[2023] JMSC Civ 141

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV04172

BETWEEN	**URBAN TAXI AND TOURS LIMITED**	**CLAIMANT/ RESPONDENT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED**	**DEFENDANT/ APPLICANT**

IN CHAMBERS

VIDEO CONFERENCE

Miss Zara Lewis instructed by Zara Lewis & Company appeared for the Claimant/Respondent

Miss Faith Gordon holding for Samuda & Johnson appeared for the Defendant/Applicant

Heard: 28th June and 25th July 2023

Civil Procedure – Application to set aside Default Judgment – Whether the requirements for entering a Default Judgment for failure to file Acknowledgment of Service or Defence have been met – Whether Default Judgment should be set aside – Prejudice – Overriding Objective – Civil Procedure Rules 2002 (as amended) 1.1.12.4,12.5,13.3 (1) and (2).

MASTER CARNEGIE (AG)

BACKGROUND

[1] This Application to Set Aside Default Judgment arose out of a Claim where the Claimant (hereinafter referred to as the Respondent), Urban Taxi and Tours Limited, claims against the Defendant (hereinafter referred to as the Applicant), Advantage General Insurance Company Limited, for damages for breach of Motor Vehicle Policy of insurance.

[2] The Respondent claims –

(i) a Declaration that pursuant to a Motor Vehicle Policy of Insurance numbered MPCC 860611 dated 17th October 2017 and made between the Claimant and the Defendant, the Defendant are liable to indemnify the Claimant in respect of their loss arising out of the theft of motor vehicle on or about the 14th or 15th November, 2017 in which the Claimant's 2013 Nissan Ad Van licenced and registered 1460 HM bearing Chassis Numbered VZNY12039217 was stolen from Lot 270, 5 East Greater Portmore, St. Catherine, Jamaica.

(ii) An indemnity under the policy of motor insurance in respect of the loss under the policy sustained by the plaintiff by reason of his liability arising out of the said accident alternatively damages for breach by the Defendant of the policy of insurance.

(iii) Special Damages in the sum of Three Million Nine Hundred and Fifty Thousand Dollars ($3,950,000.00).

(iv) Interest on the award of Damages for such rate and for such period as this Honourable Court deems just pursuant to the Law Reform (Miscellaneous Provisions) Act.

(v) Costs; and

(vi) Such further and or other relief as this Honourable Court may consider just in the circumstances.

PROCEDURAL HISTORY

[3] The file indicates that –

(i) an Affidavit of Service in respect of the Claim was filed on November 13th 2019.

(ii) An Affidavit of Search was filed on March 11th 2020.

(iii) An Acknowledgment of Service was filed October 29th 2020 by the Respondent.

[4] The Notice of Application for Court Orders filed on behalf of the Applicant on November 5th 2020 reflects the following –

(i) The Judgment in Default entered herein against the Applicant/Defendant and all subsequent proceedings be set aside on the grounds that the Default Judgment was irregularly obtained.

(ii) Alternatively, the Judgment in Default entered herein against the Applicant/Defendant and all subsequent proceedings be set aside on the grounds that the Applicant has a real prospect of successfully defending this Claim.

(iii) The time limited for the filing of the Defence herein be extended by a period of fourteen (14) days from the date of this Order.

(iv) The Applicant/Defendant be granted relief from any sanctions imposed by the Civil Procedures Rules, 2002 for failing to file a Defence within the prescribed time.

(v) There be such further relief as the Honourable Court may see fit.

[5] The grounds on which the Orders are sought in the Notice of Application for Court Orders filed by the Applicant on November 5th 2020 are –

(i) The Applicant was not served with the Particulars of Claim herein;

(ii) Alternatively, the Applicant has a real prospect of successfully defending the claim;

(iii) The court's overriding objective will be advanced if the proceedings in default are set aside.

(iv) The Respondent has not and will not be prejudiced by the filing of the said Defence.

[6] The Affidavit of Ruthann G Anderson in support of the Notice of Application for Court Orders was filed February 15th 2021.

SUBMISSIONS ON BEHALF OF THE PARTIES

[7] Oral and written submissions were made on behalf of the Parties which have been summarized accordingly.

