[2021] JMCA Civ 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 58/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**GEORGE ALBERT THOMPSON**	**APPELLANT**
AND	**ZAHEER CLARKE**	**RESPONDENT**

Miss Jacqueline Cummings instructed by Archer, Cummings & Co for the appellant

Leslie Campbell instructed by Campbell McDermott for the respondent

30 October 2018 and 25 March 2021

PHILLIPS JA

[1] This is an interlocutory appeal from the decision of Master Bertram Linton (as she was then) given on 9 July 2014, refusing an application by George Albert Thompson (the appellant) to set aside the default judgment entered on 2 May 2013. The appellant is challenging that decision on the basis that the learned Master had erred in finding that his defence had no real prospect of success; and that his affidavit did not disclose a reasonable explanation for the delay in filing the acknowledgment of service and defence within the prescribed time. The appellant further claimed that the learned Master erred in her assessment of the weight to be given to the appellant's evidence and whether the respondent would have been prejudiced by setting aside the default judgment.

Background

[2] This matter arose out of a motor vehicle collision that occurred along the Rose Hall Main Road in the parish of Saint James on 13 November 2009. The respondent claimed that the appellant had negligently driven his motor vehicle licensed PA 9534, so that it had collided with his motor vehicle licensed 6009 EX, as a result of which, he had suffered personal injury, loss, and damage. He filed a claim form on 25 June 2012 to recover damages from the appellant.

[3] In the particulars of claim, the respondent stated that at all material times he was the driver of the motor vehicle licensed 6009 EX, whereas the appellant was the owner and driver of the motor vehicle licensed PA 9534. He pleaded that the appellant had driven his motor vehicle negligently into the rear of the motor vehicle that he had been driving, and he set out the particulars of negligence as follows: (i) speeding excessively; (ii) failing to keep a proper look-out; (iii) colliding into the rear of a motor vehicle licensed 6009 EX; (iv) failing to maintain a safe distance between the two vehicles; and (v) failing to stop or otherwise manoeuvre to avoid the collision.

[4] The respondent stated that as a result of the collision, he had sustained personal injury, loss, and damage. He set out the particulars of his personal injury suffered:

> "Back injury with symptomatic L5-S1 disc bulge with radicular symptoms and 12% whole person disability."

He indicated that further particulars of his injury would be added once they became available and that the pleadings would be amended accordingly.

[5] The respondent pleaded further that he had been treated for his injuries at the Mobay Hope Medical Centre and later by Dr Don Gilbert MBBS, FRCS Ed, DM, an orthopaedic surgeon. Dr Gilbert had prepared a medical report which was attached to the claim form. Additionally, the respondent also identified and attached to the claim form, receipts relating to expenses incurred as a result of the injuries sustained. He further set out particulars of the loss and damage incurred with specific regard to the cost of consultation; the medical report; medication; hospital examinations; future surgery; household assistance; and transportation, totalling $1,567,634.21. He similarly indicated that there may be further particulars of special damage which would be added once they became available, and he stated that the pleadings would also be amended accordingly.

[6] In the medical report submitted by Dr Gilbert, he stated that the respondent reported that he had been in a motor vehicle accident on 13 November 2009, and Dr Gilbert stated that he had seen the respondent on 12 January 2012 for an assessment of his injuries, and to write the "medico-legal report". The respondent, however, had been attended to at the Mobay Hope Medical Centre shortly after the accident, was assessed as having a soft tissue injury, was given analgesics, and was sent home. He was first seen by Dr Gilbert in the Orthopaedic Outpatient Department on 8 December 2009, on one of the respondent's return visits for review, further assessment, and treatment.

[7] Dr Gilbert set out the respondent's complaints, the results of the physical examinations conducted on him, and the investigation of his condition. The information stated that as at December 2009 on examination he had no neurological deficit, and no tenderness in the thoracic spine with full flexion of the spine. But in 2010, the respondent

complained of spasms in the back and radicular symptoms in the lower limbs. He developed pains making it difficult to ambulate. Walking, sitting, and standing made his pains worse. Dr Gilbert's diagnosis was that the respondent had a "persistent symptomatic L5-S1 disc bulge with radicular symptoms". He gave the prognosis as follows:

> "[the respondent] has had a course of physiotherapy and epidural steroids all without success and therefore has failed all conservative management. He will therefore require removal of the offending disc and fusion to resolve his pain however not all patients have resolution of their symptoms with this procedure."

He indicated that pursuant to the Guides to the Evaluation of Permanent Impairment published by the American Medical Association, the respondent had an impairment of 12% of the whole person. He set out the specific cost of the future surgery required to be performed, namely $1,104,600.00 and gave a detailed breakdown of that cost.

[8] Having been served with the claim form and particulars of claim, the appellant failed to file an acknowledgment of service within the prescribed period, and so, on 2 May 2013, judgment in default of acknowledgment of service was entered against him.

The applications

[9] On 29 July 2013, the appellant filed an application to extend time to file his defence within 14 days of any order made thereon, on the grounds that, although the filing had not been done in time, the failure to do so was not deliberate and the respondent would not have been prejudiced by any such order granted.

[10] The appellant deponed to an affidavit in support of the application filed on the same day as the notice. He averred that he had received the court documents on 3 April 2013, and had promptly sent the same to his insurers, Advantage General Insurance Company Limited (AGIC). He said that they had investigated the accident but had experienced some delay in obtaining the investigative report. As a consequence, AGIC was unable to instruct its attorneys-at-law until 13 June 2013, and an acknowledgment of service was duly filed on or about 28 June 2013. Having handed the documents to AGIC, the appellant said that he was "under the genuine belief that AGIC would handle the matter on [his] behalf including making timely responses and taking steps to defend the claim filed".

[11] He said that the delay in filing the defence was due to the late production of the investigative report, which delay was not deliberate or meant to disregard a timely response to the claim. He stated also that he had always meant to file a defence in the matter because although he had collided into the rear of the motor vehicle registered 6009 EX, the accident was also caused by the negligence of the respondent, as the respondent stopped suddenly along the roadway without warning. Additionally, he also disputed the alleged loss and damages claimed by the respondent and intended to put the respondent to strict proof thereof.

[12] The appellant attached his draft defence to the affidavit which essentially said that he denied that the accident was as a result of his negligence. He said that the collision was caused "solely by or alternatively contributed to by the negligence of the [respondent]". He set out the particulars of negligence as follows:

"(a) Driving without due care and attention

(b) Failing to maintain proper control over the vehicle

(c) Crossing [the] lane on a thoroughfare without ascertaining if it was safe to do so

(d) Driving into the path of the [appellant's] motor vehicle

(e) Failing to keep any or any proper lookout or to have any or sufficient regard for traffic that was or might reasonably be expected to be on the said road

(f) Changing lanes when it was manifestly unsafe to do so

(g) Failing in time or at all to observe or heed the presence of the [appellant's] motor vehicle along the roadway

(h) Operating the said motor vehicle in a negligent and/or inattentive manner so as to expose himself to the risk of harm, loss, and damage

(i) Failing to stop, to slow down, to swerve or in any other way so as to manage or control the said motor vehicle to avoid the collision

(j) Failing to give any or sufficient regard for motorists and/or other road users along the main road."

