

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCv2023/0340

BETWEEN:

ROSEMARIE RYAN

Claimant

and

GEORGE & GEORGE CONSTRUCTION CO. LTD.

Defendant

Appearances:

Mr. Septimus Rhudd, Counsel for the Claimant

Mr. Justin L. Simon KC, with him, Mr. Jason Tiwari, Counsel for the Defendant

2024: February 8th, 19th.

ORAL DECISION

Introduction

- [1] **MICHEL, M.:** By claim form and statement of claim filed on 27th September, 2023 the Claimant commenced proceedings against the Defendant, a company engaged in construction and building activities and related construction services, for breach of a construction agreement. The claim was purportedly served on the Defendant on the same day it was filed. A notice of acting was filed by the legal practitioners for the Defendant on 4th October, 2023; however, no acknowledgement of service was filed by the Defendant within the time limited by the **Civil Procedure Rules (Revised Edition) 2023** ("CPR 2023"). On 23rd October, 2023 the Claimant made a request for judgment in default of acknowledgement of service, which was granted by the Court Office.
- [2] The Defendant, by notice of application filed on 24th October, 2023 now seeks to set aside the judgment in default of acknowledgement of service pursuant to CPR Part 13. The application is resisted by the Claimant.
- [3] When the Defendant filed its set aside application, it was apparent that the application was being made pursuant to the Court's discretionary powers under CPR 13.3. However, in its affidavit in reply to the Claimant's affidavit in response

to the set aside application and in its written submissions, the Defendant has also advanced the argument that the Court must set aside the default judgment pursuant to the mandatory provisions of CPR 13.2(1), on the basis that the default judgment was wrongly entered because the claim was not served on the Defendant in accordance with the CPR 5.7.

- [4] For the reasons set out in this decision, I am satisfied that there was effective service on the Defendant and that the default judgment should not be set aside as being irregular pursuant to CPR 13.2; however, I would grant the Defendant's application to set aside the judgment in default of acknowledgement of service pursuant to the discretionary provisions under CPR 13.3.
- [5] I will first consider the Defendant's application pursuant to CPR 13.2.

Service on the Defendant Company

- [6] 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).

- [7] The provisions of CPR 13.2 are mandatory, if all the conditions under CPR 12.4 or 12.5 as the case may be, were not satisfied, the Court must set aside the default judgment. It should be noted that the Court can exercise its power to set aside the default judgment under CPR 13.2 on or without an application. Therefore, notwithstanding that the Defendant's set aside application was made pursuant to CPR 13.3 and not CPR 13.2, the fact that the regularity of the default judgment has been brought into issue, the court can quite properly consider the issue.
- [8] The specific rule that is engaged for the Court's consideration is CPR 13.2(1)(a). The rules provides that the court must set aside a judgment entered for failure to file an acknowledgment of service if any of the conditions in rule 12.4 was not satisfied.
- [9] CPR 12.4 provides

“12.4 The court office at the request of the claimant must enter judgment for failure to file an acknowledgment of service if –

(a) the claimant proves service of the claim form and statement of claim;

(b) the defendant has not filed –

(i) an acknowledgment of service; or

(ii) a defence to the claim or any part of it;

(c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;

(d) (if the only claim is for a specified sum of money, apart from costs and interest), the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;

(e) the period for filing an acknowledgment of service under rule 9.3 has expired;”

[10] The Defendant’s contention is that it is a limited liability company, and the Claimant has not satisfied CPR 12.4(a) because it was not served with the Claimant’s claim in accordance with CPR 5.7 which deals with services on a limited company. In the circumstances, the Defendant submits that the judgment in default of acknowledgement of service must be set aside pursuant to CPR 13.2(1)(a).

[11] CPR 5.7 provides:

“Service on limited company

5.7 Service on a limited company may be effected –

(a) by leaving the claim form at the registered office of the company;

(b) by sending the claim form by courier, prepaid post or authorized electronic means, addressed to the registered office of the company;

(c) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim;

(d) by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company; or

(e) in any other way allowed by any enactment.”

