

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

GRENADA

CLAIM NO. ANUHCV2023/0524

BETWEEN:

- 1. KEVIN SWALES**
- 2. CHARLES SWALES**

Claimants

and

LYNDON LANGDON

Defendant

Appearances:

Mr. Jerry Edwin for the Claimant

Mr. Ruggles Ferguson KC, with him, Ms. Lawrene Griffith for the Defendant

2024: April 18, 22.

DECISION

- [1] **MICHEL M:** Before the Court was an application by the Defendant to set aside the judgment in default of defence obtained by the Claimants on 9th January 2024. The application is vigorously opposed by the Claimants.

Background

- [2] By claim form and statement of claim filed on 24th October 2023, the Claimants commenced proceedings against the Defendant, seeking the sum of £344,123.67 being a debt allegedly due and owing by the Defendant to the Claimants, together with interest and costs.

- [3] The Claimants filed an affidavit of service evidencing service of the claim on the Defendant on 7th December 2023. On 21st December 2023, the Defendant filed an acknowledgment of service.
- [4] Pursuant to rule 10.3 of the **Civil Procedure Rules (Revised Edition) 2023** ("CPR"), the Defendant was required to file a defence to the Claimants' claim 28 days after service of the Claimants' claim on him. Therefore, the last day for the Defendant to file his defence was 5th January 2024. No defence was filed by the Defendant within the time limited by the rules.
- [5] On 9th January 2024, the Claimants filed a request for judgment in default of defence. In their request, the Claimants claimed the East Caribbean Dollar (EC) equivalent of the sum of £344,123.67 at the exchange rate of £1 = EC\$3.44, totaling EC\$1,183,785.42. The request also sought fees, costs and interest from the date of issue of the claim to the date of the request in the sum of EC\$6,227.04. Judgment in default of defence was entered for the Claimants by the Court Office for the sum of \$1,195,832.46.
- [6] On 12th January 2024, the Defendant filed a notice of application pursuant to rule CPR 13.2 for an order setting aside the default judgment and extending the time to file and serve his defence. The application was supported by the affidavit of the Defendant and a draft defence was exhibited to the affidavit. The Defendant filed a supplemental affidavit together with an exhibit on 8th February 2024. The Defendant's set aside application came on for hearing on 12th February 2024 and on that day the Court issued directions for the hearing of the application.
- [7] The Defendant subsequently amended his notice of application to set aside the default judgment on 22nd February 2024 to indicate that the application was being made pursuant to CPR 13.3(1) and 13.3(3). The Claimants filed a notice of opposition to the Defendant's application and an affidavit in response to the application on 23rd February 2024. On 26th February 2024, the Defendant filed an affidavit together with exhibits in reply to the Claimant's affidavit in response. The Defendant filed written submissions in support of his application on 26th February 2024, the Claimant filed written submissions in relation to the application on 11th March 2024 and the Defendant filed submissions in reply on 15th March 2024.

- [8] All of the above documents have been read and considered in determining this application.

The Defendant's Set-Aside Application

- [9] The grounds of the Claimant's amended set aside application filed on 22nd February 2024 are:

- i. The Defendant has a good explanation for the failure to file his Defence within the time specified by the rules;
- ii. The Defendant applies to the court promptly and soon as is reasonably practicable;
- iii. The Defendant has a real prospect of successfully defending the claim; and
- iv. There are exceptional circumstances which warrant the setting aside of the judgment."

- [10] Although the grounds of the Defendant's application have been framed under the discretionary provisions of CPR 13.3(1) and 13.3(3) on the basis that the default judgment was regularly entered, when considering that Defendant's affidavit evidence and written submissions, it is clear that the Defendant is also asserting that the default judgment must be set aside because it is irregular. This therefore engages the Court's consideration of CPR 13.2

- [11] I will first consider the Defendant's application pursuant to CPR 13.2.

Whether the Default judgment must be set aside

- [12] CPR 13.2 provides:

- "13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –
- (a) a failure to file an acknowledgment of service – any of the conditions in rule 12.4 was not satisfied;
 - (b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.

