

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

SAINT VINCENT AND THE GRENADINES

CLAIM NO: SVGHCV2020/0122

BETWEEN:

KHALIQUE BROWNE

Claimant

and

WEST INDIAN INSURANCES LTD.

Trading as Sentry

Defendant

Appearances:

Mr. Ronald Marks for the Claimant

Mr. Akin John for the Defendant

2021: June 29;
July 27.

RULING

[1] **GILL, M.:** This is the court's ruling on an application by the defendant to set aside judgment in default of defence entered on 5th January 2021.

Background

2 By clam form and statement of claim filed on 4th November 2020, the claimant seeks against the defendant damages for breach of contract, a declaration that his policy of insurance with the defendant was in good standing at the date of an accident, indemnification for loss and damage, damages for loss of use, special damages, interest and costs.

- [3] The claim form, statement of claim and supporting documents were served on the defendant on 11th November 2020. An acknowledgement of service was filed on behalf of the defendant on 25th November 2020. However, the defendant failed to file a defence within the 28-day period stipulated for so doing by the Civil Procedure Rules 2000 as amended (CPR 2000). The deadline for filing the defence was 10th December 2020.
- [4] That being the case, on 14th December 2020 at 3:00 p.m., the claimant lodged a request for judgment in default of defence.
- [5] By letter dated the same day, 14th December 2020, to counsel for the claimant, counsel for the defendant requested an extension of time to file the defence to 14th January 2021. Counsel for the claimant received this letter at 3.37 p.m. on the said 14th December 2020.
- [6] Counsel for the claimant responded by letter dated 17th December 2020 indicating that the claimant did not agree to the request for an extension of time.
- [7] On that day, 17th December 2020, the defendant filed an application for extension of time to file its defence.
- [8] On 5th January 2021, judgment in default of defence was entered by the learned registrar and the matter was set down for assessment of damages.
- [9] The judgment in default of defence was served on the defendant on 8th January 2021.
- [10] On 12th January 2021, the defendant filed the notice of application to set aside the judgment in default of defence.

Issue

- [11] The court must decide whether to set aside the judgment in default of defence entered against the defendant on 5th January 2021. The application for extension of time has been overtaken by the application to set aside the default judgment.

Law and analysis

[12] Part 13 of CPR 2000 deals with setting aside or varying default judgment. The defendant's application is made pursuant to CPR 13.3(1), which reads as follows:

- (1) *"If Rule 13.2 does not apply [dealing with cases where the court **must** set aside a default judgment] 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 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.*
- (3) *Where this rule gives the court power to set aside a judgment, the court may instead vary it."*

[13] At present, the requirements under CPR 13.3(1) are conjunctive. In **Kenrick Thomas v RBTT Bank Caribbean Limited**,¹ Barrow JA, in highlighting the differences between CPR 2000 and the English Civil Procedure Rules, stated:

" 'Only if' can only mean that if the three matters are not present then the court may not set aside a default judgment. The difference between the English equivalent and the provision in CPR 2000 lies in the discretion. The discretion in the English CPR [in] Rule 13.3 [is] significantly unlimited; it specifies only one matter to which the court must have regard and does not even make fulfillment of that matter a condition that the defendant must satisfy. In contrast, the discretion in CPR 2000 is severely limited; it specifies three conditions that the defendant must satisfy before the court is permitted to set aside a default judgment.

[14] The learned Justice of Appeal made these pronouncements before the introduction of CPR 13.3(2) which somewhat relaxed the rigidity of CPR 13.3(1). Following on from this, the application of the

¹ Civil Appeal No. 3 of 2005 (St. Vincent and the Grenadines), at paragraph 7; see also SKBHCVAP2020/0004 Lindsay F. P. Grant and Another v Tanzania Tobin Tanzil, delivered July 6, 2020, per Pereira CJ at paragraph 9

amendment was discussed by Pereira CJ in the consolidated appeals of **Public Works Corporation v Matthew Nelson** and **Elton Darwton and Public Works Corporation v Matthew Nelson**² where Her Ladyship stated:

“It is now well settled that, unlike the English CPR, the discretion granted under our CPR 13.3(1) is more limited than the broad discretion which is given under the English Rules. A failure to satisfy any one of the three conditions is fatal unless a defendant manages to bring himself within the rule 13.3(2) by demonstrating exceptional circumstances warranting the exercise of the discretion in his favour.”

