[2021] **JMSC Civ 13**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 00708

BETWEEN	**FRANCES WALTON-JAMES**	**CLAIMANT**
AND	**ADVANTAGE GENERAL INSURANCE CO LTD**	**DEFENDANT**

IN CHAMBERS

Ms De-Andra Butler for the Applicant instructed by Samuda and Johnson

Mr Richard Reitzin for the Respondent instructed by Reitzin and Hernandez

Heard: May 28th, 2020, December 1st, 2020 and January 29th, 2021

Application to set aside default judgment – real prospect of success – effect of delay – good explanation – risk of prejudice

HUTCHINSON, J

INTRODUCTION

[1] This application for the setting aside of a default judgment was filed on behalf of the Applicant/Defendant on the 28th of October 2019. It was supported by an affidavit from Ruthann Morrison, legal officer for the Defendant which was filed on the 18th of November 2019 in which they seek the following orders;

a. That the Judgment in Default entered herein against the Applicant be set aside;

b. That the time limited to filing a Defence be extended by a period of twenty-one (21) days from the date of this Order; and

c. There be such further or other relief as this Honourable Court sees fit.

[2] On the 28th day of May 2020, at the commencement of these proceedings, Counsel for the Applicant made an oral application for the notice filed to be amended as follows;

d. That the Acknowledgment of Service filed herein on the 1st of March 2018 be permitted to stand as filed in time.

[3] She also requested that the grounds be amended to state that the failure to file the acknowledgment of service and the defence within the time prescribed by the Civil Procedure Rules was unintentional. In support of this application to amend, Counsel made reference to the affidavit of Ruthann Morrison which had been filed and served on Counsel for the Respondent/Claimant. The affidavit exhibited an acknowledgment of service which bore a filing date of March 1st, 2018 and at paragraph 12 of the said affidavit, an explanation was provided for the filing of same after the deadline for doing so. Paragraphs 13 and 14 of the same affidavit spoke to the reason for the delay in filing the defence.

[4] The Application was opposed by Counsel for the Respondent and after hearing submissions from Counsel on both sides, I allowed the amendment as I was satisfied that this was a proper exercise of the Court's powers as set out at Rule 11.3 of the CPR taking into account the application itself, the evidence in support of same and the overriding objectives.

BACKGROUND

[5] On the 18th of September, 2014, the Respondent obtained a judgment in Claim 2013HCV01102 against the third defendant, Kats & Supplies Limited, which was one of the defendant's insured. She was also awarded interest on the special and

general damages at 6 % and on the 2nd of October 2014 a payment of $1,527,743.34 was made to her Counsel in respect of the judgment sum awarded.

[6] On the 29th day of June 2016 at the conclusion of the costs hearing, the Respondent was awarded cost in the sum of $761,610.50 with interest at 6%. On the 26th of October 2016 a cheque was sent to her Counsel by Samuda and Johnson, Counsel for the Applicant herein in the sum of $472, 256.66. On the 8th of December 2017, correspondence was sent on behalf of the Respondent to Samuda and Johnson making an enquiry in respect of the sum of $411,228.23 plus interest which was stated as outstanding. No further payment was made by the Applicant.

[7] On the 8th of February 2018, the Respondent commenced this claim in which she seeks payment of;

1. The sum of $415,025.75;

2. Interest on the said sum of S415,025.75 at the rate of the average of one percentage point above the average commercial bank prime lending rate and the interest rate paid by the Bank of Jamaica on Treasury Bills during the period from 1 September, 2016 being the date upon which the final costs certificate was issued; and

3. Costs.

[8] On the 9th of February 2018, the Claim and Particulars were served on the Applicant and on the 2nd of March 2018, a cheque in the amount of $447,226.31 was issued to Counsel for the Respondent. On the 5th of March 2018, the Respondent filed a request for Default Judgment citing the Applicant's failure to file an acknowledgement of service and judgment was formally entered in the judgment register on the 31st of October 2018. The matter was then set down for assessment of damages which was subsequently adjourned as a result of this application.

