[2022] JMSC Civ. 228

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV02908

BETWEEN	**NORMAN WILLIAMS**	**CLAIMANT**
AND	**GLORIA TOWNSEND (deceased, Christopher Townsend administrator Ad Litem)**	**1ST DEFENDANT**
AND	**CARLTON HUTCHINSON**	**2nd DEFENDANT**

IN CHAMBERS

Sherine Golding-Campbell instructed by Golding-Campbell and Associates for the claimant

Kaysian Kennedy-Sherman and Denelia Alvaranga instructed by Townsend, Whyte and Porter for the 1st defendant

Heard: December 4 and 8, 2022

Application to set aside default judgment – Alleged failure to serve claim form - Whether a delay in filing the application should result in the failure of the

application – Whether the defendant has a defence which has a realistic prospect of success - Whether a draft defence attached to an affidavit is sufficient – Hearsay evidence in affidavit – Need to specify source(s) of information and belief - Prejudicial effect of evidence outweighing its probative value- Section 31L of the Evidence Act - Eyewitness account in affidavit – No indication if said eyewitness is/will be expected to testify for the defendant at trial - Burden and standard of proof where there is a dispute as regards whether a claim form has been served - Court's assessment of conflicting witnesses' accounts – Credibility of witnesses – Whether the court has power to waive service of a claim form – Consideration of general power of the court - General powers of the court to remedy procedural defects– Inability of the court to cure a procedural defect where the rules of court provide a sanction for that defect – Statutory interpretation - Generalia specialibus non derogant

ANDERSON K. J

BACKGROUND

The application before the court

[1] The 1st defendant filed an application to set aside default judgment on June 10, 2022, seeking the following orders:

> *'That the default judgment entered against the 1st defendant filed on 20th April 2017 and granted on September 19, 2017, be set aside.*
>
> *That there be a stay of proceedings in respect of claim 2015 HCV 02908 until the hearing of the defendant's application to set aside default judgment or until such further time as this Honourable Court deems fit.*
>
> *That the defendant be at liberty to file a defence within 14 days of the date of this order.*
>
> *That the time for filing and service of this application be abridged, if necessary.*

That the costs of this application be the costs in the claim.'

[2] The bases on which the 1st defendant had sought those orders, were as follows, in summary:

a. The 1st defendant has a real prospect of successfully defending the claim against him.

b. The 1st defendant applied to the court as soon as it was reasonably practicable after finding out that the judgment had been entered and has a good explanation for his failure to file an acknowledgment of service.

c. The default judgment was never served on the 1st defendant.

d. The 1st defendant was never served with the claim form or particulars of claim.

[3] The 1st defendant, Mr. Christopher Townsend and one Karldon Hutchinson have led affidavit evidence in support of that application. The evidence of the applicant in summary is that: He was made aware of the default judgment, albeit not in a way that he then properly understood, on November 19, 2021, when he was then served with a without notice application for permission to enforce judgment. In respect of that application, there was a court hearing on November 22, 2021, at which he was then present.

[4] He then had his initial consultation with counsel, in or around December of 2021, whereafter he had then, on his own, gathered the court documents pertaining to this claim, from the Supreme Court. Thereafter, the 1st defendant consulted again, with his counsel. This application was filed on June 21, 2022 – approximately six (6) months after, in this court's view, the 1st defendant became aware of the default judgment that had been entered against him.

ISSUES

[5] The following issues are now before the court for determination:

a. Whether a delay in filing an application to set aside default judgment is a factor to be considered in the application and if so, what weight does that delay have on an application to set aside default judgment?

b. Whether the 1st defendant has a real prospect of successfully defending the claim.

c. Whether the 1st defendant was served with the claim form in August 2016.

d. Whether the court may waive the service of a claim form.

LAW AND ANALYSIS

[6] **Rule 13.3 of the CPR** sets out the circumstances in which a court may set aside a default judgment and **rule 13.2 of the CPR** sets out the circumstances in which this court must set aside a default judgment. Those provisions read as follows:

> *'13.2*
>
> *(1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because -*
>
> *(a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;*
>
> *(b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or*
>
> *(c) the whole of the claim was satisfied before judgment was entered.*
>
> *(2) The court may set aside judgment under this rule on or without an application.'*
>
> *'13.3*

(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:

(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.'

[7] This application encompasses and therefore requires the application of both of those rules of court.

Delay in filing this application

[8] I do not find that the 1st defendant 'acted as soon as reasonably practicable' after finding out that a judgment had been entered against him, to have applied to set aside the default judgment which he learnt was entered against him, approximately six (6) months prior. Also though, I do not find that he acted with any undue delay in having applied to set same aside. To my mind, instead, he applied to set same aside, during the period of time, which to my mind exists, between when it was as soon as was reasonably practicable to have applied to have set same aside and from when it would have been, that this court would have considered that there had been, not merely delay on his part, in doing so, but moreover, undue delay.

