

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

**GRENADA**

**CLAIM NO. ANUHCv2023/0376**

**BETWEEN:**

**[1] ATLANTIC PARTNERSHIP ARCHITECTS INC.  
[2] JS CONSTRUCTION LTD**

Claimants

**and**

**JUDITH MC GREGOR**

Defendant

**Appearances:**

Ms. Chandel Delzin-Bartholomew for the Claimant  
Mr. Kadeem Strachan for the Defendant

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2024: May 21;  
June 6.

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**ORAL DECISION**

- [1] **MICHEL M:** The Claimants commenced these proceedings against the Defendant claiming the sum of \$17,168.59 being monies allegedly due and owing in the form of professional fees to the 1<sup>st</sup> Claimant for the rendering of architectural services, including designs and drawings for a residential building at Egmont, Petit Calivigny, St. George's; and the sum of \$241,838.39 being monies due and owing under a written agreement dated December 2020 for the construction of the said residential building.
- [2] The Defendant failed to file an acknowledgement of service within the time limited by the **Civil Procedure Rules (Revised Edition) 2023** ("CPR"), and at the request

of the Claimants, judgment in default of acknowledgement of service was entered for the Claimants against the Defendant. The Defendant now seeks to set aside the default judgment pursuant to CPR 13.3(1), (2) and (3) and 13.4

[3] For the reasons set out below, I would grant the Defendant's application to set aside the default judgment and order that the Defendant pay the Claimants the costs of this application, to be summarily assessed at the next hearing of this matter, if not sooner agreed.

[4] CPR 13.3 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."

[5] The starting point in considering a set aside application pursuant to CPR 13.3 is whether the Defendant has a real prospect of successfully defending the claim. I consider this to be the gateway provision to the court's exercise of its discretion to set aside a default judgment under the rule.

[6] In **Sylmord Trade Inc. v Inteco Beteiligungs AG**,<sup>1</sup> Michel JA accepted that the test for summary judgment as was stated by George-Creque JA in **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste**<sup>2</sup> would be similarly applicable to the Court's consideration of whether a defendant has a real prospect of successfully defending a claim in the context of the CPR Part 13. Michel JA stated:

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<sup>1</sup> BVIHMAP2013/0003 (delivered 24<sup>th</sup> March 2014, unreported).

<sup>2</sup> SLUHCVP2009/0008 (delivered 11<sup>th</sup> January 2010, unreported).

“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<sup>3</sup> [Saint Lucia High Court Civil Appeal SLUHCV2009/0008 (delivered 11<sup>th</sup> 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.”

- [7] The Court must therefore consider the parties pleaded cases and the evidence before it to make a determination whether the Defendant's proposed defence has a real, as opposed to fanciful prospect of success. The proposed defence must carry a degree of conviction,<sup>3</sup> as a defendant is asking the court to set aside a regularly obtained default judgment, which, notwithstanding its status as a judgment obtained by default, is something of real value.<sup>4</sup> If the Court considers that the defence obviously cannot be sustained or is otherwise an abuse of the process of the court, then the defence would have no real prospect of success and the set aside application should fail.
- [8] Having carefully considered the statement of claim and the defence and the affidavit evidence before the court, and the oral and written submissions of the parties, I am satisfied that the Defendant has a real prospect of successfully defending the claim.
- [9] Firstly, at paragraph 11 and 12 of its statement of claim, the Claimants assert that the Defendant unilaterally and unjustifiably terminated the agreement with the Claimants and exhibited correspondence from the Defendant in that regard. The Defendant denies the Claimants' assertions and relies on the contents of the letter to that effect. There is clearly a factual dispute as it relates to the termination of the agreement and competing assertions by the parties. It is a triable issue and it

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<sup>3</sup> International Finance Corporation v Utefaxicia Spril [2001] CLC 1361.

<sup>4</sup> Ibid.

would be wrong to conclude at this stage that the Defendant has no real prospect on the issue in light of the material before the court.

[10] Secondly, there is clearly conflicting evidence as to what amounts the Defendant is liable to the Claimants for based on Defendant's assertion of defective works. I do not agree with the submission of learned counsel for the Claimants to the effect that the written agreement having a mechanisms to deal with defects and remedying the same, and the Defendant having wrongfully terminated the agreement prior to this period of inspection, the Defendant cannot allege defects in the works done. The fact is that there was a termination of the contract and the question as to whether the termination was wrongful or not remains in issue. In circumstances where the contract was terminated, the provisions for remedying defects would no longer be applicable.

[11] At paragraph 15 of her defence, the Defendant asserts that there were several defects in the construction by the 2<sup>nd</sup> Claimant particularly as it relates to the construction of the Defendant's pool, to which end, she procured an assessment of the construction of the pool performed by the 2<sup>nd</sup> Claimant from the Grenada Bureau of Standards, which assessment allegedly revealed the integrity of the pool to be sub-standard.

[12] If at the trial of the matter the court were to conclude that there were defects in the work done by the 2<sup>nd</sup> Claimant, this would go to the heart of the Defendant's liability for payment to the Claimant. In my view, the defendant has pleaded placed sufficient evidence before the Court for the Court to conclude at this juncture, without having to conduct a mini trial, that the Defendant has a real prospect of successfully defending the claim.

