

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

GRENADA

CLAIM NO. GDAHCV2023/0061

BETWEEN:

FREDERICK FINLAY

Claimant

and

[1] RAYMOND PRIME

[2] DESIREE PRIME

Defendants

Before:

The Hon. Carlos Cameron Michel

Master

Appearances:

Mr. Derick Sylvester for the Claimant

Ms. Gennilyn Ettienne for the Defendants

2023: May 19; 31

DECISION

[1] **MICHEL M:** This is the court's decision on an application filed by the defendants to set aside the judgment in default of defence dated 16th March 2023 entered against them in favour of the claimant.

Background

[2] The background to this matter can be set out briefly. On 8th February 2023, the claimant commenced these proceedings against the defendants, seeking damages for negligence resulting from a collision between the claimant's motorcycle and the defendants' motor vehicle

which at the material time was being driven by the 1st defendant. As a result of the collision, the claimant alleges that he suffered personal injuries and the loss of his motorcycle.

- [3] According to the affidavit of service filed on behalf of the claimant, the claim was served on the defendants on 9th February 2023 at 4:50 p.m. The defendants filed an acknowledgement of service on 21st February 2023. On the acknowledgement of service, they indicated that they received the claim form and statement of claim on 9th February 2023.
- [4] The claimant filed a request for entry of judgment in default of defence against the defendants at 8:37 a.m. on Monday, 13th March 2023. At 2:52 p.m. on even date, the defendants filed a defence and counterclaim to the claimant's claim. Judgment in default of defence was entered for the claimant by the Court Office on 16th March 2023 and the default judgment was filed on the E-Litigation Portal by the claimant on 24th March 2023.
- [5] On 29th March 2023, the defendants filed this application to set aside the default judgment. The application is accompanied by the affidavit of Ariela Leah Medford, Law Clerk at Excelsior Law Firm in support, with a draft defence and counterclaim exhibited thereto and a draft order. The grounds of the defendants' application as set out in their notice of application are as follows:

- "1. The Applicants are the Defendants in this Suit;
2. The Applicants have filed a Defence and Counterclaim on 13th March 2023 at 2:52 pm in accordance with The Civil Procedure Rules, Rule 10.3(1) being with in the period for filing a defence;
3. The conditions of The Civil Procedure Rules, Rule 12.5(b) have not been satisfied; the judgment is therefore wrongly entered by virtue of The Civil Procedure Rules, 2000, Rule 13.2 (1)(b);
4. In the event the court is of the opinion that the judgment is not wrongly entered the applicants pray this honourable Court for an order that the judgment be set aside in accordance with rule 13.3(1)(a) and (b).
5. The defendants intend to defend the claim and instructed their legal practitioner, Gennilyn E. Ettienne of Excelsior Law Firm St. George's, Grenada to draft and file a defence and counterclaim;
6. The 28-day period for filing the defence including any extensions of time in accordance with Rule 10.3 expired on the 13th day of 9th day of March, 2023.

7. The defence was ready for filing prior to this day by 9th day of March and in the process of filing the equipment malfunctioned and was not filed on the said day. Filing was concluded on the next day on which the court office was opened and the defendants aver that this was the 13th day of March, 2023.
8. The defendants intend to file a defence and have applied as soon as they found out about the judgement;
9. The defendants have a good chance of succeeding in their defence and the same has already been filed. A true copy of same is exhibited to the affidavit in support.”

[6] Based on the grounds of the application and the affidavit filed in support, it is evident that it falls to be considered under rule 13.2, alternatively rule 13.3(1) of the **Civil Procedure Rules 2000** (“CPR”).

[7] I pause here to note that shortly before the hearing of this application commenced on 18th May 2023, the defendants filed a further affidavit of Ariela Medford in support of the application to set aside and to correct a statement in her affidavit filed on 29th March 2023. During the hearing of the application, the defendants then filed what appears to be an affidavit by the 1st defendant in support of an application for an extension of time to file a defence. This affidavit was sworn to by the 1st defendant on 13th March 2023. The late filings of the affidavits on the E-Litigation Portal as the parties were logged on for the hearing of the application were strenuously objected to by counsel for the claimant. I must comment that this is highly undesirable. The court ought not to have regard to these affidavits given the time of the filing and without the claimant having had an opportunity to consider and respond to them. In any event, I am of the view that little turns on the statements made in the two belatedly filed affidavits.