Did the defendant apply to the court as soon as reasonably practicable after finding out that judgment had been entered?

[15] There is no set period of time stipulated in the CPR as to satisfy the requirement under CPR 13.3(1)(a). The court must determine whether, in all the circumstances of each case, the applicant acted as soon as reasonably practicable.

[16] The default judgment was served on the defendant on Friday 8th January 2021. The application to set aside the default judgment was filed on Tuesday 12th January 2021, four days later. With the intervening weekend, the parties agree that the application was made promptly. I am satisfied that the application was made as soon as reasonably practicable after the defendant was served with it. Therefore, the defendant has met the requirement under CPR 13.3(1)(a).

Has the defendant given a good explanation for the failure to file its defence on time?

- [17] The defendant states its reason for the delay as follows:
- i Due to the disruption of COVID-19, legal practitioners for the defendant were unable to directly consult, within the period of time for filing a defence, with an independent investigator, Mr. Eric Kipps, who is based in Trinidad, in relation to allegations of fraud, which are pivotal allegations of the defence.
 - i The defendant had proactively sought the consent of the legal practitioners on record for the claimant for an extension of time to file a defence pursuant to CPR 10.3(5), at a date and time before a request for judgment in default had been filed.

² DOMHCVAP2016/0007 and DOMHCVAP2016/0008, at paragraph 13

- [18] The affidavit of Anieke Frederick, legal clerk at the chambers of the legal practitioners on record for the defendant, in support of the application, at paragraph 10, addresses the delay thusly:

“The basis for the delay in filing the Defence as set out in the grounds of the Application for Extension was due in part to the fact that Counsel for the Defendant was engaged in the preparation of pleadings and submissions in relation to a number of other matters in compliance with deadlines directed by the High Court. Accordingly, the Defendant was unable to meet the deadline for filing the Defence.”

- [19] Learned counsel for the defendant, Mr. John, admits that this evidence refers to Counsel's workload as having impacted on the ability to file a defence on time. However, Counsel explains that this was intended to inform the circumstances under which a pro-active effort was made to seek Counsel for the claimant's consent to an extension of time for filing a defence, and not to explain the failure to file the defence on time. Counsel is cognizant of the judgment of the Court of Appeal in **Michael Laudat and The Attorney General of the Commonwealth of Dominica v Danny Ambo**³ where Edwards JA admonished:

“Finally, we wish to remind legal practitioners, particularly junior counsel, of the numerous decisions of this court which clearly establish that counsel do not have a good explanation which will excuse non-compliance with a rule or order, or practice direction where the explanation given for the delay is misapprehension of the law, mistake of the law by counsel, lack of diligence, volume of work, difficulty in communicating with client, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence or inadvertence.”

- [20] Mr. John submits that whilst it may be considered at first blush that the case at bar falls within the limitations of the **Michael Laudat** line of decisions, the chronology of events prior to the default judgment being entered, and the totality of the circumstances surrounding the failure to file a defence within the prescribed time, establish that reasonable efforts were vigorously made to remedy the defendant's non-compliance.

COVID-19 disruption

- [21] The essence of the defendant's argument under this head is that direct consultation with Mr. Eric Kipps, an independent investigator who resides in Trinidad & Tobago, was required to file the detailed and specific defence with respect to allegations of fraud against the claimant. A deficiency

³ HCVAP 2010/016 at paragraph 14

in the pleadings could result in summary judgment being entered against for the claimant.⁴ Learned counsel Mr. John contends that the defendant appreciated the necessity for detailed particulars in order to sustain an allegation of fraud against the claimant and that consulting with Mr. Kipps was critical in order to set out those particulars. However, due to the disruption of COVID-19, legal practitioners for the defendant were not able to consult Mr. Kipps directly within the period of time for filing a defence. Counsel refers the court to the case of **Felix Wilson v Duravision Inc & Others**⁵ in which Stephenson J held that it was “reasonable to find that due to the upheaval following the passage of Hurricane Maria and the total disorganization of the Court Registry and in fact in Dominica as a whole...the first defendant’s ability to instruct counsel and to file a defence would have been impeded and should be excused”. The learned judge formed the view that as a consequence of the catastrophic occurrence, there was good reason for the first defendant not to file a defence.

