[2023] JMSC Civ 58

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

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2020CV01884**

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| **BETWEEN** | **WARREN NAM** | **CLAIMANT/RESPONDENT** |
| **AND** | **CLIVE ALBERT BROWN** | **1ST DEFENDANT/APPLICANT** |
| **AND** | **THUNDER TOURS LIMITED** | **2ND DEFENDANT/APPLICANT** |

IN CHAMBERS

**Mr. Josemar Belnavis instructed by Lindsay Law Chambers for the Claimant**

**Mr. Stuart L. Stimpson and Ms. Tashaunna Grannum instructed by Hart Muirhead and Fatta for the 1ST and 2ND Defendants**

**Heard: November 18, 2022 and March 28th, 2023**

**Civil procedure- Application to set aside default judgment– service by publication – considerations of whether service can be deemed good service -Whether there is a reasonable prospect of successfully defending the claim- delay- good explanation - overriding objectives - prejudice**

**T. HUTCHINSON SHELLY, J**

**[1]** The matter for the consideration of the court is an application by the defendant to have a judgment in default set aside on the basis that it was wrongly entered against the 1st Defendant in that the 1st Defendant was not served with the Claim Form and Particulars of Claim as required in **rule 5.1 (2) and 5.2 (1) of the Civil Procedure Rules** (hereinafter "**the CPR**"). The application is supported by an affidavit sworn to by the 1st Defendant, Mr. Clive Brown. An affidavit opposing the application was sworn to by Ms. Aaliyah Greene, an employee of Lindsay Law Chambers.

## BACKGROUND AND CHRONOLOGY

a. On June 11, 2020, the claimant, Warren Nam, filed a claim against the defendant, to recover damages for negligence. The claim arose out of a motor vehicle accident on January 1, 2020, in which he was allegedly injured when motor vehicle licensed 1620 PK, which was being driven by the 1st defendant, collided with his motor vehicle along the Nelson Mandela Highway.

b. The Notice of Proceedings was filed and served on the 2nd Defendant's insurers, GK General Insurance Company Limited on June 11, 2020.

c. On November 25, 2020, Master P. Mason (as she then was), extended the validity of the Claim Form, dispensed with personal service of the claim form and particulars of claim on the defendants and granted permission for the claim form and particulars of claim to be served on the 2nd Defendant's insurer, GK General Insurance Company Limited and service on the 1st Defendant by newspaper publication.

d. On January 26, 2021, the Claimant filed an Amended Claim Form, Amended Particulars of Claim along with all the relevant accompanying documents.

e. On January 28, 2021, the 2nd Defendant's insurer, GK General Insurance Company Limited was served with the Amended Claim Form, Amended Particulars of Claim along with all the relevant accompanying documents.

f. On February 1st and 8th, 2021, the claimant advertised Notice of Proceedings in the Jamaica Observer in accordance with the orders of Master P. Mason.

g. On February 2, 2021, the 2nd Defendant filed an Acknowledgment of Service.

h. On February 11, 2021, the 2nd Defendant filed his Defence in response to the Claim.

i. On February 12, 2021, an Affidavit of Publication was filed in relation to the service on the 1st Defendant by way of newspaper publication in accordance with the Orders of the Court.

j. The 1st Defendant failed to file an Acknowledgment of Service or a Defence within the required timeline. Consequently, on the 6th of April 2021, a request for default judgment was filed on the basis that the 1st Defendant had failed to file an Acknowledgment of Service. Judgment in default was entered against the 1st Defendant, in Binder 777 Folio 306 with effect from December 14, 2021.

k. On January 6, 2022, a Notice of Assessment of Damages with respect to the 1st Defendant was filed.

l. On March 7, 2022, a Case Management Conference was scheduled. The Honourable Mrs. Justice T. Hutchinson Shelly ordered that the Case Management Conference be adjourned to May 30, 2022 and for the 1st Defendant to be served by way of two publications in the daily newspaper, in keeping with the previous Orders of Master Miss P. Mason (as she then was).

m. On April 18th and 25th, 2022, the Notice of Proceedings was published in the Jamaica Observer.

n. On April 27, 2022, an Affidavit of Publication was filed in accordance with orders of the Court.

