IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO: G 0006/2021

BETWEEN:

MURLYN BOBB-STEPHENS

PLAINTIFF

AND:

EMILY HURLSTON-HOSEIN

DEFENDANT

Appearances:	**Ms. Margeta Facey-Clarke of Facey-Clarke & Associates for the Plaintiff**
	Ms. Alice Carver of Nelsons for the Defendant
Before:	**Hon. Justice Cheryll Richards Q.C.**
Heard:	**30th March 2021**
Draft Judgment:	**6th April 2021**

HEADNOTE

Civil Law *– GCR O.19 r. 3. Principles re exercise of discretion to set aside default judgment.*

JUDGMENT

1. By Summons filed on the 9th March 2021, the Defendant applies for an Order that the Default Interlocutory Judgment for Damages to be Assessed, dated 23rd February 2021, be set aside. The Defendant also applies for certain connected orders including costs on an indemnity basis.

2. The background history is as follows. On the 12th January 2021, the Plaintiff filed a Writ of Summons against the Defendant. The Plaintiff's claim is for damages and costs following on from a motor vehicle accident which occurred on the 26th January 2018. The Plaintiff was a pedestrian in the vicinity of the Rubis Gas Station on Walkers Road in George Town. She alleges that she was struck by a motor vehicle driven by the Defendant who was in the process of exiting the gas station compound. The Plaintiff further alleges that she suffered multiple injuries as a result of the accident.

3. The Writ was served personally on the Defendant on the 20th January 2021. Service was acknowledged on her behalf by her present attorneys on the 3rd February 2021. The Acknowledgement indicated an intention to defend the action. The Defendant did not file a defence within the specified time limit and no extensions of time were agreed or sought from the Court. Time for filing expired on the 18th February 2021. On the 19th February 2021, the Plaintiff applied for Default Judgment pursuant to GCR O.19 r.3.

AFFIDAVIT IN SUPPORT

4. In support of her application to set aside, the Defendant has filed the Affidavit of Maylin Moxam dated 4th March 2021. This states that following the filing of the Acknowledgment of Service on the 3rd February 2021, Counsel for the Defendant contacted Counsel for the Plaintiff by telephone and discussed the matter with her. There

is no written record of what was said and there is a factual dispute as to what each understood the essence of the discussion to be.

5. Both Counsel, and in particular Counsel for the Defendant, (not Counsel appearing for the Defendant before me today), did not shortly thereafter follow up the conversation with written communication.

6. Counsel for the Defendant understood that, pending settlement discussions, either a Defence would be filed or the case would be stayed by consent. Counsel for the Plaintiff's understanding, as set out in an email dated 2nd March 2021, was that opposing Counsel had not had time to review the file and would have been in further contact with her with a without prejudice offer.

THE LAW AND APPLICABLE PRINCIPLES

7. GCR O.19 r.9 provides that the Court may on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

8. In ***Evans v. Bartlam***[1], the House of Lords considered the application of the discretion to set aside a default judgment pursuant to RSC O.13 r.10 and O.27 r.15 which are in similar terms to the Cayman Islands Rules. The Court reviewed the guiding principles which should be considered in the exercise of the discretion. These principles include that where the judgment was obtained regularly, there must be an affidavit of merits from the applicant in order to provide evidence that the applicant has a *prima face*

[1] 1937 2 All ER 646

defence. While there is no rule that the applicant must satisfy the court that he has a reasonable explanation for why the judgment was allowed to go by default, the court will have regard to any such reason in the exercise of its discretion.

9. In the later case of ***ED &F Man Liquid Products Ltd. v. Patel and another***[2], the English Court of Appeal compared the tests to be applied under the older Rules and the more recent Civil Procedure Rules in England and Wales. The Court referred with approval to the decision of the Court in ***Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.***[3]. That decision noted that the case of ***Evans v. Bartlam*** contemplated that a defendant who is asking the court to exercise its discretion in his favour must show that he has a defence which has a real prospect of success, meaning, a defence which carries with it some degree of conviction. The court is required to form a provisional view of the probable outcome if the judgment were to be set aside.[4]

10. Underpinning the approach in the cited cases is the commonsense principle that if the Defence is unmeritorious and unlikely to succeed, there would be no point in setting aside the default judgment.