A. *The pre-eminent consideration*

[9] The pre-eminent consideration for a court in this jurisdiction, as regards whether a regularly entered default judgment, should be set aside, pursuant to **rule 13.3 of the CPR** is whether the defendant has a real prospect of successfully defending the claim. Thus, the fact that the defendant has delayed in filing his present application, will not, to the extent that the said application is made, in part, in

reliance on **rule 13.3 of the CPR**., make that application be, one which is bound to fail.

[10] The law, as laid down by the Court of Appeal and applied by this court, on more than one occasion, points nearly unequivocally to the contrary, at least, ever since **rule 13.3 of the CPR** was amended in September of 2006, such that the same is not now and has not been, since then, in precisely the same terms, as the English rules of court which apply to the setting aside of regularly obtained, default judgments.

[11] For all of these principles and also for a historical understanding of same, see first: **Marcia Jarrett v South-East Regional Health Authority, 2006HCV00816** judgment delivered on November 3, 2011. The case: **Administrator General for Jamaica v Cool Petroleum Ltd. & Ors. [2019] JMSC Civ. 181**, serves to emphasize the legal principle, that the paramount consideration for this court, with respect to an application such as this, is whether the applicant's proposed defence, is one which has a realistic prospect of success. Furthermore, the case of **Victor Gayle v Jamaica Citrus Growers & Anthony McCarty (2008) HCV05707** delivered on April 4, 2011 – per Edwards, J. (Ag.) (as she then was), similarly so emphasizes.

Does the 1st defendant have a defence which has a realistic prospect of success

[12] The next question for this court to answer therefore, is: Does the 1st defendant have a defence which has a realistic prospect of success? In answering that question, it is important to bear in mind that Mr. Christopher Townsend – the applicant, is the representative of the 1st defendant for the purposes of this claim, as the 1st defendant is now deceased. The 1st defendant is Gloria Townsend and this court's records now show that she passed away, after this claim had been brought against her.

B. *A draft defence*

[13] Mr Christopher Townsend- the 1st defendant's representative has attached to his affidavit evidence which was filed on June 10, 2022, a draft defence to this claim. The appending of a draft defence, as an exhibit to affidavit evidence filed by the 1st defendant, it should be noted though, cannot equate with the establishment, on a balance of probabilities, that the 1st defendant has a defence which has a realistic prospect of success. It is, for present purposes, the 1st defendant who needs to establish that, through direct evidence led on her behalf, rather than by means of a draft defence. The case: **Ramkissoon v Olds Discount Co. (1961) 4 W.I.R. 73**, is instructive, in that regard. The reasoning of the court in the **Ramkissoon case**, has been applied by Jamaica's Court of Appeal, in the case: **Attorney General of Jamaica v John Mckay [2012] JMCA App 1**.

[14] I will, for purpose of ease, borrow from the references to the **Ramkissoon case (op.cit)** which have been set out, in typically lucid manner by Morrison JA (as he then was), in the **Attorney General of Jamaica & John McKay case (op.cit)**. quoting paragraphs 23 & 24 of the **Attorney General of Jamaica & John McKay judgment (op.cit)**, will suffice for present purposes:

> *'[23] It seems to me that the learned judge's conclusion that Miss White's affidavit did not provide a basis for defending the action is plainly irresistible. As long ago as 1961, in **Ramkissoon v Olds Discount Co (TCC) Ltd (1961) 4 WIR 73,** a decision under rules of court long predating the CPR, the Supreme Court of Trinidad & Tobago (Appellate Jurisdiction) held, on an application to set aside a regularly obtained default judgment, that an affidavit sworn to by the defendant's solicitor, in which there was nothing to suggest that the solicitor had any personal knowledge of the facts of the case, or that what appeared in the draft defence exhibited by him was true, was not a sufficient affidavit of merit for the purposes of setting aside the judgment. Under the rules then applicable, a defendant was only obliged to demonstrate on affidavit that in the main action he had "a prima facie defence" **(Evans v Bartlam [1937] AC 473**, per Lord Atkin at page 480). The language in the CPR is obviously stronger, with the result that, as Mr Stuart Sime puts it in 'A Practical Approach to Civil Procedure' (10th edn, para. 12.35), "the written evidence in support of the application to set aside will have to address [the relevant] factors, and in particular the alleged defence on the merits.*

> *[24] Miss White's affidavit in this case was hardly an improvement on that in the Ramkissoon case, suggesting as it did, no more than that there was "intended evidence", which it was the intention of the Crown to advance at trial. It is also clear from the fact that, on the subsequent application for leave to appeal, Miss White felt it necessary to swear to two further affidavits purporting to demonstrate the applicant's prospects of success at trial (see para. [9] above) that she herself appreciated that the original application as filed lacked a proper evidential basis.'*

C. *The affidavit evidence*

[15] In the circumstances, I am in agreement with the oral submission of learned counsel for the claimant – Mrs. Golding-Campbell, that the affidavit evidence of Mr. Christopher Townsend, which was filed on June 10, 2022, does not serve to provide any proper basis to enable this court to be properly satisfied that the 1st defendant has a defence which has a realistic prospect of success. In that evidence, the 1st defendant, at paragraph 8, has referred to his having:

> *'…gathered evidence, including eye witness testimony that points to the claimant contributing and/or being the author of his own misfortune as at all material times he acted negligently and or carelessly and without due regard for his own safety …'*

[16] The 1st defendant has referred to the particulars of that suggested negligence/carelessness of the claimant, in that affidavit of his. However, in said affidavit, he has given no evidence as to the source or sources, of that information and belief of his. It is very clear to this court, that he needed to have done so, since he was and still is not, personally aware of the events which led up to the motor vehicle accident which led to this claim having been brought before this court. As such that is hearsay evidence, which was being given by the said Mr. Townsend.

