[2018] JMSC Civ. 69

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 02456

BETWEEN	**BALVINE MOORE**	**CLAIMANT**
AND	**MARCIA ANDREA MILLS**	**1ST DEFENDANT**
AND	**BILTON BROWN**	**2ND DEFENDANT**

IN CHAMBERS

Ms. Sashawah Newby for the Applicant

Mr. Jason Jones for the Respondent

HEARD: 8TH FEBRUARY, 20TH MARCH AND 27TH MARCH, 2018

Application to set aside Default Judgment- Defendant filed an Acknowledgement of Service but failed to File Defence. - Whether, there is good reason for the delay - Whether information contained in the Acknowledgment of Service amounts to an Admission of the Claim - Whether the Defence has a real prospect of success. Rules 1.1,1.2 13.3,13.4.13.5,13.6.

MASTER A. THOMAS (AG.)

Introduction

[1] This is an application by Ms Marcia Andrea Mills to set aside a default Judgment that was entered against her on the 3.11.15. The Claim is one for damages allegedly sustained in a motor vehicle accident.

[2] The history as it relates to the Claim is that on the 5th of May 2015 the Claimant Mr. Balvine Moore brought a claim against the 1st Defendant Marcia Andrea Mills and the 2nd Defendant Mr. Milton Brown to recover damages for negligence and or breach of statutory duty. The claim alleges that on or about the 17th of May 2013 the 2nd Defendant negligently dove a Toyota Platz motor car owned by the 1st Defendant causing it to collide with a motor bike driven by the Claimant. As a result, the Claimant suffered injuries. The Claim Form was served on the 1st Defendant on the 18th of May 2015. On the 26th of May 2015 she promptly filed an Acknowledgment of Service in person. However she failed to file her defence within the time limited by the Supreme Court of Jamaica Civil Procedure Rules, (2006), herein after refer to as the ***Rules***. The Claimant applied for, and obtained judgment in default of defence which was entered on the 12th of October 2015. On the 1st of February 2017 the 1st Defendant filed this application to set aside the Default Judgment.

The Issue

[3] The issue which arises in this application is whether the 1st Defendant has satisfied the requirements for the court to exercise its discretion in her favour to set aside the judgment entered in default of her filing a defence.

The Law

[4] Part 13 of the ***Rules*** outline the circumstances in which a judgment entered in default of an appearance or a defence can be set aside.

Rule 13.2 (1) outlines the conditions upon which a court must set aside a judgment entered in default. That is, where the judgment was irregularly or wrongfully obtained. ***Rule 13 .3*** gives the court a discretion to set aside a regularly obtained Default Judgment once certain conditions are satisfied. There is no suggestion by the Applicant that the Default Judgment in the instant case was irregularly obtained, therefore this application must be considered under ***Rule 13.3***

[5] ***Rule 13.3 (1)*** states that:

> *"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".*

Rule 13.3 (2) states that:

> "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.*
>
> Where this rule gives the court power to set aside a judgment, the court may instead vary it".

Rule 1.1 (1) states:

> *"These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly".*

Rule 1.2 states that the court:

> *"must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these Rules".*

[6] Therefore, in order for the 1st Defendant to be successful in this application certain conditions must be met. The 1st Defendant must establish that she has a good prospect of successfully defending the claim. This is the primary consideration for an application of this nature. Additionally, the court has to consider:

> (a) Whether she has applied as soon as it was reasonable practicable to have the judgment set aside after she discovered that judgment in default was entered against her.

(b) Whether she has given a good explanation for the delay.

(c) In light of the requirement under the **Rules** that the court must deal with the cases justly, any prejudice the Claimant is likely to suffer in having the judgment set aside.

Analysis

[7] Both sides have submitted authorities in support of their respective positions for which this court is grateful. I will examine these and others which I find relevant to the matters in issue. In conducting this analysis, as a matter of convenience I will not examine the evidence in relation to conditions that ought to be satisfied in the chronological order in which they have been listed.

