[2019] JMSC Civ 97

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NOS. 2010HCV05040 & 2010HCV05041

BETWEEN	ROGER LORDE	1ST CLAIMANT
AND	LISA-ANN EDWARDS	2ND CLAIMANT
AND	IPS INTERNATIONAL LLC	DEFENDANT

IN CHAMBERS

Mrs. Alia Leith-Palmer instructed by Kinghorn & Kinghorn for the Claimants

Oraine Nelson instructed by Brian J Barnes & Associates for the Defendant

Heard on September 20, 2017, December 7, 2017, June 8, 2018, October 1, 2018 and April 2, 2019

Application to Set Aside Default Judgment – Rule 13.3 of the Civil Procedure Rule (CPR) whether there is a valid claim against a company struck off the Register - Service pursuant to rule 5.9 of the CPR

MASTER MASON

Background

[1] The Claimants commenced proceedings on the 12th and 14th of October 2010 with the filing of Claim Forms and Particulars of Claim to recover damages arising from a breach of contract between themselves and an alleged investment club facilitated by the then 1st and 2nd Defendant, IPS International LLC and

Ouida Desreen Stennett respectively. The Claimants aver that they deposited large sums of money to the Defendants based on representations of high interest rates per month on investments (80% security of money deposited and the other 20% at risk or being traded). To date, all attempts made by the Claimants to recover the deposits made and the returns on the said deposits have proved futile.

[2] The documents were served on the Defendants on the 28th of February 2011, three months after the initial filing. The Defendant filed in the registry an Acknowledgement of Service on the 11th of March 2011 on behalf of both Defendants. However, an amended Acknowledgement of Service was filed on the 11th of April 2011 to reflect the acknowledgement of only the then 2nd Defendant. Additionally, on the same date, a Defence for the 2nd Defendant was filed.

[3] A default judgment was sought and obtained by the Claimants in August and September 2013 respectively on the basis that the 1st Defendant was duly served, had filed an Acknowledgement of Service and failed to file a Defence. Subsequently on the 11th of February 2016 a Notice of Application for Court Orders was filed by the 1st Defendant seeking to set aside the default judgment.

[4] On the 12th of September 2016 the Claimants discontinued the claim against the 2nd Defendant Ms Ouida Desreen Stennett.

Chronology

(1) Claim Forms and Particulars of Claim along with Acknowledgment of Service Form and Prescribed Notes to the Defendant filed on October 12 and 14, 2010.

(2) Served Claim Form and Particulars on the Defendant on February 28th 2011.

(3) Acknowledgement of Service of Claim Form filed on March 11th 2011 on behalf of both Defendants.

(4) Amended Acknowledgement of Service filed on April 11th 2011 on behalf of the 2nd Defendant Ouida Desreen Stennett

(5) Defence on behalf of the 2nd Defendant filed on April 11th 2011.

(6) Referral to mediation January 13, 2012.

(7) Exparte Notice of Application for Freezing Order along with Affidavit in Support filed on November 16th 2012.

(8) Affidavit of Urgency in support Notice of Application filed on January 8th 2013.

(9) Formal Order granting injunction filed on January 9th 2013.

(10) Formal Order filed on May 15th 2013 extending the interim injunction and hearing date set.

(11) Notice of Change of Attorney filed July 3rd 2013.

(12) Request for Default Judgment filed on August 30th 2013 and September 4th 2013.

(13) Judgment in Default of Defence granted on September 10, 2013.

(14) Notice of Application and Affidavit in Support filed on December 12th 2013 (Lisa-Ann Edwards) and February 27th 2014 (Roger Lorde) requesting that the land owned by the 2nd Defendant stand charge for payment.

(15) Order filed March 18th 2014 extending interim injunction and consolidating both claims.

(16) Affidavit of Ouida Desreen Stennett filed on May 16th 2014 disclosing assets.

(17) Notice of Change of Attorney for the Defendant filed on July 21st 2015.

(18) Amended Defence filed August 24th 2015 on behalf of both Defendants.