The Law

[8] CPR 13.2 deals with cases where the court must set aside a default judgment. The rule provides that:

“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.”

[9] The provisions of CPR 13.2 are mandatory, not discretionary. If the court concludes that any one of the conditions in CPR 12.4 (judgment for failure to file acknowledgment or service) or CPR 12.5 (judgment for failure to defend) as the case may be, are not met, the court must set aside the default judgment.

[10] 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 decide 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.”

[11] 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). Therefore, a defendant whose application falls for consideration under CPR 13.3(1) must satisfy each of the three discretionary conditions under the rule for the court to set aside the default judgment. Failure to satisfy any one of the conditions will result in the application failing.

Whether the Default Judgment must be set aside pursuant to CPR 13.2

[12] CPR 12.5 lists the conditions which must be satisfied for the entry of judgment for failure to defend. The rule states:

“12.5 The court office at the request of the claimant must enter judgment for failure to defend if –

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

¹ SKBHC VAP2020/0004 (delivered 6th July 2020, unreported).

(ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;

(b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;

(c) the defendant has not –

(i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6)); or

(ii) (if the only claim is for a specified sum of money) filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or

(iii) satisfied the claim on which the claimant seeks judgment; and

(d) (if necessary) the claimant has the permission of the court to enter judgment.

[13] The defendants contend that when the claimant made a request for default judgment on 13th March 2023, CPR 12.5(b) was not complied with. Their argument is that the default judgment entered by the Court Office on 16th March 2023 was irregular as the time for filing a defence had not expired when the request was made. The claimant on the other hand argues that the default judgment is regular as the last day for the defendants to file their defence was Friday, 10th March 2023 and therefore, they argue, the request was properly made on 13th March 2023 when no defence had yet been filed.

[14] This is a short point. The time limited by CPR 10.3(1) for the filing of a defence is 28 days after service of the claim, subject to any extension agreed to by the parties in accordance with CPR 10.3(5) or application sought for an extension in accordance with CPR 10.3(9). CPR 5.19 deals with deemed date of service of a claim form. CPR 5.19(3) states:

“(3) If an acknowledgment of service is filed, whether or not the claim form has been duly served, the claimant may treat –

(a) the date of filing the acknowledgment of service; or

(b) (if earlier) the date shown on the acknowledgment of service for receipt of the claim form; as the date of service.

(4) A claimant may file evidence on affidavit to prove that service was in fact effected on a date earlier than the date on which it is deemed to be effected.

[15] The acknowledgement of service filed by the defendants on 21st February 2023 indicates that the claimants received the claim form and statement of claim on 9th February 2023. This accords with the affidavit of service of Geoffrey Grey, Bailiff, filed by the claimant on 13th March 2023,

which evidences personal service of the claimant's claim on the defendants on 9th February 2023. I am therefore satisfied that the defendants were served with the claimant's claim on 9th February 2023. No agreement having been made between the parties for an extension of time, nor application made by the defendants to the court for an extension of time, the defendants were required to file their defence 28 days after service of the claim.

[16] CPR 3.2 deals with computation of time under the CPR. The rule states:

"3.2 (1) This rule shows how to calculate any period of time for doing any act which is fixed by –

- (a) any judgment or order of the court;
- (b) any practice direction; or
- (c) these Rules.

(2) All periods of time expressed as a number of days are to be computed as clear days.

(3) In this rule –

"clear days" means that in computing the number of days the day on which the period begins and the day on which the period ends are not included.

(4)

(5) If the period specified for doing any act at the court office ends on a day on which the court is closed, the act is in time if done before close of business on the next day on which the court is open."

[17] Considering the above, the defendants would have been required to file their defence 28 days after service of the claim on 9th February 2023. Computing the 28-day period in accordance with CPR 3.2, it is readily apparent that the last day on which the defendants were required to file their defence was Friday, 10th March 2023. Accordingly, the claimant was entitled to make a request for judgment in default of defence at 8:37 a.m. on Monday, 13th March 2023 as no defence had been filed by that time.