ISSUES

1. Was judgment in default properly entered?

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

3. Has the Applicant applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered?

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

LAW AND ANALYSIS

[9] Although the matter was a fairly straightforward one, there were several submissions filed on both sides. These submissions have been carefully considered in arriving at my decision and while I do not intend to re-state them in detail, the considerations raised therein have been addressed in the course of my examination of the relevant issues.

Was the judgment in default properly entered?

[10] There is no dispute on the face of the submissions presented by opposing Counsel that the relevant provisions which arise for the Court's consideration are found at Part 12 and 13 of the CPR. Rule 12.4 which contains the provision on which the Respondent relied in applying for default judgment states as follows;

> *12.4 The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if*
>
> *(a) the claimant proves service of the claim form and particulars of claim on that defendant;*
>
> *(b) the period for filing an acknowledgment of service under rule 9.3 has expired;*
>
> *(c) that defendant has not filed (i) an acknowledgment of service; or (ii) a defence to the claim or any part of it;*

(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.

[11] A review of the application filed by the Respondent on the 5th of March 2018, reveals that it contained a request that judgment be entered as no acknowledgment of service had been filed and the time for doing so had expired under 12.4 (b). In order to determine whether judgment had been properly entered, I carefully considered Part 9 of the CPR with emphasis on 9.3(1) which reads;

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

[12] In the affidavit of Ms Ruthann Morrison, it is accepted that the acknowledgment of service was filed outside of the 14-day window. Ordinarily, this admission would have been sufficient to conclude that the default judgment was properly entered. Such a conclusion would however have failed to take into account rule 9.3 (4) which states as follows;

(4) A defendant may file an acknowledgment of service at any time before a request for default judgment is received at the registry out of which the claim form was issued. (emphasis added)

[13] From the language used in the wording of this provision it is evident that although the general rule requires compliance within 14 days, it is open to a party to file their acknowledgment of service even after this timeline, provided no request for default judgment has been received. Implicit in this provision is the clear indication that provided the filing pre-dates the request the consequences of Rule 12.4 (b) would be avoided.

[14] An examination of the acknowledgment of service exhibited by Ms. Morrison reveals that it bears a filing date of the 1st of March 2018 which was 4 days before the request for judgment was filed by Counsel on behalf of the Respondent. The

effect of this is, at the point when judgment was entered, the acknowledgment of service had already been filed. Mr Reitzin asserted that in spite of the filing date the Respondent had never been served with same. While it is a requirement that documents filed in Court proceedings ought to be served on the opposing party, the language of the provision makes it clear that the filing itself is sufficient to satisfy this rule. It is noteworthy that no similar language is found at Rule 10.3 in respect of the time for filing a defence.

[15] In light of the foregoing considerations, it is evident that the judgment entered was in fact irregular as the Applicant had already filed their acknowledgment of service. Rule 13.2 which governs the setting aside of a default judgment where it has been irregularly entered was then considered with emphasis on Rule 13.2(1) which reads as follows;

> *The court must set aside a judgment entered under Part 12 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*

[16] The condition at Rule 12.4(b) which provides that judgment can be entered on a failure to comply with Rule 9.3 not having been met, this in and of itself is sufficient to set aside the default judgment.

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

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

> *13.3 (1) The court may set aside or vary a judgement entered under Part 12 if the defendant has a real prospect of successfully defending the claim.*
>
> *(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:*

> *(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.*
>
> *(b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.*

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

> *'that in an application to set aside a default judgment entered under part 12 of the CPR, in applying rule 13.3, the primary consideration is whether the defence has any real prospect of success…However in exercising the discretion whether or not to set aside the judgment regularly obtained, the court must also consider the matters set out in rule 13.3(2). (emphasis supplied).*

[19] In respect of this requirement, it was submitted on behalf of the Respondent that the Applicant does not have a real prospect of success as the draft defence in essence admits the claim as filed and the issue raised as to the Claimant's entitlement to interest at a commercial rate is a matter for a court at an assessment hearing. Counsel argued that the Applicant's payment of the sum claimed should also be viewed as evidence in support of its admission of liability and the sole issue being one of quantum on interest to be paid the matter ought to pass to assessment.

