[2019] JMSC Civ 242

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2018HCV01863**

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|---|---|---|
| **BETWEEN** | **FITZROY ANTHONY CAMERON** | **CLAIMANT** |
| **AND** | **ASHLI O'CONNOR** | **1st DEFENDANT** |
| | **IAN GALBRAITH** | **2nd DEFENDANT** |

IN CHAMBERS

**Ms. Kristina Beckford instructed by Kinghorn and Kinghorn for the Claimant**

**Ms. De-andra Butler instructed by Samuda Johnson for the Applicant/2nd Defendant**

**Heard: October 31st, 2019 and December 13th, 2019**

**Civil Procedure – Application to set aside Default Judgment – Rules 13.2 and 13.3(1) and (2) – Misdescription of address – Defence of Merit – Servant or Agent.**

**T. HUTCHINSON, J (AG.)**

**INTRODUCTION**

**[1]** The application before the Court was filed on behalf of the Second Defendant, Mr Ian Galbraith in which he seeks the following orders: -

1. That the Judgment in Default entered against him and all subsequent proceedings be set aside on the ground that it is invalid or irregular;

2. Alternatively, that the Default Judgment be set aside on the ground that the Applicants have a real prospect of successfully defending this claim;

3. The time limited for the filing of the acknowledgement of service be extended to a period of fourteen days from the date of this order;

4. The time for filing his defence be extended to a period of 21 days from the date of this order.

5. The Applicant be granted relief from any sanctions imposed by the Civil Procedure Rules 2002 for failing to file an acknowledgement of service and/or defence within the prescribed time; and

6. There be such further relief as this Honourable Court may see fit.

**BACKGROUND**

**[2]** The background to this matter is that on the 14th of November 2015 the Claimant was riding his motorcycle along Ruthven Road in the vicinity of the Knutsford Court Hotel when a collision occurred between his motorcycle and a Subaru Impreza motorcar registration 7863GW owned by the Applicant/2nd Defendant which was being driven by Ashli O'Connor the first defendant.

**[3]** On the 15th of May 2018, a Claim was filed on behalf of Mr Cameron against both Defendants which outlined injuries allegedly sustained by him and seeking damages for negligence in addition to interests and costs.

**[4]** On the 17th of July 2018, Mr. Jermaine Richards, Process Server for the Claimant, provided an affidavit in which he outlined visiting an address at 33 Hill View Drive, Graham Heights and being instructed by a male, who identified himself as the 2nd Defendant, to leave both sets of documents in the mail box which he said he did.

**[5]** No acknowledgment of service or defence was filed by either defendant and on the 18th of July 2018, Judgment in Default of Acknowledgment of Service was entered for the Claimant and the matter was set down for assessment of damages

on the 29th of October 2018. This hearing did not proceed as the Application to set aside Default Judgment was filed on the same date.

**[6]** On the 8th of April 2019, the Judgment in Default of Acknowledgment of Service was set aside in respect of the 1st Defendant on the basis that it was irregularly obtained and the hearing of this Application in respect of the 2nd Defendant was adjourned to be heard on the 31st of October 2019.

**APPLICANT'S SUBMISSIONS**

**[7]** In written submissions Counsel for the Applicant made reference to the relevant rules which should be considered by the Court, specifically rule 13.2 which governs the setting aside of a default judgment which was irregularly entered if the requirements under rule 12.4 were not satisfied. In addition to the rule Counsel also cited and relied on the decision of the UK Court in ***Anlaby v Paraetorius 20 QBD 764***, where it was held :-

> *Where a plaintiff has obtained judgment irregularly, the defendant is entitled ex debito justitiae to have such judgment set aside and the court has only power to impose terms upon him as a condition of giving him his costs.*

**[8]** In respect of the alternate order, to have the judgment set aside on the basis that the defendant has a reasonable prospect of success, Rule 13.3(1) and (2) were highlighted. Counsel also noted that in ***Victor Gayle v Jamaica Citrus Growers and Anthony McFarlene 2008HCV05707*** (unreported) the learned judge made it clear: -

> *'that in an application to set aside a default judgment entered under part 12 of the CPR, in applying rule 13.3, the primary consideration is whether the defence has any real prospect of success…However in exercising the discretion whether or not to set aside the judgment regularly obtained, the court must also consider the matters set out in rule 13.3(2).*