[18] No complaint is made by the defendants in relation to the other conditions under CPR 12.5. I have reviewed the procedural history of the matter, and I am satisfied that the claimant has met all the requirements under CPR 12.5 for entry of judgment in default of defence. Therefore, there is no basis on which the court can set aside the default judgment pursuant to CPR 13.2.

[19] I will now consider the defendants' application under CPR 13.3(1).

Whether the Defendants have applied to the Court as soon as reasonably practicable after finding out that judgment had been entered

- [20] No specific date has been given as to when the defendants found out that a default judgment had been entered against them. However, the default judgment entered by the Court Office was filed on the E-Litigation Portal by the claimant on 24th March 2023. The defendants would have been alerted of this filing by a notification from the E-Litigation Portal. Five days later, on 29th March 2023, the defendants applied to set aside the default judgment. I consider that a period of 5 days as more than reasonable within which to make an application to set aside the default judgment. The defendants have therefore satisfied this limb under CPR 13.3(1).

Whether the Defendants have given a good explanation for the failure to file a defence

- [21] CPR 13.3(1)(b) requires that an applicant seeking to persuade the court to exercise its discretion to set aside a default judgment must give a good explanation for failing to file an acknowledgement of service or defence. In **Public Works Corporation v Matthew Nelson**,² Chief Justice Pereira referred to **The Attorney General v Universal Projects Limited**³ (which concerned an application for relief from sanctions) for guidance on what constitutes a good explanation under CPR13.3(1). In **Universal Projects Limited**, the Judicial Committee of the Privy Council stated:

“First, if the explanation for the breach i.e. the failure to serve a defence ... connotes real or substantial fault on the part of the defendant, then it does not have a “good” explanation for the breach. To describe a good explanation as one which “properly” explains how the breach came about simply begs the question of what is a “proper” explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency.”

- [22] With this guidance in mind, I will now consider the affidavit evidence filed in support of the defendants’ application. The explanation for the defendants’ failure to file their defence can be gleaned from the affidavit of Ariela Leah Medford, Law Clerk, filed on 29th March 2023 in support of the defendants set aside application. In so far as is relevant, Ms. Medford deposed as follows:

² Public Works Corporation v Matthew Nelson and Elton Darwton et al v Matthew Nelson DOMHCV2016/0007 and DOMHCV2016/0008 (delivered 29th May 2017, unreported) at para 14.

³ [2011] UKPC 37 at para 23.

- “4. I make this affidavit in support of the Notice of Application for the request for entry of Judgment in default of defence filed on 13th March, 2023 be set aside.
5. I have first-hand knowledge about this matter as a litigation clerk assisting my principal Ms Ettienne, aforesaid, in the preparation of the defence and counterclaim including E- filing of the Defence and Counterclaim which was filed on the 13th March, 2023 in accordance with The Civil Procedure Rules, Rule 10.3(1) on behalf of the defendants.
6. I am advised by my principal and verily believe that the period for filing the defence had not yet elapsed when the claimant served the Request for entry of default judgment on the 13th day of March, 2023 via E-mail on the Excelsior Law Firm and as such the conditions of The Civil Procedure Rules Rule 12.5 (b) had not been satisfied
7. I have reviewed the Request for entry of Judgment filed on the 13th day of March, 2023 for default of defence and on behalf of the defendants I vouch that the defence was duly filed within the prescribed period. In fact I assisted my principal with the preparation of the defence. It was intended that the defence be filed on Friday the 9th day of March, 2023.
8. Therefore, in preparation the defendants visited the Excelsior Law Firm on Thursday the 8th of March, 2023 to review the final draft with my principal. Having kept their said appointment on the said date they approved the draft defence and I further assisted in the preparation of the certificate of Truth to accompany the defence and counterclaim. The same was duly signed by them on the said 8th day of March, 2023, seeking to meet the deadline for filing the defence in advance of expiration.
9. However, On Friday 9th March, instant, my principal instructed me to upload the defence and counterclaim and as events would happen, there was a glitch with the scanner used to scan the documents for E-filing and as such the documents was not filed on Friday as intended.
10. However, on Monday 13th day of March, 2023 after the issue with the scanner was re-solved the defence and counterclaim were scanned by me and uploaded on the Litigation Portal and duly filed.
11. I confirm that on the date of filing the defence and counterclaim judgment was not by the claimant and as such in the circumstances as outlined the entry of judgment is irregular. A true copy of the defence and Counterclaim filed and the transaction receipt showing that the defence was accepted on The ECS E-litigation Portal are produced and shown to me and exhibited hereto and marked 'ALMI'.
12. I therefore further pray this honourable court to set aside the default judgment dated the 24th day of March, 2023 against the defendants on the ground that the said is irregular.

