

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCV2024/0203

BETWEEN:

[1] IAN JOSEPH
[2] DWANE FRANCIS
[3] KEITHROY BENJAMIN
[4] LLEWELLYN WILLOCK

Claimants

and

[1] OTIS MATTHEW
[2] ANTHONY PIERRE
[3] JAVID GOODWIN
[4] MARVIN MARTIN

Defendants

Appearances:

Mr. Wendel Alexander, Counsel for the Claimants
Ms. Saskia Diamond, Counsel for the Defendants

2025: March 27th;
April 4th.

DECISION

- [1] **MICHEL, M.:** This is the Court's decision on an application by the Defendants to set aside the judgment in default of acknowledgement of service entered for the Claimants by the Court on 5th December, 2024.

The Claimants' Claim

- [2] The Claimants and Defendants (collectively, "**the Parties**") are taxi drivers at the V.C. Bird International Airport. By claim form and statement of claim filed on 21st May, 2024 the Claimants commenced the present proceedings against the Defendants seeking declarations, orders, and damages for the Defendants' alleged breach of contract by failing to honour the results of an election held on 3rd April, 2024 and failing to vacate the office and positions as Executive Members of the United Taxi Association.

[3] The Claimants alleged in their statement of claim that they are Members of the United Taxi Association. They further alleged that the Defendants are also Members of the United Taxi Association and were formerly Members of the Executive of the United Taxi Association duly elected in 2022. The Claimants alleged that general elections of the United Taxi Association were held on 3rd April 2024 and a new Executive of the Association was elected. The Claimants further alleged that following the 3rd April 2024 elections, and despite several requests and petitions, the Defendants refused to hand over the management or administration of the United Taxi Association to the newly elected executive. The Claimants pleaded that the basis of the Defendants' refusal is the Defendants' claim that the election held on 3rd April, 2024 was unlawful since the United Taxi Association is not an association but a company.

[4] The Claimants contended that the Defendants are in breach of the contractual agreement which exists within the Association and between the Parties to the claim. The Claimants' therefore claimed the following:-

- (1) Damages, inclusive of general, aggravating, exemplary and punitive damages;
- (2) Damages for breach of contract;
- (3) A declaration that the defendants are in breach of the United Taxi Association Rules;
- (4) A declaration that the Defendants hold all monies inclusive of deposits, deductions or otherwise belonging to the Association as constructive trustees and to which a fiduciary duty ensues;
- (5) An order that a full and proper accounting be done as to the use of the Association's financial position during the period the defendants held their positions as executive members of the association;
- (6) A declaration that the elections held on 3rd April 2024 be deemed valid and legal;
- (7) An order that the Defendants vacate their offices and position as executive members of the association; having been duly voted out of office;
- (8) Such other orders and reliefs as the court deems fit;
- (9) Cost to be assessed in accordance with the CPR Rules and Statute against each defendant personally;
- (10) Interests against the defendants.

[5] The Claimants' claim was personally served on each of the four Defendants on 3rd June, 2024. No acknowledgement of service was filed by the Defendants within the 14 days limited by rule 9.3 of the Civil Procedure Rules (Revised Edition) 2023 ("CPR 2023"). On 24th June, 2024 the Claimants filed an application for judgment in default of acknowledgement of service and for the court to determine the terms of the judgment. The Defendants subsequently filed

acknowledgements of service on 3rd July, 2024 and a joint defence on 26th September, 2024. They also filed an application on 26th September, 2024 for an extension of time to file their acknowledgement of service and defence.

- [6] Following a hearing of the Claimants' application for default judgment, judgment in default of acknowledgement of service was entered for the Claimants on certain terms by the Court on 5th December, 2024 in accordance with CPR 12.10. On 10th December, 2024 the Defendants filed the present application pursuant to CPR 13.3 to set aside the default judgment. A notice of opposition was filed by the Claimants on 18th December, 2024. For reasons that are unclear, the application was refiled on 23rd December, 2024.

The Law on Setting Aside a Default Judgment

- [7] CPR 13.3 provides:-

“Cases where court may set aside or vary default judgment

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.

