

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2022/0356

BETWEEN:

KENDALL SAMUELS

Claimant

and

GERALDINE DICKENSON

~~(EXECUTRIX & LEGAL REPRESENTATIVE OF THE ESTATE OF ELDINA R. MARTIN WADE
A.K.A. ELDEN R. MARTIN A.K.A. ELDEANA R. MARTIN WADE A.K.A. ELDEANA R. MARTIN
A.K.A. ELDEANA R. MARTIN STRUNKEY, DECEASED)~~

~~1st Defendant~~

JOSEPH PINDER

~~(EXECUTOR OF THE ESTATE OF ELDINA R. MARTIN WADE A.K.A. ELDEN R. MARTIN A.K.A.
ELDEANA R. MARTIN WADE A.K.A. ELDEANA R. MARTIN A.K.A. ELDEANA R. MARTIN
STRUNKEY, DECEASED)~~

2nd Defendant

Appearances:

Mr. Peyton Knight, Counsel for the Claimant

Mr. Lawrence Daniels, Counsel for the 2nd Defendant

2023: July 18;
September 19th

DECISION

- [1] **MICHEL, M.:** The Claimant commenced these proceedings against the 1st and 2nd Defendants by claim form and statement of claim filed on 15th September, 2022 for the sum of \$9,816,900.00 for breach of an agreement made between the Claimant and the 1st Defendant to provide land clearing services for and on behalf of Eldina R. Martin Wade a.k.a. Elden R. Martin a.k.a. Eldeana R. Martin Wade a.k.a. Eldeana R. Martin a.k.a. Eldeana R. Martin Strunkey, Deceased (“the Deceased”).
- [2] The claim was purportedly served on the 2nd Defendant on 22nd September, 2022 and on the 1st Defendant on 26th September, 2022. The 1st Defendant filed an acknowledgement of service of the claim on 7th October, 2022 and applied for and was later granted an extension of time to file a defence. On 4th January, 2023 the claim was discontinued against the 1st Defendant. No

acknowledgement of service or defence to the claim was filed by the 2nd Defendant within the time prescribed by the **Civil Procedure Rules 2000** ("CPR").

- [3] On 4th January, 2023 the Claimant also applied for default judgment against the 2nd Defendant. Before the application was determined however, the 2nd Defendant filed a defence and an application for an extension of time to file a defence. The Court heard the applications filed by both Parties on 10th May, 2023 and delivered an oral decision on 12th May, 2023 dismissing the 2nd Defendant's application for an extension of time to file a defence and entered judgment in default of acknowledgement of service against the 2nd Defendant for an amount to be decided by the Court. The 2nd Defendant has now applied to set aside the default judgment.
- [4] Before I delve into the grounds of the 2nd Defendant's set aside application, I consider it useful to first set out the background giving rise to the Claimant's claim as pleaded, to place the matter into its proper context.

Background to Claimant's Claim

- [5] The Claimant is a businessman who owns and provides heavy-duty equipment services. The 1st Defendant is the former Executrix of the Estate of the Deceased. In his claim, the Claimant alleged that he entered into an agreement with the 1st Defendant to provide land clearing services for and on behalf the Deceased. He pleaded that the 1st Defendant represented that she had the authority to enter into the agreement and informed him that she had obtained a grant of probate on behalf of the Estate of the Deceased. The Claimant pleaded that he relied on the representation made by the 1st Defendant and as such entered into an agreement with the 1st Defendant to provide the said land clearing services for the Estate of the Deceased. The Claimant pleaded that the initial agreement between himself and the 1st Defendant was verbal in 2016 and that this verbal agreement was subsequently reduced to writing and as such became both a verbal and written contract.
- [6] The Claimant alleged that, during the period 30th November, 2017 to 15th May, 2019 he performed these land clearing services based on the representations made by the 1st Defendant and performed his obligations under the agreement. He provided the 1st Defendant and the designated independent contract manager with invoices for the works done but to date has not been paid.
- [7] In the intervening period, it appears that the 1st Defendant was removed as Executor of the Deceased's Will and the 2nd Defendant was appointed as the new executor of the Deceased's Will. The Claimant alleged in his claim that the 1st and 2nd Defendants failed, neglected and or refused to provide payments for services rendered and that there is now due and owing to him the sum of \$9,816,900.00.
- [8] As indicated above, the Claimant discontinued his claim against the 1st Defendant. The 2nd Defendant did not file an acknowledgment of service of the claim and upon an application by the

Claimant, judgment in default of acknowledgment of service was entered against the 2nd Defendant.

