

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2022/0001

BETWEEN:

MALCOLM MADURO
(DBA SUNSHINE POWER BOAT RENTAL)

Appellant

and

DEPARTMENT OF CUSTOMS

Respondent

Before:

The Hon. Mr. Trevor Ward
The Hon. Mr. Paul Webster
The Hon. Mr. Eddy Ventose

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Ms. Mandy Hamarinesingh for the Appellant
Ms. Nicosie Dummett and Ms. Abayna Devonish for the Respondent

2023: May 25;
June 19.

Interlocutory appeal – Civil Appeal - Seizure and detention of vessel - Breach of statutory duty - Crown Proceedings Ordinance - Rules 13.2 and 13.3 of Civil Procedure Rules 2000 (“CPR”) - Return of goods – Natural justice - Default judgment - Whether the learned master was correct in finding that the default judgment was irregular on grounds that do not form part of CPR 13.2 – Damages - Exceptional circumstances – Whether the learned master was correct in finding that there were no exceptional circumstances to set aside the default judgment under CPR 13.3(2) - The use of Form 7 - Whether the learned master was correct in concluding that the use of Form 7 to request a default judgment for both a failure to acknowledge service and for a failure to file a defence was irregular - Whether the appellant

had to abandon his claim for any other relief other than a liquidated sum in order to obtain judgment in default of defence

On 20th March 2020, the appellant filed a claim form and statement of claim seeking various remedies against the respondent in respect of the detention of his vessel. These remedies included: (i) a declaration that the seizure and/or continued detention of his vessel by the respondent is unlawful; (ii) a declaration that the respondent is in breach of its statutory duty; (iii) a declaration that the respondent is in breach of its statutory duty by failing to institute court proceedings for the condemnation of the vessel within a reasonable time, delivery of the vessel or the sum of US\$130,000.00; (iv) the costs of import fees, shipping fees, customs and other duties for the importation of a new vessel, special damages at the rate of US\$1,200.00 per day from 27th October 2019 to today and continuing; and (v) damages, including aggravated damages, exemplary damages, further and/or other relief as the court may deem fit, interest, and costs.

The respondent did not file an acknowledgement of service or a defence. As a result, the appellant filed a request for default judgment against the respondent for failure to file an acknowledgement of service and defence. On 26th October 2020, judgment in default of acknowledgement of service and defence was entered against the respondent by the first master and the assessment of damages was ordered to be set for a date to be fixed by the Registrar of the High Court.

The assessment of damages came up for consideration on 18th May 2021 where directions for the filing of witness statements and submissions for the assessment of damages were given. Counsel for both parties were present. On 11th June 2021, the second master agreed to the consent order of the parties to vary the directions previously given. The appellant's witness statements and submissions were duly filed in accordance with the amended directions of the second master. Another consent order was accepted by the second master on 14th July 2021 at a hearing at which both parties and their counsel were present. The assessment was adjourned to 29th September 2021. At the adjourned hearing, the Solicitor General requested time to review the file and to make submissions, if necessary. The second master gave further directions for the respondent to file Form 31 (Notice of Intention to be heard on the Assessment) and extended the time for the respondent to file its witness statement and submissions in respect of the assessment of damages. The matter was further adjourned to 1st December 2021. The respondent filed a Form 31 on 7th October 2021.

On 19th November 2021, the respondent filed an application to set aside the default judgment on the basis that exceptional circumstances exist, including: (1) it was in the public interest that justice be done between the parties and considering the reputation of the Territory of the Virgin Islands as a financial services jurisdiction; (2) the respondent lawfully detained the appellant's vessel as a result of an international and inter-jurisdictional law enforcement operation which took place on 27th October 2019 and that the vessel was subject to forfeiture under the Customs Management and Duties Act 2010 and the Drug Trafficking Offences Act 1992; and (3) the respondent has a good defence with a reasonable prospect of success.

The application to set aside the default judgment came before the learned master on 25th January 2022 and in a judgment delivered on 22nd February 2022, the learned master: (1) set aside the default judgment on the basis the default judgment was irregularly obtained; (2) granted permission to the respondent to file and serve its defence to the claim; and (3) made no order as to costs.

Being dissatisfied with the decision of the learned master, the appellant filed a notice of appeal on 2nd May 2022 challenging several findings of the learned master's decision. On 12th May 2022, the respondent filed a counter notice of appeal citing several grounds of appeal. The issues arising for this Court's determination are: (1) whether the learned master was correct in finding that there were no exceptional circumstances to set aside the default judgment under CPR 13.3(2); (2) whether the learned master was correct in finding that the default judgment was irregular on grounds that do not form part of CPR 13.2; (3) whether the learned master was correct in concluding that the use of Form 7 to request a default judgment for both a failure to acknowledge service and for a failure to file a defence was irregular; (4) whether the appellant had to abandon his claim for any other relief other than a liquidated sum in order to obtain judgment in default of defence and (5) whether the learned master erred in setting aside the default judgment on grounds not raised during the hearing without affording the parties an opportunity to make submissions before adjudicating upon those grounds.

Held: allowing the appeal and making the orders at paragraph 50 of this judgment that:

1. The general rule is that an applicant seeking to set aside a default judgment would have to satisfy the court of all the grounds set out in CPR 13.3(1). This Court has repeatedly stated that a failure to satisfy any one of the conditions set out in CPR 13.3(1) is fatal to the application. The only refuge for an applicant who cannot satisfy all the conditions in CPR 13.3(1) is to satisfy the court that there exist exceptional circumstances to justify the exercise of discretion to set aside the default judgment under CPR 13.3(2). There is nothing preventing an applicant who knows that they cannot satisfy all the conditions set out in CPR 13.3(1) from seeking to set aside a default judgment based solely on CPR 13.3(2). If an applicant decides that their application to set aside default judgment under CPR 13.3(1) is hopeless, they can apply to set aside the default judgment solely on the ground set out in CPR 13.3(2). In this case, the respondent's affidavit in support of the CPR 13.3(2) application did not have any evidence of the requirements set out in CPR 13.3(1) to enable the learned master to decide the application on that basis. The master was therefore wrong to conclude that the respondent could not ground its application under CPR 13.3(2) unless there was first a consideration of CPR 13.3(1).

Rule 13.3 (1) of the Civil Procedure Rules 2000 considered; **Rule 13.3 (2)** of the Civil Procedure Rules 2000 considered.

2. Exceptional circumstances cannot be equated to showing a realistic prospect of success. It should not be construed that providing evidence of exceptional circumstances under CPR 13.3(2) equates to demonstrating that the defence

has a realistic prospect of success under CPR 13.3(1)(c). Once the master concluded that the respondent had not satisfied him that there existed any exceptional circumstances to justify setting aside the default judgment under CPR 13.3(2), there was no basis in CPR 13.2(1) on which the master could properly have held that the procedural irregularities that he found were sufficient to set aside the default judgment. Even if these were to be considered as irregularities, they were certainly not nullities that would form the basis on which the court must set aside the default judgment in accordance with CPR 13.2(1). The master therefore erred in setting aside the default judgment on grounds not set out in CPR 13.2(1).