- [8] In **Rosemarie Ryan v George & George Construction**,¹ this Court made the following observations in relation to CPR 13.3, which had been recently revised at that time:-

“[31] In my view, CPR 13.3(1) is a gateway provision which a defendant must satisfy for the Court to go to consider whether it should exercise its discretion to set aside a default judgment. If the court decides that a defendant does not have a real prospect of defending the claim, matters end there and the court should refuse to set aside the default judgment (unless there are exceptional circumstances warranting the default

¹ ANUHCv2023/0340 (delivered 19th February 2024, unreported).

judgment pursuant to CPR 13.3(3)). If the court is satisfied that a defendant does have a real prospect of defending the claim, then the court must consider whether the default judgment should be set aside. In doing so, the court may consider the matters under CPR 13.3(2)(a) and (b), i.e. whether the defendant has applied to the court as soon as reasonably practicable after finding out that judgment has been entered; and gives a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.

[32] The use of the word may in CPR 13.3(2) is noteworthy. In my view, this means that a defendant does not have to satisfy both, or for that matter, either of the sub-rules under CPR 13.3(2) to have a default judgment set aside (although satisfying both sub-rules would, in all likelihood, lead to the Court setting aside the default judgment if a defendant has a real prospect of defending the claim). It is clear that CPR 13.3 gives the Court the ability to ensure that in appropriate circumstances a defendant who has a genuine, bona fide defence to a claim but is unable to bring itself within the ambit of exceptional circumstances, is not shut out from defending the claim, leading to an injustice. This does not mean that the court must take a lax approach in applying the rules, but the Court must ensure that its application of the rules furthers the overriding objective”

[9] Having considered CPR 13.3, it is pellucid that the Court must first decide whether the Defendants have a real prospect of successfully defending the claim before determining whether a default judgment should be set aside.

Whether the Defendants have a real prospect of successfully Defending the Claim

[10] It was accepted by the Court of Appeal in **Sylmord Trading Inc. v Inteco Beteiligungs Ag**² that the approach of the Court in considering the test of ‘real prospect of success’ on a summary judgment application under CPR Part 15 would be applicable when determining whether a defendant has a real prospect of successfully defending a claim on a set aside application under CPR 13.3.

[11] The Defendants would therefore have to show that their defence has a ‘real’ (that is realistic as opposed to fanciful) prospect of success. As the guidance on summary judgment applications show,³ the Court should consider the proposed

² BVIHCMAP2013/0003 (delivered 24th March 2014, unreported).

³ Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste Saint Lucia Civil Appeal No. 8 of 2009 (delivered 11th January 2010, unreported).

defence in the context of the pleadings and such evidence before it and on that basis determine whether the defence has a real prospect of success. Thus, in the context of an application to set aside a default judgment, if having considered the pleadings and the evidence, the Court finds it difficult to see how the Defendants could defend the claim, then it would be open to the court to refuse to set aside the default judgment.⁴

- [12] In the present case, in their proposed defence, the Defendants dispute that they are members of an association or operate under an association. They contend that they function and operate as part of the company, the United Taxi Company (Antigua) Limited (“**the Company**”). The Defendants allege that they cannot trade as a business. They contend that they are officers of an established and incorporated company under the laws of Antigua and Barbuda and have been so since the incorporation of the Company in 2005. Attached to their proposed defence are the certificate of incorporation and the Bye-Laws of the United Taxi Company (Antigua) Limited. The Defendants aver that they serve in different capacities in the Company.
- [13] In response to Claimant’s allegations about general elections held on 3rd April, 2024 the Defendants aver that they cannot speak to the nature and results of the elections given that it was not that of the United Taxi Company (Antigua) Limited. The Defendants further deny paragraph 3 of the Claimants’ statement of claim wherein the Claimants pleaded that the Defendants are members of the Association and were members of the previous Executive, elected in the year 2022, until the general elections of the Association were held on 3rd April, 2024. The Defendants aver that they are not members of any association. They further aver that the Claimants also wear the uniform of the Company and operate under the umbrella of the Company.
- [14] The Defendants further aver in their proposed defence that they cannot speak to the requests and or petitions alleged by the Claimants in the statement of claim nor are they aware of the former Executives mentioned in the Claimants’ claim. The Defendants aver that they agree that they are a part of a company and not an association and they further contend that they are therefore not aware in what capacity they are being sued by the Claimants.
- [15] In the affidavit of Latoya Bowen, filed by the Defendants in support of the set aside application, it is stated on behalf of the Defendants that based on the Defendants’ proposed defence, the Defendants have a good and arguable defence to the claim and as such the overriding objective should be upheld in disposing with the matter fairly.