13. However, in the event the court is of the opinion that the judgment is regularly entered then in the alternative I pray this honourable court to set aside the judgment in accordance with the provisions of the Civil Procedure Rules, 2000 Rule 13.3 (1) and (2) for an order to deem the defence filed on the 13th day of March, 2023 duly and properly filed. The defendants intend to defend the claim, have filed a defence as soon as reasonably practicable and relief from sanctions.”

[23] The court has noted what could only be considered errors in the dates stated in paragraphs 7, 8, and 9 of the affidavit of Ms. Medford. The court notes that 8th March 2023 was in fact a Wednesday, 9th March 2023 a Thursday and 10th March 2023 a Friday (Ms. Medford seemingly sought to clarify these errors in the affidavit to which I referred to above which was filed shortly before the hearing of this application on 18th May 2023).

[24] Putting the inconsistent dates aside, it can be gleaned from paragraphs 7, 8 and 9 of the affidavit of Ms. Medford that the explanation for the defendants’ failure to file their defence is that there was a glitch with the scanner when she attempted to scan the defendants’ defence and counterclaim for uploading to the E-Litigation Portal on Friday, 10th March 2023, and that after the issue with the scanner was resolved, the defence and counterclaim was scanned by her and uploaded and filed on the E-Litigation Portal on Monday, 13th March 2023.

[25] In my view, a bald assertion that there was glitch with the scanner, without more is not a good explanation for the failure to file a defence. In the context of an application for relief from sanctions, Baptiste JA in **Prudence v Sagicor General Insurance Group**⁴ stated that reliance on bald assertions must be inimical to the grant of relief. I say that the defendants have made a bald assertion because the defendants have not sought to provide in their affidavit filed in support of their application any material detail for the court’s consideration of their explanation. We do not know whether the glitch with the scanner occurred on the morning of 10th March 2023, or in the afternoon, or right before the 4:00 p.m. deadline for filing. This quality of evidence would allow the court to better assess the timeframe within which the defendants were left to comply with the filing of their defence. We also do not know the nature and the effect of the glitch. One would assume that the glitch left the scanner inoperable, but there could also have been any series of resulting effects of a ‘glitch’ to a scanner, not all of which would prevent a document from being scanned, albeit perhaps at less than optimal quality. All the court is left to reconcile is that when

⁴ SLUCVAP2013/0009 (delivered 29th September 2014, unreported).

the defence was being prepared for uploading to the E-Litigation Portal there was a 'glitch' with the scanner.

[26] CPR requires that a defendant files a defence within 28 days after service. If a defendant waits until the last day to comply with the rule, every effort must be made to do so, otherwise he or she runs the risk of a claimant applying for a default judgment. In my view, any number of steps could have been taken or at least attempted, in order to timeously file the defence and counterclaim on the E-Litigation Portal in the face of a glitchy scanner; for example, using another device to scan the defence and counterclaim, exploring whether there are reprographic centres available to have the defence and counterclaim scanned, or taking steps to have the defence and counterclaim filed at the Service Bureau at the High Court. These are some of the same considerations raised by the Court of Appeal in **Digital Security Services Ltd. et al v Nevis International Bank & Trust Ltd.**⁵ The defendants, by their affidavit filed in support of the application, have not sought to evidence any such steps being taken. In my view, what would not be acceptable is for a defendant to simply wait for a technical glitch to be resolved in the face of a looming deadline.

