[2022] JMSC Civ. 144

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**
**CIVIL DIVISION**
**CLAIM NO. SU2019CV03954**

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| **BETWEEN** | **OMOBOWALE THOMAS** | **CLAIMANT** |
| **AND** | **ROHAN GARDNER** | **1ST DEFENDANT** |
| **AND** | **MARLON WEBB** | **2ND DEFENDANT** |

**Mr Christopher O. Honeywell instructed by Christopher O. Honeywell & Co for the claimant.**
**Miss Houston Thompson, instructed by Dunbar & Co. for the 2nd defendant.**

**Heard May 24, 2022, June 3, 3022 and July 28, 2022**

***Setting Aside Default Judgment – CPR 13.3 – Whether the defence is one with a real prospect of success – Whether the defendant applied to set aside the defence as soon as reasonably practicable – Whether there is a good explanation for failing to file an acknowledgement of service within the time stipulated by the CPR – Whether the claim form was served***

**CORAM: JARRETT, J. (Ag).**

**Introduction**

**[1]** The Civil Procedure Rules (CPR) 13.3 provides that a court has the discretion to set aside a default judgment if the defendant has a real prospect of successfully defending the claim. The burden is on a defendant to prove that his defence meets

this test. It is settled law that if a court finds that the defence meets this threshold test, it must go on to consider whether the defendant applied to set aside the default judgment as soon as reasonably practicable and whether he has a good explanation for not filing an acknowledgment of service or defence (as the case may be) within the time stipulated by the CPR. I have before me for determination, the 2nd defendant, Marlon Webb's application to set aside default judgment pursuant to CPR 13.3. The primary issue therefore is whether his proposed defence meets the threshold test of having a real prospect of success. A satellite, but important issue that also arises is whether he was in fact served with the claim form and particulars of claim. Interestingly, he raises this latter issue not as a basis to set aside the default judgment under CPR 13.2, but as one of the matters that I should take into account when considering whether he has a good explanation for not filing an acknowledgment of service on time.

**Procedural background**

**[2]** The background to the application is a judgment in default of acknowledgment of service, which the claimant obtained against the 2nd defendant on October 16, 2020. The default judgment is in respect of a claim filed on October 4, 2019, in which the claimant sought damages for negligence against the defendants, arising from a motor vehicular accident which took place on the Hart Hill Main Road in Portland on August 1, 2018. On that day, the 2nd defendant was the driver of a Toyota Succeed motor car which was involved in a collision with the claimant's Nissan Bluebird. The Toyota Succeed was owned by the 1st defendant, Rohan Gardner, but the claim form was never served on him.

**[3]** The claimant alleges in his claim that on the day in question, he was driving along the Hart Hill Main Road in an easterly direction when on reaching a section of the roadway, the 2nd defendant who was travelling in the opposite direction, negligently failed to keep to his left lane and thereby collided into his motor car. He claims to have suffered whiplash injury, neck and back pain.

**The 2nd defendant's affidavit evidence**

**[4]** In support of his application, the 2nd defendant relies on his affidavit filed on February 18, 2022. He says in that affidavit that he has a good defence to the claim which has a real prospect of success. He is a driver and on the day of the accident he was on his left lane travelling towards Annotto Bay on the Hart Hill Main Road, when in the vicinity of the Buff Bay Cemetery, the claimant who was travelling in the opposite direction, encroached into his lane. Instinctively he swerved away from the claimant's car towards the right to try to avoid a collision, but at the same time, the claimant swerved "back to his left", and both vehicles collided in the middle of the road. He was travelling uphill while the claimant was travelling downhill around a corner, and it was the claimant who caused the accident.

**[5]** He was served with a Notice of Assessment of Damages in April 2021 at which time he contacted the 1st defendant and gave him the documents. He believed, based on information from the 1st defendant, that Advantage General Insurance Company Limited (AGIC), the 1st defendant's insurers, were responsible for providing legal representation in such matters and, the 1st defendant had taken the documents to them. In January 2022, he was advised by the 1st defendant to contact Dunbar & Co, and he did. He received another Notice of Assessment of Damages and the default judgment in early January 2022 and he took those documents to Dunbar & Co when he met with them. He told the attorneys that he did not receive any other documents and gave them instructions to set aside the default judgment and to challenge service in respect of the claim form and the particulars of claim.