[9] I will now consider the 2nd Defendant's application to set aside the default judgment.

The 2nd Defendant's Set Aside Application

[10] The 2nd Defendant has advanced some eight grounds for his application. I now reproduce these grounds in full as follows:

- (1) This application to set aside the default judgment is being made as soon as is reasonably practicable since the Oral Pronouncement of the Judgment on Friday 12th May, 2023.
- (2) That the 2nd Named Defendant has a good explanation for his failure to file an acknowledgement of service or a Defence within the prescribed time.
- (3) That the 2nd Named Defendant has a real prospect of successfully defending the Claim, since the Last Will and Testament of the Deceased never gave the first Named Defendant any authority to enter into any contract on behalf of the Estate or any beneficiary of the Estate.
- (4) That the contract entered by the 1st Named Defendant and the Claimant is an illegal contract and requires the Court's determination.
- (5) That the 1st Named Defendant has no knowledge and was never served with the Claim No. ANUHCv2022/0356 but accepted being served with the first Claim bearing Claim No. ANUHCv2022/0269, which the 2nd Named Defendant carried promptly to his Attorney.
- (6) That an Ancillary Claim against the 1st Named Defendant is mandatory as the beneficiary of the Estate had no knowledge of any contract being entered between the Claimant and the 1st Named Defendant. Secondly, the Last Will and Testament of the Deceased made no provision for the Executor to enter any contract.
- (7) The contract was never registered, and such is unenforceable.
- (8) There are exceptional circumstances pursuant to Civil Procedure Rules 13.3 (2) for this Judgement in default to be set aside in that the Executor cannot act outside the terms of a Will which only provided Power to Distribute, collect the assets of the estate and to pay the just debts of the estate. The said Will did not make any provisions for the sale of any parcel of lands or the entering of any contract for the clearing of any parcels of land or the cutting of any roads.

[11] The 2nd Defendant filed an affidavit together with exhibits in support of his application to set aside the default judgment. The Claimant filed an affidavit in response. Both Parties also filed written submissions for the hearing of the application.

Procedural Rules for setting aside a Default Judgment

- [12] The rules governing applications to set aside a default judgment are contained in Part 32 of the CPR. In relation to a judgment in default of acknowledgement of service, as in the present case, CPR 13.2(1)(a) provides that the Court must set aside a default judgment if it was wrongly entered because of the failure to satisfy the conditions under CPR 12.4. CPR 12.4 provides:

“Conditions to be satisfied – judgment for failure to file acknowledgment of service

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) 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 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; and
- (f) (if necessary) the claimant has the permission of the court to enter judgment.”

- [13] It is settled principle that, if any of the conditions under CPR 12.4 for the entry of judgment in default of acknowledgement of service has not been satisfied, the Court has no discretion and must set aside the default judgment.

- [14] On the other hand, on an application made pursuant to CPR 13.3(1) or 13.3(2), the Court may set aside a regularly entered default judgment in certain circumstances. CPR 13.3(1) stipulates three conditions an applicant must satisfy for the court to exercise its direction to set aside a regularly entered default judgment. The rule provides:

“Cases where the court may set aside or vary default judgment

13.3(1) 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.”