[12] The essence of the Defendant’s argument is that the Claimant’s claim was served on the son of the managing director of the Company who, the Defendant argues, has no connection with this case and is not a director or officer of the Defendant.

Therefore, the Defendant contends that service on the son of the Managing Director of the Defendant Company offends the rules of service on a limited liability company. In the circumstances, the Defendant Company has asked this Court to set aside the default judgment as the service as relied on by the Claimant amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside.

- [13] Learned Counsel for the Claimant argued on the other hand that CPR 5.7 provides the ways by which service may be effected on a limited liability company. He argued that the applicable word in the rule is “may” as opposed to “shall” which would have made it mandatory to employ one of the five stated methods of service. Learned counsel for the Claimant argued that CPR 12.4(a) requires a claimant to prove service of the claim form and statement of claim and that the manner of proving service is not there set out so that service can, in the case of a limited company, be effected other than by any of the methods set out in paragraphs (a) to (e) of CPR 5.7. Learned Counsel for the Claimant argued that what is required is that the Claimant proves service of the claim documents on the Defendant. This, he submitted, is the critical consideration.
- [14] Learned Counsel for the Claimant, relying on several authorities including the decision of the Court of Appeal in **Jayson Stickings and Sharon Allen v RBC Royal Bank of Canada (now doing business as ACB Caribbean)**¹ argued in essence that the purpose of service of a claim on a defendant is to seek to ensure that a defendant is given proper notice of a claim and is given a reasonable opportunity to put forward a defence to the claim.
- [15] Learned counsel for the Claimant argued that notwithstanding the Defendant’s assertion on this application that there was no proper service on it, the Defendant Company did, by way of filing an acknowledgement of service on 24th October, 2023 formally acknowledge receipt of the claim form and statement of claim and thereby confirmed proof of service of the claim on it on 27th September, 2023 the same date stated in the affidavit of service filed by the process server on 2nd October, 2023. The Claimant also asked the Court to note that the legal representative of the Defendant filed a notice of acting on 4th October, 2023 seven days after service of the claim form. Learned counsel for the Claimant pointed out that this step could only be done with the E-Litigation Portal authorisation codes served with the claim form and statement of claim. Learned counsel for the Claimant also pointed out that in the affidavit filed in support of its set aside application, the affiant, Francisca Francis, legal clerk deposed that the documents had been received by the Defendant’s son on 27th September, 2023 thereupon the Defendant instructed its legal practitioner to enter an appearance in the matter.

¹ ANUHCVP2021/0023 (delivered, unreported).

[16] Learned Counsel for the Claimant also asked the Court to note that the entire premise of the Defendant's filed set aside application is on proper service of the claim on the Defendant Company. Learned counsel for the Claimant submitted therefore that the Court should not be in any doubt that the Defendant Company had proper notice of the claim documents from 27th September, 2023 when it was served. He argued that the acknowledgment of service filed on the Defendant's behalf settles that point and sufficiently proves service and having so acknowledged the service, and having indicated an intention to file a defence and counterclaim, the primary purpose of service, based on the authorities submitted, has been met. Learned Counsel argued that the Defendant Company had been effectively served and was fully aware of the details of the claim brought against it.

Discussion

[17] The recent decision of the Court of Appeal in **Edmund Estephan v McDowall Broadcasting Corporation (MBC) Limited**² is instructive in considering the issue of service. The respondent to the appeal (the defendant in the court below) made an application in the court below to strike out the appellant's claim on the basis that the court lacked the jurisdiction to try the claim due to prescription. One of the grounds of the application was that the claim was served on a receptionist at the appellant's place of business and not at its registered office. It was argued by the defendant that the claim was not served in the manner prescribed by CPR 5.7 and that since the time had already elapsed after filing the claim, the claim had become prescribed and could not be heard by the Court. The Court below agreed with the defendant and struck out the claimant's claim having formed the view that it was prescribed.