o. On May 30, 2022, the 1st Defendant filed a Notice of Application to set aside default Judgment, this application was supported by an affidavit from Clive Brown. The jurat was not completed and the affidavit was declared defective by the Honourable Ms. Justice A. Jarrett (Ag).

p. On May 30, 2022, the Honourable Ms. Justice A. Jarrett (Ag). ordered that the Case Management Conference be adjourned to October 13, 2022. She also made orders for Written Submissions and Authorities in relation to the 1st Defendant's Notice of Application to be filed and exchanged on or before July 29, 2022.

q. On October 10, 2022, the 1st Defendant Bundle of Submissions and Authorities in Support of the Notice of Application to set aside Default Judgment was filed.

r. On October 13, 2022, the Honourable Mrs. Justice T. Hutchinson Shelly ordered the 1st Defendant to file and serve a Supplemental Affidavit in support of the Notice of Application to set aside Default Judgment.

s. The hearing of the Notice of Application to set aside Default Judgment was scheduled for November 18, 2022.

t. On October 13, 2022, the 1st Defendant filed and served a second (replacement) affidavit of Clive Brown.

**THE APPLICATION**

**[2]** As outlined in the chronology, the Applicant filed this notice on May 30, 2022, in which he seeks the following orders from the Court:

1. *the default judgment entered on December 14, 2021 against the 1st defendant in Judgment Binder 777 Folio 306 is set aside;*

2. *Costs of this application be awarded to the 1st Defendant.*

**[3]** The premise of the application is that the Applicant has a real prospect of successfully defending the claim and has applied to the court as soon as reasonably

practicable after finding out that the judgment has been entered when advised of same by the 2nd defendant.

**[4]** The Applicant averred that on January 1, 2020, he was the driver of motor car licensed 1620 PK, which was involved in a collision with motor vehicle licensed 3699 GW, which was being driven by the Claimant along the Nelson Mandela Highway in the vicinity of the toll entrance of the PJ Patterson Highway in the parish of St. Catherine.

**[5]** The Applicant also r deponed that on March 18, 2022, he was contacted by Ms. Tashauna Grannum from Hart Muirhead Fatta, Attorneys-at-Law for the 2nd defendants and it was at that time that he became aware that he was '*named as a party in the suit brought by the claimant and that a judgment was entered against me despite me not having knowledge of the claim against me or being served with any documents in this claim.*'

**[6]** The Applicant asserted that he was unaware of the Publication as he does not read the Jamaica Observer or any other local newspaper. He also averred that he had not contacted his former employer since he stopped working with him sometime in 2020 and stated that a connection was re-established when he was advised of this matter on March 17, 2022.

**[7]** The Applicant denied any negligence with regard to the collision and asserted that he has a real prospect of successfully defending the claim. He also contended that he had no reason to hide as he had provided a statement to GK Insurance on the 22nd of June 2020 in which he had outlined his account as to how the collision had occurred and had been advised by the Principal of the 2nd Defendant that he should advise him if he was served with any court proceedings in order to be provided with legal representation. The defence exhibited to his affidavit denies any negligence on his part and attributes the collision solely to the negligence of the claimant.

**[8]** The Claimant relies on the affidavit of Ms Aaliyah Greene and the notice of proceedings exhibited which was served on G.K Insurance Company Ltd, the

insurers for the 2nd defendant and bears their endorsement acknowledging receipt of the notice on the 11th of June 2020. In her affidavit Ms Greene highlighted that this date is 11 days before the 1st Defendant provided a statement to the insurance company in respect of this collision.

**SUBMISSIONS ON BEHALF OF THE APPLICANT/ 1ST DEFENDANT**

**[9]** Mr Stimpson submitted that the default judgment entered was irregularly entered as this mode of service had failed to bring the Claim Form and accompanying documents to the Applicant's attention as required by **Rule 12.5 of the CPR**. He took issue with the mode of service and contended that the situation should be carefully reviewed by the Court given the fact that the original order was made on an ex-parte hearing. He made reference to the decision in ***Annette McCarthy v Kennard Gardener etal*** *[2022] JMSC Civ 167* where the Court emphasized the need for note to be taken as to whether service of the documents was likely to bring the contents of the claim form and particulars to the attention of the defendant.