⁴ See Sylmord Trade Inc. v Inteco Beteiligungs Ag.

[16] The Claimants filed the affidavit of Aliyah Andrew, Legal Secretary in the Chambers of counsel for the Claimants in response to the Defendants' set aside application. Ms. Andrew deposed that she is advised by the Claimant's legal representative and truly believes that the Defendants' draft defence fails to disclose a real prospect of success, for the following reasons:-

- "a. The Applicants have not denied their election as executive members of the United Taxi Association in the 2022 elections.
- b. Their assertion that they were merely part of a company, rather than the Association, is inconsistent with their conduct during their tenure, including their assumption of leadership roles within the Association.
- c. The Draft Defence lacks sufficient specificity and fails to address critical allegations in the Claimants' Statement of Claim."

Submissions on Prospects of Success

[17] Learned Counsel for the Defendants in her written submissions argued that in their statement of claim, the Claimants noted that the United Taxi Association is trading as a company (the Untied Taxi Company (Antigua) Limited) of which the Defendants are members. She submitted that the Defendants in their defence agree that they are Executive Members of the Company and in the case of Mr. Otis Matthew, the 1st Defendant, a Director of the Company. Learned counsel for the Defendants submitted however that it is well established that Directors and/or Executive Members ordinarily cannot be sued in their individual names, and proceedings must be instituted against the company. Further, she argued that the Company is governed by its Bye-Laws and its own rules and regulations. Learned counsel for the Defendants submitted that to say that the Company is trading as an association that has no existence with no evidence to establish same is against company law.

[18] The Claimants did not file any written submissions for the hearing of the Defendants' set aside application but did file a notice of opposition setting out the grounds for their opposition to the application. In his oral submissions, learned counsel for the Claimants submitted that the Defendants have operated as an association in accordance with the United Taxi Association rules that the Association's Members including the Defendants are governed by. He submitted that the Defendants' entire conduct does not suggest and does not lend itself to the Defendants operating as part of a company.

[19] Learned counsel for the Claimants submitted that all the Defendants' defence states is that there is a company rather than an association, but, he submitted, the Defendants have not denied there was an election process and have not

denied that the Claimants were duly elected. He emphasized that the Defendants have behaved as members of an association.

Discussion on Prospects of Success

[20] Having examined the Defendants' draft defence, and the evidence before the Court, it is apparent that the Defendants are resisting the Claimants' claim on the basis that the Defendants are not part of an association but are officers of the company, the United Taxi Company (Antigua) Limited. Accordingly, their defence challenges the very sustainability of the Claimants' claim against them. In my view, the material before the Court certainly raises a triable issue as to whether the Parties to these proceedings are properly part of an association governed by the rules of the association or whether the Parties operate as part of a company and that the Defendants serve as officers of the Company, governed by its Bye-Laws.

[21] It should be noted that on their own claim, the Claimants pleaded that 'Although the association is trading under the name of the United Taxi Company, in fact, in operation and all the hallmarks of the daily operations are in fact an association.' Further, in resisting the application, the Claimants have sought to dispute the Defendants' proposed defence based on allegations that their conduct overtime shows that the Parties operated as an association. The Claimants' very own statement of claim and evidence therefore raises the triable issue of whether the Parties operate and the Defendants hold office as part of an association, the United Taxi Association as contended by the Claimants, or as part of a company, the United Taxi Company (Antigua) Limited as contended by the Defendants, that if concluded in the Defendants' favour, the Claimants' would in all likelihood be unable to sustain their claim and/or obtain the relief sought on their claim, as their claim is based on the Parties being part of an association.

[22] Thus, having carefully considered the pleadings and evidence before the Court, I am of the view that the Defendants have a real prospect of successfully defending the Claimant's claim. The Defendants have demonstrated a more than merely arguable case and their prospects of success are certainly not fanciful. The Defendants' proposed defence challenges the standing of the Parties to the claim and the viability of the claimant and raises for determination the issue of the true legal status of the entity underlying the claim.

