**[2019] JMSC Civ 93**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**
**IN THE CIVIL DIVISION**
**CLAIM NO. 2012HCV05796**

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| **BETWEEN** | **ALICIA HUGHES** | **CLAIMANT** |
| **AND** | **PAJ IMPORTS LIMITED** | **DEFENDANT** |

Ms. Kacey-Ann Nelson for the Applicant/Defendant.

Mr. Kevin Page instructed by Page and Haisley for the Respondent/Claimant.

Heard: February 7th, March 14th, April 3rd, 12th and 30th, 2019.

**Civil procedure – Application to set aside default judgment pursuant to rule 13.2 of the Civil Procedure Rules – Irregularly obtained default judgment – Application to set aside default judgment pursuant to rule 13.3 – Tests to be applied.**

**Civil procedure – Whether the court's power to dispense with the service of a document in rule 6.8 applies to the claim form.**

**NATALIE HART-HINES, MASTER**

[1] The matter for the consideration of the court is an application by the defendant to have a judgment in default set aside on the basis that it was irregularly obtained in that the Defence form (Form 5) was not served along with the claim form and particulars of claim as required in rule 8.16(1) of the Civil Procedure Rules (hereinafter "the CPR"). The application is supported by affidavits sworn to by one of the directors of the defendant company, Mr. Michael Powell. In opposition to the application, the respondent's process server, Mr. Mohan Escoffery, and counsel Mr. Kevin Page also swore affidavits.

[2] The applicant's Notice of Application for Court Orders and Amended Notice of Application for Court Orders, filed on May 21, 2018 and October 8, 2018 respectively, state that the following orders are sought:

1. *That the court makes a declaration declining to exercise its jurisdiction to try this claim;*
2. *That the claimant's claim form and particulars of claim filed on October 26, 2012 be struck out;*
3. *In the alternative, the default judgment dated the 12th day of February 2016 and entered in Binder 769 Folio 235 be set aside;*
4. *The cost of this application to the applicant;*
5. *Such further and/or other orders as this Honourable Court deems fit.*

[3] The grounds indicated in the Amended Notice of Application are *that*:

1. *"Rule 8.16(1)(b) mandates the serving of a form of defence (form 5) along with the claim form and particulars of claim and there is no credible evidence that this was done;*
2. *Pursuant to Part 13.2(1)(a) of the Civil Procedure Rules form of defence (form 5) was served on the defendant making service irregular;*
3. *Pursuant to Part 13.2(1)(b) [sic] of the Civil Procedure Rules the defendant has a real prospect of successfully defending the claim."*

[4] During the hearing of the application, clarification was sought by the court and counsel Ms. Nelson confirmed that the orders indicated at paragraphs 1 and 2 of the amended application were not in fact sought. As the defendant had not filed an Acknowledgement of Service within 14 days of the service of the claim form, and had not filed an application disputing jurisdiction within the period for filing a defence, as required under rules 9.6(2) and 9.6(3), the application was pursuant to rules 13.2 and 13.3, to have the default judgment set aside.

**BACKGROUND AND CHRONOLOGY**

[5] By way of a claim form filed on October 26, 2012, the respondent claimed against the applicant, damages for negligence and/or breach of the provisions of the **Occupiers' Liability Act** (hereinafter "the OLA") as a result of an incident on July 19, 2011, when she visited the applicant's place of business to purchase car parts and a van seat fell on her head, causing her to sustain personal injury and to suffer loss and damage. The history of events after October 26, 2012 is quite protracted and I will therefore only indicate some of the salient events:

1. On July 19, 2011, an accident occurred at the applicant's business premises and registered address located at 76 Constant Spring Road, Kingston 10, St. Andrew.

2. On October 26, 2012 the claim form and particulars of claim were filed along with

a Notice to Defendant, the Prescribed Notes for Defendants (Form 1A) and Acknowledgment of Service (Form 3). The forms for the Defence (Form 5) and Application to Pay by Instalments (Form 6) were not filed.

3. On October 30, 2012 at 10:53am service of the claim form and particulars of claim and some accompanying documents were said to be effected.

4. Eight (8) months later, on July 17, 2013 an Affidavit of Service was sworn to by Mohan Escoffery, process server, and was filed. In his Affidavit Mr. Escoffery stated that on October 30, 2012 at about 10:53am, he served claim form and particulars of claim along with the form of Acknowledgment of Service, the form of Defence and the Prescribed Notes for Defendants on Mr. Powell on behalf of the defendant company at its registered address.

5. On July 18, 2013 a Notice of Application for Court orders was filed, seeking permission to enter judgment in default against the defendant and reliance was placed on Mr. Escoffery's affidavit of service filed on July 17, 2013.

