[2023] JMSC Civ. 131

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013HCV04724

BETWEEN	**WARREN MARLEY (near relation and Father of Vittoria Marley, deceased)**	**1ST CLAIMANT**
AND	**LEIZA BLAKELY (near relation and Mother of Vittoria Marley, deceased)**	**2ND CLAIMANT**
AND	**ROSE HALL DEVELOPMENTS LTD**	**DEFENDANT**

Mr. Franz Jobson for the Claimants instructed by Jobson Wadsworth Thompson Fontaine

Ms. Alexandria Fennell for the Defendant instructed by Nunes Scholefield & DeLeon

Civil Procedure - Application to set aside default judgment - Service by fax - Whether Defendant has a real prospect of successfully defending the claim - Good explanation- Risk of Prejudice- Rules 12.4, 13.2 and 13.3 of the CPR

HEARD – May 11th, 2023, June 21st, 2023 and July 28th, 2023

T. HUTCHINSON SHELLY, J

INTRODUCTION

[1] This application for the setting aside of a default judgment was filed on behalf of the Applicant/Defendant on the 18th of May 2022. It was supported by an affidavit from Cheryl Ann Lyon, Company Secretary for the Defendant which was filed on the same date in which they seek the following orders:

1. *The Default Judgment entered on the 18th of September 2019 in Judgment Binder 777 Folio 53 and all subsequent proceedings against the Applicant/Defendant prior to this application be set aside.*
2. *That there be a stay of execution and the enforcement of the said Default Judgment pending the determination of this Application.*
3. *The Applicant/Defendant be given an extension of time within which to file and serve its Acknowledgment of Service and Defence to the Claim Form and Particulars of Claim.*
4. *Cost of the application to the Applicant/Defendant to be agreed or taxed.*
5. *Such further and other relief as this Honourable Court deems fit.*

[2] The grounds on which the Defendant/Applicant is seeking these orders are as follows:

a. *Pursuant to Civil Procedure Rules, 13.2, and in the alternative, Rule 13.3 and 13.4 (1).*
b. *The Applicant/Defendant was never served with the claim Form and Particulars of Claim.*
c. *The Defendant/Applicant was not aware that a Default Judgment had been entered against the Defendant/Applicant until receipt of an email from the Claimants' Counsel notifying it of a Case Management Hearing for Assessment of Damages.*
d. *To date the Defendant/Applicant has not been served with a perfected copy of the Default Judgment.*
e. *That the Default Judgment entered is irregular as the Claimant did not prove service of the Claim Form and Particulars of Claim.*
f. *The Defendant seeks the above orders pursuant to Rule 13.2 of the Civil Procedure Rules, 2002 and in keeping with the overriding objective of dealing with cases justly.*
g. *Alternatively, the Applicant/Defendant seeks the above orders pursuant to Rule 13.3 of the Civil Procedure Rules, 2002 and in keeping with the overriding objective of dealing with cases justly.*
h. *The Defendant has a real prospect of successfully defending the claim.*

i. This application is made as soon as reasonably practicable.

j. The granting of these Orders will further the overriding objective.

[3] On the 11th of May 2023, at the commencement of the hearing, the Defendant applied to amend the application to include an order that the Claim Form and Particulars of Claim had already expired at the time of service on the 17th of September 2015. The amendment was permitted and the Claimant was granted the opportunity to file additional submissions in response. Both parties were then heard on the point.

BACKGROUND

[4] On the 27th of August 2013, the 1st and 2nd Claimants, the parents and near relations of Vittoria Marley, brought this action under the Law Reform (Miscellaneous Provisions) Act and also under the Fatal Accidents Act. The Claimants seek an award of damages for negligence and breach of the Defendant's statutory duty of care which the Claimants say resulted in the death of their teenage daughter. The Defendant is a company duly incorporated under the Companies Act which at all material times was the owner of the Cinnamon Hill Golf Course as well as the golf carts used in connection with the business of the aforesaid golf course.

[5] The circumstances which form the foundation of this claim is that on the 3rd day of September 2010, the late Vittoria Marley was involved in an accident while using a golf cart owned by the Defendant which overturned with her in it. As a result of the accident, she suffered injuries which proved fatal.