(19) Notice of Application for Court Orders to set aside Default Judgment and Amended Defence along with Affidavit in Support filed on February 11th 2016.

(20) Supplemental Affidavit in Support of Notice of Application filed February 16th 2016.

(21) Notice of Discontinuance against the 2nd Defendant Ouida Desreen Stennett filed on September 12th 2016

(22) Affidavit of Lisa-Ann Edwards in opposition to Application to Set Aside Default Judgment filed on January 3rd 2017.

(23) Legal Submissions by Defendants filed on January 18th 2017.

(24) Further Amended Defence filed January 18th 2017.

(25) Affidavit of Ouida Desreen Stennett in support of Notice of Application to set aside Default Judgment filed on March 16th 2017

(26) Legal Submissions filed by Defendants on March 27th 2017.

(27) Claimants Skeleton Submissions on the Defendants Application to Set Aside Default Judgment filed on March 27th 2017.

(28) Claimants Supplemental Submissions filed December 14th 2017.

(29) Defendant Supplemental written submission filed on December 14th 2017.

(30) Defendant Supplemental Legal Submissions filed October 12th 2018.

Defendant's Submissions in Support of Application

[5] The Defendant asserts that Ouida Desreen Stennett, manager of IPS International LLC was not served at a place of business of the Defendant that has a real connection with the claim as per Rule 5.7(d) of the Civil Procedure

Rules 2006 (hereinafter "CPR"). Ouida Desreen Stennett was required to report on condition of bail at the Fraud Squad for criminal charges laid against her. It was here Ouida Desreen Stennett was personally served and the Defendant asserts that this was not the place of business of the Defendant it having no real connection to the claim. In the circumstances, the Defendant submits that the Claimants have failed to serve the Defendant as the required procedure was not followed. However, because of the injunction affecting the assets of the Defendant since about 2010, the Defendant has voluntarily entered the proceedings.

[6] Additionally, the Claimants did not apply for an order for specified service on the 1st Defendant in the absence of serving Ouida Desreen Stennett at a place of business having a real connection with the claim.

[7] The Defendant submits that as a consequence of a complaint to the Financial Services Commission the company's registration was blocked and the Company was eventually struck off the Register. Since then, the 2nd Defendant has been discharged of criminal charges. The Company is now awaiting re-instatement, however, at the time the claim was commenced the Company no longer existed.

[8] It is the Defendant's submission that there is a real prospect of successfully defending the claim as per Rule 13.3 (1) of the CPR. The Defendant submits that the funds deposited by the Claimants were for transmission to OLINT and/or Keen Exchange both of whom were foreign exchange traders. Following said deposits both OLINT and Keen Exchange collapsed, therefore the money deposited by the Claimants was not returned by the Defendant. The Claimants were always aware that their money was with OLINT and Keen Exchange; the Defendant was merely a third party transmitting the deposits on the request and direction of each Claimant. The Defendant further submits that the case ought to be tried on its merits, as there was no contract between them and the Claimants. The Defendant maintains that the Company is in no way responsible for any loss

of investments as the Claimants acted on their own when deciding what steps to take.

[9] The Defendant also maintains that the application filed on February 16, 2016 was made as soon as reasonably practicable after finding out that judgment had been entered as per Rule 13.3(2)(a) of the CPR. Additionally, the Defendant avers that prior to the Default Judgment the Company was not represented. Once Counsel was retained, an application was filed to set aside the Default Judgment approximately a month after service of the Judgment.

[10] The Defendant has a good explanation for failing to file a Defence in accordance with Rule 13.3(2)(b) of the CPR. The Defendant submits that it was considered prudent to wait until the adjudication proceedings against the manager, Ouida Desreen Stennett were completed in the Resident Magistrates' Court before filing a Defence. Further, the then 2nd Defendant relied heavily on her then lawyers and did not know that these filings did not cover the Company as she was told that the Claimants had no reasonable case against the company.

[11] The Defendant also submits that a litigant must be given a reasonable opportunity to be heard.