[22] The claimant submits that the COVID-19 disruption should not be viewed as a good explanation for the delay in this case. Learned counsel for the claimant, Mr. Marks, directs the court to the evidence in the affidavit of Terron Davis, supervisor/claims officer of the defendant. At paragraph 15 of the affidavit, Mr. Davis swears:

“15. When served with the instant Claim on or about 11th November 2020, the region was in the throes of the Covid-19 pandemic. I am aware that Trinidad & Tobago employed some of the most stringent protocols in the region, which meant that Mr. Kipps remained confined to that country. I am also aware that legal practitioners on record for Sentry were unable to consult with Mr. Kipps on the findings of his report within the time period that the defence should have been filed.”

[23] Likewise, the affidavit of Anieke Frederick states that Mr. Kipps resides in Trinidad & Tobago, which continues to experience travel and other restrictions in response to the COVID-19 pandemic so that “Counsel has not yet had an opportunity to consult with Mr. Kipps as part of its instructions in preparing a defence”.

[24] Mr. Marks points out that this evidence is a blanket excuse of COVID-19, and no reasonable explanation is given for the reason why Mr. Kipps could not be consulted. No detailed evidence has

⁴ See *St. Lucia Motor & General Insurance Co. Ltd v Peterson Modeste* SLUHCVP2009/008, delivered January 11, 2010, at paragraphs 16 and 17

⁵ DOMHCV 2017/0226 at paragraph 25

been provided to the court to allow it to accept this bare statement as a good explanation. Further, Counsel invites the court to take notice of paragraph 9 of the affidavit of Terron Davis, which reveals that the written report of Mr. Kipps was available to the defendant since around 26th September 2018. Mr. Marks is of the view that the defendant had within its possession enough information to file its defence in keeping with the timelines of CPR 2000.

Previously seeking agreement for extension of time

- [25] The parties are in dispute as to when counsel for the defendant contacted counsel for the claimant requesting an agreement for an extension of time, the former contending it was before the request for judgment in default had been filed, the latter stating it was after.

Good explanation

- [26] The concept of “good explanation” was illustrated in the case of **Emmerson International Corporation v Starlex Company Limited and Sunglet International Inc.**⁶, which involved an application for relief from sanctions. At paragraph 53 of the judgment, Blenman JA stated, “The question of what constitutes good explanation for the purpose of CPR 26.8(2) (b) is fact sensitive.” Her Ladyship went on to adopt the pronouncements of Davis-White J [Ag.] (as he then was) in **QVT Fund V LP et al v China Zenix Auto International Group et al** when he said:

“The quality of the explanation has to be viewed against all the circumstances and not simply by reference to the question of whether all was done that could have been done. A ‘good explanation’ is a universal standard, in the same way that the duty of care in negligence is, but what is required to discharge that standard will depend on the particular facts and circumstances.”

- [27] At paragraph 54, Blenman JA restated the oft-quoted pronouncement of Lord Dyson in **Attorney General v Universal Projects Ltd** as follows:

“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.”

- [28] The meaning of ‘good explanation’ under CPR 13.3 was explored in **Inteco Beteiligungs Ag v Sylmord Trade Inc.**⁷ The learned judge at paragraph 15 of the judgment, had this to say:

⁶ BVIHCVMAP2018/0044, delivered March 11, 2019

⁷ BVIHCM(COM) 120 of 2012

“In my judgment, the expression ‘good explanation’ where it occurs in CPR 13.3(1), means an account of what has happened since the proceedings were served which satisfies the Court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix up, are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered.”

