[2020] JMSC Civ. 256

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 04116

BETWEEN	**EVON MESSAM**	**CLAIMANT**
AND	**TREVOR DUNKLEY JUNIOR** **HAULAGE AND EQUIPMENT LIMITED**	**DEFENDANT**

IN CHAMBERS

Chadwick Berry, instructed by Townsend, Whyte and Porter, for the claimant

Aon Stewart, instructed by Knight, Junor and Samuels, for the defendant

Heard: December 14 and 18, 2020

Application to set aside default judgment – Whether there is a good explanation for the failure to file an acknowledgment of service within time – Alleged default of applicant's insurers – Whether the application was made as soon as was reasonably practicable after finding out about the default judgment – Application made almost a year after finding out about the default judgment – Whether the proposed defence has a realistic prospect of success – Reliance on hearsay evidence

ANDERSON, K. J

THE BACKGROUND

[1] The defendant has applied to set aside a default judgment which was entered against it, on March 20, 2018. The evidence which is undisputed on this point, informs that the defendant became aware of that judgment on or about September 6, 2019.

[2] That application to set aside default judgment, was filed on September 2, 2020 and an amended application was filed on that same day. That amendment was relatively minor. It only included the names of the defendant's attorneys, immediately below the defendant's name, on the second page of that document. Those names were omitted in the original application, above the attorneys' signature to same and there was no signature by the attorneys' office to same, in the original.

[3] Both parties filed submissions and authorities and a bundle of documents pertinent to the application was filed by defence counsel - as **Practice Direction No. 8 of 2020**, requires. The amended application was heard on paper. This court has carefully considered all of the parties' submissions and mean no disrespect to counsel, by not extensively referring to same, or by not referring to all of same.

[4] The default judgment which was entered against the defendant was so entered arising from the defendant's failure to file an acknowledgment of service, which is the first document that a party must file, in order to begin the process of defending themselves against a claim.

[5] It is the defendant's contention that they have provided, in support of the relevant amended application of theirs, to this court, a good explanation for their failure to file an acknowledgement of service and also, have provided sufficient evidence, to establish to the requisite standard, that the defendant applied to the court, as soon as was reasonably practicable, after finding out that judgment had been entered against them.

[6] In all respects, as regards the defendant's said amended application, the burden of proof rests squarely on the applicant's shoulders and proof is required to the standard of a balance of probabilities.

[7] The defendant has also contended that it has placed before this court, on affidavit evidence, a proposed defence which has a realistic prospect of success. It is on that score, that the claimant takes issue and has contended that the defendant has not in fact shown that it has a defence with a realistic prospect of success.

[8] I will hereafter examine all three of these issues, but before doing so, must state that all three of those submissions are central to the defendant's amended application. The wording of **rule 13.3 of the Civil Procedure Rules ('CPR'),** makes that clear. At this early stage though, it must also be made clear, that the pre-eminent consideration for this court, at this stage of this claim, is whether the defendant has a real prospect of successfully defending this claim. **Rule 13. 3(1) of the CPR** makes that clear, but also, in that regard, see: **B and J Equipment Ltd v Joseph Nanco [2013] JMCA Civ. 2**, especially at paragraphs 43 and 47, per Morrison JA., (as he then was). I will now proceed to address the three issues highlighted by **rule 13. 3 of the CPR**, in turn.

Whether the defendant has provided a good explanation for its failure to file an acknowledgment of service within time.

[9] The defendant's explanation for its failure to file an acknowledgement of service within time, has been provided by Mr. Trevor Dunkley, the only deponent whose evidence is being relied on by the defendant, in support of the defendant's amended application. Mr. Dunkley has deponed in his affidavit which was filed on September 2, 2020, that he is a Director of the defendant.

[10] He has deponed that the defendant was served with the claim form and particulars of claim, on January 8, 2019. '*That same day'* he took '*the matter'* to the defendant's insurers – Guardsman General Insurance Co. '*The matter'*

referred to is the claimant's claim for damages for negligence and employer's liability, arising out of a motor vehicle accident in which the claimant was involved, while driving a truck owned and operated by the defendant through its then employee - the claimant.

