

IN THE EASTERN CARIBBEAN SUPREME COURT
GRENADA
IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. GDAHCV2024/0303

BETWEEN:

BYRON L.J. CAMPBELL

Claimant

and

THE ATTORNEY GENERAL

Defendant

Appearances:

Mr. Ruggles Ferguson KC, with him, Ms. Mckaeda Augustine for the Claimant
Ms. Aleya Williams for the Defendant

2025: October 21, 27.

DECISION

- [1] **MICHEL, M:** Before the Court is an application by the Defendant to set aside the default judgment entered for the Claimant for an amount to be decided by the Court on the Claimant's claim against the Defendant for breach of contract. The set aside application is strenuously opposed by the Claimant.

Background

- [2] The brief background to the matter is that on 1st October 2017, the Claimant was contracted by the Government of Grenada ("GOG"), through the Ministry of Finance, to serve as Programme Manager for the Market Access and Rural Enterprise Programme ("MAREP") for a period of one year ("the MAREP Contract").
- [3] The MAREP contract defined the GOG as "the Client" and the Claimant as "the Consultant". Clause 15 of the MAREP contract, titled "Termination" provided as follows:

"The Client may terminate this Contract, by not less than thirty (30) days written notice of termination to the Consultants, to be given if the Consultants do not remedy a failure in the performance of their obligations

under the Contract, within thirty (30) days after being notified or within any further period as the Client may have subsequently approved in writing. Unsatisfactory performance (evaluated twice a year) is a cause for unilateral termination. The Consultant may terminate this Contract by no less than thirty (30) days written notice to the Client.”

- [4] The Claimant was subsequently appointed to the position of Head of Rural Development with responsibility for the Climate Smart Agriculture and Rural Enterprise Programme (“SAREP”), and the Basic Needs Trust Fund (“BNTF”) from 1st October 2018 under a contract with the GOG (“the SAREP Contract”).
- [5] The appointment of the Claimant to the position of Head of Rural Development was by way of three letters. The first, was a letter dated 17th May 2017 (which apparently ought to have been dated 17th May 2018) from Patricia Clarke, Acting Permanent Secretary in the Ministry of Finance, Planning Economic Development and Physical Development. The letter stated that the Claimant would be guided by the terms and conditions of the MAREP contract. The letter further stated that the appointment letter would be used in the absence of a formal contract which would be issued pending the results of a job analysis process.
- [6] The Claimant received a further letter dated 24th October 2018, from Mrs. Ophelia Wells-Cornwall, Acting Permanent Secretary in the Ministry of Finance, Planning, Economic Development and Physical Development. The letter stated that all contracts under MAREP concluded 30th September 2018 and that the Ministry was in the process of reviewing and drafting new contracts for persons interested in being part of the new construct, Rural Development. The letter further asked the Claimant to indicate by Tuesday, 30th October 2018, whether he would accept the position of Head of Rural Development along with its requisite responsibilities.
- [7] By letter dated 29th October 2018 the Claimant responded to the Permanent Secretary indicating that he would accept the offer from the GOG to be the Head of Rural Development with its requisite responsibilities.
- [8] The Claimant thereafter received an amended appointment letter dated 27th November 2019, signed on behalf of Ms. Patricia Clarke, Acting Permanent Secretary, Ministry of Finance, Planning, Economic Development and Physical Development, for the position Head of Rural Development. The amended appointment letter for Head of Rural Development stated that the Claimant would be guided by the terms and conditions of his previous contract as Programme Manager for the MAREP and would receive a monthly salary of \$8,487.20 in addition to a travelling allowance of \$600.00 and a telephone allowance of \$200.00 effective

as of 1st October 2019. The amended appointment letter further stated that the Claimant's total package would be \$9,287.20 per month. The amended appointment letter further informed the Claimant that the amended appointment letter would be used in the absence of a formal contract which would be issued pending the result of the job analysis process.

