BARBADOS

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
(Civil Division)

Claim No. CV89 of 2014

BETWEEN:

FAYE JORDAN **CLAIMANT**

AND

STANSFELD SCOTT & CO. LTD. **DEFENDANT**

Before the Honourable Mr. Justice Cecil N. McCarthy, Judge of the High Court

Date of Decision: 2020 June 11

Mrs. Kristin C. A. Turton for the Claimant

Ms. Nicole C. Roachford for the Defendant

DECISION

INTRODUCTION

[1] This is an application filed by the defendant on the 6th day of October 2015, for an order setting aside a default judgment obtained by the claimant on the

8th day of December 2014 and entered on the 13th day of March 2015 for damages to be assessed, arising out of a road traffic accident.

[2] In the application, the defendant also requests the Court to grant leave to the defendant to file a defence within fourteen days of the order sought.

[3] The sole ground stated in the application is that the defendant has a good defence to the claim.

THE FACTUAL BACKGROUND

[4] The brief facts relating to the chronology of the claim are not in dispute. On 17 January 2014 and on 1 October 2014 respectively, the claimant filed a claim form and a statement of claim.

[5] The claim form had a general endorsement by which the claimant stated her claim to be for *"Damages, Interest and Costs for personal injuries, loss and damage suffered as a result of damage caused to her motor vehicle arising from a motor vehicular accident on the 17th day of January 2011 due to the negligence of the defendant's employee."*

[6] In the statement of claim, the claimant set out the place and the circumstances of the accident and gave full particulars of the claim.

[7] The claim form and the statement of claim were both served on the defendant at its registered address on 7 October 2014.

[8] The defendant did not file an acknowledgement of service nor a defence.

[9] On the 28 October 2014, the claimant filed a request for entry of a default judgment in default of acknowledgment of service.

[10] On 9 December 2014, a default judgment was granted by the Deputy Registrar for an amount to be determined by the Court and was entered on the 13 March 2015.

[11] On the 6 October 2015, the defendant filed an application for an order setting aside the default judgment.

[12] On the 30 October, 2015 the claimant applied to the court for damages to be assessed, and also filed an affidavit in support of the application.

[13] On 11 March 2016, the defendant filed written submissions in support of the application to set aside.

[14] On 13 May 2016 the claimant filed an affidavit in response to the defendant's application along with written submissions.

[15] On 20 November 2017, counsel for the defendant, Ms. Roachford swore a further affidavit in support of the application to set aside the default judgment.

[16] On 11 December 2018, the application to set aside the default judgment was heard.

[17] The sole ground stated in the defendant's application was that the defendant had a good defence to the claim.

THE AFFIDAVITS

[18] The application to set aside the default judgment was supported by an affidavit from the Operations Manager of the defendant company.

[19] Paragraphs 3 and 4 of the affidavit capture the defendant's version of the facts relating to the accident. They state:

> *"3. On the 17th day of July 2011 an accident occurred by the entrance of Portico, Prospect Main Road in the parish of Saint James in this Island involving motor vehicle bearing registration number MA-7790, driven by our servant and/or agent Demar Bend and motor vehicle bearing registration number SA-1396 driven by the Claimant.*
>
> *4. That I was informed by the said Demar Bend that the accident occurred when the Claimant reversed her vehicle from the entrance of Portico onto the Prospect Main Road and into the path of motor vehicle bearing registration number MA-7790."*

[20] By contrast, the claimant in an affidavit filed 13 May 2016 in response to the application to set aside the judgment, explained the cause of the accident in the following terms:

> *"4. On the date in question at approximately 1:30 pm I was driving along Prospect Main Road in a southerly direction, towards Bridgetown. I slowed down my*

vehicle, checked to ensure that the road was clear and made a right turn into the driveway of Portico. A pedestrian began crossing the driveway of Portico causing me to stop. Most of my vehicle had entered Portico's driveway. Only a small portion of the rear of my vehicle extended into the road because my rear tyres were touching the lip of Portico's driveway. While I was waiting a Transport Board Bus stopped at a bus stop opposite the entrance to the driveway of Portico. The Defendant's employee then attempted to manoeuvre the truck between the said Bus and the rear of my vehicle. The truck then began to slide and collided with the rear of my vehicle. At the time the sun was shining brightly but the road was wet."