[23] Having found that the Defendants have a real prospect of successfully defending the Claimants' claim, I will go on to further consider whether the Court ought to exercise its direction to set aside the judgment in default of acknowledgement of service. In doing so, I will first consider the factors under

CPR 13.3(2) that the Court may have regard to in considering whether to set aside the default judgment.

Whether the Defendants applied to the Court as soon as Reasonably Practicable after finding out that Judgment had been Entered

[24] The Court entered default judgment in favour of the Claimants at a hearing on 5th December, 2024. In **Linda (Lindy) Tamn (dba Lindy Tamn Realty Listing) v The Fountain Beach and Tennis Club**,⁵ Blenman J stated: 'The court reiterates that the Applicant who seeks to have a Default Judgment set aside must apply as soon as reasonably practicable after becoming aware of the Judgment in Default.' Thus, the important consideration is when the Defendants became aware of the default judgment.

[25] Judgment in default was entered for the Claimants in the presence of their counsel. Accordingly, the Defendants would have found out that judgment had been entered through their counsel at the hearing on 5th December, 2024. The Defendants filed their application to set aside the default judgment five days later on 10th December, 2024. I consider that a period of five days to apply to set aside the judgment in default to be as soon as reasonably practicable. If the operative application is the one refiled on 23rd December, 2024, whilst this may not have been particularly prompt, I do not consider that a period of 18 days to apply to the Court is unreasonable and no arguments to the contrary have been made. I am therefore satisfied that the Defendants applied to the court to set aside the default judgment as soon as reasonably practicable after finding out that judgment had been entered.

Whether the Defendants have given a Good Explanation for the Failure to File an Acknowledgement of Service

[26] In the affidavit of Latoya Bowen filed by the Defendants in support of their application to set aside the default judgment, Ms. Bowen deposed that the Defendants were served with the Claimants' claim on 3rd June, 2024 and on 24th June, 2024 the Claimants applied for default judgment. Ms. Bowen further deposed that she has been advised by Counsel and verily believes that the Defendants had at all material times every intention of vigorously defending the Claimants' claim. She further states that she has been advised and verily believes that the necessary instructions were provided by the Defendants for the filing of the defence in the matter and the relevant information for the filing of the acknowledgement of service; however, the failure to file the acknowledgement of service on time was due to an administrative oversight. Ms. Bowen further deposed that Counsel for the Defendants having realised the

⁵ AXAHCV2009/0067 (delivered 28th October 2010, unreported).

non-compliance with CPR 9.3 made contact with counsel for the Claimants for the grant of an extension of time to file the acknowledgement of service and defence, however counsel for the Claimants noted that the request may have already been made for the grant of default judgment. Ms. Bowen stated that the failure to file the acknowledgement of service within the time specified was in no way intentional.

Discussion on Good Explanation for Failure to file Acknowledgment of Service

[27] It is clear that the explanation provided by the Defendants for their failure to file an acknowledgement of service within the time prescribed by CPR 2023 is administrative oversight on the part of their Counsel. It has been consistently held by the Court of Appeal that administrative oversight or inadvertence of counsel is not, without more, a good explanation to excuse the failure to comply with a rule or order, or practice direction.⁶

[28] In **Public Works Corporation v Matthew Nelson**,⁷ Pereira CJ adopted the pronouncements of the Judicial Committee of the Privy Council in **The Attorney General v Universal Projects Limited**,⁸ in relation to providing a good explanation under CPR 13.3. In **Universal Projects**, the Board was dealing with an appeal concerning the conditions to be satisfied for relief from sanctions under the Trinidad and Tobago Civil Procedure Rules. As it relates to providing a ‘good explanation’, after setting out submissions by the appellant, the Board stated:-

“The Board cannot accept these submissions. First, if the explanation for the breach...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.”

[29] In the present case, the Defendants offer nothing more to explain the failure to file an acknowledgement of service other than simply stating that it was an administrative oversight. No explanation has been provided that could perhaps

⁶ See: Anthony Clyne v The Guyana and Trinidad Mutual Insurance Company Limited GDAHCV2010/0011 (delivered 5th May 2010, unreported) at para. 18; Michael Laudat et al v Danny Ambo DOMHCVAP2010/0016 (delivered 15th December 2010, unreported) at para. 14.