[11] For the purposes of that claim, it is the claimant's contention, that the said truck, was then defective and unfit for use, in that it then had no working foot brakes, or parking/emergency brakes and additionally, had electrical defects. It is the claimant's case, that while he was using that truck to haul bauxite up a hill, the same developed mechanical difficulties and shut down, whereupon, it then began to run backwards, and the claimant was unable to stop that from happening, because of the allegedly defective brakes. While in the course of running backwards, that truck then impacted with a pile of dirt and overturned, causing the claimant to suffer injuries, loss and damage.

[12] It is important to note that it is not at all, part of the claimant's statement of case, or any affidavit evidence, filed by the claimant, in response to the relevant amended application, that at any time while the said truck was rolling backwards, that the claimant jumped out of the said truck. The relevance of this fact, concerning that particular issue of fact, will be highlighted, further on, in these reasons.

[13] As set out in the defence's witness' affidavit evidence, when he took '*the matter,'* to the defendant's insurers, the insurers were already aware of that accident, as by then, same had already been reported to them. According to Mr. Dunkley:

> *'The authorized agent of said insurers who were already aware of the said accident, for that the matter had already been reported to the said insurers, who assured Trevor Dunkley, as the representative of the Defendant that the matter would be taken care of. The Defendant's agent and director Trevor Dunkley, left the offices of said insurer and thought nothing further of the matter.'*

(Part of paragraph 8 of the affidavit of Trevor Dunkley, which was filed on September 2, 2020.)

[14] Paragraphs 9, 10 and 11 of that affidavit, are worthwhile repeating in full. They read as follows:

> *'9. That it only came to the Defendant's attention on or about the 6th of September, 2019, that the Defendant's insurers did not defend the matter on behalf of the defendant or at all, when a document headed 'Interlocutory Judgment in Default of Acknowledgement of Service' was left at the office of the Defendant.'*
>
> *10. The Defendant is therefore caught by surprise, for that at all material times it was represented to the Defendant's Director Trevor Dunkley, by the said insurers that the matter was being handled and there was an ongoing investigation.*
>
> *11. The Defendant's Director immediately took the Default Judgment to its insurers where they subsequently indicated to the Defendant's Director that they were not willing to represent the Defendant in this matter, alleging that though the accident had been reported, the Defendant had not informed his insurers of the lawsuit against the Defendant. '*

[15] The summary of some of Mr. Dunkley's evidence and his only evidence that is pertinent to the particular legal issue that is now being addressed in and of itself, serves to cast grave doubt as to the veracity of Mr. Dunkley's account that he was informed by his insurer, *'that the matter would be taken care of,'* with '*the matter'* being the lawsuit that the defendant was faced with, brought by the claimant against it.

[16] That is so, because, on the one hand, Mr. Dunkley has stated that he was so informed, whereas, on the other hand, he has also, stated that he was also informed by his insurer that they were not informed of the lawsuit against the defendant and therefore, would not assist the defendant, as regards same.

[17] The evidence as to what Mr. Dunkley was allegedly told by the defendant's insurers, is original evidence, since it is not being relied on, for the purpose of proving the truth of what was allegedly stated to him, by the defendant's insurer, but rather, for the purpose of proving that the same was allegedly stated to him. In that regard, see: **Ratten v R [1972] AC 378.**

[18] As it not hearsay evidence and is specifying matters of alleged fact which the deponent is able to prove, from his or her own knowledge, such evidence is

admissible and does not require, in order to be admitted, that the source of Mr. Dunkley's information as to same, as he has alleged, be provided to this court.

[19] Notwithstanding that though, the same ought to, I think, have been made known to the court, whereupon, this court would then be properly placed in a position, wherein it could assess whether the defendant has, via Mr. Dunkley's evidence, provided, *'a good explanation for its failure to file an acknowledgement of service...'* (Quoted from **rule 13. 3(2)(b) of the CPR**.

[20] To my mind, that must be so, since, if Mr. Dunkley was told by a very junior employee, at his insurer, *'that the matter would be taken care of,'* that would not be a good explanation as to why an acknowledgement of service was not filed. It would not, in that context be a good explanation because it would mean, that the defendant, through its Director - Mr. Dunkley, would have placed its reliance wholly on the word of a junior employee, of its then insurer, as to same.

[21] In respect of the matter at hand, not only does this court not know, the name of the insurer's employees, who had allegedly related those contrasting positions as regards the claim, which was allegedly brought to their attention by the defendant, in a timely way, this court does not know, what employment positions, those persons who allegedly related those contrasting positions to Mr. Dunkley, held, at that time.