[21] The Operation Manager deposed that the reason for the failure to file a response to the claim was that the claim form and statement of claim were forwarded to the insurers for the defendant, who inadvertently failed to expeditiously forward the documents to counsel for the defendant.

[22] The said affidavit does not state when the default judgment came to the attention of counsel for the defendant. However, it did state that the default judgment had recently come to the attention of the defendant.

[23] As required by the Supreme Court (Civil Procedure) Rules, 2008 (CPR) the draft defence is annexed to the affidavit.

[24] The Operations Manager states that the defendant has a real prospect of successfully defending the claim and that the failure to file a defence was not the fault of the defendant.

[25] The application to set aside the default judgment came before me on the 11 December 2018. At the hearing, counsel for both parties made oral submissions to supplement the written submissions that were filed.

The Defendant's Submissions

[26] Counsel for the defendant, Ms. Nicole Roachford highlighted the contrast between the cause of the accident as shown in the draft defence and the cause of the accident as pleaded by the claimant.

[27] Counsel submitted that there were three (3) issues for determination by the court:

(a) whether the defendant has a reasonable prospect for success;

(b) whether the defendant has applied to the court as soon as reasonably practical after finding out that judgment was entered;

(c) whether the defendant had given a good explanation for the failure to file an acknowledgment of service.

[28] Counsel referred to the White Book for the approach to the application to set aside the judgment and particularly for the meaning of 'real prospect of success'.

[29] Counsel referred to the commentary at paragraph 24.2.3 of the White Book 2005, having pointed out that the court has defined "real prospect of successfully defending the claim" in a setting aside of a default judgment application in a similar way to a summary judgment application.

[30] Counsel recites the commentary as follows:

> *"In order to defeat the application for summary judgment it is sufficient for the Respondent to show "some prospect", ie some chance of success. That prospect must be real, that is the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word 'real' means that the respondent has to have a case which is better than merely arguable. The respondent is not required to show that his case would probably succeed at trial. A case may be held to have a "real prospect of success" even if it is improbable.*
>
> *The hearing of an application for summary judgment is not a summary trial. The court at the summary judgment application will consider the merits of the respondent's case only to the extent necessary to determine whether it has sufficient merit to proceed to trial. The proper disposal of an issue under Part 24 does not involve the court conducting a mini-trial as stated by Lord Woolf, Master of the Rolls, in Swain v Hillman [2001] 1 All ER page 91."* (see the White Book 2005 – case reference excluded)

[31] Essentially, counsel argues that the facts as pleaded by the defendant met the requirements of a case which has a real prospect of success.

[32] Counsel submits that the differences in the facts as alleged are for the trial judge to determine. She submits that the version of the facts as alleged by the defendant, if proved, would be evidence of negligence on the part of the claimant.

[33] Counsel referred the Court to the Barbados Highway Code 210, where among other things, it states at paragraphs 7.69 and 7.70:

"7.69 If you cannot see clearly behind, get someone to guide you when you reverse.

7.70 Avoid reversing from a side road into a main road or from a driveway into the road. You must not reverse your vehicle on any road for longer than necessary."

[34] Ms. Roachford contends that the claimant did not adhere to the above provisions of the Highway Code and in the circumstances of the case was negligent.

[35] Ms. Roachford contends that the defendant applied to have the judgment set aside as soon as reasonably practicable after finding out about the judgment. She points out that the order with respect to the default judgment was only filed on 13 March 2015 despite having been granted on 8 December 2014. Indeed, she argues that at no time prior to filing the defendant's application was she served with the said order.