Carl Baynes v Ed Meyer ANUHC VAP2015/0026 (delivered 30th May 2016, unreported) followed; **Tanzania Tobing Tanzil v Lindsay F.P. Grant et al** SKBHCV2017/0391 (delivered 28th October 2019, unreported) considered.

3. CPR 12.3(1)(b) provides that a claimant who wishes to obtain a default judgment on any claim against a State, as defined in any relevant enactment relating to state immunity, must obtain the court's permission. A clear reading of CPR 12.3(1)(b) shows that the words 'a State' refers to a foreign State, not the Crown, the State or the government. Section 29(2)(c) of the **Crown Proceedings Ordinance** (the "Ordinance") is an enabling one. It does not mandate that leave of the court must first be obtained before default judgment is entered against the Crown. All it simply does is to provide that rules of court shall be made to provide that default judgments shall not be entered against the Crown without the leave of the court. The court cannot read into the CPR or the Ordinance a requirement that does not exist. This is a matter for the consideration of the Rules Committee. Therefore, there is no lacuna in the CPR concerning service against the Crown. The position is, and remains, that default judgments can be entered against the Crown.

Crown Proceedings Ordinance Cap. 21 Revised Laws of the Virgin Islands 1991 considered; **Ministry of Communication and Works v Clement Cassell** MNIHC VAP2008/0006 (delivered 19th June 2008, unreported) followed.

4. A judgment will be wrongly entered if any of the conditions set out in rule 12.4 (failure to file an acknowledgement of service) or rule 12.5 (failure to defend) are not satisfied. The principles emerging from the decisions of this Court in **Hogan and Edgecombe** can be summarized as follows: (1) the court can only set aside a default judgment on the grounds set out in CPR 13.2(1), namely a failure to comply with conditions contained in CPR 12.4 and CPR 12.5; (2) a failure to file a Form 7 request in accordance with CPR 12.7 is not a precondition for obtaining default judgment under CPR 12.5; (3) a failure to serve the documents in the response pack is not a precondition for obtaining default judgment under CPR 12.4; (4) the failure to comply with the conditions set out in CPR 12.4 and CPR 12.5 will make the default judgment a nullity; and (5) other matters such as failing to use Form 7 to request a default judgment or failing to

serve the documents in the response pack are irregularities that will not render a default judgment a nullity which must be set aside under CPR 13.2(1).

Mary Hogan v Wilston Johnson MNIHCVAP2021/0010 (delivered on 10th February 2022, unreported) followed; **Antigua Flight Training Center v Deidre Pigott Edgecombe et al** ANUHCVP2020/0017 (delivered 22nd October 2021, unreported) followed.

5. CPR 12.7 provides that a claimant applies for default judgment by filing a request in Form 7. It is true that a judgment in default of acknowledgement of service can only be for a liquidated sum, but that does not mean that an applicant cannot claim a liquidated sum in the same Form 7 request for judgment in default of both acknowledgement of service and defence. CPR 12.4 outlines the conditions that must be satisfied before the court office can, at the request of the claimant, enter judgment for failure to file an acknowledgement of service. One of these conditions is contained in CPR 12.4(d), namely, if the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all the money claimed together with a request for time to pay it. There is nothing improper in using Form 7 to request a default judgment for both a failure to acknowledge service and to defend if the conditions in both CPR 12.4 and CPR 12.5 are satisfied.

Rule 12.4 of the Civil Procedure Rules 2000 considered; **Rule 12.7** of the Civil Procedure Rules 2000 considered.

6. An applicant who wishes to use the same Form 7 to request a default judgment for both a failure to file an acknowledgement of service and for a failure to file a defence must ensure that the conditions for both requests are satisfied pursuant to CPR 12.4 and CPR 12.5 respectively. Otherwise, the default judgment is liable to be set aside under CPR 13.2(1). Since the default judgment was also entered for failure to file a defence, there was no requirement for the appellant to abandon his claim for any other relief other than a liquidated sum to obtain judgment in default of defence. This would only be necessary if the request in Form 7 was for failure to file an acknowledgement of service only. There was nothing irregular or in excess of jurisdiction for the appellant to be granted default judgment for failure to defend and to include in that request a claim for the delivery of his vessel or payment of its value to be assessed by the court. The master therefore fell into error when he concluded that the appellant could not obtain the relief of return of the vessel or alternatively, damages in an administrative judgment as this is precisely what is covered by CPR 12.10(1)(c)(i).

Rule 12.4 of the Civil Procedure Rules 2000 considered; **Rule 12.5** of the Civil Procedure Rules 2000 considered.

7. A plain reading of section 1.3 of **Practice Direction 12 No.1 of 2012 (Reissue)** – **Default Judgment** permits the request for default judgment to be considered

by a master. Even without section 1.3, there is nothing improper for a master or a High Court judge to enter a default judgment for failure to file an acknowledgement of service or for failure to file a defence.

Practice Direction 12 No. 1 of 2012 (Reissue)-Default Judgment considered.

8. The court must give any party likely to be affected by an order of its own initiative, a reasonable opportunity to be heard thereon. The failure by the master to provide the appellant with an opportunity to make submissions on the issue of the alleged 'irregularity' of the default judgment meant that the master did not hear the appellant on this issue and his failure to do so amounted to a denial of natural justice.

Mary Hogan v Wilston Johnson MNIHCVAP2021/0010 (delivered on 10th February 2022, unreported) followed; **George W. Bennett Bryson's & Co. Ltd trading as Bryson's Shipping v George Purcell trading as Hortico Landscaping and Nursery** ANUHCVP2011/0023 (delivered 28th February 2018, unreported) applied.

JUDGMENT

- [1] **VENTOSE JA [AG]:** Once again, this Court is called upon to set out the applicable principles relating to default judgments under the **Civil Procedure Rules 2000** ("the CPR") regime, arising from the decision of the Master dated 22nd February 2022, which set aside a default judgment in favour of the appellant dated 26th October 2020.