[22] With his affidavit evidence being bereft of such information, it casts grave doubt about the veracity of the information which Mr. Dunkley has provided to this court, in paragraphs 9 to 11 of his first affidavit, in support of the defendant's present, amended application. In addition, the same also, in and of itself serves to cast grave doubt as to whether a good explanation for the failure to file an acknowledgment of service has been provided to this court. An explanation has been provided, but this court has been unable to assess that same is, a good one. That is what the defendant needed to have provided to this court – *'a good explanation for its failure to file an acknowledgment of service.'*

[23] In any event though, even if I am wrong in having reached that conclusion, I am fortified in my conclusion that the defendant has not provided a good explanation, by the fact that the defendant would have, according to its own account, had entirely left to its insurer, the responsibility for, '*handling the matter*,' without any oversight from him, whatsoever.

[24] To my mind, that is simply unacceptable. Sykes J., (as he then was), had rejected a similar explanation, in the case: **Sasha Gaye Saunders v Michael Green et al** Claim No 2005 HCV 2868, judgment delivered 27 February 2007, especially at paragraphs 10 and 14.

[25] In certain contexts, the situation, may be somewhat different and may require a different approach from this court, if the default being attributed to a litigant, is in reality, due primarily if not exclusively to the default of that litigant's attorney, but even that is not and cannot be so, in all cases. See paragraphs 57 to 61 of the Court of Appeal's judgment in the **Nanco case** (op. cit).

[26] In the case at hand, we have before this court, no explanation from the insurers, as to what it either did, or did not do, or as to what it either stated, or did not state to Mr. Dunkley, for and behalf of the defendant. Of course though, it ought to be realized that this court does not even know whether either Mr. Dunkley, the defendant, or the defendant's attorneys for the purposes of this amended application of their client, even sought any such explanation from any of them, bearing in mind, that which has been deponed to by Mr. Dunkley. Even if such an explanation had been sought from the insurer though, they may have been particularly hard-pressed, to be able to properly respond to same, bearing in mind that Mr. Dunkley's affidavit evidence, has failed to provide, to my mind, the significant important details, as to who it was, or as to who were the persons that had purportedly stated those contrasting positions to him, on two different occasions.

[27] Thus, in all of the circumstances, the defendant has, to my mind, failed to provide, to this court, a good explanation for its failure to file an

acknowledgement of service. Only an explanation was provided. That explanation is not, a good one.

Whether the defendant applied to the court as soon as was reasonably practicable after finding out that the judgment had been entered against them

[28] There is no dispute that the defendant's representative and Director – Mr. Trevor Dunkley, unfortunately has, at the very least, a medical condition which negatively impacts the proper functioning of his heart. He has, in his first affidavit, alleged that he suffered a heart attack, '*which frustrated all of his efforts to provide instructions to his attorney.*' That is regrettable and this court hopes that with appropriate medical treatment, he will eventually be able to recover significantly, from same. What this court does not know though, is: When did that heart attack, occur? That information if it had been provided, may have been useful to this court, if it could have taken that evidence, as may very well have been the case, as being supportive of the defendant's amended application, which is now under consideration. Regrettably though, the same has not been made known to this court.

[29] What has, instead, been made known to this court, is that Mr. Dunkley had chest pains which he had been feeling, in the last quarter of 2019, after he had received news of the judgment that had been obtained against the defendant, at the instance of the claimant.

[30] Mr. Dunkley stated, as follows in his second affidavit, as regards his symptoms of chest pain:

> *'Now I understand that my symptoms of chest pain that I understood to be a heart attack was actually as a result of my Coronary Artery Heart Disease/ Ischemic Heart Disease and Hypertensive Heart disease, Dyslipidaemia as stated in my Medical Report by Dr. S. Weekes, from Heart Institute of the Caribbean. I now attach a signed copy of my medical report dated December 4, 2020 marked 'TD1' for identification.'*

[31] Mr. Dunkley though, has not provided this court with any medical report that actually specified that he had, at any time, undergone a heart attack and

moreover, that the chest pains that he had allegedly been experiencing throughout the last quarter of 2019, were in fact, symptoms of a heart attack. In the absence of any medical evidence having been provided as to either of same, this court has found itself wholly unable to accept that Mr. Dunkley had undergone, that which is described by medical doctors, as, 'a heart attack' or that the chest pains which Mr. Dunkley was purportedly experiencing, in that last quarter of 2019, were symptoms of a, 'heart attack.' The fact that Mr. Dunkley may have undergone heart surgery, cannot properly lead this court to conclude that he underwent same, because he had suffered from a heart attack. I am though, prepared to accept that Mr. Dunkley underwent heart surgery on June 8, 2020.