He denied the loss and damage claimed and put the respondent to the strict proof thereof.

[13] On 19 November 2013, an amended notice of application was filed by the appellant seeking orders for the said default judgment (entered on 2 May 2013) to be set aside; for the acknowledgment of service filed on 3 July 2013 to stand as having been filed in time; and that the appellant be permitted to file his defence within 14 days of the order of the court. The grounds of that amended application were that the appellant had not filed either the acknowledgment of service or his defence within the specified time, but

that the late filing of the documents had not been deliberate and would not prejudice the respondent.

[14] The appellant filed a further affidavit in support of the amended notice of application mentioned above. He stated that he had been informed by his attorneys that on 15 November 2013, they were served via facsimile transmission with the judgment in default of the acknowledgment of service (dated 2 May 2013) and the notice of assessment of damages (dated 16 October 2013), scheduled for the hearing on 20 November 2013. He reiterated his position as to how the accident had occurred, in that, he had been travelling in the extreme right lane, and the respondent, without any warning and without due care and attention, swung from the left lane into the right lane, directly in front of the path of his motor vehicle, and then stopped so suddenly that both vehicles collided. He again attached his defence and referred to his previous affidavit for the good explanation as to why the acknowledgment of service and the defence had not been filed in the stipulated time.

The notes of evidence

[15] Master Bertram Linton heard the amended notice of application on 9 July 2014. Brief notes of evidence of those proceedings were submitted to the court, although not signed by her. The representation of the parties had been noted and the fact that the appellant was in attendance. There was a notation that the "Affidavit of Leslie Campbell filed today 9th July 2014 not admissible; not relied on [sic]".

[16] Counsel for the appellant, Miss Carla Brydson, referred to the reasonable prospect of success set out in the appellant's affidavit. She then addressed the delay in the filing of the acknowledgment of service, referred to the affidavits filed by the appellant and submitted that delay was the fault of AGIC as they took approximately two months to act. This two-month delay, she argued, was not grossly inordinate.

[17] The appellant was sworn and questioned by counsel for the respondent, Mr Leslie Campbell. The appellant said that having taken the documents to AGIC he blamed them for having not carried out his contract. He was asked and indicated that he was not aware that his insurer, AGIC, had paid out sums in respect of damage pertaining to the owner of the vehicle involved in the accident, in the amount of $279,962.81. He said that AGIC would have done that without him telling them to do so. They would have done so based on what he had told them about the accident, but not on his instructions to do so. He agreed that his contract with AGIC says that they can conduct litigation on his behalf, but he testified that they had not done anything. In fact, he said that AGIC had acted with serious delay, not within the court's stipulated time.

[18] In answer to Miss Brydson, he stated that all he had done was to go to AGIC and write down what had happened in the accident which he repeated for the court. He said that he could not be the only person blamed for the accident. He repeated that he had never told AGIC to pay out any money.

[19] The submissions of Miss Brydson were that the appellant was accepting some liability, but not all, and had not told AGIC that he was liable, only how the accident had

occurred. It was a matter of contributory negligence which ought to be put before the court for trial. She reminded the court that he had not instructed AGIC to pay-out any sums and submitted that he could not be held accountable for the actions of his agents.

[20] The submissions of Mr Campbell were that the appellant accepted that AGIC's obligation to assist in protecting him arose under the contract of insurance, and AGIC was his agent for the litigation, yet the appellant was not accepting AGIC's obligation, when acting on his behalf, to pay out settlement of property damage, even though without his express permission. He submitted that if AGIC acts "in contravention of principle" then the recourse of the insured is to AGIC. Counsel queried how the appellant could cross the hurdle of the agent having paid 100% of the property damage and separate any amount payable in respect of the driver's personal injuries. He further queried whether there was sufficient information to say that AGIC had acted contrary to his instructions and whether there was enough material before the court, in the light of the evidence adduced, to support the appellant's position that he had a real prospect of success. Counsel submitted that there was no real prospect of successfully defending the claim.

The judgment of Master Bertram Linton

[21] The note of the oral judgment delivered by the court was that certain aspects of the matter had been duly considered, namely: (a) delay on account of the appellant and AGIC; (b) the reason for the delay; (c) prejudice; (d) real prospect of success; and (e) the overriding objective. Subsequent to that deliberation, the note stated further the court's decision, as previously indicated, that the application to set aside the default

judgment, and to extend time to file the defence was refused with costs to the respondent. An order was made for the matter to proceed to assessment.

[22] Subsequent to the oral judgment delivered on 9 July 2014, Master Bertram Linton submitted her reasons for judgment in writing.

[23] She indicated the chronological events as they had occurred, starting with the facts of the accident. She pointed out that the claim and the particulars of claim, although filed on 25 June 2012, had not been served until 3 April 2013. The notice of proceedings, however, was also filed on 25 June 2012. She also set out the course of the litigation. She endeavoured to capture the respective cases of the parties particularly the submissions made before her.

[24] In paragraph [6] of her reasons, she stated that it was submitted on behalf of the appellant that AGIC had made "a payment to the [respondent] for damage to his car", however, I must state, right away, that that was stated in error. There was no submission made by Miss Brydson to that effect. The respondent did not own the motor vehicle. Indeed, he made no such plea.

[25] When stating the respondent's case in her reasons for judgment, the learned Master said at paragraph [8] that:

> "Further, Counsel for the respondent pointed out that [AGIC] made payment to the [respondent] for damage to his car on 25th June 2011 in the sum of $279.962.81. As such, it is presupposed that the insurance company and by extension [the appellant] is accepting full liability for the accident. Having accepted full liability for the property damages [sic],

> [the appellant] is now also expected to accept liability for this personal injury claim."

There was no submission, as can be seen from the notes of the proceedings, although brief, as stated previously, that AGIC made a payment to the respondent "for damage to his car".

[26] Nonetheless, the court stated that the issues for consideration were the following:

> "a. whether the [appellant] has met the criteria for granting an extension of time within which to file an acknowledgment of service and defence; and
>
> b. should the default judgment granted on 2nd May, 2013 be set aside and an extension of time be granted for [the appellant] to file his defence."

[27] The learned Master referred to rule 10.3 of the Civil Procedure Rules (CPR) relating to the application for extension of time for filing a defence, and the bases on which one can make the application: the length of the delay; the reason for the delay; the prejudice to the other party; the merits of the claim; the effect of the delay on public administration; the importance of compliance with time limits; the resources of the parties; and the authorities where the principles are set out therein (see **Commissioners of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and others** (2000) Times, 7 March; and **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4). She also referred to rule 13.3 of the CPR relating to the setting aside of default judgments.

[28] The learned Master examined the timelines for the filing of documents and concluded that as the filing of the acknowledgment of service was "approximately" three

months late, and the application to file the defence out of time was "just about" six months late, there had been substantial delay, but it was not inordinate, and in her opinion, that situation could have been remedied.