(2) The court may set aside judgment under this rule on or without an application.” (Emphasis added).

[13] The provisions of CPR 13.2 are mandatory. If all the conditions under CPR 12.4 or CPR 12.5 have not been satisfied, the Court must set aside the default judgment.

[14] The specific rule that is engaged for the Court’s consideration in this case is CPR 13.2(1)(b) as default judgment was obtained for the Defendant’s failure to file a defence. The rule provide that the court must set aside a judgment entered for failure to file a defence if any of the conditions in rule 12.5 were not satisfied.

[15] CPR 12.5 provides

- “12.5 The court office at the request of the claimant must enter judgment for failure to defend if –
- (a) (i) the claimant proves service of the claim form and statement of claim or proves that service is dispensed with; or
 - (ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;
 - (b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
 - (c) the defendant has not –
 - (i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6)); or
 - (ii) (if the only claim is for a specified sum of money) filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or
 - (iii) satisfied the claim on which the claimant seeks judgment;
 - (d) (where necessary) the claimant has the permission of the court to enter judgment; and
 - (e) the claim is not a claim listed under rule 12.2 in which default judgment may not be obtained.

[16] A default judgment that has been entered in circumstances where the conditions under CPR 12.4 or 12.5 were not met, will render the judgment irregular and it must be set aside. Thus the Court’s power to set aside an irregular default judgment is made pursuant to CPR 13.2. However, the judgment of the Court of

Appeal in **Deidre Pigott Edgecombe et al v Antigua Flight Training Centre**¹ makes it clear that the Court still retains an inherent jurisdiction to set aside an irregular judgment or one which may be considered a nullity. Thus, although the conditions under CPR 13.2 may not be met in that the default judgment was not irregularly obtained, the Court has an inherent jurisdiction to set aside a default judgment *ex debito justitiae* or as a matter of right where the default judgment is irregular or a nullity.

[17] Turning back to the facts of this case, in my view, there is no basis to set aside the default judgment pursuant to CPR 13.2. The Claimants, in requesting judgment in default of defence, satisfied all the conditions under CPR 12.5 and no complaint is made by the Defendant in this regard. The Defendant filed an acknowledgement of service; the time for filing a defence had expired; and no defence had been filed by the Defendant. None of the other conditions under CPR 12.5 were applicable to this case.

[18] The Defendant's affidavit evidence and written submissions raised several assertions that the Claimant's claim did not comply with the provisions of CPR 8.6 and 8.7 rendering the claim irregular. Particularly, that the Defendant alleged that the Claimants failed to include in the claim form or in the statement of claim a statement of all the facts on which they rely and the Claimants failed to identify in or annex to the claim form or the statement of claim, the documents which are necessary to the Claimants' case.

[19] In response to this contention, learned counsel for the Claimants argued that the Claimants' claim disclosed the facts of the claim that the Defendant was expected to meet and the Claimants were not required to evidence the factual assertions in their claim at this stage in the proceedings, as these are matters left for fleshing out in witness statements and disclosure.

[20] The Defendant also argued that the Claimant did not comply with CPR 12.12 for interest to be awarded on the default judgment.

¹ ANUHCVP2015/0005 (delivered 26th June 2015, unreported).

[21] In my view, none of these matters render the default judgment a nullity or irregular, liable to be set aside *ex debito justitiae*. The Court should not mechanically be setting aside the default judgment because of procedural irregularity. The default judgment would only be liable to be set aside if it is an irregular judgment or it is a nullity.² This is not the position in the present case and in the circumstances the Defendant having failed to demonstrate that the default judgment is irregular pursuant to CPR 13.2 or that the judgment is a nullity, warranting the Court's inherent jurisdiction to set aside the default judgment, the Defendant must have resort to the discretionary provides under CPR 13.3 to seek to have the regularly obtained default judgment set aside.

[22] I will therefore consider whether the default judgment should be set aside pursuant to CPR 13.3.