[27] In the submissions on behalf of the defendants, it was the defendants' contention that the issue with the scanner was resolved, and the defence and counterclaim was filed on the very next day court office was open. This was submitted as a factor for consideration by the court in deciding that the defendants have provided a good explanation, since the failure was resolved on the next day the court office was open. Whilst I disagree that the promptness with which a defence was filed after the period for filing a defence had already expired has any bearing on whether a good explanation has been provided for the failure to file a defence, by way of observation, I would simply point out that with the advent of the E-Litigation Portal, legal practitioners have access to the online platform 24 hours a day, 7 days a week (save and except for when there are service interruptions with the E-Litigation Portal and for which the **Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules** ("E-Litigation Portal Rules") provides an avenue for relief).⁶ It is not the case that a legal practitioner has to wait for the doors of the court to open to manually have a document filed. Notwithstanding that a document would not be deemed filed until 8:30 a.m. on Monday, 13th March 2023, pursuant to the E-Litigation Portal Rules, steps could have been taken to upload and submit the defendants' defence and

⁵ NEVHCVP2021/0003 (delivered 7th April 2022, unreported) at para. 24.

⁶ See rule 9 of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2021.

counterclaim for filing on the E-Litigation Portal anytime between Friday, 10th March and Monday, 13th March 2023 when the court office would reopen. The defendants have not placed any evidence before the court of such steps being taken.

[28] Learned counsel for the claimant submitted that taken as a whole, the evidence relied upon by the defendants to show that they have a good explanation for the failure to file a defence demonstrates a lack of diligence, which the courts have repeatedly held does not amount to good explanation to comply with a rule.⁷ I agree. However, even if I were wrong in the view that the explanation proffered by the defendants for their failure to file their defence can be considered lack of diligence, in any event, for the reasons I have set out above, I am still of the view that the defendants have not provided a good explanation to satisfy CPR 13.3(1)(b).

[29] By way of observation only, it is noted in passing that as stated above, in Ms. Medford's affidavit filed on 29th March 2023 in support of the defendants' application to set aside the default judgment, she deposed that the defendants failed to file their defence because there was a glitch with the scanner but that on Monday 13th March 2023, after the issue with the scanner was resolved the defence and counterclaim were scanned by her and uploaded on the E-Litigation Portal and duly filed. Curiously, the affidavit of the 1st defendant sought to be filed by the defendants on 18th May 2023 whilst the application was being heard, contradicts Ms. Medford's account. The 1st defendant deposed that the scanner malfunctioned and on Friday, 10th March 2023 efforts were made to repair the scanner, but this proved futile, and that the documents had to be prepared from another location and time ran out and as such the documents could not be filed on the date set for filing the defence. The two statements are clearly inconsistent as Ms. Medford made no mention of the documents being prepared at another location only that on Monday, 13th March 2023 after the issue with the scanner was resolved, she scanned and uploaded them to the E-Litigation Portal and the documents were duly filed.

[30] Considering my earlier findings, I am of the view that the defendants have not provided a good explanation for their failure to file a defence within the time prescribed by the CPR. The defendants have therefore not satisfied CPR 13.3(1)(b). Having reached this conclusion, this is sufficient to dispose of the defendants' application to set aside the default judgment pursuant to CPR 13.3(1) as the failure to satisfy any one of the conditions under the rule is fatal to the application. Notwithstanding, I will go on to consider the application under CPR 13.3(1)(c).

⁷ See e.g. *Laudat et al v Ambo DOMHCVAP2010/0016* (delivered 15th December 2010, unreported).

Whether the Defendants have a real prospect of successfully defending the claim

- [31] In **Sylmord Trade Inc. v Inteco Beteiligungs Ag**,⁸ Michel JA cited the principles laid down by George-Creque JA in the case of **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste**⁹ (a case dealing with summary judgment) to define real prospect of successfully defending a claim:

“The approach taken by our court to the issue of “real prospect of successfully defending the claim” in the case of **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**,³ 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.”

- [32] I shall therefore consider the defendants draft defence in the context of the claimant’s statement of claim and the evidence available to the court. The claimant’s claim is in negligence. In his statement of claim, he has pleaded that he and a passenger were riding on his motorcycle on the left side along the Westerhall main road. He pleaded that he recalls riding past a supermarket and remembers nothing further about the accident as he was knocked unconscious on the scene of the accident. He pleaded that based on details provided by his passenger and a police report, the 1st defendant was driving on the main road and whilst moving to turn onto a minor road along the right side of the road, which was the side he the claimant was riding along, the defendants’ vehicle collided with his motorcycle. In their draft defence and counterclaim, the defendants have pleaded that the 1st defendant was driving along the main road heading to the direction of Close Rock minor road and that he took steps to ensure the road was clear and after doing so proceeded to manoeuvre right towards the minor road and after completing the turn and just as he entered the minor road, the claimant negligently and recklessly drove his motorcycle and collided with the defendants’ vehicle.