**[6]** Dunbar & Co filed an acknowledgement of service on his behalf on February 1, 2022, and served it on February 2, 2022. In February 2022, upon being made aware by Dunbar & Co, of the affidavits of service of the process server Leon Brown, he recalled, belatedly, that he was served "sometime ago" with documents in Buff Bay, Portland, but he cannot remember the exact date. He does not know what these documents were as he did not look at them but took them to the 1st defendant. He thought the matter was being dealt with until January 26, 2022,

when he met with Dunbar & Co. He would be prejudiced if the default judgment is not set aside. He fully intends to defend the claim and would have filed an acknowledgement of service and a defence if he had understood that that is what he was to do.

**The claimant's affidavit evidence**

**[7]** On March 29, 2022, the claimant filed an affidavit in opposition to the 2nd defendant's application. In that affidavit he says that the collision occurred at the elbow of a blind corner. He was negotiating a left-hand corner, going slightly uphill and had no reason to encroach on his right lane. The 2nd defendant would not have been able to see his vehicle until he was about 30 to 40 feet away from him and the manoeuvres which he describes in his affidavit were not plausible within such a distance. He exhibits photographs of the accident scene which he alleges he took immediately after the collision, using the camera on his telephone. The photographs indicate that his car was positioned close to the extreme left, with his rear wheel almost on the soft shoulder, while the 2nd defendant's vehicle was completely on his side of the road with the front of his vehicle pointing in the direction it was moving, just prior to the collision. Also exhibited to his affidavit is a police report dated October 9, 2018, with a sketch of the positions of both motor vehicles after the accident, which mirrors the photographs he took.

**Oral evidence and evidence on cross examination**

**Leon Brown**

**[8]** Given the 2nd defendant's prevarication on whether he was served with the claim form, I allowed Mr Leon Brown the process server and the 2nd defendant to give viva voce evidence and to be cross examined. Mr Leon Brown testified that he first served what he described as a "pile" of documents on the 2nd defendant in Buff Bay Portland. The documents were for the assessment of damages, and service was on October 18, 2019. He explained to the 2nd defendant what the documents were, that he had been sued in relation to an accident and that the documents

were for him to go to court. Mr Brown said that he enquired of the whereabouts of the 1st defendant, and the 2nd defendant said he would take the documents to him.

**[9]** When asked if he knows the names of the documents he served on the 2nd defendant, Mr Brown said that he knows they were: "the assessment of damages". He did not read them in detail but he thinks the documents were: "the filing of what the claim was for." Questioned if he was familiar with the claim form and the particulars of claim, Mr Brown said that he was familiar with them. Asked whether any of these documents was in the "pile" of documents he served on the 1st defendant on that day in Buff Bay, Mr Brown said that he was not sure what was inside of the documents. He read the first paragraph which indicated who sued the 2nd defendant and "what the suing was about". The 2nd defendant had been known to him before as "Ziggy", but he did not know his last name was "Webb". Mr Brown said that he made the connection between the 2nd defendant and the names "Ziggy" and "Webb", by the licence plate number on the car. When he asked the 2nd defendant if" Webb" was his last name, he said yes.

**[10]** Mr Brown said that one month later, he had another occasion to serve the 2nd defendant with documents. This time, he did not read the documents. Service was at a garage on the main road between Annotto Bay and Buff Bay. At that time, he said he told the 2nd defendant to take the documents to his lawyer and let them deal with them, because if his boss does not deal with the documents, he should. After this occasion, he served the 2nd defendant additional documents in Buff Bay, St Mary. That was around April 2021. He said that at that time, the document he served had the court date on it, and he thinks that that document was the default judgment. He said he asked the 2nd defendant what was going on and why a default judgment: "had reached you guys". Mr Brown said he encouraged the 2nd defendant to show up in court on the court date. According to him, this was the last time he served the 2nd defendant with documents. Asked whether apart from seeing the 2nd defendant in Buff Bay and along the road, he had seen him anywhere else before, Mr Brown said he grew up in Windsor Castle, Portland, the same community in which the 2nd defendant lived.

**[11]** In relation to a supplemental affidavit filed on February 1, 2022, in which he deponed that it was the 1st defendant he served with the claim form and supporting documents, Mr Brown said he recalls signing that supplemental affidavit. His earlier affidavit in which he had said that it was the 1st defendant on whom he had served documents was his error. He said he did not serve the 1st defendant Rohan Gardner with anything. The mistake he said occurred because he had not read what he had signed.