**[9]** In expanding on this point, Counsel also made reference to an extract from **A Practical Approach to Civil Procedure 13th Edition** where this very issue was considered as well as the ruling of the Court in ***Thorn plc v McDonald [199] CPLR***

***660***. On the issue of what is meant by 'a real prospect of success', Ms. Butler has referred to and relied on the decision of Brooks J as he then was in ***Dave Blair v Hugh Hyman & Co (A Firm) and Hugh C Hyman 2008 (Supreme Court No. 2297 of 2005.*** Where he stated as follows;

> *'…the inclusion of the word 'real' means that the (defendant) has to have a case which is better than merely arguable'*

**[10]** In respect of the evidence given by the Process Server, Ms Butler highlighted that in cross examination, it was accepted by him that at the time he went to the address he did not know Mr Galbraith, neither did he have a photograph of him nor see an identification presented by the person to whom he spoke. She also made reference to the witness's evidence that he was unable to see clearly through the window and he could not say for sure whether the person present in Chambers for the hearing was the same person to whom he spoke.

**[11]** In examining the evidence of the Applicant, Counsel noted that Mr Galbraith testified that he was never personally served with the documents but was in fact handed them by his mother who found them in the mail box. She also highlighted that the utility bills presented by Mr. Galbraith show that he was living at 15 Cassia Park Avenue and not the address where the Process Server said he saw him. His evidence of his fiancé's miscarriage on the day of the purported service, which was supported by her account that they were together at the time she sought medical assistance is also advanced for the Court's consideration as to whether service took place.

**[12]** It was Counsel's submission that the evidence of the Process Server by itself raises questions as to whether Mr. Galbraith was in fact served and the uncertainty of service is compounded by the evidence of Mr Galbraith and Ms O'Connor that they were elsewhere on the date of service. It is in light of this 'uncertainty' Counsel submitted that the default judgment should be set aside as irregularly entered.

**[13]** In her submission in respect of the alternate order sought, Ms Butler pointed out that the 1st Defendant maintains that the collision was caused or at the very least

contributed to by the Claimant who did not ensure that it was safe to overtake. She observed that in such circumstances the 2nd Defendant has a substantial defence which has a reasonable prospect of success. Although it was not stated in the submissions, it was also evident on the draft defences filed that the Defendants were taking issue with the 1st Defendant being an agent or servant of the 2nd Defendant as this assertion by the Claimant was strongly denied.

**[14]** On the failure of the 2nd Defendant to file an acknowledgement of service once the documents were brought to his attention, Counsels submitted that he had handed the documents to his insurance company and had expected that they would have dealt with the matter. She asks that this explanation be viewed as a good explanation in all the circumstances.

**[15]** It was also submitted that the Applicant/2nd Defendant sought to act with due expediency as he was served with the Perfected Judgment in Default on the 9th of October 2019 and his application to set aside this order was filed on the 29th of October 2018. She referred to and relies on the decision of ***Victor Gayle*** supra, where a delay of more than a year was not viewed by the Court as a bar to the setting aside of the order where there was a defence of merit.

**[16]** On the point of any prejudice which would be occasioned to the Defendant by the setting aside of this order, Counsel submitted that no evidence has been put before the Court stating that there would be any prejudice. She accepted that if the order is set aside it would prevent the immediate recovery of the proceeds of his judgment by the Claimant but contended that in light of the Defendants account as to how the accident occurred, any setting aside would be but a mere inconvenience. Counsel concluded her submission on this point by noting that any possible prejudice which may be caused to the Claimant should not outweigh the need for the case to be decided on its merits.

**CLAIMANT'S SUBMISSIONS**

**[17]** In outlining her submissions in opposition to the orders sought, Ms. Beckford sought to draw the Court's attention to the fact that while there was some disagreement as to whether the address to which the Process Server went was 33 Hill View Close or Hill View Drive, the description of the premises given by him was accepted by the Applicant under cross examination. She has also highlighted that the physical description of the male to whom the Process Server spoke in terms of complexion, build and height were also accepted by the Applicant as matching his appearance save for a difference of one inch in respect of the height.

**[18]** Counsel also submitted that based on the evidence of the 2nd Defendant, he is the only male who would likely have been at the premises at the relevant time. She highlighted the portions of his evidence where he stated that only he, his mother, his sister and his fiancé, the 1st defendant, had access to the premises and by access he meant a key. She also asked the Court to take note of his concession that no other Ian Galbraith lived in that complex.

