[2019] JMSC Civ 181

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV01702

BETWEEN	**ADMINISTRATOR GENERAL FOR JAMAICA (on behalf of the ESTATE and NEAR RELATION STEPHEN LLOYD SPENCER, deceased)**	**CLAIMANT**
AND	**COOL PETROLEUM LIMITED**	**1ST DEFENDANT**
AND	**COOL CORP. LIMITED**	**2ND DEFENDANT**
AND	**OTHNEIL WILLIAMS (T/A WILLIAMS & SON GENERAL MAINTENANCE)**	**3RD DEFENDANT**

IN CHAMBERS

Winsome Marsh for the claimant

Antonia Armstrong instructed by Jordon and Francis for the 3rd defendant/applicant

June 26, 2017 and September 16, 2019

Application to set aside default judgment – Rule 13 of the Civil Procedure Rules (CPR) – Whether application for relief from sanctions under rule 26 of the CPR is required – Requirements to set aside default judgment – Real prospect of success in defending claim is foremost consideration – Applicant must have an affidavit of merit – Waiver of affidavit of merit possible only in exceptional circumstances – Applicant must have acted promptly and have a good explanation for failure to comply – Court still has discretion to set aside judgment where application not prompt and there is no good explanation

D. FRASER J

THE APPLICATION

[1] On May 24, 2016, the 3rd defendant (the applicant herein) filed a notice of application with supporting affidavit and draft defence exhibited, seeking amongst others, the following orders, that:

(i) The 3rd defendant be relieved from sanctions pursuant to rules 26.7 and 26.8 of the **Civil Procedure Rules** (**CPR**);

(ii) Judgment in default of acknowledgment of service entered against him be set aside; and

(iii) The time for filing an acknowledgment of service and defence be extended and he be permitted to file same within 7 days and 14 days, respectively, of the hearing of the application.

[2] The grounds on which the orders were sought included, that:

(i) Rules 26.7(2) and 26.8 permit a party to apply for relief from sanction and empowers the court to grant relief if satisfied that the failure was not intentional, and there is a good explanation for the failure;

(ii) Rule 13.3(1) empowers the court to set aside or vary a default judgment if the defendant has a real prospect of successfully defending the claim. Rule 13.3(2) provides that on such an application the court must consider whether the defendant has applied to the court as soon as reasonably practicable after finding out that judgment has been entered and has given a good explanation for the failure to file an acknowledgment of service or defence; and

(iii) Under rule 26.1(2) (c) the court is empowered to extend or shorten the time for compliance with any rule, practice direction, order or direction of

the court, even if the application for an extension is made after the time for compliance has passed.

THE CLAIM

[3] On March 21, 2012, the underlying claim was filed by the claimant under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act, for the benefit of the near relations and the estate of Stephen Lloyd Spencer, deceased against the defendants. The claim seeks damages for negligence, breach of contract and/or breach of statutory duty under the Occupiers Liability Act arising out of the deceased suffering fatal burns while carrying out work on or about March 22, 2009 on premises occupied by the defendants on the instructions of the defendants.

[4] A settlement was negotiated with the 1st and 2nd defendants and the matter proceeded against the 3rd defendant. The 3rd defendant denied liability on bases outlined in his draft Amended Defence, that will be reviewed during later analysis.

ISSUES:

[5] The issues which arise for determination are:

(i) What is the appropriate application to be made where an applicant seeks to set aside a default judgment obtained pursuant to Part 12 of the **CPR?**

(ii) Whether the default judgment entered against the 3rd defendant/applicant on March 6, 2014 should be set aside?

Issue I – What is the appropriate application to be made where an applicant seeks to set aside a default judgment obtained pursuant to Part 12 of the CPR?

Submissions

[6] Counsel for the 3rd defendant/applicant sought to demonstrate that the applicant had satisfied both rule 13 which addresses setting aside default judgments as well as rule 26 which deals with relief from sanctions.