- [9] It is not in dispute that the Claimant never received the results of any job analysis process and never received a further formal contract.
- [10] By letter dated 23rd February 2023, the Claimant's contract as Head of Rural Development was terminated by the GOG with effect from 28th February 2023 on the basis that his services were no longer required. The Claimant's termination letter provided that in lieu of notice of termination, the Claimant would be paid two months' service fee for the months of March and April 2023 in the sum of \$18,174.40.
- [11] The termination letter additionally advised the Claimant that, pursuant to Clause 8 of contract negotiated and agreed upon between Claimant and the GOG on 1st October 2017, and re-confirmed by letter under the hand of the Permanent Secretary in the Ministry of Finance, Planning, Economic and Physical Development dated 27th November 2019, if he was in possession of any reports, studies, or other material, graphic software or otherwise (whether originals or copies and whether on paper, computer memory or otherwise) relating to the business of and any other property belonging to the Government, he was kindly asked to return same to the Permanent Secretary in the Ministry.

The Present Proceedings

- [12] The Claimant subsequently commenced the present proceedings against the Defendant pursuant to section 14(2) of the **Crown Proceedings Act**¹ by claim form and statement of claim filed on 18th August 2023 for breach of contract by the GOG. The Claimant alleged in his claim that the GOG breached expressed and implied terms of his contract with the GOG by:

- (1) terminating his services in breach of the termination clause of the contract which governed his appointment;
- (2) terminating his services without addressing the GOG's outstanding obligation to provide a formal contract containing an upgraded salary and other benefits following the results of a job analysis project;

¹ Cap. 74, Laws of Grenada. Section 14(2) of the Act provides that civil proceedings against the Crown shall be instituted against the Attorney General.

- (3) terminating the services of the Claimant without compensating the Claimant the outstanding monies due to him under the pending formalized Contract, which would be retroactive to 1st October 2018 for the Claimant's four plus years of carrying out his duties as Head of Rural Development, in anticipation of the formalized and concluded SAREP contract.

[13] The Claimant therefore claimed the following against the Defendant:

- (1) General damages for breach of contract.
- (2) An order directing the Defendant to pay to the Claimant, the following sums:
 - (i) The sum of \$159,000.00 for 53 months unpaid portion of the Claimant's salary (\$3,000.00 x 53 months);
 - (ii) The sum of \$6,000.00 for the unpaid portion of the two months payment in lieu of notice given to the Claimant (\$3,000.00 x 2 months);
 - (iii) The sum of \$11,487.20 representing payment in lieu of notice for a third month;
 - (iv) \$2,400.00 representing the Claimant's travelling and telephone allowances up to the 3-month notice period; and
 - (v) Legal expenses.
- (3) In the alternative, an order directing payment to the Claimant on a quantum meruit basis provided for the period October 2018 to February 2023 inclusive.

[14] The claim was duly served on the Defendant on 24th August 2023. No acknowledgement of service or defence was filed by the Defendant within the time limited by the **Civil Procedure Rules (Revised Edition) 2023** ("CPR 2023"). On 4th December 2023, the Claimant filed a request for the entry of judgment in default of acknowledgement of service and defence against the Defendant. On 29th August 2024, the Court Office uploaded the signed default judgment to the E-Litigation Portal.

[15] On 15th October 2024, the Defendant filed an acknowledgement of service and also filed the present application pursuant to CPR 13.3(1) to set aside the default judgment. The set-aside application was accompanied by a draft defence and was supported by the affidavit of Lisa Telesford, Senior Legal Counsel. An affidavit in response was filed by the Claimant on 14th May 2025 and an affidavit of Lisa Telesford in reply was filed by the Defendant on 29th May 2025. Both parties filed written submissions in relation to the Defendant's application.

Setting aside a Default Judgment under CPR 13.3

[16] The Court has a discretionary power under CPR 13.3 to set aside a default judgment. The rule provides:

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

(2) In determining whether to set aside under paragraph (1), the court may consider if the defendant –

(a) applied to the court as soon as reasonably practicable after finding out that judgment has been entered; and

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

(3) In any event, the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.

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

[17] The rule makes it plain that the Court may only set aside a default judgment under CPR 13.3(1) if a defendant has a real prospect of successfully defending the claim. Thus, the starting point to any application to set aside a default judgment pursuant to CPR 13.3(1) is to determine whether a defendant has met this threshold requirement for the court to exercise its discretion to set aside the default judgment.