**[12]** When asked in cross-examination what was the court date on the document he served the 2nd defendant in April 2021, Mr Brown said that he could not recall the date. He said that he served the 2nd defendant on three different occasions but that he cannot recall what he served on the second occasion. He insisted however that he did serve the 2nd defendant a second time. He said that every document he serves he always reads the first part of the document to the person he is serving. On counsel's suggestion that the first document he served the 2nd defendant was on October 18, 2019, and that he had said that that document was a notice of assessment of damages, Mr Brown's answer was:

> "Yes. He asked me what it was. If I didn't look at it, I could not tell him what it was".

***2nd defendant***

**[13]** The 2nd defendant said in cross-examination that he recalls being served with documents by Mr Leon Brown in October 2019 but he cannot remember the exact date. He said that when Mr Brown served him with the documents, he told him what they were about and that he was being sued by the person with whom he was involved in a motor vehicular accident. The following exchange then took place between Mr Honeywell and the 2nd defendant:

> Q: Do you recall anything else he said?
>
> A: He said carry it go give it to the boss.
>
> Q: Who was the boss?

A: Rohan Gardner

Q: Did you take his advice?

A: Yes sir

Q: Do you remember when you gave it to the boss? You say you get it today, how long after you gave the boss?

A: Him give it to me today and I give it to the boss in the evening.

Q: When him give you the thing, that took place in Buff Bay?

A: Yes Sir.

Q: That is where the taxi men stand up and work?

A: Yes

Q: You agree that after that first time, he saw you and gave you some more documents?

A: Yes sir.

Q: The first time did you look at the document?

A: No sir because he explained to me what it was.

Q: Was it two more times after that that he gave you documents?

A: Yes, sir.

**[14]** When asked by me what Mr Brown told him when he was first served with documents, the 2nd defendant said that he was told that he was being sued by the person for the other car involved in the accident and that he should take the documents to the owner. He said he was served a total of three times by Mr Brown and that the last document he was served was a reminder.

**Submissions**

**The 2nd defendant's attorney-at-law**

**[15]** Counsel for the 2nd defendant began her submissions by expressly stating that the defendant was not taking any issue with service and that the application was being pursued under CPR 13.3. Nevertheless, in arguing that the 2nd defendant has a good explanation for failing to file an acknowledgment of service on time, counsel sought to support those submissions by arguing that the reason for the 2nd

defendant's failure was directly related to the question, which she says still arises as to whether he was served with the claim form.

**[16]** In relation to the defence, Ms Thompson said that the evidence reveals two different versions of how the accident occurred and that it is best that the evidence of both the claimant and the 2nd defendant be tested under cross examination. She said that at this stage, I should be cautious about coming to a conclusion based on the state of the evidence as it cannot be said how the accident occured. Counsel argued that the contradictions in the affidavit evidence highlight that there are serious triable issues to be resolved. In questioning the veracity of the claimant's affidavit, it was submitted that he is not in position to say what the 2nd defendant could or could not see as he approached the blind corner. If the matter went to trial, based on the 2nd defendant's account, his defence would be successful. Counsel insisted that the defence is not fanciful.

**[17]** Miss Thompson said that I should be careful with how I considered the photographs exhibited by the claimant to his affidavit. She said they have not been "sufficiently explained" by either side and if it were the trial, a court would want to know how soon after the incident the photographs were taken.

**[18]** In her application of the principles in CPR 13.3(2)(a), counsel said that the 2nd defendant's application was filed on February 18, 2022. He was served with documents on four different occasions. The default judgment was served on him on January 4, 2022, and his application was made quickly. Counsel said he acted in a timely manner and as soon as reasonably practicable. As to CPR 13.3(2)(b), Miss Thompson submitted that the 2nd defendant "was not to his knowledge served with the claim form", but the realistic position is that he was served, and he brought those documents to his insurers. In light of Mr Brown's evidence that the document he first served the 2nd defendant on October 18, 2019, was the notice of assessment of damages and that he cannot recall what were the documents he served the 2nd defendant in April 2021, she argued that there was conflicting evidence as to whether the claim form was served. However, of paramount

consideration in an application under CPR 13.3, is whether the defence has a real prospect of success. The matters in CPR 13.3(2)(a) and (b), she argued, are not primary considerations. Counsel cited as her authority for this submission, the judgment of Sykes J (as he then was) in **Sasha- Gaye Saunders v Michael Green decided February 27, 2007.**

**The claimant's attorney-at-law**

**[19]** Mr Honeywell started his submissions with the affidavit evidence of the 2nd defendants in which he says that when he met with Dunbar & Co. and was shown the affidavits of Mr Leon Brown, he recalled being served with documents from Mr Leon Brown in Buff Bay. According to Mr Honeywell, this evidence corroborates the affidavit evidence of Mr Leon Brown which states that the 2nd defendant was served with the claim form and supporting documents in Buff Bay. According to counsel the issue of the service of the claim form must be determined on a balance of probabilities in favour of the claimant who has consistently asserted that the claim form was served, and against the 2nd who cannot assert definitively whether he was served.