[36] Counsel submits also that there was a good explanation for the failure to file an acknowledgment of service. The reason given was that the claim and statement of claim were given to its insurers with the understanding that the documents would have been passed to its attorneys. Given the contract of insurance between the defendant and its insurers, counsel submits that the inadvertence of the insurers was a good explanation for the failure to file an acknowledgment of service.

[37] Finally, counsel submits that the claimant's statement of claim was in breach of the CPR which requires that the statement of claim and the claim form be issued together.

[38] Counsel argues that the claimant was required to file its statement of claim at the same time as the claim form unless the claim form included all the information required by rules **CPR 8.4** and **8.5** and if applicable **8.7** and **8.8**; or alternatively if the court gave permission.

[39] No permission having been given by the court, counsel submits that on its face the default judgment was irregular and ought not to have been granted by the Deputy Registrar.

[40] It should be noted that this argument was first raised in counsel's written submissions filed on 9 March 2015. It did not from part of the application to set aside the judgment.

The Claimant's Submissions

[41] Counsel for the claimant, Mrs. Kristin Turton, made both oral and written submissions in response to the defendant's application.

[42] Counsel contends that the judgment entered was not irregular. In this regard, she submits that it is the time that the claim form and statement were served not when they were filed that matters. She submits that since they were both served at the same date there was compliance with the CPR.

[43] Moreover, Mrs. Turton argues that the application which was filed by the defendant did not mention any irregularity but stated only one ground, namely that the defendant had a good defence to the claim.

[44] Counsel submits that the only issue for the court is whether it ought to exercise its discretion to set aside the default judgment.

[45] In answering the above question, counsel argues that the court must first be satisfied that the defendant has a real prospect of successfully defending the claim. Furthermore, counsel submits that the burden is on the defendant to

convince the court that it has a real prospect of successfully defending the claim.

[46] Counsel defines a real prospect of success as a realistic prospect of success as opposed to a fanciful prospect of success as explained in **Swain v Hillman [2001] ALL ER 91**.

[47] Counsel submits that while the court has advised against conducting a mini-trial when hearing such applications, in order to make a proper determination a judge may conduct an enquiry in appropriate cases, of which the instant matter is one such case.

[48] Counsel submits further that the essential issue that the Court must decide in the substantive matter is whether the defendant is wholly responsible for the collision.

[49] Counsel recites the two versions of the cause of the accident mentioned at paragraphs 19 and 20 respectively of this judgment and submits that the defendant's account as exhibited in the draft defence is materially inconsistent with the contemporary account given by Mr. Bend to the police.

[50] Counsel submits that Mr. Bend stated in his interview with the Police that *"I was on the way down and I saw the reverse lights"* but there was no mention

Mr. Bend observing the vehicle reversing into his path or even moving at all. On this basis counsel submits that the defence has no realistic prospect of success.

[51] Counsel also argues that the alternative view that the defendant can assert that there was contributory negligence, on the facts, is not sustainable because the defendant would have been required to assert facts that demonstrate its employee used proper care and skill and the defendant had failed in this regard.

[52] Counsel for the claimant therefore submits that the defendant has failed to provide sufficient information to establish that it has more than an arguable case.

[53] Counsel for the claimant also considered whether the defendant applied to the court as soon as practicable as required by the CPR 13.3(2)(a).

[54] In this regard, counsel submits that the onus is on the defendant to show that it applied to the court as soon as reasonably practical after "finding out that judgment has been entered". Counsel contends that the rule does not speak about the time when the order was served on the defendant but it focuses on the time frame between when the defendant discovered that there was a default judgment and the date on which the application to set aside has been

filed.

[55] Counsel submits that the application to set aside judgment must be made 'promptly'. She cites **Regency Rolls Ltd. v Carnall [2000] EWCA Civ 379.** in support of this.

[56] Moreover, counsel argues that since counsel for the defendant does not indicate when the defendant first became aware of the default judgment there is no basis for the court to conclude that the application was made 'promptly'. Therefore, counsel submits that the requirements of **CPR 13.3 (2)(a)** have not been satisfied.

