BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1761 of 2005

BETWEEN

JEFFREY BRATHWAITE ***PLAINTIFF***

AND

M & W JORDAN ENTERPRISES INC. ***FIRST DEFENDANT***

ADRIAN MAYNARD ***SECOND DEFENDANT***

Before: The Hon. Olson DeC. Alleyne, Judge of the High Court (Ag)

(In Chambers)

2008: 10 April

2008: 29 April

Ms Liesel N. Weekes for the Plaintiff

Ms Debra Gooding for the First and Second Defendants

DECISION

Introduction

[1] This is an application under the provisions of Order 13 r. 10 of the Rules of the Supreme Court (RSC), 1982 on the part of the First and Second Defendants (The Defendants) for an Order setting aside a regular judgment in default of notice of intention to defend obtained against them jointly and/or severally, by the Plaintiff, on 30th January 2007. By their Summons, which was filed on 28th September 2007, the Defendants also seek leave to file an acknowledgement of service and their defence in the terms set out in a draft defence which was exhibited with the Affidavit filed in support of the Summons. That Affidavit was also filed on 28th September 2007. The Application was heard, in Chambers, on 10th April 2008 and, on that date, the decision was reserved.

Chronology of Events

[2] The chronology of events is not in dispute. On 9th September 2005, the Plaintiff issued a Writ of Summons along with a Statement of Claim. His claim against the Defendants jointly and/or severally is for damages for personal injuries, consequential loss and damage sustained as a result of a road traffic accident said to have occurred on 15th March 2003. Notice of proceedings was filed in the Supreme Court on 9th September 2005, though there is nothing before me to indicate if, or when, that notice was served on the Defendants' insurers, as is required by Section 43(2) of the Road Traffic Act, Laws of Barbados.

[3] A certified copy of the Writ of Summons was served on the First Defendant on 12th August 2006 and one on the Second Defendant on 21st August 2006. Consequently, the time limited for acknowledgement of service and notification of an intention to defend expired, in the case of the First Defendant on 20th August 2006 and, in the case of the Second Defendant, on 29th August 2006. Neither Defendant acknowledged service. Neither gave notice of intention to defend.

[4] A letter dated 26th October 2006 was written by the Plaintiff's Attorney-at-law, at the time, Mr. Freundel Stuart, to Guardian General Insurance Co. Ltd., the insurers of the motor vehicle ZR 34. That letter purported to inform them that neither Defendant had filed an acknowledgement of service or contacted him. Mr. Stuart also sought to notify the insurance company of his intention to proceed to judgment and an assessment of damages, if he did not hear from the Defendants by 3rd November 2006. A copy of that letter was produced at the hearing by Counsel for the Plaintiff without objection by Counsel for the Defendants. There was no indication as to if, or when, that letter was delivered to the Defendants' insurers.

[5] No notice of intention to defend having been given by either Defendant, the Plaintiff obtained judgment in default on 30th January 2007 with damages to be assessed. On 19th April 2007, he filed a Summons for assessment of damages. A certified copy of this Summons was served on the First Defendant on 16th June 2007 and on the Second Defendant on 7th June 2007. Hearing of this Summons was set for 9th July 2007 but the matter has not been heard. There was no explanation in this respect.

[6] On 28th September 2007, the Defendants filed their Summons for the relief outlined at paragraph 1 of this judgment with the supporting affidavit.

The Plaintiff's Cause of Action

[7] By his Statement of Claim, the Plaintiff asserts that he was riding his bicycle along Dalkeith Hill, St. Michael on 15th March 2003 when it was struck by a motor van bearing registration number ZR 34. It is not in dispute that the van was owned, at the material time, by the First Defendant and driven by the Second Defendant. The Plaintiff claims further that he was overtaking another motor vehicle, ZR 115, which was in a stationary position, when ZR 34 attempted to overtake that vehicle and his bicycle, striking the bicycle in the process. He pleads that the accident was caused by the negligence of the Second Defendant, who was, at all material times, the servant and/or agent of the First Defendant. He provides particulars of the personal injury, loss and damage which he

claims to have sustained and of the negligence alleged. The particulars of negligence make mention of a motor vehicle bearing registration number XB 673, the approach of which the Second Defendant is alleged to have taken no notice. I mention the reference to this vehicle for, as will be seen later, the Defendants claim that the Plaintiff struck this vehicle and makes no claim that he was struck by ZR 34.