Background

- [2] The appellant filed on 20th March 2020 a claim form and statement of claim seeking various remedies against the respondent in respect of the detention of the appellant's vessel, including: (1) a declaration that the seizure and or continued detention of his vessel by the respondent is unlawful; (2) a declaration that the respondent is in breach of its statutory duty, owed to the appellant under Schedule 2 of the **Customs Management and Duties Act 2010**,¹ by failing to issue a written notice to the appellant advising of the seizure of the appellant's boat and the grounds for same; (3) a declaration that the respondent is in breach of its statutory duty, owed to the

¹ Act No. 6 of 2010 Laws of the Virgin Islands.

appellant under Schedule 2 of the **Customs Management and Duties Act 2010**, by failing to institute court proceedings for the condemnation of the vessel within a reasonable time; (4) delivery of the vessel or the sum of US\$130,000.00 being the value of the said boat and engines; (5) the costs of import fees, shipping fees, customs and other duties for the importation of a new vessel, in the event that the vessel is not returned and the respondent is ordered to pay the value of the vessel; (6) special damages at the rate of US\$1,200.00 per day from 27th October 2019 to today and continuing; (7) damages, including aggravated damages, for breach of statutory duty, detainee and/or trespass and/or conversion for the wrongful seizure and/or detention and/or continued detention of the vessel by the respondent; (8) exemplary damages; (9) such further and/or other relief as the court may deem fit; (10) interest; and (11) costs.

[3] The respondent did not file an acknowledgement of service or a defence. Consequently, on 17th July 2020 the appellant filed a request for default judgment using Form 7 seeking the following remedies:

“1. Delivery of the Claimant’s vessel wrongfully seized and detained by the Defendant and/or wrongfully seized and/or detained by the Defendant in breach of their statutory duty owed to the Claimant or the sum of USD\$130,000.00 being the value of the said boat and engines or such value as shall be assessed by the Court.

2. The cost of import fees, shipping fees, customs and other duties for the importation of a new vessel in the event that the vessel is not returned and the Defendant is ordered to pay the value of the vessel, as shall be assessed by the Court.

3. Special damages at the rate of US\$1,200.00 per day from 27th October 2019 to today and continuing

4. Damages, including aggravated damages, for breach of statutory duty, detainee and/or trespass and/or conversion for the wrongful seizure and/or detention and/or continued detention of the vessel by the Defendant as shall be assessed (sic) by the Court

5. Exemplary damages.

6. Costs

7. Interest (from the date of issue of the claim) to today.

8. Court fees on claim - US\$135 .00
9. Legal Practitioner's fixed costs on issue- US\$2,100.00
10. Court fees on entering judgment- US\$65.00
11. Legal Practitioner's fixed costs on entering judgment - US\$400.00.”

- [4] The request was for entry of judgment against the respondent for failure to file an acknowledgement of service and for failure to file a defence. The request came up for consideration by Master Sandcroft on 24th September 2020 and was adjourned. On 26th October 2020, Master Sandcroft entered judgment in default of acknowledgement of service and defence against the respondent in essentially the same terms as set out in the appellant's request and ordered that the assessment of damages be set for a date to be fixed by the Registrar of the High Court.
- [5] The assessment of damages came up for consideration before Master Gill on 18th May 2021 who gave directions for the filing of witness statements and submissions for the assessment of damages. Counsel for both parties were present. Master Gill on 11th June 2021 agreed to the consent order of the parties to vary the directions previously given. The appellant's witness statements and submissions were duly filed in accordance with the amended directions. A consent order was accepted by Master Gill on 14th July 2021 at a hearing at which both parties and their counsel were present. The assessment was adjourned to 29th September 2021. At the adjourned hearing, the Solicitor General requested time to review the file and to make submissions, if necessary. Master Gill gave further directions for the respondent to file a Form 31- Notice of Intention to be heard on Assessment, and extended the time for the respondent to file its witness statement and submissions in respect of the assessment of damages and the matter was further adjourned to 1st December 2021. The respondent filed Form 31 on 7th October 2021.
- [6] On 19th November 2021, the respondent filed an application to set aside the default judgment on the basis that exceptional circumstances exist and these were said essentially to be that: (1) it was in the public interest that justice be done between the

parties and considering the reputation of the Virgin Islands as a financial services jurisdiction; (2) the respondent lawfully detained the appellant's vessel as a result of an international and inter-jurisdictional law enforcement operation which took place on 27th October 2019 and that the vessel was subject to forfeiture under the **Customs Management and Duties Act 2010** and the **Drug Trafficking Offences Act 1992**;² and (3) the respondent has a good defence with a reasonable prospect of success.

[7] The application to set aside the default judgment came before the learned master on 25th January 2022 and in a judgment delivered on 22nd February 2022, the master: (1) set aside the default judgment on the basis that the default judgment was irregularly obtained; (2) granted permission to the respondent to file and serve its defence to the claim; and (3) made no order as to costs.

[8] The appellant on 2nd May 2022 filed an appeal against the decision of the master on the following grounds (in summary):

- (1) The master erred in law and acted in excess of jurisdiction when he set aside the default judgment on the basis of matters not prescribed in CPR 13.2 and CPR 13.3;
- (2) The master erred in law and acted ultra vires in setting aside the default judgment pursuant to CPR 13.2 on the basis that Form 7 filed by the appellant was procedurally irregular in that it contained a request for a default judgment both on the basis of the respondent's failure to file an acknowledgement of service and the respondent's failure to file a defence;
- (3) The master erred in law by finding that a claimant is precluded from obtaining a judgment in default of acknowledgement of service unless he abandons his claim for any relief other than a liquidated sum; and

² Act No. 5 of 1992 Laws of the Virgin Islands.

(4) The master erred in law and acted ultra vires in setting aside the default judgment pursuant to CPR 13.2 since all the conditions of CPR 12.5 have been completely satisfied.

[9] In its counter notice of appeal filed on 12th May 2022, the respondent relied on the following grounds: (1) the master failed to give sufficient regard to the Crown Proceedings Ordinance and failed to consider that permission was in fact required as there is a lacuna in the Civil Procedure Rules as regards service against the Crown; (2) that having found that there was a good and arguable defence, the master had sufficient evidence before him to satisfy CPR Part 13 to set aside the default judgment; (3) the master was correct in his application of the law when he found that the default judgment was in fact a purely administrative act and the case not having been decided on the merits he could set aside the default judgment; and (4) the master correctly decided that the default judgment was irregularly entered and pursuant to the CPR he could set aside the default judgment without the application of either party.

[10] The appeal raises the following issues: (1) whether the master was correct in finding that there were no exceptional circumstances to set aside the default judgment under CPR 13.3(2); (2) whether the master was correct in finding that the default judgment was irregular on grounds that do not form part of CPR 13.2; (3) whether the master was correct in concluding that the use of Form 7 to request a default judgment for both a failure to acknowledge service and for a failure to file a defence was irregular; (4) whether the appellant had to abandon his claim for any other relief other than a liquidated sum in order to obtain judgment in default of defence; and (5) whether the master erred in setting aside the default judgment on grounds not raised during the hearing without affording the parties an opportunity to make submissions before adjudicating upon those grounds.

Exceptional Circumstances

[11] CPR 13.3(1) provides that:

"If Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –

- (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
- (b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and
- (c) has a real prospect of successfully defending the claim."

CPR 13.3(2) provides that:

"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."