THE SUBMISSIONS

11. The Application by the Defendant in this case is made primarily on the basis that the proposed Defence to the Claim shows a reasonable prospect of success.

[2] 2003 All ER (D) 75 (Apr)
[3] 1986 2 Lloyd's Rep. 221
[4] Ibid, para. 3

12. In the draft Defence attached to the application, the Defendant denies driving without due care and attention, denies that the motor vehicle made any contact with the Plaintiff and avers that the Plaintiff was inattentive, negligent and stepped in front of the vehicle.

13. The Defendant's case as set out in the Affidavit of Ms. Moxam is that the Plaintiff crossed in front of the vehicle driven by the Defendant without looking where she was going and either tripped or fell. It is further stated that there is no medical evidence which gives an opinion which is consistent with the Plaintiff's version of events. Alternatively, the Defendant submits that even if the Defendant's version of events were to be rejected there is a reasonable prospect of success on the aspect of contributory negligence. It is also urged that the Defendant would be deprived of the right to raise the issue of causation and to challenge the extent of the injuries claimed by the Plaintiff. Finally on this aspect, Counsel noted that the reference to possible settlement discussions was not a concession as to the lack of merit of the Defendant's case but that frequently in smaller claims, Insurers will often consider the time and cost of the pending litigation as against the sums claimed and make a commercial decision.

14. In response, Counsel for the Plaintiff submits that the Defence being put forward is a bare denial and cannot succeed at trial. It is said to be unmeritorious, particularly in light of the fact that the duty to give way rested with the vehicle of the Defendant which was exiting from a side road on to the main road. It is also said that it is obvious from the Report of the Accident Reconstructionist (not before the Court) and from the admissions made by the Defendant, that she was attempting to get on to the main road and that when the accident occurred, the Defendant did not make sure that the way was clear before proceeding.

15. Counsel also submits that certain statements made under caution by the Defendant in the course of a police investigation and a sketch produced by the Police provide a sufficient evidential basis for this Court to say that the Defendant has no defence to the Plaintiff's claim.

16. Counsel submits further that the discretion should not be exercised to set aside the Default Judgment as to do so will cause prejudice to the Plaintiff and the case will be prolonged into a lengthy trial at the end of which the Plaintiff will succeed in any event.

17. After the hearing, Counsel for the Plaintiff attempted to transmit for the Court's attention a medical report. This was met with the immediate objection of Counsel for the Defendant. In response to this objection, Counsel for the Plaintiff withdrew the report. This report was not and has not been reviewed by this Court and for the avoidance of doubt, it is made plain herein that no account is taken of it.

18. By way of a second limb, Counsel for the Defendant also argues that having been put on notice of a possible settlement or Defence of the action it was procedurally improper for the Plaintiff not to put the Defendant on notice of the pending Default application or to bring to the attention of the Court the fact that these discussions had taken place. In support of this submission, Counsel relies on the cases of ***Woodgate (Cynthia) v. Zuniga (Migule Angel) and Another***[5], ***Jackson v. Jackson and Jackson***[6] and ***Gay v. Collins***[7]**.**

19. In ***Cynthia Woodgate v. Miguel Angel Zuniga and Anor***, the application before the Court was a Summons to set aside a Default Judgment which had been originally filed on the basis that service had been properly effected on the Defendants. That case turned

[5] GC 75 of 2017, 12th July 2017
[6] 2013 (1) CILR Note 4.
[7] G.C. Cause 86 of 2014, 7th October 2014

on the fact that the Default Judgment had been entered irregularly, there having been no valid service on the Defendants.

20. Before the entry of the Judgment, attorneys for the Insurance Company in respect of the vehicle owned and driven by the two Defendants had written to the Plaintiff's attorneys for details as to the service of the Writ. No response was provided until after the Default Judgment had been obtained. The Court noted that while it was accepted that there had been no duty to provide copies of Affidavits of Service to the Insurers' attorneys, it would have been professional courtesy. The Court also said that it would have been proper to warn the attorneys of the intention to enter Default Judgment.