**[20]** Given the oral evidence of Mr Brown and the 2nd defendant, Mr Honeywell argued that both witnesses essentially corroborated each other and the gaps in Mr Brown's recollection of what he served, were clarified by the examination of both witnesses. Mr Brown described the documents he initially served the 2nd defendant in October 2019 as the assessment of damages documents, but that according to Mr Honeywell, was an error. He is not counsel. He made a mistake which is understandable. But there can be no doubt that the documents he served in October 2019 were the claim form and particulars of claim since as a matter of necessity, the date for the assessment of damages would come after the service of the claim form. Counsel posited that on a balance of probabilities, I should find that the claim form and particulars of claim were served on the 2nd defendant in October 2019.

**[21]** On the threshold test whether the defence has a real prospect of success, Mr Honeywell said that the defence is nothing but a holding defence. He submitted that the evidence of the claimant coupled with the photographs which he took with his cellular phone immediately after the collision and which is exhibited to his affidavit, all show that the accident occurred around a blind corner and on the claimant's side of the road. The accident was caused by the 2nd defendant encroaching on the claimant's side of the road. The proposed defence does not have a good prospect of success.

**[22]** In relation to the considerations under CPR 13.3(2)(a), counsel argued that it took the 2nd defendant a little over a month to apply to set aside the default judgment, and as that "could be acceptable", he takes no strong point on the question whether he applied to set aside the default judgment as soon as reasonably practicable. However, on the question whether the 2nd defendant has a good explanation for not filing an acknowledgement of service within fourteen days of service, Mr Honeywell argued insistently that there is no good explanation for the 2nd defendant's failing. He posited that based on the evidence of both Mr Brown and the 2nd defendant, service of the claim form was on October 18, 2019. The 2nd defendant says he gave the documents to the 1st defendant, but he gives no evidence of any follow -up done by him thereafter.

**[23]** Counsel also observed that the 2nd defendant gave no evidence as to why he thought that the matter was being dealt with. He described the 2nd defendant as displaying by his evidence a "cavalier approach" to the court's process. A process that he knew he had been subject to. Mr Honeywell suggested that this is perhaps why the 2nd defendant is" foggy" as to the date he was served with the claim form. Counsel characterised the 2nd defendant's approach as one of "continuous" and "contumelious" delay. The claimant, he says, has been waiting since 2019, to have his redress. The delays do not bespeak justice.

**Analysis and discussion**

**[24]** It is settled law that a defence with a real prospect of success is one that is more than arguable, is not fanciful, has conviction and makes good sense. Recently, in **Christopher Ogunsalu v Keith Gardner [2022] JMCA12** the court of appeal provided a timely reminder of what a defence with a real prospect of success is, within the meaning of CPR 13.3. Writing for the court, D Fraser JA said at paragraph 22 that:

> "The application to set aside default judgment is to be supported by an affidavit of merit, which should exhibit a draft defence (see rule 13.4(2) and (3) of the CPR). This court must consider whether the defendant has a real prospect of successfully defending the claim. In order to do so, the court relies on the oft-cited guidance from **Swain v Hillman and Another [2001] 1 All ER 91**, that the defence must demonstrate a real prospect of successfully defending the claim and not merely a fanciful one. This means the defence must be more than just merely arguable (see paragraph [15] of **Flexnon Limited v Constantine Michell and others**). In making this determination, the court must not engage in a mini trial".

**[25]** Fraser JA went further at paragraphs 37 and 38 to underscore the point that if a court finds that the defence does not meet the threshold test, it need not take the matter any further: -

> [37] Rule 13.3(2) of the CPR provides that the court must consider a) whether the defendant applied to set aside the default judgment promptly and b) whether there is a good reason for the delay. Concerning this requirement, in the case of **Flexnon Limited v Constantine Michell and others**, McDonald-Bishop JA stated at paragraphs [27] and [28]:
>
> > "[27] It is clear from rule 13.3(2)(a) and (b) that it is incumbent on the court to consider whether the application to set aside

was made as soon as was reasonably practicable after finding out that judgment had been entered and that a good explanation is given for the failure to file an acknowledgement of service and or a defence as the case may be. So the duty of a judge in considering whether to set aside a regularly obtained judgment does not automatically end at a finding that there is a defence with a real prospect of success. Issues of delay and an explanation for failure to comply with the rules of court as to time lines must be weighed in the equation.

