, because the claim against Grant Thornton had not resulted in a judgment. He interpreted paragraph 120 so that the precondition of Grant Thornton being "found not liable" extended

to, or included, the claimant's discontinuation of its claim against Grant Thornton.

[57] Just as in the **Renewable Power & Light Ltd** case, the second defendant in the instant case is only entitled to costs and fees if the claimant is unsuccessful at trial or if the claim is struck out or discontinued. The counterclaim for indemnity ought to be left for determination at a trial where the court will consider the issue of negligence and contributory negligence. Pursuant to clause 5(k) of the employment contract, the second defendant has a right to indemnity costs, but that right is only enforceable once it is established that the claimant breached the contract by virtue of his negligence, and that breach of contract resulted in losses to the second defendant.

[58] The fees and costs claimed in paragraph 20 of the counterclaim in this case may not be recoverable as they have not yet been proved in the way they were proved in the **Geotechvision** case relied on by defence counsel. These are essentially costs which may properly be dealt with at the conclusion of a trial, having regard to the relevant provisions of Part 64 of the CPR. It should be noted that it is also possible to set off any costs awarded to the second defendant after the main claim has been determined (see Rule 64.6(8)). The second defendant could not be said to be in a position to prove its loss, damages or costs as there has been no determination of the claim. To that extent, the default judgment on the counterclaim might be regarded as otiose.

<u>Should a default judgment have been entered administratively?</u>

[59] No permission is required under Rule 18.2(4)(b) for a default judgment to be entered in respect of a counterclaim in which the second defendant seeks a contribution or indemnity although the issue of liability has not been settled as between the claimant and the defendants in the main proceedings. This might result in some injustice in a case such as this, where it is more appropriate that the counterclaim or ancillary claim be dealt with together with the primary claim. CPR Rule 18.2(4)(b) permits a default judgment to be entered administratively.

There seems to be an anomaly or in Rules 12.5 and 18.2(4)(b) in not providing that the permission of the court is required to enter default judgment on a counterclaim, which is closely connected to the claim.

[60] In the case of **Satnarine Maharaj v The Great Northern Insurance Company Ltd et al** Civil appeal No.198 of 2015 (judgment delivered on February 16, 2016), the Court of Appeal of Trinidad and Tobago had to consider the decision of a Supreme Court Judge to strike out the appellant's claim and to enter judgment in favour of the second respondent on her counterclaim with damages and costs to be assessed. The Judge at first instance heard a notice of application filed on April 20, 2015, wherein the respondents applied for various orders including an order that judgment be entered against the appellant on the basis that the appellant was deemed to admit the averments of negligence made by the respondents in their counterclaim (pursuant to Rule 18.12(2)(a) of the CPR), by reason of the failure of the appellant to file a defence to the counterclaim. The application was granted. The relevant portion of Rule 18.12 stated:

> *"(1) This rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time. (Rule 18.9 (2) deals with the time for filing a defence to an ancillary claim)*
> *(2) The party against whom the ancillary claim is made—*
> *(a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim; and*
> *(b) subject to paragraph (4) if judgment under Part 12 is given against the ancillary claimant, he may enter judgment in respect of the ancillary claim.…"*

[61] The issue in the appeal was whether the Judge was correct to strike out the claim in view of the failure of the claimant/appellant to defend the counterclaim of the second defendant/respondent and to enter judgment on the counterclaim. The appellant argued that the Judge was wrong to give judgment in favour of the respondents on the counterclaim and to strike out his claim.

[62] At paragraphs 19, 22, 24, 27, 30 and 31 of the judgment, the Court of Appeal of Trinidad and Tobago stated:

> *"19. Counsel for the appellant before this Court accepted that by failing to file a defence to the counterclaim the appellant was deemed to admit the counterclaim. This was the clear*

effect of rule 18.2(2)(a). This he submitted, however, did not entitle the second respondent as ancillary claimant to judgment on the counterclaim. Rather, the second respondent was entitled to have the admissions taken into account in the main claim between the appellant and the respondents. In other words the respondents must wait until the Court hears the dispute between the appellant and the respondents. Counsel submitted that if that approach is adopted in this case, the deemed admissions of the appellant was that the accident was caused "wholly or in part" by the appellant's negligence. A trial of the claim was necessary to determine whether he was wholly liable or partly liable, and if the latter the extent of his liability. The Judge was therefore wrong to make the orders on the respondents' application that are the subject of this appeal ….