6. Eight (8) months later, on March 4, 2014 the application to enter judgment in default was listed to be heard. However, the permission of a Court was not required to enter judgment in default, and the proper procedure was under rules 12.7, 12.10(1)(b) and 16.2(1). In the circumstances, the judge before whom the application was listed directed counsel to file a Request for Default Judgment.

7. On March 7, 2014, two copies of a Request for Default Judgment were filed along with a draft Judgment in Default order and a fresh Affidavit of service sworn to by Mr. Escoffery on March 6, 2014. In error, the signature of the claimant's attorney appeared on the draft Judgment in Default. The error was not discovered for nearly two (2) years by Registry staff.

8. On February 3, 2016 a requisition was issued (but dispatched on February 5, 2016) by the Registry to the claimant's attorneys for the error to be corrected.

9. On February 12, 2016 two fresh copies of a Request for Default Judgment were filed, and a draft Judgment in Default order and a fresh Affidavit of service sworn by Mr. Escoffery on February 12, 2016. One of the Requests for Default Judgment stated that the claimant requested entry of judgment against the defendant in default of Acknowledgment of Service and a Defence being filed. However, the other stated that the request was made in default of a Defence being filed.

10. On April 22, 2016, a requisition was issued that the claimant's attorneys should indicate whether or not judgment was being sought in default of an Acknowledgment of Service or of a Defence being filed. It does not appear that any further Requests were filed. Instead, judgment in default was later entered.

11. On July 19, 2017 the claim became statute barred.

12. On July 27, 2017, the Judgment in Default was perfected by the Registrar and entered in Binder 769 Folio 235 with effect from February 12, 2016.

13. Seven (7) months later, on March 1, 2018 the Notice of Assessment of Damages was issued by the Registrar of the Supreme Court indicating that the Assessment of Damages hearing was scheduled for May 28, 2018.

14. On May 4, 2018 and May 10, 2018 documents were filed on behalf of the claimant in respect of the Assessment of Damages hearing.

15. On May 21, 2018 a Notice of Application for Court Orders was filed on behalf of the defendant seeking an order setting aside the default judgment. The application was supported by the Affidavit of Michael Powell filed that same day.

16. On May 28, 2018 the Assessment of Damages hearing was adjourned as a result of the application to set aside default judgment.

17. On October 8, 2018 an Amended Notice of Application for Court Orders was filed. The amendment indicated that the application was made pursuant to rule 13.2(1)(a), as the service of the claim form was irregular. A Supplemental Affidavit of Michael Powell was filed on October 8, 2018 exhibiting a draft defence.

18. On November 21, 2018, the applicant filed an Acknowledgment of Service indicating that the claim form was received “on or about June 11, 2013”. A Further Supplemental Affidavit of Michael Powell was filed, indicating that liability is denied and that the defendant had adequate staff and safety measures in place, and alleging that the claimant’s injuries were caused by her own negligence.

**THE HEARING OF THE APPLICATION**

[6] As there was a dispute between the affidavit evidence of Mr. Michael Powell and that of the process server, Mr. Mohan Escoffery, it was necessary to have both persons give viva voce evidence and have their accounts tested in cross-examination. Mr. Escoffery gave evidence on February 7, 2019 and Mr. Powell gave evidence on March 14, 2019. In addition to the written submissions which were filed prior to the commencement of the hearing of the evidence, counsel were afforded an opportunity on April 3, 2019 to make further oral submissions on the evidence heard. Upon the invitation of the court, counsel also made submissions on whether rule 6.8(1) was applicable to the claim form and what prejudice each party might suffer if an order was made dispensing with re-service of the claim form and service of the requisite accompanying documents.

[7] Mr. Mohan Escoffery swore to affidavits on July 17, 2013 and February 12, 2016 and I have considered the content of the affidavits. In his evidence in chambers he testified that he had been working as a process server employed to Page and Haisley for over six years. He said that on October 30, 2012, he was given documents to serve and he examined the documents before he put them in an envelope. During cross-examination, he initially agreed that in addition to the claim form and particulars of claim he was given three sets of documents and he agreed with the suggestion that those were (1) Prescribed Notes, (2) Acknowledgment of Service and Form (3) Notice to Defendant. However, he went on to say that there were other documents given to him, including the Defence Form. It was suggested that he only served five listed documents and he agreed with the suggestion. However, when it was put to the witness that he did not serve the Defence Form, he again stated that he served the Defence Form.

[8] In response to questions from the court as regards how he was able to recall what he served in 2012 and whether or not there was anything to aid him, such as a notebook, he replied that he serves documents daily and that he would fill in a "Particulars of Service form". However, when this form (Exhibit 1) was produced, the form did not contain a list of the documents served. Further, the form indicated that Mr. Escoffery served to persons, one "Shaneika" and Mr. Powell. Mr. Escoffery could not explain how the name Shaneika came to be on the form as he said that he only recalled speaking with Mr. Powell at the entrance of an office where the parking lot was, on the outside of the building.