Whether the Default Judgment should be set aside pursuant to CPR 13.3(1)

[23] A defendant who seeks to set aside a regularly entered default judgment must persuade the court to exercise its direction to set aside the default judgment pursuant to the discretionary provides of CPR 13.3. The rule 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.

² See *Antigua Flight Training Center v Deidre Pigott Edgecombe et al* ANUHCv2020/0017 (delivered 22nd October 2021, unreported).

- [24] In the case of **Rosemarie Ryan v George v George**,³ this Court explained that CPR 13.3(1) is effectively a gateway provision which a defendant must satisfy for the court to determine whether it should exercise its discretion to set aside a default judgment. As was explained in the decision, 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 setting aside of the default 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 will go on to 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 whether the defendant has given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.
- [25] CPR 13.3(2) does not make it mandatory to consider the factors under sub-rules (a) and (b) in order to set aside the default judgment pursuant to CPR 13.3(1), nor does it appear to restrict the Court to only consider those factors when deciding to set aside a default judgment pursuant to CPR 13.3(1). It simply provides that the Court may consider the factors.
- [26] Unlike the old rule 13.3(1) of the **Civil Procedure Rules 2000**, the provisions of rule 13.3(1) and (2) of the **Civil Procedure Rules (Revised Edition) 2023** are not conjunctive; once a defendant satisfies the court under CPR 13.3(1) that it has a real prospect of successfully defending the claim, the failure of a defendant to satisfying one of the considerations under CPR 13.3(2) is not automatically fatal to its application. The Court is only guided by the considerations under CPR 13.3(2) in exercising its discretion to set aside a default judgment. In applying the rules, the court is required to bear in mind the overriding objective under CPR 1.1.

³ ANUHCv2023/0340 (delivered 19th February 2024, unreported).

- [27] In deciding whether to exercise its discretion to set aside the default judgment, the Court must therefore first consider whether the Defendant has a real prospect of successfully defending the claim.

Whether the Defendant has a real prospect of defending the Claim

- [28] In **Sylmord Trade Inc. v Inteco Beteiligungs Ag**,⁴ an appeal arising from the dismissal of an application to set aside a default judgment, Michel JA cited the principles laid down by George-Creque JA in the case of **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste**⁵ (a case dealing with summary judgment) to outline the approach taken by the court in considering whether a Defendant has a real prospect of defending a claim. Michel JA stated:

“The approach taken by our court to the issue of “real prospect of successfully defending the claim” in the case of **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste** ³ [Saint Lucia High Court Civil Appeal SLUHCV2009/0008 (delivered 11th January 2010, unreported), albeit in the context of summary judgment, would appear to vindicate the conclusion reached by trial judge in the present case. George-Creque JA, who delivered the judgment of the Court, opined that the court had to consider the issue in the context of the pleadings and such evidence as there is before it and determine on this basis whether the defence has a real (as opposed to a fanciful) prospect of success and that if at the end of the exercise the court arrives at the view that it would be difficult to see how the defendant could establish its case then it is open to the court to enter summary judgment. In the context of rule 13.3(1), it would be open to the court to refuse to set aside a default judgment.”

- [29] Thus, in determining whether the defendant has a real prospect of successfully defending the claim the Court has to be satisfied that the Defendant has a real as opposed to a fanciful defence. As was echoed by Pereira CJ in **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste**, real in this context does not mean, real and substantial, nor does it mean that a court will only find that the Defendant has no real prospect of success if the defence is bound to fail at trial. A defendant’s proposed defence should be one that is more than merely arguable.

⁴ BVIHCV2013/0003 (delivered 24th March 2014, unreported).

⁵ Saint Lucia Civil Appeal No. 8 of 2009 (delivered 11th January 2010, unreported).

[30] As was summarized by Moore-Bick J in **International Finance Corporation v Utefaxicia Spril** [2001] CLC 1361:

“A person who holds a regular judgment, even a default judgment, has something of value, and in order to avoid injustice, he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice in favor of setting the judgment aside... the expression “realistic prospect of success” in this context means a case which carries a degree of conviction.”