[32] It may have been particularly useful to the defendant though, if this court had been informed by means of evidence from Mr. Dunkley, as to how long he had been in hospital for, or as to whether he had needed, after he had been released, special assistance in order to carry out his usual daily tasks and/or whether thereafter, he was able to carry out those daily tasks, at all. Additionally, this court does not know, precisely what role, Mr. Dunkley played, at any time, if any, in the actual management and operation of the defendant, save and except that this court knows and it is not disputed that he is a Director of the defendant. That information is, to my mind, not enough, in the present context.

[33] The defendant took as long as nearly a year after the defendant had become aware, via its Director – Mr. Trevor Dunkley, that a default judgment had been entered against it, to file an application seeking to set aside that judgment. That is to my mind, a very lengthy period of time, and required, for present purposes that the defendant presented a good explanation as to why it took them so long, to file that application.

[34] Mr. Dunkley is not a sole trader. Whatever he does, for and on behalf of the company, he does so, under the ambit of and with the support of that company. Why then, if even he could not have personally, taken certain useful steps in

seeking to set aside the default judgment, due to his then ongoing defective heart condition, could someone else from the company (the defendant), not have then done so? Mr. Dunkley's affidavit evidence, is also bereft of any such explanation.

[35] In the **Sasha Gaye Saunders case** (op. cit), Sykes J. (as he then was), expressed, as follows, in paragraph 14:

> *'… using August 4, 2006, as the date of knowledge, the application to set aside was made quite late. The time lapse between August 4, 2006 and October 6, 2006, is too long to be ignored. In the modern era of civil litigation where there is much emphasis on speed and efficiency, that time lapse is inordinate. It is reflective of a culture of lassitude and sluggishness, the implacable enemies of the new ethos propounded by the new rules.'*

For my part, I wholly endorse the views expressed by Sykes J., (as he then was), as to what is expected of persons in the modern era of civil litigation and I am also, of the view that a lapse of time of nearly a year; after a party has become aware of a default judgment having been entered against it, before that party applies to set that judgment aside, is inordinate. The defendant's explanation as to why there was a delay, has to my mind, also fallen well short of the explanation that would have been required, to properly satisfy this court, that the defendant had applied, to set aside the default judgment as soon as was reasonably practicable after having found out that same was entered against it. **Rule 13. 3(2)(a) of the CPR** requires this court to consider that, as a factor, in deciding on whether or not, to set aside a default judgment.

[36] Even though this court has not found in the defendant's favour, on the last two issues though, that is not the end of this matter. As stated earlier, the pre-eminent consideration of this court, for present purposes, must be, whether the defendant's proposed defence, is one which has a realistic prospect of success. See: **Evans v Bartlam**, **[1937] AC 473** and **Attorney General v McKay [2012] JMCA App 2**. I will therefore address that issue, next.

Whether the defendant's proposed defence has any realistic prospect of success

[37] The defendant's proposed defence is, in summary, that the relevant motor vehicle accident involving the claimant who was then driving the defendant's truck, in his capacity as an employee of the defendant, occurred wholly due to the claimant's negligence and not due to any fault of the defendant; and that the relevant truck, '*was inspected after the accident and found to be in good working condition save and except for a door that had been damaged and was changed after which the truck was fully operational.*' (Paragraph 4 of the draft defence)

[38] The claim centers around the relevant truck, having been defective, as to its braking and electrical systems, at that material time. In these reasons, I had earlier, so stated. The draft defence cannot, in and of itself, constitute any evidence of merit. The Court of Appeal made that clear, in the **Nanco case** (op.cit) at paragraphs 43 to 50 per Morrison JA., (as he then was).

[39] What then, has been the evidence if any, put forward by the defendant, in an effort to satisfy this court that there is a proposed defence with a realistic prospect of success, which it ought be afforded the opportunity to place before this court, as a defence to this claim, albeit belatedly and after a judgment in default, has been entered against it?