THE APPLICANT

[8] The Applicant having done its investigations refuses to indemnify the Respondent and seeks declaratory relief that:

a. the Respondent is not entitled to an indemnity pursuant to the insurance policy;
b. the Particulars of Claim was not served on the Applicant;
c. the overriding objective will be achieved if proceedings in default is set aside; and
d. the Respondent would not be prejudiced by the filing of the Defence as personal service was not effected since it is a Company.

Judgment Irregularly Entered

[9] Counsel for the Applicant contends that having been served the Claim Form on the 11th of November 2019, but not the Particulars of Claim, a request was made to enter judgment on March 11th 2020.

[10] In placing reliance on the Affidavit of Ruthann G. Anderson in support of the Applicant's Application, Counsel submitted that Ruthann G Anderson instructed her attorneys to obtain a copy of the Particulars of Claim from the Court's file, as they were not served with same. Counsel submitted that the Respondent only provided proof of service of the Claim Form which the Respondent has not denied, and the admit stamp is incontrovertible proof of service as no admit copy of the Particulars of Claim was exhibited to the Affidavit in opposition.

[11] Considering that the Applicant was not served with the Particulars of Claim contrary to CPR 12.4 and 12.5, a default judgment entered in those circumstances is irregular and should be set aside as of right in accordance with Rule 13.2.

Realistic Prospect of Success

[12] Counsel asked that in the alternative, should the court find that the judgment was regularly entered, it is determined whether the Applicant has a real prospect of success in defending the Claim. The submission made on this ground was that the Respondent in his Claim Form identified a certain policy of insurance numbered MPCC 870611 dated October 17, 2017, which the Respondent relies on in support of the argument that gives rise to the Applicant's liability for offer of

indemnity in respect of the motor vehicle which is the subject of the substantive Claim.

[13] It was Counsel's submission that the Respondent must identify or reference the terms of the policy which guaranteed indemnity for the loss claimed and having not done so, the existence of a policy of insurance without more is insufficient. Counsel argued that similarly, the Respondent's claim for damages for breach of contract has not identified the contractual provision which has been breached by the Applicant, by virtue of what Counsel describes as the bilateral agreement (the policy of insurance) between the insurer and the insured.

[14] Counsel submitted that the Applicant, on the other hand, has placed before the court the policy of insurance which comprised the insurance policy booklet and the schedule of policy which sets out the terms of the indemnity which it agreed to provide to the Respondent. It was Counsel's contention that the duty to provide for theft and the terms and conditions under which that indemnity will be provided to the Claimant can be found nowhere else except in the insurance policy booklet and the schedule of policy documents.

[15] Counsel in relying on the Applicant's Motor Accident Report Form (RGA-2) stated that the relevant motor vehicle was in the custody of Mr. Javion Davis at the time it was stolen and whose original issue date of his licence was stated as October 27th 2017. Counsel's submission was that the theft which occurred November 15th 2017, indicates that Mr. Davis had his licence for less than the required one (1) year. Counsel submitted further that there was an admission by the Respondent in respect of the age requirements set out in the Policy Schedule, that Mr. Davis had custody of the motor vehicle at the time it was stolen and that Mr. Davis had his licence for less than the required one (1) year.

[16] A relevant issue for determination is whether the motor vehicle was in the charge of an unauthorised driver for the purpose of being driven when it was stolen. In support of this submission Counsel's reliance was placed on **Donovan Bennett v Advantage General Insurance Co. Ltd**. (unreported) Claim No. 2009HCV0078 delivered on July 28, 2011; and **Victor Gayle v Jamaica Citrus**

Growers and Anthony McCarthy (unreported) Claim No. 2008HCV05707 delivered on April 4, 2011, which outlined the requirements of CPR 13.2. Counsel relied on the words of the learned Edwards J, in **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy** *supra*, who stated at paragraph 7 of the judgment that:

> *"It is clear therefore, 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. It is to be accepted therefore, that there is now only one ground for setting aside a judgment obtained under Part 12 and that is the ground listed in 13.3(1) that is, whether the defendant has a realistic prospect of successfully defending the claim. However, in exercising the discretion whether or not to set aside the judgment regularly obtained, the court must also consider the matters set out in rule 13.3(2)."*

[17] Counsel adopted the meaning of the phrase "real prospect of success" in the decision of **Dave Blair v Hugh C. Hyman & Co. (A Firm) and Hugh C Hyman** (unreported) Claim No. 2005HCV2297 delivered on the 16th of May 2008, where Brooks J (as he then was) defined the phrase "a real prospect of success" by saying and adopting below:

> *"…the learned editors of Civil Procedure 2003 (The White Book); at paragraph 13.3.1 opined:*
>
> *The phrase …reflects the test for summary judgment …it is not enough to show an arguable case…"*
>
> *At paragraph 24.2.3 the learned editors expanded on the subject:*
> *it is sufficient for the (defendant) to show some "prospect", i.e. some chance of success. That prospect must be real, i.e. the court will disregard prospects which are false, fanciful and imaginary. The inclusion of the word "real" means that the (defendant) has to have a case which is better than merely arguable… The (defendant) is not required to show that his case will probably succeed at trial"*
>
> *I accept this as a working definition of the phrase.*

[18] Concluding this ground, Counsel stated that the Applicant having done its investigations, refuses to indemnify the Respondent and therefore seeks to approach the court for declaratory relief that the Applicant is not liable for indemnity pursuant to the insurance policy. Further, the contentions set out in the Draft Defence which is exhibited to the Affidavit of Ruthann G Anderson are in no way false, fanciful or imaginary but rather point to the fact that the Defendant has

a substantial defence and the authorities together with the Affidavit evidence discloses a defence which has a reasonable prospect of success.

Timing of Application – Applied to the Court as soon as reasonably practicable after finding out that judgment had been entered and Length of Delay

[19] Counsel submitted that their application was filed within time and made as soon as is reasonably practicably in the circumstances, despite the Affidavit not being attached, and was made promptly in the circumstances.

[20] Counsel relied on the Affidavit of Ruthann Anderson who avers that the Claim was brought to the attention of the legal department on or around October 28, 2020. Counsel submitted that Ruthann G Anderson advised her that a Request to Enter Default Judgment was filed on March 11th 2020, and the Application to Set Aside was filed on November 5, 2020.

[21] It was Counsel's submission that even if the Court finds that this was not prompt, it is important to bear in mind that the principles in **Victor Gayle v Jamaica Citrus Growers** *supra* indicate that a lack of alacrity in finding the Application is not determinative of the issue, though it is a factor to take into account.

Explanation for the Failure to file an Acknowledgment of Service and Defence within time required by the Civil Procedure Rules

[22] In submitting that the Applicant's failure to respond to the Claim was not intentional, Counsel placed reliance on the Affidavit of Ruthann G Anderson, who averred that the Applicant did not file a Defence within the specified time because of an internal oversight which resulted in the Claim Form being brought to their attention on or about October 28, 2020. Additionally, Counsel submitted that the Defence was not filed because of investigations that had to be done which would inform the conduct of the proceedings.

Prejudice to the Applicant

[23] Counsel indicated that the Applicant is mindful that a Default Judgment is a thing of value but urged the court to consider the prejudice that would accrue to the Applicant if it were not given an opportunity to present its Defence. In support of this point, Counsel drew reference to section 9 of the Claimant's Policy, exhibit 1, which speaks to authorized drivers at paragraph 1(ii)(b) of the Schedule – Authorized Drivers. Counsel submitted that the investigation by the Applicant revealed that the driver was unauthorised, as the driver had not had his licence, at the time of the theft, for at least one (1) year. Counsel stated this was a breach of the Policy as one of the terms of the policy stipulates that a person with a licence under one (1) year is not authorized to drive the insured's motor vehicle.

[24] Counsel submitted that by virtue of the terms of the policy, the Applicant would be prejudiced because of the criteria set out for authorized invoice in the sum of three (3) to four (4) million dollars, the judgment would therefore be a declaration in contravention of insurance policy. In this context, Counsel submitted that the overriding objective will be achieved if the court is minded to set aside the Default Judgment.

[25] Counsel argued that no evidence has been presented to the court which would cause the Court to find that the Respondent would be prejudiced if the Default Judgment is set aside. It was Counsel's submission that the Respondent would be prejudiced as an order to set aside the Default Judgment would prevent the immediate recovery of the proceeds of his judgment. However, the judgment flows from the alleged default of the Applicant and therefore any prejudice suffered by the Respondent in this regard would not amount to more than a mere inconvenience. Counsel submitted that the Applicant will suffer an injustice if the judgment is not set aside, as the Respondent would be entitled to recover a judgment in circumstances where the Respondent's contentions have not been the subject of a trial. The possible prejudice to the Respondent, Counsel submits, does not outweigh the need for the case to be heard on the merits.

