**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2016 D00392**

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| **BETWEEN** | **NAETYN DEVELOPMENT COMPANY LIMITED** | **CLAIMANT** |
| **AND** | **KIRK HOLBROOKE** | **DEFENDANT** |

**Application to Set Aside Judgment - No draft defence attached - Whether adjournment to be granted-Whether human or administrative error can be a good reason for failure to file acknowledgment or defence - Whether defence has real prospect of success-Whether certificate for two counsel to be granted.**

**M. Taylor-Wright and Anwar Wright instructed by Marvalyn Taylor Wright & Co. for the Claimant.**

**G. Gibson Henlin QC, Kristen Fletcher and Yannic Fletcher instructed by Henlin Gibson Henlin for the Defendant.**

**Heard: 17th, 25th and 27th October, 2017**

**In Chambers**

**Cor: Batts J.**

1. On the 27th October 2017, I set judgment aside and promised to put my reasons in writing. I now do so. The matter concerns an application by the Defendant to set aside a judgment in default of acknowledgement or defence. The judgment was lawfully entered and there is no allegation of an irregularity. The Claimant vigorously opposed the application.

2. The circumstances may be briefly summarised. The Claim was filed on the 6th December 2016. The Claim and Particulars of Claim were served on the Defendant in his words "in or around January 2017." The Claimant asserts it was served on the 3rd January 2017. The Defendant did not instruct attorneys or do anything in relation to the said documents. In his words (paragraph 33 of his affidavit filed on the 5th September 2017) :

> **"I placed the documents in a folder at home intending speak to [sic] Richard about them, particularly because of our friendship of over twenty (20) years. I honestly was shocked and surprised. Due to my inability to contact him and other work related pressures, I unfortunately did not remember the claim. Also, the folder had other documents including bills and invoices and the claim form and Particulars of Claim got misplaced among those documents. The situation was compounded by the fact that I did not read the documents that are attached to the Claim Form, which would have alerted me to the time lines."**

3. A request for Judgment was filed by the Claimant on the 14th January, 2017. The Registrar of the Supreme Court declined to entertain the same and therefore an application for Court orders was filed on the 17th February 2017. (See affidavit of Richard Williams filed 17 February, 2017). This resulted in a judgment and order of the Hon. Miss Justice Nicole Simmons of the 28th April 2017. The learned judge ordered that judgment be entered with damages to be assessed. A Notice of Assessment of Damages was filed on the 15th May, 2017.

4. The Defendant asserts that he became aware of the judgment on the 23rd August 2017 via Whatsapp. His friend seems to have sent him a link to the judgment of Justice Simmons by way of the Supreme Court's website. He says he immediately instructed attorneys on the 24th August, 2017. Up to the date he swore his affidavit in support of the application, being the 5th September 2017, he had not yet been served with the judgment or notice of hearing of the

assessment of damages. The Claimant avers that the Defendant was, on the 11th September 2017, served with the Formal Order containing the Judgment and Notice of Assessment of Damages.

5. These being the circumstances, the Claimant's counsel opposed the application on three main bases:

    a) There is no good reason for failing to acknowledge or defend the Claim.
    b) There is no defence demonstrated with any real prospect of success.
    c) There is no draft defence attached contrary to the mandatory requirement of Rule 13.4 of the Civil Procedure Rules.

6. It was the third ground of objection, which prompted a request by learned Queen's Counsel for an adjournment. This request was only made after the Claimant's counsel had completed her submissions. I decided, over the understandably strenuous objections of Mrs. Taylor Wright, to grant the adjournment in order to allow an affidavit with a draft defence to be filed. It seems to me that, as the facts of the defence were fully stated in the Defendant's affidavit, the attaching of a draft defence is something of a formality. The rules do require it. However, it certainly would be unjust to drive a Defendant away from the judgment seat where the relevant defence is stated on affidavit but not attached as an exhibit. The Claimant suffers no prejudice that an order for costs would not repair. Rule 26 allows a court to make orders to allow matters to be put right. This includes the grant of an adjournment.

7. At the resumption, the Claimant's counsel was allowed to submit on the Defence filed as well as to reply to Queen's Counsel's submission. In the event, Mrs. Taylor-Wright provided a very detailed speaking note and authorities which have proved to be of assistance to me.

8. I will not restate the details of the respective submissions. It suffices for me to indicate that I do find that the Defendant has demonstrated that he has a real prospect of successfully defending the claim as required by Rule 13.3(1). He asserts that it was his company Proper Construction and Development Limited that was retained to carry out the works of construction. He attaches cheques in support of that assertion. Both parties are ad idem that the arrangements and contract were oral and more or less informal. The Claimant and Defendant were very good friends. It seems to me that only after hearing evidence will a court be able to determine just who were the contracting parties. The Defendant also says that there were changes made to the original Bill of Quantities consequent on changes to the scope of work done. The Defendant details in paragraphs 20, 21, 22, 23 and 24 work he did on the project. He asserts that he used company funds on the project. He alleges that the Claimant is in fact indebted to the company for fees and advances made. He asserts that all the money paid is accounted for and that the contract was breached by the Claimant who prevented its completion.