[20] In order to determine this issue, the draft defence was examined. Paragraph 1 contains an admission of paragraphs 1 to 13 of the Particulars of Claim, the details of which have been summarised in the background information outlined above in this judgment.

[21] At paragraph 2, the Applicant assert that they have satisfied the claim in full by making payment to the Respondent's Attorney of the sum $447, 226.31 on the 2nd of March 2018 and at paragraph 3 they deny that the Claimant is still entitled to damages, interest and/or costs pleaded. Paragraph 4 of the Defence also contains a denial that the Claimant is entitled to any of the relief sought.

[22] While it is correct that the Applicant has admitted the background information to this Claim for $415,025.75, and acknowledged a payment in this regard, on a careful review of paragraphs 2 to 4 it is evident that it would be a misrepresentation of the draft defence to describe it as a complete acceptance/admission of the Claimant's case as it is the Defence's contention that all liabilities owed by them to the Claimant have been settled and there is nothing to be assessed. Additionally, they have asserted that the Respondent is not entitled to interest at a commercial rate as no set of circumstances existed between the parties to justify this neither has any evidence been presented by the Claimant to justify a departure from the provisions of Section 2 of the Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order which states as follows;

> *The rate of interest payable on every judgment debt shall be-*
>
> *a. six percent per annum in the case of judgment debts denominated in Jamaican dollars; and*
>
> *b. Three percent per annum in the case of judgment debts denominated in foreign currency.*

[23] On the other hand, it is the Respondent's position that the payment of $447,226.31 does not constitute full satisfaction of the debt as the rate of interest requested which was to be determined by the Court was not paid by the Applicant and the Applicant cannot usurp the Court's jurisdiction to pay interest at a rate that it chooses and in this regard reference was made to Section 3 of the Law Reform (Miscellaneous Provisions) Act which provides as follows;

> *3. In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:*
>
> *Provided that nothing in this section-*
> *(a) shall authorize the giving of interest upon interest; or*
> *(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue*

of any agreement or otherwise; or
(c) shall affect the damages recoverable for the dishonour of a bill of exchange

[24] Mr Reitzin also submitted that this is not an action in which the Respondent was seeking to enforce a judgment in her favour, as has been contended by the Applicant, but it in fact an action for compensation by the Applicant's for its breach of its statutory duty.

[25] In ***Swain v Hillman and another*** **[200] 1 All ER 91** it was noted by the Court that in order to be able to set aside a default judgment regularly obtained the defendant must have a real prospect of successfully defending the claim rather than a fanciful one. In determining whether the test has been satisfied, there must be a defence on the merits to the requisite standard. It was also outlined that the term real prospect of success means that the evidence presented should reveal more than a merely arguable case.

[26] Applying these legal principles to the evidence before me, it is my considered view that the draft defence filed satisfies this test as a Court could conclude that the Applicant had settled the debt in full and had no further obligation to the Respondent. Additionally, a Judge may decide that the current claim is without merit as it ought properly to have been an action for enforcement of a judgment as opposed to a new cause of action for breach of statutory duty as in the ***Doreen Wright*** case. This possibility is increased by the fact that the rules provide for the enforcement of a judgment to be addressed in keeping with Rule 45.2 which sets out the procedure as follows;

> *45.2 A judgment or order for payment of a sum of money other than an order for payment of money into court may be enforced by -*
>
> *(a) an order for the seizure and sale of goods under Part 46;*
>
> *(b) a charging order under Part 48;*
>
> *(c) an order for attachment of debts under Part 50;*
>
> *(d) the appointment of a receiver under Part 51;*

(e) a Judgment Summons under Part 52; or

(f) an order for sale of land under Part 55.