22. When faced with an application such as the respondents' in this case, the approach of the Court must be to determine the effect of the deemed admissions on the claim. It is necessary for the court to carefully consider the admissions and ask itself whether any of the allegations in the claim can exist consistently with the deemed admissions. If there are allegations that cannot stand in view of the deemed admissions the court must assess how that impacts on the claim. ….

24. It is the position in this case that the counterclaim is intimately wrapped up with the defence. As we mentioned the allegations contained in the counterclaim are identical to those contained in the defence. In those circumstances neither party contended that the effect of admitting the counterclaim can have no impact on the claim.. …. We think it must be right that there would be cases where the deemed admissions arising from the failure to defend the counterclaim can result in the dismissal of the claim. One such case is where the effect of the claimant admitting the counterclaim would lead to a contradictory outcome on the claim if it were allowed to continue. To permit the claimant to proceed with the claim in those circumstances would be an abuse of process. ….

27. The appellant therefore can no longer contend that the accident was caused when the second respondent vehicle came into his lane. But is that necessarily the end of the matter in this case? We think not as there is the admission that the collision occurred wholly or in part as a consequence of the second respondent's negligence. So there is therefore an admission in the counterclaim that the collision was caused wholly or in part by the negligence of the second respondent, who is the claimant on the counterclaim. The question is what does that mean for the purposes of the claim. In our judgment it leaves the question still to be decided whether the damage resulting from the accident was the result partly of the appellant's fault and partly from the second respondent's fault and raises the issue of contributory negligence. Notwithstanding the deemed admissions by the failure to file a defence to the counterclaim, that remains a live issue on the claim as there is no clear admission that the accident was not in any way the fault of the second respondent.

30. In the circumstances in our view notwithstanding the admission of the counterclaim, the issue of contributory negligence is still a live one. Although the appellant's position has now been rendered difficult in view of the failure to defend the counterclaim, we cannot at this stage say that there exists no ground for the continuation of the claim. We are therefore of the view that the Judge was wrong to strike out the claim and accordingly we allow this appeal and set aside the order of the Judge below.

31. The judgment on the counterclaim should also be set aside. On the trial of the claim any findings as to the responsibility for the resulting damage will of course be binding on the parties and must be taken into account in relation to the counterclaim. The final disposition of the counterclaim is best left to be dealt with at the trial of the claim."

[63] Rule 18.12 of the CPR of Trinidad and Tobago differs slightly from our Rule 18.11 in that our rule expressly states that the rule applies to an ancillary claim *"other than a counterclaim*" if the ancillary defendant fails to file a defence in respect of the ancillary claim within the permitted time. In Trinidad and Tobago, it seems that a default judgment may only be entered on a counterclaim *if* judgment under Part 12 is made against the ancillary claimant. There is no such requirement in Jamaica. In our jurisdiction, a defendant/ancillary claimant may therefore obtain a default judgment against an ancillary defendant in respect of a counterclaim without judgment first being entered against him on the claim, and without an application (as distinct from a request). However, an ancillary defendant is not deemed to have admitted a counterclaim merely by failing to file a defence to the counterclaim.

[64] Although the Rules in Part 18 of the Jamaican CPR and those in the CPR of Trinidad and Tobago differ slightly, the following principles expounded in the **Maharaj** case are applicable in this case:

1. In considering an application for judgment to be entered against a defendant on the basis that he failed to file a defence to a counterclaim or ancillary claim, the court must carefully examine the pleadings to see what is admitted, or what is not completely denied on each party's case.
2. Where there is no clear or complete denial of fault or liability by the parties, and where the counterclaim is intimately or closely connected to the claim, the issue of negligence and contributory negligence must be decided at trial by a judge.