**[10]** Mr Stimpson contended that while service by publication was an acceptable mode of service, it was the least effective in an era where the print media is becoming obsolete and is often only granted as a last resort. Counsel asserted that this method of service had clearly failed to achieve this objective as the Applicant did not read the newspapers and as such the requirements under **Rule 5.14 of the CPR** were not met as the applicant only became aware of the suit/default judgment in March 2022 when informed of same by his former employer.

**[11]** Learned Counsel submitted that if the Court found that the default judgment was properly entered, it is still empowered to set aside same if satisfied that the Defendant has a real prospect of successfully defending the claim. He relied on the authority of **Swain v Hillman** [2001] 1 All ER 91, where Lord Woolf MR stated –

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

**[12]** In addressing the relevant considerations for the Court, Mr Stimpson made reference to the decision of ***Russell Holdings Ltd v L&W Enterprises Inc etal*** *[2016] JMCA Civ 39* in which Edwards JA (Ag) (as she then was) stated:

> *[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.*

**[13]** Counsel argued that in order for the court to determine whether the applicant has a real prospect of successfully defending the claim, regard should be had to the pleadings. Mr. Stimpson observed that it is the Claimant's case that the Applicant was negligent in that he controlled the 2nd Defendant's motor vehicle causing it to collide in the rear of his motor vehicle. Counsel argued that this was thoroughly rejected in the Applicant's draft defence, in which he rebutted the allegations of negligence and stated that the Claimant drifted into his lane causing the collision.

**[14]** Mr. Stimpson postulated that for the Applicant to have a real prospect of success, he need only show a denial of the facts supporting the Claimant's cause of action and relied on the authority of ***Lorraine Whittingham v Odette McNeil et al*** [2018] JMSC Civ. 5 in support of this position. In that matter, the Court while considering the term real prospect of success on a summary judgment application outlined that '*the phrase "real prospect of success" does not mean "real and substantial" prospect of success. Nor does it mean that summary judgment will only be granted if the defence is "bound to be dismissed at trial."* Counsel asserted that to embark on an assessment of the credibility and reliability of the witnesses, the evidence would be tantamount to engaging in a mini-trial which is contrary to the objective in addressing matters such as these.

**[15]** On the issue of delay, Mr. Stimpson argued that, the applicant was only made aware of the claim in March of 2022 and by May 30, 2022, an application was filed to have the default judgment set aside. He submitted that there is less than a 3-months gap between the defendant having notice of the claim and the application being filed.

Counsel commended to the Court the decision of ***Mitzie McKnight (as Administratix Estate Aldane Lumsden) v Derval Rodney et al*** [2019] JMSC Civ 168, in which Master T Mott Tulloch – Reid (Ag) (as she then was) found that **"an almost three-month delay"** was not unreasonable.

**SUBMISSIONS ON BEHALF OF THE CLAIMANT/RESPONDENT**

**[16]** In submissions on the Claimant's behalf, Mr Belnavis outlined a chronology of events which included efforts made to serve both Defendants. He highlighted that it was in circumstances where the Claimant had failed to personally serve the defendants that orders were sought and granted for service by alternative method. Mr Belnavis acknowledged that Rule 13.3 outlined the circumstances within which an application to set aside a default judgment can be granted. He also agreed that the relevant principle in an application of this nature had been enunciated by Lord Atkin in ***Evans v Bartlam*** *[1937] 2 All ER 646 as follows;*

> *'unless and until the court has pronounced a 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 obtained by a failure to follow any of the rules of procedure.'*

**[17]** Mr Belnavis commended the judgment of Phillips JA in ***Marlene Murray-Brown v Dunstan Harper and Winsome Harper*** *[2010] JMCA App 1* wherein the Learned Judge noted the importance of a Court carefully considering the nature of the defence, period of delay, any prejudice that the Claimant was likely to suffer if the judgment is set aside and the overriding objectives. Counsel also made reference to the decision of ***Sasha Gaye Saunders v Michael Green etal 2005HCV02868*** in which Sykes J (as he then was) emphasised that '*the test of a real prospect of successfully defending the claim is certainly higher than the test of an arguable defence'*

**[18]** Mr Belnavis submitted that applying these legal principles to the instant case, it is clear that the Applicant has not shown that he has a real prospect of successfully defending the claim. In addressing the Applicant's assertion that the Claimant had

caused the collision by drifting into his lane, Mr Belnavis submitted that the impact to the extreme rear of the Claimant's vehicle suggests that the Applicant's contention does not accord with the physical facts.