[18] After canvassing a number of authorities,³ Price-Findlay JA, delivering the decision of the Court of Appeal reasoned that, in view of the authorities on service and the purpose of service, and considering CPR 26.9 which empowers the Court to rectify matters where there has been a procedural error, service in the matter could be described as being procedurally irregular, however, it satisfied the purpose of service and engaged the attention of the respondent who filed an acknowledgement of service in the matter.

[19] At paragraph 31 of the Court of Appeal's decision, Price-Findlay JA stated:

² SLUHCVP2022/0002 (delivered 23rd August 2023, unreported).

³ Hoddinott v Persimmon Homes(Wessex) Ltd [2007] EWCA Civ 1203; Lapierre v Andrew (1983) 45 A.R. 220 (QB); Barbara Angela Reid v Melroc Investments Limited t/a Access Cambio [2019] JMSC Civ 244.

“The court must carefully examine CPR 5.7 and the Companies Act with respect to the issue of service and not nitpick in order to find technicalities which put litigants out of the doors of court. For true justice to be done matters must be allowed to come to court for final determination. Courts are interested in hearing substantive matters and unless a procedural breach proves fatal to a claim the court will use its powers under the CPR in order to have matters heard.”

[20] At paragraphs 35 and 36 of the judgment, Price-Findlay JA went on to state:

[35] It is clear that the respondent, in these proceedings, received the claim form and the documents and engaged the court by filing an acknowledgement of service as prescribed by the rules of court. The respondent was not only provided with the necessary information about the nature of the claim, but also that the claim had been filed within the jurisdiction, and that the court had processed the claim.

[36] In these circumstances, it would have been entirely appropriate for the learned master to exercise his discretion under CPR 26.9 and deem service of the documents on the receptionist as a procedural error capable of being corrected by the court.”

[21] I believe there are two important points to take away from this decision considering the authorities of this Court in **Jayson Stickings and Sharon Allen v RBC Royal Bank of Canada (now doing business as ACB Caribbean)**⁴ and the English authority of **Canada Goose UK Retail Ltd & Another v Persons Unknown and another**⁵ which were submitted by the Claimant and the English authorities of **Hoddinott v Persimmon Homes (Wessex) Ltd**⁶ which was referred to by the Court of Appeal in **Edmund Estephan**. Firstly, the purpose of service is to ensure that a defendant is given proper notice that a claim has been brought against it and is given a reasonably opportunity to put in a defence to the claim. Secondly, if there has been a procedural misstep in serving the claim, but the purpose of service has been fulfilled and there has been no prejudicial effect on the defendant occasioned by the procedural irregularity, then the court can exercise its powers under CPR 26.9 and put matters right.

[22] I turn back now to the provisions concerning service on a limited company. Section 513 of the **Companies Act, 1995**⁷ provides:-

⁴ ANUHCVP2021/0023 (delivered 6th July 2022, unreported).

⁵ s (2019) EWHC 2459 (QB).

⁶ [2007] EWCA Civ 1203.

⁷ Act No. 18 of 1995.

“513. A notice or document may be served on a company
(a) by leaving it at, or sending it by telex or telefax or by prepaid post or cable addressed to, the registered office of the company; or
(b) by personally serving any director, officer, receiver, receiver-manager or liquidator of the company.”