Whether the Defendant has a real prospect of successfully defending the Claimant’s claim

[18] The parties appear to agree that, for the Court to find that the Defendant has a real prospect of successfully defending the Claimant’s claim, the Defendant must demonstrate that his defence has a ‘realistic’ as opposed to ‘fanciful’ prospect of success.² As submitted by the Defendant, relying on the dicta of Moore-Bick J in **International Finance Corporation v Ute Africa Sprl**,³ the proposed defence should be more than merely arguable. It should carry a degree of conviction.

² See *Sylmord Trade Inc. v Inteco Beteiligungs Ag* BVIHCPMAP2013/0003 (delivered 24th March 2014, unreported) at para 35.

³ [2001] EWHC 508 (Comm) at para. 8.

[19] Following the approach approved by the Court of Appeal in **Sylmord Trade Inc. v Inteco Beteiligungs Ag**,⁴ I will consider the Defendant's prospects of success in the context of the pleadings and the evidence before the Court.

[20] The Defendant's position is that it has a real prospect of successfully defending the claim. The Defendant asserts that the termination of the Claimant's contract was conducted lawfully, with two months' compensation provided in lieu of notice and that the Claimant's additional claims for further payment are unfounded.

The Proposed Defence

[21] At paragraph 10 of its proposed defence, the Defendant pleads that paragraphs 11 and 12 of the statement of claim are admitted in that the Claimant's position of Head of Rural Development was effective from 1st October 2018 and that an amended appointment letter dated 27th November 2019 was sent by the Permanent Secretary at the Ministry of Finance, Ms. Patricia Clarke, to the Claimant. This letter informed the Claimant that the terms and conditions of the MAREP contract applied to the Claimant's appointment as Head of Rural Development and that monthly allowances of \$200.00 EC (telephone allowance) and a traveling allowance \$600.00 EC would be effective as of 1 October 2019.

[22] At paragraph 13 of its proposed defence, the Defendant denies paragraph 15, of the statement of claim wherein the Claimant averred that the GOG arbitrarily and wrongfully terminated the Claimant's contract as Head of Rural Development. The Defendant avers that it did not arbitrarily and wrongfully terminate the Claimant and that the Claimant was lawfully terminated and he was paid two months' salary in lieu of notice in accordance with the law. The Defendant further avers that in terminating the Claimant, who at the time was over 70 years old, the Defendant, in addition to the allowance paid, gave reason, that is, the Defendant's services were no longer required.

[23] The Defendant further pleads at paragraph 14 of its proposed defence that as to paragraph 16 (i) of the statement of claim, without prejudice to the Defendant's reservation on the applicability of the MAREP contract beyond 30th September 2019, the Defendant denies that it terminated the Claimant in breach of the termination clause in the said contract, and repeats paragraph 13 of its proposed defence.

⁴ BVIHCPMAP2013/0003 (delivered 24th March 2014, unreported at para. 35).

- [24] The evidence in support of the Defendant's application to set aside the default judgment is contained in two affidavits of Lisa Telesford, Senior Legal Counsel. At paragraph 7 of the affidavit of Ms. Telesford filed by the Defendant on 15th October 2024, Ms. Telesford stated:

"The draft Defence exhibited to this affidavit and marked "L.T.2" shows that the Claimant's only entitlement is based on the inference of the terms and conditions of the MAREP contract, upon which his remuneration would be calculated and not the remuneration package he thought he should have received. Further, the MAREP contract contemplated thirty (30) days written notice of termination for cause by the Client. In the absence of termination by the Client other than provided for in the said contract, the Claimant was paid two months' salary in lieu of notice. This is ultimately the Defendant's case, which is also set out in the draft Defence and can be successfully maintained if given an opportunity by the Court."

- [25] At paragraph 6 of Ms. Telesford's affidavit filed by the Defendant on 29th May 2025, in response to the affidavit of the Claimant, she further stated the following:

"I note in paragraphs 10 and 11 that the Claimant did serve as the Head of Rural Development. The other assertions made in those paragraphs are denied and I state that the Claimant was duly informed that the Government of Grenada being the Client in the Market Access and Rural Enterprise Programme (MAREP), was entitled to terminate the contract which was entered into on 1st October 2017, in the absence of an express stipulation or arrangement as to notice, upon reasonable notice. The Defendant acted within the confines of the contractual provisions in terminating the contract with the Claimant with two months' compensation in lieu of notice. This is ultimately the Defendant's case, which is also set out in the draft Defence filed on 15th October 2024 and can be successfully maintained if given an opportunity by the Court."