[28] While it is accepted that the primary consideration is whether there is a real prospect of the defence succeeding, that is not the sole consideration and neither is it determinative of the question whether a default judgment should be set aside. The relevant conditions specified in rule 13.3(2) must be considered and such weight accorded to each as a judge would deem fit in the circumstances of each case, whilst bearing in mind the need to give effect to the overriding objective."

[38] From what was stated by McDonald-Bishop JA in paragraph [28] it follows as a matter of inexorable logic, that it is only if an applicant successfully clears the hurdle of rule 13.3(1) of the CPR, that is, "there is a real prospect of the defence succeeding", that the factors under rule 13.3(2) come into play. That logic was explicitly embraced by Edwards JA (Ag), (as she then was), in **Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited** cited earlier, where she stated at paragraph [83] that:

"If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is

without merit and has no real prospect of success, then that's the end of the matter." (Emphasis supplied)

I bear these principles firmly in mind as I analyse the evidence that is before me.

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

**[26]** For the reasons which follow, I do not find that the proposed defence has a real prospect of success. While the claimant relies on photographs he says he took immediately after the accident and the police report, my findings are based solely on the 2nd defendant's evidence. Moreover, the police report is hearsay evidence and the proper foundation for the admissibility of the photographs he relies on, have not been laid.

**[27]** It is true that the claimant and the 2nd defendant give two different versions of how the accident occurs, but while the claimant's version makes good sense and is logical, the 2nd defendant's version does not make sense. He claims that he "instinctively swerved away from the claimant's car towards [his] right" to avoid a collision. Based on this evidence, it would be the 2nd defendant himself who would have caused the accident by his action, because any movement by him to the right, is a movement towards the claimant's vehicle and not away from it. Furthermore, he says that at the same time that he swerved to the right, "the claimant also swerved back to his left". If this is so, then the claimant could only veer one way and that is off the road, instead of colliding with the 2nd defendant's vehicle in the middle of the road, as alleged by the 2nd defendant. I find the proposed defence to be fanciful.

**[28]** Having found that the defence does not meet the threshold test, I need not take the matter any further. However, in the event that I am wrong in my analysis and finding, I will go on to consider whether the defendant applied to set aside the default judgment as soon as reasonably practicable and whether he has given a good explanation for not filing an acknowledgement of service within the time stipulated by the CPR.

**Did the 2nd defendant apply to set aside the judgment as soon as reasonably practicable**

**[29]** Based on the affidavit of service of Leon Brown filed on January 28, 2022, the default judgment was served on the 2nd defendant on January 4, 2022. The 2nd defendant says he took it to Dunbar & Co when he met with them on January 26, 2022 and the application to set aside the default judgment was filed on February 18, 2022. It took forty-five days for the application to be made after the 2nd defendant became aware of the default judgment. Oddly, in an application where the burden is on the 2nd defendant to show that he had a good explanation for this forty- five-day period, no explanation is given by him as to why the application was not made sooner. Mr Honeywell took the view that forty-five days after knowing of the default judgment "could be acceptable", but in the absence of any reason for not making the application earlier than that, I cannot agree with him. Such applications are to be made promptly and without delay. What is prompt will obviously depend on the facts and circumstances in any given case. Nothing was offered by way of evidence to help me to contextualise this forty-five-day period. There is nothing in the 2nd defendant's twenty-five paragraph affidavit that demonstrates that the circumstances of this case were such that forty-five days to make an application to set aside the default judgment was reasonably practicable. In the absence of any such evidence I find that it was not.

**Is there a good explanation for not filing an acknowledgement of service on time?**

**[30]** Given the evidence of both Mr Brown and the 2nd defendant, I find on a balance of probabilities that the claim form and particulars of claim were served on the 2nd defendant in Buff Bay on October 18, 2019. I agree with Mr Honeywell that the gaps in Mr Brown's recollection of the documents he first served the 2nd defendant, were filled by the 2nd defendant himself. The 2nd defendant's affidavit chronicles the timeline when he says that documents in this matter were served on him. He starts with the Notice of Assessment of Damages in April 2021, and he ends with the default judgment and another Notice of Assessment of Damages in January 2022. He then goes on, quite tellingly to say in paragraphs 18 and 19 that:

18. [I] am further advised by representatives of Dunbar & Co, and I do verily believe that a further Affidavit of Service was deponed to by Leon Brown filed on February1, 2022. I crave leave to refer to the Affidavits of Leon Brown deponed on November 18, 2019, October 12, 2020 and January 31, 2022, respectively.