- [23] CPR 5.7 lists five ways in which a Claimant may serve a claim on a limited liability company. In the present case, the process served in his affidavit of service sworn to on 29th September, 2023 and filed on behalf of the Claimant on 2nd October, 2023 deposed that on 27th September, 2023 at the Defendant Company's place of business, he personally served the claim form, statement of claim and E-Litigation Portal authorisation codes on the Defendant company by handing the documents to Dave George Jr who identified himself to him and who acknowledge that he was authorized to accept service on the Defendant Company's behalf.
- [24] A notice of acting was filed on behalf of the Defendant on 4th October, 2023. In doing so, the Defendant would have required the E-Litigation Portal authorisation codes served with the claim to represent case for the Defendant on the E-Litigation Portal. On 24th October, 2023 the day after the 2nd request for judgment in default of acknowledgement of service was filed by the Claimant, an acknowledgment of service was filed on behalf of the Defendant in which the Defendant indicated that it received the claim form and statement of claim on 27th September, 2023 the same date that the processes served deposed in his affidavit of service that he served the Defendant Company. Further, the entire premise of the Defendant's application filed on 24th October, 2023 was that it did not file the acknowledgement of service through inadvertence compounded by personal and work issues affecting the legal clerk at the chambers of its legal counsel and by its legal representative being on sick leave.
- [25] A thorough examination of the Defendant's affidavit evidence would indicate that no prejudice was occasion to the Defendant by any irregularity in leaving the claim documents with the son of the managing direction of the Defendant Company at the Defendant's Company's place of business. It is clear that the purpose of service was accomplished as the Defendant had notice that the proceedings had been brought against it, which on the Defendant's own evidence, that notice was received on the same day that the claim was served at the Defendant's place of business. The failure of the Defendant to file its acknowledgement of service was not occasioned by any procedural misstep in leaving the claim form with the son of the Managing Director of the Defendant Company, but rather, on the Defendant's own evidence, it was in advertence of staff at chambers of the Defendant's Counsel. The Claimant was well aware of the proceedings that had been brought against it, had received the claim documents and had taken the steps to defend the claim. This can be gleaned from the Defendant's own affidavit evidence. Therefore, I am satisfied that any error of procedure by leaving the

Claimant's claim with the son of the managing director of the Defendant at the Defendant's place of business can be put right under CPR 26.9.

- [26] For the sake of completeness, I would indicate that the cases relied on by learned Counsel for the Defendant in their reply written submissions do not assist on this point. The cases of Dorothy Vendryes v Dr. Richard Keane and another⁸ and Kelvin John and Honora John v British American Insurance Company Limited⁹ concerned the failure of a claimant to serve the response pack together with the claim form and statement of claim. In those cases, the Courts considered that the failure to serve the response pack was an irregularity warranting the setting aside of the default judgments pursuant to CPR 13.2 (or its equivalent in the case of the Jamaican case of Vendryes v Keane). These decisions however were later disapproved by the Court of Appeal in Antigua Flight Training Centre v Deirdre Pigott Edgecombe.¹⁰ At paragraph 25 of the Court of Appeal's reasons for decision, Webster JA stated:

“Pulling all the strings together we found that a failure to comply with the mandatory requirement in rule 8.14 of serving the documents in the response pack with the claim form and statement of claim is an irregularity and not a nullity. If the claimant proceeds to enter a judgment in default of acknowledgment of service as in this case, the defendant can apply under rule 13.3(1) to set aside the default judgment and the court will consider the criteria in rule 13.3(1) for setting aside a default judgment and exercise its discretion in accordance with the CPR and the overriding objective. What the court cannot do is to mechanically set aside the default judgment as a nullity. The learned judge in this case, not having been alerted to the relevant authorities, took the wrong turn in setting aside the default judgment as a nullity without considering whether the circumstances gave rise to her having a discretion to exercise pursuant to the discretionary factors in rule 13.3(1) as distinct to her having no discretion under rule 13.2. This Court therefore set aside the learned judge's order made on 4th November 2019 and restored the default judgment entered on 21st August 2014.”

- [27] Turning back to the matter at bar, in light of the matters previously discussed, I would deem the service of the claim on the Defendant Company as good service. I also find that the Claimant proved service on the Defendant as required by CPR 12.4. In the circumstances, there is no basis to set aside the default judgment under CPR 13.2.

⁸ [2011] JMCA Civ 15.

⁹ ANUHCv2009/0320 (delivered 13th November 2009, unreported).

¹⁰ ANUHCv2020/0017 (delivered 22nd October 2021, unreported).

[28] I will now go on to consider the Claimant's application pursuant to the discretionary provisions of CPR 13.3.