[6] On the 21st of August 2014, the Claimants filed an application seeking an order to extend the time within which the Claimants could serve the Defendant with the Claim Form and Particulars of Claim. This application was heard on the 18th of March 2015 and the order granted for a period of six months '*from the date hereof*'.

On the 17th of September 2015, a copy of the Claim Form and Particulars of Claim were sent to Ms Lyons. The email correspondence which is not in dispute reveals that receipt of the documents was acknowledged by Ms Lyons who provided the contact information for the documents to be served at the head office by facsimile.

[7] A request was made for judgment to be entered in default of acknowledgment of service on the 18th of September 2019. This was preceded by an affidavit sworn to by Mr Jobson on the 15th of November 2018. The affidavit makes reference to 2 exhibits, **FCJ1** being an email thread between Mr Jobson and Ms Lyon and **FCJ2,** a transmission record in proof of the documents being faxed to the Defendant's registered office.

[8] During the course of the hearing, it was brought to Mr Jobson's attention that **FCJ2** was not affixed to the affidavit on the Court's file and a request was made for an affidavit with same. This has not been received up to the point of preparing this judgment. Ms Fennell informed the Court that a search conducted of the Court's file for a copy of this document was unsuccessful and a copy had to be requested of Mr Jobson. This was subsequently provided by his office on the 6th of May 2022 and was attached to the affidavit of Ms Lyon as Exhibit **CL11**.

[9] A review of the document revealed the words: Transmission Verification Report as its caption. It also had the date as 09/17/15 and the time was stated as 16:51. There was additional information which stated that the fax was sent to a number provided by Ms Lyon, the length of the transmission, the pages stated as 11 and the result as ok. There was no further information beyond this.

[10] In the absence of an acknowledgment of service and/or defence from the Defendant, judgment was formally entered in the Judgment Binder on an amended interlocutory judgment on the 17th of September 2021. A case management notice

for assessment of damages was issued on the 4th of February 2022 indicating that the hearing would be held on the 10th of March 2022.

ISSUES

[11] The Court has to decide the following issues:

1. Was judgment in default properly entered?
2. Does the Applicant have a realistic prospect of success to justify the setting aside of the judgment in default?
3. Has the Applicant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered?
4. Has the Applicant given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be?

LAW AND ANALYSIS

[12] There were extensive submissions filed on both sides in respect of this application. I have carefully considered them in arriving at my decision and while I do not intend to re-state them in detail, the considerations raised therein have been addressed in the course of this judgment.

Was the judgment in default properly entered?

[13] There is no dispute between the parties that the relevant provisions which arise for the Court's consideration are found at **Part 12 and 13 of the CPR**. **Rule 12.4** which contains the provision on which the Respondent would have relied in applying for default judgment states as follows:

> *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*

> *(a) the claimant proves service of the claim form and particulars of claim on that defendant;*
> *(b) the period for filing an acknowledgment of service under rule 9.3 has expired;*
>
> *(c) that defendant has not filed (i) an acknowledgment of service; or (ii) a defence to the claim or any part of it;*

[14] A review of the application filed by the Respondent reveals that it contained a request that judgment be entered as no acknowledgment of service had been filed and the time for doing so had expired under **12.4 (b)**. In order to determine whether judgment had been properly entered, I carefully considered **Part 9 of the CPR** with emphasis on **9.3(1)** which reads:

> *9.3 (1) The general rule is that the period for filing an acknowledgment of service is the period of 14 days after the date of service of the claim form.*

[15] In the affidavit of Ms Cheryl Lyon, it is accepted that an acknowledgment of service was never filed. She explained however that this was not intentional as the Defendant never actually received the initiating documents filed in this suit. In support of this position, she made reference to internal and external email threads which were exhibited as **CL3** – **CL9**. The contents of these emails disclose communication with personnel ostensibly located at the registered office, in which it was indicated that no documents had in fact been received. There was also communication with the Defendant's insurers in respect of the non-service of the relevant documents. It is the Defendant's position that these exhibits which date back to the time of and immediately following the professed service raises questions as to whether this had in fact occurred.