[26] In concluding, Counsel submitted that the question of timing of the receipt of the Policy Booklet by the Respondent is a triable issue. Further, it has not been denied that the person who had charge of motor vehicle, at the time of theft, had

a driver's licence issued to him less than one (1) year. Counsel stated that the breach asserted by the Applicant is material and therefore the Applicant is within its right to refuse to indemnify Respondent. Reliance was placed by Counsel on the Court of Appeal case of **C. Braxton Moncure v Doris Delisser** [1997] 34 JLR 423 referred to in **Victor Gayle v Jamaica Citrus Growers** *supra* which states –

> *"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 that defence can be founded."*

THE RESPONDENT

[27] Counsel for the Respondent grounded her submissions on Section 18 (1) of the **Motor Vehicle Insurance Act** –

> *"18(1) If a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by who a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under subsection (1), (2) and (3) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment the amount covered by the policy or the amount of the judgment, whichever is the lower, in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."*

[28] In support of her submissions Counsel quoted from the case of **Board in Motor and General Insurance Company Ltd v John Pavy** [1993] UKPC 47 –

> *"… the expression liability covered by a policy in section 10(1) (similar to section 18(1) of the MVIA) means a liability which comes within or arises out of risk apparently insured by the express terms of the policy, whether or not it is a liability in respect of which the insurers are entitled to refuse an indemnity on the ground that the insured has committed some breach of the terms of the policy."*

[29] Counsel for the Respondent submitted that the Applicant's submission and allegations that there was a breach to the policy is immaterial as the policy indicated that the Claimant's motor vehicle was insured against it being stolen.

Real Prospect

[30] The primary consideration, Counsel submitted, is whether the Applicant has no real prospect of successfully defending the Claim as is required pursuant to CPR 13.3. In this regard, Counsel placed reliance on **Swain v Hillman** [1999] EWCA Civ J1021-8, where Lord Woolf opined that a realistic prospect of success means realistic as opposed to a fanciful prospect of success. Counsel relied also on the case of **International Finance Corporation v Ultexfrica Spril** [2001] EWHC 508 (Comm), where Moore-Bick J promulgated that -

> *"a person who holds a regular judgment, even a default, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice in favour of setting the judgment aside."*

[31] Counsel submitted further that the court may set aside the judgment as indicated by CPR 13.3 if the Defendant has a real prospect of successfully defending the Claim.

[32] Counsel adopted Moore Bick J's pronouncements and accepts that the expression "realistic prospect of success" means "a case which carries a degree of conviction." Counsel advanced in this vein that there is no realistic prospect of success in the case at bar, because an insurance contract is a contract of utmost good faith (*uberimae fidel*). In other words, the Applicant did not put forward a contractual agreement which upheld the principle of good faith, as the Respondent was never issued a policy booklet. This means that at the beginning and throughout the existence of the contract, all the parties to the contract are under a duty to deal fully and frankly with each other. Counsel argues that the Applicant did not deal with the Respondent fully and frankly as the Applicant never issued the policy booklet to the Respondent. It was the further submission of Counsel that this is the same policy booklet which the Applicant now intends to rely on which was never included nor contemplated when the contractual agreement was entered into.

[33] Counsel contended that the law is clear that when an insurance company raises the issue of a policy breach, it is their duty to prove that the insured breached the

policy to the extent that the insurer would not be duty bound to the terms of the policy.

[34] Furthermore, the driver whom the Applicant contends was unauthorized was not driving and was not in the motor vehicle when it was stolen and that the limitation to the policy was not proposed, signed or seen by the Respondent nor was it communicated to the Respondent.

[35] The Affidavit filed by Mr. Willard Costly who averred that on the 17th October 2017, he only received the cover note and receipt of insurance payment he made when he entered in to the contractual agreement with the Applicant. Mr. Costly averred that he is not aware of the contents of the insurance agreement as he was not privy to the insurance policy having not received same. Counsel contends that the Applicant must prove that the contract of insurance was provided to the Respondent and the failure of the Respondent to do so is what prevents the Applicant from having a reasonable prospect of success in this Claim.

