[2025] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS FOSTER-PUSEY JA
THE HON MR JUSTICE LAING JA

SUPREME COURT CIVIL APPEAL COA2022CV00086

BETWEEN	**MARLON WEBB**	**APPELLANT**
AND	**OMOBOWALE THOMAS**	**RESPONDENT**

Ms Racquel Dunbar instructed by Dunbar & Co for the appellant

Christopher Honeywell instructed by Christopher Honeywell & Co for the respondent

23 January and 17 March 2025

Civil Procedure —— Application to set aside default judgment – Negligence claim – Motor vehicle collision – Conflicting versions of cause of accident – Whether judge conducted a mini-trial of the claim – Whether there is a defence with a real prospect of success —— Whether the application was made as soon as reasonably practicable – Whether there was a good explanation for not filing acknowledgement of service or defence – Possible prejudice – Civil Procedure Rules (2002), rules 12.4, 13.3

F WILLIAMS JA

[1] I have read, in draft, the judgment of Laing JA. I agree with his reasoning and conclusion and have nothing to add.

FOSTER PUSEY JA

[2] I too have read the draft judgment of Laing JA and agree with his reasoning and conclusion.

LAING JA

[3] In this appeal, the appellant challenges the following orders of a judge of the Supreme Court ('the learned judge') made on 28 July 2022:

> "a) The [appellant's] application [to set aside default judgment entered] is refused.
>
> b) Cost to [respondent] to be agreed or taxed."

Background

[4] On 1 August 2018, there was a collision between a motor vehicle owned by Rohan Gardener ('Mr Gardener'), which was being driven by the appellant, and a motor vehicle owned and driven by the respondent. The accident occurred along the Hart Hill Main Road, Buff Bay, in the parish of Portland.

[5] The respondent filed a claim, on 4 October 2019, claiming damages for negligence against the appellant and Mr Gardener. The respondent alleges in the claim that he was driving along the Hart Hill Main Road in an easterly direction when, on reaching a section of the roadway where there was a corner, the appellant, who was travelling in the opposite direction, negligently failed to keep to his left lane and thereby collided into his motor car.

[6] The appellant failed to file an acknowledgement of service or defence within the stipulated time period, and the respondent applied for default judgment to be entered against them. This was granted by the learned judge.

[7] On 18 February 2022, the appellant filed an amended notice of application to set aside default judgment, which was supported by an affidavit sworn to by him and filed on the same date. In his affidavit in support of his application to set aside the default judgment, the appellant stated he has a good defence to the claim, which has a real prospect of success. He alleged that he was driving in the left lane, travelling towards Annotto Bay on the Hart Hill Main Road, when, in the vicinity of the Buff Bay Cemetery, the respondent, who was travelling in the opposite direction, encroached into his lane.

Instinctively, he swerved away from the respondent's car towards the right to try to avoid a collision, but at the same time, the respondent swerved "back to his left", and both vehicles collided in the middle of the road. He was travelling uphill while the respondent was travelling downhill around a corner. He stated that it was the respondent who caused the accident.

[8] He further stated that he was served with a notice of assessment of damages in April 2021. He then contacted Mr Gardener and gave him the documents. Mr Gardener took the documents to his insurer, Advantage General Insurance Company Limited ('AGIC'), which was responsible for providing legal representation in such matters. In January 2022, he was advised by Mr Gardener to contact Dunbar & Co, and he did. He received another notice of assessment of damages and the default judgment in early January 2022, and he took those documents to Dunbar & Co when he met with them on 26 January 2022. He told the attorneys that he did not receive any other documents and gave them instructions to set aside the default judgment and to challenge the service of the claim form and the particulars of claim. On 1 February 2022, Dunbar & Co filed an acknowledgement of service and served it on 2 February 2022.