[9] Mr. Michael Powell swore to affidavits on May 18, 2018, October 8, 2018 and November 21, 2018 and I have considered these affidavits. Mr. Powell gave evidence under oath that he is Company Director for the defendant, PAJ Imports Limited. He denied that he was personally served with the claim form and particulars of claim, but accepted that the defendant was so served. He said that sometime in June 2013, the court documents were placed on his desk and he looked at the front page of the documents, which were stapled together. He admitted that he was aware that an accident occurred on July 19, 2011. Consequently, when he saw Ms. Hughes' name on the court documents, he gave the documents to his secretary and sister, Donna Powell, to pass them on to his

lawyer. He said that he did not read the documents. He said that as he did not hear from his lawyer, he did not "think" that his lawyer filed anything on behalf of the company. Mr. Powell later admitted that the documents were not sent to his lawyer. He further said that the next time that he saw the documents (after 2013) was in 2018 when his wife brought the papers to his attention. He said that further documents were received in 2018 and these were brought to him by his wife. Mr. Powell said that all the documents received in 2013 and 2018 were turned over to his current lawyer and it was then discovered that the Form of Defence was not among the documents which the lawyer received. During cross-examination Mr. Powell admitted that he assisted the claimant with some of her medical bills after the accident. When asked by the court why he did not ask his sister about the documents between 2013 and 2017 (when she died), he said that she became ill in 2014 and he "did not remember" about the documents.

**SUBMISSIONS**

[10] I thank counsel for their industry in preparing written submissions and for the oral submissions on behalf of the applicant and the respondent, which I assure them that I have considered. In order to avoid repetition, I do not propose to summarise the submissions, but instead, to address these within this judgment as regards the law in relation to rules 13.2 and 13.3 and issues of credibility.

**ISSUES**

[11] The application pursuant to rule 13.2 will turn on the credibility of the witnesses in respect of the service of the Defence Form. This is one issue for the court's consideration. Another issue is whether the court can make an order dispensing with the re-service of the claim form and whether it is appropriate to make such an order in this case where the claim form has expired and the claim is now statute-barred. Finally, another issue is whether the applicant has established that it has a real prospect of successfully defending the claim.

**THE LAW**

[12] Rule 8.16(1) provides that the Prescribed Notes for Defendants (Form 1A), Acknowledgment of Service form (Form 3), the Defence (Form 5) and Application to Pay by Instalments (Form 6) must be served along with the claim form. This is

a mandatory requirement. It is important to bear in mind the objective of rule 8.16 in stipulating that Form 1A, Form 3 and Form 5 be served. These forms provide guidance to the unrepresented litigant, such as indicating the timeframe within which documents should be filed and the consequences for failing to file responses to a claim. It is also important to note the purpose of service of the claim form. In ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2008] 1 WLR 806, it was said at page 821 at paragraph 54:

> *"…service of the claim form serves three purposes. The first is to notify the defendant that the claimant has embarked on a formal process of litigation and to inform him of the nature of the claim. The second is to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted: until he has been served, the defendant may know that proceedings are likely to be issued, but he does no know for certain and he can do nothing to move things along. The third is to enable the court to control the litigation process. If extensions of time for serving pleadings or taking other steps to justify, they will be granted by the court. But until the claim form is served, the court has no part to play in the proceedings…"*

[13] Where a default judgment has been irregularly obtained, because of some irregularity in the service of the claim form and other requisite documents, and where an application is made pursuant to rule 13.2 of the CPR, the court must set aside the default judgment. However, where a default judgment has been regularly obtained, and where the application to set aside the default judgment is made pursuant to rule 13.3, the court has a discretion whether or not to do so, but will usually do so once the applicant demonstrates that he has a real prospect of successfully defending the claim. I will give consideration to rule 13.3 below at paragraph 34. Rule 13.2(1) of the CPR provides:

> *"13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because*
> *(a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;*
> *(b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or*
> *(c) the whole of the claim was satisfied before judgment was entered.*

**The effect of irregular service**

[14] It is accepted that where rules 12.4 and 12.5 have not been satisfied, or where there was a failure to serve all the requisite documents with the claim form, this would necessitate the setting aside of a default judgment *ex debito justitiae* under rule 13.2. As P. Williams JA said in ***Frank I Lee Distributors Ltd v Mullings &***

***Company*** [2016] JMCA Civ 9, at paragraph 54, this unfettered 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*".