[29] Not surprisingly, the court has been recently bombarded with the excuse of the COVID-19 pandemic for the failure of legal practitioners to comply with rules, directions or orders of the court. Issues of border restrictions, social distancing, lockdowns, internet and connectivity problems and deficiencies have become the norm in recent times. The court is fully aware of the difficulties and hardship the judicial system has had to, and continues to endure as we ride out the waves with hope for an end to this global challenge. Where the circumstances permit, the court will adopt a tolerant approach.

[30] However, this does not mean that parties can commit breaches of the rules, directions and orders of the court and use the pandemic as a broad-brush justification for violations. In order to constitute a good explanation for the failure to comply, a party must demonstrate to the court by detailed evidence what particular circumstances contributed to the breach, and convince the court that the explanation is a good one, even in light of the pandemic.

[31] In the instant case, the defendant relies on the COVID-19 excuse of being unable to consult directly a potential witness, Mr. Eric Kipps, who resides in the Republic of Trinidad & Tobago. Mr. Kipps is needed to provide detailed information to ground a proper defence. Although Mr. Kipps prepared a report, which was available to the defendant since September 2018, and which allegedly forms the basis for the defendant to mount a defence of fraud on the part of the claimant, I take the point that more information is needed from him because of the nature of the allegation and the legal requirements and ramifications involved in the filing of a viable defence. Nonetheless, I am left wondering what exactly has prevented counsel from consulting with Mr. Kipps. Does the consultation require Mr. Kipps to travel to St. Vincent and the Grenadines? If so, why was this necessary? Was there a need for him to visit the locus? Is there anything preventing consultation by “work from home” measures such as Zoom conferencing or emails or even telephone

conversations? Did Mr. Kipps have no access to any of these? The notice of application, filed on 12th January 2021, seeks an order that the defendant be allowed to file and serve its defence on a date in January 2021. The question arises as to whether the draft defence was prepared without the required consultation as put forward by the defendant. The COVID-19 explanation provided by the defendant, in the circumstances of this case, is woefully inadequate to enable the court to conclude that it is a good one.

[32] The issue of the defendant requesting the claimant to agree to an extension of time within which to file the defence, to my mind, does not assist the defendant in this case. The deadline for filing the defence was 10th December 2020. The evidence of the defendant is that on 14th December 2020, after the deadline had passed, counsel for the defendant wrote to counsel for the claimant requesting an extension of time to file the defence to 14th January 2021. Counsel's request on the 14th, whether before or after the request for default judgment was lodged, does not convince the court that the defendant was not indifferent to this matter before the deadline for filing the defence passed. In the midst of Counsel's great workload, a simple initial telephone communication before time ran out could have made all the difference.

[33] Based on the foregoing, I am the view that the explanation advanced by the defendant in this case will not suffice as a good and/or proper reason for the failure to file a timely defence. I rule that the defendant has failed to satisfy the requirement in CPR 13.3(1)(b).

Does the defendant have a real prospect of successfully defending the claim?

[34] The defendant submits that the draft defence exhibited to the affidavit of Anieke Frederick discloses a meritorious defence founded on breach of contract, public policy considerations and fraud. The defendant contends that these are not bald allegations but are premised on the findings of an independent investigative report conducted by Mr. Kipps.

[35] The affidavit of Terron Davis reveals that the claimant completed and submitted a formal accident report to the defendant, in which he alleged that his vehicle rolled off a cliff onto the rocks in the sea below. Mr. Kipps was engaged to carry out an investigation and issue a report on his findings. In his report, Mr. Kipps states, "*Undoubtedly, this vehicle was aided with acceleration, whether via a push or pull but there is no way the situation as described by the driver of this vehicle makes any sense.*" Further, as shown in the affidavit of Anieke Frederick, the report concluded, "*...for this*

vehicle to have travelled this path and fall below the cliff, it was not in NEUTRAL but in DRIVE with the handbrake down....Absolutely, there is no way the Motor Vehicle would have moved with it being in neutral and the handbrake up and the information presented by the driver occurring...This accident possesses the hallmark of a staged collision which is tantamount to insurance fraud."