[9] The learned judge concluded that the appellant had been properly served with the documents relating to the claim, and that judgment in default of acknowledgement of service was validly granted. She acknowledged that there were two different versions of how the accident occurred advanced by the appellant and the respondent respectively. The learned judge concluded that the respondent's version made good sense while, conversely, the appellant's version did not make sense. Accordingly, the learned trial judge found that the proposed defence was "fanciful" and refused the application to set aside the default judgment.

The appeal

[10] By his notice and grounds of appeal, the appellant is seeking to set aside the default judgment entered against him and all subsequent processes flowing therefrom as

well as costs of the appeal. The grounds of appeal on which the appellant relies are the following:

> "(i) The Learned Judge erred in her application of the law related to the setting aside of a Default Judgment;
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> (ii) The Learned Judge erred in that she conducted a mini trial of the claim in finding that the 2nd Defendant had no prospect of successfully defending the claim.
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> (iii) The Learned Judge failed to sufficiently consider and weigh the evidence presented to find that the Appellant could not have entered his Defence to the Claim as he did not know about the claim against him nor could he have applied to set aside the default judgment until he knew about it;
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> (iv) The Learned Judge erred in finding that the 2nd Defendant was served in light of the oral and written evidence of the Process Server. This is in circumstances where the Process Server indicated he served the 2nd Defendant with a Notice of Assessment of Damages and told him that the documents were actually for his boss. The process server gave no evidence that he served the 2nd Defendant with the Claim Form and Particulars of Claim.
>
> (v) The Learned Judge failed to sufficiently consider and weigh the evidence presented to find that the Appellant's Defence as explained in his Affidavit was one that was not merely arguable, but if proven, had a real prospect of success;
>
> (vi) The Learned Judge erred in that she failed to exercise the power she has to set aside the default judgment;
>
> (vii) Other grounds of appeal will be added when the notes of evidence and/or written Judgment are available."

Appellant's submissions

[11] Counsel for the appellant, Ms Dunbar, submitted that the learned judge, in coming to her decision on the application to set aside the default judgment, erred in finding that the appellant did not have a real prospect of successfully defending the claim. She argued

that the learned judge, in finding that the appellant moved towards the respondent's vehicle by swerving to the right and, by doing so, caused the accident, failed to consider all the evidence and disregarded the assertions of the appellant that the respondent had encroached on his side of the road. She further submitted that the learned judge took into account only one aspect of the appellant's case in coming to her decision and did not consider the explanation provided by the appellant for swerving to his right.

[12] Counsel also commended to the court the pronouncement of Lord Griffiths in the Privy Council case of **Ng Chun Pui and Ng Wang King Administrators of the Estate of Ng Wai Yee and Attornies of Choi Yuen Fun and Ng Wan Hoi and Others v Lee Chuen Tat (also spelt as Lee Tsuen Tat) and Another** Privy Council Appeal No 1 of 1988, judgment delivered 24 May 1988, in which his Lordship referred to the principle that a defendant placed in a position of peril or emergency cannot be judged at a critical standard when he acted in the spur of the moment to avoid an accident.

[13] Counsel also contended that the learned judge erred in taking into account at the stage of an interlocutory application, a photograph exhibited in the respondent's affidavit, which she ought not to have done. In so doing, she contended that the learned judge was, in essence, conducting a mini-trial at the stage of an interlocutory application, which is prohibited. In keeping with that submission, counsel also contended that serious triable issues arose that could only be dealt with at trial and could not be resolved by the learned judge without improperly conducting a mini-trial.

[14] Counsel also advanced the position that the learned judge erred in finding that the delay in the filing of the appellant's application to set aside the default judgment was excessive and unexplained. Counsel argued that there was no delay or no excessive delay in the circumstances. She further argued that the appellant, in his affidavit, provided an explanation for the alleged delay, that is, while, admittedly, being served with documents on several occasions, he was not served with any initiating documents to the claim, neither the claim form nor the particulars of claim. This, she submitted, was supported by the evidence of the process server, who served the appellant.