Claimants Submissions opposing the Application

[12] The Claimants submit that the Defendant was duly served and had filed an Acknowledgement of Service on March 11, 2011 and had filed no Defence in the matter. The amended Acknowledgement of Service filed April 11, 2011 reflecting acknowledgement only for the then 2nd Defendant does not have the effect in law as the 1st Defendant was not served. The then 2nd Defendant, Ouida Desreen Stennett, was served as a Principal Officer and/or Director of the 1st Defendant based on several representations both oral and written made by the 2nd Defendant. The Default Judgment would have been properly obtained as the 1st Defendant would have been properly served in accordance with Rule 5.7(c) of the CPR.

[13] The Claimants also submit that the then 2nd Defendant is abusing the process of the Court as the 2nd Defendant is purporting to act for the 1st Defendant to set aside a regularly obtained judgment when she has admitted that she is an ex-employee and therefore would have no locus standi. Further if the Court rejects Ouida Desreen Stennett's assertions that she is the sole Director/ Corporate Officer of the 1st Defendant's Company then this application must also be dismissed with costs to the Claimants.

[14] Additionally, the Claimants state that the Application is in breach of Rule 22.4 of the CPR which states:

> *"where a company has been dissolved, the party duly authorized to carry out proceedings on behalf of the Company is a Liquidator."*

[15] The Claimants also submit that a 5 year delay in responding to the Claim is more than dilatory and a clear affront to justice. In addition, it was not until 2 years and 2 months after Default Judgment was entered that the Defendant filed an application to set it aside.

[16] Furthermore, the Claimants submit that the 2nd Defendant would have been present and represented by Counsel at several inter partes hearings in the substantive matter where freezing orders were granted against the 1st Defendant. Therefore, she would have been aware of the Default Judgment. Additionally, the Amended Defence was filed in August 2015 and the Application to Set Aside could have also been made at that time.

<u>Issues</u>

(1) Whether the Defendant was properly served?

(2) Whether there is a valid claim against the Company being that the Company was struck off the Register at the commencement of the claim?

(3) Whether the default judgment obtained by the Claimants should be set aside?

Law and Analysis

Issue 1: Whether the Defendant was properly served?

[17] In the Affidavit of Ouida Desreen Stennett filed on the 17th March 2017, Miss Stennett admits to representing the Defendant in a corporate capacity, as a manager. According to Rule 5.7 (c) of the CPR service on a limited company may be effected by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company. Therefore, service on the Defendant would have been properly effected through Ouida Desreen Stennett.

Issue 2: Whether there is a valid claim against the Company being that the Company was struck off the Register at the commencement of the claim?

[18] At the time the claim commenced in 2010 the company was struck from the roles of the Registry in St. Kitts and Nevis. It would therefore seem as though the company was not in existence at the commencement of the claim. However, **The Nevis Limited Liability Company Ordinance 1995 as Amended in January 2002** states at **Section 54 (1):**

> "All limited liability companies whether they expire by their own limitations or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities, and to distribute to the members any remaining assets, but not for the purpose of continuing the business for which the limited liability company was organized. With respect to any action, suit, or proceeding begun by or against the limited liability company either prior to or within

> three years after the date of its expiration or dissolution, and not concluded within such period, the limited liability company shall be continued beyond that period for the purpose of concluding such action, suit or proceeding and until any judgment, order, or decree therein shall be fully executed."

[19] It is evident, therefore, that the company was dissolved in 2010 and the claim was brought in 2010, the Claimants would have met the requisite three year criterion and would have a valid existing claim against the company.

Issue 3: Whether the default judgment obtained by the Claimants should be set aside?