[36] It was the submission of Counsel that for a binding contract of insurance to arise, there must first be an offer put forward by one party to the contract and the acceptance of it by the other. Counsel submitted further that there must be an offer of all the terms and an acceptance of all the terms. The offer is usually made by the proposer (the proposed assured) who completes a proposal form and sends it to the insurers for their consideration and the insurers would then accept the proposal made leading to an agreement. In some situations, counter-proposals may be made by the insurer so that negotiations may end with the insurer making a final offer for insurance cover to the proposer which is up to the proposer to accept by, for instance, tendering the premium due.

[37] Counsel in drawing reference to **MacGillivray & Parkinson on Insurance Law, sixth edition p. 86**, submitted that when the Applicant (as the insurer) comes to issue its policy, its only obligation is to issue it with the terms and conditions usually attached to its policies, in so far as those were not inconsistent with the express terms of the parties' preliminary contract. Counsel contends this

was not done. Therefore, the terms that the Applicant seeks to rely on cannot be binding on the Respondent as the Applicant did not do their due diligence which was their obligation as the writer of the contract.

[38] It was submitted that the policy booklet does not bear a signature purporting to be that of the Respondent or that any such agreement postulated by the Applicant existed at the time when the contractual agreement between the parties was entered.

Delay and Prejudice

[39] Counsel submitted that when the factors stated at CPR 13.2 are considered, the Applicant delayed the proceedings despite being duly served. Further, the Applicant completely disregarded the fact that a Claim was made against them and now seeks to have the judgment entered against them set aside which Counsel submits was admitted in the Applicant's Affidavit.

[40] Counsel for the Respondent argued that the reason advanced by the Applicant for the delay is insubstantial, especially because the Respondent followed due course of the law for redress and at the conclusion of the matter, the Applicant seeks to have the judgment set aside. Counsel argues that setting aside the judgment would therefore be prejudicial to the Respondent.

[41] Counsel relied on the Affidavit of Service filed November 13th 2019, specifically paragraph 2 which indicates that what was served was the Claim Form and Particulars of Claim on November 13th 2019. Counsel asserted that even though only the Claim Form was stamped, it does not mean that the Applicant was not in receipt of the Particulars of Claim and perhaps the Applicant misplaced the Particulars of Claim. In such circumstances, the Default Judgment was not irregularly entered.

[42] The failure of the Applicant to provide proof that Mr. Willard Costly was provided with the policy booklet as agreed upon, Counsel submitted, is what prevents the Applicant from having a reasonable prospect of success in the Claim.

ISSUES FOR DETERMINATION

[43] I thank Counsel for the authorities provided which were considered in arriving at my decision. Having regard to the submissions made and authorities provided, the issues for the Court's determination are:

1. Whether the requirements for entering a Default Judgment for Failure to file Acknowledgment of Service or Defence have been met.
2. Whether the Request for Default Judgment should be set aside.
3. Whether there is prejudice in setting aside or not setting aside the Request for Default Judgment.
4. Whether the overriding objective would be furthered in the granting or non-granting of the Request to set aside the Default Judgment.

LAW AND ANALYSIS

Whether the requirements for entering a Default Judgment for Failure to file Acknowledgment of Service and Defence have been met.

[44] It must be noted that at the time of hearing of the Application at bar, the Default Judgment is yet to be entered as per the request filed by the Respondent. However, it is necessary to consider the requirements for entering a default judgment, consequent on the submissions made on behalf of the Parties in respect of the Notice of Application to Set Aside the Default Judgment.

[45] The requirements to enter default judgment is governed by CPR 12.4 and 12.5 which reads –

> *"**Conditions to be satisfied – judgment for failure to file acknowledgment of service***
>
> *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) the defendant has not filed –*
> *(i) an acknowledgment of service; or*
> *(ii) a defence to the claim or any part of it;*
> *(d) where the only claim is for a specified sum of money apart from costs and interest that defendant has not filed an admission*

of liability to pay all of the money claimed together with a request for time to pay it;
(e) that defendant has not satisfied in full the claim on which the claimant seeks judgment; and
(f) (where necessary) the claimant has permission to enter judgment.--"

Conditions to be satisfied - judgment for failure to Defend

12.5 The registry must enter judgment at the request of the claimant against a defendant for failure to defend if –
(a) the claimant proves service of the claim form and particulars of claim on that defendant; or
(b) an acknowledgment of service has been filed by the defendant against whom judgment is sought; and
(c)The period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
(d) that the defendant has not –
(i) filed a defence within time to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under rule 22.2(6);
(ii) where the only claim is for a specified sum of money, filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or
(iii) satisfied the claim on which the claimant seeks judgment; and
(e) there is no pending application for an extension of time to file the defence.