- [15] The conditions set out under CPR 13.3(1) are conjunctive. As stated by the learned Chief Justice Pereira in Lindsay F.P. Grant et al v Tanzania Tobin Tanzil:¹ “it is well established, as to be considered trite, that the provisions of CPR 13.3(1) are unyielding. **A failure to satisfy any one of the three conditions is fatal to the application.**” (Emphasis added). Where a defendant is unable to satisfy all three discretionary conditions under CPR 13.3(1), the court may nevertheless set aside the default judgment under CPR 13.3(2) if satisfied that there are exceptional circumstances for so doing.
- [16] Based on the grounds of the 2nd Defendant’s set aside application, I will first consider whether the default judgment must be set aside pursuant to CPR 13.2(1)(a).

Whether the Default Judgment must be Set Aside

- [17] The fifth ground advanced by the 2nd Defendant in his application is that he had no knowledge of and was never served with the instant claim. It is readily apparent that this contention goes to the issue of service of the claim form and therefore engages the provisions of CPR 13.2 and 12.4. As made plain above, the default judgment must be set aside if any of the conditions in CPR 12.4 are not satisfied. These include the condition that the Claimant proves service of the claim form and statement of claim.²
- [18] Two affidavits evidencing service on the 2nd Defendant were sworn to by Mr. Khalid Shabazz, a process server. In the affidavit of service sworn to on 4th January, 2023 and filed on even date, the process server stated that he identified the Defendant at approximately 12:30 p.m. on 22nd September, 2022 at Denfields Development, St. Mary’s, Antigua, by asking him if he was Joseph Pinder, to which he, the 2nd Defendant, responded in the affirmative. The process server then stated that he personally served the 2nd Defendant with a copy of the claim form, statement of claim, authorisation code form bearing the E-Litigation Portal authorisation code for the 2nd Defendant and supporting exhibits. This affidavit of service was filed subsequent to an earlier affidavit of service sworn to by Mr. Shabazz on 3rd October, 2022 and filed on even date which did not state the E-Litigation authorization code which was on the authorisation code form served on the 2nd Defendant on 22nd September, 2022.
- [19] Having examined the affidavits of service of Khalid Shabaz, I am satisfied that the Claimant has proved service on the 2nd Defendant.
- [20] The 2nd Defendant advanced no further complaints which would fall for consideration under CPR 13.2(1)(c), and I am of the view that the conditions under CPR 12.4 were satisfied for the entry

¹ SKBHCVAP2020/0004 (delivered 6th July 2020, unreported).

² CPR 12.4(a).

of the judgment in default of acknowledgement of service. Accordingly, in the circumstances, I can find no basis on which to set aside the default judgment under rule 13.2(1)(c).

[21] I will now consider whether the 2nd Defendant's application satisfies the conditions under CPR 13.3(1).

[22] As noted above, CPR 13.3 deals with cases where the Court may set aside a judgment entered under Part 12. The rule sets out the conditions that a defendant must satisfy for the Court to determine, in exercise of its discretion, whether a judgment in default of acknowledgement of service or defence entered against a defendant should be set aside. CPR 13.3 provides that:

“13.3(1) 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.

(2) 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.”

[23] I will first consider the 2nd Defendant's application under each condition stated in CPR 13.3(1).

Whether the 2nd Defendant has applied to the Court as soon as reasonably practicable after finding out that Judgment had been entered

[24] The rules do not define the term ‘as soon as reasonably practicable’, therefore, what time frame may be considered ‘as soon as reasonably practicable’ is to be decided on a case-by-case basis. In the instant case, on 12th May, 2023 in the presence of the Parties and their Counsel, the Court delivered an oral decision on the Claimant's application for judgment in default of acknowledgement of service and ordered that default judgment be entered against the 2nd Defendant. The 2nd Defendant applied to set aside the default judgment on 22nd May, 2023. Why it took a further 10 days to apply to set aside the default judgment is left wholly unexplained by the 2nd Defendant. Given that the 2nd Defendant and his Counsel were present when the default judgment was entered and the 2nd Defendant had already made an application for an extension of time and filed a defence to the Claimant's claim, it is curious that the 2nd Defendant did not act with greater promptitude in making his application.