[16] In submissions on the point, Ms Fennell asserted that in adopting the approach of serving the documents by fax, there had been no compliance with the requirements of **Rule 5.12** as no affidavit of service had been filed in proof of service by this method. This provision states as follows:

> *5.12(1) Service by FAX is proved by an affidavit of service by the person responsible for transmitting the claim form to the person to be served.*
> *(2) The affidavit must exhibit –*
> *(a) a copy of the document served;*
> *(b) a copy of any cover sheet to that document; and*
> *(c) a copy of the transmission record and must state –*
> *(i) the date and time of transmission; and*
> *(ii) the FAX number to which it was sent.*

[17] In response to this argument, Mr Jobson contended that the Defendant would nonetheless have had notice of the matter as in the email communication with Ms Lyon, she was provided with the claim form and particulars of claim. Counsel also made reference to the hearing which had occurred before the Master as constituting further notice of these proceedings to the Defendant, as although they had not yet been served, they were represented by Counsel at this hearing who indicated that they were watching proceedings. In making this point however, Mr Jobson accepted that those attorneys were never on record and are not the Attorneys who have brought this application on behalf of the Defendant.

[18] In considering this issue, I carefully examined the provisions of **Rule 5.12** as well as **Rule 6.6** of the CPR which addresses the deeming date for service of a document served by facsimile and states as follows:

> *6.6 (1) A document which is served within the jurisdiction in accordance with these Rules shall be deemed to be served on the day shown in the following table –*
>
> | ***Method of Service*** | ***Deemed date of service*** |
> |---|---|
> | *FAX* | *(a) if it is transmitted on a business day before 4 pm the day of transmission; or*
(b) in any other case, the business day after the day of transmission |

[19] In my examination of these provisions, I noted that whereas an affidavit of service is strictly required to comply with **Rule 5.12 (1),** the affidavit filed by the Claimant on the 15th of November 2018 does not state by whom service by fax was done. There were additional shortcomings in the document as the copy of the document

faxed was not attached, neither was there a cover page which outlined what was sent.

[20] In the decision of ***Consie Thompson-Reid v Lodian Reid*** **[2016] JMSC Civ 95,** the Court was faced with a similar situation in which service by facsimile had been disputed. The Learned Judge reviewed the relevant provision as well as the submission by the Claimant's counsel that a document served by fax must include a cover page stating certain details, and commented as follows:

> *"Suffice it to say, that certain of these elements are missing from the cover page, for example the date and time [printed] of transmission as well as the name and (phone) number of the person to be contacted if a problem arises."*

[21] At paragraph 20 of the judgment, Straw J considered the deemed date of service and observed:

> *"It is to be noted also that by virtue of rule 6.6 [1], the relevant date of service by fax is set out. If it is transmitted on a business day before 4:00pm, service is effected on that day. In any other case, the business day after the day of transmission."*

[22] In this situation, not only is there no cover page which provides any useful information as to the nature of the documents sent, the name of the sender or a contact person for confirmation; but the transmission record exhibited by the Defendant shows the transmission time as 16.47 which would be 4:47pm. Applying the provisions of **Rule 6.6** and the pronouncement by the Court in the ***Consie Thompson-Reid*** case, the document having been transmitted after 4pm would in effect have been sent/served on the following business day and not on the 17th of September 2015. A situation which would further compound the issue of service/timely service.

[23] In respect of Mr Jobson's submission that the complaint of the Applicant is without merit as they had received notice of the action, it goes without saying that the relevant consideration for the Court is not whether notice had been provided but

whether service had been effected in keeping with **Part 5 of the CPR**. In these circumstances, it is evident that there are valid questions as to whether the service of the documents had in fact taken place as required.

[24] This is not however the sole issue with which the Claimant is faced as the Defendant/Applicant contends that even if service had been effected on the 17th of September 2015, the Claim Form would have already expired. The basis of this argument is while the application to extend the life of the claim form had been filed within the 12-month period, the hearing itself did not occur until the 18th of March 2015 and any extension of six months from that date would have been a nullity as the Claim Form would have already expired. In support of this position, Ms Fennell relied on the decision of ***Perrin (Glasford) v Cover (Donald) [2019] JMCA Civ 28,*** in which the Court of Appeal dealt with the issue of when the life of a claim form could be extended.