[36] The learned authors of Halsbury's Laws explain what a fraudulent claim is, stating that:

"A claim is fraudulent if the insured has suffered no loss or has brought about his own loss; if the claim is supported by the use of fraudulent means or devices; or if the insured has deliberately suppressed a defence which would otherwise be open to the insurers."⁸

[37] The paragraph following the above addresses the extreme seriousness with which fraudulent claims are considered by stating that they are against public policy as follows:

"Claims may be unenforceable on the ground that to enforce them would be against public policy...Public policy precludes, for example, a claim in respect of an accident arising from threatening violence with a loaded shotgun, or from a deliberate running down by a vehicle."⁹

Learned counsel for the defendant, Mr. John, invites the court to extend this paragraph to read "or deliberately causing one's vehicle to roll over a cliff". Counsel posits that when the draft defence, together with the report of Mr. Kipps, is considered in the context of the authorities, the defendant has established with some degree of conviction, an arguable case for the defence.

[38] The claimant posits that the burden of proof with which the defendant is faced to establish insurance fraud cannot be borne out by the evidence in this case. Learned counsel for the claimant, Mr. Marks, points out that the claimant, a serving police officer, is the only witness to the accident. Given the nature of the defence and the requisite proof involved, the evidence does not support a successful defence of this claim. Further, Counsel contends that the maker of the report must be deemed an expert in order for his evidence to be admissible. Until then, Counsel argues, the report is without much merit or weight. The claimant contends that the defendant has no real defence and asks the court to disregard the defendant's ridiculous and scandalous claims that the claimant was the author of his misfortune and is seeking to commit insurance fraud.

⁸ Halsbury's Laws of England 5th edition, Volume 60, paragraph 203

⁹ Ibid at paragraph 204

[39] In **Doreen Leslie v Bradley Davis & Another**,¹⁰ Thom J (as she then was), set aside a judgment in default of defence. Dealing with CPR 13.3(1)(c), paragraph 30 of the ruling reads:

“[30] In International Finance Corporation v Utes Africa SPRL [2001] Commence 1361, the Court in considering Part 13.3(1)(a) of the UK CPR which is in the same terms as Part 13.3(1)(c) stated at paragraph 8 that:

“The fact that in ordinary language to say that a case has no realistic prospect is generally much the same as saying it is hopeless; whereas to say that a case has a realistic prospect of success carries the suggestion that it is something better than merely arguable...A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice in favour of setting the judgment aside. In my view therefore Mr. Howe was right in saying that the expression “realistic prospect of success” in this context means a case which carries a degree of conviction.”

[40] The draft defence constitutes a serious allegation of insurance fraud against the claimant. If the conclusion arrived at by Mr. Kipps is to be believed, it is a complete defence to the claim. The evidence in support of the application shows that Mr. Kipps of Jaric St. Vincent Ltd (Jaric SVG) was engaged to investigate the accident report submitted by the claimant. In the affidavit of Terron Davis, it is stated that Jaric SVG is a subsidiary of Jaric ESH (Trinidad) Ltd, which has been providing road safety, health, environment, consulting and training services in the Caribbean region for over sixteen (16) years. The affidavit boasts of Mr. Kipps’ qualifications as a Safety Professional with over 25 years of industry experience who has been involved at all levels in safety management, training, consultancy, policy development, accident investigation, risk assessments, ergonomic assessments, auditing and the implementing of safety and health management systems for a number of organizations both locally and internationally. A copy of Mr. Kipps’ curriculum vitae and a copy of an excerpt from Jaric SVG’s website are exhibited to the affidavit.