[27] In respect of the claim for interest at a commercial rate, while a Court could find that it has the power to order that interest should continue to accrue on judgment debts at a rate higher than the statutory rate pursuant to Section 3 of the LRMP Act, this is usually done in cases of commercial transactions and a Judge may conclude that the Claimant has not presented any evidence that this claim would fall within this category of interest.

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

[28] I then moved on to examine whether the Applicant had complied with Rule 13.3(2) (a) and (b) of the CPR. At Paragraph 14 of her affidavit, Ms. Morrison acknowledged that they were served with the notice of assessment of damages on April 30, 2019 but formed the view that this was due to oversight on the part of the attorney for the claimant to discontinue the matter once payment had been received. She noted that when they realized that the Claimant was proceeding instructions were given to their Attorneys to take steps to protect their interest. The application to set aside the default judgment was subsequently filed October 19th, 2019.

[29] In her submissions, Ms Butler contended that although there was this further delay of over six months it was not the most egregious as the Court in ***Victor Gayle*** had granted an application filed a year after the Applicant had become aware of the judgment. She submitted that in spite of this delay Edwards J, was of the view that this did not by itself outweigh the factors that supported the setting aside of the Judgment.

[30] On the other hand, it was submitted by Mr. Reitzin that although Ms. Morrison acknowledged being served with the notice of assessment hearing she did not

state that she had been served with the interlocutory judgment. He argued that no evidence has been presented in respect of the date on which the Applicant found out that judgment had been entered and in those circumstances they have failed to provide the Court with evidence on this issue.

[31] He submitted that in the alternative, if the Court determined that notice of the judgment was provided at the time that the notice of assessment was received there was a further delay of 181 days or 6 months before the application to set aside was filed. He argued that with that period of delay for which no explanation had been provided it cannot be said that the application was made as soon as reasonably practicable.

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

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

[33] I have examined the timing of this application and while I am prepared to accept that the Applicant would have had notice of the interlocutory judgment at the time when the notice of assessment hearing was served on them an additional period of 6 months was then allowed to elapse until this action was taken. Additionally, I

note that there has been no explanation provided for the additional delay in having this application filed. In circumstances where delay can negatively impact the case for the Claimant as well as the application for relief sought by the Applicant, an explanation in this regard takes on greater significance. In these circumstances with no explanation to address the reason for this further delay it is my conclusion that the Applicant was tardy in applying to set aside the default judgment.

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

[34] In addressing 13.3(2)(b) Ms Butler made reference to paragraphs 12, 13 and 14 of the affidavit Ms Morrison in which she provided an explanation for the late filing of the acknowledgement of service and the failure to file the defence. In respect of the acknowledgment of service, Ms. Morrison in her capacity as legal officer for the Applicant stated that the delay in filing the acknowledgment was caused by the time that it took for their claims department to process the claim documents. She also accepted that this resulted in the document being filed 6 days later than it ought to have been. In respect of the failure to file their defence, she outlined that upon the cheque which was paid over to the Respondent's Attorney being accepted and negotiated, the Applicant held a genuine belief that the matter would have been discontinued and filed no defence.

[35] In his submissions on this point, Mr Reitzin argued that the contents of Ms Morrison's affidavit should not be considered by the Court as it is inadmissible. He asserted that she could not swear to any facts from which the Court could conclude that the delay was caused by the Claims Department as she has provided no evidence that she works in that department or communicated with anyone there. He submitted that the affidavit was not in compliance with Rule 30.3(2) (b) (ii) as there was nothing to show the means of her knowledge of the explanation provided. In respect of the defence, Counsel questioned the ability of the Company, a legal entity to hold a genuine belief that the matter would have been

discontinued and he highlighted the failure of the Applicant to consult with him to confirm that this course of action would have been taken.