[29] She considered the reason proffered for the delay and referred to the appellant's position that the production of the investigative report was the main cause of it, and consequently, the delay ought to have been laid at the feet of AGIC and not him. The learned Master stated a concern that this information had not been placed before the court by AGIC, particularly since she said they had made payment on the property damage and "would have seemed to [conclude] that they were liable for such property damage based on the investigation carried out". She stated that she therefore had no evidence to conclude what the reason for the delay was, but she stated, "even if it was [a] valid reason, at the conclusion, by their payment, they expressed their views as to liability". She indicated that she was "constrained [to] decide this point in the respondent's favour".

[30] The learned Master dealt with the potential prejudice to the parties. With regard to the appellant, she noted that if the default judgment was not set aside, the appellant would only be able to address the issue of quantum, which would cause some prejudice to him, especially if he had a real prospect of success. However, since subsequent to the investigation, which had taken some time, AGIC had settled the property damage in the matter, "[t]he issue of liability therefore would have been settled and there would be nothing for the court to consider but the amount of damages to be awarded". She therefore did not think that any prejudice to the appellant was great.

[31] With regard to the respondent, the learned Master said that if the matter were to proceed to trial, the respondent would have been obliged to repay the sums paid to him, after a substantial period has passed, and in respect of which negotiation and settlement had already taken place. She said that this would cause substantial prejudice to the respondent as he "would have had a legitimate expectation that liability had been accepted".

[32] The learned Master considered the real prospect of success. She referred to the oft-cited speech of Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91 indicating a focus on the word "real" distinguishing "fanciful" prospect of success. She referred to the appellant's statement as to how the accident had occurred but stated that the respondent had admitted that AGIC had accepted liability for the accident and had paid the respondent the sum of $279,962.81 for the damage to his motor vehicle. She indicated that even if the appellant was not aware of that payment having been made and also had not instructed it to have been made, and despite the appellant's claim that AGIC's acceptance of liability was not his position, the principle of subrogation in contracts of insurance would be applicable. She referred to and relied on the dictum of Brett LJ in **Castellain v Preston and others** (1883) 11 QBD 380. She stated that his defence would therefore be "moot". Indeed, she concluded that the appellant "cannot now contest liability in order to place some, if not all, of the blame at the [respondent's] feet". She therefore decided that the appellant's defence had no real prospect of success.

[33] In dealing with the overriding objective, the learned Master said that, prima facie, on examination of the defence, it would be a waste of judicial time and process to proceed further with the defence as filed, it not having met the requirements of the CPR.

[34] In conclusion, the learned Master reiterated that although the delay was not inordinate, there was no good reason for it, and the appellant did not have a defence with a real prospect of success, and therefore the application was refused.

The appeal

[35] The learned Master did not grant leave to appeal, but on 9 May 2016, this court granted permission to appeal and scheduled a case management conference for the conduct of the appeal, which was heard on 30 October 2018.

[36] On 7 June 2016, the appellant filed notice and grounds of appeal. There were seven grounds of appeal which are set out below:

> "1. The learned Master erred in not giving any or any sufficient weight to any of the following matters:
>
> A. The fact that the [appellant] at no time indicated or advised AGIC that he was to blame for the accident which occurred on the 13th November 2009
>
> B. That further, that the [appellant] had no knowledge that AGIC did in fact settle the value of the property damage caused to the motor vehicle registered 6009EX
>
> 2. The learned Master erred in finding that there is no genuine reason for the delay in filing his Application with the Affidavit of merit and Defence to the claim herein within the specified time.

3. The learned Master erred in finding that AGIC's decision to settle property damage caused to the motor vehicle registered 6009EX is indicative of the [appellant's] admission of liability for the accident in question

4. The learned Master erred in finding that since property damage for the said motor vehicle registered 6009EX was fully satisfied by AGIC on the [appellant's] policy with AGIC, there now exists a real prejudice to the [respondent] in having the said Interlocutory Judgment in Default set aside.

5. The Learned Master erred in treating the evidence of the [appellant] was of [sic] no evidential value in determining the issue of liability.

6. The Learned [Master] erred when she held that the allegation of the [appellant] for failure of the [respondent] to wear a seatbelt goes to quantum of damages for his injuries and not contributory negligence or liability for the injuries arising from the accident.

7. The learned Master erred in finding that any prejudice to the [respondent] cannot be alleviated by an award of costs as the balance of convenience and the overriding objective lie in favour of the [appellant] herein."

[37] The appellant sought orders setting aside the default judgment entered against the appellant; allowing the acknowledgment of service filed 3 July 2013 to stand as having been properly filed; and an extension of time of 14 days from the order of the court to file the defence.

The issues in the appeal

[38] For ease of reference and convenience, and as counsel for the appellant made no reference whatsoever to the individual grounds, I have grouped them according to issues relative to the grounds as filed.

[39] Having canvassed these grounds and the submissions of counsel, in my view, four issues were raised for consideration in this appeal:

The learned Master erred in finding that:

(a) the appellant had no real prospect of success on his defence, bearing in mind that:

(i) the particulars of negligence stated that the respondent drove his motor vehicle negligently by changing lanes and stopping suddenly in the path of his motor vehicle; and

(ii) an allegation of a failure to use a seat belt addresses contributory negligence and not quantum of damages only (grounds 5 and 6);

(b) the appellant's affidavit did not disclose a reasonable explanation for the delay of filing the acknowledgment of service and the defence within the required time frame (ground 2);

(c) weight ought to be given to the evidence of the appellant that he had not informed AGIC that he was to blame for the accident, nor had he given instructions to AGIC to settle property damage of motor vehicle 6009EX, and had no knowledge that that had occurred;

payment of property damage of motor vehicle 6009 EX was not evidence of admission of liability for the accident in question; and

payment of property damage of the said motor vehicle did not mean that full liability had been accepted by AGIC and was therefore admission of liability by the appellant (grounds 1, 3 and 4); and

(d) payment of property damage of the said vehicle did not mean that there existed real prejudice to the respondent in having the default judgment set aside, which could not be alleviated by an award of costs; or any prejudice on the basis of the balance of convenience and the overriding objective (grounds 4 and 7).

Issue (a): Real prospect of success (grounds 5 and 6)

Submissions

[40] Counsel for the appellant, Miss Jacqueline Cummings, submitted that the learned Master erred in not finding that pursuant to rule 13.3 of the CPR, the appellant did not have a real prospect of success on his defence, based solely on the settlement of a related claim, in spite of the negligent driving of the respondent, and the issue of contributory negligence, which had been raised on the pleadings. Counsel recognised that the power exercised under rule 13.3 is a discretionary one and must be used to prevent injustice.

However, she reminded the court that the process of entering a default judgment was an administrative one. She also referred to the fact that it was well recognised that the Court of Appeal would hesitate to interfere with the exercise of the judge's discretion except on the grounds of law and to prevent injustice. However, the court does reserve the right to do so, and particularly in circumstances of default, until it has entered judgment on the merits or by consent (see **Evans v Bartlam** [1937] AC 473). In this case, counsel submitted that there were several serious issues to be tried.