21. In ***Jackson v. Jackson and Jackson***, the Plaintiff had failed to submit his statement of claim within the deadline set by the Court yet, nevertheless, applied for Judgment in Default once he had done so. The Court held that he had not been entitled to take any further step in the proceeding until he had purged his contempt. The Court also held that since at the time of the making of the application, the Plaintiff knew that the Defendants had intended to file a Defence, it would be unjust to allow the Default Judgment to stand. The Default judgment was set aside with leave given to the Defendants to file their Defence.

22. In ***Gay v. Collins***,[8] on an application to set aside a Default Judgment which was regularly entered, the Grand Court said this:

> "*Before I move on, I would like to comment on what I perceive to be good practice in cases where the attorney for the plaintiff is aware that the defendant is legally represented especially if an acknowledgement has been filed. It is a matter of professional courtesy and good practice that where an attorney knows that another attorney is concerned in a case that he should not seek to proceed by default without enquiry and warning.*"

[8] G.C. Cause 86 of 2014, 7th October 2014

23. Counsel for the Defendant also relies heavily on the case of ***Roundstone Nurseries Ltd. v. Stephenson Holdings Ltd***.[9] and submits that the application therein was made in circumstances which were contrary to the basis of the Civil Procedure Rules which Rules are similar to the overriding principles to the GCR.

24. In that case the English Court applied the test as set out in the Civil Procedure Rules:

i) Was the judgment wrongly entered i.e. is it irregular?
ii) The Court may set aside a default judgment even if it is regular where
    a. The Defendant has a real prospect of defending the claim.
    b. It appears to the Court that there is some other good reason.

25. In that case, the parties had agreed to previous stays of the action in an attempt to reach settlement including by way of mediation. A Default Judgment had been obtained in circumstances where the agreed stay had expired and a further stay would have been required at least until after the scheduled mediation had been concluded. The Court noted that the position had been expressly confirmed in correspondence between the attorneys. Against the background of these circumstances the Court concluded that the application for Default Judgment was unreasonable. The Court stated:

> *"During the course of his helpful submissions on this point, Mr. Crangle went so far as to say that, if a claimant was technically entitled to enter judgment in default then he was entitled to do so, even if he knew that the defendant had a real prospect of defending the claim and therefore setting aside such judgment. I am afraid I do not accept that submission: it seems to me that it is contrary to the entire basis of the CPR. If a claimant knows that, because of some technical glitch, he could enter judgment in default against the defendant, but that the defendant had a real prospect of successfully defending the claim (and therefore getting judgment set aside) then that claimant should not, at least as a general rule, enter judgment in default. If he does, it seems to me that he must face the costs consequences of that decision.*
>
> *Thus, I conclude that there is a good reason why the judgment in default should be set aside: because it was obtained in an improper manner and was the result*

[9] 2009 EWHC 1431

of unreasonable conduct. Therefore, it seems to me the judgment in default requires to be set aside pursuant to the over-riding objective (CPR 1.1).”

26. In the instant case, Counsel submits that despite the difference of understanding between the attorneys, the judgment should be set aside in circumstances where:

i. The Plaintiff knew that there was an attorney on record;

ii. There had been discussion on 3rd February 2021 which at the very least indicated that the matter was yet to be reviewed and liability remained an issue;

iii. An Acknowledgement of Service had been filed indicating an intention to defend;

iv. There had been attempts to reach the Plaintiff to resolve matters prior to the 23rd February 2021 when the judgment was issued; and

v. No notice had been provided of the application for Default Judgment.

27. In response to these submissions, Counsel for the Plaintiff argued that there had already been inordinate delay in this case including a period of extensive and fruitless negotiations prior to the Writ having been filed. It was submitted in effect that with there being no further response from the opposing side after the 3rd February 2021, the application for Default Judgment was not inappropriate.