- [12] Ordinarily, an applicant seeking to set aside a default judgment would have to satisfy the court of all the grounds set out in CPR 13.3(1). Only if an applicant fails to do so that a consideration of the requirement set out in CPR 13.3(2) may arise. It has been repeatedly stated by this Court that a failure to satisfy any one of the conditions set out in CPR 13.3(1) is fatal to the application. The only refuge for an applicant who cannot satisfy all the conditions in CPR 13.3(1) is to satisfy the court that there exist exceptional circumstances to justify the exercise of discretion to set aside the default judgment under CPR 13.3(2). The master was of the view that he does not understand or interpret CPR 13.3(2) to be a separate route to set aside a default judgment. I disagree. There is nothing preventing an applicant who knows that they cannot satisfy all the conditions set out in CPR 13.3(1) from seeking to set aside a default judgment based solely on CPR 13.3(2). In such circumstances, this approach furthers the overriding objective including considering whether the likely benefits of taking a particular step will justify the cost of taking it. When parties do not pursue applications that are bound to fail, it saves costs and prevents a waste of the court's time and resources. If an applicant decides that their application to set aside default judgment under CPR 13.3(1) is hopeless, they can apply to set aside the default judgment solely on the ground set out in CPR 13.3(2). In any event, the respondent's affidavit in support of their CPR 13.3(2) application did not have any evidence of the requirements set out in CPR 13.3(1) to enable the master to decide the application on that basis. The master was therefore wrong to conclude that the respondent could

not ground its application under CPR 13.3(2) unless there was first a consideration of CPR 13.3(1).

- [13] The respondent submits that: (1) the master failed to give sufficient consideration to the **Crown Proceedings Ordinance**³ (the “**Ordinance**”) and failed to consider that permission was in fact required before judgment in default could be entered against the Crown as there is a lacuna in the CPR as regards service against the Crown; and (2) having found that there was a good and arguable defence, the master had sufficient evidence before him to satisfy him under CPR 13.3(2) to set aside the default judgment. The second argument can be dealt with easily as this Court has repeatedly made clear in decisions such as **Carl Baynes v Ed Meyer**⁴ that evidence of exceptional circumstances under CPR 13.3(2) is not to be equated with showing that the defence has a realistic prospect of success under CPR 13.3(1)(c). The Court in **Meyer** stated that:

“[26] What amounts to an exceptional circumstance is not defined by the Rules and no doubt, for good reason. What may or may not amount to exceptional circumstances must be decided on a case by case basis. I am in full agreement with the reasoning of Bannister J, as approved by this Court, that it must be ‘one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained’. It must be something more than simply showing that a defence put forward has a realistic prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR 13.3(1)(c). They are not to be regarded as interchangeable or synonymous. CPR 13.3(2) is not to be regarded as a panacea for covering all things which, having failed under CPR 13.3(1), can then be dressed up as amounting to exceptional circumstances under sub-rule (2). Sub-rule (2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed, to satisfy rule 13.3(1). A few examples come to mind. For instance, where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or the defence being put forward is a “knock out point” in relation to the claim; or where the remedy sought or granted was not one available to the claimant. This list is not intended to be exhaustive. Indeed I would have been prepared to hold,

³ Cap. 21 Revised Laws of the Virgin Islands 1991.

⁴ ANUHCVP2015/0026 (delivered 30th May 2016, unreported).

had the learned master been correct as to the non-viability of the claims herein, that such could be regarded as an exceptional circumstance. In the exercise of the discretion afresh, and for the reasons set out above I find no basis for holding that the bases put forward by Mr. Meyer, amount to exceptional circumstances warranting Mr. Baynes being deprived of his default judgment. I would accordingly restore the default judgment.”⁵

- [14] This paragraph was endorsed on appeal to the Privy Council.⁶ In **Tanzania Tobing Tanzil v Lindsay F.P. Grant et al**,⁷ I distilled at paragraph 32 the following principles emerging from **Meyer**:

“... (1) what amounts to exceptional circumstances must be decided on a case by case basis; (2) there must be a compelling reason to permit the defendant to defend the proceedings; (3) exceptional circumstances under CPR 13.3(2) do not equate to showing realistic prospects of success under CPR 13.3(1)(c); (4) it is impermissible to dress up matters that have failed under CPR 13.3(1)(c) as amounting to exceptional circumstances; and (5) CPR 13.3(2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed, to satisfy CPR 13.3(1).”

- [15] It bears repeating that exceptional circumstances cannot be equated to showing a realistic prospect of success. Consequently, there is nothing to the point that the master accepted that the respondent’s defence, at best, is arguable and has a reasonable prospect of success.

- [16] The respondent is of the view that one exceptional circumstance is their interpretation of section 29(2) of the **Ordinance**. The respondent submits that the permission of the court is required before judgment in default can be entered against the Crown, relying on section 29(2) of the **Ordinance** which provides as follows:

“29. (1) Any power to make rules of court or Magistrates’ Court rules shall include power to make rules for the purpose of giving effect to the provisions of this Ordinance, and any such rules may contain provisions to have effect in relation to any proceedings by or against the Crown in substitution for or by way of addition to any of the provisions of the rules applying to proceedings between subjects.

⁵ Supra n. 4, paragraph 26.

⁶ See *Meyer v Baynes* [2019] UKPC 3, [2019] All ER (D) 90 (Jan).

⁷ SKBHCV2017/0391 (delivered 28th October 2019, unreported).

(2) Provisions shall be made by rules of court and Magistrates' Courts rules with respect to the following matters-

...

(c) for providing that in the case of proceedings against the Crown the plaintiff shall not enter judgment against the Crown in default of appearance of pleading without the leave of the court to be obtained on an application of which notice has been given to the Crown;"

[17] The respondent submits that the CPR could not, by its silence, repeal and or negate the clear words of section 29 (2) of the **Ordinance**. The relationship between section 29(2)(c) of the **Ordinance** and the CPR was considered by this Court in **Ministry of Communication and Works et al v Clement Cassell and Laurretta Daley**.⁸ CPR 12.3(1)(b) provides that a claimant who wishes to obtain a default judgment on any claim against a State, as defined in any relevant enactment relating to state immunity, must obtain the court's permission. Although the decision of the Court in **Cassell** concerned whether the intended appellants had any realistic prospect of succeeding on appeal in setting aside the judgments in default of defence under CPR 13.3, the statements made therein are applicable here. The intended appellants argued that permission was required before default judgment was entered based on section 29(2)(c) of the Crown Proceedings Ordinance of Monserrat and that since CPR 12.3(1)(b) was not complied with, the default judgments must be set aside under CPR 13.2. The Court stated that:

"[17] It seems to me that the argument in support of leave to appeal perpetuates the common failure in the proceedings below to appreciate the object and scope of rule 12.3(1)(b). Rule 12.3 provides that permission is needed before obtaining default judgment against a minor, a patient, a State and a diplomatic agent. The reference in the rule to "a State" is to a foreign state, which enjoys state immunity, hence the reference in rule 12.3(1)(b) to a "State as defined in any relevant enactment relating to state immunity". The reference in that rule is not to the State but to a State and, therefore, to states generally. The rule, it must be observed, makes provision in respect of four types of defendants and does not make provision in respect of a specific defendant – the Crown (citations omitted)."⁹ (Underlined as in original)

⁸ MNIHCVP2008/0006 consolidated with MNIHCVP2008/0007 (delivered 19th June 2008, unreported).