[41] Miss Cummings submitted further that the respondent was the negligent party on the basis of the manoeuvre of changing lanes, from the extreme left to the extreme right lane, without any warning or signal of an intention to do so, and then stopping suddenly, in the appellant's path, causing a collision into the rear of the motor vehicle that the respondent had been driving. Counsel said that as a consequence, there were contested facts to be resolved at a trial on the merits. Counsel also stated that as the parties were driving on the road, they owed each other a duty of care. Questions arose, therefore, as to whether that duty was breached, by whom and in what manner. Counsel relied on the case of **Ronald Chang and another v Frances Rookwood and another** (Consolidated appeal) [2013] JMCA Civ 40, indicating that the facts of that case were on all fours with the instant case, where the Court of Appeal upheld a decision that a collision into the rear of a motor vehicle was not definitive of the cause of negligence. Counsel submitted that that disclosed a real prospect of success.

[42] Additionally, counsel submitted that on the basis of information disclosed in the medical record, a question of causation arose, as the respondent had not sought medical

attention until two days after the accident, and then there was no indication or sign of a degenerative disc condition until 5 October 2010, nearly a year later. So, counsel submitted, after detailed examination of the report, there was no unequivocal statement that the disk bulge injury about which the respondent had complained latterly was due to the accident on 13 November 2009.

[43] Miss Cummings also submitted that the learned Master erred in concluding that the issue of the failure of the respondent to wear a seat belt related only to the question of the quantum of damages and had no applicability to the issue of contributory negligence.

[44] Counsel for the respondent, Mr Campbell, submitted that the appellant had placed his defence before the learned Master in his affidavits. He had also attached draft defences to the respective affidavits for her consideration. After her deliberations on the same, and given the guidance of Lord Woolf MR in **Swain v Hillman** that the defence must have a "real" and not "fanciful" prospect of success, the learned Master had concluded correctly that the appellant's defence had not done so.

[45] With regard to the question as to whether the issue of failing to wear a seat belt was referable to the principle of contributory negligence or to the quantum of damages, the respondent submitted that it is the latter, and in any event, the appellant was unable to show any proof that the respondent had failed to wear a seat belt. Additionally, counsel argued, one would have to show that the failure to wear one would have increased his injuries. He relied on the dictum of Lord Denning in **Froom and others v Butcher**

[1975] 3 All ER 520, for the applicability of the principles of contributory negligence and the approach of the court to the potential reduction of compensation in respect of injuries sustained relative to the failure to wear a seat belt.

Discussion and analysis

[46] The amended application before the court, sought two important reliefs, namely, an order to set aside the judgment in default under rule 13.3 of the CPR, and an order to extend the time for filing the defence, under rule 10.3(9). Bearing in mind the import of the applications, it would appear to me that the application under rule 13.3 ought to have been considered first, as if successful, given the criteria for both applications, the deliberations in respect of the application for extension of time would be far less protracted and readily concluded.

[47] Rule 13.3 of the CPR reads as follows:

> "(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 has 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."

[48] There have been several cases from this court dealing with the proper interpretation to be accorded this rule. Moore-Bick J in the High Court of Justice, in the Commercial Court in the Queen's Bench Division in **International Finance Corporation v Utexafrica Sprl** [2001] EWHC 508 (Comm) made the statement in paragraph 8, that "[a] person who holds a regular judgment, **even a default judgment**, 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" (emphasis added). However, as indicated, rule 13.3 of the CPR makes it clear that the court may do so if the defendant has a real prospect of successfully defending the claim. Moore-Bick J accepted that the expression "realistic prospect of success" means "a case which carries a degree of conviction".

[49] In **Rohan Smith v Elroy Hector Pessoa and another** [2014] JMCA App 25, referring to the wording of rule 13.3, the court stated at paragraph [26] that "although there are three considerations mentioned, the primary consideration is whether the defendant has a real prospect of successfully defending the claim or put another way, whether there is a deference that has [merit]". Of importance too, is the fact that the decision to set aside an order made due to the default of a person involves the exercise of a discretion which must be done judicially, and it is also well-known that an appellate court will hesitate to interfere with that exercise of discretion by a judge. It will only do so if it can be demonstrated that it was entirely wrong, based on a misunderstanding by the judge of the law or the evidence before him, or that the decision was otherwise so

aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it (see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042; and **The Attorney General v John Mackay** [2012] JMCA App 1).

[50] In this case, therefore, the appellant would have to show that the learned Master was wrong in not accepting that he had a real prospect of success on his defence, and, as a consequence, failing to set aside the default judgment. This was a case about a motor vehicle collision. The appellant's case was that the respondent changed lanes from the extreme left to the extreme right lane and then stopped suddenly in front of his path, and so he collided into the rear of the motor vehicle that the respondent had been driving. The respondent's case was that the appellant had been speeding and failed to keep a proper lookout, and so failed to manoeuvre his motor vehicle so as to avoid colliding in the rear of the motor vehicle that he was driving. This is a situation of competing and conflicting facts. It may well only be just a question of credibility. If, however, the court were to accept the appellant's contention as to how he said that the accident had occurred, he could be entirely successful or found to be partially so, being contributorily negligent. In any event, once found to be credible, the appellant would have a real prospect of succeeding on his defence. There is also the question of causation, as the medical report, although setting out the respondent's treatment over the years, has not specifically made a conclusion on the cause of the diagnosis.

[51] The consolidated appeal of **Ronald Chang v Frances Rookwood** concerned an appeal from the decision of Straw J (as she was then) relating to a claim founded in

negligence arising out of a motor vehicle collision on 22 September 2007, along Hope Road in the parish of Saint Andrew. The facts of the case were similar to those in the instant case. It concerned a motorist switching lanes in the vicinity of an intersection controlled by traffic lights. Straw J rejected the evidence of the driver attempting to switch lanes and found her entirely to blame for the accident. In that case, that manoeuvre caused the other driver to mount the sidewalk and hit a cable box and a utility box, resulting in damage and severe injuries. The Court of Appeal reviewed the judge's assessment of the evidence, stated that she had dealt with all the discrepancies and inconsistencies in the evidence of the witnesses, had indicated which evidence she found credible, and had made her findings. Dukharan JA, on behalf of the court, stated that Straw J had the advantage of seeing and hearing the witnesses, and had made full use of that advantage. There was no reason to disturb her findings.

[52] In a similar vein, a court could make findings in favour of the appellant, in the instant case. And if that was done, there would be a real prospect of succeeding on his defence. Additionally, the default judgment was served on AGIC, via facsimile transmission, on 15 November 2013, and the amended application to set aside the default judgment was filed on 19 November 2013. That was within a reasonably practical time frame. The period of delay and the reason given for the time between the service of the claim and the filing of the acknowledgment of service, and the application to set aside the default judgment will be dealt with in issue (b) dealing with delay (ground 2). The court considered those matters in its deliberation on that aspect.