[25] In opposing this position, Mr Jobson argued that not only would adopting such an approach result in an injustice but the Court has the power, pursuant to the provisions of the CPR, to correct any error which may have occurred when the Court extended the life of the claim form from March 18th, 2015 as opposed to the date of the application.

[26] It is accepted by the parties that this was a matter which at the time of its filing fell within the 12-month period for service. There has also been no issue taken with the Defendant's assertion that once the period had elapsed, the Claim Form would be deemed to be invalid. **Rule 8.15** outlines the procedure and requirements for the application to extend the validity of the claim form where it states as follows:

> *8.15 (1) The claimant may apply for an order extending the period within which the claim form may be served.*
> *(2) The period by which the time for serving the claim form is extended may not be longer than 6 months on any one application.*
> *(3) An application under paragraph (1) –*
> *(a)* ***must be made within the period –***

> ***(i) for serving the claim form specified by rule 8.14; or***
> *(ii) of any subsequent extension permitted by the court,*
> *(emphasis added)*

[27] In addressing the relevant period for which the life of the Claim Form could be extended, the Court in ***Cover v Perrin*** supra provided the following guidance:

> *[37] Both parties and the judge accepted that the order extending the life of the claim form should take effect on or before the date that the claim form was slated to expire.* ***Therefore, if the order extending the validity of the claim form takes effect after the claim had expired, the claim would be invalid.*** *This would be the effect of the order if it was left unadjusted (emphasis added).*

[28] Having affirmed the impact of the relevant provision of the CPR on an application for extension, the Learned Judge continued:

> *[47] Lindo J (Ag) was therefore correct to endeavour to rectify the problem caused by the terms of the order of 13 July 2015. The learned judge correctly identified the tools that she had to correct the defective order. She acknowledged the legal principles which would have allowed her to use the tools at hand. She recognized that based on the above authorities she had the jurisdiction to deal with the matter, and so refused the point in limine challenging that she had none.* ***It was clear that the words "from the date hereof" in the application meant just that (from the date the application was made), and not the date of the hearing of the application, which would have been at a time when the claim was invalid, and the order would have been sanctioning service of an invalid claim. That was obviously not what the court intended to do.***
>
> *[43] In the light of the circumstances of this case, since the error had been brought to the learned judge's attention at the time of the hearing of the application, she could have and undoubtedly would have immediately corrected that error. In Weir v Tree, the order had been perfected and this court still went ahead and corrected the order so that it would accord with the court's intention. In my view, the nature of the error in the order of 13 July 2015 clearly fell within the category of errors that a court can correct to give effect to its true intentions. The learned judge therefore could have corrected the order to reflect her true intention and rectify the matter.*
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> *45]* ***Phillips JA, at paragraph [68] of Weir v Tree said that a court has the jurisdiction to correct, in certain circumstances, errors in its own orders in order "to preserve the clarity and functioning of its order". In this case, the order needed to be corrected to preserve the functioning or efficacy of it, so that the life of the claim form could be extended in order to proceed with the matter.*** (emphasis added)

[29] Applying the principles outlined to the instant situation, it is evident that the Claim having been filed on the 27th of August 2013, would have expired on the 26th of August 2014. The application to extend the life of the claim form had been filed in time and as such the extension could have been granted for a 6-month period effective from the date of the application or date on which the Claim Form would have expired. The order having been made to extend the life from the date of the hearing would have run afoul of the Rule and the principle of law enunciated in the ***Perrin*** case.

[30] In respect of Mr Jobson's contention that this extension was a clerical error which could be corrected; while it was stated in the ***Perrin*** decision that a Court could exercise its powers to correct particular instances where an error had occurred, it is clear that this ability depends on the circumstances. In the proceedings in the Lower Court, the Learned Judge made the correction while still seised with the matter in recognition of the fact that this was necessary to prevent the order being ineffective. The life of the Claim Form having been extended prior to the expiry of same, the situation is markedly different from that which occurred in the instant case as in the current circumstances, this order resulted in the sanctioning of the service of a claim which had already expired. It is also noteworthy that the composition of the Court on this hearing is different from when the order was made, a situation which further distinguishes this matter from what existed in both the ***Perrin*** and ***Weir*** decisions.