[15] Further, she contended that the affidavit evidence of the appellant, filed on 18 February 2022, illustrates that after being served with documents in April 2021, they were brought to the insurer, AGIC, which was responsible for obtaining legal representation. Once legal representation was retained, a meeting was conducted on 26 January 2022, and the acknowledgement of service, defence and notice of the application to challenge the court's jurisdiction were filed on 1 February 2022, less than a week after the meeting. The amended notice and affidavit were also filed on 18 February 2022, approximately 23 days after instructing counsel.

[16] Counsel contended that the learned judge, in doing her assessment of the application, failed to appreciate her role to do justice to all parties and to determine the matter on its merit. Instead, she wrongly emphasised the issue of delay rather than the primary consideration, which is whether the appellant's defence had a real prospect of success. Counsel relied on the cases of **Rohan Smith v Elroy Hector Pessoa and Nickeisha Misty Samuels** [2014] JMCA App 25, **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy** (unreported), Supreme Court, Jamaica, Claim No 2008 HCV 05707, judgment delivered 4 April 2011.

[17] On the issue of possible prejudice, counsel argued that the learned judge did not weigh this issue in coming to her decision.

[18] In concluding, counsel submitted that the learned judge erred in her application of the law and how she treated with the evidence thereby invoking this court's power to review the lower court's decision. Reliance was placed on the decisions of **Hadmor Productions Limited v Hamilton** [1982] 1 All ER 1042 and **Attorney General v John MacKay** [2012] JMCA App 1.

Respondent's submissions

[19] In contrast, Mr Honeywell, counsel for the respondent, argued that the learned judge did not err in refusing to set aside the default judgment. Counsel submitted that the learned judge did not err in her application of the law to refuse to set aside the default

judgment. He argued that at all times, the learned judge recognised that the primary consideration in applications to set aside default judgments was the existence of a defence of merit with a real prospect of success. This, he pointed out, was made clear at paras. [24] - [26] of her ruling. He indicated that this was even illustrated in her reference to the other two considerations as satellite concerns.

[20] Further, in engaging in the assessment of the merits of the defence, he argued that the learned judge considered the proposed defence and made findings in relation to her interpretation of the defence, concluding that the appellant's version of how the accident occurred made no sense. Mr Honeywell submitted that, on the facts before the learned judge, she was entitled to analyse the defence and come to the conclusion that the proposed defence had no real prospect of success and, in so doing, there was no mini-trial because she did not measure and counter-balance it against the appellant's averments in the affidavit. However, Counsel acknowledged that the issue of merit was not the only consideration, and he placed emphasis on the delay and lack of any good reasons provided therefor by that appellant.

[21] Regarding the appellant's argument that the learned judge relied on the photographs exhibited to the appellant's affidavit, counsel denied there was any reliance on the photographs or the police report. He submitted that the learned judge at all material times indicated that these documents did not satisfy the evidential threshold to be considered by her and indicated in her reasons that she did not utilise them.

[22] Counsel also maintained that while a meritorious defence is the primary consideration in matters of this sort, it is not the only consideration and, even where the defence was found to be one with merit, that is not determinative of the matter, and other considerations must be taken into account and weighed in the balance. He submitted that the issue of whether the appellant applied to set aside as soon as reasonably practicable was an important consideration but did not forcefully advance that the 45 days between the appellant learning of the default judgment and when the application to set it aside was made, could properly be found to be excessive.

[23] Counsel also addressed the court on the explanation given by the appellant for the delay in filing the acknowledgement of service. Counsel submitted that the learned judge, in analysing the explanation for the delay, had before her sufficient evidential material to come to the reasonable conclusion that the appellant was served with the originating documents. He contended that the appellant, on his own evidence, admitted to being served with documents before the default judgment and assessment documents, which he indicated he failed to read but took to his employer, Mr Gardener, as he was instructed to do by the process server, Leon Brown, and then took no further action. Counsel suggested that these documents could only be the originating documents, considering the appellant's evidence that he was served three times. This, counsel submitted, would demonstrate the progression of how the documents were served, initially, from the service of the originating documents to the default judgment and, lastly, the assessment documents. Reference was also made to evidence given *viva voce* by the process server, during which he stated that he told the appellant that the documents were being served on him because he was involved in a traffic accident.