[20] According to Rule 13.3 of the CPR the Court may set aside a default judgment if the defendant can prove that he has a real prospect of successfully defending the claim. In considering whether to set aside the default judgment the Court will take into consideration:

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

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

[21] Straw J in **Cynthia Smith v Movac Protection Limited** [2016] JMSC Civ. 75 opined at paragraph 3 that:

> *"The conditions triggering the exercise of the court's discretion are clearly outlined with the major emphasis being whether the applicant has a real prospect of successfully defending the claim. If there is a defence with a real prospect of success, the court would therefore consider the other factors such as the delay in filing the defence and any reasons advanced as well as the period of time taken to file the application to set aside the judgement."*

Real Prospect of Success

[22] The case of **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy** 2008HCV05707 at paragraph 7 clearly highlights the fundamental importance of the Defence having a real prospect of success. Edwards J (as she then was) stated:

> *"It is clear therefore, that an application to set aside a 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. It is to be accepted therefore, that there is now only one ground for setting aside a judgment obtained under Part 12 and that is the ground listed in 13.3(1) and that is, whether the Defendant has a real prospect of successfully defending the claim. 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)."*

[23] Additionally Sykes J pointed out at paragraph 22 of his judgement in **Sasha Gaye Saunders v Michael Green et al,** 2005HCV02868 the meaning of "real prospect of success". He noted that when considering the merits of the defence, the test of "real prospect of success" is higher than the test of an arguable defence. Real prospect does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the court, where available, to look at contemporaneous documents and other material to see if the prospect is real. He relied on the judgment of Lord Potter at paragraph 10 in **ED&F Man Liquid Products Ltd v Patel & Anor** [2003] which stated that:

> *"….in some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable…."*

[24] Sykes J further declared in his judgment that this passage should be noted with great care.

> "*It is clearly suggesting that the judge must conduct some evaluation of the proposed defence and decide whether it has a real prospect of success. If the defence has substantial contradictions then that may be an indication that the prospect is not real….*"

[25] Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91, opined at page 92 that: -

> *"The words, "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or...directed the court to the need to see whether there was a "realistic" as opposed to a, fanciful" prospect of success."*

[26] Based on the authorities, it is clear that the paramount consideration for the court is whether the defendant has a real prospect of successfully defending the claim. In order to make such a determination, the court must examine the evidence. Rule 13.4(2) and (3) of the CPR set out two distinct requirements, namely that the application must be supported by evidence on affidavit and that the affidavit must exhibit a draft of the proposed defence.

[27] In the well-known case of **Evans v Bartlam** [1937] AC 473, Lord Atkin at page 480 stated that one of the rules laid down to guide the Courts in exercising its discretion to set aside a regularly obtained Judgment in Default is that:

> *"…there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence."*

[28] After careful review of the Affidavit evidence in this matter and the Defence it is evident that there is a serious issue to be tried and that there is a realistic chance of the Defendant being successful. The Defendant has presented case law; namely, **Wilbert Howard v Conroy Forte Snr** [2015] JMSC Civ. 70 which was

decided on a similar issue and the courts have found in their favour. It would be remiss to ignore this fact and dismiss the application.

[29] The claim surrounds a breach of contract as purported by the Claimants, however, the Defendant in its Amended Defence avers that there was no contract between them and puts the Claimants to strict proof that it operated an Investment Club. The Defendant further denies taking any investments from the Claimants and maintains that the Claimants gave Ouida Desreen Stennett money for no other purpose but to forward same on the Claimants behalf, to OLINT. However being that OLINT was not accepting new members the Claimants implored Ouida Desreen Stennett to facilitate trading through her account with OLINT. The Defendant asserts that at no time were they party to this or any other contracts with the Claimants.

[30] Lindo J in **Wilbert Howard v Conroy Forte Snr** [2015] JMSC Civ. 70 was clear in her opinion at paragraph 31 on claims of this nature, she noted that evidence would have to be led to satisfy the Court that on a balance of probabilities the Defendant held himself out to be in the business of operating an investment scheme. It is therefore for the Claimants to demonstrate on a balance of probabilities that the investment agreement was a binding contract or that the Defendant's contract caused them to invest in OLINT.