[31] In light of the foregoing discussions, it is evident that the default judgment which had been entered is irregular as not only had the Claimant failed to comply with the requirements of **Rule 5.12**, but the claim form had long expired at the time of service rendering it a nullity and the judgment entered in respect of same could not stand.

Does the Defendant have a realistic prospect of success to justify the setting aside of the judgment in default?

[32] Having arrived at this conclusion, I considered it prudent nonetheless to consider the arguments which were advanced by Counsel for the respective parties in respect of **Rule 13.3** which provides as follows:

> *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.*

[33] The importance of an Applicant satisfying the first limb of this rule was highlighted by Edwards J (as she then was) in ***Victor Gayle v Jamaica Citrus Growers and Anthony McFarlene*** **2008HCV05707** where she stated:

> *'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). (emphasis supplied).*

[34] In respect of this requirement, it was submitted on behalf of the Respondent that the Applicant does not have a real prospect of success as the draft defence strains the limits of credulity in seeking to place the blame on the deceased minor. Mr Jobson also highlighted the prejudice which would be suffered by the Claimant who would be barred from re-filing this claim by the Limitations Act. Counsel also argued that the timing of the application and draft defence should be carefully considered as these were filed over 2 years after judgment had been entered and this situation should be sufficient for the application to be denied. Mr Jobson also prayed in aid of the overriding objectives specifically asserting that in order for

justice to be done to the Claimants, the only fair result would be the denial of the application.

[35] Ms Fennell submitted that contrary to Counsel's assertions, the Defendant had a real prospect of success. She relied on the draft defence which was attached to the affidavit of Ms Lyon and asserted that there was no evidence provided by the Claimants to support their contention that the death of the minor had in fact been caused by any breach of the Defendant's duty of care. Counsel made reference to the contents of the defence and argued that it showed that the Defendant had complied with what was required of them and in those circumstances the likelihood of them succeeding at a trial was more than 'fanciful.'

[36] In order to determine this issue, the draft defence was examined. I noted that the Defence was comprised of more than mere denials and actually outlined at paragraph 5 the maintenance of the golf carts at the property as required. Paragraph 4b stated that the cart involved was examined after the incident and showed no signs of mechanical defect and was fully functional at the time. At paragraph 7, the Defendant asserted that the deceased had in fact been negligent in her manoeuvring of the cart and had by her actions caused or materially contributed to the cause of the accident.

[37] In ***Swain v Hillman and another*** [2000] 1 All ER 91, it was observed by the Court that in order to set aside a default judgment regularly obtained, the defendant must have a real prospect 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. It was also outlined that the term '*real prospect of success*' means that the evidence presented should reveal more than a merely arguable case.

[38] Applying these legal principles to the evidence before me, it is my view that the draft defence filed satisfies this test as it raises a defence as to liability which is highly capable of succeeding before a Tribunal of Fact.

Has the Defendant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered

[39] The importance of an Applicant satisfying the requirements of **Rule 13.3(2)(a)** and **(b)** was acknowledged by Edwards J in the ***Victor Gayle*** decision when she stated as follows:

> *10.Although the primary consideration is the prospect of success, the factors in rule 13.3 (2) are not redundant. The rule states that the court •must consider them and the question remains that having considered them what is to be done about them. Sykes J took the view in the case of Sasha-Gaye Saunders', at paragraph 24, that, in the absence of some explanation for the failure to file a defence or acknowledgment of service, the prospect of succeeding in having the judgment set aside should diminish. Also if the delay is quite gross then that ought to have a negative impact on successfully setting aside the judgment. (emphasis added)*
>
> *11. This approach means 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. See also the case of Salfraz Hussain v Birmingham City Council, Coral George Coulson, Governors of Small Heath. Grant Maintained School (2005) EWCA Civ 1570 (delivered February 25, 2005) for a discussion on the approach the court ought to take in the case of multiple defendants.*