Did the 1st Defendant Apply as soon as Reasonable Practicable after Finding out that Judgment was Entered Against Her?

[8] The judgment in default was entered on the on the 3.11.15. In her affidavit in support of this application, the 1st Defendant indicates that she became aware of the fact that judgment was entered against her on the 20.1. 2017. She stated that this was after she was contacted by JN General Insurance Co. This evidence has not been challenged. This application was filed on the 1st of February 2017. That is 12 days after she discovered that judgment was entered against her. In all the circumstances I find that an interval of 12 days cannot in anyway be considered an inordinate delay. I find that the 1st Defendant acted promptly in making this application. In any event counsel for the Claimant has raised no serious objection on this particular issue.

Has the 1st Defendant Given a Good Explanation for the Delay?

[9] In her affidavit field on the 1st of February, 2017 the 1st Defendant Ms. Marcia Andrea Mills, gave the following explanation for her delay in filing her defence:

“After she was served with the claim, she went to her insurance company and was advised by them to seek legal advice externally. She went to the offices of the Kingston Legal Aid Clinic in order to seek legal representation. The Legal Aid Clinic indicated to her that they could not represent her as to do so would present a conflict of interest. They gave her a card for attorney-at- law Mr. Richard Bonner with the name Melton Jackson on it. She visited the office of the attorney-at-law and retained his services. She did so by paying a retainer. (She exhibited copies of the receipt). The receptionist at the Kingston Legal Aid Clinic assisted her to fill out the form for the acknowledgement of service. She showed the form to Mr. Jackson and he instructed her to file it. She later discovered that Mr. Jackson was not a lawyer but a paralegal. Her delay was due to the fact that she was assured by her attorney-at- law that her interest in the claim was fully protected in accordance with her instructions. She did not file a defence to the claim because she was not aware that she needed to file a second additional document. Moreover, she would ask for updates in relation to her court dates whenever she went to the said attorney-at-law’s office to pay fees in the matter or whenever she would call periodically. She was advised by them and particularly Mr. Melton Jackson and did verily believe that everything was all right and that she had no reason to be concerned regarding the instant claim. She was unaware that any document was outstanding or that any further steps had been taken in the matter against her. When she discovered that judgment in default was entered against her she attended the office of the attorney-at-law whom she had retained to deal with the matter and requested her file which she did not receive immediately. However she took steps to retain another attorney-at-law.”

[10] Mr. Jones in resisting this application made the following submission on this issue; "Inadvertence on the part of the Claimant's attorney-at-law may not be a good reason for the delay".

[11] He relies on several authorities which I will now examine. In the case of **Anwar Wright v The Attorney General**, *In* The Supreme Court of Judicature of Jamaica, Claim No. 2009HCV 4340, the claim was for the wrongful detention of a bus by a member of the Island Special Constabulary Force . At the time of the seizure, no charge was laid against the driver of the motor vehicle. The Claimant who was the owner of the bus alleged that there was no basis for any charge whether traffic or otherwise and therefore no basis in law for the seizure. He further alleged that a letter of complaint and demand was sent to the Director of State Proceedings for the release of the bus. The Claimant subsequently filed an action for detinue and conversion and duly served the Defendants. The Defendants failed to file an acknowledgement of service within the time allowed by the Rules and the Claimant made an application to the court for permission to have a judgment entered in default.

[12] At the hearing of that application, the Claimant was granted leave to enter the judgment in default of acknowledgement of service. The Defendant was also given permission to file an acknowledgement of service by 4:00 p.m. the following day. The Defendant complied with that order. Up to that time the filing of the acknowledgement of service would have been three months after the service of the claim form and particulars of claim. The default judgment was entered on that same day and served on the Defendants six days later. The Defendants promptly applied for that judgment to be set aside. At the hearing of the application to set aside the Default Judgment, the explanation given for the failure to file an acknowledgment of service within the time stipulated by the Rules was that the delay was due to inadvertence on the part of counsel in the Attorney General's Chambers.