[25] Notwithstanding the absence of an explanation for the lack of promptitude in making this set aside application, I am prepared to accept that the 2nd Defendant's application, filed 10 days after he became aware that default judgment was entered, was made as soon as reasonably

practicable considering intervening weekends and no doubt the need for Counsel to take instructions from the 2nd Defendant.

Whether the 2nd Defendant has given a good Explanation for the Failure to file an Acknowledgement of Service

[26] The 2nd Defendant has contended in his application to set aside the default judgment that he was never served with the present claim, Claim No. ANUHCV2022/0356 but had been served with a previous claim, Claim No. ANUHCV2022/0269. He further asserted that he was not served with notice of the hearing of the 1st Defendant's application for an extension of time to file a defence and that the only notice he received of the present claim was when he was served with the Claimant's application for default judgment. This explanation was also advanced by the 2nd Defendant on his application for an extension of time to file his defence and at the hearing of that application the process server was cross-examined on his affidavit of service. The 2nd Defendant only baldly asserts that he was never served with the present claim despite the evidence of service provided by the Claimant. He has not proffered a different version of events to that set out in the affidavits of service as to his whereabouts on the date and time of service in question, nor has he proffered any other evidence to rebut or refute the Claimant's evidence of service of the instant claim on him. The Court on the 2nd Defendant's extension of time application was and similarly on this set aside application is satisfied that the 2nd Defendant was duly served with the present claim on 22nd September, 2022. Therefore, the Court does not consider the explanation advanced by the 2nd Defendant for his failure to file his defence as a good explanation. The 2nd Defendant's application therefore fails to satisfy the second condition under CPR 13.3(1).

[27] As I have already explained, CPR 13.3(1) is unyielding. A defendant must satisfy all three conditions to be successful on their set aside application. The 2nd Defendant has failed to satisfy the second condition under CPR 13.3(1) and accordingly, his application under this sub-rule fails. For the sake of completeness however, I will briefly address the third condition under the CPR 13.3(1), that is, whether the 2nd Defendant has a real prospect of successfully defending the claim.

Whether the 2nd Defendant has a real prospect of successfully defending the Claim

[28] In **Sylmord Trade Inc. v Inteco Beteiligungs Ag**,³ Michel JA, citing the principles elucidated by George-Creque JA in the case of **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste**⁴ (a case dealing with summary judgment), explained what is meant by 'real prospect of successfully defending a claim' in the following terms:

³ BVIHCV2013/0003 (delivered 24th March 2014, unreported).

⁴ 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**, albeit in the context of summary judgment, would appear to vindicate the conclusion reached by trial judge in the present case. George-Creque JA, who delivered the judgment of the Court, opined that the court had to consider the issue in the context of the pleadings and such evidence as there is before it and determine on this basis whether the defence has a real (as opposed to a fanciful) prospect of success and that if at the end of the exercise the court arrives at the view that it would be difficult to see how the defendant could establish its case then it is open to the court to enter summary judgment. In the context of rule 13.3(1), it would be open to the court to refuse to set aside a default judgment.”