The Submissions

[8] The Summons was vigorously argued by Counsel for the Defendants and contested with equal trenchancy by Counsel for the Plaintiff.

[9] On behalf of the Defendants, Ms Weekes submitted that the paramount consideration for the Court is whether the Defendants have a defence on the merits of the case of which the Court should take heed. She submitted further, that the Affidavit filed in support of the Summons along with the draft defence and the Police Report exhibited with that Affidavit raised issues that are triable. She urged too that they provide evidence that the Defendants have a good and arguable defence of which the Court should take heed. She pointed out that the Defendants had provided an explanation for the delay but argued that, in any event, the failure to provide any or any satisfactory explanation for delay is not necessarily fatal to an application to set aside. She argued that the delay in this case was not so inordinate as to have prejudiced the Plaintiff who, having obtained judgment over one year ago had not yet had damages assessed and that he would not be significantly prejudiced by a trial on the issue of liability on the merits. Counsel quoted extensively from paragraphs 13/9/2, 13/9/5 and 13/9/9 of the United Kingdom Supreme court Practice 1988 and cited the cases of *Evans v. Bartlam* [1937] A.C. 473, *McDonald Farms Ltd. v. Bico Ltd.* Civ. App. No. 33 of 1993, and *Strachan v. The Gleaner Co Ltd and Another* [2005] 1 W.L.R. 3204 in support of her submissions.

[10] Counsel for the Plaintiff submitted that the Affidavit filed in support of the Summons is not an affidavit on the merits, one that, on its face, discloses that there is a meritorious defence available to the Defendants, of which the Court ought to take heed. In support of this submission, she placed great store on the case of *Ramkissoon v. Olds Discount* Co *(T. C. C.) Ltd*. (1961) 4 WIR 73. She noted that the Affidavit in support of the application was not sworn by the Plaintiff but by his Counsel. She contended that nothing in the Affidavit was sworn to the deponent's personal knowledge or information and that the defence which was exhibited with the affidavit was not sworn or signed by anyone. She further argued that such a proposed defence was no substitute for an affidavit of merits, sworn either separately by a Defendant or conjointly with his Attorney-at-law, in which that Defendant attests to the facts on which the Defendants rely in support of their defence and of which he has personal knowledge. On that basis, she contended that the affidavit did not meet the required standard to be considered a sufficient affidavit of merits. She submitted further that, given the chronology of events and the fact that the Defendants had been given notice by the Plaintiff of his intention to proceed to judgment, it is unconscionable for the Defendants or their insures to have sat back and allowed the Plaintiff to proceed to judgment, only now to seek to have that judgment set aside.

[11] The above submissions require a careful examination and analysis of the affidavit on which the Defendants rely, a task that is undertaken later in this judgment.

Principles informing the Exercise of Discretion

Rationale

[12] Order 13 rule 10 of the RSC provides that a Court may set aside a judgment entered in default, on such terms as it thinks just. This rule is expressed to be subject to rule 8(3) and (4). These latter provisions are of no relevance in this case. The rationale for this discretion was expressed succinctly by Lord Atkins in *Evans v. Bartlam* [1937] A.C. 473, 480:

> "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."

Principles

[13] Counsel for the Applicant referred to the general principles set out in the United Kingdom Supreme Court Practice. The Court took the opportunity to review those principles as set out in the 1999 edition of this work at paras. 13/9/7, 13/9/12 and 13/9/18.