[31] Having considered the Defendant’s proposed defence to the Claimant’s claim in and the affidavit evidence before the Court, I am of the view that the Defendant has a real prospect of defending the Claimants’ claim.

[32] The Claimants’ case is that in March 2022 the Defendant solicited an unsecured personal loan from the Claimants and represented to them that he was seeking the loan to invest in his carnival band. They allege that between the period 5th April 2022 and 31st January 2024 they loaned the Defendant the sum of £344,123.67. They further stated that on the Defendant’s instructions the loan was disbursed by (a) payments to third parties on behalf of the Defendant for services and material provided to the Defendant’s mas band and (b) direct payments to the Defendant. The Claimants allege that on numerous occasions the Defendant acknowledged his indebtedness to the Claimants including through written messages. They allege that the Defendant represented and agreed that he would commence repayment of the loan in August 2022. The Claimants allege that in breach of his contractual obligation to commence repayment of the loan in August 2022 and despite numerous demand from the Claimants and promises by the Defendant, the defendant did not make any payments towards liquidating his indebtedness to the Claimants.

[33] In his proposed defence to the Claimants’ claim, the Defendant denies that he solicited personal loans from the Claimants as alleged in their statement of claim and denies the sum of £344,123.76 together with interest is owed to the Claimants and puts the Claimants to strict proof of the said debt.

- [34] The Defendant alleges that in or about December 2021 he and the 2nd Claimant developed a certain close personal relationship and had expressed that she wanted to assist him with the operation of his carnival band and had assured him that he did not have to worry to repay her.
- [35] The Defendant pleads that the 2nd Claimant by her conduct expressed and implied, led him to believe that she was at liberty to offer financial assistance which was intended to be gifts. He alleges that, save and except a letter of introduction which was prepared by the 2nd Claimant and emailed to the Defendant to present to the 1st Claimant, he had no dealings with the First named Claimant as it relates to monies paid for the Band.
- [36] The Defendant states at paragraph 2(ix) of his proposed defence that between March 2022 and August 2022, the 2nd Claimant made contributions to him in cash by way of bank transfer and payments to suppliers. The Defendant asserts however that at no time did the 2nd Defendant state that he was responsible for the repayment of the monies advanced. He further avers that there was no agreement, meeting of the minds or intention to create legal obligations that the monies and payments made were loans to be repaid after the carnival season. He avers in his proposed defence that it to be a personal gesture by 2nd Defendant who, he states, consistently told him that this was a contribution, and he need not worry about repaying same.
- [37] The Defendant states that he trusted and relied on the 2nd Claimant and did not obtain copies of invoices, receipts and confirmation of payments to third parties, to date the Second named Claimant has not provided any documentation to the Defendant on the sums spent. He further alleges that if it had been made clear to him that he had to repay the sums he would not have accepted the money and would have restricted the size of his band and not incur additional costs.
- [38] He alleges that despite the offer of generosity from the 2nd Claimant, in the course of dealings he told the 2nd Claimant that he will repay the monies wired to him and the payment to a third party for costume accessories and that he will do so when the band became financially viable and this was mutually understood.