[53] With regard to the question of failing to wear a seat belt, failing to do so is an offence under section 43A(4) of the Road Traffic Act. The courts have given some guidance over the years as to how to treat with this situation. Lord Denning MR, in **Froom v Butcher**, canvassed several authorities indicating that at that time the law was in a developing stage, and in some cases, the courts had decided that it was contributory negligence not to wear a seat belt, but that was not so in all cases. He said, at page 523, that:

> "Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to *others*. Contributory negligence is a man's carelessness in looking after *his own* safety. He is guilty of *contributory* negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself: see *Jones v Livox Quarries Ltd* [[1952] 2 QB 608]." (Italicized as in original)

[54] Lord Denning referred to the United Kingdom Law Reform (Contributory Negligence) Act 1945, and then reviewed the arguments for and against the safety of wearing seat belts and the resultant legal consequences. He specifically referred to the argument that the seat belt is only necessary in circumstances which carry a high-risk element (which he rejected), and also the share of responsibility when one did not cause the accident, but where the wearing of the seat belt may have reduced the extent of the injury or prevented injury altogether. Ultimately, Lord Denning concluded on behalf of the court that one ought to know that one should generally fasten a seat belt when one goes into a motor vehicle, whether driver or passenger. If one fails to wear it and an accident occurs and injuries are suffered, then if the injuries could have been prevented

or lessened if he had worn it, his damages should be reduced. It could be that the failure to wear the seat belt through one's own lack of care for their own safety may be the cause of their injuries. In this matter, there is very little information on this aspect of the case, but in my opinion, these are all issues worthy of debate at a trial, particularly as the Road Traffic Act makes it an offence not to wear a seat belt, which could find favour with the court, demonstrating real prospect of success. Grounds 5 and 6 must therefore succeed.

Issue (b)-Delay (ground 2)

Submissions

[55] Miss Cummings submitted that the appellant had explained the delay. He had informed his insurers (AGIC) promptly of the claim, forwarding the court documents to them. AGIC took some time to have the accident investigated and to obtain the report so that they could instruct attorneys-at-law in the matter. They had acted reasonably. They filed an acknowledgment of service, but it was too late, the default judgment having already been entered. Having not known that at the material time, the appellant had first filed an application for an extension of time to file his defence, but AGIC having subsequently accepted service of the default judgment by facsimile transmission on 15 November 2013, they then timeously ensured the filing of an application to set aside the default judgment.

[56] Mr Campbell submitted that the learned Master had not specifically found that the appellant had not provided a good reason for the delay. However, he stated, that the reasons given by the appellant for the delay were avoidable, and only highlighted

inefficiencies in AGIC's system, which were not in keeping with the tenets of the overriding objective, where the courts and the parties are being exhorted to pay more attention to "promoting efficiency and avoiding delay" (see **Standard Bank Plc & Another v Agrinvest International Inc & Others** [2010] EWCA Civ 1400, at paragraph 22). He also referred to **Rahman v Rahman** (1999) LTL 26/11/99 in relation to the elements that the court ought to consider when exercising its discretion on an application to set aside a default judgment. Counsel submitted that whether or not a good explanation had been given the appellant had failed to cross the important hurdle of satisfying the test that he had a defence on the merits, which had a real prospect of success.

Discussion and analysis

[57] As indicated, rule 10.3(9) of the CPR permits an application for extension of time to file the defence. The claim form and particulars of claim were served on 3 April 2013. The acknowledgment of service was due on 17 April 2013 and the defence was due on 15 May 2013. Both documents were therefore approximately three months overdue. Panton JA (as he then was) said in **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Motion No 12/1999, judgment delivered 6 December 1999, that in considering an application for extension of time, the court ought to focus on: (i) the length of the delay; (ii) the reason for the delay; (iii) the merit of the case; and (iv) the prejudice to the parties on the grant of the application.

[58] In the instant case, the court found that the length of delay was not inordinate but seemed unable to accept the reason given by the appellant for the same. The learned Master said that the basis of the delay was not acceptable, as AGIC must have decided that the appellant was to blame for the accident, as they settled the property damage, making that payment to **the respondent**, and so the investigative report seemed otiose and moot in the circumstances. This seems curious to me on many bases. This is because the only evidence before the court was that $279,962.81 had been paid as property damage **to the owner** of the motor vehicle, not to the respondent. This was not part of the claim before the court. The payment had not been pleaded in any way. Those funds did not relate to the respondent. In fact, the appellant had not known that the owner had been paid. As a consequence, there was no indication as to why those sums were paid, when they were paid, or if they represented the whole loss. Was it a commercial decision taken to avoid litigation expenses, without any admission of liability and by way of a compromise? In which case, the investigative report may have only been requested and pursued with reference to the claim filed in court by the respondent, which was the concern of the appellant. That claim makes no mention whatsoever of the damage to the motor vehicle, the owner of the motor vehicle, and the settlement made to the owner.

[59] There was no information of any connection between the owner and the respondent, the driver of the motor vehicle, save the inference of agency, him being in possession of the same, driving it at the material time. The court found that the delay was not inordinate, and that conclusion cannot be faulted. The rejection of the reason for the delay seems to be due, however, to a misunderstanding of the material before

her. As a consequence, if the length of the delay was not inordinate and there was good reason for it, and there was merit in the defence, as stated above, a fortiori, ground 2 must succeed.

Issue (c)- The insured/insurer – consequential impact of payment on a related matter (grounds 1, 3 and 4)

Submissions

[60] Miss Cummings submitted on the appellant's behalf that the settlement of a portion of a claim does not mean that the appellant has no realistic prospect of success. Counsel submitted further that AGIC acted without the appellant's knowledge or instructions. AGIC's interests may have conflicted with that of the appellant as AGIC may be guided by the costs of the litigation against the expenses on the claim. A financial decision to settle a small, related claim cannot be used to conclude that AGIC has accepted liability, full or otherwise, and on the part of the insured (the appellant). Generally, a release and discharge signed by a third party is done by way of compromise of the claim and without any admission of liability. It is the obligation of the insurer to indemnify the insured to the limit of the policy which is readily effected. Once acting within the terms of the policy, the insurer can act without the knowledge and consent of the insured, but counsel argued, acting as his agent, the insured was not bound by his action.

[61] In this case, Miss Cummings argued that the settlement was the subject of without prejudice communications and was related to the property of another party. Once the negotiations become an agreement, they were then admissible as evidence of an agreement that had been reached in respect of that particular head of damage. However,

that was not done in this case. The affidavit to which the instrument of release and discharge was attached was ruled inadmissible, and so the release was not adduced into evidence at the hearing of the application. In any event, counsel submitted, the agreement having been arrived at on a without prejudice basis, cannot mean that there is no real prospect of success of the defence of another party in the accident.