[14] In summary, those principles are (1) it is an almost inflexible rule that there must be an affidavit of merits, in the absence of which an application will only be acceded to for some very good reason; (2) the major consideration is whether the Defendant has disclosed a defence on its merits; (3) the disclosure of a defence on the merits transcends any reasons given by the Defendant for the delay in making the application; (4) the defence on the merits which the Defendant is required to show must have a real prospect of success and carry some degree of conviction; (5) there is no rigid rule that the Applicant must satisfy that there is a reasonable explanation why judgment was allowed to go by default, though the reason, if any, is a factor to which the Court would have regard in exercising its discretion; (6) the application to set aside should be made promptly and within a reasonable time, though, in a fit case, the Court will disregard lapse of time and (7) if the delay is coupled with prejudice occasioned to the Plaintiff or to a bona fide assignee of the judgment debt, the Court may refuse to set aside the judgment. These principles have oft been considered and applied by our Courts.

Merits

[15] In *McDonald Farms Limited v. Bico Limited* Civ. App. no. 32 of 1993, the Court of Appeal highlighted the major factors for consideration in applications of this sort. At page 2 of the Judgment, the Court stated:

> "McDonald's default judgment against Bico was regularly obtained and before it can be set aside Bico must show that it has a defence to which the Court should pay heed. See the decision of this Court in **Bank of Nova Scotia V. Emile Elias and Co. Ltd.** delivered on September 1, 1992 and applying **Evans V. Bartlam [1937] 2 All E. R. 646 H.L.** and **Alpine Bulk Transport Co. Inc. V. Saudi Eagle Co. Inc. (The Saudi Eagle) [1962] 2 Lloyds Rep. 221."**

[16] In *Bank of Nova Scotia v Emile Elias & Co Ltd* (1992) 46 WIR 33, the Court was faced with competing submissions as to the standard to be attained by an affidavit of merits filed in support of an application to set aside a default judgment. Counsel for the Respondent, relying on the case of *Burns v Kondel* [1971] 1 Lloyd's Rep 554, had submitted that the applicant needs only show a defence which discloses an arguable or triable issue. Counsel for the Appellant referred to the more recent decision of the English Court of Appeal in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* (*The Saudi Eagle*) [1986] 2 Lloyd's Rep. 221 and submitted that the affidavit has to show a defence that has a real prospect of success.

[17] The Barbados Court of Appeal referred to the portion of the judgment in *The Saudi Eagle* where Sir Roger Omrod noted that, though the phrase 'an arguable case' occurs in some of the reported cases, the authorities clearly contemplate that the test required of a defendant is that he demonstrates that he has a defence which has a real prospect of success. He opined further that to attain that standard the arguable defence must carry some degree of conviction.

[18] The Barbados Court of Appeal expressly endorsed the reasoning of the Court in *The Saudi Eagle* and concluded:

> "In this case if Emile Elias wishes to have the default judgment set aside, it must show that the defence, in the words of Lord Wright in *Evans v Bartlam* [1937] AC 473, "has merits to which the court should pay heed". (page 36 para. a)

[19] Counsel for the Defendants referred to the two tests discussed above. She cited the case of *Stratchan v. The Gleaner Co Ltd. And Another* [2005] 1 W.L.R. 3204, noting that the standard adopted by the first instance Judge in that matter – the real prospect of success test – was a higher one than the "arguable or triable issue test" referred to at paragraph 13/9/5 of the United Kingdom Supreme Court Practice 1988. Counsel concluded that in *McDonald Farms Limited v. Bico Limited,* "the Court of Appeal was of the view that the standard with respect to the defence is simply that it is one of which the Court should take heed."

[20] To the extent that Counsel seemed to be suggesting that the test set out by the Court of Appeal in the *McDonald Farms* case is an alternative and less exacting standard to that set out in *The Saudi Eagle* and adopted by Walker J in *Strachan*, I disagree with her submission. The above analysis shows that the Barbados Court of Appeal has clearly endorsed the standard set in *The Saudi Eagle*. In saying that the defence must be one of which the Court must take heed, the Court was merely emphasising the requirement for the more exacting standard.

[21] Indeed, this was confirmed by the Court of Appeal in *Cheryl Diana Patricia Clarke v. Ivan Hinds et al.*, Civ. App. No. 20 of 2003. In that case, the Court reiterated that the "major legal requirement to set aside a regular judgment will generally be whether the defendant has a good defence which has a real prospect of success" (para.15.) and noted that the relevant principles were set out in the *Emile Elias* case.