[36] He referred the Court was referred to the consolidated appeals of ***Attorney General v Roshane Dixon and Attorney General v Sheldon Dockery*** **[2013] JMCA Civ 23** where appeals filed on behalf of the Attorney General's Chambers were dismissed by the Court on the basis of their failure to proffer a satisfactory excuse for the delay. Mr Reitzin asked that special note be taken of paragraph 18 of that judgment where Harris JA stated as follows;

> *[18] It cannot be denied that rule 1.1 of the CPR under which the appellant seeks assistance, imposes an obligation on the court to deal with cases justly. In order to give effect to the overriding objective, under the rule, the court, in its application and interpretation of the rules, must ensure as far as is practicable that cases are dealt with fairly and expeditiously. The court, in considering what is just and fair looks at the circumstances of the particular case. In an application for an extension of time, the delay and the reasons therefor are the distinctive characteristics to which the court's attention is initially drawn. It cannot be too frequently emphasized that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice. It follows therefore, that in applying the overriding objective, the court must be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties.*

[37] In examining this issue, I began with the initial submission of Mr. Reitzin of there being no evidence before the Court from the Applicant on this point. In respect of affidavits being relied on for the purposes of any hearing the CPR provides as follows;

> *30.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.*
>
> *(2) However an affidavit may contain statements of information and belief -*
>
> > *(a) where any of these Rules so allows; and*
> >
> > *(b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-*

> *(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and*
>
> *(ii) the source for any matters of information and belief.*

[38] At paragraph 2 of her affidavit, Ms Morrison averred that the facts and matters deponed to were derived from her knowledge of the file in this matter. She went on to state that insofar as they are within her knowledge they are true and where they are not they are true to the best of her information and belief. It is apparent from the contents of her affidavit that Ms. Morrison, holding the position that she does with the Applicant company, is familiar with the file in respect of this matter and all its contents and is this regard is perfectly positioned to speak same. This conclusion finds support in the fact that the acknowledgment of service which was filed in response to this claim was actually filed by her.

[39] This is no different from the situation which exists in respect of the affidavit which was filed in opposition to this application on the 29th of November 2019. This affidavit was not sworn to by the Claimant herself but by Mr Reitzin who did so in his capacity as an attorney at law who 'had the care and conduct of the judgment creditor's claim in these proceedings' (paragraph 2). The affidavit also contained an averment similar to that found in the Morrison affidavit as to the source of his knowledge.

[40] Having considered the foregoing factors and relevant rules, I was not persuaded that this affidavit should be rejected on the basis outlined by Mr Reitzin. I am satisfied that as legal counsel with the Applicant, Ms. Morrison would have been in contact with the file and all matters related thereto, she would also have been a custodian of the records in respect of same. She has attributed her source of knowledge to her familiarity with and handling of the file and in those circumstances would have been an appropriate person to depone to this affidavit.

[41] In respect of the merit of the explanations provided, useful guidance was provided by the dicta of Panton JA (as he then was) in ***Strachan v The Gleaner Co Motion***

12/1999 delivered 6th December 1999 in respect of the factors which should be considered by a Court on an application for extension of time. This was re-stated in ***AG v Dixon*** *supra* by Harris JA as follows;

> *[17] The court is endowed with discretionary powers to grant an extension of time but will only do so where it is satisfied that there is sufficient material before it which would justify it in so doing. In Strachan v The Gleaner Company Motion No 12/1999 delivered 6 December 1999, Panton JA (as he then was) outlined the following factors which a court takes into consideration in the exercise of its discretion on an application for an extension of time:*
>
> > *"(i) the length of the delay;*
> >
> > *(ii) the reasons for the delay;*
> >
> > *(iii) whether there is an arguable case for an appeal and;*
> >
> > *(iv) the degree of prejudice to the other parties if time is extended."*