[7] She submitted that rule 13 (1), (3) and (4) had been complied with, as the applicant:

i) has a real prospect of successfully defending the claim;

ii) applied to the court as soon as reasonably practicable after finding out that judgment had been entered;

iii) gave a good explanation for the failure to file an acknowledgment of service or defence; and

iv) supported his application by evidence on affidavit, which exhibited a draft of the proposed defence;

[8] She relied on the cases of ***Evans v Bartlam*** [1937] AC 473; ***Ramkissoon v Olds Discount Co. (T.C.C.) Ltd.*** (1961) 4 W.I.R. 73; ***Thorn plc v MacDonald and another*** [1999] CPLR 660, CA; ***Smith v Medrington*** (1997) Supreme Court, BVI, no 103 of 1995 (unreported); and ***Sydney Malcolm v Metropolitan Management Transport Holdings Ltd and Glenford Dickson*** (unreported), Supreme Court, Jamaica, Suit No. C.L. 2002/M225, heard 21 May 2003.

[9] Counsel also submitted that, as the granting of default judgment is an administrative procedure, in keeping with the overriding objective the court should allow the substantive issues to be tried and give the applicant the opportunity to show that he had no liability at all. Counsel further noted that under rule 27.2 of the **CPR** the court has the power to extend time.

[10] Counsel additionally argued that the court had the power both to set aside the default judgment, as well as under Part 26 to grant relief from sanctions imposed by Part 12, for failure to acknowledge service and file a defence. She submitted that relief from sanctions should be granted as: the application had been made promptly; was supported by evidence on affidavit; the applicant's failure to file an acknowledgment of service and defence was not intentional; there was a good explanation for his failure; and the applicant had generally complied with the court's rules in making this application. Further, she contended that granting the application would be in the interests of justice, and in keeping with the overriding objective.

[11] Counsel for the claimant in response submitted that there was no need for an application for relief from sanctions as it was solely Part 13 of the CPR which applied. She relied on the case of ***The Attorney General of Jamaica v John Mackay*** [2012] JMCA App 1.

Discussion and Analysis

[12] In ***Attorney General v Keron Matthews*** [2011] UKPC 38, on a consideration of rules 26.6 and 26.7 of the **CPR** in Trinidad and Tobago, which is similarly worded to rules 26 (7) & (8) of our **CPR** Lord Dyson writing for the Board stated at paragraph 18 that:

> [I]t cannot have been intended that, where a Defendant wishes to set aside a default judgment, it must satisfy the conditions of both r 13.3 and 26.7. Part 13 is concerned with setting aside a default judgment. That is clear from the content of the Part and is spelt out in r 13.1 ("the rules in this Part set out the procedure for setting aside or varying a default judgment entered under Pt 12 (default judgments)"). Part 26 is concerned with the court's general powers of management. It cannot have been intended that a Defendant who wishes to set aside a default judgment must satisfy the requirements of both rules. If a Defendant satisfies the two conditions specified in r 13.3, his application to set aside the judgment should succeed. The court cannot refuse the application on the grounds that, although the r 13.3 conditions have been satisfied, the further conditions specified in r 26.7(3) have not been. If it had been intended that, unless a

> Defendant satisfies these further conditions, the court may not set aside a default judgment, this would have been stated in r 13.3. The fact that it is not stated in r 13.3 indicates that the r 26.7(3) conditions have no part to play when the court decides whether to set aside a default judgment. It follows that an application to set aside a default judgment is not an application for relief from a sanction imposed by the rule.

[13] In ***The Attorney General of Jamaica v John Mackay***, Morrison JA, (as he then was), writing for the Court of Appeal said at paragraph 29:

> In ***Keron Matthews***, the Board held that the entering of a default judgment pursuant to rule 12.4 or 12.5 of the rules (providing for the entry of default judgment for failure to file an acknowledgment of service or a defence within the time limited by the rules) was not an 'implied sanction'. A defendant who wished to set aside such a judgment was therefore only obliged to satisfy the conditions of rule 13.3, which sets out the criteria for setting aside default judgments, and not of rule 26.8, which sets out the conditions upon which the court will grant relief from sanctions.

[14] Then, later at paragraph 31, he noted the critical distinction between, *firstly,* a default judgment entered because of a failure to comply with Part 12, and *secondly,* one where judgment was entered following non-compliance with a court order extending time for filing a defence, in default of which, permission is given to the claimant to enter judgment. In keeping with the judgment of the Judicial Committee of the Privy Council in ***Attorney General v Universal Projects Ltd*** [2011] UKPC 37, Morrison JA outlined that in the first situation, Part 13 governed applications to set aside such a default judgment, whereas in the second situation an application for relief from sanctions was required under Part 26.

[15] The instant matter falls squarely within the first situation. The applicant failed to comply with the timelines for the filing of his acknowledgment of service and defence set out in Part 12. There was no time line established in a court order that was breached. Accordingly, based on the above analysis, only Part 13 applies to this application.