[13] Master Simmonds, as she then was, found that the Defendant had not provided a good explanation for the failure to file an acknowledgment of service within the time prescribed by the *Rules*. However, it is to be noted, that consistent with the settled law on this matter she stated that,

> "This ruling is not fatal to the defendant's application as the primary consideration is whether the defence has a real prospect of success. The issue of whether a good explanation has been given for the failure to file an acknowledgment of service is one of the factors that must be considered by the court in the exercise of its discretion" (See paragraph 25 of the judgment)

[14] In the case of **Ken Sales & Marketing Limited v. James & Company** (a firm), Supreme Court Civil Appeal No. 3/05, delivered on the 20th December 2005, part of the evidence given by the managing director of the appellant company was that the claim against the company was brought to his attention the end of October 2004. He delayed until early November 2004 to bring it to the attention of his attorney- at- law, who, due to inadvertence, did not file an answer in time. The court did not regard this as a good explanation for the delay.

[15] In the case of **Teslyn Carter v Jamaica Urban Transit Co. Ltd Metropolitan Management Transport Holdings Ltd**. 2008 HCV 00555, delivered 10.11.2009, service on the Defendant company was effected by registered post. Up to 140 days after the deemed date of service the Defence was not yet filed. Despite the fact that the claim and particulars of claim were posted on the 12th of February 2008, the Defendant Company stated that the claim only came to their attention on the 10th of March 2008. That is approximately five days after the deemed date of service. They stated that they passed the documents to their insurance brokers with instructions to pass them on to their insurers, assuming that they would have instructed counsel to defend the claim. A number of claim forms were returned to them by the insurance brokers. These included the claim that was the subject of the matter under consideration by the court. They advised them that claims would

no longer be handled by the insurers. However, an acknowledgment of service was filed by the insurers albeit out of time.

[16] The company then instructed an attorney- at- law to represent them. This was after the 42 days for the filing of the defence. Additionally, the request for the default judgment was already entered. The particulars of claim, claim form and acknowledgement of service form were sent to the attorney -at- law. They stated that they had to give him repeated instruction to enter an appearance and protect their interest. He did not provide them with updates. They eventually dismissed him and retained new counsel. The Applicant Company alleged that the new attorney-at-law attempted to reconstruct the file.

[17] Master George, as she then was, indicated that she was at a loss to see what else was required by counsel in order to put him in a position to file a Defence or to ascertain whether a default judgment had been entered. It was her view that the claim form would have provided sufficient material to ground a defence. Additionally, she found that the status of the matter could have been ascertained from the Claimant's attorney at law. At paragraph 9 of the judgment she described the reasons for the delay as "a great administrative mishap, blunder, inefficiencies and confusion contributed to by counsel, the Defendants' insurers and the Defendants." She found that the reasons were avoidable.

[18] However, I find that this Defendant in the instant case is placed in a peculiar and more vulnerable position than those of the Defendants in the authorities previously discussed. In the case of ***Anwar* Wright *v the* Attorney General** (Supra) the Defendant was the Attorney for the state. The Attorney General's Chambers is staffed with many attorneys-at-law who fall under the direct supervision of the Director of State Proceedings. These attorneys-at-law are accountable to her with regard to the conduct of their cases. She is in a position where she is able to physically check the progress of matters against the state and give directions and instructions and to ensure that the ***Rules*** of the court are complied with in order to protect the interest of the state. She has the power and

the authority based on the available human resources to assign and reassign cases in order to facilitate timely compliance with the ***Rules***.

[19] In the case of Ken **Sales & Marketing Limited v. James & Company (a firm),** (supra), there was evidence that the Defendant contributed to the delay. The managing director of the Defendant Company kept the claim for a period of time and did not promptly bring it to the attention of the attorney- at- law. Additionally, there was no evidence that he made any further enquiry of the attorney-at- law as to the progress of the matter. Therefore, in this regard the Defendants could not be allowed to sit idly by and then rely on the attorneys-at- law's inadvertence as a reasonable excuse.