[62] Miss Cummings also referred to the dictum of Evan Brown J in **Amos Virgo v Steve Nam** (unreported), Supreme Court, Jamaica, Claim No 2008HCV00201, judgment delivered 1 December 2009, and distinguished it on the facts. In that case, she said, the learned judge found that the defendant in a personal injury claim who had settled portions of a claim in respect of related property was estopped from contending that he had a real defence to the rest of the claim. Also, the defendant had on several occasions admitted liability on the claim in its entirety, and the insurer had settled the property related portion of the claim. The admission of liability featured prominently in the decision which, counsel submitted, was not the situation in the instant case. The appellant had never admitted liability, in fact, he had constantly maintained that the respondent was the negligent party. In **Amos Virgo** also, counsel submitted, there had not been any extensive communications with an attempt to settle. There was also no division of the claim as the defendant had admitted liability in full. The case counsel submitted was clearly distinguishable.

[63] Counsel challenged the statements made by the learned Master that AGIC had paid the respondent for damage to **his** motor vehicle as that was in error. The driver and the owner of the motor vehicle 6009 EX had not put forward one claim. The driver (the

respondent) did not at any time claim for property damage of the motor vehicle. The settlement of the property damage claim of the owner was not an admission that bound the appellant, and certainly not in the current claim. Additionally, the instrument of release was not admitted into evidence. It was attached to the affidavit of Leslie Campbell which was ruled inadmissible at the beginning of the hearing of the application. The learned Master, therefore, fell into further error when she referred to and relied on the release, and in any event, did so erroneously with regard to its terms.

[64] Mr Campbell argued, in response, that although the appellant stated that he had not indicated to AGIC that he was to blame for the accident, nor had he any knowledge that they had settled property damage, namely, repairs to 6009 EX, nonetheless, it was the obligation of the appellant to demonstrate that he had not admitted liability or approved the settlement, and there had not been any such information before the court. Counsel submitted further that "[b]y virtue of clause 5 of the [insurance] Policy conditions included in [the appellant's] motor vehicle policy of insurance, the appellant's insurers [AGIC] have been granted full discretion in the control of any proceedings or the settlement of any claim".

[65] Counsel added further that the appellant having received indemnity from any claims by the owner of the motor vehicle 6009 EX, relative to the said accident which had occurred on 13 November 2009, he had "therefore authorised explicitly, or by virtue of contract, or had later ratified the actions of his insurers [AGIC]". Counsel maintained that even if the appellant had no knowledge of the settlement, or there had been no admission of liability by him, the actions of AGIC were still binding on him for those claims that had

been proceeded with and in respect of those claims that might follow thereafter. He relied on the case of **Kitchen Design and Advice Ltd v Lea Valley Water Co** [1989] 2 Lloyd's Rep 221 for that proposition.

[66] Counsel also relied on the Privy Council case of **Ramsook v Crossley** [2018] UKPC 9, stating that the Law Lords, having considered the relevant insurance clause, concluded that the insurers had the actual and apparent authority to take all the normal steps that the insured might take including filing a defence and admitting liability. In that case, their obligations to the insured, the court said, "fell very seriously short" by having failed to take proper instructions or to keep the insured informed of the proceedings being conducted in her name, and in respect of which she faced a potentially large exposure. The policy, the court said, was not a means for the insurer to proceed to act in their own interest, without reference to the insured, who may be severely affected by their actions, and without keeping her informed of the progress of the proceedings. However, the third party could readily accept the actions of the agent as having the authority to represent the insured.

[67] Counsel insisted that the appellant had agreed that a relationship of agency existed between himself and AGIC, they were inextricably linked, and the appellant would therefore have a right to establish any claim against it. It was counsel's contention, however, that it would be "incongruous for the [appellant] to have settled one claim in respect of property damage in relation to the same accident, and yet deny liability for personal injuries caused in the same accident". He would, he submitted, if the owner of the motor vehicle brought a claim, "use the indemnity to his benefit as a shield".

[68] Counsel argued that the learned Master was correct to use the third party release in coming to her conclusion, as it was indicative of an admission of liability. He relied on dicta of Evan Brown J in **Amos Virgo**, at paragraphs 19 and 26, where he stated that:

> "19. … The indemnification cannot properly proceed without an unequivocal acceptance of the insured's liability.
>
> …
>
> 26. … That is, the defence is wholly unfit to go to trial. Surely it would bring the administration of justice into disrepute if a defendant were allowed to admit liability in respect of property damage arising from a motor vehicle accident but deny liability in respect of personal injury claims…"

[69] Mr Campbell maintained that the facts of the instant case were similar to those in **Amos Virgo**, and the property damage claim having been settled, was one of the many factors that influenced the learned Master to exercise her discretion correctly to refuse the application to set aside the default judgment.

Discussion and analysis

[70] In relation to this issue, and the grounds related thereto, the respondent relied on two cases, **Ramsook v Crossley** and **Amos Virgo** and the principles emanating therefrom, and their applicability to the issues in this case, which the learned Master appeared to have accepted. In my opinion, she was wrong. I intend to examine the facts and the decisions made in those cases to show that they are entirely distinguishable, and brings to the fore that within legal principles, each case must still, always be decided on its own peculiar facts and set of circumstances.

[71] The insurance contract is one of indemnity. In this case, there will be a question as to whether the sums paid were to settle a loss of the insured. Any sums paid by an insurer could bind the insured, but this will depend on the provisions of the contract of insurance and the rules of agency.

[72] The respondent included in his bundle containing his submissions and authorities a "Specimen" contract of AGIC, attaching an excerpt of a portion of section II, dealing with the liability to third parties. The copy was, in the main, illegible, there certainly were no identifying signatures, but the section that counsel for the respondent referred to and relied on read as follows:

> "(v) In the event of accident involving indemnity under this Section to more than one person the Limits of Liability shall apply to the aggregate amount of indemnity to persons indemnified and such indemnity shall apply in priority to the Insured.
>
> (vi) The company may at its own option
>
> (a) …
>
> (b) undertake the defence of proceedings in any Court of Law in respect of any act or alleged offence causing or relating to any event which may be the subject of indemnity under this Section."

[73] Unfortunately, there was no information before the court, certainly no evidence adduced as to whether this clause was applicable to the insured (the appellant) before the court, and how it came to be included in the respondent's bundle. However, I have not seen any noticeable objection to its conclusion and therefore proceed accordingly. In my opinion, even if the above clauses were applicable, they can only mean that AGIC

would have had the authority to act in the appellant's defence in his claim, which would be subject to the limits of indemnity in the policy which could include any sums paid out in relation to the accident. In acting pursuant to the contract of insurance in the insured's claim, the insured would be bound by those acts.

[74] In this case, it may be moot as to whether the appellant would be able to contest the payment of $279,962.81 to the owner of the motor vehicle. The owner was not before the court, but it would seem could have relied on the action of AGIC, allegedly acting on behalf of the appellant, for the payment of that sum, and the owner would have released AGIC and the appellant, from any further claims, costs, or expenses in relation to the said accident, relative to the damage to the motor vehicle, even though without his knowledge. He would, however, be bound by that.