The Defendant's Submissions

- [26] The affidavits of Ms. Telesford and the written submissions of learned counsel for the Defendant confirm that the Defendant's position is that the terms and conditions of the MAREP contract were applicable to the Claimant's appointment as head of Rural Development and he was bound by them.
- [27] Learned counsel for the Defendant submitted that the Claimant's termination was effected by application of the common law principles of termination as clause 15 of the MAREP contract provided for termination by the GOG for cause. Learned counsel for the Defendant submitted that clause 15, however, in no way precluded

the GOG from terminating the contact as instructive case law provides that in the absence of an express stipulation or arrangement as to notice, a contract of employment is terminable at common law on reasonable notice. The Defendant relied on the cases of **Richardson v Koefod**⁵ and **Reda and another v Flag Ltd**⁶ in support of this position.

[28] The Defendant further argued that the Claimant's employment term as gleaned from the various documents comprising same, was for an indefinite period and relying on the dicta of Ellis J in the Virgin Islands High Court judgment in **Deca Penn v Scotiabank (British Virgin Islands) Limited**,⁷ learned counsel for the Defendant submitted that reasonable notice is a critical component of the termination process in circumstances where the contract is for an indefinite period and is silent on the Employer's ability to terminate at will or without cause. Learned counsel for the Defendant submitted therefore that in terminating the services of the Claimant, the Defendant provided two months' pay in lieu of notice as guided by the case of **Konski v Peet**.⁸

[29] In her supplemental written submissions and in her oral submissions, learned counsel for the Defendant appeared to take a slightly different approach as to the Defendant's reliance on reasonable notice in terminating the Claimant's contract. Learned counsel for the Defendant submitted that the GOG's ability to terminate the Claimant's contract without cause with 30 days' notice to the Claimant is an obvious common law term that can be implied into the Claimant's contract. She relied on the officious bystander test in support of this submission.

[30] Learned counsel for the Defendant submitted that an expressed termination provision that fails to provide for termination by the employer without cause fails to give business efficacy to the contract. She submitted that the contract between the Claimant and the Defendant presents an unbalanced scale wherein the Claimant was entitled to terminate with notice, but the Defendant was limited to invoking termination with cause. Learned counsel for the Defendant submitted that applying the officious bystander test, in the case of **Wilson v Maynard Shipbuilding Consultants AB**,⁹ it was held that a term may be implied if it is something so obvious that the parties must have intended it.

⁵ [1969] 3 All ER 1264.

⁶ [2002] UKPC 38.

⁷ BVIHCV2009/0277 (delivered 28th February 2013, unreported).

⁸ [1915] 1 Ch. 530.

⁹ [1978] 2 All E.R. 78.

- [31] Learned counsel for the Defendant submitted that an expressed termination provision that fails to provide for termination by the employer without cause fails to give business efficacy to the contract. She relied on the case of **The Moorcock**¹⁰ where the court determined that the term to be implied must be ‘necessary in the business sense to give efficacy to the contract’. The court stated:

“When we imply a term, we recognise that the parties have not expressed this in words which cover the situation but we impute to them an intention which we say they would have expressed if they had put their minds to it and we apply the principles. I have no doubt that if the parties in the present case had been asked whether or not it was their intention to incorporate a term to the effect that dismissal of the services of the plaintiff was subject to reasonable notice, they would both have replied in the affirmative.”

- [32] Learned counsel for the Defendant submitted that should a bystander review the present termination clause (clause 15 of the MAREP contract), there would be a resounding and obvious notion that it should be implied that the GOG was also entitled, like the Claimant, to terminate the contract without cause by giving 30 days’ notice.