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

[29] One of the notable revisions to the Civil Procedure Rules 2000 ("CPR 2000") concerned rule 13.3 which gave the Court the discretionary power to set aside or vary a regularly entered default judgment. The conditions under the former CPR 13.3(1) were conjunctive. For an application to set aside a default judgment to have been successful, an applicant had to satisfy all three conditions. As had been noted by Pereira CJ in Lindsay F.P. Grant et al v Tanzania Tobin Tanzil,¹¹ in relation to the former rule, the provisions of the CPR 2000 13.3(1) were unyielding and a failure to satisfy any one of the three conditions was fatal to the application.

[30] The revised CPR 13.3 provides the Court with greater flexibility in considering in application to set aside a default judgment, which in my view better enables the Court to exercise its discretion in a way that will further the overriding objective of dealing with cases justice and not be restrained in exercising its discretion by the former conjunctive requirements of the rule. The revised CPR 13.3:

"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.

[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 realistic 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 judgment pursuant to CPR 13.3(3)). If the court is satisfied

¹¹ SKBHCVP2020/0004 (delivered 6th July 2020, unreported) at para. 9.

that a defendant does have a realistic 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.
- [33] I will first consider whether the Defendant has a real prospect of successfully defending the claim.

Whether the Defendant has a realistic prospect of defending the Claim

- [34] The Defendant filed a defence and counterclaim on 25th October, 2023 two days after the Claimant requested judgment in default of acknowledgement of service. The Defendant also attached a draft defence and counterclaim to the affidavit of Dave George, Managing Director of the Defendant Company filed on 14th November, 2023 in answer to the affidavit in reply filed on behalf of the Claimant. I am satisfied that the Defendant has complied with CPR 13.4 and has met the real purpose of the rule in that it has placed before the Court its proposed defence to the Claimant's claim which the court is required to have regard to in determining the set aside application and in particular, determining whether the Defendant has a real prospect of successfully defending the Claimant's claim.
- [35] In **Sylmord Trade Inc. v Inteco Beteiligungs Ag**,¹² 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**¹³ (a case dealing with summary judgment) to define real prospect of successfully defending a claim. Michel JA stated:

¹² BVIHCV2013/0003 (delivered 24th March 2014, unreported).

¹³ Saint Lucia Civil Appeal No. 8 of 2009 (delivered 11th 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 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.”

- [36] The Claimant's claim is for breach of a construction agreement entered into between her and the Defendant for the construction of a 3-bedroom dwelling house for the Claimant. The essence of the Claimant's claim can be gleaned from paragraph 7 of her statement of claim. The Claimant contends that in breach of the construction agreement, the Defendant failed and/or refused to carry out and complete the construction work in a proper, efficient and workmanlike manner and the Defendant ceased showing up on the construction site with any regularity. She contended that she protested to the Defendant about the poor quality of the work being done on her premises but the Defendant ignored her complaints and protests and the Defendant eventually left the job with the work incomplete.
- [37] The Defendant has contended in its draft defence that the Claimant unilaterally terminated the construction agreement without legal justification and therefore it is the Claimant who is in material breach of the construction agreement. The Defendant contends that the Claimant prevented the Defendant from completing the remaining works on the dwelling house.
- [38] At paragraph 12 of its draft defence, the Defendant states that at all material times, the works carried out on the dwelling house were done in a proper, efficient, and workmanlike manner and reiterated that that Claimant terminated the construction agreement without legal justification and prevented the Defendant from completing the works.
- [39] The Defendant also has a draft counterclaim against the Claimant. In its proposed counterclaim, the Defendant alleges that as a result of the Claimant's unjustified and material breach of the construction agreement, the Defendant was prevented from completing the third stage of the construction agreement and that the Defendant has not been paid by the Claimant for the labour costs associated with

the painting for stage 3, despite completing the same. The Defendant also contends that it remains unpaid by Claimant for extra work completed on the dwelling house which were not covered by the agreement. The Defendant therefore seek to counterclaim for outstanding payments it alleges was due and general damages for breach of contract.