D. *Hearsay evidence*

[17] The 1st defendant to this claim, is Gloria Townsend. Christopher Townsend is not a named defendant to this claim. He was appointed by this court, since as of June 27, 2016, as the administrator ad litem for this purposes of this claim and in that

capacity, represents the interests of the estate of the 1st defendant, who is now deceased. Mr. Townsend was not, it seems to this court, based on all the evidence that has been given, a witness to the relevant motor vehicle accident. In the circumstances, any averment in his affidavit evidence as regards what he has or may have learnt of that accident from an account or accounts of same, as may have been or was/were in fact provided to him, by any other person or persons, will, in the circumstances, be hearsay evidence. The motor vehicle accident which is the subject of this claim, occurred on June 19, 2009 and this claim was filed on June 4, 2015.

[18] Whilst this court accepts that in respect of an application such as this, that being an application to set aside default judgment, hearsay evidence is admissible, it is a condition precedent, as prescribed by our rules of court, that in order for same to be so admitted, the deponent must provide to the court, in reference to said hearsay evidence, the source(s) of his or her, information and belief. See **rule 30.3(2)(b)(ii) of the CPR.**

[19] That provision of the rules of court, needs to be complied with, in order for the said evidence to be admissible. The importance of that provision lies in the fact that, in the absence of compliance with same, this court cannot properly assess what weight, if any at all, ought to be given to such evidence. In the circumstances, such evidence is far more prejudicial, than probative and as such, pursuant to what is laid down, in **Section 31L of the Evidence Act**, this court is excluding that evidence of the applicant from any further consideration. That section provides that:

> *'It is hereby declared that in any proceedings the court may exclude evidence if, in the opinion of the court, the prejudicial effect of that evidence outweighs its probative value.'*

E. *Eyewitness evidence*

[20] At first glance though, fortunately for the 1st defendant, there is other evidence before this court, as to the pertinent details surrounding and most importantly, as

regards the relevant events involving the now deceased, Gloria Townsend and others, immediately leading up to the relevant motor vehicle accident, having occurred. That evidence has been provided to this court, by Mr. Karldon Hutchinson. By means of his evidence, as set out in his affidavit, which was filed on June 10, 2022, it has been alleged that when the relevant motor vehicle accident occurred, when the said Mr. Hutchinson, was then driving a coaster bus, owned by Gloria Townsend, along the left lane, on Orange Street, in the parish of Kingston and was then heading towards Cross Roads in the parish of Kingston.

[21] According to the said Mr. Hutchinson's account, while travelling along the left lane on Orange Street, on June 19th, 2009, with Orange Street then having been a one-way street, consisting of two lanes, he saw the claimant operating a hand-cart and approaching from the opposite direction on Orange Street. The hand-cart had a female passenger and was then also being used to carry, what appeared to be goods.

[22] At that time, there were vehicles parked on the left hand side of the road, in the lane that Mr. Hutchinson was then driving Gloria Townsend's vehicle in and the claimant was pushing the hand-cart which he was then operating, in a direction which was the wrong way, on a one-way street and therefore being operated such as to have then been heading towards any oncoming traffic.

[23] If that account as given, is both truthful and accurate, then it follows that, at the material time, the claimant was operating his hand-cart unlawfully along that roadway, at that time, since he would then have been operating same, in order to travel in the wrong direction, on a one-way street. That is therefore, one of the bases upon which the applicant has contended that the claimant is the author of his own misfortune.

[24] Mr. Hutchinson's account of the relevant events, has gone on to describe that while he (Mr. Hutchinson), was slowly trying to drive past another coaster bus, that was parked in the left lane of Orange Street, which was then the lane that he was

travelling in, the claimant then proceeded to maneouvre the hand-cart which he was then operating, between the sidewalk and the coaster bus that Mr. Hutchinson was then driving and suddenly and without warning, caused his foot to be placed into the path of the wheel of Gloria Townsend's coaster bus, which Mr. Hutchinson was then driving, as a consequence of which, the claimant sustained the injuries which he is now, by means of this claim, claiming relief from the defendants, for. Immediately following on the said accident having occurred, the claimant was taken to the hospital by the said Mr. Hutchinson. Regrettably, the claimant suffered extensive injuries to his right foot, as a consequence of that accident.