⁹ Supra note 8 at para 17.

[18] A clear reading of CPR 12.3(1)(b) shows that the words “a State” refers to a foreign State, not the Crown, the State or the government. In relation to the equivalent section of section 29(2)(c) of the **Ordinance**, the Court stated that:

“The requirement of the Crown Proceedings Act

[22] Much of the confusion that has attended this matter stemmed from the assumption that rule 12.3(1)(b) was intended to satisfy the requirement stated in section 29(2)(c) of the Crown Proceedings Ordinance that rules of court must provide that a claimant must first obtain leave before he can obtain judgment against the Crown. The Crown Proceedings Act or Ordinance of each Member State and Territory of the Eastern Caribbean Supreme Court is a replication of the English enactment of the same or similar name. The former Rules of the Supreme Court of England provided, in Order 77 rule 9, for permission to first be obtained before entering judgment in default of defence against the Crown. So did the former Eastern Caribbean Rules of the Supreme Court 1970, in Order 54 rule 7(1).

[23] The present Rules in England do not contain the requirement for permission to obtain judgment in default against the Crown. It is stated in Blackstone’s Civil Practice 2007 at 20.7, that

“Default judgment in claims against the Crown may now be entered upon filing a request for judgment. An application is no longer necessary. However, a request for a default judgment against the Crown must be considered by a master or district judge, who must be satisfied that the claim form and particulars have been properly served on the Crown in accordance with the Crown Proceedings Act 1947, s. 18, and CPR, r. 6.5 (8).” (Emphasis added.)

[24] Similarly, the present Rules of the Eastern Caribbean Supreme Court do not contain a requirement for permission to obtain judgment in default against the Crown. We have followed the English position. It may be noted, as regards the English position, that the permission requirement in the English Crown Proceedings Act 1947 was expressly removed by legislation that repealed, among other things, paragraph (c) of section 35 (2) of the English Act, which was the provision that the Montserrat Crown Proceedings Ordinance replicated in section 29(2)(c). It does not appear that there has been a corresponding amendment to the Montserrat legislation (citations omitted).¹⁰

[19] Section 29(2)(c) of the **Ordinance** is an enabling one. It does not mandate that leave of the court must first be obtained before default judgment is entered against

¹⁰ Ibid at paras 22,23 and 24.

the Crown. All it simply does is to provide that rules of court shall be made to provide that default judgments shall not be entered against the Crown without the leave of the court. The Court cannot read into the CPR or the **Ordinance** a requirement that does not exist. This is a matter for the consideration of the Rules Committee. Section 29(2)(c) of the **Ordinance** does not assist the respondent. The decisions of the Supreme Court of Jamaica in **Rutair Limited v Jamaica Civil Aviation Authority et al**¹¹ and **Marcia Jarrett (Administratrix of the Estate of Dale Jarrett, deceased) v South East Regional Health Authority et al**¹² are not binding on this Court in so far as they decide that section 29(2)(c) of the Crown Proceedings Act of Jamaica imposes a requirement on the courts to construe CPR 2002 (Jamaica) to be subject to the Crown Proceedings Act where a default judgment is to be against the Crown so as to require leave of the court before any default judgment is entered against the Crown. I do not agree for the reasons stated above.

- [20] Contrary to the submission of the respondent, there is no lacuna in the CPR concerning service against the Crown. The position is, and remains, that default judgments can be entered against the Crown. This second basis does not amount to exceptional circumstances justifying the exercise of discretion in favour of the respondent under CPR 13.3(2). The master, applying the decision of this Court in **Cassell**, correctly held that that permission of the court was not required to obtain default judgment against the Crown. Consequently, the master was correct in his overall conclusion that neither the proposed amended defence nor the affidavit in support of the application to set aside the default judgment disclosed any exceptional circumstances which warranted setting aside the default judgment under CPR 13.3(2).

Setting Aside Default Judgment

- [21] CPR 13.2(1) sets out the applicable rules that exclusively govern situations where the court **must** set aside a default judgment as follows:

¹¹ [2006] 9 JCC 1804.

¹² (2006 HCV 00816) dated 3rd November 2006.

“Cases where court must set aside default judgment

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; or
- (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.”

[22] A judgment will be wrongly entered if any of the conditions set out in rule 12.4 (failure to file an acknowledgement of service) or rule 12.5 (failure to defend) are not satisfied. The appellant submits that the master was wrong to set aside the default judgment based on matters not prescribed in CPR 13.2 and CPR 13.3 and that he erred in determining that CPR 13.2(1) required him to set aside a default judgment if it was ‘irregular’. The appellant cites in support of these submissions the decision of this Court in **Mary Hogan v Wilston Johnson**¹³ where the Court had to consider whether a master was correct in setting aside the default judgment on the sole basis of Ms. Hogan’s failure to file a request for default judgment using Form 7. On that issue the Court stated at paragraphs 27 and 28 that:

“[27] On a conjoint reading of CPR 12.5, 12.7 and 13.2, we were fortified in our view that the failure to obtain default judgment by way of a request in Form 7 cannot be a basis for setting aside a default judgment. While CPR 12.7 provides that a request for default judgment may be made in Form 7, the rule is not couched in mandatory terms. The rule also does not contain an express sanction for the failure to comply with its provisions. It is well-settled that the court should not imply a sanction where no sanction has been expressly specified by a rule. As much was said by the Privy Council in **The Attorney General of Trinidad and Tobago v Keron Matthews**¹⁴ and quite recently by this Court in **Antigua Flight Training Center v Deidre Pigott Edgecombe and Nordel Edgecombe**¹⁵. Had it been the intention of the drafters of the CPR to impose a sanction for non-compliance with CPR 12.7, the rule would have clearly said so. In essence, a finding by this Court that the failure to file a request in Form 7 is a ground for setting aside

¹³ MNIHCVAP2021/0010 (delivered on 10th February 2022, unreported).

¹⁴ [2011] UKPC 38.

¹⁵ ANUHCVP2020/0017 (delivered 22nd October 2021, unreported).

a default judgment has the unavoidable effect of implying a sanction into CPR 12.7 when no such sanction is imposed by the rule. (Emphasis in original)

[28] In any event, a default judgment can only be set aside under CPR 13.2 where any of the conditions in CPR 12.5 has not been met. There is absolutely nothing in the CPR 12.5 checklist of conditions which speaks to the claimant filing a request in Form 7 and therefore it would be quite wrong for the Court to somehow interpose the provisions of CPR 12.7 into CPR 12.5. Had the rule-makers intended for the filing of a request in Form 7 to be a precondition for obtaining default judgment, it would have, quite easily, been included in CPR 12.5.”