[40] Firstly, it is important to note, when answering that question, that no evidence has been provided by the defendant, in support of that which it has sought to assert, as per paragraph 4 of the draft defence, which was referred to, in Mr. Dunkley's affidavit and attached as an exhibit, to that affidavit.

[41] In and of itself, that may very well suffice to answer the above question and also therefore, may suffice to dispose of the defendant's amended application, in favour of the claimant.

[42] I will though, carry out my analysis further. In order for me to do so, in a useful way, it is, I think, necessary to refer, by means of quote, to the precise contents of paragraphs 3 to 7 of the first affidavit of Mr. Dunkley.

[43] Those paragraphs read, as follows:

'3. The Claimant is a former employee of the Defendant and the claim arises out on an incident that occurred on or about the 16th of June 2018. Specifically, the claimant was operating a motor truck registration number CF 0722 at the directive of the Defendant when the claimant so negligently and or carelessly operated the vehicle causing it to overturn. The Claimant further acted negligently and or carelessly and without due regard for his own safety in that he elected to jump from the vehicle wherein his right leg was injured and a portion of the said leg was later amputated.

4. The nature of the task to which the Claimant was employed required him to use his best skill and judgment as a driver of a vehicle laden with dirt. The Claimant was employed to transport bauxite from UC Rusal Windalco mines in St. Catherine to the local refinery. As a driver he was expected to use his skill and judgment in correct gear selection at every stage of the journey, including the collection of bauxite, exiting the dirt pit and making his way to the refinery.

5. The Defendant has gathered evidence including that of an eye witness, who, on that day, inspected the vehicle moments after the Claimant was removed from the scene of the said accident and found that the truck was being driven in high gear while the Claimant was attempting to go over a hill with the said vehicle laden with dirt. Further, the Claimant was seen by others speaking on the telephone while he drove away from the pit with the load of dirt. The Claimant was negligent in that he failed to place the laden truck in low gear when going up a hill.

6. Also, the Claimant in choosing to jump out of the said vehicle, was negligent in respect of caring for his own safety for that the Claimant should have been aware that he could have put the truck in reverse and allow it to roll back on flat land.

7. In the circumstances, the Defendant has a meritious defence and the matter ought fairly to be ventilated in a trial.'

[44] Mr. Dunkley has given evidence that the claimant chose to and did in fact, jump out of the relevant vehicle, which was the defendant's truck and that in doing so, he acted negligently, or carelessly, and without due regard for his own safety. According to Mr. Dunkley, the defendant has gathered evidence from an eyewitness to the relevant accident. The identity, in terms of a name, of that eyewitness, is entirely unknown to this court, since no evidence has been provided as to same. The claimant has, for his part, in affidavit evidence, expressly disputed that alleged, un-named eyewitness' account, as to what led to the relevant accident having occurred.

[45] No evidence though, has been provided by anyone other than Mr. Dunkley, purportedly as a matter of his personal knowledge, since he has not stated that he received this information from anyone else, that at the material time, that being while the truck had been rolling or moving downhill, the claimant had

jumped out of same, thereby causing his own injuries. Mr. Dunkley though, has never stated, in any of his affidavit evidence, that he had witnessed the relevant motor vehicle accident's occurrence. How then could he know this? How reliable is that information as provided to this court, solely by him? The answers to those questions, quite simply, are as follows: He could not know this and therefore, that information as provided by him, is entirely unreliable and absolutely worthless, for present purposes. This court, treated with same, accordingly.

[46] As for the un-named eye-witness' alleged account of the relevant events, it must firstly be recognized that said evidence is, for present purposes, almost certainly, not admissible, since the source of Mr. Dunkley's knowledge of the information which he has provided to this court, from the alleged eyewitness, has not, to my mind, been properly identified. It cannot be enough, to identify him or her, as, '*an eyewitness.*' Surely, a name of that person should have been provided, in order that the claimant could have, if he had chosen to do so, perhaps responded more strongly to that eyewitness' account of the pertinent events, save and apart from denying same and repeating some of that which has been certified by him, in his particulars of claim. To my mind, that is what **rule 30. 3(2)(b**) requires, by its provision that:

> *'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 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.'*