Delay

[22] Having concluded that Bico had establised a good defence on the merits, the Court in *McDonald Farms Limited v. Bico Limited* then addressed the question of delay at page 9 stating:

> "The question remains, should Bico be prevented from putting forward its defence because of delay? This is not a case in which the Applicant has waited for an inordinately long period before applying for relief. The amended Statement of Claim was filed on June 15, 1992, judgment was entered on January 18, 1993, Bico's defence was made one week later.
>
> Admittedly Bico was dilatory in filing its Defence and has shown no good reason for its delay. On the other hand McDonald has not shown any prejudice in a way or of a kind which would justify this Court from refusing relief to Bico."

[23] The learning regarding delay in *Cheryl Diana Patricia Clarke v. Ivan Hinds et al* is also instructive. In that case, the Court addressed this issue at paragraph 18:

> "Although in most cases the primary consideration in exercising the discretion is whether the defendant has a case with a real prospect of success, we are of the view that there will be cases in which, irrespective of the merits, it will be a correct exercise of the discretion not to set aside a default judgment because of delay and the lapse of time between the judgment and the order setting it aside…Delay could be decisive, if it seriously prejudices the Plaintiff or third party rights have arisen in the intervening period. ***Harley v. Samson (1914) 30 T. L. R. 450*** was a case in which the Defendant had a good defence but the default judgment was nevertheless not set aside because of the delay of one year during which the judgment debt had been assigned. Delay may also be such that it is proper to infer that there can be no longer a fair trial, especially where the resolution of the dispute depends on memories of witnesses who are going to give oral evidence of an event that happened in a moment of time, such as is the case in most accident litigation: ***Griffiths L.J*** in ***Eagil Trust Co Ltd. v. Piggott-Brown [1985] 3 All E.R. 199 at 123 CA***."

At paragraph 25 of the judgment, the Court made this further

point:

> "A defendant has no right to have a regularly obtained default judgment automatically set aside. There must reach a point when, because of delay, even a defendant with a meritorious defence is precluded from defending: "it is in the interest of the state that there should be an end to litigation". That maxim derived from Latin is the basis of statutes of limitation and of the power of the court to dismiss an action for want of prosecution if there has been excessive delay."

[24] Undoubtedly, the major, though not the only, consideration for the Court is whether the Defendants have disclosed a defence on the merits. The period of time for which the defendants were in default, regard being had not only to the overall period but also to the period elapsing between the date of the judgment and the filing of the application to set aside, and the reasons advanced for the delay are also factors to be taken into account.

[25] In considering this matter, therefore, I start by asking myself whether the Defendants have shown that they have a defence which has a real prospect of success, one to which this Court should pay heed. If the answer to that question is in the negative, that disposes of the matter. If, however, the answer is yes, I need to go on to consider the reasons for the delay and whether the delay is decisive for any of the reasons set out in the judgment of *Clarke v. Ivan Hinds et. al.* or for any other sufficient reason.

The Affidavit

[26] As a general rule, there must be an affidavit of merits to support an application to set aside a regularly obtained judgment: *Bank of Nova Scotia v. Emile Elias & Co Ltd* (1992) 46 WIR 33,35 (para d). Hudleston, B's elucidation of this requirement in *Farden v. Richter* (1889) Q.B.D 124, 129 bears repeating here:

> "The application to set [the judgment] aside must be taken to have been met on the threshold by the objection that the defendant had not made any affidavit suggesting that he had a defence on the merits. During the argument I was inclined to doubt whether such an affidavit could be always necessary. But in *Smith v. Dobbins* [7 L.T. (N.S.) 777] the present Master of the Rolls appears to have stated that it was "an inflexible rule" that a regular judgment properly signed could not be set aside without such an affidavit, and there are statements in the manuals of practice to much the same effect. The expression is perhaps strong, *but, where there is no such affidavit, it is only natural that the Court should suspect that the object of the applicant is to set up some mere technical case. At any rate, when such an application is not supported, it ought not to be granted except for some very sufficient reason."* [Emphasis mine].