[23] Similarly in **Antigua Flight Training Center v Deidre Pigott Edgecombe et al**,¹⁶ this Court made the following observations:

“[19] On a plain reading of rule 13.2(1) the court is mandated to set aside the default judgment only if it is satisfied that there was a failure to comply with rule 12.4. Rule 12.4 requires the claimant to serve the claim form and statement of claim on the defendant. But was there a failure to comply with rule 12.4 in this case? Rule 12.4 does not mention service of the documents in the response pack and there is no breach of the rule if these documents are not served with the claim form and statement of claim. Rule 12.4 does not make service of the response pack a precondition to obtaining a default judgment. If this was intended it would have been a simple matter of the drafters of the CPR adding the documents comprising the response pack to rule 12.4(a). They did not do so and it is not to be implied as a precondition. Accordingly, a failure to serve these documents does not trigger the mandatory provisions in rule 13.2(1). The undisputed evidence in this case is that the claim form and statement of claim were served on the respondents. Therefore, there was compliance with rule 12.4 and the situation that Wilkinson J was dealing with on the set-aside application was one where there was a procedural irregularity in the service of the claim due to a failure to comply with the mandatory requirement in rule 8.14(1). As an irregularity, and not a nullity, the learned judge was not obliged to set aside the default judgment pursuant to rule 13.2. The effect of the failure to comply with rule 8.14 and the way that the court should have dealt with the application to set aside the default judgment is illustrated by the cases referred to above. She should have considered the application as if it was made under rule 13.3(1) and decide whether it satisfied any or all of the criteria in the rule, and then decide how to exercise her discretion...

[25] 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

¹⁶ ANUHCVP2020/0017 (delivered 22nd October 2021, unreported) at paragraphs 19 and 25.

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."

[24] The principles emerging from the decisions of this Court in **Hogan** and **Edgecombe** can be summarized as follows: (1) the court can only set aside a default judgment on the grounds set out in CPR 13.2(1), namely a failure to comply with conditions contained in CPR 12.4 and CPR 12.5; (2) a failure to file a Form 7 request in accordance with CPR 12.7 is not a precondition for obtaining default judgment under CPR 12.5; (3) a failure to serve the documents in the response pack is not a precondition for obtaining default judgment under CPR 12.4; (4) the failure to comply with the conditions set out in CPR 12.4 and CPR 12.5 will make the default judgment a nullity; and (5) other matters such as failing to use Form 7 to request a default judgment or failing to serve the documents in the response pack are irregularities that will not render a default judgment a nullity which must be set aside under CPR 13.2(1).

[25] The master, in support of his decision that the default judgment was irregularly obtained, cites at paragraph 39 the following passage from **Blackstone's Civil Practice 2019** at page 458:

"A default judgment obtained using the request procedure in error instead of the application for judgment procedure was irregular and capable of being set aside as of right under r. 13.2 (Intense Investments Ltd v Development Ventures Ltd [2005] EWHC 1762 (TCC), [2005] BLR 478). It is submitted that this decision ignores the constraints of r. 13.2 which specifies precisely the circumstances in which the court must set aside

default judgment. These do not include using the wrong procedure to enter the default judgment.

What about the case where a judgment has been entered incorrectly, in circumstances other than those set out at r.13.2.? in *Northern Rock (Asset Management) plc v Chancellors Associates Ltd* [2011] EWHC 3229 (TCC), [2012] 2 All ER 501, an acknowledgement was returned to the claimant with the “I do not intend to defend this claim’ box ticked in error. The claimant submitted a request for judgment form to the court instead of making an application for judgment in default, and, incorrectly judgment was entered by the court as an administrative act without any judicial consideration of the case. The circumstances clearly fell outside the situations envisaged by r. 13.2. The Court held that it has jurisdiction under r.3.1.(2)(m) to set aside the judgment it (sic) is was fair and just to do so, on the grounds that the overriding objective would normally demand that a judgment should be set aside, where it has been obtained irregularly on the basis of an obviously mistaken admission, where there was a properly arguable defence, where the application to set aside was brought reasonably promptly and where there was no prejudice caused by the setting aside.” (Emphasis in original)

- [26] In the first paragraph, immediately following the sentence highlighted by the master, the authors of **Blackstone’s Civil Practice 2019** state that **Intense Investments Ltd v Development Ventures Ltd**¹⁷ ignores the constraints of the UK CPR 13.2 which specifies precisely the circumstances in which the court must set aside a default judgment, and these do not include using the wrong procedure to enter the default judgment. The decision in **Northern Rock (Asset Management) plc v Chancellors Associates Ltd** (“North Rock”)¹⁸ does not apply since it concerned the relevant UK rule which required a claimant to make an application for default judgment which must then be considered by the court when an admission is made by a defendant (except where permitted by any sub-rule). In such a case, a default judgment cannot be entered administratively by the court office and in any event the admission was a mistaken one.

- [27] The master stated that the court in furtherance of the overriding objective to deal with cases justly will set aside a judgment irregularly obtained once it is fair and just to

¹⁷ [2005] EWHC 1726 (TCC), [2005] BLR 478.

¹⁸ [2011] EWHC 3229 (TCC).

do so. The decision in **North Rock**, however, must be limited to its facts and cannot be said to be authority for a principle so broadly stated as this would have the effect of undermining the carefully crafted regime for setting aside default judgments in Part 13.

The Use of Form 7

[28] CPR 12.7 provides that a claimant applies for default judgment by filing a request in Form 7. The master believed there was no proper request because the appellant used Form 7 for the request for default judgment both for failure to file an acknowledgement of service and for failure to file a defence. The master was of the view that using this 'hybrid request' was procedurally incorrect. It is true that a judgment in default of acknowledgement of service can only be for a liquidated sum, but that does not mean that an applicant cannot claim a liquidated sum in the same Form 7 request for judgment in default of both acknowledgement of service and defence.

[29] If the matters claimed in the request exceed what is permitted by CPR 12.4, then, a problem arises. CPR 12.4 outlines the conditions that must be satisfied before the court office can, at the request of the claimant, enter judgment for failure to file an acknowledgement of service. One of these conditions is contained in CPR 12.4(d), namely, that the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all the money claimed together with a request for time to pay it. I agree with the appellant that there is nothing improper in using Form 7 to request a default judgment for both a failure to acknowledge service or to defend if the conditions in both CPR 12.4 and CPR 12.5 are satisfied.