- [39] The Defendant then pleaded a course of dealings between himself and the 2nd Defendant by which he alleges that he agreed to assist the 2nd Claimant with the repayment of 50% of a certain sum of money to the Claimant. The Defendant therefore asserts that the 2nd Claimant is wholly responsible to the First named Claimant for any debt incurred or monies spent.
- [40] Having considered the pleadings and the affidavit evidence, it is clear that the main distinction between the parties cases are that the Claimants are asserting that they loaned certain moneys to the Defendant which he has refused to pay back after demand for payment was made, whilst the Defendant's case is that the moneys were given to him by the 2nd Claimant as a gift. In support of these cases are competing factual assertions by the Claimants and the Defendant. The Defendant in his defence is essentially asserting that there was no business relations between himself and the Claimants but rather he and the 2nd Defendant had formed a close personal relationship and money was given to him by the 2nd Claimant on a personal gratuitous basis. Accordingly, his is not liable to the Claimants for money given to him.
- [41] Whilst the Defendant's defence and affidavit evidence does appear to suggest an admission of indebtedness to the 1st Claimant, when one considers it, it is entirely consistent with the Defendant's assertion that based on the alleged nature of the relationship between him and the 2nd Claimant, he received money from the 2nd Claimant and that it is the 2nd Claimant who is indebted to the 1st Claimant.
- [42] The question of whether the money was a loan or gift is clearly a matter in dispute between the parties. There are conflicting factual assertions raised by the parties which require testing of the evidence. The Defendant's defence, considered in the context of the Claimant's pleaded case and the evidence placed before the Court, is, in my view, not a fanciful one as is argued by the Claimants. If his assertions in his defence are proved at trial to be true, it may well result in judgment in this favor.
- [43] It is not the task of the Court on this application to decide whether it believes or disbelieves the defence put forward by the Defendant, unless it is manifestly

incapable of proof. To make such a finding would be to conduct a mini-trial. What the Court has to consider is whether the defence has a real prospect of success and the Court has already found that the proposed is not fanciful. The Court is satisfied that evidence placed before the Court by the Defendant contradicts the assertions of the Claimants, and supports the Defendant's case that there were no legal relations with the Claimants. These contradicting factual assertions can only properly be reconciled at a trial.

[44] In light of the foregoing, I am of the view that the Defendant has a real prospect of defending the claim.

[45] Having found that the Defendant has a real prospect of defending the claim, I will now consider whether the default judgment should be set aside under CPR 13.3(1), in doing so, I will also consider the factors under CPR 13.3(2).

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

[46] There is no disputing that the Defendant applied to the court as soon as reasonably practicable to have the default judgment set aside. The Claimants filed their request for judgment in default of defence on 9th January 2024 and three days later, on 12th January 2024, before the request for default judgment had even been processed by the Court Office, the Defendant made his application to set aside the default judgment.

[47] No complaint can properly be made by the Claimants about the promptness of the Defendant's set aside application. I am therefore satisfied that the Defendant applied to the Court to set aside the judgment as soon as reasonably practicable.

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

[48] The Defendant has essentially advanced three reasons for his failure to file a defence. First, that the Claimants failed to provide sufficient documents to support their claim, and he therefore had to obtain certain bank statements to

support his defence. He contended that it would take 21 days to obtain the information from the Bank and that the request was made during the holiday period and this would further delay the processing.

[49] Secondly, the Defendant contended that he had to travel to Trinidad on business after being served with the Claim. Thirdly, on 6th January 2024, whilst in Trinidad he received news that his grandfather, his primary caregiver from birth to adulthood had died. He stated in his affidavit in support of the set aside application that upon his return to Grenada on Tuesday 9th January 2014, he had to attend to bereavement matters and despite best efforts, he was unable to meet with his Attorney to review and sign his defence.

[50] The approach of our court in determining whether a defendant has a good explanation for its failure to file an acknowledgement of service or defence was discussed by Pereira CJ in the Court of Appeal's decision in **Public Works Corporation v Matthew Nelson**.⁶ At paragraph 14 of the judgment, Pereira CJ stated:

“In *The Attorney General v Universal Projects Limited*,³ 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

⁶ DOMHCVAP2016/0007 and Elton Darwton et al v Matthew Nelson DOMHCVAP2016/0008 (delivered 29th May 2017, unreported).

oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency.”

[51] I note by way of observation, the statement of Bannister J [Ag in **Inteco Beteiligungs AG v Sylmord Trade Inc**⁷ in relation to whether a defendant had a good explanation under the old CPR 13.3:

“... 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.”

[52] Having considered the Defendant’s affidavit I am of the view that the Defendant has not provided a good explanation his failure to file his defence.