[57] Counsel next addressed the requirements of **CPR 13.3(2)(b)** and submits that the defendant did not give a good explanation for the failure to file an acknowledgement of service.

[58] Counsel contends that the evidence before the court shows that the defendant's application was made as a result of a third party discovering the filing of the default judgment.

[59] Counsel also argues that the defendant has provided no evidence to show why its insurers failed to file a defence as instructed by the defendant.

[60] Counsel submits that there is evidence that notice of the filing of the claim was served on the defendant's insurers on 5 February 2014. Counsel also mentions that counsel for the defendant was notified as early as

11 September 2014 of the claimant's intention to advance the proceedings in the High Court. In the circumstances, counsel contends that the failure of the insurers to file an acknowledgment of service is inexcusable.

[61] Counsel submits that the negligence of the insurer is not a sufficiently good explanation for the delay. Counsel submits that in all the circumstances the defendant has failed to provide an acceptable explanation for its failure to file an acknowledgment of service and the court should, therefore, refuse to exercise its discretion to set aside the default judgment.

[62] Finally, counsel addressed the procedural "irregularity" that was raised in the defendant's written submissions. Counsel for the defendant had contended that since the claim form and the statement of claim were filed on separate dates the default judgment was given on an irregular claim form and statement of claim.

[63] In answer to the defendant's contention, the claimant submits that **CPR 8.2(1)** addresses the circumstances in which the claim form may be "issued and served" without a statement of claim. Counsel contends that given the wording of the rule it was not breached since both the claim form and statement of claim were served together.

[64] Furthermore, counsel argues that **CPR 12.4** prescribes the conditions to be satisfied for a judgment to be entered in default of acknowledgment of service and points out that those provisions focus on the service of the claim form and statement of claim and there is no mention of the dates of filing of the documents being a relevant consideration.

[65] Counsel therefore submits that there is no merit in the defendant's argument and therefore, the court ought to disregard it. Counsel urges the Court to dismiss the defendant's application.

ISSUES

[66] Having regard to the application and the parties' oral and written submissions the issues that arise for determination are:

i) Was the default judgment regularly entered?

ii) If the judgment was regular, has the defendant satisfied the requirements for the court to set aside the judgment entered in default of acknowledgment of service?

THE LAW AND ANALYSIS

ISSUE I – Was the default judgment regularly obtained?

[67] Ms. Roachford argues that the CPR requires that a statement of claim be filed together with the claim form unless the claim form was issued as a matter of urgency, or the limitation for filing the claim form was about to expire and the claimant only obtained legal advice within 28 days. Ms. Roachford contends that this is the effect of **CPR 8.2(1)** and **CPR 8.2(2)**.

[68] The provisions read as follows:

> "8.2 (1) Subject to sub-rule (6), a claim form may be issued and served without the claimant's statement of claim (or an affidavit or other document referred to in sub-rule (1)(c) of rule 8.1) only where:
>
> (a) the claimant has included in the claim form all the information required by rules 8.4 and 8.5 and (if applicable) 8.7 and 8.8; or
>
> (b) the court gives permission.
>
> (2) The court may only give permission if the court is satisfied that:

(a) the claim form must be issued as a matter of urgency and that it is not appropriate of the claimant to be required to prepare a statement of claim or affidavit or other document; or

(b) without limiting paragraph (a), a relevant limitation period is about to expire and the claimant has only obtained adequate legal advice within the 28 days prior to the date on which he wishes to file the claim form."

[69] Mrs. Turton, in response, highlighted the fact that the CPR 8.2(1) speaks to a claim form being "**issued and served**" (**my emphasis**) without the claimant's statement of claim. The claim form and the statement of claim having been served together, Mrs. Turton contends that there is no breach of the CPR.

[70] Mrs. Turton goes further to mention that **CPR 12.4**, which prescribes the conditions to be satisfied for judgment to be entered in default of acknowledgment of service, merely requires proof of the service of the claim form and the statement of claim and that there is no mention of the dates of filing of the documents.