[27] It is therefore necessary to see whether the affidavit relied on by the Defendants in this application can be categorised as an affidavit of merits. If it is not so considered, is there some very sufficient reason why relief should not be refused?

[28] The affidavit in support was sworn by Counsel for the Defendants, Ms Weekes. There is no affidavit evidence from the Second Defendant, the driver of the vehicle. No one provides direct evidence of the circumstances of the accident. This feature forms the basis of Ms Goodings' assault on the affidavit.

[29] At paragraphs 1 and 2 of the affidavit, Ms Weekes deposes that she is the Attorney-at-law on behalf of the Defendants and their insurers. That constitutes the first of four parts into which the affidavit can conveniently be divided. The second part comprises paragraphs 4 to 12 which deal largely with the reasons for the delay. Paragraphs 13 to 20 speak to the Defendants' defence. That third part is followed by a solitary paragraph, which states that the affidavit is sworn in support of the application.

[30] Ms Weekes' evidence is that she was given conduct of the matter on 9th January 2006, at which time she became aware that a Writ of Summons had been filed on 15th July 2005 with respect to this accident. Clearly, Counsel is referring to another Writ since the one in this action was not filed until September 2005. She attests that she did not receive that first Writ but did receive a notice of commencement as well as a notice of discontinuance of the action commenced by that document. She states further that she "subsequently" received a Writ of Summons and a Statement of Claim. Apparently, that was the Writ and Statement of Claim in this action

but, according to Counsel, she thought it related to the earlier action so, believing the matter to be at an end, she closed her file.

[31] Clearly, this points to poor communication between the Defendants' insurers and Ms Weekes and some oversight on the latter's part. There is no indication as to the date on which she received the Writ of Summons in this action but we know it must have been on or after 12th August 2006, for that was the date of earliest service of that document.

[32] The reasons for the delay between the date of the judgment and the date of the application to set aside follow. Ms Weekes deposes that she became aware of the subsistence of the action only when she received the Summons for the Assessment of damages. There is no evidence as to what date she received that Summons but the record shows that the Summons was filed on 19th April 2007 and served on the defendants in June 2007. The Second Defendant received his certified copy on 7th June 2007 and the First Defendant his on 16th June 2007.

[33] Yet it was not until beyond three months after service that the application to set aside was filed. Ms Weekes deposes that, having become aware of the subsistence of the action, she then sought full instructions and concluded that there was an issue to be tried.

[34] Turning to the question of the Defendants' defence, at paragraph 13 of her affidavit, Ms Weekes states that, on the basis of her instructions, she believes there is an issue to be tried between the parties. At paragraph 14, she states that the Plaintiff's claim arises out of a collision which occurred at Dalkeith Hill, St Michael, the locus identified in the Plaintiff's Statement of Claim. However, she asserts that the collision was between the Plaintiff's bicycle and the motor vehicle bearing registration number XB673 which was owned and driven at the relevant time by Patrick McConney. She notes that Mr. McConney is not a party to this action. At paragraphs 15 and 16, she informs that the Plaintiff asserts a claim in negligence on the part of the Second Defendant and that he particularises that claim at paragraph 7 of his Statement of Claim. She next asserts at paragraph 17 of her affidavit that the Second Defendant denies that he was negligent as alleged or at all.

[35] At paragraph 18 of her affidavit, Ms Weekes attests that the Defendants intend to rely on an accident report which was issued by the Royal Barbados Police Force. That report is exhibited with the affidavit and marked "LNW1". It is necessary to refer to its contents in some detail.

[36] The Police Report refers to an accident which occurred at Dalkeith Hill, St Michael on 15th March 2003 at 11:25 hours. To be faithful to the report, I reproduce the particulars of the accident in full. Under the caption "BRIEF STATEMENT OF PARTICULARS OF ACCIDENT" it provides as follows:

> "ZR 115 was travelling along Dalkeith Hill, St Michael and the driver stopped to pick up a passenger. ZR 34 was also travelling along Dalkeith Hill towards the same direction and this vehicle ZR 34 drew up alongside ZR 115. This vehicle ZR 34 was driven by Adrian Maynard of St. Hill road, Carrington Village, St. Michael. The motor van XB 673 was traveling in the opposite direction of ZR 115 and ZR 34 and as a consequence the driver of XB 673 had to stop because the road was impassable. At that said time the two bicyclist approached ZR 115 and ZR 34 from the rear. They were riding in a reckless manner. As a consequence of their riding, bicyclist