[53] Firstly, the Defendant was served with a claim for a significant sum of money, £344,123.67. In light of these pending proceedings, I do not consider the Defendant to have a good explanation for failing to file his defence by saying he had to travel to Trinidad for work. It was the Defendant’s duty to ensure that his defence was timeously filed, whether he had overseas work obligations or not. In any event, it is apparent that the Defendant’s business trip to Trinidad was a short one as he was only there from 9th to 12th December 2023. It is also clear that the Defendant engaged counsel to represent him in this matter as he stated that on his return to Grenada on 12th December 2023, he consulted with his attorney who requested certain financial statements and particulars from the Bank. The Defendant filed an acknowledgement of service on 21st December 2023.

[54] The Defendant stated in affidavit in support of his application to set aside that he was again required to travel to Trinidad on work related matters on 4th January 2024, returning on 9th January 2024 and was restricted in providing the necessary information to his attorney to complete the preparation of his defence. The Defendant’s travel to Trinidad during this period would be of little consequence to

⁷ At para. 5.

the filing of his defence as his defence was due for filing on 5th January 2024. Therefore his time in Trinidad after this date had no bearing on his ability to file his defence. In any event I am not of the view that without more, having to travel for work for a short period during the 28-day period for filing a defence is a good explanation for the failure to file a defence.

[55] As to the matter of the death of the Defendant's grandfather, whilst the Court can understand the grief this would cause, it is of no assistance to the Defendant in explaining why he failed to file his defence. I would reiterate that the Defendant's defence was due for filing by 5th January 2024. The Defendant's evidence is that he received news of the passing of his grandfather on 6th January 2024 and returned to Grenada on 9th January 2024. This does not account for the period within which the defence was to be filed.

[56] The Defendant's strongest explanation for his failure to file his defence relates to his contention that he had to obtain statements from the Bank to provide to his counsel to file his defence. However, having considered the circumstances of the case, I do not consider that this is a good explanation for his failure to file his defence. Firstly, it is noted that the Defendant has given no timeline as to when the request was made to the bank for the statements. This kind of particularity is crucial for the court to consider whether the explanation proffered is a good one. Further, in the Defendant's affidavit in support of his set-aside application, he stated that he still has not obtained the statements from the bank. However, the Defendant has furnished the court with a complete draft defence. In my view, nothing in the Defendant's evidence or draft defence demonstrates the relevance of the bank statements for the filing his defence. In fact, it is obvious that the statements from the Bank were not necessary for the Defendant to file his defence and the defendant has provided no evidence to demonstrate otherwise.

[57] Taken individually, or cumulatively, the matters set be the defendant in my view do not provide a good explanation for his failure to file his defence.

Whether the Judgment should be set aside

- [58] Although I have found that the Defendant has not provided a good reason for his failure to file a defence, this is not fatal to his set aside application. It is just one of the considerations the court may have regard to in exercising its discretion to set aside the judgment.
- [59] The Defendant made a number of further arguments as to why it would be unjust to allow the judgment to stand. Learned King's Counsel for the Defendant argued orally that the Claimants' claim is essence a claim for breach of contract, as they allege that money was lent to the Defendant and he has not paid it back. Learned King's Counsel for the Defendant argued however that the Claimants have failed to plead any facts about the alleged contract to lend money to the Defendant. He argued that the Claimants have not pleaded when the alleged contract to loan money to the Defendant was entered into, and that the Claimants have not pleaded the terms of the alleged contract to lend money to the Defendant nor have they pleaded the nature of the alleged contract, whether oral, written, or partly oral and partly written. He argued that the Claimants have not sought to evidence the alleged loan made to the Defendant.
- [60] I am of the view that these matters properly go to the issue of whether the Defendant has a real prospect of defending the Claimant's claim and would not be a separate basis upon which the judgment should be set aside. Any lack of specificity in the Claimant's pleading in my view, would support the Defendant's contention that money he received from the 2nd Claimant was a gift, and that there was no agreement, meeting of the minds or intention to create legal obligations that the monies and payments made were loans to be repaid by the Defendant to the Claimants.
- [61] Learned King's Counsel for the Defendant also argued that the Claimants have brought a claim against the Defendant for over EC\$1 million but have provided no particulars and evidence to substantiate the sums claimed. He argued that there was no material before the Court Office to enter a default judgment for the Claimants for a specified sum of money as the sum claim was unsubstantiated.