Issue II – Whether the default judgment entered against the 3rd defendant/ applicant on March 6, 2014 should be set aside?

The Applicable Rule

[16] Rule 13.1 of the CPR indicates that Part 13 sets out the procedure for setting aside or varying default judgments entered under Part 12. Rule 13.2 of the CPR, which both parties agree does not apply in this matter, addresses cases where the court must set aside the default judgment.

[17] Under the heading, "Cases where court may set aside or vary default judgment", Rule 13.3 provides that-

(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 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 the power to set aside a judgment, the Court may instead vary it.

[18] Under the heading, "Applications to vary or set aside judgment – procedure, Rule 13.4 provides that-

(1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on the affidavit.

(3) The affidavit must exhibit a draft of the proposed defence.

Submissions

[19] The submissions of counsel for the applicant were blended across the two issues on the basis of the view, now shown to be mistaken, that the application had to address both setting aside under Part 13 and relief from sanctions under Part 26. The following submissions are therefore in addition to those previous outlined under issue 1.

[20] Counsel for the 3rd defendant/applicant additionally submitted that the applicant's affidavit evidence, which has attached and incorporated the draft Defence, cumulatively sets out the reasons for the applicant's failure to comply, in a manner which shows the merits of his application and his defence. She argued that the instant case was distinguishable from the circumstances in ***Ramkissoon v Olds Discount Co. (T.C.C.) Ltd.***, hence there was no impediment to the application of the applicant being granted. She further advanced that the applicant's sworn affidavit evidence disclosed that he had no intention of flouting the rules, but that his default was due to his having relied on Mr. Wynter, who had fraudulently passed himself off as an attorney-at-law.

[21] Counsel also contended that the application to set aside was made as soon as reasonably practicable after the applicant learned the default judgment was entered, as it was made just 11 days after the applicant became aware of it and of the fact that his legal interests were not being protected by Mr. Wynter as he had believed.

[22] Counsel for the applicant further submitted that the applicant had a real prospect of successfully defending the claim which alleged against the applicant a breach of the **Occupier's Liability Act**, and/or negligence, and/or breach of contract of employment in failing to provide a safe system of work and proper tools.

[23] The basis of this submission was hinged on the applicant's assertion in his amended draft defence that:

i) Concerning the alleged statutory breach he was an independent business operator contracted by the 1st and/or 2nd defendants to carry out certain maintenance work on the day of the accident, and accordingly was a mere invitee to the relevant premises at the time of the incident;

ii) In relation to the alleged of breach of contract of employment the deceased was not his employee, but a casual / day worker who offered his services for labour on/for the relevant day;

iii) On the question of negligence, the deceased was provided with adequate and appropriate safety gear for the job which he was to be doing on the particular day, namely, to move hoses and clean-up of the work area. Further, that the deceased wholly/substantially caused and/or contributed to his own demise in that he, amongst other things, knowingly engaged in an activity on site which he knew was dangerous and which he knew he was not qualified to do / undertake.

[24] Counsel contended that the applicant's amended draft Defence raised significant issues/questions of fact and law which can only be properly ventilated at a trial.

[25] Counsel for the claimant/respondent submitted that the applicant must first satisfy the court that once he discovered that the judgment was entered against him, he acted promptly and he must give a good explanation for his delay in dealing with his matter.

[26] Counsel argued that the combined effect of:

i) there being over one year between the 1st court date the applicant attended (April 14, 2015) and when he filed the application to set aside the judgment (May 24, 2016); and

ii) the fact that on his second appearance in court (November 2015) he was informed of the importance of having a lawyer and knew from then that something was wrong and he was at risk;

meant that it could not be said he acted promptly, as if he had been more diligent he would have discovered earlier that his matter was not being handled satisfactorily.

[27] Counsel for the claimant also advanced that the applicant had not demonstrated that he had a real prospect of successfully defending the claim as it was not sufficient to have attached the draft amended defence to one of his affidavits; the defence should have been incorporated in the body of an affidavit. Consequently, there was no evidence on oath for the court to consider as required by rule 13.4(2) of the CPR. Counsel relied on the authorities of ***Ramkissoon v Olds Discount Co. (T.C.C.) Ltd***; ***The Attorney General of Jamaica v John Mackay***; and ***Kimaley Prince v Gibson Trading & Automotive Limited (GTA)*** [2016] JMSC Civ 147.