[24] Counsel argued that, in exercising her discretion, the learned judge took into account the overall delay of two years, three months, and 10 days that the appellant took from learning of the originating documents to the filing of the acknowledgement of service. Counsel posited that the learned judge was entitled to accept as she did that the appellant was, in fact, served and to reject his explanation for his delay in filing the acknowledgement of service as being unreasonable.

[25] On the issue of prejudice, while counsel admitted there was no evidence on the point of prejudice, counsel shared the view that the learned judge was able to take judicial notice of the prejudicial factors which she considered in coming to her decision as they were well-known facts that plagued the justice system.

[26] In his conclusion, counsel submitted that, in these circumstances, the exercise by the learned judge of her judicial discretion ought not to be disturbed.

Analysis and discussion

[27] The general principle guiding the court in this appeal and in considering to set aside the exercise of the discretion of a judge is contained in the principles enunciated by Lord Diplock in the case of **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042, 1046 that have been adopted by Morrison JA (as he then was) in the oft-cited case of **Attorney General v John MacKay** [2012] JMCA App 1 at paras. [19]-[20] that:

> "[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.
>
> [20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is 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'."

[28] The respondent was granted a default judgment in accordance with rule 12.4 of the Civil Procedure Rules ('CPR') because the appellant did not file an acknowledgement of service or a defence to the claim within the requisite period. The material portions of rule 12.4 are 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;"

[29] Rule 13.3 of the CPR identifies the cases in which the court may set aside or vary such a default judgment and is in the following terms:

> "(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 acknowledgement 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."

[30] The concept of a "real prospect of being successful or succeeding" was examined in **Swain v Hillman** [2001] 1 All ER 91 and interpreted to mean that the defence must demonstrate a real prospect of successfully defending the claim and not merely a fanciful one. Although, in that case, the concept was examined in the context of applications for summary judgment, our courts apply the guidance given in that case and a similar test in applications to set aside default judgments under rule 13.3.

[31] There are numerous decisions in which this court has confirmed that although there are three considerations identified in rule 13.3, the paramount consideration is rule 13.3(1), that is, whether the applicant has a real prospect of successfully defending the claim. This has been recently affirmed in the case of **Christopher Ogunsalu v Keith Gardner** [2022] JMCA Civ 12 where D Fraser JA, at para. [23], made the following observation:

> "[23] Additionally, the rule provides that if this court considers to set aside or vary the default judgment, it must examine: i) the length of the delay between the time the applicant became aware of the judgment and the filing of the application to set it aside, as well as ii) the reason for failing to comply with the rules, which in this case is the failure to

> file the defence within time. The matter must be considered through the lens of the overriding objective and, therefore, this court must also have regard to any prejudice a claimant may suffer if the default judgment is set aside (see paragraph [16] of **Flexnon Limited v Constantine Michell and others** and paragraph [13] of **Brian Wiggan v AJAS Limited** [2016] JMCA Civ 32). All these ingredients are essential, but, the two most important are whether the defence has a real prospect of success (see paragraph [15] of **Flexnon Limited v Constantine Michell and others**) and ensuring that justice is done (see Stuart Sime's A Practical Approach to Civil Procedure, 15th edition at page 159)." (Emphasis as in the original)

Does the defence have a real prospect of success?

[32] In order to arrive at a reasoned assessment of the merits of the proposed defence, the court must assess its quality from a provisional view of the likely outcome of the case if we set aside the default judgment (see **Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc** [1986] 2 Lloyd's Rep 221).

[33] The learned judge concluded that the appellant did not cross the first hurdle in establishing that his defence has a real prospect of success and that the appellant's version of the incident, which encapsulates his defence, "does not make sense".