[15] While a default judgment must be set aside on account of irregular service, the claim form itself is not a nullity by virtue of the irregular service. The claim form is only invalid if no order was made extending its validity for the purpose of service (see rules 8.14 and 8.15). The Court of Appeal has indicated that where the service of the claim form was irregular, it would be necessary to re-serve the claim form with the correct information and documents and fully comply with the relevant Rules. In ***B & J Equipment Rental Limited v Nanco*** [2013] JMCA Civ 2, per Morrison JA (as he then was) said at paragraph 37:

> *"While the purported service in such a case would obviously be irregular ... I would have thought that the validity of the claim form itself would depend on other factors, such as whether it was in accordance with Part 8 of the CPR.... It is equally difficult to see why a claimant, who has failed to effect proper service of a claim form because of non-compliance with rule 8.16(1), would not be able to take the necessary steps to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule...."*

[16] Likewise, in ***Rohan Smith v Elroy Hector Pessoa and another*** [2014] JMCA App 25, Phillips JA said that a breach of rule 8.16(2) meant that service would have been irregular, but it did not render the originating documents invalid. At paragraph 31, Phillips JA endorsed the dictum in ***B & J Equipment***, per Morrison JA at paragraphs 37 and 38, and added that the reasoning in relation to rule 8.16(1) was equally applicable to the failure to observe rule 8.16(2), so that the reference number could be inserted on the claim form and particulars and "*the documents be re-served in accordance with that rule*".

[17] However, an issue potentially arises in the instant case, where a claim form has expired and therefore cannot be re-served, and where the claim is statute-barred and therefore no fresh claim form can be issued. This issue only stands to arise if I find that service of the claim form was irregular in this case. As I have observed this issue in a few cases recently, it is worthwhile addressing it here.

**Is there a power to dispense with service of the claim form?**

[18] In England it is settled law that a court may dispense with the service of the claim form in exceptional cases. Prior to the 2008 amendment of the English CPR, the power to dispense with service of a document was contained rule 6.9, which used similar wording as our rule 6.8. The English rule 6.9, which provided that the court "*may dispense with service of a document*", was considered by the English Court of Appeal in 2002 in ***Anderton v Clwyd County Council (No. 2)*** [2002] EWCA Civ 933. The court considered five joined appeals concerning the service of the claim form at the end of the limitation period, where service was effected within the life of the claim form but was deemed late by virtue of the calculation of the deemed day of service. The court held *inter alia* that the court's power in rule 6.9, to dispense with service of "a document" applied to a "claim form", and that a court could make such an order prospectively or retrospectively, but in "exceptional" cases, including where the limitation period had expired. What was required in the exercise of its discretion is that the court assesses what is fair in the circumstances, having regard to the balance of prejudice between the parties. See too ***Olafsson v Gissurarson*** [2008] EWCA Civ 152, (decided after the 2008 amendment) where the Court held that justice required that such an order be made to ensure that the domestic time bar would not defeat the claim.

[19] I must indicate that I have found no authority from this jurisdiction which endorses the ***Anderton*** decision that the court has the power to dispense with service or re-service of the claim form. I am also mindful of the guidance given by Morrison P in ***B & J Equipment*** regarding re-serving the claim form, but I do not believe that the ***Anderton*** case conflicts with his guidance regarding re-service. I believe that a judge could, as an alternative to directing re-service, order that service of the claim form and the accompanying documents be dispensed with in a case where the claim form was in fact served (albeit irregularly), the claim is time-barred, and the claim form has expired and cannot be extended and re-served, and where there was no delay by the claimant. In such a case, applying rule 6.8 to the claim form will not cause an abuse of the fundamental principle of English law, that a defendant "*is entitled to effective notice of the proceedings against*

*him*"[1], since the defendant would have received the claim form and understood the nature of the claim.

**ANALYSIS AND FINDINGS**

[20] Before I indicate my analysis and findings on the issue of whether or not the claim form was properly served with the Form of Defence, I feel that it is important to consider whether this Court has the power to dispense with the service or re-service of the claim form if the default judgment were to be set aside. I will briefly discuss the law on this area, then discuss why I believe the power exists in our CPR, and then indicate my findings on the issue of service.

**Does the power in our Rule 6.8(1) apply to the claim form?**

[21] Rule 6.8(1) provides that the court "*may dispense with service of a document if it is appropriate to do so*". While the Jamaican CPR appears to be closely modelled on the English CPR, the provisions are not identical. Ms. Nelson submitted that as this power to dispense with service of a document falls under Part 6, which deals with service of "*other documents*", it does not apply to Part 5, which deals with service of the claim form. I have noted that in the English CPR, no distinction was made between the service of the claim form and the service of other documents, as the provisions in respect of service generally were contained in one part, Part 6. Nonetheless, it is my opinion that the power in rule 6.8 extends to the claim form, for the following reasons:

1. It seems that Parts 5, 6, 7, and 8 should be read conjunctively, thus making rule 6.8 applicable to the claim form;
2. A "literal" interpretation of the word "*document*" in rule 6.8(1) and of the word "*may*" in rule 8.13 would mean that the claim form is a document with which service may be dispensed with, in an appropriate case;
3. Applying rule 6.8 to the claim form, in an exceptional case, would give effect to the overriding objective in rule 1.2; and
4. A similar power to dispense with service of process and draconian orders exists in Parts 52 and 53.