[28] In summary, counsel submitted that the explanation of delay was insufficient, the claimant was prejudiced by the delay, which could not be addressed by costs, and there was insufficient evidence which fell short of what the rules require. Counsel therefore invited the court to dismiss the application with costs to the claimant and the grant of leave to the claimant to secure a date for assessment of damages.

Discussion and Analysis

[29] In the scheme of rule 13.3 the first hurdle that an applicant has to overcome is to satisfy the court that he has a real prospect of successfully defending the claim. That is without doubt critical to the granting of any application. There is authority for the proposition that if an applicant satisfies this condition the court may in appropriate circumstances still favourably rule on an application to set aside, even if the applicant has not acted with reasonable promptitude and/or does not have a good explanation for failing to file the acknowledgment of service or defence within time. See ***Victor Gayle v***

Jamaica Citrus Growers and Anthony McCarthy 2008HCV05707 (jud. del. April 4, 2011). If, however, there is no real prospect of successfully defending the claim, then even an immediate application after the default judgment has been entered and the best of explanations for the default, should not suffice to move the court to grant a pointless reprieve. Accordingly, I will first consider whether the applicant has established that he has a real prospect of successfully defending the claim.

[30] It is perhaps best to start with ***Ramkissoon v. Olds Discount Co. (T.C.C.) Ltd,*** The details of that case are adequately summarised in the headnote as follows:

> The respondent obtained judgment in default of defence against the appellant on 28 November 1960. On 15 December 1960, the appellant applied to a judge in chambers to have the judgment set aside. The application was supported by an affidavit sworn to by the appellant's solicitor and a statement of defence signed by counsel. The application was refused. The appellant appealed, contending, *inter alia*, that the affidavit along with the defence constituted a sufficient disclosure of merit and dispensed with the need for an affidavit from the defendant personally. In his affidavit, the solicitor did not purport to testify to the facts set out in the defence, nor did he claim to have personal knowledge of the matters put forward to excuse the failure to deliver the defence. **Held:** (i) the solicitor's affidavit did not amount to an affidavit stating facts showing a substantial ground of defence; and as the facts related in the statement of defence were not sworn to by anyone, there was no affidavit of merit before the judge or the Court of Appeal; (ii) the judge had given consideration to the relevant factors before exercising his discretion and as there was no sufficient ground for saying that he had acted contrary to principle, his decision could not be disturbed. *Evans v Bartlam* [1937] AC 473, sub nom Bartlam *v* Evans, 157 LT 311, HL, Digest Supp) applied.

[31] In ***The Attorney General of Jamaica v John Mackay*** the situation was similarly that, in seeking to set aside the default judgment entered due to the failure of the applicant to file a defence, within the time limited by the rules, the applicant relied on an affidavit of counsel. The Court of Appeal in upholding the refusal of the Chamber judge to set aside the default judgment, held that the affidavit was insufficient to provide the defence on the merits required by the rules to entitle the judge to exercise his discretion as prayed. Morrison JA, (as he then was), writing for the Court, stated at paragraph 23, that:

> 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".

[32] Counsel for the applicant in this case placed great reliance on the fact that in the instant case the affidavits filed were sworn to by the applicant himself. That counsel submitted, was a significant basis for distinguishing ***Ramkissoon***, *(and by implication also **Mackay**)*, where in each case, the affidavit was sworn to by counsel on behalf of the applicant. The issue, however, goes beyond who files the affidavit. The significant factor is whether the affiant can and does provide, sufficient content from his own knowledge that can establish a defence on the merits.

[33] That significance was clearly demonstrated in the case of ***Kimaley Prince v Gibson Trading & Automotive Limited (GTA)*** [2016] JMSC Civ 147. In that matter, McDonald J considered an application to set aside a default judgment obtained in default of acknowledgment of service. The evidence in support of the application was provided not by counsel, but by Mr. Ian Gibson a director of the defendant company. His affidavit sought to explain the reason for the company's default and stated that there was a good defence, a draft copy of which was attached to his affidavit.