[20] In the case of **Teslyn Carter v Jamaica Urban Transit Co. Ltd Metropolitan Management Transport Holdings Ltd,** (supra) the court attributed the delay not only to the attorney at law but to the Defendant Company themselves . Firstly, they instructed counsel after the time had passed for the filing of the Defence. They were aware that the attorney-at-law was not acting in accordance with their instructions. Yet they delayed in dismissing counsel. They dismissed counsel in the month of June but failed to retained new counsel immediately. They retained new counsel in the month of July to set aside the default judgment. Therefore, even after they dismissed counsel they delayed in making the application. In these circumstances the court reasonably concluded that the Applicant company contributed to the delay.

[21] However, the Defendant in the instant matter finds herself in a most peculiar and unfortunate position. She sought legal advice and turned over the claim form and particulars of claim to the attorney-at-law. She took steps to personally file an acknowledgement of service. She was not advised by her counsel that any additional documents needed to be filed. She made follow up calls and visits and was not advised that any document was outstanding. She was assured that everything was alright.

[22] In these circumstances, apart from going into her counsel's office and physically check his records it appears that this 1st Defendant would have done all that is reasonably expected of her. This is against the background that in juxtaposing her position against a company or the state there is no evidence that she would have had access to the same level of human resources in order to monitor the activities of counsel. Therefore, in these circumstances I find that she should not be held responsible for the counsel's non-compliance with the ***Rules***.

[23] I find support for this position in the case of **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1. At paragraph 30 of the judgment Phillips, J.A. stated:

> "The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorney's errors made inadvertently, which the court must review. In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended. "

I believe in light of the peculiar circumstances in the instant case it is apt for the court to step in and protect this litigant. In light of the requirement under the ***Rules*** to deal with the matters justly it would be unjust to attribute the failure of the attorney- at- law do what he was paid to do to the1st Defendant. Therefore, I find that the excuse given for the delay is reasonable. However, as the cases have indicated, even if I found otherwise, this is only one of the factors to be taken into consideration.

Does The 1st Defendant Have a Real Prospect of Success in Her Defence Of The Claim

[24] It is clearly outlined in the Rules and the cases such as **Victor Gayle v Jamaica Citrus Growers and Anor**. [2008] In the Supreme Court of Judicature of Jamaica

Marcia Jarrett v South East Regional Health Authority (SERAH), Robert Wan & The Attorney General [2006]. In The Supreme Court of Judicature of Jamaica; and **Bryan Wiggan v Ajas** [2016] JMCA Civ. 32, that the primary factor that the court should consider in an application to set aside a regularly obtained judgment in default of defence is whether the Defendant has a real prospect of success. In **Marcia Jarrett v SERHA and Others** (supra), it has been established that in order to arrive at a decision on this issue the court should conduct an assessment of the nature and quality of the evidence.

[25] In the instant case, the 1st Defendant has indicated in her proposed Defence that:

> "Contrary to the allegations of the Claimant, the 2nd Defendant was not her employee, servant and or agent at the material or any other time".

She further stated that:

> "he was acting on his own behalf and solely for his own purposes in which she had no interest or concern given that he had borrowed the said motor vehicle from her to go to Spanish Town to deliver some money to his wife".

[26] Therefore in her proposed Defence the 1st Defendant has put the relationship of servant and agent in issue. As such, for liability to be vested in her, there ought to be a determination of this issue as to whether at the time of the accident the 2nd Defendant was driving her motor vehicle as her servant or agent for her benefit or he was driving for his own purpose. This is a question of fact to be determine by a tribunal.