[46] By virtue of the above Rules, the Registry must enter judgment on request of a litigant, once a determination that the requirements for entering same have been met. This means that once all requirements have been satisfied as per CPR 12.4 or 12.5, judgment must be deemed entered as at date of filing of the request for entry of judgment in Default of Acknowledgment of Service or Defence.

[47] The Parties have drawn issue on the point of whether all the requirements for entering the judgment have been met. I have determined that the requirements would have been met for entering judgment for the failure of the Applicant to acknowledge service or to file a Defence as per CPR 12.4 and 12.5. The file does not reflect that there was a Notice of Application to Extend Time to File an Acknowledgement of Service nor was there a pending Application to Extend Time to File the Defence (see: CPR 10 and 12.5(e)). Therefore, all would have been in place for the Registry to enter the Default Judgment.

[48] However, I also considered the submissions made in respect of the service of the Claim Form and the Affidavit of Ruthann G Anderson filed in support of the Notice of Application to Set Aside Default Judgment, where she averred to what was served on the day in question. Consideration is made of the submission that in the Affidavit of Ruthann G Anderson where it was stated that an internal oversight led to the Claim Form not being served on the Applicant until on or about October 28th 2020. The Affidavit did not state that the Particulars of Claim was not served on the Applicant. In this regard it must be noted that on careful reading of the Affidavit of Ruthann G Anderson, they instructed the Attorney-at-Law for the Applicant to obtain a copy of the Particulars of Claim from the Supreme Court. On perusing the Affidavit of Ruthann G Anderson, I am not convinced on the facts before me that the Particulars of Claim was not one of the documents served by the Process Server.

[49] The burden of proving service is on the Respondent. Regard is had to the submissions made on the Respondent's behalf and the Affidavit of Service which speaks to both the Claim Form and Particulars of Claim being personally served at the Applicant's registered office. I have determined without more that the requirements for entering a Default Judgment would have been met by virtue of the failure to file an Acknowledgment of Service or Defence within the required time and therefore, the Default Judgment would be entered as of right and as per CPR 5.5.

Whether the Default Judgment Should be Set Aside

[50] CPR 13.2 outlines the circumstances whereby a default judgment may be set aside when wrongly entered. It states –

> *13.2 (1) The court must be set aside a judgment entered under Part 2 if judgment was wrongly entered because –*
>
> *(a)In the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;*
>
> *(b) In the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or*
>
> *(c) The whole of the claim was satisfied before the judgment was entered.*

(2) The court may set aside judgment under this rule on or without an application.---

Based on the analysis above CPR 13.2 would therefore not be applicable in the Application at bar.

Whether there is a Realistic Prospect of Successfully Defending the Claim

[51] Having regard to the fact that I have determined that the conditions have been met for entering the Default Judgment, the court has a discretion whether to set aside a judgment regularly obtained, the circumstances of which CPR 13.3 and 13.4 sets out and are outlined below –

*"**Cases were court may set aside or vary default judgment***

13.3 (1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

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

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

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.

***A*pplications to vary or set aside judgment – procedure**

13.4 (1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence."

[52] In **Fletcher v Destiny Company Ltd.** [2021] JMCA Civ 42, Foster Pusey JA held in paragraph 63, that the default judgment entered was regular and so the Respondent, in order to set aside the judgment, had to show that it had a reasonable prospect of successfully defending the claim by way of an affidavit of merit. Therefore, in order to do so, the Application must be supported by an affidavit which exhibits a Draft Defence (See: **Christopher Ogansalu v Keith**

Gardener [2022] JMCA 12.). The Applicant in support of this Application met the requirements as set out in **Christopher Ogansalu v Keith Gardener** *supra.*

[53] The case of **Thorn Plc v MacDonald and Another** [1999] CPLR 660 outlined the following principles to take into account when considering an application to set aside a default judgment:

(a) While the length of any delay in making the application must be taken into account, any pre-action delay is irrelevant.