[34] After reviewing authorities and in particular dicta from Morrison JA, as he then was, in ***B & J Equipment Rental Limited v Joseph Nanco,*** in which he affirmed his

decision in ***The Attorney General of Jamaica v John Mackay,*** McDonald J had this to say at paragraphs 22 – 23:

> **[22]** Having regard to the foregoing, it is apparent that the affidavit of merit ought to disclose facts which constitute the defence and in my view this obligation is not met by exhibiting a draft of the proposed defence which is a separate requirement under rule 13.4(3).
>
> **[23]** In the instant case, the defendant has failed to produce to the court evidence on affidavit that there is a prima facie defence and in particular has failed to set out the alleged defence on the merits. The effect of this is that the defendant's application to set aside the default judgment must fail. I am fortified in my view by reference to the **Commonwealth Caribbean Civil Procedure**, 3rd ed. at page 58, wherein the learned authors, Gilbert Kodilinye and Vanessa Kodilinye, opine –
>
>> *It had been stated, on innumerable occasion [sic] in Commonwealth Caribbean courts under the RSC regime, that the absence of an affidavit of merit in support of an application to set aside a default judgment would normally be fatal to such application, and the practice of providing an affidavit of merit would be departed from only in rare cases. In view of the need under the CPR for the defendant to show not merely an arguable case but a real prospect of success, it seems that the affidavit of merit should be even more essential under the CPR regime. Indeed, Rule 13.4 specifically provides that an application to set aside a default judgment 'must be supported by evidence on affidavit", and the affidavit must exhibit a draft of the proposed defence.*
>>
>> *However, service of a defence alone is not sufficient, as a statement of case is not evidence'...*

[35] The cases of ***Thorn plc v MacDonald and another***; ***Smith v Medrington***; and ***Sydney Malcolm v Metropolitan Management Transport Holdings Ltd and Glenford Dickson*** relied on by the applicant, do not directly assist in the resolution of this matter. They all emphasize that the critical consideration for the court on an application to set aside a default judgment is whether the applicant has a real prospect of successfully defending the claim. However, in the final analysis of both ***Thorn plc v MacDonald and another*** and ***Sydney Malcolm v Metropolitan***

Management Transport Holdings Ltd and Glenford Dickson in neither was there a concern about the absence of demonstrated merit of the defence and an evidential lacuna, as exists in the instant matter. In each of those cases, the court found there was adequate affidavit evidence outlining a defence. Though I was unable to ascertain the facts of ***Smith v Medrington,*** the extract highlighted by Kodilinye and Kodilinye in their text **Commonwealth Caribbean Civil Procedure** 3rd ed. at page 57 established that the learned chamber judge Moore J indicated that, *"The…applicant…must by potentially credible affidavit evidence, demonstrate a real likelihood that he will succeed."* The principle stated is therefore consistent with the requirement as outlined in the other cases.

[36] Against this background of authority, I now turn to consider the affidavit evidence proffered by the applicant. The applicant filed three affidavits. In his first affidavit filed May 24, 2016, he indicates that to the best of his recollection he was served with court documents in the matter in 2015, after which he consulted Mr. Wynter who he believed was a certified attorney-at-law. He further indicated that he had attended court in February and October 2015, but on neither occasion did Mr. Wynter appear. Despite these non-appearances, based on Mr. Wynter's representations that all was well with the case, he had confidence his legal interests were being duly represented and protected. However, with the hearing of the matter pending for May 13, 2016 and being unable to contact Mr. Wynter he decided to try to obtain another lawyer. He was unable to do so before the hearing. When he attended court on May 13, 2016, he learned from a female attorney that Mr. Wynter was not an actual lawyer. He was unable to get her to represent him so he attended the hearing himself, explained the situation to the judge, and later on May 20, 2016 obtained counsel who now appears for him. A draft defence was exhibited to this affidavit.

[37] The applicant's second affidavit was filed on April 3, 2017 and sought to respond to an affidavit in opposition to his application filed by the claimant in which the most significant factual assertion was that the applicant had been served with the claim on October 28, 2013. In his response the applicant indicated he was not lying in

his first affidavit since he had stated it was to the best of his recollection as he did not recall the specific date. He did not seek to challenge the date of service averred by the claimant.

[38] In his third affidavit, styled as a supplemental affidavit in support of his application, also filed on April 3, 2017, the applicant explained that the initial defence exhibited to his first affidavit had been hurriedly filed and exhibited a draft Amended Defence which he indicated clarified and better detailed his defence.