> Dwayne Medford collided with the rear of ZR 115 and bicyclist Jeffrey Brathwaite who had overtaken ZR 34 crashed into XB 673, smashing its windshield. The driver of ZR 34 contributed to the accident by obstructing the highway. He did so by parking alongside ZR 115 and blocking the oncoming vehicle XB 673. He also blocked the path of the two bicyclist who had intended overtaking the parked vehicle ZR 115. The two bicyclist are also to blame for the accident. They were riding in a reckless manner and failed to acknowledge that the road was blocked. The driver of XB 673 should carry no blame. No one was prosecuted."

[37] In summary therefore, the report suggests that the Plaintiff collided, not with ZR 34, as alleged in the Statement of Claim, but with XB 673. More fundamentally, the report states that the Plaintiff was riding in a reckless manner and failed to observe that the road was blocked.

[38] Ms Weekes deposes that it is on the basis of the above that she believes that the Defendants have a good defence and that, accordingly, she prepared and exhibited a draft defence. In that draft defence, the Defendants deny negligence on their part and assert that the Plaintiff's injuries were caused or contributed to by his negligence.

[39] At the hearing, Ms. Weekes submitted that the police report provides evidence that the Plaintiff may have caused or contributed to the accident. *En passant*, it must be noted that, on a claim of negligence, a defendant has a defence, even if he only intends to argue that the Plaintiff's negligence contributed to the accident. In *Burns v Kondel* [1971] 1 Lloyd's Rep 554, 555 Lord Denning stated:

> "In an accident case it is sufficient if he shows that there is a triable issue of contributory negligence. A plea of contributory negligence, if successful, may reduce the damages greatly."

Ramkissoon v. Olds Discount

[40] The submissions made by Counsel for the Plaintiff invite a consideration of the case of *Ramkissoon v. Olds Discount Co. (T.C.C.) Ltd*. (1961) 4 WIR 73 and an analysis of the Affidavit, the details of which were set out above.

[41] In *Ramkissoon*, the Applicant's application to set aside a default judgment was supported by an affidavit sworn by the Applicant's Solicitor and a statement of defence signed by his Counsel. The Solicitor did not purport to testify to the facts set out in the affidavit nor did he claim to have personal knowledge as to the reasons for the delay in filing a defence.

[42] The Trinidad and Tobago Court of Appeal held that the Solicitor's affidavit did not amount to an affidavit showing a substantial ground of defence and that as the facts related in the statement of defence were not sworn by anyone, there was no affidavit of merit before the judge or the Appellate Court. The basis on which the Court reached its decision is to be found at page 74 of the report, where McShine, Ag C.J., as he then was, stated:

> "Nothing in the affidavit of the solicitor says or suggests that the solicitor had any personal knowledge of the facts of the case *or that what appears in the statement of defence is true*. This affidavit merely attempts, in our view, to excuse the defendant for not filing his defence.

> The appellant seeks to have this court hold that the statement of defence exhibited is a sufficient substitute for an affidavit of merit by the defendant.
>
> In the first place such a statement is not itself on oath *and it is open to the court to suspect that the object of the defendant, in the absence of an affidavit, is to set up some mere technical case, or to cause delay."* [Emphasis mine]

[43] The details of the affidavit in issue in the Ramkissoon case were not set out in the judgment of the Court. Nonetheless, it is clear that, in the circumstances before it, the Court felt that it was open to it to suspect that the defendant's objective was to set up a mere technical defence or cause delay. *Ramkissoon,* does not purport to lay down any rule that the failure to adduce affidavit evidence from someone having personal knowledge of the facts results, axiomatically, in a finding that there is no affidavit of merits.