[13] The conflicting assertions by the parties in relation to defects in the work done on the Defendant's property is even evident on the Claimants' own pleadings. At paragraph 19 and 20 of the Claimant's statement of claim, the Claimants pleaded:

"19. The parties engaged in discussion with a view to resolving the matter and appointed TVA Project Cost and Management to carry out a valuation of the works done by the Second

Claimant. A true copy of the said valuation report is hereto annexed and marked "K".

20. Notwithstanding the Claimants take issue with some of the matters raised in the TVA report in that more work was completed by the Second Claimant than as represented in the said report, and they reserve their right to make further representations in regard to thereto; they were prepared to meet with the Defendant to discuss the report and to obtain at least some interim payments to themselves. The Defendant refused to meet and otherwise refused and/or failed to pay the outstanding sums or any part thereof to the Claimants.

[14] In my view, the Defendant's defence raises issues when considered in the context of the Claimant's pleaded case and the evidence before the court, are appropriate for trial and if found in the Defendant's favour, would be determinative of the Defendant's liability to the Claimants. I am therefore of the considered view that the Defendant has a real prospect of defending the claim.

[15] Having made the above finding on the Defendant's prospects of success, 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).

[16] There is no disputing that the Defendant applied to the court as soon as reasonably practicable to have the default judgment set aside. The order for entry of judgment in default of acknowledgement of service was made by the Court Office on 24<sup>th</sup> October 2023 and was filed (and therefore served) via the E-Litigation Portal on 27<sup>th</sup> October 2023. Six days later, on 2<sup>nd</sup> November 2023 the Defendant filed the present application to set aside the default judgment.

[17] In the above circumstances, I am of the view that 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.

[18] As it relates to the question of whether the Defendant has given a good explanation for failure to file a defence, I am guided by the pronouncements of

Pereira CJ in in **Public Works Corporation v Matthew Nelson**.<sup>5</sup> At paragraph 14 of the judgment, Pereira CJ stated:

“In *The Attorney General v Universal Projects Limited*,<sup>3</sup> 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.”

[19] I note by way of observation, the statement of Bannister J [Ag in **Inteco Beteiligungs AG v Sylmord Trade Inc**]<sup>6</sup> 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.”

[20] Having considered the Defendant’s affidavit, I am of the view that the Defendant has not provided a good explanation her failure to file an acknowledgement of service.

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<sup>5</sup> DOMHCVAP2016/0007 and *Elton Darwton et al v Matthew Nelson* DOMHCVAP2016/0008 (delivered 29<sup>th</sup> May 2017, unreported).

<sup>6</sup> At para. 5.

- [21] As correctly pointed out by learned counsel for the Claimant, the prospect of litigation had been looming in this matter and there is clear evidence of pre-action discussions. The Defendant was duly served with the claim on 21<sup>st</sup> August 2024, and had 14 days to file an acknowledgement of service, which time would not begin to run until 16<sup>th</sup> September 2023 as the Defendant was served during the Court's long vacation. In such circumstances, it cannot be said that the Defendant's failure to complete a retainer with counsel, without more, is a good reason for her failure to file an acknowledgment of service within the time limited by CPR. Even without legal counsel, the Defendant had the option of filing her acknowledgement of service in person at the Service Bureau at the High Court but did not avail herself of that service.
- [22] Counsel for the Defendant would no doubt have been aware of the risk of the failure to acknowledge service within the time limited by the rules, which fate the Defendant unfortunately met as a result of counsel for the Claimant swiftly requesting default judgment as provided for by the rules.
- [23] It is noted that the Defendant did attempt to file a defence on the same day that the request for default judgment was made. This however was later in time to the request and after the conditions for the entry of default judgment had already crystallised.
- [24] Although I have found that the Defendant has not provided a good reason for her failure to file acknowledgement of service, this is not fatal to her set aside application. It is just one of the considerations the court may now have regard to in exercising its discretion to set aside a default judgment.
- [25] I have considered my finding that the Defendant has a real prospect of successfully defending the claim, in circumstances where there are factual assertions in dispute raised by the Defendant on her defence, supported by evidence. I have further considered that the Defendant attempted to file a defence on the same day the request for default judgment was made, and that the Defendant promptly applied to set aside the default judgment, which in my view

showed a strong intention to defend the claim. Therefore, having considered all the relevant circumstances of the case under CPR 13.3(1) and (2), and in exercising my discretion under the rule 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. I would therefore grant the Defendant's set aside application.

[26] The Defendant has been successful on her 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 Claimants on this application, to be summarily assessed at the next hearing of this matter if not sooner agreed.

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

- (1) The judgment in default of acknowledgement of service herein dated 25<sup>th</sup> October 2023 is set aside pursuant to rule 13.3(1) of the Civil Procedure Rules (Revised Edition) 2023 on the condition that the Defendant re-files and serve her defence and counterclaim as exhibited to her affidavit filed in support of the set aside application, on or before Monday, 18<sup>th</sup> June 2024.
- (2) Thereafter the matter shall proceed in accordance with the **Civil Procedure Rules (Revised Edition) 2023**.
- (3) The Defendant shall pay costs to the Claimants on this application to be summarily assessed at the next hearing of this matter if not earlier agreed.
- (4) The matter shall be set down for case management on a date to be fixed by the Registrar of the High Court in accordance with rule 27.3 of the Civil Procedure Rules (Revised Edition) 2023.

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

**Carlos Cameron Michel**  
**Master**

**By the Court**

**Registrar**