[71] Having reviewed the language of the **CPR 8.2** I agree with Mrs. Turton's submissions. The purpose of the provisions, in my view, is to ensure that the

full particulars of the claim are given at the time the documents are served on the defendant.

[72] It is only if the claimant intends to depart from this that the permission of the court is required. I, therefore hold that the judgment entered by the Deputy Registrar was regularly entered.

ISSUE II – Has the defendant satisfied the requirements for the Court to set aside the default judgment?

[73] **CPR 13.3(1)** and **(2)** make provision for setting aside a default judgment. They provide:

> "13.3(1) The court may set aside or vary a judgment 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 reasonably practicable after finding out that judgment had been entered; and
>
> (b) given a good explanation for the failure to file an acknowledgment 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."

[74] Based on the above rules it is evident that the sole ground for setting aside a default judgement is if the court finds that the defendant has a real prospect of successfully defending the claim.

[75] However in considering how to exercise its discretion the court must consider whether the defendant has:

(a) applied to the court as soon as reasonably practical after finding out that judgment had been entered; and

(b) given a good explanation for failure to file an acknowledgment of service or defence as the case may be.

What is a "Real Prospect of Success"?

[76] Having considered the extensive case law on the subject I am of the view that a real prospect of success as used in **CPR 13** means one that has a realistic as opposed to a fanciful chance of success, one that is better than merely arguable and one that carries some degree of conviction. Some of the cases in which this term has been discussed are:

Swain v Hillman [2001] ALL ER, 91;

International Finance v Utexafrica Sprl [2001] ALL ER 101;

Three Rivers District Council v Bank of England (No.3) [2003] AC 1;

ED&F Man Liquid Products Ltd v Patel and ANN [2003] ALL ER 75;

Olympia Incorporated and Chandler v RBTT Bank Barbados Limited (Suit: 1679 of 2011, date of decision March 28, 2014);

Clarke v Hinds et al (Civ. Appeal No. 20 of 2003, date of decision 4 June 2004).

[77] It is also important to note that the cases have defined real prospect of successfully defending the claim in the context of a CPR 13 application to set aside, in a similar manner as in an application for summary judgment.

[78] Of course, there is the difference that in the Part 13 application it is for the defendant to show that his defence has a real prospect of success while in a summary judgment application it is for the claimant to show that the defence has no real prospect of success.

[79] I also accept that the extract from the White Book 2005 reproduced at paragraph 30 hereof is still an accurate explanation of "real prospect of success" and I adopt it.

[80] The defendant's defence is straightforward. The defendant contends that the claimant reversed her motor car onto the main road and into the path of the vehicle that was being driven by its employee or agent.

[81] In response, the claimant's case is that this version of events was not communicated to the Police at the time of the accident. Counsel for the

claimant argues further that based on the conflict between the defendant's case and that exhibited in the police report that a court would have no alternative but to reject the evidence of the defendant and find for the claimant.

[82] Counsel for the claimant relies on the Police Report which records the defendant's driver at the time of the accident as saying: "I was on my way down and I saw her reverse lights. I press brakes and tried to stop. The road was wet and the van started to slide and I pulled to my right to avoid hitting the van and my van slide and hit the car."

[83] The evidence from the Operations Manager of the defendant is that the claimant reversed her car from the entrance of Portico into the path of the vehicle driven by the defendant's employee.

[84] On this basis the defendant pleads that the accident was caused solely or contributed by the claimant.

[85] Having regard to the fact that the report records the defendant's driver as saying that he saw the reverse lights on the claimant's vehicle, is the defendant's version of the accident incompatible with what was stated in the police accident report?

[86] It seems to me that the resolution of this matter is one for the trial judge based on evidence subject to cross-examination.

[87] As it stands, it seems likely that if the defendant can establish its allegations concerning the accident the defence would have a realistic prospect of success. Although the defendant's case is not overwhelming in my judgment it is a defence that is more than merely arguable.