[40] It is clear having considered the draft defence in the context of the claimant's claim and the affidavit evidence, that this a fact sensitive dispute. The trial of this matter would require the trial judge to make findings of facts as to the quality of work done and whether it was the Defendant who abandon the job or whether the Defendant was prevented by the Claimant from completing the works without legal justification. The matter is also likely to involve expert evidence. If the Defendant's contentions as set out in its draft defence are true, then, in my view, the Defendant would have a real prospect of successfully defending the claim.

[41] Having found that the Defendant has a real prospect of successfully defending the Claimant's claim, I will go on to further consider whether the Court ought to exercise its direction and 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 Defendant applied to the Court as soon as reasonably practicable after finding out that judgment has been entered

[42] There is no question that the Defendant applied to the court as soon as reasonably practicable to have the default judgment set aside. The Claimant originally filed a request for judgment in default of acknowledgement of service on 13th October, 2023 and refiled its request on 23rd October, 2023. In its refiled request, it abandoned the portion of the claim for general damages to be assessed. On the next day, 24th October, 2023 the Defendant filed the present application, in which it sought an order declining the Claimant's request for judgment in default of acknowledgment of service. In substance, this was an application to set aside the default judgment which was dated 23rd October, 2023 and the Parties and the Court have proceeded on that basis.

[43] No complaint is made by the Claimant about the promptness of the Defendant's set aside application which it filed the day after the date of the default judgment. I consider that given the matters outlined above, the application being filed the day after the date of the default judgment, the Defendant applied to the Court as soon as reasonably practicable.

Whether the Defendant has given a good explanation for the failure to file an acknowledgement of service

[44] The initial affidavit filed in support of the Defendant's set aside application was sworn to by Francisca Francis, Legal Clerk at Wason & Company, Attorneys-at-law for the Defendant. Ms. Francis deposed that she has conduct of this matter. She stated that she was out of the country from 24th July, 2023 to 1st October, 2023 tending to her child's medical condition. She stated that she was instructed by Counsel with conduct of the matter for the Defendant to enter an appearance in the matter, however, in light of the fact that she was still tending to her child and handling multiple ongoing matters, she inadvertently filed a notice of acting instead of an acknowledgement of service. She stated further that Counsel for the Defendant was outside of the jurisdiction due to medical and personal reasons and the Claimant then made its request for default judgment.

[45] The thrust of the Defendant's reasons for its failure to file an acknowledgment of service is that a notice of acting was inadvertently filed on 4th October, 2023 instead of an acknowledgement of service and it had not been noticed and the acknowledgment of service had not been filed as Counsel for the Claimant was on medical leave and the legal clerk with carriage of the matter was dealing with personal and other work matters.

[46] 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**.¹⁴ 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 is the failure to serve a defence

¹⁴ DOMHCVAP2016/0007 and *Elton Darwton et al v Matthew Nelson* DOMHCVAP2016/0008 (delivered 29th May 2017, unreported).

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.”

- [47] In **Michael Laudat et al v Danny Ambo**,¹⁵ which was referred to by Pereira CJ in **Public Works Corporation**,¹⁶ Edwards JA reminded legal practitioners of matters which would not be considered a good explanation to excuse non-compliance with a rule or order, or practice direction. The learned Justice of Appeal stated at paragraph 14 of the judgment that:

“Counsel do not have a good explanation which will excuse non-compliance with a rule or order, or practice direction where the explanation given for the delay is misapprehension of the law² (See Richard Frederick and Owen Joseph and others. St. Lucia Civ App No. 32 of 205 (unreported) 16/10/06; Pendragon International Limited and others v Bacardi International Limited, Anguilla Civ App No. 3 of 2007 (Unreported) 23/11/07), mistake of the law by counsel³ (See Donald F. Conway and Queensway Trustees, St Christopher and Nevis Civ App No. 11 of 1999 (Unreported) 3/4/2000); lack of diligence, volume of work, difficulty in communicating with client,⁴ (See John Cecil Rose and Anne Marie Rose. Saint Lucia Civ App No. 19 of 2003 (Unreported) 22/9/2003), pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence⁵ (See Mills v John, OECS Law Reports Vol.3 page 597 Per Liverpool JA; Vena McDougal and Reno Romain, Commonwealth of Dominica HCVAP 2008/003 (Unreported) 7/4/08) or inadvertence.⁶ (Anthony Clyne v The Guyana and Trinidad Mutual Insurance Company Limited, Grenada Civ. App No. 11 of 2010: (Unreported) 5/5/10)