Submissions on Behalf of the Claimant

[27] In resisting the 1st Defendant's application Mr. Jones submits on behalf of the Claimant that the 1st Defendant categorically inserted in the acknowledgement of

service that she admits paragraph three (3). He insists that she voluntarily admitted that the 2nd Defendant was her servant and or agent at the time and was acting within the scope of his duties. He also pointed out that the 1st Defendant in paragraph seven (7) of her affidavit indicated that she got assistance from the receptionist at the Kingston Legal Aid Clinic in filling out the acknowledgement of service form. He also made reference to information contained in her affidavit in which she stated that she showed the acknowledgement of service form to the paralegal at the attorney-at- law's office and that he instructed her to file the same in court. Therefore he submits that she got assistance from two individuals.

[28] He further submits that what the 1st Defendant is saying in her proposed Defence is the complete opposite of what is stated in her acknowledgement of service. Therefore her proposed Defence is not believable. "It is clearly disingenuous and has no real prospect of success".

[29] In **Swain V Hillman** [*1999] EWCA Civ J1021-8*, the court, in addressing the meaning of "real prospect of success" stated that, "the word "real" directed the court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success". Therefore in light of the Claimant's submissions, it is incumbent on me to examine the acknowledgement of service and pleadings in more details, in addition to the 1st Defendant's oral evidence. This is with a view to determine whether or not the 1st Defendant had in fact admitted the claim rendering her propose Defence weak and fanciful. At paragraph two (2) of the particulars of claim it is alleged that the "1st Defendant is the owner of a 2000 Toyata Platz motor vehicle with registration number 2116 FE ". At paragraph three (3) it is alleged that:

> "The 2nd Defendant was at all material times the driver of the 2000 Toyota Platz motor vehicle with registration number 2116FE. At all material times the 2nd defendant was acting as a servant and or agent of the 1st Defendant."

[30] In the particulars of claim the Claimant further made the following allegations; That he was the driver of 2013 motor bike registered 6467 H. While travelling along Port Henderson Plaza he was in a line of traffic. He stopped to allow another motorist to turn in the Plaza. The 2nd Defendant negligently undertook a line of traffic, made a U- turn and collided with his motor bike. The 2nd Defendant then fled the scene.

[31] In paragraph (six) 6 of her acknowledgement of service filed on May 26 2015, there is an indication that the Applicant intended to defend the Claim. At paragraph seven (7) in answer to the question, "Do you admit the whole of the claim?" The word "No" is circled. At paragraph eight (8) in answer to the question, "Do you admit any part of claim" the word "Yes" is circled. At paragraph nine (9) in answer to the question "If so what do you admit?". The word and number "paragraph 3" are written. The acknowledgement of service was filed in person.

[32] In her oral evidence in reply the 1st Defendant explained that it was the receptionist who filled out the acknowledgement of service form. All she did was to sign it. In answer to questions from Mr. Jones she admitted showing the form to Mr. Melton Jackson the paralegal at her counsel's office and that he instructed her to file it. She further indicated that she did not read the form. She just signed it.

[33] There are authorities in support of a court conducting its own examination of documents in circumstances such as these and drawing conclusions therefrom. (*See* **Re Sookram,** deceased, TT 1982 HC 54, (delivered 22 July 1982); and **Bankay v Sukhdeo** (1975) 24 WIR 90). On an examination of the Acknowledgement of Service the handwriting in the body of the document appears to be different from that of the signer. At this stage I am not coming to a conclusion as to whether or not the Applicant was the person who filled out the form. The principle articulated in **Swain v Hill** (Supra) has clearly indicated that I am not required to do so at this stage. That is, I am not required to conduct a mini trial and come to a conclusion on issues that are in the province of the trial judge.

However there is evidence on which the court can use is own eyes and arrive at a decision in support of the Defendant's assertions that she never intended to admit the Claim but that she intended to defend it. I am well aware of the fact that the authorities cited above have decided that where a court does use its own eyes, it should exercise caution and should look for other evidence to support its finding on an examination of the document. However, it is my view that there will be ample opportunity if the matter goes to trial for the 1st Defendant to make the evidence of the receptionist available for the court.