[41] In the event the default judgment is set aside and the matter is on course for trial, it is expected that the defendant will make the requisite application for Mr. Kipps to be appointed an expert

¹⁰ Claim No. 47 of 1998 (Saint Vincent and the Grenadines), delivered September 21, 2006; see also *Elvis Wyre v Alvin G Edwards and Another* ANUHCVP2014/0008

witness in this case. If he is so appointed, it would be up to the trial judge to determine his credibility as well as that of any other witness called by both parties. This court has no authority to engage in a min-trial on the pleadings at this stage, whether draft or properly filed. Nevertheless, on the evidence in this application, it does not appear that the defence is based on a bald or frivolous assertion. If Mr. Kipps' report is found to be credible by a court of competent jurisdiction, then there is cogent evidence to dispute the claimant's version as to how his car rolled over the cliff. It is evident, then, that the defendant has a real prospect of successfully defending this claim. The proposed defence appears to me to be more than arguable. I am of the view that this is "a case which carries a degree of conviction". Accordingly, I rule that the defendant has satisfied the requirement in CPR 13.3(1)(c).

- [42] Having failed to meet the threshold of the second limb of CPR 13.3(1), the defendant has not satisfied the conjunctive requirements of the rule. In that event, the defendant is asking the court to invoke its powers under CPR 13.3(2) to rule that there are exceptional circumstances to set aside the judgment in default.

Exceptional circumstances

- [43] I accept the submission on behalf of the defendant that consistent with the learning in **Graham Thomas v Wilson Christian trading as Wilcon Construction**,¹¹ even where an application to set aside a judgment in default is moved pursuant to CPR 13.3(1), the court can still consider whether there are exceptional circumstances to set aside the default judgment pursuant to CPR 13.3(2), so long as there is relevant evidence before it.

- [44] In the Court of Appeal decision in **Carl Baynes v Ed Meyer**,¹² the exposition by Pereira CJ on exceptional circumstances is invaluable. At paragraph 26 of the judgment, Her Ladyship explained as follows:

"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

¹¹ ANUHCv 2011/0629, delivered July 6, 2012

¹² ANUHCvAP2015/0026

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 to be 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 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.”

[45] The above reasoning of Pereira CJ was respectfully endorsed by the Privy Council.¹³

[46] Learned counsel for the defendant, Mr. John, submits that the non-exhaustive list of exceptional circumstances referred to by Pereira CJ, can be expanded to include a situation involving a grave injustice. This is based on the statement of Thom JA in **The Marina Village Limited v St. Kitts Urban Development Corporation Limited**.¹⁴ In upholding the ruling of the learned trial judge in finding that there were no exceptional circumstances in that case to fall within CPR 13.3(2), Her Ladyship opined:

“This is not a case of unjust enrichment on the part of the Government or a situation where a grave injustice would result if the default judgment is not set aside. Further, the claim does not raise any area of the law in which there is a need for clarification.”

[47] Mr. John submits that in light of the more than arguable allegation of fraud against the claimant in this case, a grave injustice would result if the judgment in default is not set aside.

[48] Learned counsel further submits that critical consideration must also be taken of the well-established principle of *ex turpi causa*, which the Court of Appeal in **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**¹⁵ considered trite law in reaffirming as follows:

“...no court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. In **Moore Stephens (A Firm) v Stone & Rolls Ltd.**, Rimer LJ delved at some length into the history of the “*ex turpi causa*” principle. It is well established that it is not a principle of justice but one of policy whose application is

¹³ Meyer v Baynes [2019] UKPC 3, per Lord Kitchin at paragraph 12

¹⁴ SKBHC VAP2015/0012, delivered May 19, 2016, at paragraph 36

¹⁵ HCVAP 2009/008, delivered January 11, 2010, per George-Creque JA (as she then was) at paragraph 10

indiscriminate leaving no room for the exercise of a discretion in favour of any party. This case also appears to say that the principle applies to all causes of action including claims in tort. In essence, it establishes that:

“...whether a claim brought is founded in contract or in tort, public policy only requires the court to deny its assistance to a plaintiff [claimant] seeking to enforce a cause of action if he is implicated in the illegality and in putting forward his case he seeks to rely upon the illegal act.”