⁸ BVIHCV2013/0003 (delivered 24th March 2014, unreported).

⁹ Saint Lucia Civil Appeal No. 8 of 2009 (delivered 11th January 2010, unreported).

[33] Having critically considered the claimant's statement of claim, the police report exhibited thereto and the defendants' proposed defence and counterclaim, it would be difficult to see how the defendants could establish their case. There appears to be no dispute in the defendants pleaded case that they were attempting to turn from the left side of a major road onto a minor road on the right side of the road. This would have required that the 1st defendant to manoeuvre from the left of the main road and across the right side the road on which traffic is moving in the opposition direction. When one considers the particulars of special damage in the counterclaim, all the damage particularised by the defendants is in respect of damage to the left side of the defendants' vehicle. This damage pleaded is consistent with the claimant's pleaded case and the police report that the defendant crossed in front the claimant's motorcycle. The defendants have pleaded no other facts which dispute the claimant's version of events and on which to mount a defence. Taking the defendants' pleaded case at its highest, it would be difficult to see how the defendants could mount a defence to the claimant's claim that the 1st defendant negligently turned across the road on which he the claimant was riding.

[34] As was stated by Pereira CJ in **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste**,¹⁰ what must be shown is that the defendants' defence has 'no "real" (realistic as opposed to fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial.' The defence must be more than arguable. It must be one which carries a real conviction.¹¹ With that in mind and in light of my findings above, I do not consider that the defendants have a realistic prospect of successfully defending the claim and therefore, they have not satisfied CPR 13.3(1)(c).

Whether there are any Exceptional Circumstances to set aside the Default Judgment

[35] For the sake of completeness, it must be noted that the finding of an exceptional circumstance under CPR 13.3(2) will override the requirement to satisfy the conditions under CPR 13.3(1).¹² In **Carl Baynes v Ed Meyer**,¹³ Pereira CJ explained that what may or may not amount to exceptional circumstances must be decided on a case-by-case basis. These have been considered and approved by the Judicial Committee of the Privy Council in **Meyer v Baynes**.¹⁴

¹⁰ At para. 20.

¹¹ International Finance Corporation UteAfrica S.P.R.L.13

¹² Public Words Corporation v Matthew Nelson and Elton Darwton et al v Matthew Nelson DOMHCV2016/0007 and DOMHCV2016/0008 (delivered 29th May 2017, unreported).

¹³ ANUHCVP2015/0026 (delivered 30th May 2016, unreported).

¹⁴ [2019] UKPC 3 at para. 17.

In the Court of Appeal decision, the learned Chief Justice stated the following in relation to the question of what would amount to exceptional circumstances:

“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).”

- [36] The defendants did not ground their application under CPR 13.3(2). In any event, I do not consider that there are any exceptional circumstances in this case which allow the Court to set aside the judgment in default of defence under this sub-rule.

Conclusion

- [37] The defendants have failed to satisfy the court that the default judgment must be set aside pursuant to CPR 13.2 and have failed to satisfy the discretionary pre-conditions under CPR 13.3(1)(b) and 13.3(1)(c) for setting aside the default judgment. In the circumstances, their application to set aside the default judgment entered on 24th March 2023 must accordingly be dismissed.

- [38] The defendants being unsuccessful on their application, shall pay costs to the claimant to be summarily assessed if not agreed within 28 days.

Disposition

- [39] I shall therefore make the following orders:

- (1) The application filed by the defendants on 29th March 2023 to set aside the judgment in default of defence dated 16th March 2023 is dismissed.
- (2) The defendants shall pay costs to the claimants to be summarily assessed if not agreed 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.

[40] I wish to thank learned counsel on both sides for their helpful submissions.

Carlos Cameron Michel
Master

By the Court

Registrar