[75] With regard to the instrument of release and discharge, I would first say that this document was **not** before the court. It had been attached to an affidavit which, as stated in the notes of evidence, had been ruled inadmissible at the very beginning of the hearing of the application. I was therefore unable to understand why it was placed as the last page in the bundle containing the said notes of evidence. The only indication that it had been utilised at all was that it may have been shown to the witness under the principle in **R v Peter Blake** (1977) 16 JLR 61. As a consequence of that process, the appellant had agreed that the sums had been paid to the owner but without his knowledge or instructions. The matter could be taken no further. Yet the court referred to it, gave her decision based on it, and the respondent's counsel also referred to and relied on it in his submissions. There was, however, no reference to the statement made in the said release

that the payment was received "by way of compromise" and "without any admission of liability" on the part of AGIC and the appellant. The respondent's submissions that 100% of the property damage had been paid was also therefore not before the court. There was also no evidence of the "several items of correspondence" and negotiations in respect of the settlement, referred to by counsel for the appellant.

[76] In **Ramsook v Crossley**, the facts were that the insured Mrs Carol Crossley was insured against third party risks with Trinidad and Tobago Insurance Ltd (TATIL). Because of the way the claim was handled, Mr Davidson Ramsook obtained judgment against her with damages to be assessed which were later assessed at TT$3,600,000.00, plus costs of TT$127,112.96. She had been insured for third party risks under their motor vehicle third party risks legislation, up to TT$1,000,000.00, but eventually, she was covered up to TT$1,500,000.00. A defence had been entered admitting liability purportedly on her behalf by an attorney instructed by TATIL. TATIL paid TT$1,000,000.00 into court, which the court ordered should be paid out. Mrs Crossley claimed that she only knew of the decision of the court when a letter was delivered to her home by an attorney representing Mr Ramsook. When Mr Ramsook took steps to declare her bankrupt, she took out an application to set aside the judgment on the basis that the documents had not been served on her. The judge set aside the judgment on the basis that it had been entered in proceedings in which she had not really been made a party, but which had been conducted in her name without her authority. He found that the prejudice was greater to her than to Mr Ramsook. That decision was upheld by the Court of Appeal.

[77] In the Court of Appeal, Mr Ramsook took a new point that the defence of Mrs Crossley had been taken over and conducted by TATIL by virtue of the policy of insurance. This contention was, however, dismissed with dispatch due to the fact of non-service of the claim on Mrs Crossley. Mr Ramsook appealed to the Judicial Committee of the Privy Council.

[78] Lord Mance, on behalf of the Board, reviewed the history of the proceedings. He noted that Mr Ramsook's attorneys had written a before action letter to TATIL and Mrs Crossley directly. It threatened suit. Mrs Crossley took the same to TATIL, who indicated that they would deal with the matter. TATIL in some unexplained way received the claim documents which were not served on Mrs Crossley. TATIL's attorneys entered an appearance stating that it had done so on Mrs Crossley's behalf although she knew nothing of it. They also filed a defence admitting liability with regard to the collision but putting Mr Ramsook's injuries and quantum in issue. The defence filed was certified by TATIL's attorneys stating that it was impractical for Mrs Crosswell to sign the same as she was not readily available. The attorneys also wrote to Mr Ramsook's attorneys indicating that they acted on her behalf and that as she had admitted liability, they were willing to pay TT$1,000,000.00. They also indicated that Mr Ramsook's attorneys could pursue any amount in excess on the judgment from Mrs Crossley. The attorneys had no authority to act on behalf of Mrs Crossley to settle the claim in that way, but in any event, the offer was not accepted.

[79] Mrs Crossley did not admit fault for the accident. Her case was also one of changing lanes. She pulled to the left to avoid the vehicle which had been driving very

fast, and which had attempted to pull into her lane. The vehicle hit her vehicle and caused her to cross the median and crash into the vehicle in which Mr Ramsook was a passenger. He sustained severe injuries.

[80] Lord Mance stated that the appeal before the Board was decided on the short point of the construction of clause 15 of the insurance contract. It was clear that TATIL was entitled to take over and conduct the defence and settlement of the claim, to retain an attorney and to have full discretion in the settlement of the claim. The Board also noted that a litigant against whom a claim is made is entitled to waive service of the claim documents and enter acknowledgment of service and file a defence. So, regardless of how TATIL came into possession of the claim documents, they could proceed without insisting on service, and in any event, they had never raised any issue with non-service, and so Mrs Crossley was not able to do so at that late stage. In fact, the attorneys of TATIL once retained to conduct Mrs Crossley's defence, their actions were under the actual authority of clause 15 of the insurance contract, and so they acted with the actual and apparent authority to take all normal steps that Mrs Crossley herself would have taken in her defence, including filing a defence admitting liability and seeking to reduce damages.

[81] Lord Mance criticised the actions of TATIL in failing to obtain the instructions from Mrs Crossley and to keep her apprised of the process of the proceedings, particularly in circumstances where she wished to defend the matter and not admit liability as TATIL had done. However, bearing in mind the actual and apparent authority pursuant to clause 15, any complaint Mrs Crossley had was against TATIL. Mr Ramsook's position could not

be affected as a claimant pursuing proceedings "unsuspecting of any such breach of duty". The Board mentioned though that had the contract not authorised TATIL and its attorneys to act so that they had actual and apparent authority, then the non-service of the documents would have resulted in the proceedings being a nullity. The appeal was therefore allowed, and the default judgment was restored.

[82] In my view, it is clear that any actions taken by AGIC within its actual or apparent authority would bind the appellant. But, to date, there is nothing whatsoever before the court dealing with AGIC acting on behalf of the appellant in this claim in respect of the alleged personal injuries suffered by the respondent, save and except the late filing of the acknowledgment of service and the applications before the court. As indicated previously, the respondent filed his own claim. There was no reference in the pleadings to payment of the sum to the owner of the motor vehicle, and further whether the sum previously paid had been accepted fully or as part payment on the part of the owner. All issues in controversy between the respondent and the appellant remained extant. There was no admission of liability by anyone on the appellant's behalf or by the appellant himself. There can be no question, therefore, of the appellant being bound by any action having been taken by AGIC adverse to his interest, which could bind him.

[83] In **Amos Virgo**, the facts are also clearly distinguishable from those of the instant case. The case did concern another motor vehicle collision, this time in the vicinity of Dunn's River Falls, Saint Ann's Bay in the parish of Saint Ann. The claimant was driving his motor vehicle towards Saint Ann's Bay when he stopped to permit a motor truck to exit Dunn's River Falls. Vehicles proceeding from Saint Ann's Bay stopped also, except for

the defendant who overtook a line of traffic and crashed head-on into the claimant's stationary motor vehicle, resulting in severe injuries in respect of which he was hospitalised for two weeks. The defendant admitted to the claimant at the scene of the accident, right away, that he was wrong but that he was rushing to go to work. The defendant was charged with careless driving and pleaded guilty. He subsequently in an affidavit in response to the claimant's application to strike out the defence and for summary judgment, endeavoured to state that the accident occurred due to the negligent driving of the motor truck. He stated that the motor truck drove out from the entrance of Dunn's River Falls, and in an effort to avoid colliding with the rear of the motor truck, he had swerved to the right and crashed into the claimant's motor vehicle. And on another occasion, he said that the motor truck swerved right without warning, causing the collision. The defendant accepted that he had admitted culpability twice but stated that he had done so without any advice or any legal advice.