**[19]** In respect of the documentation submitted as exhibits to the affidavits of both defendants' as proof that they resided at an address other than 33 Hillview Close, Ms. Beckford submitted that these attachments should be examined by the Court taking into account two important factors. The first being that both defendants had resided at 33 Hillview Close and had moved to a total of 4 different addresses within a short space of time. She submitted that the sole place of stability was the Mother's address at Hillview Close with which they continued to be associated and she asserted that this was where they had again been residing in June 2018. The second factor that Counsel asked the Court to bear in mind is the fact that inspite of utility bills being presented from Flow and others from JPS, none of these covered the relevant date of service.

**Viva Voce Evidence**

**[20]** In considering the application before me, I took careful note of the contents of the affidavits of both Defendants as well as that of Mr Richards. The submissions provided by Counsel for the Claimant and Defendant have also been given due consideration. This was one of those cases where the Court also had the benefit of seeing and hearing from both individuals, as well as the witness for the 2nd Defendant and the observations made of their demeanour while they testified have also been noted.

**ISSUES**

**[21]** In respect of the question whether service had been effected, the first issue to be resolved is one of credibility, that is, who did the Court accept as a witness of truth in respect of the circumstances as outlined by the Applicant and the Process Server. In order to arrive at a finding as to where the truth lies, I carefully examined the respective accounts of the parties to determine who I found to be credible, consistent and reliable and I did this bearing in mind the standard of proof. To aid in this determination, as to whose account could be relied on, as stated above, I also took careful note of their respective demeanour as they responded to cross examination or questions posed by the Court.

**[22]** In addition to the issue of credibility, the Court also had to consider whether the Applicant had established that he has a real prospect of successfully defending the claim in the event it was found that he had been served.

**LAW AND ANALYSIS**

**Was the judgment irregularly entered?**

**[23]** As outlined in the submissions on behalf of the Applicant, the relevant provisions which arise for the Court's consideration are found at Rule 13.2 and 13.3 of the CPR. The first limb of the application is grounded in Rule 13.2 which governs the setting aside of a default judgment where it has been irregularly entered. Rule

13.2(1) makes it clear that this can be done if one of the conditions under Part 12.4 or 12.5 had not been complied with before judgment was entered. In this situation the Applicant asserts that 12.4 had not been complied with and that part reads as follows;

> a) *12.4 The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if*
>
> b) *the claimant proves service of the claim form and particulars of claim on that defendant;*
>
> c) *the period for filing an acknowledgment of service under rule 9.3 has expired;*
>
> d) *that defendant has not filed (i) an acknowledgment of service; or (ii) a defence to the claim or any part of it;*
>
> e) *where the only claim is for a specified sum of money apart from costs and interest, that defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;*
>
> f) *that defendant has not satisfied in full the claim on which the claimant seeks judgment; and*
>
> g) *(where necessary) the claimant has permission to enter judgment.*

(emphasis supplied)

**[24]** It is accepted that where rules 12.4 and 12.5 have not been satisfied, this would necessitate the setting aside of a default judgment under rule 13.2. As stated by P. Williams JA in ***Frank Lee Distributors Ltd v Mullings & Company [2016] JMCA Civ 9, at paragraph 54,*** the Applicant's right to have judgment entered set aside *"... is not only captured in the relevant provisions of the CPR but is part and parcel of the rules of natural justice".*

**[25]** It has been submitted by Counsel for the Applicant that in his evidence the Process Server wasn't one hundred percent certain that the male he served on the 30th of

June 2018 was Mr Galbraith as he spoke to him through a window. She has asked the Court to find that if the individual who effected service isn't sure that it was the 2nd Defendant to whom he spoke and at whose instructions he left the documents in the mail box, then the Claimant has failed to satisfy the requirement at 12.4(a) and the judgment entered should be set aside.

**[26]** While acknowledging that this would be the usual outcome if there was no other evidence on the point, Counsel for the Claimant has asked that the Court takes careful note of what she identifies as additional evidence outlined at paragraphs 17 and 18 above, which she submits, provides proof of service on the correct individual.