[42] While it is not in dispute that the acknowledgment of service was filed outside the established timeline, the delay was not a lengthy one as although it was 6 days late, it was received prior to the request for default judgment. In respect of the reason for the delay the explanation points to a bureaucratic or administrative failing as opposed to deliberate malingering on the part of the Applicant. In respect of the delay in filing the defence to this claim, while I agree with the submission of Mr Reitzin that this explanation is not the most compelling one given the Applicant's obligation to confirm its assumptions as opposed to resting on its laurels, I adopt the words of Panton JA in the ***Strachan*** decision where he stated;

> *"Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."*

Possible prejudice to the Claimant

[43] I also considered whether the Applicant's inaction for the 6-month period occasioned any prejudice to the Respondent. In submissions on this point, Ms Butler argued that although the Respondent would lose a benefit in being deprived of this judgment she did not outline any particular prejudice that would be

occasioned to her. She argued that on the other hand, the Applicant would suffer immeasurable prejudice in being made to pay commercial interest without a determination being made on evidence as to whether the Respondent would be entitled to same. She submitted that if the default judgment is not set aside, the Respondent would receive the benefit of interest on top of interest where the recovery of same was not supported by the law.

[44] Mr Reitzin submitted that the Applicant has deliberately and deliberatively caused the Respondent to suffer inordinate, inexcusable and unjustifiable delay and setting aside the default judgment would increase the delay dramatically. He also argued that the issue to be determined in respect of the interest to be paid can be done on an assessment hearing and in these circumstances there is no prejudice to the Applicant.

[45] Upon examination of this issue, while I recognize that a default judgment is a thing of value which the Court should be loathe to remove from a Claimant's grasp without good reason, I was not able to identify a specific hardship that the Respondent would actually encounter if the judgment were to be set aside. The claim would still exist and would be able to proceed to a finding and costs could be ordered to compensate for this loss. In light of the foregoing, it is my conclusion that there is a greater chance of prejudice being suffered by the Applicant if the judgment were not set aside than there would be to the Respondent herein.

Overriding Objective

[46] It was submitted by the Applicant that the overriding objective favoured the setting aside of the default judgment and in this regard she relied on the dicta of Edwards J in the ***Victor Gayle*** decision where she stated;

> *I am satisfied that the draft defence annexed to the affidavit of merit satisfactorily established a real prospect of success if the matter goes to trial. Having found that the 1st defendant has a real prospect of success if the case is tried on the merits, I take the view that taking into consideration all the circumstances and against the background of the overriding*

objective, this is a case where the default judgment entered against it ought to be set aside.

[47] In his response Mr Reitzin submitted that there was nothing unjust in the Respondent's interest being assessed at an assessment of damages hearing.

[48] Upon consideration of the overriding objectives and the requirement that justice be done between the parties, I am satisfied that this is an appropriate case for the default judgment to be set aside as not only was it improperly entered but the defence which has been raised reveals that the Applicant has a real prospect of success if the matter were to proceed to trial. In these circumstances I am persuaded that in spite of the delay in bringing this application the overriding objective weighs heavily in favour of this application being granted.

Lack of Bonafides/Conduct of Counsel

[49] I have elected to deal with this as a separate heading even though it was heavily intertwined with all areas of the submissions filed on behalf of the Respondent. It was submitted by Mr. Reitzin that this application was not brought bonafide as Ms Butler had failed to disclose correspondence which had been passed between as Counsel prior to the filing of the claim, specifically a letter dated October 25th 2016. He argued that by not disclosing this letter, which he exhibited, Ms. Butler had sought to mislead the Court in respect of the failure of the Applicant to comply with the Court of Appeal decision of ***Advantage General Insurance Company Ltd v Doreen Wright*** **[2016] JMCA Civ 31.**

[50] The premise of this submission is that this letter was deliberately concealed by Ms Butler as its contents revealed that although costs had been assessed at $761, 610.50, in that letter the Applicant had indicated that they intended to pay only the balance of the policy which was capped at $2 million, a position which was contrary to the Court's ruling in ***AGI v Doreen Wright***. It was Mr Reitzin's position that this approach was a premediated effort to flout the ruling of the Court as Counsel from Samuda and Johnson had also represented this Applicant in the ***Doreen Wright*** case.

