

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER AND NEVIS

NEVHCVAP2021/0003

BETWEEN:

**[1] DIGITAL SECURITY SERVICES LTD.
[2] MICHAEL PEETS**

Appellants

and

NEVIS INTERNATIONAL BANK & TRUST LTD.

Respondent

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag]

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag]

Appearances:

Mrs. M. Angela Cozier for the Appellants

Mrs. Dahlia Joseph-Rowe and Ms. Asha Joseph for the Respondent

2022: March 24;
 April 7.

Interlocutory appeal — Default judgment — Rules 13.3(1) and 13.3(2) of the Civil Procedure Rules 2000 — Whether judge applied a subjective test in assessing the reasons for the short delay and should have applied an objective test as set out in the case of Attorney General v Universal Projects Ltd — Whether judge failed to take into account or proper account that the evidence discloses a good and substantial reason for the failure to file defence on time — Whether judge failed to take account of relevant considerations and took into account irrelevant considerations — Extension of time — Whether the judge failed to pay due regard to the application for an extension of time to file the defence and misapplied the test for such an application, thereby wrongly denying the appellants' extension application

In early June 2019, the 1st appellant, Digital Security Services Ltd. ("Digital") and the respondent, Nevis International Bank & Trust Ltd. ("the Bank"), entered into an oral labour and materials agreement for the installation of a security system at the Bank's headquarters in Nevis ("the Security Agreement"). In October 2019, the Bank entered into another oral

agreement with Digital, this time for the supply and installation of a wireless internet system at the Bank's headquarters ("the Wireless Agreement"). The 2nd appellant, Mr. Michael Peets, was at all material times the sole director, sole shareholder and principal technician of Digital. Digital and Mr. Peets are referred to together as "the Appellants". Unhappy differences developed between the Bank and the Appellants before the completion of the works contemplated by the two agreements, resulting in a claim being filed by the Bank against the Appellants for the delivery up of usernames, authorisation codes and passcodes for the security system installed by the Appellants, and for damages for breaches of the Security Agreement and the Wireless Agreement.

The claim was duly served on the Appellants and they were required to file their defence by 26th June 2020. The Appellants did not meet this deadline and on 29th June 2020 the Bank filed a request for judgment in default of defence. The Appellants filed a defence and counterclaim on 30th June 2020. The defence alleged, among other things, that Mr. Benjamin Wey, who negotiated the agreements for the Bank and was generally responsible for managing and coordinating the works contemplated by the agreements, was not a director or officer of the Bank and therefore could not make binding agreements on behalf of the Bank. On 6th July 2020, the court office entered judgment in default of defence against the Appellants. On 13th July 2020, the Appellants applied under rule 13.3(1) of the Civil Procedure Rules 2000 ("CPR") to set aside the default judgment. The application was amended on 31st July 2020 to include an application to extend the time for filing their defence to the claim. The learned judge heard the contested application and found that he was not satisfied that the Appellants had provided a good explanation for their failure to file their defence on time, as required by rule 13.3(1)(b) of the CPR. The judge also considered CPR 13.3(2) and found that there were no exceptional circumstances justifying an order setting aside the default judgment. The judge accordingly dismissed the application to set aside the default judgment and to extend time to file the defence.

The Appellants were dissatisfied with the judge's decision and appealed to this Court on six grounds which may be summarised into the following issues: (i) whether the judge applied a subjective test in assessing the reasons for the short delay and should have applied an objective test as set out in the case of *Attorney General v Universal Projects Ltd*; (ii) whether the judge failed to take into account or proper account that the evidence discloses a good and substantial reason for the failure to file the defence on time; (iii) whether the judge failed to take account of relevant considerations and took into account irrelevant considerations; and (iv) whether the judge failed to pay due regard to the application for an extension of time to file the defence and misapplied the test for such an application, thereby wrongly denying the Appellants' extension application.

Held: dismissing the appeal and awarding the costs of the appeal of \$1,000.00 to the Bank, being two-thirds of the amount awarded in the lower court, that:

1. In considering the evidence and deciding whether there is a good or substantial explanation for the delay in filing a defence, the approach is not whether the judge is applying a subjective or objective test. The correct approach is that the judge must

consider the evidence and decide whether it amounts to a good or substantial reason for the delay.

Attorney General v Universal Projects Ltd [2011] UKPC 37 considered.