**[19]** Counsel also asserted that road users (motorists) are to keep a safe distance between themselves and other motorists. He argued that the Applicant had failed in his duty to keep a safe distance and avoid a collision and has pleaded nothing in his proposed Defence to explain his failure to do so. Mr Belnavis relied on the authority of ***Albourne Matthews & Winston Morrison v The Attorney General and Gregg Gardener*** **Claim No. 2007HCV04547** in which the Learned Judge had emphasised that a motorist should '*always leave enough space between you and the vehicle in front so that you can pull up safely if it slows down or stops*'**.**

**[20]** Counsel argued that the Applicant's evidence had not met the relevant threshold as it failed to demonstrate a real prospect of success that the Claimant was the cause of the collision and his case was merely arguable at best. Mr Belnavis highlighted that the contents of the Police Report, which is annexed to the Amended Claim Form, outline that the vehicle which was being driven by the 1st Defendant collided into the rear of the Claimant's Honda Civic and the 1st Defendant was warned for prosecution. He asserted that this provides important support for the Claimant's position that the Applicant was responsible for the collision.

**[21]** On the issue of delay, Counsel argued that no good reasons have been proffered on behalf of the Applicant and that in any event the delay was inordinate as the Applicant filed his application to set aside the Default Judgment one year and one month after the judgment was entered.

**[22]** Mr Belnavis also made reference to the 2nd Defendant's defence wherein it was stated that it was relying on a signed statement from the 1st Defendant. Counsel submitted that this suggests that the Applicant should have or ought to have been aware of the Claim, and this nullifies any excuse for such a lengthy delay in making an application for Default Judgment to be set aside. Counsel also contended that in

the circumstances where the 1st Defendant is an agent of the 2nd Defendant, it is inconceivable that the 1st Defendant was not aware that judgment could be and would be entered against him, given that the 2nd Defendant was using his written and/or oral evidence in defending the Claim in which he is named as the 1st Defendant.

**[23]** Mr Belnavis argued that it was only after the 2nd Defendant realized that Judgment was entered against the Applicant and that a Case Management Conference with respect to the Assessment of Damages was about to commence against him that any attempt was made to "*contact him*", that is, the Applicant and have him come forward to defend the claim. Counsel asserted that by nature of the employee-employer relationship between the 1st and 2nd Defendants, it is expected that having warned the Applicant as to the prospect of being sued the Insurers/2nd Defendant ought to have at the very least deemed it necessary to have contact information on file for him. Counsel argued that the length of the delay was exacerbated by the fact that no credible explanation has been proffered for same by the applicant and this failure should be carefully scrutinised by the Court.

**[24]** Mr Belnavis also contended that the setting aside of the default judgment would be extremely prejudicial to the Claimant as having secured a thing of value the Applicant was now seeking to deprive him of same. Counsel argued that when considering whether to set aside the default judgment, the risk of injustice to the Claimant must be considered as justice ought not to be weighed in favour of the applicant only. Mr Belnavis submitted that the Claimant has already incurred heavy financial losses and expense as he had to repair his vehicle and has expended a significant sum on the matter to date to include efforts to serve the documents, publication and medical expenses. Counsel also asserted that the Claimant has been waiting to have closure in this matter for over 2 years and taking into account the foregoing factors the application ought to be denied.

**ISSUES**

**[25]** The Court has to decide the following issues:

1. Whether the Applicant was properly served with the Claim Form and Particulars of Claim?
2. Whether the Default Judgment was properly entered?
3. In the alternative, whether the Applicant has a real prospect of successfully defending the claim to justify the setting aside of the judgment in default?
4. Whether the Applicant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered?
5. Whether the Applicant has given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be?