[88] Counsel for the claimant has invited me to consider whether the default judgment should not be varied if I am not minded to set it aside. This power is found in CPR 13.3(3), above.

[89] I have considered counsel's argument. However, I must bear in mind that my role is to make an assessment based principally on the affidavit evidence. It seems to me that where the evidence conflicts unless the version of the facts is clearly unsustainable or unbelievable the court must assume that the trial judge can be persuaded by the evidence. To make a judgment in the absence of having the oral testimony would in my view be a usurpation of the function of the trial judge.

[90] In this regard I refer to the following extract from the headnote in **Day v RAC Motoring Services Ltd [1999] 1 ALL ER 1007**:

"The court should, however, be very wary of trying issues of fact on affidavit evidence where facts were apparently credible and were to be set against the facts being advanced

by the other side, since choosing between them was the function of the trial judge, not the judge in the interlocutory application unless there was some inherent improbability in what was being asserted, or some extraneous evidence which would contradict it."

[91] I, therefore decline to make a judgment on whether there was contributory negligence.

Has the defendant applied to the Court as soon as reasonably practicable after finding out that the default judgment was entered.

[92] In deciding whether to set aside the default judgment I am required under CPR **13.3(2)(c)(a)** to consider whether the defendant has applied to the court as soon as reasonably practicable after judgment had been entered.

[93] By an affidavit sworn on the 20th day of November 2017 counsel for the defendant deposed that on 9 July 2015 she was orally informed by counsel for the claimant that she had obtained default judgment in the matter but would confirm by sending a copy to her.

[94] Counsel deposed further that a copy of the default judgment was served on the 11 December 2015 together with the application for assessment of damages. According to counsel, on 21 September 2015 her office confirmed with the documents clerk at the Registry at the Supreme Court that a request for a default judgment was made on 28 October 2014 and the order was granted.

[95] In responding to this requirement Mrs. Turton submits that the CPR speaks to applying to the court as soon as reasonably practicable after "finding out" that judgment had been entered and not after being served with the order. On this basis, she argues that the time frame that the court has to consider is the period between when the default judgment came to Ms. Roachford's attention and the date on which the application to set aside the judgment was made.

[96] If that is so, based on Ms. Roachford's affidavit, the application was made approximately two months and twenty days after being orally informed of the default judgment. On the other hand, if the court uses the date of service of the order, there would be no issue of delay since the application for setting aside was made prior to the service of the default judgment.

[97] Interestingly, Mrs. Turton does not use the same precision of language when she refers to the **CPR 13.3(2)(c)(a)**. Instead she equates *"as soon as reasonably practical"* with *"promptly*" and invokes the decision of the English Court of Appeal in **Regency Rolls v Carnell [2000] EWCA Civ. 379** where Simon Brown LJ concluded that for a party to act promptly they need to exercise "all reasonable celerity in the circumstances".

[98] "Promptly" is the language used in the English Civil Procedure Rules. But even in those rules "promptly" takes its meaning from its context as explained by William Davis J in **Ian Workman v Deansgate 123 LLP [2019] EWHC 360 (QB)** at paragraphs 25 and 26 of his judgment:

"25 The term "promptly" has been the subject of detailed consideration in the context of Part 39 i.e. where an application is made to set aside an order made after a party has failed to appear at a hearing or trial. In Regency Rolls v Carnall [2000] EWCA Civ 379 Simon Brown LJ (as he then was) concluded that, for a party to act promptly, they need to exercise "all reasonably celerity in the circumstances". This was to be contrasted with the concept of "no needless delay whatever" which

Simon Brown LJ concluded would be too high a threshold. In Bank of Scotland v Pereira [2001] EWCA Civ 241 Lord Neuberger MR emphasised that what constituted promptness in any particular case was highly fact-sensitive.

26 In Part 39 promptness is a requirement which must be satisfied before relief can be granted. The same does not apply in Part 13. As made clear in Standard Bank v Agrinvest International [2010] EWCA Civ 1400 it is nonetheless a factor of considerable significance."