[34] In the case of **Ed & F Man Liquid Products Ltd V Patal and Another** [2003] EWCA Civ 472 a judge of the High Court rejected the application of the first Defendant to set aside a judgment obtained against him in default of acknowledgment of service. The action had been brought against the first Defendant and the second Defendant, as partners trading in industrial alcohol under the name of "Quickstop Group". The Claim was brought for the payment of two shipments of alcohol which was supplied to the first Defendant. He sought to rely on an original arrangement for a joint venture under which profits on investments were to be shared at an agreed percentage. The Claimants contended that the joint venture was never executed and that goods were delivered to the Defendants in the normal course of business and that payments for the goods were to be made on delivery. The Defence alleged that the delivery of the goods was governed by the terms of the joint venture. Therefore the Claimant was only entitled to claim under the joint venture. They further argued that there was no provision in the joint venture agreement for payment by Quickstop to the Claimants on delivery of the goods supplied. There was simply a provision for accounting by Quickstop and calculation of the profit against a declaration of expenses by both parties with payment to the Claimants of the Claimants' expenses plus 50% of the profit.

[35] In the proposed Defence the 1st Defendant asserted that in those circumstances, under the provisions of the joint venture agreement, the terms of which were never altered, title to the alcohol in the warehouses had never been passed to

Quickstop. The obligation to pay the Claimants never arose, nothing was due to the Claimants under the invoices as they had no contractual force or effect. They merely evidenced the joint venture relationship under the agreement being "mainly issued for the benefit of customs authorities, who required contracts to be registered with them before allowing the goods to pass”

[36] However, in response to letters threatening legal action the debt was acknowledged and there were promises to pay. One of the correspondence read:

> **"Further to our telephone conversation today about the outstanding payment, we have been informed by our office in Tashkent that due to a small problem at the central bank they are unable to transfer any funds. They hope to resolve this problem in a few days. As soon as these funds are transferred to our UK bank, we will be able to transfer US$100,000 to your account."** (See Paragraph 24 of the Judgment)

The letter by the Claimant threatening legal action indicated that that if the schedule was not adhered to in the future the debt would be passed to their legal department for recovery.

[37] After that correspondence the Defendants made two payments. The court made the observation at paragraph 38 of the judgment that:

> *“Throughout the whole of that correspondence in 1998 and 1999, going through to December 2000, there is not the least suggestion that (a) the money was not due, (b) it was subject to the Joint Venture, (c) there was any suggestion of a denial of liability.”*

The court also expressed the view that there was “unequivocal and continued acknowledgement of the debt and proposals for payment from 1998 onwards when, over a period of two years, the first defendant was pressed to settle the debt”. (See paragraph 43 of the Judgment)

It was also stated in that case that if the judge is "**satisfied of the genuineness of the admissions, issues of fact which might otherwise require to be resolved at trial may fall away**". (My emphasis. See Paragraph 53 of the Judgment)

[38] In the case of **AseMetals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37, there was an application to strike out the Defence and for Summary Judgment to be given on the basis that the respondent had acknowledged the debt and had made a commitment in writing to pay the sum. The Claimant argued that the Defence had no reasonable prospect of success. The Claim was for the recovery of a sum of money by virtue of an agreement to settle an outstanding balance for a quantity of reinforcing steel bars which the Claimant Company Supplied to the Defendant Company. The Defendant had not paid for the steel. The Claimant alleged that the Defendant agreed to pay the sum inclusive of interest in settlement of the outstanding balance.

[39] The Defendant filed a Defence acknowledging receipt of some steel but alleged that the steel received was not the grade that it had ordered. It also averred that the steel had not been bundled in the manner that it had specified in its order. It further asserted that it was not a party to the agreement that ASE relies upon, in that its name did not appear on the document and that the person who purported to sign on its behalf, did not have any authority to bind it.