[44] Each case has to be examined on its own facts to determine whether sufficient has been brought before the Court to establish the existence of an affidavit of merits or, failing such, that there is some very sufficient reason to set aside a judgment. *Ramkissoon* must therefore be seen as a decision on its own facts and I am not persuaded that it is an authority which should lead me to the inevitable conclusion that there was no affidavit of merits in the case before me.

Assessment

[45] In this case, the Attorney-at-law for the Defendants swears of her personal knowledge as to the matters going to constitute the excuse for the delay. She further attests that she received full instructions from the Defendants, on the basis of which, she believed that there was an issue to be tried. It is on the basis of those instructions that she prepared the defence exhibited with the affidavit in which it is asserted, with particulars, that the Plaintiff was negligent. Moreover, she asserts that the Defendants will rely on the accident report which was issued by the Royal Barbados Police Force and exhibited with the affidavit. The assertions of fact in that report suggest that the Plaintiff might, in part or in whole, have been the architect of his own injuries and consequential loss. Clearly, Ms Weekes asserts that the evidence contained in the affidavit and annexed exhibits that speaks to the defence was based on information received from her clients and the Royal Barbados Police, sources she identifies in the affidavit. That being so, Ms. Gooding falls into error when she submits that the affidavit was not sworn to Ms Weekes' personal knowledge or information. The latter had personal knowledge as to the reasons for the delay and information as to the asserted facts giving rise to the defence.

[46] In putting their defence before me, the Defendants did not follow the approach which was highlighted in *Ramkissoon*. There the Court said:

> "Specimen Forms are given in CHITTY'S QUEEN'S BENCH FORMS (18th Edn.) #15 at p. 208 and #25 at p. 123, for use in such cases, where the defendant may in a separate affidavit or conjointly with his solicitor show such merit as would enable a court or judge to set aside the judgment, and in the same affidavit disclose such excuse as may be advanced for his failure to follow any of the rules of procedure." (page 74, para. I)

[47] Nonetheless, it is not without significance that, despite the assault by Counsel for the Plaintiff on the affidavit in support, at no time did she make an application to strike out any portions of that affidavit. It is just as well that she did not, for the evidence as to the circumstances of the accident presented in the exhibited Police Report is, in any event, admissible by virtue of the provisions of Order 41 r 5 (2) of the RSC.

[48] Order 41 r 5 of the RSC provides as follows:

> "(1) Subject to Order 41, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38 r 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof."

[49] This provision allows a deponent of an affidavit in interlocutory proceedings to adduce hearsay evidence, provided the source of that information is identified. That these proceedings are interlocutory proceedings is not in question.

[50] In *Water and Sewerage Authority v Lilian Waithe* (1972) 21 WIR 498, a decision of the Trinidad and Tobago Court of Appeal, the affidavit to set aside was sworn by the Appellant's Secretary who identified the source of his information and stated that he verily believed that information. The information was such as to satisfy the merits' test. However, the Respondent's application was dismissed, the judge opining that the Respondent was barred by Order 38, r 3 of the Rules of the Supreme Court 1946 (Trinidad and Tobago) from relying on the affidavit since, according to him, the proceedings were final in nature. This provision of the Trinidad and Tobago Rules are in *pari materia* with Order 41 r 5 of the RSC.

[51] The Trinidad Court of Appeal gave a contrary ruling, holding the proceedings to be interlocutory in nature. Phillips CJ Ag (as he then was), delivering the judgment of the Court, adopted the test enunciated by Lopes LJ in *Salaman v Warner & Ors* [1981] 1 Q B 734 at 736-737 and stated the applicable test and result this way:

> "It seems to us that the critical point in determining that an order is final for this purpose, is that it must appear that whichever way it went, in other words, whatever was the decision of the judge in Chambers in this application, it would have the effect of determining the rights of the parties. Of course "determining" does not mean that there cannot be an appeal, but determining the rights of the parties in a case where the plaintiff had obtained an order against the defendant entering judgment for damages to be assessed.
>
> Counsel for the respondent sought to argue that the order was final because the order meant in effect that the plaintiff remained with a judgment; but that is not the test. To apply the test it is necessary to see what would happen if the judge had come to the other conclusion. Had he given leave to the defendant to defend, could it be said that the rights of the parties as regards the claim for damages were finally determined? The answer is obviously in the negative."