2. The judge did not rely on irrelevant matters in coming to his decision. He was entitled to rely on the cases **America 2030 Capital Limited et al v Sunpower Business Group PTE Ltd et al** and **The Marina Village Limited v St. Kitts Urban Development Corporation Limited** as relevant matters in coming to his decision. Moreover, the Appellants failed to give satisfactory answers for their failure to explore alternative options to file their defence on time. Accordingly, the judge's finding that there was no good explanation for the delay in filing the defence is unimpeachable and the finding is affirmed.

America 2030 Capital Limited et al v Sunpower Business Group PTE Ltd et al SKBCVAP2020/0015 (delivered 30th October 2020, unreported) considered; **The Marina Village Limited v St. Kitts Urban Development Corporation Limited** SKBHCVAP2015/0012 (delivered 19th May 2016, unreported) considered.

3. The requirements in sub-rules (a) to (c) of CPR 13.3(1) are conjunctive and an application for relief under this rule must satisfy all three conditions. A failure to satisfy any one of the three conditions means that the judge or master hearing the application should not set aside the default judgment unless he or she is satisfied that there are exceptional circumstances within the meaning of CPR 13.3(2). The finding that the Appellants had not satisfied sub-rule (b) of rule 13.3(1) means that the judge was not required to consider conditions (a) and (c), and he did not make a finding, by implication or otherwise, that the Appellants have a reasonable prospect of defending the claim.

Rule 13.3(1) of the **Civil Procedure Rules 2000** applied; **Kenrick Thomas v RBTT Caribbean Bank Limited** SVGHCVAP2005/0003 (delivered 13th October 2005, unreported) followed; **Public Works v Matthew Nelson; Elton Darwton et al v Matthew Nelson** DOMHCVAP2016/0007 & DOMHCVAP2016/0008 (delivered 29th May 2017, unreported) followed.

4. The defence, viewed in its best light, creates no more than a triable issue in relation to Mr. Wey's authority to make binding contracts on behalf of the Bank. The issue falls far short of the standard required to satisfy the requirement for exceptional circumstances within the meaning of CPR 13.3(2) and the test in **Carl Baynes v Ed Meyer**.

Rule 13.3(2) of the **Civil Procedure Rules 2000** applied; **Carl Baynes v Ed Meyer** ANUHCVAP2015/0026 (delivered 30th May 2016, unreported) followed; **Meyer v Baynes** [2019] UKPC 3 followed.

5. The application to set aside the default judgment was filed before the extension application and the court's usual practice is to deal with applications in the order in which they are filed. Furthermore, the court cannot deal with an application for an

extension of time to file a defence in the face of a regularly entered default judgment. As long as the default judgment remains on record the court does not have jurisdiction to extend the time for filing a defence. It is only if the judgment is set aside that the court can go on to consider whether the defendant should be given an extension of time to file a defence.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal against the decision of the learned judge, Moise J (“the Judge”), made on 15th February 2021 dismissing the appellants’ application to set aside a judgment in default of defence entered against them at the request of the respondent, and to extend the time for filing their defence to the claim.

- [2] The 1st appellant, Digital Security Services Ltd. (“Digital”) is a duly incorporated company under the Companies Act of the Federation of Saint Christopher and Nevis (“the Federation”), providing commercial and home security systems and services in the Federation.

- [3] The 2nd appellant, Mr. Michael Peets, was at all material times the sole director, sole shareholder and principal technician of Digital. Digital and Mr. Peets are referred to together in this judgment as “the Appellants”.

- [4] The respondent, Nevis International Bank & Trust Ltd. (“the Bank”), is a banking corporation carrying on the business of banking in the Federation from its headquarters at Jessups Estate, Nevis.

- [5] In or about early June 2019, the Bank entered into an oral labour and materials agreement with Digital for the installation of a security system at the Bank’s headquarters in Nevis (“the Security Agreement”). The basic terms of the Security Agreement were set out in an invoice issued by Digital to the Bank dated 10th June 2019. The invoice set out the total contract price for materials and labour for the installation of the security system at US\$42,000.00 with the payment of a deposit of

US\$35,000.00 and the balance due on completion. The estimated time to complete the installation was 22 working days.