[34] The respondent, in his affidavit filed on 29 March 2022, denied that he drove onto the appellant's correct side and stated that at no time prior to the collision did he encroach on the appellant's side of the road. He asserted that it was evident from the photograph that the collision occurred at the very elbow of a blind left-hand corner (what I understand to be the apex of the corner). He further stated that his car was negotiating the corner and going slightly uphill, and he had no reason to encroach on the other side.

[35] The important findings of the learned judge with respect to the evidence of how the accident occurred are summarised in para. [27] of the judgment as follows:

> "[27] It is true that the [respondent] and the [appellant] give two different versions of how the accident occurs, [sic] but while the [respondent's] version makes good sense and is

> logical, the [appellant's] version does not make sense. He claims that he 'instinctively swerved away from the [respondent's] car towards [his] right' to avoid a collision. Based on this evidence, it would be the [appellant] himself who would have caused the accident by his action, because any movement by him to the right is a movement towards the [respondent's] vehicle and not away from it. Furthermore, he says that at the same time that he swerved to the right, 'the [respondent] also swerved back to his left'. If this is so, then the [respondent] could only veer one way, and that is off the road, instead of colliding with the appellant's vehicle in the middle of the road, as alleged by the [appellant]. I find the proposed defence to be fanciful."

[36] Every driver owes a duty of care to others on the road to operate his vehicle reasonably and safely to avoid causing harm. Accordingly, the appellant will be liable for negligence if he failed to attain the standard of a reasonable, careful driver, and the collision with the respondent's vehicle was caused as a result. This being a civil case, the burden of proof, on the balance of probabilities, rests with the respondent.

[37] A critical fact for determination is whether the vehicle being driven by the respondent had encroached in the appellant's lane before the collision. The appellant admitted that he swerved to the right and, accordingly, another significant issue is whether swerving to his right instead of keeping as far left as was possible, constituted a breach of his duty of care.

[38] The learned judge quite correctly identified the importance of the evidence of the appellant contained in his affidavit filed 18 February 2022 that: "Instinctively, I swerved away from the [respondent's] car towards my right to try and avoid the collision, but the [respondent] also swerved back to his left at the same time and both vehicles collided in the middle of the road".

[39] On the appellant's case, he faced an emergency. However, that is not an automatic defence to every conduct on his part. The court must determine whether he exercised reasonable care in the circumstances and acted as an ordinary prudent driver would have if faced with those circumstances.

[40] What is unclear from the evidence is exactly what is meant by the appellant when he asserts in para. 16 of his affidavit that the respondent "… drove from his lawful lane, encroached into my lawful lane and was heading towards collision with the car I was driving". What was the extent of the encroachment? How much or what proportion of the appellant's lane, as determined by an actual or imaginary line in the middle of the road, was being encroached upon prior to the collision? Additionally, what did the appellant mean when he asserted in para. 16 of his affidavit that "…both vehicles collided in the middle of the road". This suggests that he is asserting that both vehicles were partially in the other lane at the point of impact, but if so, was the degree of encroachment of both vehicles the same?

[41] To assess liability, it is important to determine exactly where was the point of impact. Was it wholly on the respondent's side of the road or in the middle of the road? that is, with a portion of each vehicle encroaching on the other side? If the accident occurred in the middle of the road, with each vehicle encroaching on the other side, then the issue is raised as to whether the respondent is contributorily negligent. The resolution of the issue of liability becomes more difficult since the appellant is asserting that the collision occurred while he was taking evasive measures.

[42] In a scenario in which the respondent's vehicle was encroaching on the appellant's side of the road before the collision (as the appellant asserts), when determining whether the ordinary prudent driver, faced with the situation as described by the appellant, would necessarily have attempted to avoid an accident by keeping as far left as possible, instead of veering to the right as the appellant said he did, a tribunal will need to make a determination on a number of related facts. These include but are not limited to, the relative speeds of each vehicle prior to and at the point of impact, the distance each vehicle was from the other when the appellant first saw it encroaching on his side (as he asserts happened), the width of the road at the point of impact, and the existence or non-existence of a soft shoulder or run-off area that could have been utilised by the appellant.