[25] That evidence of Mr. Hutchinson would, under ordinary circumstances, have served to constitute the setting out for this court, upon the present application, of a proposed defence which has a realistic prospect of success. That is what is required to be proven, by an applicant, in order for an application such as this, to the extent that it has, in part, been made under **rule 13.3 of the CPR**, to be successful.

[26] For the purposes though of this application and **rule 13.3 of the CPR**, that evidence of Mr. Hutchison, has not in fact met the required standard of proof. That is so because, nowhere in Mr. Hutchinson's affidavit evidence, is it at all stated that he is willing to and is presently expecting to testify at trial, on behalf of either the 1st defendant, or the 2nd named defendant, who is, it should be carefully noted, a person named as: '**Carlton Hutchinson.'** (Highlighted for emphasis). In the claim form and in the further amended particulars of claim which was filed on April 5, 2018 and also, in the claimant's witness statement, which was also filed on April 5, 2018, the claimant has, throughout, consistently referred to the driver of the coaster bus which was, at the material time, owned by Gloria Townsend as being: '**Carlton Hutchinson.'** (Highlighted for emphasis).

[27] The name of the defendant who, in his affidavit evidence which was sworn to, on June 9, 2022 and filed on the following day and who has referred to himself therein, as having been the driver of Gloria Townsend's coaster bus on that fateful day, is

'Karldon Hutchinson.' (Highlighted for emphasis). This court is not prepared to assume, for present purposes, that the persons named respectively, as: 'Carlton' and 'Karldon' Hutchinson, are one and the same, nor as to, if there is an error in that regard, or an omission of pertinent information, on whose shoulders, responsibility for that error or omission, should now lie.

[28] Suffice it to state though for present purposes, that there was need for evidence to have been given by someone who is expected to testify at trial. This is a claim form proceeding. Evidence at trial, in respect of claim form proceedings, is not usually given by means of affidavit evidence. In any event, this court does not know and ought not to be expected to assume that the said Mr. Karldon Hutchinson, will testify at trial, for the 1st defendant or any other defendant, that there may be, in respect of this claim. Furthermore, even if the named 2nd defendant's name is amended to read as – 'Karldon Hutchinson,' or when, if the 2nd defendant's first name as spelt on all court documents filed to date, in respect of this claim, remains entirely the same and appropriate clarification of same is hereafter provided to this court, by some means, it does not follow automatically, that simply because a person is a named defendant who is as individual, that the said individual is expected to testify either in his own defence, or in the defence of any other person, or both, during his trial.

[29] In the circumstances, the applicant has failed in his quest, to establish to this court's satisfaction, on a balance of probabilities, that the 1st defendant has a proposed defence which has a realistic prospect of success. In the circumstances, this court has found it unnecessary to treat with, in any detail, yet another consideration, under **rule 13.3 of the CPR**, which is whether the applicant has given a good explanation for his failure to file an acknowledgement of service. Suffice it to state though, that I think that he has, if, but only if, he has satisfied this court to the required standard, that he was never served with the claim form and other required documentation, pertaining to this claim. That is the other plank upon which the applicant has rested his present application. I will therefore now, go on to address that.

Whether the 1st defendant was served with the claim form and particulars

[30] I will begin by addressing firstly, the failure of the claimant to have served the document entitled: 'Application to pay by instalments.' There is no dispute by the claimant, that same was not served and that the failure to have served same, constitutes an irregularity. Arising from that irregularity though, at paragraph 10 of her written submissions filed on December 1, 2022, the claimant's counsel has leaped forth and altogether requested this court to dispense with service of the claim form.

[31] For reasons which I will shortly specify, it is not the view of this court, that this court can, in any event, properly dispense with the service of a claim form and furthermore, I am not of the view that such is an appropriate approach to be taken by this court, in a circumstance wherein a document such as an application to pay by instalments, has not been served, in addition to which, the relevant claim form has not been served, albeit that this court does accept that the failure to have served, an application to pay by instalments, does in fact, constitute an irregularity.

[32] I am of the considered opinion, that instead, the correct approach of this court, in a situation such as this one, is as was set out by the Court of Appeal, in **B & J Equipment Rental Ltd. & Joseph Nanco (2013) JMCA Civ 2** and which was adopted and applied by me, in an earlier judgment of mine which was rendered in this court, in the case: **Lyn's Funeral Home v Paul Fearon [2018] JMSC Civ 33**. To my understanding, the rigid approach that was once taken by our Court of Appeal, as per the case: **Dorothy Vendryes v Richard Keane & Karen Keane [2011] JMCA Civ 15,** is not any longer, the approach taken to this type of issue, by the Court of Appeal. I therefore, entirely disagree with both the written and oral submissions as were made on this particular issue, by lead counsel for the 1st defendant.

