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

**CLAIM NO. 2011 HCV 06895**

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| **BETWEEN** | **ELIZABETH BROWN-DAVIS** | **CLAIMANT** |
| **A N D** | **EPHRAIM HENRY** | **DEFENDANT** |

Mr. Richard Reitzen for claimant instructed by Reitzen & Hernandez
Mr. David Johnson for defendant instructed by Samuda & Johnson

**HEARD:** **19th November 2012, 31st January 2013, 13th March 2013, 13th May 2013, 22nd July 2013 and 31st October 2013**

**APPLICATION FOR CROSS EXAMINATION RULE 26.1(2)(L)**
**APPLICATION TO SET ASIDE DEFAULT JUDGMENT**
**APPLICATION TO FILE DEFENSE OUT OF TIME – RULE 13.3**

**BERTRAM-LINTON**
**MASTER-IN-CHAMBERS (AG.)**

[1] On the 16th May 2011 the parties were involved in a motor vehicle collision along Camp Road in the vicinity of the St. Hughes High School. The Claimant filed her action on November 4, 2011 and it was served on the defendant on the 18th November 2011. There was no Acknowledgment of Service filed within the requisite period allowed under the rules and (that is fourteen (14) days after date of service) and thereafter a request for default judgment was made and granted on December 6, 2011 and June 20, 2011 respectively.

[2] On April 24, 2012 some four (4) months later the defendant filed an acknowledgement of service and subsequently on the 1st and 2nd May filed it application and affidavit requesting this court to act as follows:

1. The time limited for the filing of the Acknowledgement of Service be extended herein.
2. The Judgment in Default of Defence entered herein against the Applicant be set aside on the ground that the Applicant has a real prospect of successfully defending this claim.
3. There be such further relief as the Honourable Court may sees fit.
4. The costs of this Application to be the claimant's to be taxed if not agreed.

The grounds were also stated and the application duly noted.

[3] It is important here to peruse to say that in fact Default Judgment was entered in default of the filing of an Acknowledgement and not the failure to file a defence as stated in the defendant's application. The matter was set for hearing on the 24th September 2012.

[4] Just days before the scheduled hearing the claimant's attorney filed an application seeking to have:

1. The defendant attends for cross-examination.
2. Production of the defendant's statement made on the date of the accident and production of the motor vehicle accident claim form submitted by the defendant to his insurers.

[5] The Claimant's Counsel Mr. Richard Reitzen is in opposition to the defendant's application for an extension of time to file his defence and it is in pursuit of this that he would wish for the Cross-Examination to take place pursuant to Rule 26.1(2)(l) before a final decision is made on the Claimant's application Rule 26.1 deals with the Court's general powers of management and 26.2 specifically delineates the various discretionary acts that it may take in order to see to the management of matters.

Rule 26.1(2)(l)

(2) *"Except where these Rules provide otherwise, the court may:-*

(a) …..

(b) ……

(c) …….

*(l) …… require the maker of an affidavit or witness statement to attend for Cross-Examination*

[6] Mr. Reitzen cites the case of **COMET PRODUCTS UK LTD v HAWKEX PLASTICS LTD 1971 2QBD, 67** a case he says based on the similar or comparable UK provision to our Rule 26 (1) (2) (l).

[7] Here the court in its interpretation of Order 38 r 2(3) says

*"… on any application made by summons or motion, evidence may be given by affidavit … but the court may, on the application of any party, order the attendance for cross-examination if the person making any such affidavit …"*

This is not contested by the defendant's counsel Mr. Johnson, his contention however is that the usual course is for the documentary form of affidavit evidence to be presented and something special must be shown to have the court depart from that.

[8] In the written submissions on the point by Mr. Reitzen, several authorities are cited to support to contention that the cross-examination on the affidavit is necessary if a decision is to be made as to a "reasonable prospect of success" of the defendant's case. These were carefully considered and in particular the case of **CAPITAL SOLUTIONS LTD v ROCK MARKETING SCCA 63/08.** This case looked at among other things, issue of assessing the "real prospect of success" of a defendant's case on an application for summary judgment.

[9] In our situation the issue of Cross-Examination is raised as a preliminary issue to be decided even before the defendant's application and the component of real prospect of success is even to be considered on that application.

[10] The issue then on the Claimant's application is whether this is "a bona fide application to cross examine a deponent on his affidavit," which should normally be granted per McGowan LJ in **COMET PRODUCT** at page 76.

Again at page 77 Cross LJ says,

> *"It is, I think only in a very exceptional case, that a Judge ought to refuse an application to cross examine a deponent on his affidavit. Therefore though in practice cross examination does not often take place on affidavits used in interlocutory applications, if we are satisfied that the plaintiff's application is bona fide, it would normally be granted."*

**IS THERE A BONA FIDE APPLICATION THEN FOR CROSS EXAMINATION**

[11] Mr. Reitzen submits that the application for Cross-Examination if granted would assist the court in an assessment of the aspect of the defense application which requires that the proposed defence show a 'realistic' and not just a 'fanciful' prospect of success.

**per SWAIN v HILLMAN[2001] 1 ALL ER, 91**

[12] I ask myself to question them, is this cross examination necessary in the determination of that issue bearing in mind that the case of **SWAIN v HILLMAN** also warms against conducting at mini trial. Mr. Johnson submits that the test as enunciated in the case law and in particular in **HENRY HARRIS v FYFFE CLAIM NO. 2005HCV02562** at page 6 give enough guidance for a decision on the application by the defendant. In addition he says Part 13.3 is clear as to the criteria to be applied without getting into the preview of cross examination which would in fact constitute a mini trial. In addition he says the claimant has not indicated why this procedure is necessary in these circumstances and wishes to go on a fishing expedition. He would not want the court to sanction this deviation from the established norm on these applications without good reason.

[13] I am inclined to agree with the submissions of Mr. Johnson here. In order for me to find that there is a bona fide application there would need to be a more compelling justification than that put forward by Mr. Reitzen.

[14] The issues here are bound up in credibility and will eventually turn on that at the trial. No specific aspect of the claimant's or defendant's case is highlighted as on which Mr. Reitzen requires clarification by cross examination at this stage. Both sides have given their account of the incident and they aver lack of liability.

[15] It is not clear how cross examination on the affidavit filed by the defendant at this stage will move the issue outside of the criteria laid down by the rules and established in the relevant case law or why regular cross examination if the matter goes to trial will not suffice.

[16] It would certainly seem to be more beneficial and crucial if the proceedings were of the nature of say summary judgment where the matter would be determined one way or the other by the proceedings underway.

It is therefore ordered as follows:

1. The application for the defendant to attend for Cross Examination is denied.
2. No arguments were heard on the other request in the application and as such no decision is rendered thereon.