[31] Consequently, I am of the view that Issues ought to be tried in open court, as it is evident that the Defendant has more than just an arguable Defence but a "real" prospect of success:

<u>Whether the Application was made promptly</u>

[32] Edwards J (as she then was) in **Victor Gayle v Jamaica Citrus Growers and McCarthy Anthony** [2008] at paragraph 11 also highlighted that:

> *"…..a defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the court considers the factors in 13.3 (2) against his favour*

> *and in going on to consider the overriding objective and any likely prejudice to the accused it comes to the conclusion that the judgment ought not to be set aside…It is therefore not impossible for the defendant to have a good defence on the merits i.e. one with a real prospect of success but find himself in the unenviable position of having the court refuse to set aside a judgment entered in default under Part 12."*

[33] The effect of the requirement for the defendant to apply to set aside the judgment as soon as was reasonably practicable after finding out that judgment was entered has been recognised and helpfully explained in **Standard Bank PLC & Another v Agrinvest International Inc & Others** [2010] EWCA Civ 1400. It was stated at paragraph 22:

> *"The overriding objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind as to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one. However, promptness will always be a factor of considerable significance, as the judge recognised in paragraph 27 of his judgment and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial."*

[34] Additionally, Straw J in **Cynthia Smith v Movac Protection Limited** [2016] JMSC Civ. 75 at paragraph 5 stated that:

> "It is clear also, that in dealing with the issue of delay, the court must examine the degree of prejudice to the other party if the application were to be granted. In **Peter Haddad v Donald Silvera,** SCCA No. 31/2003, Smith JA, at page 8, referred to the decision of a number of cases decided in the "Pre 2002 CPR" era. He pointed out that these cases held that in exercising its discretion the court should consider, the length of the delay, the reasons for the delay, whether there is an arguable case for appeal and the degree of prejudice to the other parties if time is extended."

[35] It is determined that there is a good Defence on the merits of the case, but consideration must be given as to whether the defendant acted promptly. The Defendant received the Claim Form on February 28th 2011 through the company's Manager Ouida Desreen Stennett. An Acknowledgment of service was filed on the 11th of March 2011 on behalf of the Defendants. An amended Acknowledgment of Service was filed April 11, 2011 to reflect service on the then 2nd Defendant Ouida Desreen Stennett only and not the company. It is maintained, however, that the Defendant was properly served. Judgment in Default of Defence was entered against the Defendant on the 10th of September 2013 for Roger Lorde and on the 16th of September 2013 for Lisa-Ann Edwards. According to the Affidavit evidence of Ouida Desreen Stennett filed on the 11th of February 2016 approximately one month after being served with the Judgment in Default of Defence, the Defendant applied to the Court to have the Judgment set aside.

[36] There is no documented proof evidencing service of the Default Judgment on the Defendant, except for the evidence contained in the affidavit of the Defendant's Manager, Ouida Desreen Stennett. The Claimants have not put forward any evidence challenging this assertion. The case of **Marcia Jarrett v South East Regional Health Authority, Robert Wan and the Attorney General** [2006] HCV00816 examines the issue of whether the Claimants should serve the default judgment. It was decided that service of the default judgment must be effected

on the defendants. Therefore, I adopt the decision in the case of **Marcia Jarrett.** An Application to set aside must be filed as soon as reasonably practicable after finding out that judgment has been entered. It follows therefore that the Defendant would not have been able to file an application to set aside judgment if it was not aware that judgment has been entered.

[37] The delay in applying to set aside the judgment was not inordinate to cause injustice to the Claimants, as only a month had lapsed between service of the Default Judgment and the Application to set it aside as no steps were taken to enforce the judgment. The reason proffered by the Defendant regarding recently retaining Counsel is an acceptable one as Counsel was not in a position to proceed. The Claimants themselves contributed to the prolonged state of the case as they did not serve the judgment until three years later.

<u>Explanation for not filing a Defence</u>

[38] Having concluded that there is a good Defence and that the delay on the part of the Defendant was not inordinate, consideration must be given to the explanation for failure to file a Defence within the stipulated time.

[39] The Defendant explained that a Defence was not filed because at the time of service Ouida Desreen Stennett, was charged in the Resident Magistrates' Court for fraudulent conversion. Anxious that the instant case would be prejudiced by the criminal proceedings being pursued the defendant thought it prudent to await the adjudication of those criminal proceedings. She was vindicated of the criminal charges on the 29th of April 2014 and the 13th of January 2015.