[33] In the **B & J equipment Rental Case (op.cit),** the appellant had been served with the claim form and particulars of claim, without the accompanying documents, in

accordance with **rule 8.16 (1) of the CPR.** The appellant filed an acknowledgement of service, but did not file a defence. Default judgment was entered against the appellant. Damages were assessed and the bailiff entered the appellant's premises to execute the judgment. At that stage, the appellant made an application to set aside default judgment. On the basis that the claim was not served with the accompanying documents in accordance with **rule 8.16 (1).**

[34] McDonald-Bishop, J. (as she then was), distinguished **Vendryes (op.cit)** and concluded that the respondent's failure to serve the accompanying documents did not render the service a nullity, but was an irregularity of service, meaning that the defendant/appellant, could have waived its right to receive the accompanying documents, by its conduct. Given that the appellant had waived its rights. Morrison, JA (as he then was), agreed with the reasoning and conclusion of McDonald-Bishop, J. (as she then was). See in that regard, his comments as recorded at paragraph 37 of the Court of Appeal's judgment, in that case.

[35] To my mind therefore, since the failure to serve one of the documents which ordinarily, ought to accompany the claim form, when same is served, does not render the service of that claim form, in that context, a nullity and since it is possible that the same being an irregularity which can be waived by the party who has been served with the claim form, but not with all of the ordinarily required and expected, accompanying documents, then it must be for the party who has been so served, if intent on challenging that irregularity, to file an acknowledgement of service and simultaneously file an application, challenging this court's jurisdiction, to try said claim. Also, in that acknowledgment of service, it can be made known by the party who/which is intent on challenging such jurisdiction, that the same is intended to be challenged. See my comments as regards same, at paragraphs 42 to 49 of my judgment, in the **Lyn's Funeral Home case (op.cit).** That last aspect though, is not a prerequisite for a challenge to jurisdiction. On that point, see **Rayan Hunter & Shantell Richards & Stephanie Richards [2020] JMCA Civ. 17.**

Was the 1st defendant served?

[36] The next issue to be addressed in these reasons for my ruling on the present application is in fact, the most significant issue, for present purposes. It is one, in respect of which, for reasons which I will delve into, in these reasons, if the claimant is unsuccessful in rebutting the 1st defendant's contentions on, will cause this claim, to be at an end. That issue is the one as to whether or not the 1st defendant was ever served with the claim form with respect to this claim, which is one seeking damages, arising from negligence, which is of course, a well-established tort, recognized as such, by our law.

F. *Burden of proof*

[37] In respect of that issue, I am prepared for present purposes, to accept that ordinarily, it is the applicant that has the burden of proof and I have accepted that in respect of the issue as to whether or not the 1st defendant was served with the claim form in respect of this claim, that it is therefore, the 1st defendant's representative - Mr. Christopher Townsend, that had the burden of proving to this court's satisfaction, on a balance of probabilities, that he was not served with the claim form.

G. *Analysis of the accounts*

[38] In assessing credibility, as between two (2) witnesses, one of whom is telling the truth in important respects and the other witness, who is not doing so, as regards those same matters, it is always important for the court of first instance to consider contemporaneous documents, probabilities and possible motives. The Privy Council made this clear, in the case: **Villenueve and another v Gaillard and another – [2011] UKPC 1**, per Ld. Walker, at paragraph 67:

> *'Furthermore it is implicit in the statement of Lord Macmillan in Powell v Streatham Manor Nursing Home [1935] AC 243 at p.256 that the probabilities and possibilities of the case may be such as to impel an appellate Court to depart from the opinion of the trial Judge formed upon his assessment of witnesses whom he has seen and heard in the witness box.* ***Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always***

> ***to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities****. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.' [Emphasis added]*

[39] See also: **Armagas v Mundogas SA (The Ocean Frost) – [1986] 1 AC 717**, at page 757, per Dunn, L.J. This court has adopted the approach as suggested immediately above, in assessing the parties' respective evidence.

H. *Evidence in support*

[40] The 1st defendant, throughout all of his evidence to date, in respect of this claim, some of which, was provided on affidavit evidence and some of which, was provided upon cross-examination and therefore, at the latter-mentioned stage, by means of oral evidence, never, even in part, resiled from his position that he was never served with the claim form. I did not find that the evidence that was derived from him, while he was being cross-examined, served to weaken in the slightest, either his actual evidence, on this issue, or this court's perception of him and/ or his evidence, on this issue.

I. *Evidence in opposition*

[41] On the other hand, I cannot state the same for Mr. Brian Campbell, who testified that he is the son of attorney Ainsworth Campbell, who was, at the time, when the claim form was allegedly served on Mr. Christopher Townsend, then the claimant's attorney. He testified orally, that prior to his having allegedly served Mr. Townsend, with the claim form and other accompanying documents, which he testified that he did, on August 5, 2016, at the address: 81 Bay Farm Road, in the parish of St. Andrew, he had served other court documents, before then, on other persons.

[42] In his affidavit evidence as regards his alleged service of that claim form, which was filed on April 20, 2017, he provided no physical description to the court, as regards the person whom he purportedly served on August 5, 2016 and did not state why it was that he chose to try to serve the relevant court documents, at that address. He also did not depone in that affidavit evidence of his, that he was provided with any photograph of the person whom he purportedly served with that claim form.