**[27]** On my examination of Mr. Richards, he struck me as an honest and straightforward individual, he confirmed that he had in fact visited the premises in Graham Heights more than once in an effort to locate the Defendants as this was the address that he had been given by Counsel for the Claimant. He gave a detailed description of the premises as well as the structure itself, he mentioned the location of the window to the rear of the building in the vicinity of the kitchen as well as the fact that a mailbox was attached to the gate of these premises. With the confirmation of this description by the Applicant, I was satisfied that Mr. Richards had visited the premises as he stated and that his reference to Hill View Drive instead of Close was an error.

**[28]** In considering whether Mr Richards had in fact seen and spoken to Mr. Galbraith, I took note of his expressed uncertainty that he was not one hundred percent sure that the person seated in Chambers was in fact the same person to whom he spoke on the 30th of June 2018. The person appeared similar he said but he wasn't sure. As I considered this portion of his evidence, I took careful note of his description of the male to whom he spoke and I noted that it was accepted by Mr Galbraith that this description was a physical match to himself. I also considered the concession by Mr. Galbraith that he was the only male who was likely to be at the premises, his evidence that it was possible he had gone by his mother's house

that day after taking his fiancé to the doctor and his acknowledgment that there was no other Ian Galbraith living in that community. These were all factors which I found tended to support the Claimant's position that Mr. Galbraith was in fact the male who was in the kitchen that day and gave instructions that the documents be placed in the mailbox.

**[29]** Finally, I considered the explanation offered by Mr. Galbraith as well as Ms. O'Connor as to the former being with her on that day as a result of her miscarriage. To this end, I examined the two documents provided from Musgrave Medical. On a close examination of the first document, I noted that while it states the date on which Ms. O'Connor was seen as the 30th of June 2018, it does not bear a time stamp as to when she actually sought treatment at that establishment. A review of her evidence as well as that of Mr. Galbraith also reveal no details as to the actual time when she went there. Additionally, the document does not disclose that she was admitted to the institution on that day, it merely states that a pelvic scan was done and the findings/impression. The second document provided is a referral letter dated the following day for her to receive continuation of care.

**[30]** While it was entirely possible that Ms. O'Connor might have been away from the relevant premises on the day and/or time on which Mr. Richards testified that service had been effected, I was not persuaded by the account or documentation provided that Mr. Galbraith was as well. My impression of Ms. O'Connor was that she appreciated the need for her to insist that Mr. Galbraith was with her but in circumstances where she would likely have been in a separate environment receiving emergency medical treatment I did not believe that she could properly account for Mr Galbraith's movements at all times on that day.

**[31]** In examining Mr. Galbraith's account, I found that he did not impress me as a forthright witness given his hesitation and prevarication when asked if he was in the habit of going by his mother's house and specifically if he could have gone there that day after taking Ms. O'Connor to the doctor. His reluctance to acknowledge that he would at times be found at that address coupled with Ms.

O'Connor's insistence that they hardly went there left me with the impression that his hesitation was likely due to him carefully weighing his answer and not born of a desire to provide an honest response.

**[32]** In respect of the utility bills which have been presented by both Defendants in support of their position that they had in fact been living elsewhere at the time of service, I took note of the fact that despite the number and types of bills presented both Defendants failed to prevent a bill to show their actual address during the month of June 2018. It was the evidence of Mr Galbraith that he had bought a place in December 2017 and this was the address at which they were residing at the relevant time and for which the bills were presented.

**[33]** If this is correct, it was curious that although they both presented affidavits up to October 2019 with exhibits attached, neither defendant sought to include bills for that property for June 2018. I was not persuaded by their accounts that they had in fact been living at a different address and I am satisfied by the evidence presented that on the day Mr. Richards attended the home Mr Galbraith was in fact present in the kitchen and he was the person who instructed Mr. Richards to leave the documents in the mailbox.

**[34]** Accordingly, it is my finding that the Applicant has failed to satisfy me on a balance of probabilities that he was not the person served on the 30th of June 2018 and it is my ruling that the judgment entered on the 18th of July 2018 was not irregularly entered.

**[35]** Having arrived at this conclusion, it is necessary to consider the submissions which have been made in respect of the alternate limb of the application, that is, the judgment in default ought to be set aside on the basis that the Applicant has a defence of merit. In this regard, I have taken note of the relevant rule of the CPR which is outlined below: -

> **13.3 (1)** The court may set aside or vary a judgement entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

**(2)** In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

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

**(3)** Where this rule gives the court power to set aside a judgment, the court may instead vary it.

**[36]** In her submissions on this point, Counsel for the Applicant referred to a number of authorities which have been referred to above in which it was generally accepted by the Courts that while the considerations outlined at 13.3 (2) (a) and (b) ought to be taken into account, the primary test for a Court tasked with deciding whether such an application should be granted is that which is outlined at Rule 13.3 (1).