[51] Mr Reitzin also took issue with the submission by Ms Butler that no complaint had been made in respect of the sum paid over and referred the Court to correspondence which showed that this concern had in fact been raised but had not been addressed by the Applicant. I note that this point was later conceded by Ms. Butler. There were a number of other concerns raised under this heading calling into question the approach of Ms Butler as well as Ms. Morrison. I have considered all the areas identified but have highlighted these two instances as based on his submission Counsel seemed to have regarded them as the most egregious.

[52] In addition to his submissions on this point, Mr Reitzin also made reference to a number of authorities and articles governing ethical conduct by Counsel and they have been carefully reviewed in my consideration of this issue. Upon a close examination of the documentation filed I noted that while the letter of October 25th, 2016 was not exhibited to the affidavit of Ruthann Morrison, paragraph 7 of her affidavit makes reference to Exhibit RA-4 which is a letter bearing the date of October 26th, 2016. This letter is clearly a follow up letter to that of the 25th of October 2015 as it makes reference to the payment of $472,256.66 being made 'in respect of costs and representing the relevant balance remaining on the insured's policy of insurance.' Implicit in those terms was the indication that the Applicant intended to pay the balance on the policy and not the full amount owed.

[53] A review of RRR – 1 the letter dated the 25th of October 2016, reveals a difference from the later letter in only one respect and this was the inclusion of the words 'they were informed by their institutional client that the policy limit on this matter is $2 million for any one claim'. The words making reference to the payment of the balance remaining on the policy as $472,256.66 is found in both letters as well as the intention to pay this sum over to the Respondent.

[54] It is evident from the indication in both letters that the Applicant intended to pay the balance remaining on the policy which amounted to $472,256.66. This sum when added to the judgment sum already paid, clearly reveals that it was their intention

to pay only the policy limit which was $2 million. In these circumstances, I am unable to agree with the submission of Mr. Reitzin that there was a calculated effort to mislead or deceive the Court in respect of this communication. If there had been such an intention, it could only have been achieved by concealing both letters.

[55] Mr Reitzin also asserted that Ms Butler was guilty of deceitful conduct by crafting her submissions to describe the payment made by the Applicant as 'the Applicant taking an erroneous view' in circumstances where these words had not been used by Ms. Morrison herself. I was not persuaded that this submission was well founded. In proceedings such as these, while the evidence being relied is contained in affidavits and exhibits which must be carefully considered by the Court, the language used by Counsel to describe the actions of their client or any other party are their own. I did not believe that Counsel's choice of words was intended to supplant the actual evidence before me as both the submissions and the affidavit of Ms. Morrison had been presented to the Court by Ms. Butler

Ruling on the oral application to amend the notice

[56] Although the application to amend the notice had been heard and ruled on by the Court on the 28th of May 2020, additional submissions and authorities were filed on this issue by Mr. Reitzin in November 2020 without the leave or permission of the Court. I have read the submissions as well as the authorities cited and my ruling remains.

CONCLUSION

[57] Having examined all the circumstances, I concluded that the Applicant has satisfied the requirements of Rule 13.2 and the default judgment was not properly entered and on this basis could be set aside. However, an acknowledgment of service having been filed which indicated an intention to defend the claim and Rule 13.3 (1) having been satisfied by this Applicant, there is a proper basis to move the Court to exercise its powers under 13.4. Accordingly, the Orders of the Court are as follows;

1. Application to set aside default judgment on the ground that the Applicant has satisfied the requirement of Rule 13.3(1) is granted.

2. The applicant's acknowledgment of service filed on the 1st of March 2018 is permitted to stand as having been filed within time.

3. The Applicant is to file and serve its defence within 14 days of this order.

4. The costs of this hearing is awarded to the Respondent to be taxed if not agreed.