[39] The summary of the evidence reveals a glaring omission in light of the authorities reviewed. The affidavit of merit has not disclosed facts constituting the defence, and as noted by McDonald J in ***Kimaley Prince v Gibson Trading & Automotive Limited (GTA),*** the requirement to provide evidence is not satisfied by exhibiting a draft Defence which is a separate requirement under rule 13.4 of the CPR. It is also necessary to emphasize that as noted by Kodilinye and Kodilinye in **Commonwealth Caribbean Civil Procedure**, 3rd ed. at page 58, *"a statement of case is not evidence"*.

[40] The significance of this distinction is highlighted by a review of the draft Amended Defence exhibited by the applicant. At paragraphs 4 to 7 he states in part:

> 4. …The 3rd Defendant says…that he has never been the servant and/or agent of the 1st and/or 2nd Defendants. The 3rd Defendant is a self-employed businessman who would occasionally do contracting work…for the 1st Defendant. The 3rd Defendant has never signed a contract of employment with neither *[sic]* the 1st nor 2nd Defendant in all his dealings with 1st Defendant.
>
> 5. …The 3rd Defendant was not an occupier/owner of the relevant premises; he was a mere invitee to the premises, just as all the other workmen, for the purpose of carrying out his work…
>
> 6. The 3rd Defendant says…that in all his dealings with the 1st and/or 2nd Defendants, he never entered into any contract of employment with them. Further, 3rd Defendant never engaged into any contract of employment with the deceased; the deceased was not the 3rd Defendant's employee, but a casual/day worker.

> 7. The 3rd Defendant says…that on the day in question, he had left the work site to get food. It was on his way back to the site that he received a call from a fellow work-man who advised him that there was a fire at the plant and that Mr. Spencer had died.
>
> …The following day the 3rd Defendant was advised by a fellow workman, whom he recalls to be one Donovan Wilson, that the fire broke out when the deceased left his assigned task and went to a portable diesel pump that was transporting gasoline…
>
> The deceased had no business being on/near such pump as he was not a pump operator, which fact was known by the deceased…the deceased had been given adequate and appropriate safety gears to ensure that he was reasonably safe for the job that he was to be doing…i.e. to move hoses and keep the work area clean.

[41] Counsel for the applicant had argued that by the draft Amended Defence being exhibited, it was incorporated into the relevant affidavit. However, that argument does not assist, as the affidavits together do not disclose evidence from anyone giving a first-hand account of facts that could support the Defence of the applicant. This is clear as "pleadings are not evidence", therefore the 3rd defendant's outline of his defence to the alleged breach of statutory duty under the Occupier's Liability Act and the alleged breach of contract, does not translate into evidence. Further, and in addition to the fact that pleadings are not evidence, in relation to the alleged contributory negligence of the deceased, there is no affidavit account from anyone who witnessed first-hand, the movements or actions of the deceased.

[42] The court is therefore constrained to conclude, that, there is no proper affidavit of merit which can ground a finding that the applicant has a real prospect of successfully defending the claim. On this ground alone, the application must fail.

[43] Should the court therefore go on to consider the questions of whether there was reasonable promptitude in bringing the application and a reasonable explanation for the failure to file the Defence? McDonald J in ***Kimaley Prince v Gibson Trading & Automotive Limited (GTA)*** having found that the applicant had not

succeeded in showing that he had a real prospect of successfully defending the claim deemed it unnecessary to consider those other two factors.

[44] Without going into a structured review, it is sufficient to state that counsel for the claimant in her submissions candidly stated that the opposition to the application on the basis of delay and the lack of a reasonable explanation, were not her strongest points. The court shares that view, especially in light of the evidence adduced and the authority of ***Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy,*** referenced at the start of the analysis, which held in effect that once it has been established that an applicant has a real prospect of successfully defending the claim, a court may grant the application without requiring that the other stipulations are strictly satisfied.

[45] Ultimately, however, the applicant has failed to surmount the most significant hurdle in the application. Being mindful of the approach of McDonald J in ***Kimaley Prince v Gibson Trading & Automotive Limited (GTA),*** the court will decline to conduct any further assessment of i) the promptness of the application, after the applicant obtained knowledge of the judgment; and ii) the explanation given for failing to file the acknowledgment of service within time.

CONCLUSION

[46] In light of the foregoing, it is hereby ordered that:

i) The appropriate application to have been made in this matter was for judgment in default of acknowledgment of service to be set aside under Part 13 of the **CPR**, and not an application for relief from sanctions under Part 26;

ii) The application to set aside judgment in default of acknowledgment of service entered against the 3rd defendant/applicant under Part 13 is refused;

iii) Costs to the claimant to be agreed or taxed.