[99] Bearing in mind that the ground for setting aside the judgment is identified in **CPR 13.3(1)** as the defendant having a real prospect of success, it is

difficult to see how a delay of three months can result in the court refusing to set aside a judgment on the basis of delay.

[100] I should also add that the application to set aside the judgment was made prior to the claimant's application for damages to be assessed.

[101] Having regard to the actual facts and circumstances of this case, I conclude that it cannot be said that the defendant's application to set aside the judgment was made too late.

Did the defendant give a good explanation for the delay?

[102] Under **CPR 13.3(2)(b)** the court must consider whether the defendant has given a good explanation for the failure to file an acknowledge of service or a defence as the case may be.

[103] In the instant case the explanation given for failure to file an acknowledgment of service or defence is that the claim form and the statement of claim were forwarded to the defendant's insurers for a defence to be filed but unfortunately the documents were not forwarded to counsel for the defendant.

[104] The question that arises, therefore, is whether the inadvertence of the defendant's insurers is a good reason for the defendant's failure to file an acknowledgment of service or defence.

[105] I agree with counsel for the claimant that the affidavit in support of the defendant's application does not advance a good reason for the delay.

[106] The affidavit reads at paragraph 6 and 7 as follows:

> "*6. The Claim Form and Statement of Claim was forwarded to Harmony General Insurance Company Ltd. in order that a Defence to be filed on behalf of the Defendant.*
>
> *7. Unfortunately, I am advised and verily believed that the Defence was not filed as the same was not immediately forwarded to Ms. Nicole C. Roachford for action and as a result on the 28th day of October 2014 an Application was filed requesting Default Judgment. To date no order has been served on the Defendant."*

[107] Was the failure to transmit the documents to counsel for the defendant mere inadvertence or was there some other reason for the failure? The affidavit does not condescend upon particulars of the reasons for the failure to send the documents to the attorneys.

[108] Although I am of the view that the affidavit falls short of what is required under **CPR 13.3(3)(b)** I do not agree with counsel for the claimant that the court ought to refuse to set aside the judgment solely on that account.

[109] As Kentish J points out in **Olympia** supra, the absence of a good explanation is only one factor to be considered by the court under the CPR and it is not

the primary factor in the exercise of the court's discretion (see paragraph 133 of the judgment).

[110] The cases also demonstrate that the Court should consider any prejudice that the claimant may suffer as a result of the failure to set aside the judgment.

[111] In **Clarke v Hinds et al supra.** the Court of Appeal had this to say on the issue of delay and prejudice:

> *"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. This is such a case. 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 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 no longer be a fair trial, especially where the resolution of the dispute depends on the 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. 119 at 123 CA."*

[112] In the instant case the defendant contends that the prejudice is against the defendant since it will have to pay damages and not have an opportunity to contest the judgment on the merits. On the other hand, the claimant argues that a default judgment is a thing of value which the claimant should not be deprived of without good reason. She refers to **International Finance Corporation**, supra where **Moore-Bick J** said at paragraph 6 of his judgment:

"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."

[113] Even though there has been significant delay in the resolution of this matter I cannot say that it has been caused significantly by the defendant.

[114] As it stands, it seems that the accounts of the accident would have been documented on both sides and the two accounts are not complex nor do they comprise significant detail. There is also no evidence of any third party interests being affected if this matter were to proceed to trial.

DISPOSAL

[115] Having carefully weighed the relevant factors I have decided that the default judgment entered by the Registrar herein shall be set aside, and I so order.

[116] I also order that the defendant shall pay the claimant's costs on the application to be assessed, if not agreed.

[117] The defendant shall file a defence by 26 June 2020.

APOLOGY

[118] This matter first came before me in 2018 and it has been plagued by the absence of a court file and at times the absence of relevant documents. I am grateful for counsel for having provided me with the documents to reconstitute the file. Even so, I believe I ought to have been able to render this judgment somewhat earlier and for that I apologise to counsel.

Cecil N. McCarthy
Judge of the High Court