- [62] Learned counsel for the Claimants contended in response however that if the Court is concerned that judgment ought not to have been entered for a specified sum, the Court has the power to vary the default judgment so that judgment is entered for the Claimants for an amount to be decided by the Court.
- [63] On this is a point, I consider that counsel on both sides may both be correct. I am of the view that it is doubtful whether judgment ought not to have been entered for the Claimants for a specified sum but rather for an amount to be decided by the Court. However, this does not warrant the setting aside of the default judgment, and learned counsel for the Claimants is correct that the Court has the power to vary the default judgment.
- [64] The Claimants' satisfied the conditions for the entry of the default judgment when the request was made to the Court Office. A default judgment is conclusive of the issue of a defendant's liability on claimant's pleaded case. At an assessment of damages hearing, the issue for the court is how much compensatory damages is due to the claimant upon the evidence adduced by the claimant in support its claim. Therefore, if the judgment should not have been entered for a specified sum, the judgement could be varied to be judgment for an amount to be decided by the court. At an assessment, the Claimants would therefore have to prove the sums claimed against the Defendant.
- [65] In the present case however, based on the Defendant's defence, there is a live factual dispute as to the issue of the Defendant's liability on the claimant's claim. The Defendant is disputing his liability to pay any sums to the Claimant on the basis that the money he received were not a loan from the Claimants which he was to repay. Therefore, it is not the quantum of the Claimant's claim that is truly in issue.
- [66] Having considered the foregoing matters, I am satisfied that the default judgment should be set aside. The Defendant has demonstrated that he has a real prospect of successfully defending the claim. The claim is one which is highly fact sensitive with competing factual assertions which can only properly be interrogated after full case management of the matter and testing of the evidence at a trial. The defendant's explanation to for his failure to file his defence was lacking, however

the Defendant promptly applied to set aside the default judgment, three day after the request was made and only 7 days after the deadline for filing his defence. Having considered all the relevant circumstances of the case under CPR 13.3(1) and (2), in exercising my discretion under those rules and in so doing considering the overriding objective to deal with cases justly, I am of the view that the justice of the matter tips in favour of setting aside the default judgment.

- [67] In light of my above findings, there is no need for the Court to consider whether there are exceptional circumstances warranting the setting aside of the default judgment under CPR 13.3(3).

Costs

- [68] The Defendant has been successful on his application to set aside the default judgment, however I am of the view that this is not one of the cases where costs should follow the event as the Court has exercised its discretion to set aside a regularly obtained default judgment. I would therefore award costs to the Claimant on this application, and I would summarily assess such costs in the sum of \$1,000.00.

Disposition

- [69] In light of the foregoing, and having regard to CPR 13.5, I would make the following orders:
- (1) The judgment in default of defence dated 9th January 2024 is set aside pursuant to rule 13.3(1) of the Civil Procedure Rules (Revised Edition) 2023 on the condition that the Defendant files and serve his defence and counterclaim as exhibited to his affidavit filed in support of the set aside application, on or before Thursday, 2nd May 2024.
 - (2) Thereafter the matter shall proceed in accordance with the **Civil Procedure Rules (Revised Edition) 2023**.
 - (3) The Defendant shall pay the Claimants costs on this application summarily assessed in the sum of \$1,000.00, such costs to be paid within 14 days of the date of this order.
 - (4) The matter shall be set down for management on a date to be fixed by the Registrar of the High Court.

[70] I wish to thank learned counsel on both sides for their helpful oral and written submissions.

Carlos Cameron Michel
Master

By the Court

Registrar