The Claimant’s Submissions

- [33] In his written submissions, learned King’s Counsel for the Claimant first pointed out that it is not in dispute that the Claimant was initially engaged under the MAREP contract, the termination clause of which was expressly carried forward into his role as Head of Rural Development under the SAREP programme. This, he submitted, is confirmed by the Defendant in its own submissions.
- [34] Learned King’s Counsel for the Claimant submitted that clause 15, the termination clause under the MAREP contract, which was applicable to the Claimant’s appointment as Head of Rural Development, sets out clear preconditions for termination: the employer must first identify a failure in performance, the employer must then notify the Consultant of that failure, provide an opportunity to remedy it, and only upon continued non-compliance may the GOG issue a termination notice.
- [35] Learned King’s Counsel for the Claimant submitted that the Defendant did not comply with any of these steps. He pointed out that the termination letter dated 20th February 2023 referred only to the Claimant’s ‘services no longer being required.’ Learned King’s Counsel further pointed out that the letter did not identify any performance issue, nor did it offer an opportunity to remedy. This, he submitted,

¹⁰ [1889] 14 PD 64.

amounts to a failure to satisfy the contractual mechanism for termination and renders the dismissal unlawful.

- [36] Learned King's Counsel for the Claimant submitted that the Defendant's reliance on cases to justify the assertion that the termination of the Claimant's contract by giving reasonable notice, is wholly misconceived and does not arise. Learned King's Counsel submitted that clause 15 sets out the sole basis on which the Claimant's employment could be terminated by the Defendant and the Defendant was not at liberty to bypass the expressed terms of the contract and invoke general common law principles.
- [37] The Defendant's further submissions on implying a term of reasonable notice to the Claimant's contract having regard to the officious bystander test were made by learned counsel for the Defendant in her supplemental submissions and the Claimant did not have an opportunity to reply in writing. However, in his oral submissions, learned King's Counsel for the Claimant pointed out to the Court that the terms of the Claimant's employment with the GOG were drafted by the GOG of Grenada and submitted to and agreed by the parties, therefore, the GOG cannot now argue that the terms are unbalanced and do not give business efficacy to the contract. This, learned King's Counsel for the Claimant submitted, militates against any argument of a gap to be filled by implying a term of reasonable notice.

Discussion

- [38] Having considered the submissions of the Parties and the cases referred to the Court, I find force in the arguments of the Claimant against the implication of the common law principle of reasonable notice to the contract in the present case.
- [39] The Defendant has placed great reliance on the judgment of the Privy Council in **Reda** and the Virgin Islands High Court in **Deca Penn** in support of the principle that in employment contracts of an indefinite term, the right to reasonable notice is an implied term. This principle, however, is qualified by the position that it would be applicable to contracts which are not fixed-term contracts or which do not otherwise provide for termination, a qualification not frontally addressed by the Defendant.
- [40] In **Reda**, Lord Millert, delivering the judgment of the Board, stated the following at paragraph 57 of the Board's judgment:

"The true rule, which is not confined to contracts of employment but applies to contracts generally, is that a contract which contains no express provision for its determination is generally (though not invariably) subject to an implied

term that it is determinable by reasonable notice: see Chitty on Contracts (28th Ed.) at para. 13-025. The implication is made as a matter of law as a necessary incident of a class of contract which would otherwise be incapable of being determined at all. Most contracts of employment are of indefinite duration and are accordingly terminable by reasonable notice in the absence of express provision to the contrary.”

- [41] The Defendant, in my view, has failed to demonstrate how an implied term of reasonable notice is applicable in the present case in the face of the clear express wording of clause 15 of the MAREP contract (the termination clause) which both Parties have accepted applies to the Claimant’s appointment as Head of Rural Development. In other words, no basis is identified by the GOG as to how such a term can be implied given the clear express provisions of clause 15, which is clearly inconsistent with the implication of a term of reasonable notice on the part of the GOG, and which does not evidence any lacuna for the termination of the contract by the GOG.
- [42] Clause 15 provides an express mechanism by which the GOG was entitled to terminate the Claimant’s appointment. Notably, the clause provides for the Claimant, the employee to terminate the contract by giving no less than 30 days written notice. No such clause was similarly drafted by the GOG for termination by the GOG. What the clause does provide for is the express term that the GOG may terminate the contract by not less than 30 days written notice of termination to be given to the Claimant if the Claimant does not remedy a failure in the performance of his obligations under the contract, within 30 days after being notified or within any further period as the GOG may have subsequently approved in writing. The contract further provides that unsatisfactory performance (evaluated twice a year) is a cause for unilateral termination.
- [43] In relation to the Defendant’s further refined argument, in **Artscrafts SpA v MOU Ltd**,¹¹ Bryan J noted that ‘It is trite that the process of implication occurs after the express terms of the contract are given their proper construction.’ In the present case, the Defendant is attempting to imply a term in relation to termination on reasonable notice into a contract which has provided for the circumstances in which each party can terminate.
- [44] As already alluded to above, in my view, an implied term of reasonable notice cannot arguably be interfered in light of the clear express terms of the termination clause of the contract as identified above, and the Defendant has not identified the features of this case warranting such an implication.