**Does the Defendant have a real prospect of successfully defending the claim – 13.3(1)**

**[37]** In ***Swain v Hillman and another [200] 1 All ER 91*** it was noted that the primary test for setting aside a default judgment regularly obtained is that the defendant must have a real suspect of successfully defending the claim rather than a fanciful one. In determining whether the test has been satisfied, there must be a defence on the merits to the requisite standard.

**[38]** The evidence which has been put forward by the Applicant in this regard is two–fold. The first part is a robust denial in his affidavit and draft defence that the 1st Defendant was the servant and/or agent of the 2nd Defendant at the time of the collision. The second is an assertion that the collision was in fact caused or contributed to by the Claimant who was seeking to overtake the vehicle being driven by the 1st Defendant at the time that she was executing a turn onto an adjacent property.

**Servant or agent**

**[39]** The principle of agency was examined by the Privy Council in ***Rambarran v Gurrucharan [1970] 1 ALL ER 249***, In that situation, the appellant was the owner of a motor car which he permitted three of his sons who were licensed drivers, to drive both on his business and on theirs. His son Leslie drove the said motor car in a manner which caused it to collide with another vehicle resulting in damage to that vehicle. On that occasion, Leslie was about his own business.

**[40]** The appellant was found by the majority of the Court of Appeal, which overruled the decision of George J, the trial judge, to have been vicariously liable for the negligent driving of Leslie. In arriving at its decision, the Privy Council reviewed a number of authorities on the matter. These included ***Barnard v Sully (1931) 47 TLR 557*** in which Scrutton LJ's stated as follows: -

> *"No doubt, sometimes motor-cars were being driven by persons who were not the owners, nor the servants or agents of the owners...But, apart from authority, the more usual fact was that a motor-car was driven by the owner or the servant or agent of the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motor-car was being driven by the owner of it or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts."*

**[41]** On the Board's behalf, Lord Donovan expressed the view that:

> *"Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence." (page 751 para i) [40]*

**[42]** The Privy Council also examined the New Zealand Court of Appeal case, ***Manawatu County v Rowe [1956] NZLR 78, which had also considered the Barnard v Sully***. At page 752 paragraph f Lord Donovan outlined, the principles the New Zealand Court of Appeal deduced from the authorities as follows:-

> *"1. The onus of proof of agency rests on the party who alleges it. 2. An inference can be drawn from ownership that the driver was the servant or agent of the owner, or in other words, that this fact is some evidence fit to*

> *go to a jury. This inference may be drawn in the absence of all other evidence bearing on the issue, or if such other evidence as there is fails to counterbalance it. 3. It must be established by the plaintiff, if he is to make the owner liable, that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit and on his own concerns." (Emphasis applied) (page 752 para f)*

**[43]** It is observed that in the affidavits of both Ms O'Connor and Mr. Galbraith although it is acknowledged that she was his fiancée and that they shared a common residence they both assert that on the day in question she was operating purely as an authorized driver of the motor vehicle owned by Mr. Galbraith, as from time to time she would borrow the vehicle to drive it to work. It was in those circumstances it is said that the collision occurred.

**[44]** My review of the case law on this point makes it clear that while an inference can be drawn from ownership that the driver was the servant or agent of the owner, the onus is on the party who asserts agency to prove it. This type of proof could only be presented in the course of a trial once this defence has been raised. If the Claimant is unable to prove this assertion at trial the 2nd Defendant could not be found liable. In this regard the 2nd Defendant's assertion that he has a realistic prospect of success at trial receives strong support from this concession by the first defendant and provides a proper basis on which the default judgment can be set aside.

**[45]** In respect of the second limb of the defence, it is noted that the contents of the Draft Defence of the 1st Defendant as to the circumstances in which the collision occurred have been wholly adopted and are being relied on by the 2nd Defendant. The Defence as outlined presents a situation in which the Claimant failed to keep a proper look out as he drove his motorcycle along the roadway and that it was in those circumstances he failed to note that other vehicles had stopped to allow the 1st Defendant to turn and ended up colliding into her vehicle. It is noted that if this account were to be accepted by a jury the 1st Defendant could not be found liable for the collision and the 2nd Defendant would benefit from such a finding as well.