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[1] Per Lord Reading CJ said at page 887 in ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent***: [1915] 1 KB 857.

[22] The rules that relate to the service of the claim form are not confined to just Part 5, but instead, are also contained in Part 6, Part 7, and Part 8, and in particular, in rule 6.6, rule 8.2 and rules 8.13 through to 8.16. It seems therefore, that the rules on service of the claim form and the powers of the court contained in Parts 5, 6, 7 and 8 are to be read conjunctively, and that includes the power in rule 6.8(1) to dispense with the service of a document.

[23] It seems significant that the drafters of the CPR elected to use the word "*may*" rather than "*must*" in rule 8.13, which provides:

> *"**Service of the claim form***
> *8.13 After the claim form has been issued it **may** be served on the defendant in accordance with Part 5 (service of claim form) or Part 7 (service out of the jurisdiction)." (emphasis supplied)*

[24] The "literal rule" approach of statutory construction means that a Court must apply the literal meaning of the exact words of a statute or rule. However, if giving the word its natural and ordinary meaning might result in "*some absurdity, or some repugnance or inconsistency with the rest of the instrument"*[2], then the court may apply the "golden rule" approach and substitute another word or meaning in place of the word used. In my opinion, interpreting the word "*may*" in rule 8.13 literally as a permissive rather than a mandatory word, would not lead to any inconsistency with the approach to service of the claim form in Part 5, since the guidance in ***Anderton*** is that the power to dispense with the service of the claim form is to be used only in exceptional circumstances.

[25] Further, using the "literal rule" approach to interpret the word "document" in rule 6.8(1) as including the claim form, would be in keeping with rule 1.2 that the court *"must seek to give effect to the overriding objective [of dealing with cases justly] when interpreting these rules or exercising any powers under these Rules".*

[26] Finally, a review of rules 52.3, 52.4(a), 53.5(3) and 53.10(3) reveals that the court is vested with a similar power to dispense with the service of a judgment summons, a committal order, a confiscation order and an application for committal for contempt, if it is "*just to do so*". Committal and confiscation orders

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[2] Per Lord Wensleydale in ***Grey v Pearson*** (1857) 10 ER 1216 at page 1234.

are often described as draconian or extreme orders which affect the liberty and property of persons. If the drafters of the CPR felt that the court should have the power to dispense with service of such draconian orders, it does not seem farfetched that it was also their intent that the court should have the power to dispense with the service of the claim form, in an appropriate case.

**Would this be an exceptional or appropriate case to dispense with re-service?**

[27] If I were to find that service was irregular and set aside the default judgment, there are three factors which would make this an exceptional case in which to make an order dispensing with the re-service of the claim form. These are:

1. Though errors were made, the claimant's counsel acted promptly in filing the claim and in remedying errors. While counsel could have pursued the Registry to ensure that the Requests for Default Judgment was considered swiftly, the speed at which dates are fixed or court documents are reviewed depends entirely on the Registry and its resources. Counsel could not be blamed for the claim becoming statute-barred.
2. It seems to me that the delay in the progression of this matter is due in large part to the Registry. The Registry repeatedly delayed (by months and years) in reviewing the Requests for Default Judgment. If the Registry responded swiftly, any errors made by counsel could have been remedied earlier, and a default judgment possibly granted from 2014, thereby allowing the claimant adequate time to refile the claim if there was an irregularity in service. In ***Cranfield v Bridgegrove Ltd*** [2003] 3 All ER 129, the English Court of Appeal upheld the decision of a judge who retrospectively granted an extension of the validity of the claim form, after the court staff erred in not attempting to serve it within the four-month period. Similarly, the circumstances of the instant case would make it appropriate to dispense with re-service of the claim form.
3. Mr. Powell said he was aware of the claim from 2013 yet he seemed to ignore the proceedings instead of seeking to dispute the court's jurisdiction under rule 9.6. It would seem unjust for the defendant to benefit from this nonchalance, now that the claim is statute-barred.