[43] It may be that in some circumstances by swerving to the right, it is less likely that a reasonably prudent driver would be able to avoid a collision since he would have to travel a greater distance to move across the entire front of the oncoming vehicle. However, it is impossible to state as an absolute rule that faced with a vehicle encroaching on your proper lane, swerving to the right may not be prudent. However, it appears that the learned judge improperly placed too much emphasis on this one fact in determining whether the appellant has a defence with a real prospect of success. The learned judge found that if the appellant's account of him swerving right and that the respondent swerved back to the respondent's left side of the road was correct, "then the [respondent] could only veer one way, and that is off the road, instead of colliding with the [appellant's] vehicle in the middle of the road, as alleged by the [appellant]".

[44] In light of the disputed evidence, and the numerous factors to be considered in determining liability, it was not permissible for the learned judge to conduct a mini-trial and accept a scenario in which the appellant was wholly liable and in which, implicitly, a defence of contributory negligence is negated. I am of the view that, in such circumstances, the learned judge was incapable of properly reaching the conclusion that the appellant did not have a defence with any merit. Accordingly, the order for default judgment in favour of the respondent was inappropriate and should be set aside.

Did the appellant apply to the court as soon as was reasonably practicable after finding out the judgment had been entered?

[45] Although the learned judge found that the defence did not meet the threshold test, she nevertheless considered the other two requirements of rule 13.3 in the event that her conclusion on the merits of the defence was wrong.

[46] The learned judge accepted the evidence that the appellant was served with the default judgment on 4 January 2022. The appellant, in para. 9 of his affidavit, explains that on or about 26 January 2022, together with Mr Gardener, he visited the offices of Dunbar & Co and was advised by a representative of the firm that the firm had been retained by Mr Gardener's insurer to represent him in this matter.

[47] The learned judge found that it took 45 days for the application to set aside the default judgment to be made. She also found it odd that no explanation was given as to why it was not made sooner. The learned judge is quite correct that a clear explanation was not provided for the delay. However, the appellant indicated that he was told that the law firm was retained on his behalf, and there was no evidence to the contrary. His legal representatives should be aware of the requirements on an application to set aside a default judgment and the duty of the appellant to demonstrate to the court the relevant affidavit evidence that the application was brought as soon as reasonably practicable. They ought to have assisted the court with an explanation to assist in its assessment, and such failure falls at the feet of his legal representatives. Despite the fact that there has not been a clear assertion by way of an explanation that the application to the court was made as soon as was reasonably practicable, I am of the view that, objectively viewed, a delay of 45 days is not unreasonable and the failure to satisfy the requirement under rule 13.3(2)(b) should not weigh heavily against the granting of the appellant's application.

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

[48] A litigant who asserts that he has not been served with a claim form in compliance with rule 8.16(1) may challenge the court's jurisdiction under rule 9.6. However, as the learned judge correctly appreciated, although the appellant raised the issue of non-service of the claim form, the appellant did not pursue a challenge to the court's jurisdiction, which was foreshadowed by the notice of application to challenge jurisdiction filed on 1 February 2022, the same date that his acknowledgement of service was filed. Instead, he concentrated on explaining why he had not filed an acknowledgement of service or defence within the required period.

[49] In the case of **Frank I Lee Distributors Ltd v Mullings & Company (A Firm)** [2016] JMCA Civ 9, this court confirmed that there is no mandatory requirement in the CPR that in order for the court to entertain his application to set aside a default judgment, a defendant must file an acknowledgement of service in circumstances where he is

alleging that he was never served with and had no knowledge of the claim. As the court indicated in para. [53]:

> "[53] It must be recognized that there was an effort to engage the court in a consideration of the issue of whether the statement of case was not served. However, it is not relevant to the question of whether there is a mandatory requirement for an acknowledgment of service to be filed to have an application for the setting aside of a default judgment properly before the court. **The question becomes material upon the hearing of the application when it would become incumbent on the applicant to seek to prove to the court that all conditions of CPR 12.4 had not been satisfied or that there was a good explanation for the failure to file the acknowledgment of service**." (Emphasis supplied)

[50] In this case, the appellant similarly sought to "engage the court in a consideration of the issue of whether the statement of case was not served". This was in support of his assertion that there was a good explanation for his failure to file the acknowledgement of service. In this regard, as he was entitled to do in respect of this separate ground, he sought to rely on the evidence that he was not properly served in the first place.