[43] His evidence, both on affidavit and orally, was that he did not know the person who was named as Gloria Townsend's representative, for the purposes of this claim, namely: Christopher Townsend, at any time prior to August 5, 2016 and specifically, at any time prior to when he has testified, by means of his affidavit evidence, that he went to 81 Bay Farm Road, in the parish of St. Andrew and there, served Mr. Christopher Townsend, with the claim form, an amended claim form, amended particulars of claim and other, accompanying court documents. According to that affidavit evidence of his, the same were served on Mr. Townsend, between the hours of 1 and 2 p.m., on that day.

[44] It is, I think, useful at this juncture, to quote from paragraph 3 of that affidavit evidence of his, in which the following, is succinctly stated:

> *'That at the time of service the first Defendant Christopher Townsend admitted that he was the person named therein and accepted service of the said document.'*

[45] While being cross-examined though, Mr. Campbell's evidence, to my mind, differed in a fairly significant way, from that particular, quoted aspect of that sworn, written evidence, of his. It differed to the extent that, during cross-examination, Mr. Campbell stated that when he went to the premises at 81 Bay Farm Road, he noticed what appears to have been a residential premises and structure there, albeit that the only description that he was then able to give about same, was that it had a gate, the colour of which he could not remember and a small staircase leading to a front patio area. He was expressly asked if he could provide to this

court, any further description of that structure and he testified that he was unable to do so. His oral testimony to this court, was provided on December 4, 2022 though, so in that context, it is not necessarily surprising to this court, nor troubling, that he was then unable to remember same. No description of same, was provided in any affidavit evidence of his, for the purposes of this claim.

[46] Mr. Campbell though, went on to testify orally, while under cross-examination, that upon his arrival at that premises, he asked for: '*Mr. Townsend*,' to which, the person whom he purportedly served with the claim form and other court documents pertaining to this claim, responded, '*This is he*.' At that time, Mr. Campbell allegedly then served that person, with the said documents and then left the said premises.

[47] That oral evidence is distinctly different from that which Mr. Campbell deponed to, in paragraph 3 of his affidavit evidence, as earlier quoted. It is distinctly different because, firstly, this court now doubts that the said Mr. Townsend ever identified himself to Mr. Campbell, on August 5, 2016, as, '*Christopher Townsend'* and moreover, did not, it seems to me now ever '*admit*' to anyone, on that day, that he was the person named in any of the documents that were purportedly served on him, on that day.

[48] This court has had therefore, to next go on to ask itself and to answer the question as to why there was such a divergence of evidence as to exactly what were the immediate precursor events, which occurred, immediately leading up to the purported service of the said documents. The conclusion that I have reached in that regard, is that Brian Campbell's evidence of service, simply cannot be believed and therefore, is not believed by this court, since this court has concluded, for present purposes, that the said divergence of evidence, on the part of Mr. Campbell, was because he was not testifying truthfully, whether in his affidavit, which he swore to, on November 10, 2022 or in his oral testimony given under cross-examination, in person, before this court on December 4, 2022. I have accepted the 1st defendant's representative's evidence that on August 5, 2016, he was then living at 81 Bay Farm Road, in the parish of St. Andrew, but I do not, at

all, accept Mr. Campbell's evidence that he served Mr. Townsend, with the relevant documents, on that day.

[49] I am fully aware that more than one person can have the same first and last names and that in fact, more than one such person may even be adults, living in the same house, during a particular period of time, or, for whatever reason, may be together in a single house, at a moment in time, on a particular day. That often happens, with respect to a father and his son. Based on Mr. Campbell's overall evidence, as given on affidavit and orally, I cannot, but be filled with significant doubt, that Mr. Christopher Townsend was ever served with the said court documents.

[50] Further, Mr. Townsend's actions, in having acted promptly, to get legal advice and on his own, to have gone to the Supreme Court and collected documents pertaining to this claim and then to have returned to his attorney, with those documents and then acted to set aside the default judgment that had been entered against him and also, his action in having attended the court hearing, on November 22, 2021, after he had, according to his own account, been served with a without notice application for permission to enforce judgment, on or about November 19, 2021, do not suggest to me, that Mr. Townsend, is someone who wishes to avoid taking on the responsibility needed, in order for him to be able to mount a successful defence to this claim. He has come across to me, as a truthful witness.

[51] In the circumstances, I have concluded that Gloria Townsend was never served with the claim form, neither in person, while she was still alive, nor has her representative for the purposes of this claim, as yet, been served with the claim form.

Can the court waive service of the claim form?

[52] At this point in time therefore, the claim against the 1st defendant is statute-barred, since the **Limitation of Actions Act of Jamaica** provides that claims in tort, must be filed within six (6) years of the date when the cause of action, arose. In respect

of this matter, the cause of action arose on the date of the relevant motor vehicle accident, that having been: June 19, 2009.