(b) An application may be 'prompt' even if it was made several weeks after the default judgment was entered.

(c) Any failure by the defendant to provide a god explanation for the delay is a factor to be taken into account, but it is not always a reason to refuse to set aside.

(d) The primary considerations are whether there is a defence with a real prospect of success, and that justice should be done. The question whether there is a defence with a real prospect of success is the same as an application for summary judgment.

(e) Prejudice (or the absence of it) to the claimant also has to be taken into account.

[54] Furthermore, the law has been settled in the watershed case of **Swain v Hillman** *supra*, that the test for coming to a determination in setting aside a default judgment is whether the Applicant has a realistic prospect of success. If there is no realistic prospect of success then that is the end of the matter, and I will not be required to determine whether the threshold under 13.3(2) has been met, as there will be no need to take the case any further (see: **Christopher Ogansalu v Keith Gardener** *supra***).**

[55] Consideration was taken of the Applicant's submission that it took time to do its investigations which contributed to the delay in filing the Affidavit. The Affidavit reflects that on investigation it was revealed that the Respondent had breached the terms of the policy agreement and therefore was not entitled to an indemnity. However, the Respondent draws issue with the Applicant on this point stating that

they were never served with the policy agreement and therefore, the Applicant fails in its submission as to a realistic prospect of success.

[56] In the case of **Donovan Bennett v Advantage General Insurance Co. Ltd** *supra***,** relied on by the Applicant, McDonald-Bishop J (as she then was) had to consider a claim in which an insurer refused to honour a claim for indemnity under a policy of insurance on the basis that the insured had breached the terms of the policy. In that case, the claimant contended that the defendant had not established that the limitation of the policy, that a person should not be driving the motor vehicle with a license less than one-year-old, was communicated to the claimant or proposed to him. The effect of the limitation in **Donovan Bennett v Advantage General Insurance Co. Ltd** *supra* and whether it was communicated to or proposed by the claimant in that case, was an issue which was triable and determined at trial by learned trial judge.

[57] In this instant case, the averments by the Applicant are similar to the ones made in **Donovan Bennett v Advantage General Insurance Co. Ltd** *supra***.** The Applicant has refused to indemnify the Respondent for his loss on the basis that at the time the car was stolen it was being driven by or in the charge of, a driver who was the holder of a driver's licence less than one-year-old. Further, the Respondent makes similar averments as the Claimant in **Donovan Bennett v Advantage General Insurance Co. Ltd** *supra* as it indicated that the limitation was not proposed by the Respondent, nor was it communicated to him.

[58] Therefore, I agree with Counsel for the Applicant that the question of whether the Respondent was provided with the policy agreement is one which is a matter to be determined at trial. However, of more relevance to the Application at bar, the Applicant avers that their investigations have led them to believe that there was a breach in the policy agreement – the same circumstances which are reflected in their Draft Defence. I have therefore determined that this too is a triable issue, and the Applicant has therefore met the threshold under **Swain v Hillman** *supra* in respect of realistic prospect of success. Having determined that there is a realistic prospect of success, the court can proceed to determine the factors under 13.2(2)(a) and (b).

Whether the Applicant applied as soon as Reasonably Practicable

[59] The Application to Set Aside Default Judgment was made 5th November 2020, some eight (8) months after the Request for Default Judgment was made, and the Affidavit in support of Application to Set Aside Default Judgment was filed on the 15th February 2021, three (3) months thereafter. The case law is instructive on what is determined to be "as soon as reasonably practicable."

[60] In the case of **McKenzie v Hayden** [2020] JMSC Civ 86, one (1) month was considered prompt. However, forty-five (45) days was deemed not to meet the requirements of "as soon as reasonably practicable" in the absence of good reasons (see: **Thomas v Gardner and Webb** [2022] JMSC Civ. 144; and **Gayle v Jamaica Citrus Growers and McCarthy** *supra* where a delay in excess of a year was considered inordinate). The case law indicates that making a determination on whether an application was made as soon as possible is determined by the circumstances of each case (see: **Thorn Plc v MacDonald Another** *supra*).

[61] It is instructive that the Affidavit filed in support of the Notice of Application to Set Aside Default Judgment did not state when they realised the Request to Enter Judgment was filed. However, the Affidavit states that the Claim Form was brought to their attention on October 28th 2020. Considering that the Applicant was informed of the Claim on October 28th 2020, and filed the Application to Set Aside Default Judgment on November 5th 2020 suggests that in the circumstances that the Application was made as soon as was practicable.