9. Whether or not these assertions are true is not what I am to determine. They are not demonstrably false at this stage. Mrs. Taylor Wright urged upon me that the defence produced could not stand because it had an inconsistency. This being that in paragraph 15 it is alleged :

> **"If which is not admitted, the Defendant contracted personally with the Claimant, he is entitled to set off against the Claimant's claim in the sum of $18,298,529.80 ...."**

10. It seems to me to be a counsel of prudence to plead in the alternative. It is, in civil proceedings, perfectly understandable and allowable for a party to do so. In the event the Defendant has misconstrued the relationship, he will be able to advance the defence available to the company as his own. If he does not plead in the alternative, and the court finds he was the other party to the contract, any claim to set off would not be available to him. In summary the Defence as

alleged on affidavit and as drafted raises factual issues of relevance which can only be resolved after a trial.

11. Mrs. Taylor Wright's other complaint has to do with the matter of delay and whether : (Rule 13.3)

    a. The Defendant applied as soon as reasonably practicable after finding out that judgment had been entered.
    b. The Defendant has given a good explanation for the failure to file an acknowledgement of service or a defence.

Mrs**.** Taylor Wright submits that a good reason for any delay must be demonstrated. She relied on ***Russell Holdings Ltd v L and W Enterprises Inc and anor SCCA 118/2015 [2016] JMCA Civ 39*** *(unreported 1 July 2016).* She submits that the type of excuse advanced by the Defendant is frowned upon by the court, see also the ***Commissioner of Lands (The) v. Homeway Foods Ltd and Anor [2016] JMCA Civ 21*** (unreported 29 April 2016).

12. Having read those authorities it seems to me that the attitude of the Court of Appeal to an "administrative efficiency" type explanation cannot be divorced from the facts before it. In the Russell Holdings case the court emphasised that the primary consideration is whether the defendant has a defence with a real prospect of success ,see paragraphs 81,82,84,125,127and 129 of the judgment. The court set aside the judgment although there was an unexplained delay of one year before the application to set aside was filed. In the Homeway Foods case the breach of the court order in question was not isolated. It was, as the court observed,

> **"a continuing or composite breach of the rules and orders of the court with respect to the same matters." [Para 75]**

Further that case was in the context of an appeal. The parties had already had a trial. In the case before me, what is contemplated is shutting the doors and excluding the Defendant from the opportunity to have his case tried. I believe greater leniency, in terms of explanations for a delay, can and ought to be extended in such circumstances.

13. In this regard, I would venture to repeat my own words in a similar context :

> ***"The authorities establish that there is no rule that administrative error can never be a lawful explanation. On the contrary even a contumelious fault in a rare circumstance may be properly explained. Each case depends on its peculiar facts."***

*See* ***Sherine Blake v Ldcosta Loans and Financial Management Limited (2015) JMSC Civ 14.*** I would also reference **Pacha Zona Libre v *Mamdouh Saleh Abduljaber Sawalha [2014] JMSC Civil 232 (unreported 13 November 2014),*** and the cases cited therein.

14. In this matter, the Defendant says he received the Claim and Particulars. He intended to speak with his friend, the Claimant, about it. He placed it in a folder. His efforts to contact the Claimant were unsuccessful and due to work and other pressures, he forgot about it. In the context of their personal relationship this is understandable. We are all human. Humans sometimes put down troubling things to treat with them later. He may have hoped his friend would reconsider. This may be what happened. The defendant says he forgot about it and this I believe to be true. The delay has not unduly prejudiced the Claimant. There is no suggestion that witnesses have been lost or that there is any consequential impediment to a successful prosecution of the claim. It is manifest that the Defendant acted with alacrity once he heard judgement had been entered. He did so even before being served with the judgment. It slightly supports an assertion that his original inaction was due to forgetfulness.

15. In the circumstances, therefore I decided in favour of the Defendant. The judgment in default will be set aside. Costs of the application and costs thrown away to the Claimant to be taxed or agreed. Mrs. Taylor Wright has asked for Certificate for two counsel and I will grant it. The Defendant was represented by Queens Counsel. The Claimant was to my mind entitled to no less. It also demonstrates the complexity of the matter. Leave to appeal was granted.

16. My orders, made on the 27th October 2017, were as follows:

1. Judgment in default of acknowledgement is set aside
2. Permission granted for Defendant to file defence within 14 days of the date of this order.
3. Costs of the application to the Claimant to be taxed or agreed.
4. Certificate for 2 counsel granted.
5. Costs to be taxed forthwith if not agreed
6. Leave to Appeal granted.
7. Case Management Conference fixed for the 14th December, 2017 at 10:00 a.m. for ½ hour.
8. Claimant's attorney to prepare, file and serve this Order.

**DAVID BATTS**
**PUISNE JUDGE**