Mixed Claims and Judgment in Default of Acknowledgement of Service

[30] There is merit in the view of the master that where an applicant is seeking judgment for mixed remedies, unless all the other relief claimed are abandoned and the only remedy sought is a liquidated sum, then, the applicant simply cannot obtain

judgment in default of acknowledgement of service. Similarly, the respondent is correct in stating that under CPR 12.4(d) default judgment for failure to file an acknowledgement of service can only be granted if the claim is only for a specified sum of money. However, the master did not consider that the default judgment was entered for both the failure by the respondent to file an acknowledgement of service and for the failure to file a defence. If the request related only to the failure to file an acknowledgement of service, then one of the required conditions of CPR 12.4(d) would not be satisfied because the claim was not for a specified sum of money only, thereby making the default judgment liable to be set aside under CPR 13.2(1)(a) which provides that the court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of a failure to file an acknowledgement of service – any of the conditions in CPR 12.4 was not satisfied.

[31] The permission granted to an applicant under CPR 12.8(3) does no more than provide the applicant with options to determine which claims can be properly made in respect of the type of request being made. Contrary to the respondent's submission, CPR 12.8(3) does not require an applicant to abandon a claim as the clear reading of CPR 12.8(3) shows that it is permissive. CPR 12.8(3) provides that **if** a claim is partly for a specified sum and partly for an unspecified sum the claimant **may** abandon the claim for the unspecified sum and enter default judgment for the specified sum.

[32] If the master had considered that the default judgment was also entered for failure to file a defence he would have appreciated that including a specified sum of money with other claims did not negatively affect the default judgment also entered for failure to file a defence. That aspect of the default judgment was not affected by any perceived irregularity in relation to the default judgment entered for failure to file an acknowledgement of service. An applicant who wishes to use the same Form 7 to request a default judgment for both a failure to file an acknowledgement of service and for a failure to file a defence must ensure that the conditions for both requests are satisfied pursuant to CPR 12.4 and CPR 12.5 respectively. Otherwise, that

default judgment is liable to be set aside under CPR 13.2(1). Since the default judgment was also entered for failure to file a defence, there was no requirement for the appellant to abandon his claim for any other relief other than a liquidated sum to obtain judgment in default of defence. This would only be necessary if the request in Form 7 was for failure to file an acknowledgement of service only.

Return of Goods and Judgment in Default of Defence

[33] The master noted that even ignoring entirely the request as it relates to the failure to file an acknowledgement of service, the form of request was still improper because the primary relief sought by the appellant was the return of the vessel. The master further noted that this was not a remedy that could be obtained in a request for a default judgment and that if the appellant wished to obtain a judgment in default of defence, he had to first abandon his claim for return of the vessel. The master continued that the appellant would then be able to request a judgment in default be entered for the replacement costs of the vessel or, alternatively, the request had to be for judgment entered on terms to be decided by the court. The master concluded that the appellant could not obtain the relief of return of the vessel or, alternatively, damages in an administrative judgment.

[34] The appellant submits that that CPR 12.10 (1) (c)(i) covers precisely the type of claim that the appellant made. CPR 12.10(1)(c) states that:

“12.10(1) Default judgment on a claim for –

(c) goods – must be –

(i) judgment requiring the defendant either to deliver the goods or pay their value as assessed by the court;

(ii) judgment requiring the defendant to pay the value of the goods as assessed by the court; or

(iii) (if the court gives permission) a judgment requiring the defendant to deliver the goods without giving the defendant the alternative of paying their assessed value.”

[35] Having regard to the plain reading of CPR 12.10(1)(c)(i), I agree with the appellant that there was nothing irregular or in excess of jurisdiction, for the appellant to be

granted default judgment for failure to defend and include in that request a claim for the delivery of his vessel or payment of its value to be assessed by the court. The appellant can only be faulted for including the following words in bold in their claim for the return of the vessel or its value as determined by the court:

“1. Delivery of the Claimant's vessel wrongfully seized and detained by the Defendant and/or wrongfully seized and/or detained by the Defendant in breach of their statutory duty owed to the Claimant **or the sum of USD \$130,000.00 being the value of the said boat and engines** or such value as shall be assessed by the Court.”

[36] Without the words in bold this form of claim is permissible under CPR 12.10(1)(c)(i). Does their inclusion materially affect the claim so that it can be regarded as irregular? While the claim might be seen as a fixed sum being claimed in the alternative to the value being assessed by the court, the primary remedy was the return of the vessel. If this could not be achieved, then it would be a matter for the court on the assessment of damages to determine the value of the vessel. The addition of the words in bold could not, and did not, by itself invalidate an otherwise valid claim. The respondent submits that CPR 12.10(c)(iii) is clear that any default judgment for the delivery of goods cannot be coupled with a payment of their assessed value (in this case of the engines and the boat). I disagree. What CPR 12.10(c)(iii) does is to require the permission of the court where the default judgment is one requiring the defendant to deliver the goods without giving the defendant the alternative of paying their assessed value.

[37] I therefore agree with the appellant that the master fell into error when he concluded that the appellant could not obtain the relief of return of the vessel or alternatively, damages in an administrative judgment as this is precisely what is covered by CPR 12.10(1)(c)(i).

Request being considered by Master Sandcroft

[38] The master stated that the request for default judgment was also irregular because it was listed before Master Sandcroft who proceeded to determine the request and terms of the judgment instead of the request being considered administratively by

the court office. The master cited this Court's decision in **Lux Locations Ltd v Yida Zhang**¹⁹ for the principle that a default judgment, being an administrative act and not a judicial decision, should not be considered a judgment or order of the High Court within the meaning of section 31(1)(b) of the **Eastern Caribbean Supreme Court Act**.²⁰ The master stated that this meant that since a default judgment is not an order of the High Court and the Court of Appeal is a creature of statute, there is no right of appeal to the Court of Appeal from a default judgment. Consequently, the only remedy available to a defendant is to apply to set aside the default judgment under CPR Part 13.

[39] The decision of this Court on the question of whether a default judgment is considered as a judgment or order of the High Court was overruled by the Privy Council.²¹ The master was of the view that the request for default judgment was irregular in and of itself and that Master Sandcroft could not have entered judgment in default for the relief as claimed by the appellant on the request, having regard to the relief claimed by the appellant. The master noted that the request for default judgment should not have been referred to Master Sandcroft because it was defective and that the request should have been refused by the court office. The master further noted that Master Sandcroft exceeded his jurisdiction in granting the order that he did and that consequently the default judgment obtained was irregular and must be set aside.

[40] These statements and conclusion of the master are wrong because, as submitted by the appellant, the consideration of the request was properly before Master Sandcroft in accordance with **Practice Direction 12 No.1 of 2012 (Reissue) – Default Judgment** which provides that:

“1.3 Where there is uncertainty as to the application of any of the Rules relating to the grant of default judgments, the matter must be referred to a master or a judge immediately.”

¹⁹ ANUHCVP2020/0025 (delivered 11th January 2021, unreported).

²⁰ Cap. 143 of the Laws of Antigua and Barbuda.