[53] At paragraph 12 and 15 of her written submissions, the claimant's counsel has expressly recognized that this claim will be considered as being statute-barred, if this court concludes that the 1st defendant was not served with the claim documents and does not waive service of the claim form, as was done by Master Hart-Hines (as she then was), in two cases, namely: **Alicia Hughes v PAJ Imports Ltd. [2019] JMSC Civ. 93; and Kerry-Ann Barnaby Stoddart v Renville Barker & Eric Williams [2019] JMSC Civ 118.**

J. *Kerry-Ann Barnaby-Stoddart V Barker And Williams [2019] JMSC Civ 118*

[54] In the case above, the learned Master (as she then was),addressed her mind as to whether the service of the claim form may be dispensed with under **rule 6.8. Rule 6.8 of the CPR** provides that:

> *'(1) The court may dispense with service of a document if it is appropriate to do so.*
>
> *(2) An application for an order to dispense with service may be made without notice.'*

[55] She concluded that though **Part 6 of the CPR** referred to "*other documents*" she thought it within the court's power to dispense with the service of the claim form for the following reasons:

A. The rules regarding service of a claim form are not confined to **Part 5**. **Parts 5, 6, 7 and 8 of the CPR** should be read together

B. A "literal" interpretation of the word "document" in **rule 6.8(1) of the CPR** and of the word "may" in rule **8.13 which provides that** after the claim form has been issued it may be served on the defendant in accordance with Part 5 (service of claim form) or Part 7 (service out of the jurisdiction) would mean that the claim

form is a document in respect of which, service may be dispensed with.

C. In the specific circumstances of that case, applying the literal rule to **Rule 6.8** would be in accordance with the overriding objectives.

[56] She noted that the case from England - **Anderton v Clwyd County Council (No. 2) [2002] 3 All ER 813** has laid down, that there is power to dispense with the service of the claim form in an exceptional case. England, it is to be noted, has similar civil procedure rules to those which Jamaica now has, but those rules are by no means identical to ours. In fact, they differ in some significant respects. She went on to conclude that the case which she was then adjudicating on, was an exceptional case because:

A. The claim form had expired after being filed promptly after the accident.

B. The applicant was aware of default judgment in March 2015 and delayed two (2) years before applying to set same aside and further delaying for almost another two (2) years before filing the affidavit in support.

[57] In the final analysis, the court set aside the default judgment on the basis that the applicant was never served. The learned Master (as she then was), however, based on the reasons above, dispensed with the need for service of the claim form and sent the matter to mediation.

[58] A similar reasoning was applied in: **Alicia Hughes v PAJ Imports Ltd. [2019] JMSC Civ. 93.**

[59] With the greatest of respect to Master Hart-Hines (as she then was), I must state that I fundamentally disagree with her reasoning and conclusion, on the issue as to whether or not service of a claim form can be waived by this court, on the basis that the same constitutes an irregularity. I am of the considered opinion that this

court cannot waive the service of a claim form. This court can waive the **personal service** (highlighted for emphasis) of a claim form, by means of ordering and thereby permitting, the substituted service of same. That is not though, at all, to be equated with the waiver of **service of a claim form**. (Highlighted for emphasis)

[60] A claim form constitutes the bedrock upon which a claim is founded. Without the service of same, within the time period for service, as provided for, in **Part 8 of the CPR,** then to my mind, there will not be a valid claim before this court and thus, the claim, even if filed within the time period as prescribed by the **Limitation Act**, will be a nullity. To my mind, if a court is to properly be empowered to waive the service of a claim form, the same must be expressly provided for, by means of a statutory enactment, whether such is embodied in either primary or subsidiary legislation.

K. *Rule 26.9 of the CPR*

[61] Even if I am wrong in having drawn that conclusion though, nonetheless, a judicial officer in the Supreme Court must apply rule 26.9 in deciding as to whether the service of a claim form, can properly be waived by the court. **Rule 26.9 of the CPR.** sets out the general power if this court, within a particular context, to rectify matters where there has been a procedural error. That rule of court, reads as follows:

> *'1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified) by any rule, practice direction or court order.*
>
> *2)An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.*
>
> *3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*
>
> *(4) The court may make such an order on or without an application by a party.'*

[62] **Rule 8.14(1)** provides that:

> *'The general rule is that a claim form must be served within 6 months after the date when the claim was issued or the claim form ceases to be valid.'*

[63] **Rule 8.14 (1)** specifies a consequence, if the claim form is not served within six (6) months after the date when the claim was issued. That consequence is that, if the same, is not served within that time period, then the claim ceases to be valid. In other words, if the claim is not served within that specified time period, then the claim becomes a nullity, as the claim form will no longer be valid. That is no doubt why it is, that if an extension of time for service of claim form is being sought, the same must be sought, during the period for serving the claim form, as specified in **rule 8.14.** It cannot be sought and obtained lawfully, thereafter, because after that period as specified in **rule 8.14** has expired, the claim is no longer valid. It is then, a nullity.

[64] Given the framework set out above, it is improper for a court, in use of its general powers to waive an irregularity under **Rule 26.9 of the CPR**, in the circumstances where a particular rule, already provides for a sanction, in the event of a failure to follow a rule.