[65] As regards the instant case, I have noted that the first and second defendants deny (at paragraph 12 of the Defence) that they contributed or in any way caused the incident which led to the claimant's injuries and deny a breach of contract or

any breach of any statutory duties owed to the claimant. However, they go on to say at paragraph 13 of the Defence that the "*incident was caused solely or alternatively contributed to (sic) the negligence of the claimant*" [3]. In essence, the first and second defendants are saying that the incident may have been caused solely or “in part” by the claimant, and by saying this, they are impliedly acknowledging the incident may have been “in part” caused by the first and second defendants or some other person. The Defence, as pleaded, raises the issue of contributory negligence and it seems appropriate for that issue to be determined at a trial. Even if I am mistaken in my interpretation and treatment of the Defence and Counterclaim and the applicant’s draft Defence to the Counterclaim, it seems that the second defendant acted prematurely in requesting that a default judgment be entered. I say this as paragraph 20 of the counterclaim indicates that the second defendant would seek damages from the claimant "*in the event the claim fails entirely or partially*". The claim has not yet been determined at a trial or summary judgment hearing, and has not been struck out or discontinued, and the claim has therefore not yet failed.

[66] In applying the principles in the **Maharaj** case to this case, it would have been appropriate for the Registrar (if she were so able), to assess how the allegations of negligence or fault in the counterclaim impact the claim, and ask whether there are allegations in the claim could exist consistently with a default judgment on the counterclaim. This would have been an appropriate case for the Registrar to have properly directed the second defendant’s Attorneys-at-Law to file an application to enter judgment against the claimant in respect of the counterclaim, and then placed the application before a judge for consideration, having regard to the pleadings in the claim and counterclaim. However, based on the wording of Rule 12.5, the Registrar seemingly has no discretion when Registrar faced with a Request for Default Judgment in respect of a counterclaim of this nature, to consider whether the counterclaim ought to be dealt with together with the primary claim.

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[3] Paragraph 19, which sets out the counterclaim, repeats paragraphs 1-18 of the Defence.

CONCLUSION

[67] There was a delay of at least four (4) months between when default judgment came to the attention of the applicant's counsel and when the application was filed four (4) months. Although the applicant was tardy in filing his application pursuant to Rule 13.3, I believe that it is appropriate to grant the application for the reasons indicated above. It is more consistent or in keeping with the overriding objective that the application be granted and that case management orders be made.

[68] The second defendant is prima facie entitled to its costs in relation to the hearing of this application because of the delay by the claimant in filing the Defence to the Counterclaim. However, I am mindful that the request for default judgment seems to have been filed prematurely, having regard to the fact that damages could not be assessed on the counterclaim which seeks costs until the determination of the claim. Further, counsel could have conceded that the default judgment should be set aside. In the circumstances, I believe that it is appropriate for the parties to bear their own costs in respect of the hearing of the application.

CASE MANAGEMENT AND OTHER ORDERS

[69] The following orders were made:

1. Order granted in terms of paragraphs 1 and 3 of the notice of application filed on April 20, 2023.
2. Leave to appeal refused.
3. The parties are to bear their own costs in respect of the hearing of the application.
4. The parties are referred to mediation and must complete mediation by November 18, 2024.
5. Matter fixed for Case Management Conference on December 6, 2024 at 10am for half an hour by video conference.

6. If mediation is not successful, the parties are to comply with the Case Management Conference orders herein and attend a Pre-Trial Review hearing on July 1, 2025 at 10am for half an hour by video conference.
7. Trial fixed for September 29, 2025 and September 30, 2025 before Judge alone in open court.
8. The parties are to attend the Pre-Trial Review hearing on July 1, 2025.
9. Standard disclosure by January 13, 2025.
10. Inspection by January 27, 2025.
11. Witness statements to be filed and served by May 9, 2025.
12. Listing questionnaire and Pre-Trial Memorandum to be filed and served by June 10, 2025.
13. The issue of expert witnesses is reserved to the Pre-Trial Review hearing.
14. Claimant's Attorney-at-Law to prepare file and serve the order.