⁷ DOMHCVAP2016/0007 heard together with Elton Darwton et al v Matthew Nelson DOMHCVAP2016/0008 (delivered 29th May 2017, unreported) at para. 14.

⁸ [2011] UKPC 37 at para. 23.

excuse such oversight by their counsel. Thus, without more, I am unable to conclude that the Defendants have provided a good explanation for their failure to file an acknowledgement of service.

- [30] Although I have found that the Defendants have not provided a good explanation for their failure to file an acknowledgement of service, this is not fatal to their set aside application. The Court still has to determine whether in the circumstances of this case, the default judgment should be set aside pursuant to CPR 13.3(1). If not so satisfied, the Court would then consider whether there are exceptional circumstances warranting the setting aside of the default judgment under CPR 13.3(3).

Whether the Default Judgment should be Set Aside

- [31] I have already found that the Defendants have a real prospect of successfully defending the Claimants' claim. Based on my discussion above, in my view, the Defendants' defence goes to the heart of the sustainability of the claim brought against them which is based on the operation and membership of an association. The Defendants have challenged the lawfulness of the United Taxi Association and any purported election by their contention that the parties are in fact members and officers of a company governed by its Bye-Laws. In my view, the Defendants' defence has a real prospect of succeeding and demonstrates good reason for the Court to set aside the judgment by default obtained by the Claimants.
- [32] I have also found that the Defendants applied to the Court to set aside the default judgment as soon as reasonably practicable after finding out that judgment had been entered, the application having been made within days after finding out that judgment had been entered against them. Thus, the Defendants did not unduly delay in applying to have the default judgment set and this is a factor to consider when the Court is exercising its discretion under CPR 13.3(1).
- [33] The Defendants, however, have not provided a good explanation for failing to file their acknowledgement of service as the only explanation offered for this failure is mere 'administrative oversight' by their Counsel. Whilst this is a relevant consideration for the Court, the court must weigh this consideration among all the relevant factors in deciding the set aside application. Further, in exercising its discretion under CPR 2023, the Court should also keep in mind the overriding objective to deal with cases justly in its application of the rules.
- [34] In my view, having considered the Claimants' claim, the Defendants' proposed defence, the evidence before the Court and having made an evaluation of the Defendants' prospects of success, and that the Defendants applied to have the

judgment in default set aside as soon as reasonably practicable after finding out judgment had been entered, even though the Defendants have not provided a good explanation for their failure to file an acknowledgement of service, the scales of justice tip in favour of setting aside the default judgment. This is a matter where a serious dispute exists between the Parties and circumstances favour allowing the Defendants to defend the claim and have the dispute fully ventilated at trial.

[35] I would therefore order that the default judgment dated 5th December, 2024 be set aside.

Costs

[36] As it relates to the issue of costs, the general rule is that costs follow the event and that the unsuccessful party pay the successful party their costs. However, this is not a case where the general rule should apply. The Claimants have had a regularly obtained judgment set aside by the Court on application by the Defendants. In the circumstances, the Defendants should pay the Claimants' costs, such costs to be summarily assessed at the first case management conference of this matter unless earlier agreed by the Parties.

Disposition

[37] In light of the foregoing, I would make the following orders having regard to CPR 13.5:-

1. The judgment in default of acknowledgement of service dated 5th December, 2024 is set aside pursuant to rule 13.3(1) of the Civil Procedure Rules (Revised Edition) 2023 on the condition that the Defendants file and serve their defence as exhibited to the affidavit in support of the set aside application and as filed on 26th September, 2024 on or before Friday, 11th April, 2025.
2. The Claimants are at liberty to file a reply to the Defendants' defence within 14 days of service of the Defendants' defence.
3. The Defendants shall pay costs to the Claimants such costs to be summarily assessed at the first case management conference of this matter unless earlier agreed by the Parties.
4. The matter shall be set down for case management on 28th May, 2025.

[38] I wish to thank learned Counsel on both side for their assistance to the Court on this application.

Carlos Cameron Michel
High Court Master



By the Court

Registrar