[40] In the course of examining a similar application in **Pacha Zona Libre v Sawalha, Mamdouh Saleh Abdul Jaber** [2014] JMSC Civ. 232, Batts J stated**:**

> **"***clearly if an application is not made as soon as is reasonably practicable or if the explanation is not good then the chances of a successful application reduces significantly."*

[41] While it is a fact that the Application to set aside default judgment was filed 9 months after judgment had been entered on the amended interlocutory judgment,

it is the Applicant's position that the period of delay is even shorter and was no more than 2 months. In my analysis of this issue, I reviewed the affidavit of Ms Lyon and noted that at paragraph 12, she averred that subsequent to her last communication with Mr Jobson in respect of service, she heard nothing further until April 28th 2022 when she received an email with a Formal Order attached. This order was filed the 11th of March 2022. As a result of this communication, she contacted the Company's Insurance Brokers setting off the sequence of events which resulted in this application.

[42] Upon examination of the Court's record, I observed that subsequent to the entry of judgment in favour of the Claimant, there was no contact between the parties until the 28th of April 2022, when Ms Tiffany Peynado sent the Formal Order referred to above to Ms Lyon by email. Prior to this action, there is no affidavit of service proving service of the default judgment or any other documentation. In light of the foregoing, it is clear that the application, having been made in May after being notified in April 2022, was filed less than a month after the Defendant became aware of the judgment. In these circumstances, I was satisfied that the period of delay was far from egregious as has been asserted.

Has the Applicant given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be

[43] In addressing **13.3(2)(b)**, useful guidance is found in the dicta of Panton JA (as he then was) in ***Strachan v The Gleaner Co Motion* 12/1999** delivered 6th December 1999 which outlined the factors to be considered by a Court on an application for extension of time. This was re-stated in ***AG v Dixon*** *supra* by Harris JA as follows:

> *[17] The court is endowed with discretionary powers to grant an extension of time but will only do so where it is satisfied that there is sufficient material before it which would justify it in so doing. In Strachan v The Gleaner Company Motion No 12/1999 delivered 6 December 1999, Panton JA (as he then was) outlined the following factors which a court takes into consideration in the exercise of its discretion on an application for an extension of time:*

"(i) the length of the delay;
(ii) the reasons for the delay;
(iii) whether there is an arguable case for an appeal and;
(iv) the degree of prejudice to the other parties if time is extended."

[44] It is the Applicant's position that they were unable to file an acknowledgment of service and defence because they had never been served with the Claim Form. The exhibits outlined at **CL3** to **CL9** have been relied on in this regard. While this assertion has been strongly disputed by the Claimant, in my earlier observations and findings, I had opined that there were clearly issues which went to the root of whether service had in fact taken place. Taking those findings into account, I am satisfied that the explanation is one which has merit.

Possible prejudice to the Claimant/Overriding Objectives

[45] Upon examination of this issue, while I recognize that a default judgment is a thing of value which the Court should be loathe to remove from a Claimant's grasp without good reason, especially in these circumstances, I was also mindful of the need to do justice between the parties. In this situation, if the application is refused, the Defendant is faced with an assessment which could run into a substantial sum and be deprived of a defence under the Limitation Act. While it is an unfortunate result for the Claimant, I am unable to conclude that this should weigh the scales of justice in their favour given the fact that the Defendant had done all that was required of it in the relevant time and has a real prospect of success if the matter were to proceed to trial.

CONCLUSION

[46] Having examined all the relevant factors, it is my conclusion that the Applicant has satisfied the requirements of **Rule 13.2** as the default judgment was not properly entered and can be set aside. I am also satisfied in the alternative that the Defendant has a real prospect of success and the default judgment can be set

aside pursuant to **Rule 13.3** as well. Accordingly, the Orders of the Court are as follows:

1. Application to set aside default judgment on the ground that the Applicant has satisfied the requirement of Rule **13.2** is granted.

2. The Default Judgment entered on the 18th of September 2021 and all subsequent proceedings are set aside.

3. In the circumstances where the loss to the Claimant is as monumental as can be, it is my ruling on costs that each party is to bear their own costs.

4. Applicant's Attorneys to prepare, file and serve the Formal Order herein.