**Where would the balance of prejudice lie?**

[28] In my opinion the defendant would not be prejudiced by an order dispensing with

re-service of the claim form since Mr. Powell accepts that the claim form was previously served and since its contents enabled Mr. Powell to know the nature of the claimant's case and to prepare a draft defence on behalf of the defendant. The only real prejudice that there would be to the defendant by such an order, would be the loss of a statute of limitation defence. As regards the significance of this, I am guided by dicta in ***Shaun Baker v O'Brian Brown and Angella Scott-Smith***, *(*unreported*)* Supreme Court*,* Jamaica, Claim No 2009 HCV 5631, judgment delivered on May 3, 2010, where Edwards J (Ag) (as she then was) considered the issue of prejudice in determining an application for an extension of the time to file a claim under the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act and said:

> *"80. …Since any extension of the limitation period is designed to specifically override the statutory defence,* ***what is of paramount importance to the respondents is not the loss of the defence … but the effect it will have on the respondents' ability to defend themselves on the merits of the case****, both as to liability and quantum". (emphasis supplied)*

[29] In this case, the defendant could not reasonably be said to be prejudiced by the possible unavailability of witnesses, who were in its employment between 2011 and 2018, since it had an adequate opportunity to meet the claim by interviewing staff witnesses, collecting witness statements and preserving any documentary evidence. Mr. Powell's' affidavits suggest that investigations were carried out and that he thereafter attempted to assist the claimant with her medical expenses. Having investigated the allegations immediately after the accident, it was within the defendant's power to secure witness statements and to keep in touch with any witnesses who might have left the company. In contrast, the claimant stands to be severely prejudiced by being denied an opportunity to have her claim heard if the default judgment is set aside, because the claim is now statute-barred.

**Was the service of the claim form irregular in this case?**

[30] I now indicate my findings on whether or not the Defence Form (hereinafter "Form 5") was served. The burden of proving that Form 5 was not served and that the default judgment was irregularly obtained, rests on the applicant. This aspect of the application turns on the issue of credibility. I have assessed the witnesses' demeanour and the detail in their account and any inconsistencies. On a balance of probabilities, I find that the defendant was served with the claim form and

particulars of claim on October 30, 2012. I accept Mr. Escoffery's account that he served Form 5 and also that he served Mr. Powell personally. While I accept that Mr. Escoffery's recollection of all that transpired on October 30, 2012 was not perfect, his demeanour portrayed him to be a witness who was trying to be honest and forthright. I accept the account of Mr. Escoffery over that of Mr. Powell, who says that the papers were first brought to his attention in June 2013, and that he does not know what was served or what became of the documents shortly after they were served. In my assessment of the accounts given by Mr. Powell and Mr. Escoffery, I found Mr. Escoffery's account more credible and reliable.

[31] Though I found that there were occasions when Mr. Escoffery did not seem entirely familiar with all the documents which he said that he serves routinely, for example the Application to Pay by Instalment Form, on the whole, I found him to be a credible witness. I formed the view that he might not have listened carefully to some of the questions asked in cross-examination, but despite his initial failure to indicate all the documents which accompanied the claim form, he was insistent that he served Form 5. I noted that Mr. Escoffery sought to be forthright with the court and offered an explanation for the discrepancy relating to the Particulars of Service form he completed. I formed the view that he honestly admitted that as a result of the passage of more than six years since the event, he could not recall how the name "Shaneika" came to be recorded on the form. However, he gave details regarding how he came to serve Mr. Powell and why he recalled serving him. He said that he “focused” on Mr. Powell who was the person who was authorized to accept the document on behalf of the company. I accept Mr. Escoffery’s account when he said that the claim form, particulars of claim and Form 5 were served on October 30, 2012.

[32] In contrast, I do not find that Mr. Powell was a forthright and credible witness. Mr. Powell’s account regarding (1) the date of service, (2) what became of the papers thereafter and (3) his reason for failing to follow up the matter, seems unbelievable. He did not say why he was able to say in 2019 that he was served in June 2013, rather than October 2012. Further, Mr. Powell asks the court to accept that after receiving the claim form and accompanying documents he merely looked at the front page of the bundle of documents and gave instructions

that the documents be forwarded to his lawyer. It is noted that Mr. Powell has not said with any certainty that Form 5 was not served on him. He said he did not inspect or read the documents served. I can attach very little weight to Mr. Powell's account, having regard to the fact (1) that Mr. Powell could not say whether Form 5 was among the bundle that was allegedly served in June 2013, and (2) that Mr. Powell could not say how the bundle of documents were kept between 2013 (when he allegedly received documents from his sister) and 2018 (when his wife handed documents to him). It is insufficient for Mr. Powell to simply say that he does not know what was served in 2013 and to rely on what was found in a cabinet five years later. Though Form 5 might not have been attached to the bundle in 2018, it does not follow that the document was not served in 2012, particularly since Mr. Powell admits that the documents passed through several hands between the date of service and the date when it was given to his counsel. Likewise, though Form 5 was not filed with the rest of the documents, that does not prove that it was not served in 2012. Further, I do not accept that Mr. Powell simply forgot about the documents for five years. The applicant has not satisfied me that Form 5 was not served.