¹¹ [2024] EWHC 1558 (KB).

- [45] Further, in circumstances where an agreement contains express terms for termination, and therefore the parties have addressed their minds to defining the circumstances in which the agreement should be terminated, it will be difficult to imply further such terms of termination as being argued by the Defendant.¹² I am not satisfied that the Defendant has presented a case for the term to be implied in the present case on which it has a real prospect of succeeding on.
- [46] Based on the foregoing, I am not satisfied that the Defendant has demonstrated that it has a realistic as opposed to fanciful prospect of defending the Claimant's claim.
- [47] I further note that although the argument of an implied term was made by the Defendant in its supplemental written submissions and oral submission, there is no plea or particulars in its draft defence in relation to the term it seeks to have the Court imply. Thus, it is arguable whether this further argument is properly before the Court for consideration, however, in light of my above conclusions, I need not express any further view on this point.
- [48] In light of the foregoing, I do not consider that the Defendant has demonstrated that it has a real prospect of successfully defending the Claimant's claim for breach of contract in its termination of the contract. This conclusion would be sufficient to dispose of the Defendant's set aside application as the Defendant has failed to satisfy CPR 13.3(1).
- [49] Notwithstanding my above finding on the Defendant's prospects of success, given the extensive submissions made by the parties, and for the sake of completeness, I will nonetheless consider the matters under CPR 13.3(2) which the Court may consider in deciding whether to set aside the default judgment under CPR 13.3(1). I will also briefly consider whether there are exceptional circumstances under CPR 13.3(3) whereby in any event, the Court should set aside the default judgment.

Whether the Defendant applied to the Court as soon as reasonably practicable after finding out that judgment had been entered

- [50] The default judgment in this matter was uploaded to the E-Litigation Portal by the Court Office on 29th August 2024. The Defendant's evidence as set out in the affidavit of Ms. Telesford filed on 15th October 2024 is that on 4th October 2024 the Defendant was informed by a fellow colleague that the Claimant had indicated that he had applied for a default judgement against the Defendant. Ms. Telesford stated

¹² Ibid at para. 143.

that upon receipt of this information, the Defendant took immediate action, representing the case on the E-Litigation Portal and filing an acknowledgement of service. She stated that to date, the Defendant has not been served with the default judgement order in compliance with CPR 42.6.

[51] The Defendant applied to set aside the default judgment on 15th October 2024. Based on the affidavit of Ms. Telesford, this would have been 11 days after the Defendant became aware of the Defendant making a request for default and the Defendant would have represented case for the Defendant on the E-Litigation Portal and accordingly would have been able to see the order for default judgment uploaded by the Court Office.

[52] The Claimant sought to argue that the default judgment was uploaded to the E-Litigation Portal since 29th August 2024 and therefore the Defendant would have had notice of the default judgment since then, having previously been served with the claim and the E-Litigation Portal authorisation codes. However, I accept the Defendant's evidence that it did not become aware of the default judgment until at the earliest 4th October 2024 in circumstances where the Defendant had not been personally served with the default judgment and the Defendant had not previously represented case for the Defendant on the E-Litigation Portal for the reasons I will soon outline in this decision.

[53] I have looked at the circumstances of the case. I have accepted that the Defendant first became aware of the default judgment on 4th October 2024 and that the set aside application was made 11 days later on 15th October 2024. I am of the view that there is no real sustainable argument from the Claimant as to the promptness of the Defendant's application. I am satisfied that, considering the circumstance of this case, a period of 11 days can be considered as soon as reasonably practicable to apply to set aside the default judgment after the Defendant found out on 4th October 2025 that judgment had been entered.