19. [M]y response to the said Affidavits of Leon Brown is as follows: -

    i. That I do know Leon Brown because he used to reside in the Community of Dover District;

    **ii. That after carefully trying to rack my memory when I spoke with the representative of Dunbar & Co. and she read out the Affidavits to me, I do remember getting some documents from Leon Brown in Buff Bay Square some time ago, but I do not remember the exact date and time;**

    iii. That I do not know what documents I got from him but I took the folder and put them into the car;

    **iv. That I never looked at the documents that were in the folder but Leon Brown told me it was a summons for court;**

    v. That I gave the folder with the documents to Rohan Gardner and

    vi. That I thought the matter had been dealt with until I met with Dunbar & Co. Attorneys-at-law on January 26, 2022. [Emphasis added]

**[31]** I find that in every material particular, the 2nd defendant has by his affidavit and oral evidence, corroborated Mr Leon Brown's evidence. He was served three times by Mr Leon Brown whom he knew before from Dover District. He received documents in a folder prior to receiving the two Notices of Assessment and the default judgment. Although Mr Brown says that the documents he first served on October 18, 2019 were for the assessment of damages, the 2nd defendant's evidence of the chronology of service of documents on him, makes it plain, that

what was served on that occasion were the claim form, the particulars of claim and supporting documents.

**[32]** The acknowledgment of service was filed on February 1, 2022. Having found that the 2nd defendant was served with the claim form on October 18, 2019, it means that a period of two years, three months and ten days elapsed before an acknowledgement of service was filed. The explanation given by the 2nd defendant in his affidavit for this delay is that he did not look at the documents, he did not know what they were, he gave them to his boss and thought the matter was being dealt with. The 2nd defendant's affidavit evidence that he did not know what the documents were and did not understand what he was to do, contradicts his own oral evidence that Mr Brown explained to him what the documents were and told him that he was being sued in relation to the motor vehicle accident in which he was involved. Given his own oral evidence and that of Mr Brown, which are at idem on this issue, I find on a balance of probabilities that Mr Brown informed the 2nd defendant that he was being sued and that the documents he served on him in October 2019, were indicative of that suit.

**[33]** I must agree with Mr Honeywell's characterisation of the 2nd respondent's response to the claim. It is indeed "cavalier". The notes to defendant which accompany the claim form and particulars of claim make it pellucid what the consequences are of not filing an acknowledgement of service and a defence within the time specified in the documents. It cannot be acceptable that the 2nd defendant receives court documents with his name on them, is informed of what they are and simply "puts them in the car" and does not even bother to look at them. His evidence reflects at best an attitude of indifference and disregard for the processes of the court. This is abhorrent to the spirit and the letter of the CPR. Furthermore, the 2nd defendant has offered no evidence to explain why the he thought the matter had been dealt with. From his evidence it seems to me that in the two years, three months and ten days since service on him of the claim form, he did not even think it fit to enquire of the 1st defendant whether the matter had

indeed been “dealt with”. I do not, in all the circumstances find that he has provided a good explanation for not filing an acknowledgement of service on time.

**[34]** The 2nd defendant says he will be prejudiced if his application is not granted. This may be true, as he will be required to pay to the claimant the amount of damages assessed by the court. But the claimant has a default judgment arising from an accident which took place in August 2018, almost four years ago. If the default judgment is set aside, he will have to wait for this matter to go to trial which may not be before another several years. Memories may fail. He may have difficulties tracing potential witnesses. Given his lack of celerity in applying to set aside the default judgment and his unacceptable explanation for the delay of two years, three months and ten days before acknowledging service, I do not think the overriding objective of the CPR of dealing with cases justly, would be met, were I to set aside the default judgment. In weighing the prejudices, I think that in all the circumstances, the claimant’s potential prejudice out weights that of the 2nd defendant.

**Conclusion**

**[35]** In the result, I make the following orders:

a) The 2nd defendant’s application is refused.

b) Costs to claimant to be agreed or taxed