- [29] It is therefore necessary to consider a defendant’s proposed defence in the context of a claimant’s pleaded case and any available evidence to determine whether a proposed defence has a realistic prospect of success.
- [30] The 2nd Defendant filed what the Court considers to be a draft defence as well as an ancillary claim on 24th May, 2023. The 2nd Defendant’s affidavit also sets out his proposed defence. The 2nd Defendant’s defence consists of five main averments. First, he avers that based on the provisions of the Deceased’s Will, the 1st named Defendant did not have authority to enter into an agreement with the Claimant as the Will did not make any provisions for the 1st Defendant to conduct any road works or clearing of lands nor did the 1st Defendant have the consent of any beneficiary to enter into such an agreement. He therefore contends that the 1st Defendant was acting outside of her capacity as Executrix in the Estate and is personally liable to the Claimant.
- [31] Second, the 2nd Defendant avers that the agreement between the Claimant and the 1st Defendant was executed by the 1st Defendant in the capacity of the “Personal Representative” in the Estate of the Deceased where in fact the 1st Defendant was the Executrix of the Will and not the personal representative.
- [32] Third, the 2nd Defendant avers that the agreement between the Claimant and the 1st Defendant, is headed “Contract of Employment for services (retroactive to July 2016)” but that nowhere in the terms and conditions of the agreement does it speak to the contract being back dated, an effective date or the date the contract was executed and that it is possible that the contract was executed after the 1st Defendant was removed as Executrix of the Deceased’s Estate. He further avers that the agreement therefore cannot be retrospective and does not meet the requirements to be accorded such an interpretation.
- [33] Fourth, the 2nd Defendant avers that the invoices provided by the Claimant in support of the instant claim are different from invoices presented in a 2020 matter concerning the validity of the Deceased’s Will and that it appears that the invoices may be fraudulent.
- [34] Finally, the 2nd Defendant avers that the 1st Defendant challenged the Deceased’s Will in June 2018; however, the 1st Defendant did not cease acting on the instrument which gave her authority

but continued to act on the said instrument disregarding the wishes of the testator. The 2nd Defendant contends that upon contesting the Will of the Deceased, the 1st Defendant could no longer act on its authority since the 1st Defendant claimed the Will was fraudulent and that a fraudulent document cannot confer legal rights.

- [35] I have had regard to the provisions of the Deceased's Will. It provides *inter alia* for the payment of the Deceased's funeral expenses from a certificate of deposit; to pay any enforceable unsecured debts, the expenses of the Deceased's last illness, and the expenses of administering her estate.
- [36] The Will also provide for certain parcels of land to be devised and bequeathed to certain persons and any income derived from outstanding receivables of a certain estate to be devised and bequeathed to a certain individual. The Will also makes provisions for lands to be divided for certain persons and for remaining land to remain with the Deceased's estate to settle any related expenses of the estate.
- [37] Having considered the various allegations raised by the 2nd Defendant in his proposed defence and affidavit in support, I am of the view that he has a realistic prospect of defending the claim. Considering the provisions of the Deceased's Will, the question of whether the Will authorised the 1st Defendant to enter into an agreement for the provision of services covered by the agreement with the Claimant is more than arguable. If the Claimant is able to prove his allegation that the 1st Defendant did not have the authority to enter into an agreement, then it may well be the case that the 2nd Defendant could successfully argue that he is not liable under the agreement.
- [38] I need not go into any further detail in relation to the other matters raised by the Defendant in relation to his prospects of success, because, as I have already indicated, the 2nd Defendant having failed to satisfy the second condition under CPR 13.3(1), is unable to succeed on his application to set aside the default judgment pursuant to this rule.
- [39] I will nonetheless consider the arguments raised by the 2nd Defendant as to whether there are exceptional circumstances warranting the setting aside of the default judgment under CPR 13.3(2).

Whether the 2nd Defendant has satisfied the Court that there are Exceptional Circumstances to set aside the Default Judgment

- [40] The finding of an exceptional circumstance under CPR 13.3(2) will override the requirement to satisfy the conditions under CPR 13.3(1).⁵ In **Carl Baynes v Ed Meyer**,⁶ Pereira CJ explained

⁵ Public Words Corporation v Matthew Nelson and Elton Darwton et al v Matthew Nelson DOMHCV2016/0007 and DOMHCV2016/0008 (delivered 29th May 2017, unreported).

⁶ ANUHCVP2015/0026 (delivered 30th May 2016, unreported).

that what may or may not amount to exceptional circumstances must be decided on a case-by-case basis. The learned Chief Justice went on to state:

“...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, 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.”