[62] Without more, I have determined, based on the facts before me, that the Applicant applied as soon as is reasonably practicable to Set Aside the Default Judgment.

Whether there is a good explanation for the Delay in filing the Defence or Acknowledgment of Service

[63] The Applicant contends that it had to obtain a copy of the Particulars of Claim from the Supreme Court. The Affidavit stated that the Draft Defence was prepared after the Particulars of Claim was received.

[64] It is accepted in the context that consideration has to be given to the fact that the Applicant is a company with several departments. Whilst this may be true, it cannot be overlooked that there was an inordinate delay in filing the Defence, notwithstanding the reasons given for the delay. However, the absence of a good explanation for the delay in filing the Defence does not in and of itself dispose of the matter – as this is not always a reason to refuse to set aside the default judgment (see: **Thorn Plc v MacDonald and Another** *supra* upheld in **Victor Gayle v Jamaica Citrus** *supra* and **Ameco Caribbean Inc. v Ferguson** [2021] JMCA Civ 53).

Whether there is prejudice in setting aside or not setting aside the Request for Default Judgment

[65] The question of prejudice must be weighed between the Parties. I have determined that the Applicant will suffer greater prejudice if the judgment is not set aside, having regard to the matters that Counsel have outlined in the Draft Defence, which suggests there is a realistic prospect of success.

[66] On the other hand, Counsel for the Applicant has recognised that it must be considered that the Respondent too would be prejudiced if the Request for Default Judgment is set aside. I agree with Counsel for the Applicant that the prejudice in relation to the Respondent is in the fact that the question of liability will be postponed until the full hearing. I also agree that this postponement of liability will create an inconvenience but will not cause undue prejudice to the Respondent (see: **Victor Gayle v Jamaica Citrus Growers** *supra*).

[67] In the circumstances and in the absence of any evidence to the contrary that the Respondent will suffer or is likely to suffer any prejudice, the award of costs to the Respondent can compensate for any undue prejudice in setting aside the Default Judgment (see: **Russell Holdings Ltd. v L and W Enterprises Inc and Anor** [2016] JMCA Civ 39).

Whether the overriding objective would be furthered in the granting or non-granting of the Request to set aside the Default Judgment.

[68] In making any determination on any matter before the court, it is the duty of the parties including the court to further the overriding objective (see: CPR 1.1). Both parties have joined issue with matters that should be ventilated at trial. In this regard I rely on the words of the learned McDonald-Bishop J (Ag), as she then was, in **Marcia Jarrett v South Eastern Regional Health Authority and Others** (unreported) Claim No. 2006 HCV00816 delivered on November 3, 2006:

> *"Of course, I am mindful of the fact that this decision was prior to the Civil Procedure Rules 2002 as amended but, I think it is still relevant when one is considering the overriding objective. Rule 1.1 is primarily concerned with ensuring that justice is done between the parties. The interpretation of any of the CPR 2002, as amended, must be consistent with this objective. The authorities all suggest that it is usually better for cases to be decided on its merits rather than be rejected due to procedural defaults."*

Therefore, considering the circumstances of this matter and the words of McDonald Bishop J (Ag), I am of the view that allowing the Notice of Application to Set Aside the Default Judgment would be furthering the overriding objective.

CONCLUSION

[69] Consequently, having regard to the issues outlined in the case as evidenced in the Affidavit of Merit and the Draft Defence, I have determined in the circumstances that the inordinate delay in filing the Defence is outweighed by the fact that the overriding objective would dictate that Request for Default Judgment be set aside, by virtue of the Applicant having a realistic prospect of success. I make the following orders therefore –

1. All proceedings in respect of the Request to Enter Default Judgment are set aside on the grounds that the Applicant has a realistic prospect of successfully in defending this Claim.
2. The Applicant is permitted to file its Defence on or before August 11, 2023.
3. The parties are to embark on mediation on or before November 20, 2023.
4. If mediation is unsuccessful Case Management Conference is set for December 7, 2023.
5. Cost to the Respondent to be taxed if not agreed.
6. Applicant's attorney-at-law to prepare, file and serve orders herein.