[40] Though the concern of Ouida Desreen Stennett is legitimate, to ignore the claim until the end of the proceedings in the Resident Magistrate Court is not a good explanation, for not filing a Defence. It would have been prudent to file an application for the Courts consideration to stay the proceedings until the determination of the matter in the criminal court.

[41] The case of **Communications Consultants Limited v Software Distributors and Leicester Levy** [2016] JMSC CIV. 99 explored the idea of whether a defendant should be punished for Counsel's lethargy.

Justice Brooks in the **Attorney General of Jamaica v Western Regional Health and Rashaka Brooks Jnr. (a minor) by Rashaka Brooks Snr. (his father and next friend)** [2013] JMCA Civ 16, said:

> *"... a deserving litigant ought not to be shut out because of an error by his attorney-at-law..."*

[42] Therefore, I will now venture to say that in this particular case, the 1st defendant ought not to be penalized for being ill-advised by its counsel. What emerges next for consideration is whether any prejudice will befall the claimant if the judgment in default is set aside. It is the claimant's position that, "judgment was served on the defendant's lawful agent and attorney more than two years before the application was filed. The claimant should not be condemned to go back through the courts after a 6 years wait to get to this stage." Notwithstanding that concern, the claimant had not indicated to the court, how it would be prejudiced should the application to set aside the default judgment, be countenanced.

[43] The Claimants relied on the case of **Joseph Nanco v Anthony Levy and B& J Equipment Rental Limited** [2012] 7 JJC0201 to support the point that McDonald Bishop J (as she then was) said:

> *"The defendants cannot claim that an error of counsel in failing to file the Defence, or seeking to set aside the Judgment in Default after becoming aware of same, should deprive the claimant of the fruit of its judgment."*

[44] However, the said **Communications Consultants Limited** case distinguishes this case on the basis that the facts of the **Nanco** case differ as the 2nd defendant's attorney did take an active part in the proceedings. The defendant therefore, ought not to be penalized for being ill-advised by Counsel. Further, regardless of the delay in responding to an action before the Court, the overriding objective of the CPR cannot be ignored.

[45] This principle was highlighted by Lord Atkin in **Evans v Bartlam** [1933] AER Vol. 2 pg. 650 where he said:

> *"The principle obviously is that, unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure"*

Prejudice

[46] The issue of prejudice to the Claimants must be addressed particularly if the default judgment is set aside. The overriding concern is that the Claimants should not be forced to go through the court's process after such a long delay in moving the matter forward.

[47] However, the Claimants in their submissions have made no specific allegations with regards to any prejudice. One can so far assume that their only prejudice would be the loss of ability to proceed speedily to the assessment of damages. Though it is true that the Claimants have secured a regular default judgment which is something of value, they should not be deprived of it without exceptional reasons. Any prejudice faced by the Claimants can be covered by an order of costs. The case of **Finnegan v Parkside Health Authority** [1998] WLR is instructive in that where no prejudice has been deponed to in a claim, the applicant should not be denied full access to justice.

Conclusion

[48] It is evident based on the law that service was effected on the defendant resulting in a valid existing claim despite the company being dissolved in 2010. Based on Affidavit evidence it can be considered that the defendant acted promptly in applying to set aside the Default Judgment. Most importantly, there is a Defence on the merits with a real prospect of success. Clearly, there are

issues which can only be fairly determined by a full trial. The court at this stage cannot make any determination on such issues.

[49] Accordingly, after careful review of all the circumstances, the application to set aside the default judgment is allowed. The Defendant has a real prospect of successfully defending the claim.

I therefore make the following Orders:

1. That the Default Judgment entered in claim 2010HCV05040 and claim 2010HCV05041 is set aside.

2. That the Amended Defence filed on August 24, 2015 is to stand as filed.

3. That the parties are to proceed to mediation within 90 days of today's date.

4. Case Management Conference is scheduled for July 18, 2019 at 2:00p.m. for ½ hour.

5. Costs to the Claimants to be agreed or taxed.

6. The Applicant's attorney-at-law to prepare file and serve the order made herein.