**[46]** Having examined the evidence before me in support of this application It is my finding that a defence of merit that has a realistic prospect of success has been raised and the requirements of Part 13.3(1) have been satisfied.

**13.3 (2) (a) Has applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered**

**[47]** Part 13.3(1) having been satisfied the Court then had to consider whether the Applicant had also complied with Part 13.3(2) (a) and (b) of the CPR. It has been submitted by the Applicant that having been served with the Perfected Judgment in Default on the 9th of October 2018, the Application to have it set aside was filed on the 29th of October 2018, less than a month later.

**[48]** In this regard Counsel made reference to the ***Victor Gayle*** decision in which the delay in bringing the application was over a year after the Applicant had become aware of the Judgment. It was submitted that in spite of this delay Edwards J, as she then was, was of the view that this did not by itself outweigh the factors that supported the setting aside of the Judgment.

**[49]** In considering this submission, I also examined the decision of the Court in ***Attorney General v John Mackay*** **[2012] JMCA App 1** in which the Applicant waited 16 months after being served with the claim form and particulars and three months after finding out that Default Judgment had been entered before applying to have it set aside, a fact which was not looked on favourably by the Court.

**[50]** In giving their decision on this point however, I note that although the Court was of the view that the delay was inordinate and the application should not succeed, there was no laying down of a hard and fast rule as to an acceptable timeframe. In ***Michelle Daley etal v Tonyo Melvin etal C.L.2002/D-034 and Blossom Edwards v Rhonda Edwards 2013 HCV;*** applications were made after 31/2 and 7 months respectively. A review of these authorities' reveal that this delay in and of itself did not operate as a bar to the Applicants' successfully applying to have the Default Judgment set aside.

**[51]** In the ***Michelle Daley*** decision Justice Daye stated that a delay of 3 1/2 months after the date when judgment was entered was not an unduly long time. He also outlined that time should begin to run against the defendant from the date of service of the judgment and not from the date on which the judgment was entered.

**[52]** The circumstances in that case were very different from those that obtained in the **AG v Mackay** decision as in the latter, Counsel for the Applicant had been present at the application for Default Judgment and would have been aware from then of the adverse ruling, it was in those circumstances that the Court found that a three-month delay in making the application could not be said to satisfy the requirements of this rule.

**[53]** The circumstances in the **Michelle *Daley*** decision more closely mirrors what obtained in the instant case than those that existed in ***AG v Mackay*** as the Applicant was not in attendance for the hearing during which judgment in default was entered and only twenty days had run between the time when he became aware of the Judgment and made this application.

**[54]** Having reviewed the rule, the case law and the circumstances as exists herein, I am satisfied on this criterion that the Applicant acted within a reasonably practicable period when he made his application herein.

**13.3 (2) (b) Given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be**

**[55]** The explanation which has been presented by the Applicant in the Affidavit in support is that he failed to file an acknowledgement of service and a defence as he had handed the documents over to his Insurance Company with the understanding that the matter would be handled by them. His Counsel submits that this was a sound explanation in the circumstances and she has asked that it be accepted by the Court as a good reason for his failure to file the relevant documents.

**[56]** While the Applicant had a responsibility to follow up with the Insurance Company to ensure that the matter had been actioned and a response provided to this lawsuit the explanation itself is not an unreasonable one as this was a matter in which the Insurance Company could have had useful discussions with Counsel for the Claimant and possibly even arrive at a settlement.

**[57]** In any event, even if the Court were to find that the explanation offered is not a good one the Applicant has already provided enough evidence to justify the setting aside of the default judgment.

**CONCLUSION**

**[58]** Having examined all the circumstances, I find that the Applicant has satisfied the requirements of Rule 13.3 (1) and (2) to move the Court to exercise its powers under 13.4. Accordingly, the Orders of the Court in respect of the Application for Court Orders filed on the 29th of October 2018 are as follows;

1. Application to set aside default judgment on the grounds it was irregularly obtained is refused.

2. Application to set aside default judgment on the ground that the Applicant has satisfied the requirement of Rule 13.3(1) is granted.

3. The applicant is to file his acknowledgment of service within to a period of seven (7) days from the date of this Order;

4. The time for the filing of the Defence is extended to a period of 21 days from the date of this Order.

5. Costs to the Claimant to be taxed if not agreed.