**THE LAW**

**Service by Alternative Method**

**[26]** The issue of substituted service, is outlined in the provisions of **rule 5.13**, under the rubric ‘Alternative methods of service" where it is stated as follows;

*"Alternative methods of service*

*5.13 (1) Instead of personal service a party may choose an alternative method of service.*

*(2) Where a party —*

*a) chooses an alternative method of service; and*

*b) the court is asked to take any step on the basis that the claim form has been served, the party who sewed the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form.*

(3) *An affidavit under paragraph (2) must —*

*a) details of the method of service used;*

*show that*

*i. the person intended to be served was able to ascertain the contents of the documents; orit is likely that he or she would have been able to do so;*

(c) *state the time when the person served ,was or was likely to have been in a position to ascertain the contents of the documents; and*

(d) *exhibit a copy of the documents served.*

*(4) The registry must immediately refer any affidavit filed under paragraph (2) to a judge, master or registrar who must -*

(a) *consider the evidence; and*

(b) *endorse on the affidavit whether it satisfactorily proves service.*

*(5) Where the court is satisfied that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the registry must fix a date, time and place to consider making an order under rule 5.14 and give at least 7 days notice to the claimant.*

*(6) An endorsement made pursuant to 5.13(4) may be set aside on good cause being shown."*

**[27]** In the well known decision of ***I.C.W.I v Shelton Allen and others*** [2011] JMCA Civ 33, it was noted that, while personal service remains the primary method of service, provision is also made for "an alternative method of service", at the option of a party who so chooses. It was also observed by Morrison JA, as he then was, that;

> *'Where a party chooses an alternative method of service and the court is thereafter asked to take any step on the basis that the claim form has been served, that party must file evidence on affidavit "proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form" The required affidavit of service must not only give details of the method of service used, but must also show either that (i) the person intended to be served was able to ascertain the contents of the documents; or (ii) it is likely that he or she would have been able to do so (rule 5.13(3)(b)).*

**[28]** Having outlined the required procedure, the Learned Judge observed the purpose of alternate service when he stated:

*'if the Court js not satisfied that "the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form", then the registry will fix a date for consideration of the making of an order under rule 5.14 (rule 5.13(5).*

> *Rule 5.14 supplements rule 5.13, by providing that "The court may direct that service of a claim form by a method specified in the court's order be deemed to be good service" (rule 5.14(1)). An application for such an order must be supported by an affidavit showing that the method of service proposed "is likely to enable the person to be sewed to ascertain the contents of the claim form and particulars of claim" (rule 5.14(2)(b).*
>
> *[34]…..**it appears to me from the language of rule 5.13 to be unarguably clear that the option given by the rule to the claimant to choose an alternative method of service is expressly subject to the claimant being able to satisfy the court on affidavit, either that the defendant was in fact "able to ascertain the contents of the documents" (rule 5.13(3)(b) or that "it is likely that he or she would have been able to do so" (rule 5.13(3)(b)(ii)** (emphasis supplied)).*

**Application to set aside default judgment**

**[29]** **Rule 13. 3 of the CPR** grants the court the power to set aside a default judgment. **Rule 13.3** states that:

*(1) The court may set aside or vary a judgement 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:*

*b) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.*

*c) 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."*

**[30]** The general principle regarding the setting aside of default judgments is encapsulated in the seminal case of ***Evans v Bartlam*** supra , where Lord Atkins stated that:

> *"The principle obviously is that, unless and until the court has pronounced a 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 obtained by a failure to follow any of the rules of procedure."*

**[31]** The relevant test was also considered in the case of ***Flexnon Limited v Constantine Michell and Others*** [2015] JMCA App 55, McDonald-Bishop JA noted at paragraph 15 that:

> *"the primary test for setting aside a default judgment regularly obtained is whether the defendant has a real prospect of successfully defending the claim. The defence must be more than arguable to be such as to show a real prospect of success."*

**[32]** Paragraph 16 of the judgment is particularly instructive as McDonald-Bishop JA further stated that:

> *"Based on the provisions of the CPR and the relevant case law, the considerations for the court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence; the period of delay between the judgment and the application made to set it aside; the reasons for the defendants' failure to comply with the provisions of the rules as to the filing of a defence or an acknowledgement of service, as the case may be, and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside."*

**[33]** Useful guidance is also found in paragraph 27 where Mc-Donald-Bishop outlined that:

> *"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 at a finding that there is a defence with a real prospect of success. Issues of delay and an explanation for failure to comply with the rules of court as to time lines must be weighed in the equation."*

**Affidavit of Merit**

**[34]** In ***Evans v Bartlam*** (supra) [1937] AC 473, at pages 480,489, Lord Atkin noted the rules laid down to guide the courts in exercising its discretion to set aside a regularly obtained default judgment is that:

*"…where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence." (My emphasis).*

*"The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication… The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."*

**DISCUSSION AND ANALYSIS**

**Whether the Applicant was properly served with the Claim Form and Particulars of Claim and Judgment in Default properly entered?**

**[35]** In addition to the considerations at Rule **5.13** and **5.14** of the CPR, the relevant provisions which arise for the Court's consideration are found at **Part 12** and **13** of the CPR. **Rule 12.4** contains the provision on which the Respondent relied in applying for default judgment and states as follows:

*12.4 The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if*

*(a) the claimant proves service of the claim form and particulars of claim on that defendant;*

*(b) the period for filing an acknowledgment of service under rule 9.3 has expired;*

*(c) that defendant has not filed (i) an acknowledgment of service; or (ii) a defence to the claim or any part of it;*

*(d) where the only claim is for a specified sum of money apart from costs and interest, that defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;*

*(e) that defendant has not satisfied in full the claim on which the claimant seeks judgment; and*

*(f) (where necessary) the claimant has permission to enter judgment.*

**[36]** Upon my review of the application filed by the Respondent on the 6th of April 2021, I noted that it contained a request that judgment be entered as no acknowledgment of service had been filed and the time for doing so had expired under **12.4 (b)**. In order to determine whether judgment had been properly entered, I carefully considered **Part 9 of the CPR** with emphasis on **9.3(1)** which reads:

> *9.3 (1) The general rule is that the period for filing an acknowledgment of service is the period of 14 days after the date of service of the claim form.*

**[37]** It is the Applicant's submission that he did not file an acknowledgment of service as he was unaware of the existence of the claim. While the Applicant has insisted that notice of the matter never came to his attention as he did not read the Observer. I While Mr Brown has asserted his position in very strong terms, the authorities have shown that in considering an application such as this, the Court will consider whether the matter was likely to have come to his attention through publication. In circumstances where the publication was done in a newspaper which enjoyed national circulation, I'm satisfied that the Claimant had effected service in a manner that was likely to have been seen by the 1st Defendant and/or others around him. In light of the foregoing, it is my opinion that the Applicant's assertion that he does not read the paper is not sufficient, without more, for the publication to no longer be deemed as good service. In coming to this conclusion, I noted that this was not a situation in which he had been outside of the jurisdiction or otherwise excluded from the newspaper's area of circulation. Additionally, there was no evidence presented by him to show that persons with whom he was associated did not read the newspapers or that it would otherwise not have been possible to be informed of the contents of this publication.

**[38]** Accordingly, I was not persuaded that the Applicant had met the threshold to show that the default judgment had been irregularly entered and should be set aside pursuant to **Rule 13.2**.

**WHETHER THERE IS A REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM**

**[39]** Having concluded that the Applicant had failed to satisfy the Court on Rule 13.2, consideration was then given to the question whether the judgment should be set aside pursuant to Rule 13.3. The first limb of this rule is often described as being of paramount consideration to the Court, that is, whether the defendant has a real prospect of successfully defending the claim. The test is the same as in an application for summary judgment, ***Swain v Hillman and Another*** *supra,* which states that the defendant must have a real prospect of successfully defending the claim rather than a fanciful one. In determining whether the test has been satisfied, there must be a defence on the merits to the requisite standard. The case law also makes it clear that the evidence presented should reveal more than a merely arguable case.

**[40]** In the case of ***Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited*** *supra*, in addition to the extract cited from the judgment of Edwards JA (Ag) (as she then was), the Learned Judge also stated:

> *"[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 judgment****…..*
>
> *[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."*

**[41]** It is settled law that in determining whether there was a real prospect of success, the court must give consideration to the claim, the nature of the defence, issues of the case and whether there is a good defence on the merits with a realistic prospect of success.

**[42]** In the case at bar, the claimant outlined in his particulars of claim that he was travelling along Nelson Mandela Highway in the vicinity of the toll entrance on the PJ Patterson Highway in the parish of St. Catherine when the 1st defendant whilst in the employ of the 2nd defendant wrongfully and negligently drove, controlled, manoeuvred or steered the Nissan Caravan motor bus licensed 1620 PK causing it to collide into the rear of the vehicle in which the Claimant was driving. The Claimant also stated, that the defendant failed to have any adequate regard for other road users and failed to keep a proper look out.