DISCUSSION AND CONCLUSIONS

28. There is no suggestion here that the Defendant has not acted promptly to set aside the Default Judgment. Judgment was entered on the 23rd February 2021. The Defendant’s

attorney was served with the Default Judgment on the 25th February 2021. The Application to set aside was issued on the 9th March 2021.

29. I have considered the merits of the case to the limited extent appropriate. This is a personal injury action. The draft Defence and Affidavit in support filed raise issues of factual disagreement. It is common ground between the parties that a criminal charge of Careless Driving against the Defendant was dismissed without a trial.

30. I accept as Counsel for the Defendant put it, that if there was no contact between the vehicle and the Plaintiff, liability is less likely to arise (in so far as no other cause other than contact is pleaded). I also accept that there are issues of contributory negligence and in the absence of any medical evidence, causation and therefore, the evidential position cannot be said to be definitively in favour of the Plaintiff at this stage.

31. As the Court noted in the case of ***Woodgate v. Zuniga***, motor vehicle accident claims are notoriously fact-sensitive. On the facts of this case such as are before the Court, I cannot say that judgment for the Plaintiff is inevitable. Considering the matter broadly, I am satisfied that there is a realistic prospect of success of the Defendant's case - noting that it has multiple avenues of approach.

32. I have also considered and take into account the circumstances in which the Default Judgment was entered. The fact that there was communication between the attorneys on the 3rd February 2021, is agreed. This is also evident from the correspondence exhibited to the Affidavit in support. Before receipt of the judgment, and being unaware of its issue, on Sunday 21st February 2021, the Defendant's attorney wrote to Counsel for the Plaintiff in respect of a proposed consent order, *"as agreed in discussions upon filing the acknowledgment of service*". The evidence is that thereafter Counsel made a number

of calls to the telephone number for the Plaintiff's attorney which went unanswered. On the morning of the 23rd February 2021, Counsel wrote again to the Plaintiff's attorney indicating an inability to make contact by telephone and asking that the consent order be signed and returned.

33. Following receipt of the Default Judgment, Counsel for the Defendant by telephone and by e-mail of the 25th February 2021 endeavored to contact Counsel for the Plaintiff in order to seek agreement to the setting aside of the Default Judgment. No response was received until Counsel replied by email of the 2nd March 2021 indicating a different understanding of the conversation of the 3rd February 2021.

34. It is clear on the evidence in support of this application that Counsel for the Plaintiff was well aware that the Defendant was legally represented. Indeed direct contact had been made with her. While Counsel in filing the Application for Default Judgment may have been technically and procedurally correct, it is perhaps unfortunate in that it was contrary to the good practice and professional courtesy identified by this Court that this was done without further recourse to the Defendant's attorneys.

35. I am satisfied that in all the circumstances of this case in particular on the merits of the Defence case, that the appropriate exercise of my discretion is that the Default Judgment ought to be set aside. I am satisfied that justice requires it. I grant the application of the Defendant to set aside the Default Judgment and for an extension of time of two days following the date of this judgment to file a Defence in the form of the draft appended to the Summons.

COSTS

36. Counsel for the Defendant argued that if successful, costs should be awarded to the Defendant. Counsel asked the Court to consider that the application was made after default of only one day, and that had they been notified of the proposed application, the Defence would have been filed and all of this avoided. Additionally that the Plaintiff had been invited to set aside the application by consent rather that incur further costs.

37. While the Defendant has been successful in this application it is noted that the Defendant's own conduct contributed to the confluence of circumstances which gave rise to the need for this application. Following the filing of the Acknowledgement of Service and the discussion of the 3rd February 2021, the Defendant did not follow through with written communication until 18 days later on the 21st February 2021. Had there been earlier communication, the misunderstanding would have been laid bare and there would have been time to respond appropriately before the filing deadline. It is not unreasonable to have expected that Counsel would have sought to have either an agreed position in writing prior to the deadline or at the very least some written correspondence in place. Balancing all matters, in my view the outcome which best meets the justice of this issue is for costs to be in the cause.

Dated this the 9th day of April 2021

Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court