[51] With regard to this dispute as to service of process on the appellant, the learned judge examined the evidence on affidavit and quite properly allowed the process server to give *viva voce* evidence and be cross-examined. She found that although the process server said that the documents he first served the appellant with on 18 October 2019 were for the assessment of damages, it was evident that they were the claim form, the particulars of claim, and the supporting documents. The learned judge's conclusion cannot be faulted and is supported by the evidence in para. 19 of the appellant's affidavit. He admitted speaking to a representative of Dunbar & Co who read affidavits to him, and he recalled receiving documents in a folder from Mr Brown at Buff Bay Square on a date he could not remember. He said he did not look at the documents in the folder, but the process server told him it was a summons for court.

[52] The learned judge opined that the appellant's treatment of the claim was "cavalier" and showed an attitude of indifference and disregard for the processes of the court. She concluded that in all the circumstances, the appellant did not provide a good explanation for his failure to file an acknowledgement of service and did not explain why he felt that the matter had been dealt with. At para. [33] of the judgment, she stated that:

> "… From his evidence it seems to me that in the two years, three months and ten days since service on him of the claim form, he did not even think it fit to enquire of [Mr Gardener] whether the matter had indeed been 'dealt with'. I do not, in all the circumstances find that he has provided a good explanation for not filing an acknowledgment of service on time."

[53] I wholly agree with the learned judge's conclusion in this regard. However, the authorities show that the absence of a good reason for the delay, by itself, will not always be fatal to an application to set aside a default judgment. This was confirmed by this court in **Trade Board Limited and Another v Daniel Robinson** [2013] JMCA Civ 46 at para. [16] as follows:

> "… **Finnegan v Parkside Health Authority** [1998] 1 All ER 595 is one of the authorities that is usually relied upon in support of that principle. In that case, the headnote accurately summarises the decision of the court in respect of that principle:
>
> > '...the absence of a good reason for any delay was not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension, but the court was required to look at all the circumstances of the case and to recognize the overriding principle that justice had to be done.
>
> That principle is particularly applicable where no prejudice, as a result of the delay, has been asserted or proved. The principle has been relied upon by this court in **Fiesta Jamaica Ltd v National Water Commission** [2010] JMCA Civ 4." (Emphasis as in the original)

[54] As it relates to the issue of prejudice, in the circumstances of this case, I am of the view that, whereas the respondent will be forced to await the trial and resolution of this claim, any prejudice occasioned by this delay ought not to outweigh the justice of having the claim fully litigated by the court hearing all the relevant evidence which will assist in its proper disposition.

Conclusion

[55] The learned judge erred by, in effect, conducting a mini-trial and arriving at conclusions on disputed evidence in circumstances in which there were numerous factual matters that would be best left for trial. Accordingly, I am of the view that the application to set aside the default judgment should be granted in the interests of justice.

[56] I, therefore, propose that the following orders be made:

(1) The appeal is allowed.

(2) The order of the learned judge, made on 28 July 2022, is set aside.

(3) The default judgment entered against the appellant is set aside.

(4) The appellant is permitted to file and serve his defence within 14 days of the date of this judgment.

(5) A case management conference is to be fixed at the earliest possible time.

(6) Costs of the appeal and of the application in the court below to the respondent to be taxed, if not agreed.

F WILLIAMS JA

ORDER

(1) The appeal is allowed.

(2) The order of the learned judge, made on 28 July 2022, is set aside.

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