[41] In **Meyer v Baynes**,⁷ the Privy Council approved the above reasoning of Pereira CJ. At paragraph 17 of its judgment the Board stated:

“The Board can see no reason to question the approach taken by the Court of Appeal to the meaning of the phrase “exceptional circumstances” in the context of rule 13.3(2) of the CPR. The structure of the rule suggests that the phrase calls for something more than a real prospect of success and the Board respectfully endorses the reasoning of Pereira CJ at para 26 of her judgment as to its meaning in this context. The question for the Court of Appeal was therefore whether, as Mr Dorsett submitted, Mr Meyer’s contention that he had sold the car to Mr Hernandez before the accident constituted a knockout blow or in some other way constituted a compelling reason for setting the judgment aside.”

[42] With the above reasoning in mind, it is pellucid that the finding of exceptional circumstances is more than being satisfied that a defendant has a realistic prospect of success in defending a claim. The circumstances must be truly exceptional warranting a claimant being deprived of its

⁷ [2019] UKPC 3.

judgment. As was noted in **International Finance Corporation v Utes Africa SPRL**,⁸ a person with a regularly obtained judgment, even a default judgment, has something of value and should not be deprived of it without good reason. This was stated in the context of establishing whether a defendant has established a realistic prospect of success and as such the finding of exceptional circumstances rises to an even higher threshold.

- [43] Learned Counsel for the 2nd Defendant argued that whether or not the 2nd Defendant has satisfied all the conditions under CPR 13.3(1), based on the affidavit evidence of the 2nd Defendant and documentary evidence in support, which is not disputed, the 2nd Defendant's defence has a real prospect of success and further, it is clear that there are exceptional circumstances justifying the setting aside of the default judgment. The thrust of the 2nd Defendant's submission in support of this point is that the agreement entered between the Claimant and the 1st Defendant was illegal and that the 1st Defendant's actions in entering into an agreement with the Claimant were outside the scope of her authority.
- [44] Learned Counsel for the 2nd Defendant argued that the 1st Defendant, who was the Executor of the Estate of the Deceased had no authority to enter into any agreement with the Claimant to cut any roads or clear any lands on behalf of the Estate, since the Deceased's Will makes no provision for such work to be done. Accordingly, he argued that the 1st Defendant exceeded her authority and acted outside the scope of the Will. Learned Counsel for the 2nd Defendant submitted that an illegality or a wrongful act will justify the Court setting aside a judgment in default and relied on the judgment of Pereira CJ in **Baynes v Meyer**.
- [45] Learned Counsel for the Claimant, on the other hand, argued that the 2nd Defendant's allegation that the Deceased's Will did not authorise the 1st Defendant to enter into the agreement with the Claimant, is at best arguable and does not satisfy the threshold of realistic prospect of success, much less exceptional circumstances. Learned Counsel for the Claimant argues that the provisions of the Will are not clear and would be open to interpretation. He stated that the provisions in the Will included expenses of administering the Estate of the Deceased and this leads to a wide interpretation as to how the Estate is to be administered.
- [46] I agree with learned Counsel for the Claimant on this point. In my view, the 2nd Defendant's allegation that the 1st Defendant had no authority to enter into the agreement with the Claimant could only have gone to a consideration of whether the 2nd Defendant had a realistic prospect of success in defending the Claimant's claim. As Pereira CJ cautioned in **Carl Baynes v Ed Myer**, 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 interchangeable or synonymous and CPR 13.3(2) is not meant to be used as a catchall as such where a defendant has failed under CPR 13.3(1).
- [47] The 2nd Defendant has also placed no evidence, cogent or otherwise, to show any illegality in relation to the agreement except for his bald assertions to that effect in the affidavit in support of

⁸ [2001] EWHC 508 (Comm).

his application. What has been raised however is the issue of the 1st Defendant's authority which would merely be a more than arguable defence to the claim. In my view, the matter advanced by the 2nd Defendant does not rise to the level of being an exceptional circumstance as contemplated by the rules and authorities of this Court.