²¹ See *Lux Locations Ltd v Yida Zhang* [2023] UKPC 3 at para 32.

[41] In his affidavit in support of his application for leave to appeal, the appellant avers that prior to the request for default judgment being considered by Master Sandcroft, there was some uncertainty at the court office concerning the form that the request for default judgment should take. The court office refused several versions of the request for default judgment before the request was finally accepted and referred to Master Sandcroft for consideration. A plain reading of section 1.3 of **Practice Direction 12** permits the request to be considered by a master. Even without section 1.3, there would be nothing improper for a master or a High Court judge to enter a default judgment for failure to file an acknowledgement of service or for failure to file a defence. Consequently, I agree with the appellant that there was nothing irregular in the request for default judgment being referred to Master Sandcroft and in his determination of the request for default judgment.

Natural Justice

[42] The appellant submits that the master was wrong to set aside the default judgment on a ground on which the appellant had neither notice nor an opportunity to respond. The appellant further submits that the additional hearing before the master on 26th January, 2022 was to consider the decision of this Court in **Lux Locations Ltd** and not any of the irregularities considered by the master including, first, whether a Form 7 request for default judgment could be made in respect of both a failure to file an acknowledgement of service and for a failure to defend; and, second, whether one of the reliefs sought in the request for default judgment could have been granted namely, the return of vessel or its value to be assessed by the court. The appellant relies on CPR 26.2(4) for the view that the appellant as the affected party should have been given an opportunity to be heard on these matters. CPR 26.2(4) provides that:

- “(4) If the court proposes to –
 - (a) make an order of its own initiative; and
 - (b) hold a hearing to decide whether to do so;the court office must give each party likely to be affected by the order at least 7 days’ notice of the date, time and place of the hearing.”

- [43] The issue of whether a master erred in setting aside the default judgment based on a ground which was neither raised nor canvassed by the parties at the hearing was considered by this Court in **Hogan**. The Court stated at paragraph 14 that:

“Discussion

[14] This is a short point. It readily appears, and is not disputed, that the learned master set aside the default judgment on the basis of a point which was not canvassed before her. It is a well-settled principle that a judicial officer should refrain from seeking to resolve an issue which did not arise by way of the pleadings without the benefit of arguments on the point.”

- [44] After examining the decision of this Court in **George W. Bennett Bryson’s & Co. Ltd trading as Bryson’s Shipping v George Purcell trading as Hortico Landscaping and Nursery**²² the Court in **Hogan** further stated that:

“[15] It appears from the principles stated in the cases above that the role of the court is circumscribed in relation to raising issues of its own motion for consideration. These principles are clearly incorporated in CPR 26.2 which provides that ‘where the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representation’ – in essence to be heard thereon. A judge or master should identify the issues in dispute which arise on the pleadings or as the basis of an application and determine only those issues. Where a new issue is raised during or after the conclusion of a hearing, the judge or master is obliged to afford the parties an opportunity to make submissions before adjudicating upon that issue. Failing to do so would be tantamount to not hearing the party who is aggrieved by the decision at all and may amount to a denial of justice.”²³

- [45] The master in his written judgment accepted that he was making findings based on the ground of irregularity that was not raised by either party. In his affidavit in support of the application for interlocutory appeal, the appellant makes the uncontroverted averment that the decision of the master was made without due process and in breach of the rules of natural justice because the master made his decision on grounds that were not in issue between the parties and on which the appellant had no opportunity to respond. The failure by the master to provide the appellant with an opportunity to make submissions on the issue of the alleged ‘irregularity’ of the

²² ANUHCVP2011/0023 (delivered 28th February 2018, unreported).

²³ Mary Hogan, *supra* note 13 at para 15.

default judgment meant that the master did not hear the appellant on this issue and his failure to do so amounted to a denial of natural justice.

Conclusions

- [46] The master was required by CPR 13.2(1) to examine the application to set aside the default judgment and only set it aside if the requirements of CPR 12.4 and CPR 12.5 were not satisfied. While I agree that the master was correct in noting that the request which was also for default judgment in default of acknowledgement of service did not comply with CPR 12.4(d) because the claim was not for a specified sum of money only, his approach did not consider the fact that the default judgment was also granted for a failure to defend. Even if the request for default judgment for failure to file an acknowledgement of service was a nullity for this reason, this alone could not affect the default judgment entered for failure to defend. The master did not point to any of the conditions in CPR 12.5 that were not complied with to set aside the default judgment for failure to defend. I agree with the appellant that it was not disputed that all the conditions of CPR 12.5 were satisfied and that therefore the appellant had been entitled to obtain judgment in default of defence and that default judgment should not have been set aside under CPR 13.2(1).
- [47] The decisions of this Court in **Hogan** and **Edgecombe** state clearly that the only basis on which a default judgment must be set aside is found in CPR 13.2(1); that is, if the conditions in CPR 12.4 and CPR 12.5 are not satisfied. I do not agree with the respondent's submission that the master was correct in concluding that the default judgment was irregularly entered, and that the decision of this Court in **Hogan** can be distinguished. The issue in **Hogan** and in the court below could not have been more similar as both related to whether it was correct for the master to set aside a default judgment on a ground not found in CPR 13.2(1). In **Hogan**, that ground was the failure by the appellant to use Form 7 and, in this case, the use by the appellant of Form 7 to request a default judgment for failure to file an acknowledgement of service in addition to a failure to defend.

[48] I agree with the appellant that once the master concluded that the respondent had not satisfied him that there existed any exceptional circumstances to justify setting aside the default judgment under CPR 13.3(2), there was no basis in CPR 13.2(1) on which the master could properly have held that the procedural irregularities that he found were sufficient to set aside the default judgment. Even if these were to be considered as irregularities, they were certainly not nullities that would form the basis on which the court must set aside the default judgment in accordance with CPR 13.2(1). The master therefore erred in setting aside the default judgment on grounds not set out in CPR 13.2(1).

[49] Even if the master was correct in setting aside the default judgment on the ground that it was irregular, his decision could still not stand because the master set aside the default judgment on a ground that was not raised during the hearing and without affording the parties an opportunity to make submissions before adjudicating upon that ground.

Disposal

[50] For the reasons given above, I am of the view that the master erred in setting aside the default judgment entered in favour of Mr. Maduro on the basis that he did. In these circumstances, I would allow the appeal and reverse the order of the master setting aside the default judgment entered by Master Sandcroft on 26th October 2020 and restore the default judgment. The counter notice of appeal is accordingly dismissed. The respondent shall pay the appellant's costs in the application to set aside the default judgment in the court below and the costs of the appeal fixed in the sum of \$3,500.00 to be paid by the respondent within 21 days of today's date.

[51] I am grateful for the assistance provided by all counsel for the parties.

I concur.

Trevor Ward

Justice of Appeal

I concur.

Paul Webster

Justice of Appeal [Ag.]

By the Court

Chief Registrar