[40] The court examined several written correspondence between the parties before the Claim was filed. At paragraph 50 of the judgment his Lordship Mr. Justice Brooks JA, observed that in these correspondence on the part of Mr. Taylor, whom the court found to be agent of the Defendant Company,

> "There was no complaint about the quality or bundling of the steel. Mr. Taylor blamed the failure to pay for the product on "a dramatic down turn in the world economy especially in Jamaica. There has

> been very little construction and most of the steel is still in the yard."

Additionally, the court examined the several correspondence by email between the agent of the Defendant and the Claimant Company and found that he indicated that, "he was working on arranging a payment; or that he regretted that a payment had not been made as promised".

[41] In the case of **Sasha-Gaye Sainders v Michael Green and ORS.** In the Supreme Court of Judicature of Jamaica, delivered 2005, it was indicated by Sykes J as he then was that:

> "If the defence has substantial contradiction then that may be an indication that the prospect of success is not real. In another case documentary evidence may make it very difficult for the defence to succeed".

[42] The cases clearly established that:

(a) the court is allowed to examine any explanation proffered, for what on the face of it appears to be a written admission.

(b) (i) where there are clear unequivocal statements of admission

and

(ii) there is clear evidence that the explanation is not genuine the explanation can be rejected at this stage .

Otherwise the question of credibility is reserved for a tribunal of fact in the trial of the substantive matter. (*See* **Swain v Hillman and ED & F Man,** Supra**).** In the authorities that I have examined, there were sufficient details and information in several correspondences between the parties on which the courts were able to find that there were clear unequivocal statements of admission.

[43] In the instant case, I find that the information in paragraph nine (9) of the acknowledgment of service cannot be equated to a clear unequivocal statement of admission. Taking paragraph (nine) 9 by itself it does appear that the 1st Defendant is indicating that she is admitting paragraph three (3) of the Claim. However, this was stated in the circumstances where in the very same document the defendant indicated an intention to defend. This is in light of the fact that the gravamen of the claim against this first Defendant really rest in paragraph three (3) of the claim. It could very well mean that she was admitting liability and denying the quantum of damages. However, since this was not clearly stated in this or any other document, and in the face of her denial without more, I cannot conclude that the contents of the document amount to a clear admission. I am therefore duty bound to examine the explanation put forward by the 1st Defendant in order to determine whether or not there is any substance that amounts to a rebuttal of the allegations of the Claimant. (See **Brian Wiggan v Ajas Limited**). That is one which if accepted by a trial judge would result in successful outcome for the 1st Defendant.

[44] I have examined what is written in the document in light of the Defendant's conduct and explanation and find that in relation to whether or not she has admitted the claim she has raised sufficient evidence that is capable of rebutting that assertion. Permitting, someone to fill out a document and simply signing, without reading is clearly not the most prudent conduct on the part of anyone including the 1st Defendant. However, her explanation is capable of belief when it is examined in light of her conduct before and after the filing of the acknowledgement of service. She has demonstrated an intention to defend the claim. I make this observation on the unchallenged information provided in her affidavit. On receipt of the claim she indicated that she took it to her insurance company. They advised her to seek independent counsel. She then took it to the Kingston Legal Aid Clinic. This indicates that she was actively seeking legal assistance consistent with her intention to defend the claim. The fact that the 1st Defendant and none of the persons who assisted her to fill out the

acknowledgement of service form were trained attorneys-at-law restrains me from concluding that they understood that merely putting someone in charge of your vehicle without more does not automatically create a relationship of principal and agent.

[45] In her oral evidence the 1st Defendant has indicated that she never intended to admit the claim. There is no evidence at this stage that contradicts her explanation in relation to the information contained in paragraph nine (9) of the acknowledgement of service. No doubt it is something that can be raised again at a trial for a tribunal of fact to consider with regards to her credibility in relation to the fact in issue. That is whether the second Defendant was driving as her agent or for his own purpose.