- [48] As to the 2nd Defendant's contention that the 1st Defendant contested the deceased's Will and that upon contesting the Will of the Deceased, the 1st Defendant could no longer act on its authority since the 1st Defendant claimed the Will was fraudulent and that a fraudulent document cannot confer legal rights, I again do not consider this to be an exceptional circumstance. These are arguments which go to prospects of success. The 2nd Defendant has provided no proper argument or cogent evidence which goes to support this contention and makes nothing more than bald assertions in his affidavit. There is also no contention by the 2nd Defendant himself that the Will is somehow fraudulent. I am unable to conclude that these arguments can arise to special circumstances warranting the setting aside of the default judgment.
- [49] Learned Counsel for the 2nd Defendant also submitted that if the default judgment was allowed to stand, the Estate of the Deceased will lose a substantial sum of monies where the Executor would have exceeded her authority and entered into an agreement without the authority of the Will or the consent of the beneficiaries. He further contended that the Claimant has falsified invoices to claim the sum alleged to be due and owing to him and a trial ought to be had so that the 2nd Defendant can disprove the Claimant's contention. In relation to these further matters, I also find that these cannot be properly considered as exceptional circumstances warranting the setting aside of the default judgment. These matters in my view demonstrate no more than a realistic prospect of defending the claim, which is an entirely different threshold from what is contemplated by CPR 13.3(2).
- [50] Furthermore, as it relates to alleged fraudulent invoices produced by the Claimant, in my view, these are matters which can be adequately addressed at the assessment of damages stage. The default judgment entered by the Court was for an amount to be decided by the Court. The default judgment is conclusive only of the issue of liability. On an assessment of damages following a default judgment, the Court is required to decide how much compensation is due to a Claimant based on the evidence adduced in proof of its claim. A defendant may not take any point which is inconsistent with the liability alleged in the statement of claim, but any point which goes to quantum can be raised by the defendant, provided that it is not inconsistent with any issue settled by the judgment.⁹ Accordingly, on the assessment of damages, the Court is concerned with the quantification of the damage suffered by a claimant. It is as expressed by Edwards JA in **Michael Laudat et al v Danny Ambo**:¹⁰

"The issue of the defendant's liability having been settled by the default judgment, the only issue for the court is how much in compensatory damages is due to the claimant upon the evidence adduced by the claimant in proof of any special damages claimed

⁹ See *Pugh v Cantor Fitzgerald International* [2001] EWCA Civ 307 at para. 26 to 29.

¹⁰ DOMHCVAP2010/0016 (delivered 15th December 2010, unreported).

and general damages. Where damages for any pleaded causes of action have not been proven by the evidence, the claimant would generally not be entitled to damages under that head of claim.”

[51] The 2nd Defendant may therefore adduce any evidence and make any argument he wishes at the assessment stage that goes to the issue of quantum, as long as it is not inconsistent with the issue of liability. Therefore, the 2nd Defendant would have sufficient opportunity at the assessment stage to make any arguments in relation to the authenticity of invoices in support of sums claimed by the Claimant and other matters concerning the issue of quantum. Therefore, for this additional reason, I do not consider that the allegation made by the Defendant in relation to the invoices produced by the Claimant in support of his claim rises to the level of an exceptional circumstance warranting the setting aside of the default judgment.

[52] Having examined the Claimant’s application and evidence adduced in support of the application, I can see no other matters for consideration as exceptional circumstances in this case. Therefore, in view of the foregoing, I am satisfied that the 2nd Defendant has not met the requirements under CPR 13.2 and has not satisfied the three cumulative conditions under CPR 13.3(1). The 2nd Defendant has also failed to show any exceptional circumstances warranting the setting aside of the default judgment. In the circumstances, the 2nd Defendant fails on his application to set aside the default judgment.

[53] Having successfully resisted the 2nd Defendant’s application, the Claimant is entitled to his costs. I would summarily assess those costs in the sum of \$700.00.

[54] In the premises, I would make the following orders:

1. The 2nd Defendant’s application to set aside the default judgment is refused.
2. The 2nd Defendant shall pay the Claimant his costs of this application summarily assessed in the sum of \$700.00 within 28 days from the date of this Order.
3. The matter shall be set down for directions for assessment of damages on a date to be fixed by the Registrar of the High Court.

[55] 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