**[43]** The Applicant, in his affidavit in support of the application to set aside default judgment, averred that it was the Claimant who drifted into his lane suddenly, causing the 2nd Defendant's motor vehicle to collide into the Claimant's motor vehicle. The crux of the Applicant's defence is that it is the claimant who was the sole cause of the accident or alternatively contributed to it.

**[44]** In my examination of this issue, I am mindful of the fact that rule **10.5** of the CPR imposes a duty on the defendant to set out in the defence all the facts on which he intends to rely to dispute the claim. For the purpose of this application, the affidavit of merit should make reference to the defence on which the applicant relies. After careful review of the Affidavit evidence in this matter and the Draft Defence, it is evident that while the Applicant contends that the Claimant caused the collision by drifting into his path, his evidence is not very clear in addressing how this happened. In the draft Defence, he outlined that he was travelling in the left lane on Mandela

Highway heading towards Spanish Town. I take judicial notice of the fact that this section of roadway is divided into three lanes on each side of the median. Although the position of the Applicant's vehicle is noted, the Defence makes no mention of the position/location of the Claimant's vehicle.

**[45]** The Defence continues that upon reaching in the vicinity of entrance to the PJ Patterson Highway, the Claimant 'suddenly and without any/sufficient warning drifted into the right lane directly into the Caravan's path.' Given the account of the Applicant that he had been in the left lane prior to arriving at this juncture, this version of events raised questions as to whether the Applicant had changed lanes and was in the right lane at the time of the collision and if so, when. It also raised questions as to which lane the Claimant's vehicle had been in at the point when the drift occurred. These details are significant given the assertion that that this explained the physical damage to the right rear section of the Claimant's vehicle and the left front section of the Applicant's. While the Court recognises that the finer details are matters for a tribunal of fact and that the hearing of the application does not constitute a mini-trial, there is still the requirement for the evidence being relied on to present more than an arguable case which is the best that this evidence is able to do. Consequently, I do not agree with the submission of Mr. Stimpson that the Defendant has provided enough evidence to show that he has a real prospect of successfully defending the claim.

**WHETHER THE DEFENDANT APPLIED TO THE COURT AS SOON AS REASONABLY PRACTICABLE AFTER FINDING OUT THAT JUDGMENT HAS BEEN ENTERED**

**[46]** Although I have formed the view that the defendant does not have a real prospect of successfully defending the claim, I believed it prudent nonetheless to examine the other criteria outlined in **rule 13.3(2)** of the CPR.

**[47]** The issue of whether the application had been made to the Court as soon as practicable has been extensively considered in a number of authorities from this

jurisdiction**.** In the course of examining a like application in ***Pacha Zona Libre v Sawalha, Mamdouh Saleh Abdul Jaber*** [2014] JMSC Civ. 232, Batts J stated**:**

> ***"****clearly if an application is not made as soon as is reasonably practicable or if the explanation is not good then the chances of a successful application reduces significantly."*

**[48]** Similar guidance was given by Sykes J (as he then was) in ***Sasha-Gaye Saunders v Michael Green etal*** [2005] HCV 2868, where having reviewed the evidence, he stated:

> *"If the application is quite late, then that would have a negative impact of successfully setting aside the judgment."*

**[49]** In the **Flexnon** decision (supra), McDonald Bishop JA opined;

> *[28] "While it is accepted that the primary 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."*

**[50]** In addressing this issue, Mr. Stimpson submitted that the Applicant had only became aware of the claim in March 2022 and by May 30, 2022, an application was filed to have the default judgment set aside. In his submissions, Counsel contended that although there was a delay of less than three months between the point at which the Applicant had notice of the judgment and the application being filed, it was not the most egregious.

**[51]** Mr Belnavis, on the other hand, submitted that the application had not been filed until one year and one month after the judgment was entered. He argued that paragraph 10 of the Applicant's affidavit shows that he signed the accident report for the insurance company eleven days after the insurance company was served with the Notice of Proceedings. A point which, he argued, clearly shows that the Applicant should have been aware that he was a party to this claim. Counsel made reference to the relationship between the 1st and 2nd Defendants and asserted that the

Applicant ought to be fixed with Notice of the Proceedings as at the date that the insurance company was in receipt of same on June 11, 2020.