- [48] Having considered the affidavit evidence and examining the explanations provided by the Defendant in the context of the authorities of emanating from the Court of Appeal, I am of the view that the explanation provided by the Defendants amounts to administrative deficiencies, or secretarial incompetence or inadvertence which the Court has stated is not an explanation that will excuse non-compliance with the rules of court.

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

¹⁶ At para. 19.

- [49] Notwithstanding the above, whether a Defendant has provided a good explanation is just one factor that the Court may have regard to. Unlike under the old rules, the failure to satisfy this consideration is not fatal to the application and in the absence of satisfying the Court that a good explanation has been provided, the court may still set aside the default judgment. In my view, in exercising its discretion, the Court must consider the matter in the round.
- [50] Examining the Claimant's explanation, although in light of the authorities, the explanation offered may not be recognized as good one, I note by way of observation, the statement of Bannister J [Ag in **Inteco Beteiligungs AG v Sylmord Trade Inc**¹⁷ 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.”

- [51] I am of the view that the explanation provided by the Defendant does not show any indifference to the risk that judgment might be entered. In fact, the evidence shows quite the opposite that the Defendant did intend to file an acknowledgement of service. I accept the Defendant's evidence that a notice of acting was filed inadvertently instead of an acknowledgment of service. It should be noted that CPR Part 63 outlines two scenarios in which a practitioner would be required to file a notice of acting. Firstly, where a party changes its legal practitioner, the new legal practitioner must file a notice of acting (CPR 63.2). Secondly, if a person who has previously acted in person instructs a legal practitioner, that practitioner must file a notice of acting (CPR 63.3). Otherwise, an acknowledgement of service is generally filed by a legal practitioner, unless the defendant is unrepresented, in which case they are required to give their address for service. I have found no requirement under the rules to file a notice of acting if the Defendant is represented by counsel when it enters an appearance in the proceedings. It is therefore certainly within the realm of possibilities that an error was made filing a notice of acting instead of an acknowledgement of service to enter an appearance for the Defendant in this matter.

¹⁷ At para. 5.

[52] In applying the provisions of CPR, the Court must always keep in mind the overriding objective to deal with cases justly. Having considered all the facts and circumstances of this case, I am satisfied that the Defendant has a real prospect of defending the claim, and that it applied as soon as reasonably practicable to set aside the default judgment. Although the Defendant has not provided a good explanation for its failure to file its acknowledgement of service as recognized by the authorities of this Court this is not fatal to the application and I am of the view that the justice of the matter tips in favour of setting aside the default judgment, taking into account all of the circumstances of the case. There are highly fact sensitive and legal issues in this case which warrant the setting aside of the default judgment.

[53] 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

[54] Although the Defendant has been successful on this application, I am not of the view that costs should follow the event. The Court has decided to set aside the Claimant's regularly entered default judgment to allow the Defendant to defend the claim, in those circumstances, the Defendant should pay the Claimant's costs of this application which I will summarily assess in the sum of EC\$1,500.00.

Disposition

[55] 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 dated 23rd 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 file and serve its defence and counterclaim as exhibited to the affidavit of Dave George filed on 14th November, 2023 on or before Monday 26th February, 2024.
2. The Claimant is at liberty to file a reply to the defence and shall file a defence to the counterclaim on or before 26th March, 2024.
3. The Defendant is at liberty to file a reply to a defence to counterclaim filed by the Claimant on or before 10th April, 2024.

4. The Defendant shall pay costs to the Claimant in the sum of \$1,500.00 on or before 5th March, 2024.
5. The matter shall be set down for case management on 24th April, 2024.

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

Carlos Cameron Michel
High Court Master

By the Court

Registrar