Whether the Defendant has given a good explanation for the failure to file a defence

[54] The Defendant accepts that it was duly served for the Claimant's claim on 24th August 2023. Ms. Telesford, in her affidavit in support of the Defendant's set aside application, stated that this was a mere week after the Defendant unambiguously indicated their intention to facilitate a platform for discussion to settle the claim. Ms. Telesford admits that there was an oversight in failing to file an acknowledgement of service and defence and that this was due to an administrative mishap that caused counsel to be unaware that a suit was filed and served by the Claimant. She

stated that this was not disinterest or negligence in this matter. Ms. Telesford reiterated that the Defendant's failure to acknowledge service or file a defence in time is not indicative of mere indifference in their handling of the matter but was due to a genuine administrative mishap.

- [55] Ms. Telesford explained that due to an internal mis-recording of the file, the served claim was inadvertently overlooked. Additionally, she stated that service was conducted by the Claimant during the court's long vacation and that the Defendant's office was under-staffed, which in part accounted for the administrative mishap. Ms. Telesford stated that the failure to file an acknowledgement of service and defence does not present an incontrovertible conclusion that the Defendant had no intention to defend the matter or is devoid of a meritorious defence. She stated that in fact, the Defendant's prompt treatment of the pre-action protocol shows it has a keen interest in the matter.

The Defendant's Submissions

- [56] Learned counsel for the Defendant submitted that circumstances surrounding the Defendant's failure to file an acknowledgement of service is a good reason for its failure. Learned counsel for the Defendant referred the Court to the dicta of Bannister J [Ag.] in **Inteco Beteiligungs AG v Sylmord Trade Inc.**¹³ for the Court's consideration of whether the Defendant has a good explanation for a failure to respond to the Claimant's claim.
- [57] In the Commercial Division of the High Court's decision in **Inteco**, the learned commercial division judge stated that 'good explanation' where it occurs in CPR 13.3, means:

"an account of what has happened since the proceedings were served which satisfies the Court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix-up, are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered."

¹³ BVIHCM (COM) 120 of 2012.

- [58] Learned counsel for the Defendant submitted that considering the reasons put forward by the Defendant and the case law, the Defendant has provided a good explanation for the failure to file an acknowledgment of service and defence.

The Claimant's Submissions

- [59] Learned King's Counsel for the Claimant submitted that the Defendant does not have a good explanation for the failure to file an acknowledgment of service and defence. He submitted that the Commercial Division judgment in **Inteco** relied on by the Defendant is a lower court decision and that administrative mishap on the part of counsel has routinely been held by our courts as not being an explanation for failing to comply with the Civil Procedure Rules.
- [60] Learned King's Counsel for the Claimant relied on the High Court decision in **Ecedero Thomas et al v Chief Registrar of Lands et al**¹⁴ and the judgment of the Court of Appeal in **Michael Laudut et al v Danny Ambo**¹⁵ wherein, learned King's Counsel submitted, the Court of Appeal reaffirmed that explanations grounded in administrative error, misapprehension of the law, lack of diligence, pressure of work, or inadvertence do not qualify as good explanations under the rules.
- [61] Learned King's Counsel for the Claimant further submitted that the Court of Appeal in **Public Works Corporation v Matthew Nelson**¹⁶ clarified that the mere provision of a full and detailed explanation does not render that explanation good or excusable within the meaning of CPR 13.3(2).

Discussion

- [62] I first wish to point out that the judgment of Bannister J in **Inteco** went on appeal to the Court Appeal. The learned commercial division judge's decision was upheld by the Court of Appeal; however, in relation to the dicta of the learned commercial division judge on "good explanation", Michel JA, delivering the judgment of the Court of Appeal¹⁷ noted that none of the parties to the appeal took issue with the judge's definition of 'good explanation' and the learned Justice of Appeal specifically stated that he would not attempt for the present purposes to interfere with it.

¹⁴ BVIHCV201210002 (delivered 21st June 2012, unreported).

¹⁵ DOMHCVAP2010/0016 (delivered 15th December 2010, unreported).

¹⁶ DOMHCVAP2016/0007 heard together with Elton Darwton et al v Matthew Nelson DOMHCVAP2016/0008 (delivered 29th May 2017, unreported).

¹⁷ Sylmord Trade Inc. v Inteco Beteiligungs AG BVIHCVAP2013/0003 (delivered 24th March 2014, unreported) at para. 26.