[84] At the hearing of the applications counsel for the defendant argued that no reliance could be placed on the defendant's plea of guilty as it would run afoul of the rule of **Hollington v F Hewthorn and Company Limited and another** [1943] 1 KB 587, which states "that evidence of the [criminal] conviction was inadmissible". He submitted further that the accident was caused by the motor truck exiting the Dunn's River Falls, driving from a minor road onto the main road, and that the claimant could not demonstrate that the defendant did not have a real prospect of successfully defending the claim pursuant to rule 15.2 of the CPR, or that under rule 26.3, the defence should be struck out as an abuse of a process, or that the claimant had reasonable grounds for

bringing the claim. The judge treated the application as one of summary judgment. He then dealt with the main contention in the case, which was the distinction to be made between the inadmissibility of a conviction after trial resulting in a verdict of guilty, as against one after an admission of guilt, in subsequent civil proceedings. He canvassed several authorities and concluded that "a brief review of the cases makes it plain, that **Hollington v Hewthorn** is not authority for the proposition that a defendant's conviction in a criminal trial, based on his plea of guilty, cannot afterwards be relied on in a civil trial. An admission made anywhere is good everywhere".

[85] The learned judge addressed the principles relating to the grant of summary judgment and stated the importance of the admissions of culpability by the defendant, and also the settlement of the claimant's property damage arising out of the same accident. He stated that the defendant's insurers had thereby indemnified the defendant and that that could not have proceeded without an "unequivocal acceptance of the insured's liability". He was persuaded to this conclusion as he said in paragraph 20 that:

> "… The defendant admitted at the scene; then to his insurers, either directly or indirectly and in the face of the court. That he now seeks to recant and recoil from the consequences of his admissions renders his credibility of no more durability than that of dew in the face of the rising sun."

[86] He was moved by what he described as "these consistent confessions". With the burden on the defendant in resisting the application for summary judgment, the learned judge stated that "[t]he defendant's prospect of successfully defending this claim, in light of his several admissions, must be surely fanciful, if not delusional". He also commented,

at paragraph 23, on the fact that though it was rare to grant summary judgment in negligence actions, in that case:

> "... the application for summary judgment was grounded on the defendant's *ex ante* confession of guilt. That confession in the instant case is further supported by the defendant's contemporaneous admission and the *ex post facto* indemnification in respect of the property damage." (Italicised as in original)

He decided that the matter was wholly unfit to go to trial.

[87] That situation is not so in the instant case, as the issue of liability has been in question, from all accounts from the inception of this claim with regard to the claim, and in respect of the respondent, the appellant, and his insurer (AGIC). The appellant could not then be bound by the previous payment or previous acceptance in respect of another party in another matter, particularly as he had no knowledge of it. Additionally, there was no information before the court, whether the settlement was by way of compromise and/or without admission of liability (although the release did say so) or was for partial payment or otherwise. He was not bound by any agreement/release to another person in another claim. There had never been any admissions by him nor by his insurers of liability, in this claim acting allegedly by way of actual or apparent authority on his behalf. Grounds 1, 3 and 4 would also succeed.

Issue (d) – Prejudice (grounds 4 and 7)

Submissions

[88] In the circumstances of this case, Miss Cummings submitted that there was much greater prejudice to the appellant as there had been no payment to the respondent in

relation to property damage which could have to be returned at the end of a trial, as the learned Master held. That payment, counsel argued, had been made to the owner of the motor vehicle, and the respondent was merely the driver of it, who had filed a separate claim on his own account. That too was a statement made in error by the learned Master. Counsel submitted that, to the contrary, the respondent had suffered no prejudice that could not be alleviated by an award of costs, which would also be in keeping with the balance of convenience and the overriding objective, and the learned Master had erred in failing to acknowledge that, and to order accordingly.

[89] Mr Campbell submitted that the learned Master correctly had not made any finding that the overriding objective and the balance of convenience lay with the appellant, or that any prejudice suffered by the respondent could not be addressed by costs. But counsel stated that it was of significance, that as the default judgment was a "thing of value" it ought not to be set aside unless there was good reason to do so. Had there been a real prospect of defending the claim, he stated, that would have been a good reason. However, since the learned Master had found that there was no real prospect of successfully defending the claim, that was an end of the matter. The learned Master was therefore correct in the exercise of her discretion to refuse the applications to set aside the default judgment entered on 16 October 2013, and to extend time for the filing of the defence.

Discussion and analysis

[90] It is important to point out that, as previously stated, there was **no** payment made to the respondent for any damage to **his** motor vehicle. The motor vehicle was not his.

He had not pleaded that it was his at any time. And so, there was no possibility of potential sums having to be repaid by him, after a substantial period of time had passed, as there was no settlement by negotiation that had allegedly taken place with him. That was an error made by the learned Master. He also had not pleaded the instrument of release and discharge, or that any sums had been paid by AGIC on account of his claim, acting on the appellant's behalf or otherwise. That alleged statement by the learned Master displayed her misunderstanding and misinterpretation of the facts and appeared to guide her in the exercise of her discretion, in the application which was before her. The greater prejudice was therefore suffered by the appellant whose opportunity to place his defence before the court would have been denied on an inaccurate premise. Her decision was wrong. I would therefore be constrained to order that the court interfere and set aside the decision of Master Bertram Linton in the court below. Grounds 4 and 7 would succeed as well.

Conclusion

[91] In the light of all the above, in my opinion, the appeal ought to be allowed. The decision of the learned Master and the default judgment should also be set aside. The acknowledgment of service filed 28 June 2013 is accepted as having been properly filed. Permission ought to be granted for the defence to be filed within 14 days of this order, and the matter sent to case management conference for a trial date to be scheduled. I would make no order as to costs.

[92] This matter was heard on 30 October 2018. The delay in the delivery of the reasons and judgment in this matter is unfortunate and deeply regretted.

SINCLAIR-HAYNES JA

[93] I have had the opportunity of reading the draft reasons for judgment of my learned sister. I agree with her reasoning and conclusion and there is nothing that I can usefully add.

PUSEY JA (AG)

[94] I too have had the opportunity of reading the draft reasons for judgment of my learned sister. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

1. The appeal is allowed.
2. The decision of Master Bertram Linton delivered on 9 July 2014 is set aside.
3. The default judgment entered on 2 May 2013 is set aside.
4. The acknowledgment of service filed 28 June 2013 is accepted as having been properly filed.
5. Mr George Albert Thompson (the appellant) is permitted to file his defence within 14 days of this order.
6. No order as to costs.