[33] I find that the defendant was served with the claim form, particulars of claim, Form 5 and the other requisite documents. The application to set aside the default judgment pursuant to rule 13.2 is therefore refused. Consequently, there is no need to make an order pursuant to rule 6.8. However, had I found that the service was irregular, and set aside the default judgment, I would have ordered that re-service of the claim form and service of the other documents be dispensed with for the reasons stated in paragraph 27.

**Has the applicant satisfied the conditions of rule 13.3?**

[34] Rule 13.3 of the CPR provides:

> *"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 is reasonably practicable after finding out that judgment has been entered.*
> *(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."*

[35] Prior to the 2006 amendment to the Jamaican CPR, the old rule 13.3(1) previously provided that a Court might set aside a default judgment "*only if*" all three conditions in that rule were met, namely, that a defendant had a real prospect of successfully defending the claim, that he applied to the court as soon as is reasonably practicable and that he gave a good explanation for the failure to file a defence. In ***Kenneth Hyman v Audley Matthews and Another*** SCCA No. 64/2003 and ***The Administrator General for Jamaica v Audley Matthews and Another***, SCCA No. 73/2003, delivered on November 8, 2006, Harrison P said the three conditions were to be read cumulatively. That is not the position today, following the 2006 amendment. The Court of Appeal has since emphasised that in determining whether to set aside the default judgment, the "*foremost consideration*" is the defendant's prospects of success (see for example ***Denry Cummings v Heart Institute of the Caribbean Limited*** [2017] JMCA Civ 34 at paragraph 66 per McDonald-Bishop JA).

[36] It is well settled that in determining whether there was a real prospect of success, the court must give consideration to the claim, the nature of the defence, issues of the case, and whether there is a good defence on the merits with a realistic prospect of success. Consequently, rule 13.4 provides that the application must be supported by evidence on affidavit and the affidavit must exhibit a draft of the proposed defence. However, in considering the issues of the case while hearing the application, the court is not to conduct a mini trial.

**Does the defence show a real prospect of success?**

[37] Rule 10.5 of the CPR requires that the defence filed should state the facts relied on to dispute the claim. I find that the applicant's proposed defence is not a bare denial of the claim, but instead, states the facts relied on. In ***Swain v Hillman*** [2001] 1 All ER 91 at 92, Lord Woolf MR said "*the words '… real prospect of succeeding' ... direct the court to the need to see whether there is a "realistic" to as opposed to a fanciful prospect of success*". It must be more than a merely arguable case. It must be a good defence in fact or in law, or both. In assessing the merits of the draft defence, a brief review of the law on occupiers' liability

seems warranted.

[38] Section 3(1) to 3(4) of the **Occupiers' Liability Act** states as follows:

> *"3. (1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.*
> *(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*
> *(3) The circumstances relevant for the present purposes include the degree of care and of want of care which would ordinarily be looked for in such a visitor …*
> *(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances."*

[39] The applicant is alleging that the van seat was safely stored on a shelf at the business and that the respondent must have interfered with it in order for it to fall off the shelf. While the draft defence does not expressly state that the claimant "wholly caused or materially contributed to the accident", contributory negligence is raised as a defence as it alleges at paragraph 3 that the claimant suffered her injuries "*as a result of her failure to exercise due care and attention when viewing and/or retrieving the items for sale*". In its proposed defence, the defendant asserts that adequate safety measures were in place to secure the van seat. Specifically, it was said at paragraph 4 of the draft defence, that all items on shelves would have been placed at least four (4) centimetres away from the shelf edge. In my opinion, simply placing such a heavy item only four (4) centimetres from the shelf edge, would not have allowed the defendant to discharge its duty to lawful visitors. More would be required for the defendant to be regarded as having taken care, as is reasonable in the circumstances, to ensure that the claimant was reasonably safe in using the premises for the purposes for which she was invited by the defendant to be there. It was not indicated that there were any other safety measures in place including fencing or guarding of the van seat.

[40] The burden of proof in the claim rests with the claimant to establish, on the balance of probabilities, the cause of her injury and the defendant's negligence. The defendant bears the burden to establish on a balance of probabilities that the claimant ought reasonably to have foreseen her injury and was thus contributorily negligent. The defence of contributory negligence operates to reduce the extent of a defendant's liability (due to the extent of claimant's carelessness or fault), but

not necessarily to absolve a defendant of liability. See section 3 of **the Law Reform (Contributory Negligence) Act** in this regard. The decision in ***Tomlinson v Congleton Borough Council*** [2003] UKHL 47 is a rare example of the defence of contributory negligence wholly relieving a defendant of liability. The instant case is very different from ***Tomlinson*** since the risk of interference with the van seat would seem to be a risk which the defendant was required to guard against. It seems to me that unless the danger of the seat falling was patently clear to the claimant and she ought not to have been in that area (which is not alleged), the defendant will not be relieved of liability. However, these are issues to be determined at a trial.