L. *Part 5 and 6 of the CPR*

[65] I agree with the conclusion of the learned Master (as she then was), that **Parts 5, 6, 7, and 8 of the CPR,** ought to be read together. I will go even further though and state that actually, the entirety of the rules of court, should be read together, since that is the best means of understanding the entirety of said rules of court. That is because, far more often than not, the meaning of particular words used in any legislative instrument, can best be discerned, by properly taking into account the entirety of the context within which those words have been employed.

[66] My adoption of that approach has led me though, on this particular point of law, to a different conclusion than that which was expressed by the learned Master Hines (as she then was), in those two (2) earlier cited cases.

[67] **Part 5 of the CPR** specifically relates to the service of a claim form. On the other hand, **Part 6 of the CPR** specifically relates to the service of a judgment or order and generally, to the service of 'other documents.' If the 'other documents' referred to in **Part 6,** encompassed within its scope, a claim form, then **Part 5 of the CPR** would be entirely nugatory. This court should never interpret a legislative instrument in such a manner as to render the same nugatory, because, if this court does so, it will be legislating - which is not its role, rather than interpreting the legislation which is its role, in an appropriate context.

[68] In any event, the rule of statutory interpretation, as per the Latin maxim- '*generalia specialibus non derogant,'* would be applicable in a circumstance wherein **Parts 5 and 6 of the CPR** are being considered together, for the purposes of deciding as to whether **Part 6** also applies with respect to a claim form. That rule is *that 'the general does not, derogate from the specific.'* Thus where there are specific words in a statutory instrument, addressing a particular situation and also, general words that may be used in order to embrace same, those general words ought not, to be interpreted so as to address that specific situation addressed by the specific words used. As succinctly stated at paragraph 21.4 of the text **Bennion on Statutory Interpretation (7th ed.):**

> *'It is a principle of construction that, in the absence of a contrary intention, the general gives way to the specific where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provisions. See Vinos v Marks and Spencer PLC [2001] 3 All ER 784 at [27] and Pretty v Solly per Sir John Romily MR (1859) 26 Beav 606 at 610.'*

[69] The application of that maxim, to determining whether **Part 6 of the CPR** relates to the service of a claim form, has also led me to the inescapable conclusion that, **Part 6 of the CPR** ought not to be taken as treating with the service of a claim form.

[70] As May LJ stated in the **Vinos v Marks Spencer case (op.cit),** as reported at paragraph 789-790:

> *'…Interpretation to achieve the overriding objective does not enable the court to say that the provisions which are quite plain, mean what they do not mean, nor that the plain meaning should be ignored.'*

[71] In England, there exists a civil procedure rule, which does not exist in Jamaica, in any form whatsoever. That is their **rule 6.16**. It is a fairly short rule and it is worthwhile to quote same. It reads as follows: **6.16 (1)** 'The court may dispense with service of a claim form in exceptional circumstances. **(2)** An application for an order to dispense with service may be made at anytime and – (a) must be supported by evidence; and (b) may be made without notice.'

[72] Mummery LJ wrote for the court, in the case which was relied on by the learned Master, which is, to my mind, a case which is distinguishable, based on the rules of court which exist in England and the extent to which those rules differ from our rules of court, as regards service of a claim form, that being the case: **Anderton v Clwyd County Council (No. 2) [2002] 3 All ER 813.** In that case, he stated:

> *'Procedural rules are necessary to achieve justice. Justice and proportionality require that there are firm procedural rules which should be observed, not that general rules should be construed to create exceptions and excuses whenever those, who could easily have complied with the rules, have slipped up and mistakenly failed to do so.'*

[73] Finally on this, it behoves me to state that this court should always be disinclined to waive compliance with the applicable rules of court with respect to a litigant who has failed to serve his/her or its claim, on an intended defendant, particularly if it is, as it is in the case now at hand, that there exists no good reason shown, as to why the service of the claim form, could not have been effected on that defendant, within the applicable time period, as prescribed in **Part 8 of the CPR.**

CONCLUSION

[74] In light of the reasoning above, the applicant's application to set aside default judgment on the basis that it was never served is successful. The applicant's contention that he has a defence which has a realistic prospect of success does not meet the requisite evidentiary standard of proof for the reasons earlier stated herein. Furthermore, the court does not have the power to dispense with the service of a claim form under its general discretion to remedy defects in the circumstances where a particular rule of the CPR has stipulated that a claim form not served in six (6) months, has expired.

DISPOSITION

[75] In the circumstances, my orders on the present application, will be, as follows:

A. The 1st defendant's application which was filed on June 10, 2022 to set aside the default judgment which was entered against him, is granted and the default judgment which was entered against him, on the 19th day of September, 2017, is set aside.

B. Leave to appeal is granted to the claimant.

C. Costs of this application are awarded to the 1st defendant. Such costs shall be taxed, if not sooner agreed.

D. The 1st defendant's representative – Christopher Townsend, shall file and serve this order.

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Hon. K. Anderson, J