[47] Even if though, that evidence is admissible for present purposes, it is highly unlikely that it can and will be able to be relied on, by the defendant at trial, as it is undoubtedly, hearsay evidence, if it is proposed that same be provided to a trial court, by Mr. Dunkley. That proposed evidence therefore, if being relied on as hearsay, at trial is not even likely to be permitted to be given to the trial court,

upon any trial of this claim and as a matter of law, if objected to, by the claimant, can only be provided to this court at trial, if any of the other of the conditionalities set out at **Section 31E (4) of the Evidence Act**, are met. Of course, at this stage, this court would not be in a position to know whether or not, any of those conditionalities, can or will be met, if any such context were to later arise. The defendant, of course, would not, from, as of now, be able to properly address same either, since it relates to what may happen in the future, which no one can predict with certainty, bearing in mind that there is no evidence presently suggesting, that the alleged eyewitness' whereabouts is presently unknown and is expected to be that way, at the time of trial, or that he or she is deceased and therefore, same is already known to the defendant.

[48] Furthermore, that will only address whether such proposed evidence may even be admissible, at trial. It does not address whether that proposed evidence, even if given upon a trial of this claim, has any realistic prospect of enabling the defendant's proposed defence, to succeed at trial. Even at its best, it would likely carry little, if any evidential weight, at trial.

[49] That is why the identity of that alleged eyewitness, needed to have been specifically made known to the court, for present purposes, as also, what it is that he or she was doing at the material time and precisely where he or she was positioned at the material time, in relation to the relevant accident, immediately prior to and after same, having and had respectively occurred. That information if it had been provided, would have enabled this court, to properly conclude as to whether or not, on the face of it, that account, if provided at trial, would enable the defendant's defence, to have a realistic prospect of success. This court has found itself constrained to determine that it cannot, on the evidence provided, properly conclude that the defendant's defence has a realistic prospect of success.

[50] Additionally, it ought to have been made known to this court, for present purposes, whether that alleged eyewitness, is or is not expected to testify at trial.

Of course too, that has not been done. On the point of this court addressing its mind to the hearsay evidence being relied on, as evidence of a meritious, proposed defence, see the comments of McDonald-Bishop, J,(as she then was) at paragraphs 64 to 73, in the **Nanco case** (op. cit).

[51] Furthermore, the proposed evidence of that eyewitness, may very well, if it is intended to be given at trial, have to be given and can only be given, if same is given as expert evidence. This is, to my mind, so since it is evidence of that person's opinion as to what caused the accident's occurrence and that opinion requires a special knowledge as to how the gears of a truck operate and as to how one should go about safely driving a truck, when one is driving uphill. Certain conditions must be met in respect of any person, if that person is properly to be regarded by this court, as being an expert, See **rule 32. 6** read along with **rule 32.13(1(a), of the CPR,** in that regard.

[52] Presently, not only does this court not even know the eyewitness' name or precise location, prior to the accident and in the immediate aftermath of the accident, when he went to the truck that had, by then, crashed and looked inside of it, and reportedly, then seen that truck's gearbox, but also, this court does not even know whether, prior to then, or even at any time thereafter, prior to him or her, having purportedly provided that eyewitness account of the accident, to the defendant, that eyewitness had ever, even once, driven a car, much less, any truck and moreover, any comparable truck to that which was being driven by the claimant, at the material time. This court also, does not know, whether he or she has ever been possessed of any driver's licence and if so, what type of driver's licence. That would have helped this court to know whether he or she has any competence to drive any similar type of vehicle, as was involved in the relevant accident. If even he or she had that much, perhaps, that may have been sufficient to determine his or her competence to provide the relevant expert evidence. Without knowing any of same though, that alleged eye witnesses' opinion evidence, is wholly inadmissible, for present purposes and will also be inadmissible, if sought to be relied on, upon any future trial of this claim.

CONCLUSION

[53] In all of the circumstances, the defendant's application to set aside default judgment, must and be and is, denied. It is not in the interests of justice, that same be granted. I wish to entirely echo the comments of McDonald – Bishop, J. (as she then was), in that regard, as she made at first instance, in the **Nanco case** (op. cit), at paragraph 92.

DISPOSITION

[54] In the circumstances, this court's orders, are as follows:

(i) The defendant's amended application to set aside default judgment, which was filed on September 2, 2020, is denied.

(ii) The costs of that application are awarded to the claimant, with such costs to be taxed, if not sooner agreed.

(iii) The claimant shall file and serve this order.

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Hon. K. Anderson, J.