[41] I have noted that no mention is made in the draft defence or Affidavits filed as regards the source of the allegation that the claimant touched the seat in order to view it. It therefore remains to be seen how this would be proved. Depending on the nature of the claimant's act, the location of the van seat and the absence of sufficient safety guard to keep the seat from falling, it would have been risky for the claimant to disturb the seat. In such circumstances, contributory negligence is a live issue for a Court's determination. I find that the applicant has established a realistic prospect of liability being apportioned. There are triable issues disclosed in the draft defence for a Court to determine, including whether the defendant's duty of care to the claimant was discharged, and the *"degree of care and want of care"* of the claimant. A Court will consider the nature of the danger and whether it was obvious to the reasonable visitor and known to the occupier, and the reasonableness of the visitor's conduct, having regard to the purpose of the visit. At a trial, the claimant will be required to prove that the defendant, as occupier, failed to implement reasonable measures or precautions, such as securing the van seat or placing some type of guard around it to prevented from falling, or placing warning signs in the area or ensuring that the visitors were adequately assisted or supervised by staff.

**Did the defendant act promptly in seeking to set aside the default judgment?**

[42] From the applicant's affidavit filed on May 21, 2018, it seems that the default judgment and notification of the date for the Assessment of Damages hearing were only served on the applicant on May 8, 2018. The Notice of Application to

set aside the default judgment was filed on May 21, 2018. In the circumstances, the applicant must be taken to have acted promptly in seeking to set aside the default judgment. Mr. Powell was jolted into action in May 2018 and acted within 13 days of receiving notification of the default judgment.

**The explanation for failing to file the acknowledgement of service and defence**

[43] In his affidavit filed on May 21, 2018, Mr. Powell said that he was not aware that a defence should be filed, because no Form 5 was served. The court having rejected his account that he did not receive the Form 5, and having found that the applicant was properly served with the requisite documents on October 30, 2012, I now find that the applicant does not have a good explanation for failing to file its defence in 2012. In his testimony, Mr. Powell further said that he gave the documents to his sister to forward to his lawyer. When asked by the court why he did not ask his sister about the documents between 2013 and 2017, Mr. Powell said that he "did not remember" about the documents. I find this account incredible since Mr. Powell would have appreciated the seriousness of litigation and the nature of the claimant's injuries, as he averred that he assisted the respondent with some of her medical bills after the accident. Notwithstanding the poor explanations given, the primary consideration for the court is whether the defendant has a real prospect of successfully defending the claim.

**Is there any likely prejudice to the claimant?**

[44] As this is personal injury case, it ought to have been dealt with promptly. The claimant might have been prejudiced by the six (6) year delay in the progression of this matter. However, the overriding objective requires that cases are determined on their merits. Where there is merit in the defence, a defendant must be afforded an opportunity to be heard on its defence, unless the circumstances of the delay are so egregious that there is real injustice to the claimant. The potential injustice to the claimant is that of having to wait a further few years for her trial and incurring the additional costs of a contested trial. This must be balanced against the potential injustice to the defendant in being prevented from being heard on the issue of liability, when contributory negligence seems to be a real issue. Mr. Powell seemingly ignored the proceedings and such conduct is to be discouraged. A court may address such conduct by refusing an application to

set aside the default judgment or by ordering costs against a defendant. While the CPR does not compel a defendant to file a defence, or to file an application under rule 9.6 to challenge the court's jurisdiction, rule 1.3 provides that it is "*the duty of the parties to help the court to further the overriding objective*" of enabling the court to deal with cases justly and expeditiously. In keeping with the spirit of the CPR, defendants are to file their defence promptly after service.

[45] Aside from the additional costs incidental to a trial, I have not identified any prejudice to the claimant if the default judgment were to be set aside and the matter proceed to trial. Having regard to the merits of the defence, I find that the potential injustice to the defendant outweighs that to the claimant. In order to achieve fairness between the claimant and the defendant, I will order that the default judgment be set aside and to order costs to the claimant to address any possible prejudice or inconvenience caused by the defendant's delay in this matter.

**Disposition**

1. The application to set aside default judgment pursuant to rule 13.2 is refused. However, the application to set aside default judgment pursuant to rule 13.3 is granted.
2. The draft defence filed on October 8, 2018 is permitted to stand.
3. The parties are referred to mediation and must complete mediation by July 31, 2019.
4. A Case Management Conference hearing is fixed for October 2, 2019 at 10 am for half an hour.
5. Costs to the claimant/respondent to be agreed or taxed.
6. Leave to appeal is granted to both parties.
7. The claimant's attorneys-at-law are to prepare file and serve this order.