**[52]** On a review of the Applicant's evidence, his defence and that of the 2nd defendant, it is clear that 11 days after they were notified of proceedings against the Defendants, the insurance company collected a statement from the Applicant which formed the basis for the defence filed on behalf of the 2nd Defendant. While the order for service on the Insurers was made in order to effect service on the 2nd Defendant, it is evident that the Insurers would have been put on notice that the suit was in respect of both parties. They would also have been aware that a defence would need to be filed by both defendants but this was only done on the part of the 2nd Defendant. Although it is clear that the insurers for the 2nd defendants would have known that the Applicant was at risk of a default judgment being entered against him if he filed no defence or acknowledgment of service, I am unable to agree with the submissions on behalf of the Claimant that this would have been sufficient to fix the Applicant with notice of this judgment and in this regard, the Claimant has failed to rebut the Applicant's assertion that the application was made as soon as he became aware of the judgment.

**WHETHER THERE IS A GOOD REASON FOR FAILURE TO FILE AN ACKNOWLEDGMENT OF SERVICE OR A DEFENCE**

**[53]** In relation to this issue, it is clear from the Applicant's own admission, that he had provided his written statement to GKI on June 22, 2020, which was 11 days after the commencement of proceedings in which he was named as a defendant, yet nothing was done to progress his defence until 2022.

**[54]** I have considered his explanation that no documents were filed as he was not aware of the proceedings and that he had no intention to avoid same as he had been assured that he would be represented. While he was not personally served with the documents, I found it curious that in circumstances in which the notice of proceedings and subsequent documents had named him as a defendant, that this

was not brought to his attention by the insurers or the 2nd defendant to ensure that he was notified of the claim and acted within the requisite timelines. I also found it strange that in circumstances where he provided a statement that formed the backbone for the 2nd defendant's defence, that he did not seek to enquire whether he should provide a statement for his own defence or make any enquiries of the insurers whether he was required to make any similar provision for himself as the driver. In light of the foregoing and the fact that the Claimant had done enough to bring the matter to his attention independently, I was unable to find that he had provided a good explanation for this failure, but in any event, the good explanation in and of itself would not have been sufficient to move the Court to exercise its powers in his favour.

**PREJUDICE**

**[55]** In ***Flexnon Limited*** *supra*, the Court affirmed that prejudice to a party must be considered in determining whether a regularly entered default judgment is to be set aside. Undoubtedly, the Claimant would be prejudiced if the court is to grant the orders sought by the Applicant and set aside the default judgment. The financial and emotional prejudice likely to be suffered have been outlined by Mr Belnavis and I do not propose to re-state them here. The Court is tasked with balancing this against any equal or greater prejudice which may be caused to the Applicant if he is to be barred from proceeding with his defence and the claim not allowed to be tried on its merits. In respect of any prejudice which may be suffered by the Applicant, although his affidavit is silent on this point, I note that he would be faced with having to comply with an award of damages against him if the matter goes to assessment.

**[56]** The Court accepts that the discretionary power to be exercised in an application of this nature is not to punish a party for incompetence or technical breach without having a hearing on the merits. However**,** due regard must be had to the fact that the Claimant has a judgment in his hand. In **International Finance Corporation v. Utexafrica S.P.R.L.** [2001] EWHC 508 (Comm), Moore-Bick, J. underscored the

importance that must be attached to all judgments. The learned Judge stated as follows: -

> *"8. …A person who holds a regular judgment, even a default judgment, has something of value, and in order to avoid injustice, he should not be deprived of it without good reason."*

**[57]** On a careful assessment of the circumstances of the respective parties, I am satisfied that greater prejudice would be done to the Claimant if this judgment is to be set aside. I agree with the submission of Counsel for the Claimant that it would be in contravention of the overriding objective for the Claimant to wait another year or two to obtain a trial date and that this would not be in keeping with the requirement that justice be done between the parties.

**CONCLUSION**

**[58]** As such, for the reasons which have been outlined above, I am satisfied that this is not an appropriate case for the default judgment to be set aside. Accordingly, the following orders are made:

1. The application to set aside default judgment is refused.

2. Costs is awarded to the claimant/respondent to be taxed if not agreed.