[63] The issue of good explanation was however authoritatively addressed by Pereria CJ in **Public Works Corporation v Matthew Nelson**. At paragraph 14 of the judgment of the Court of Appeal, the learned Chief Justice stated

“In *The Attorney General v Universal Projects Limited*,³ [[2011] UKPC 37] although dealing with satisfying a precondition for obtaining relief from sanctions under CPR 26.7 of Trinidad and Tobago, what was said there in respect of providing a good explanation for satisfying that requirement may be applied here in respect of providing a good explanation for satisfying the similar condition under CPR 13.3(1). There it was sought to be argued that a ‘good explanation’ should not necessarily require the party in default to show that he was not at fault and that such things as administrative inefficiency, oversight or errors made in good faith would afford a good explanation. This was roundly rejected by the Board which had this to say at paragraph 23:

“The Board cannot accept these submissions. First, if the explanation for the breach ie the failure to serve a defence ... connotes real or substantial fault on the part of the defendant, then it does not have a “good” explanation for the breach. To describe a good explanation as one which “properly” explains how the breach came about simply begs the question of what is a “proper” explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency.””

[64] In my view, having considered the affidavits of Ms. Telesford, the Defendant has not provided a good explanation for the failure to file an acknowledgment of service and defence. Whilst the Defendant points to there being an administrative mishap, no evidence in my view has been put forward to excuse the administrative mishap other than the claim being served during the long vacation when the office was understaffed. The Defendant accepts that the claim was received by a member of staff but was not properly recorded. It has not explained how being short-staffed could have led to administrative mishap to make such administrative error excusable.

[65] The circumstances of the case, which essentially amount to administrative inefficiency, inadvertence or secretarial incompetence, fall squarely into the observations made by Ewars JA in **Laudat v Ambo** as to the explanations that do not excuse non-compliance with a rule or order or practice direction nor explanations

that without more, amount to a good explanation as contemplated by the Board in **The Attorney General v Universal Projects**.¹⁸

- [66] I hasten to add however, that had the Defendant satisfied the Court that it had a real prospect of successfully defending the Claimant's claim, the above finding on good explanation would not necessarily have been fatal to its application. The Court would have still had to go on to determine whether to exercise its discretion under CPR 13.3(1) to set aside the default judgment.

Exceptional Circumstances

- [67] As it relates to exceptional circumstances under CPR 13.3(3), no argument was made to the Court that there were exceptional circumstances warranting the setting aside of the default judgment. In any event, considering the guidance provided by Pereira CJ in the judgment of the Court Appeal in **Carl Baynes v Ed Meyer**¹⁹ on what amounts to 'exceptional circumstances' which was affirmed by the Judicial Committee of the Privy Council in **Meyer v Baynes**,²⁰ I am unable to discern any exceptional circumstances in the present case warranting the setting aside of the default judgment.

Disposition

- [68] Having found that that the Defendant has not demonstrated that it has a real prospect of successfully defending the Claimant's claim and that there are no exceptional circumstances warranting the setting aside of the default judgment, I would dismiss the Defendant's application to set aside the default judgment.
- [69] The Claimant having successfully resisted the Defendant's set aside application is entitled to his costs. I have heard the parties on the issue of costs and I would summarily assess those costs in the sum of \$2,000.00 to be paid by the Defendant to the Claimant within 28 days of the date of this order.
- [70] Finally, the Court having refused to set aside the default judgment obtained by the Claimant, the matter should proceed to an assessment of damages to determine the quantum of damages, if any, that the Claimant is entitled to on his claim pursuant to the default judgment obtained, unless quantum can be agreed by the parties.

- [71] I would therefore make the following orders:

¹⁸ [2011] UKPC 37 at para. 23.

¹⁹ ANUHCv2015/0025 (delivered 30th May 2016, unreported) at para. 26.

²⁰ [2019] UKPC 3.

1. The Defendant's application filed on 15th October 2024 to set aside the default judgment herein is dismissed.
2. The Defendant shall pay costs to the Claimant in the sum of \$2,000.00 on or before 25th November, 2025.
3. The matter shall be set down for directions for assessment of damages on 11th December 2025.
4. The Defendant shall draw, file and serve this order.

[72] I wish to thank learned Counsel on both sides for their extensive oral and written submissions.

Carlos Cameron Michel
High Court Master

By the Court

Registrar