[52] This issue was also addressed by the Judicial Committee of the Privy Council in *Honiball & Another v Alele* (1993) 43 WIR 314. The Respondent had sworn an affidavit in support of an application to set aside a default judgment in which he had given an opinion as to the value of certain lands and exhibited two expert valuations on which he had relied for that opinion. Lord Oliver of Aylmerton, delivering the judgment of the court, addressed a submission by Counsel for the Appellant to the effect that since there were no affidavits from the Valuers verifying the reports, the Respondent's evidence was mere hearsay. His Lordship described the objection as "misconceived", stating:

> "….the proceedings in their inception and form were **interlocutory proceedings** aimed simply at setting aside an order which was alleged to have been wrongly obtained and restoring the parties to the position as it was in the action before the order was made. Affidavit evidence of information and belief, disclosing the source of the information, was therefore permissible. (p. 324, para. f)

[53] These proceedings are interlocutory in nature and hearsay evidence is admissible. As is stated at para. 41/5/4 of the Supreme Court Practice 1999: United Kingdom, in such instances "a deponent may give not only first-hand hearsay evidence, but also secondhand hearsay." Consequently, the affidavits are capable of constituting an affidavit of merits, provided the evidence points to a defence of the required standard.

[54] The contents of the Police Report which is exhibited with Ms Weekes' affidavit clearly suggest that there might have been some degree of negligence on the part of the Plaintiff. Whether that was, in fact, the case and, if so, whether the degree was absolute or partial and, in the latter event, in what percentage, are serious issues relating to liability which have been raised on the Defendants' affidavit. Such matters can only be determined after the assertions of fact made by both sides are fully ventilated before a trial Court. Arguably, the draft defence must also be considered. It is clear that the effect of Ms Weekes' evidence is that, based on the information she had received, what appears in the draft defence is true. However, even without this, the Police Report suffices.

[55] Undoubtedly, the affidavit provides evidence that satisfies me that the Defendants have a meritorious defence. Any accusation that their objective is to set up some mere technical case or to cause delay cannot be sustained. They have discharged the burden of satisfying this Court that they have a meritorious defence which has a real prospect of success. It is a defence of which the Court must take heed.

[56] That leaves the issue of delay. Though Counsel for the Defendants is to be commended for her frankness, the reasons advanced for the delay do not exculpate the Defendants from stricture. A period of approximately five months elapsed between the date of service of the Writ of Summons on the lastly served Defendant and the date of judgment and a further period of almost eight months between the date of judgment and the date of the filing of the application to set aside. It is not clear when Counsel for the Defendant received the Summons for the Assessment of damages which

alerted her to the fact that a default judgment had been entered. However, this Summons had been served on each Defendant more than three months prior to the filing of the Application to set aside.

[57] This Court finds it difficult to understand why it should have taken the Defendants so long

to instruct their Counsel and have this application filed. For these reasons I find the excuse advanced for the period of delay between the date of judgment and the date of the making of the application to be unconvincing.

[58] An application to set aside should be made promptly but this Court may disregard delay where no prejudice attends as a consequence. Admittedly, the Defendants have failed to file their defence and were dilatory in filing the application to set aside. However, I do not think that the period of delay in this case was so inordinate as to merit the exercise of my discretion against the Defendants. There is no indication of serious prejudice to the Plaintiff. Indeed he too was dilatory in his conduct of his suit and, for whatever reason, had not proceeded to an assessment of damages. There is no indication that third party rights have arisen in the intervening period. The time period that has elapsed does not, without more, render any subsequent trial unfair nor is it sufficiently long to demand that some finality be brought to the litigation.

[59] For these reasons, I conclude that the Defendants are entitled to the relief sought. The judgment given by the Deputy Registrar on 30th January 2007 is set aside on condition that the Defendants file and serve their defence within fourteen days of the date of this judgment; leave to the Plaintiff to reply within 14 days thereafter. With regard to the question of costs, the Defendants will have to pay the costs thrown away by this application.

Olson Alleyne

Judge of the High Court (Ag)