- [49] Mr. John points out that, by the default judgment, the claimant stands to recover an astounding \$123,700.00 in loss of use and special damages alone before any damages for breach of contract are assessed, all purportedly arising out of the same contract, which the defendant maintains has been impacted by fraud.
- [50] Counsel urges upon the court that based on the meritorious defence, it would be a grave injustice if the claimant were permitted to do so on the basis of a default judgment that does not test the veracity of a claim of fraud and illegality, impacting on public policy. Counsel warns that there is every chance that this court will be lending its aid to a man who founds his cause of action on an immoral or an illegal act.
- [51] Additionally, Mr. John posits that the insurance policy contract in issue provides that the company shall not be liable in respect of consequential loss and it is well established by the Courts that loss of use is consequential loss. The claimant seeks damages for loss of use.
- [52] Learned counsel for the claimant, Mr. Marks, submits that there are absolutely no facts or evidence before the court to categorize this matter as falling into the definition of exceptional circumstances. Counsel emphasizes that exceptional circumstances are not the same as a realistic prospect of success, and there is no compelling reason to set aside the default judgment. The issue of the claim for damages for loss of use, he says, is best left to assessment of damages.
- [53] If the default judgment is not set aside, I agree with learned counsel for the claimant that loss of use or consequential loss in this case is a matter to be dealt with at the assessment of damages. Whereas this remedy may not be available to the claimant, a situation that the Honourable Chief Justice identified as an exceptional circumstance in **Carl Baynes**, this is one of the remedies sought by the claimant. The default judgment entered by the learned registrar in this case gives

judgment for the claimant for an amount to be decided by the court. At an assessment hearing, the court may properly determine that the claimant is not entitled to damages for loss of use while making awards under other heads.

[54] As to the issue of a grave injustice being done if the default judgment is not set aside, I am inclined to agree with the submissions of learned counsel for the defendant. The court has determined that the defendant has a real prospect of successfully defending the claim on the basis of a potentially credible expert opinion alleging fraud on the part of the claimant. While accepting that a realistic prospect of success does not equate to exceptional circumstances, I am of the view that if the default judgment is not set aside, the court runs the risk of assisting the claimant to benefit from a claim founded on an illegality perpetrated by him. To my mind, this is “something more” than the defendant showing a real prospect of success.

[55] Again, the court is not engaging in a mini-trial and it would be left to another proceeding to determine whether Mr. Kipps will be appointed an expert to give evidence at trial, and in that event, further, if his evidence is credible. However, on the evidence before this court in these proceedings, and being guided by the authorities which led me to find that there is a real prospect of a successful defence of establishing a fraudulent act on the part of the claimant in prosecuting the claim, I am persuaded that the defendant should be given the opportunity to state its case. Notwithstanding its failure to give a good explanation for the failure to file a timely defence, the non-exhaustive list of exceptional circumstances initiated by Her Ladyship in **Carl Baynes**, I respectfully opine, should include “where a claim which is founded on an illegality”. That finding, of course, is left to the trial judge, but it is a real possibility which this court will not ignore at the risk of aiding a transgression. In my view, this is a compelling reason to allow the defendant to defend the claim. Public policy dictates that the defendant be allowed to mount its defence. I am of the view that this is an exceptional circumstance enabling the court to set aside the judgment in default in this case.

Conclusion

[56] In summary, I find as follows:

- 1) The defendant applied to the court to set aside the default judgment as soon as reasonably practicable after finding out that judgment in default had been entered.

- 2) The defendant did not give a good explanation for the failure file the defence ontime.
- 3) The defendant has a real prospect of successfully defending the claim.
- 4) This means that the defendant has not satisfied the conjunctive requirements of CPR 13.3(1).
- 5) The defendant has satisfied the court that there are exceptional circumstances to enable it to set aside the default judgment under CPR 13.3(2).

Order

[57] Accordingly, it is hereby ordered as follows:

- 1) The application is granted.
- 2) The judgment in default of defence entered on 5th January 2021 is set aside.
- 3) The defendant shall file and serve its defence within 14 days of the date of this order.
- 4) Thereafter, the claim shall take its normal course in accordance with CPR 2000.
- 5) Given the nature of these proceedings, the defendant shall pay the claimant costs of the application in the sum of \$1500.00.

Tamara Gill

Master

By the Court

Registrar