[46] I will now examine whether the proposed Defence reveals a reasonable prospect of success. In the case of **Brian Wiggan v Ajas Limited** [2016] JMCA Civ 32 His lordship Mr. Justice Brooks at paragraph 45 explained what is required in order to show a real prospect of success. He stated that based on the authorities, "it would seem that (the Defendant) should produce some material to rebut the assertion of the Claimant". In her proposed Defence the 1st Defendant has indicated that the 2nd Defendant was driving her motor vehicle for his own benefit. That is, to take some money to his wife in Spanish Town.

[47] The authorities have indicated that the relationship of principal and agent is a relationship or state of affair that can be presumed in particular circumstances. However they have also indicated that this presumption is rebuttable. This rebuttal can be achieved by the party seeking to challenge the existence of such a relationship, adducing sufficient evidence to the contrary. This was expressed by Clarke J at page 74 in the case of **Mattheson v Soltau** [1933] JLR 72. He stated that***:***

> "It is now accepted in our Courts that in the absence of satisfactory evidence to the contrary, this evidence is prima facie proof that the driver of a vehicle was acting as servant or agent of its registered owner. The onus of displacing this

> presumption is on the registered owner, and if he fails to discharge that onus the prima facie case remains and the plaintiff succeeds against him."

He further indicated that the presumption can be rebutted "by evidence that although the driver had the owner's general permission, the use of the vehicle was for his own purpose". This principle was affirmed in **Princess Wright v Alan Morrison** [2011] JMCA Civ 14

[48] In **Morgans v. Launchbury and Others** *[1973] A.C*. Lord Wilberforce stated at page 135 that**:**

> *" In order to fix vicarious liability upon the owner of a car in such a case as the present it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty".*

Therefore the 1st Defendant has raised a defence that is capable of rebutting the allegations raised in the Claim. In fact if it is accepted it would be a complete answer to the Claim against her.

[49] Another principle to be applied in relation to a matter of this nature was stated in **C. Braxton Moncure v Doris Delisser** (1997)34 JLR at page 425. That is:

> *"The court will not allow a default judgment to stand if there is a genuine desire of the Defendant to contest the Claim supported by the existence of some material upon which the Defence can be founded "*

I find that the 1st Defendant has not only produced some material which is capable of rebutting the assertions of the Claimant but she has also demonstrated that she has a genuine desire to defend the Claim.

The Issue of Prejudice to the Claimant

[50] In this application I am mindful of the fact that the Claimant should not be placed at a disadvantage because of the failure of the 1st Defendant's attorney at law to act when he had a duty to do so. However, I must decide whether in light of the overriding objectives of the ***Rules*** a client should be punished for the obvious

neglect of his or her attorney at law. This is against the background that this Defendant has demonstrated that she has done all that she was reasonably expected to do with regard to compliance with the ***Rules***. It is my view that she should not be so punished for the failures of the attorney- at- law but that she should be given the opportunity to advance her Defence. Additionally, I believe that in all the circumstances that any prejudice the Claimant is likely to suffer by the setting aside of the default judgment can be adequately remedied by an award of cost.

Conclusion

[51] Therefore, on my assessment of the totality of the evidence presented, I find that the Applicant has satisfied the criteria for the setting aside of the regularly obtained default judgment.

Orders

1. Interlocutory judgment in default of defence entered on the 3rd November 2015 against the 1st Defendant is set aside.

2. The 1st Defendant is granted an extension of time to file her defence.

3. The defence is to be filed and served within 14 days from today.

4. Permission is granted for the 1st Defendant to file and serve an amended Acknowledgement of Service within 14 days from today.

5. Cost of this application to the Claimant to be agreed or taxed.

6. Parties are referred to mediation to be held on or before 18.7.18.

7. Case management Conference is set for 4.10.18 at 12:00 noon for half an hour.