- [6] In or about October 2019, the Bank entered into another oral agreement with Digital, this time for the supply and installation of a wireless internet system at the Bank's headquarters. The agreed price for the installation of the wireless system was US\$8,000.00, reduced from the invoice price of US\$9,130.00 ("the Wireless Agreement"). Subject to the reduction in the invoice price to US\$8,000.00, the basic terms of the Wireless Agreement were set out in an invoice issued by Digital to the Bank on 1st October 2019.
- [7] Unhappy differences developed between the Bank and the Appellants before the completion of the works contemplated by the two agreements resulting in a claim being filed by the Bank against the Appellants for the delivery up of usernames, authorisation codes and passcodes for the security system installed by the Appellants, and for damages for breaches of the Security Agreement and the Wireless Agreement.
- [8] The claim was duly served on the Appellants and they were required to file their defence by 26th June 2020. The Appellants did not meet this deadline and on 29th June 2020 the Bank filed a request for judgment in default of defence. Also on 29th June 2020, but after the daily cut off time of 4 pm for filing documents, the Appellants submitted to the court office for filing a defence and counterclaim. This meant that the defence and counterclaim was effectively filed on 30th June 2020. The defence raised numerous challenges to the facts and matters pleaded in the statement of claim and attributed the breakdown of the relationship between the parties to the Bank and/or its representative, Mr. Benjamin Wey. The defence also alleged that Mr. Wey, who negotiated the Agreements for the Bank and was generally responsible for managing and coordinating the works contemplated by the Agreements, was not a director or officer of the Bank and therefore could not make binding agreements on behalf of the Bank.

- [9] The counterclaim repeated the allegations of breaches of the Agreements by the Bank and claimed US\$7,000.00 as the outstanding and unpaid amount for labour under the Security Agreement, US\$8,585.75 as the cost of 17 days additional labour for the work of installing the security system beyond the estimated time of 22 days, damages for repudiation of the Agreements, costs and interest.
- [10] On 6th July 2020, the court office entered the judgment in default of defence against the Appellants.
- [11] On 13th July 2020, the Appellants applied under rule 13.3(1) of the **Civil Procedure Rules 2000** ("CPR") to set aside the default judgment. The application was amended on 31st July 2020 to include an application under rule 26.1(2)(k) of CPR to extend the time for filing their defence to the claim.
- [12] Rule 13.3(1) provides that:
- "(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."
- [13] The requirements in sub-rules (a) to (c) of rule 13.3(1) are conjunctive and an application for relief under this rule must satisfy all three conditions. A failure to satisfy any one of the three conditions means that the judge or master hearing the application should not set aside the default judgment unless he or she is satisfied

that there are exceptional circumstances within the meaning of rule 13.3(2).¹ The Judge heard the contested application and found, having considered the evidence and the issues raised by the Appellants, that he was not satisfied that the Appellants had provided a good explanation for their failure to file the defence on time (as required by sub-rule (b)).

[14] As an aside, Mrs. Cozier argued in her written submissions that implicit in the Judge's finding is that he accepted that the Appellants had a reasonable prospect of defending the claim (as required by sub-rule (c) of rule 13.3(1)). This interpretation of the Judge's finding is not consistent with the plain meaning of rule 13.3(1) and its interpretation by the courts that the three conditions in the rule have to be satisfied for the court to grant relief. The finding that the Appellants had not satisfied sub-rule (b) means that the Judge was not required to consider conditions (a) and (c), and he did not make a finding, by implication or otherwise, that the Appellants have a reasonable prospect of defending the claim. Simply put, his finding on condition (b) means that he did not have to make findings on conditions (a) and (c).

[15] The Judge also considered rule 13.3(2) and found that there were no exceptional circumstances justifying an order setting aside the default judgment. The Judge proceeded to make the following orders:

- (i) The application to set aside the default judgment is denied.
- (ii) The application for extension of time is also denied.
- (iii) The matter will proceed to further case management on the Appellants' counterclaim; and
- (iv) The Appellants will pay costs of \$1,500.00 to the Bank.

[16] The Appellants were dissatisfied with the Judge's decision and appealed to this Court.

¹ See *Kenrick Thomas v RBTT Caribbean Bank Limited* SVGHCVAP2005/0003 (delivered 13th October 2005, unreported) and *Public Works v Matthew Nelson; Elton Darwton et al v Matthew Nelson* DOMHCVAP2016/0007 & DOMHCVAP2016/0008 (delivered 29th May 2017, unreported).

The appeal

[17] The Appellants' notice of appeal lists six grounds. Grounds 1 to 3, 5 and 6 can be summarised as a challenge to the Judge's finding of fact that the Appellants did not have a good explanation for the failure to file their defence on time and his dismissal of the application to set aside the default judgment. The issues that arise from these grounds are paraphrased as follows:

- (i) Whether the Judge applied a subjective test in assessing the reasons for the short delay and should have applied an objective test as set out in the case of **Attorney General v Universal Projects Ltd.**²
- (ii) Whether the Judge failed to take into account or proper account that the evidence discloses a good and substantial reason for the failure to file the defence on time; and
- (iii) Whether the Judge failed to take account of relevant considerations and took into account irrelevant considerations.

[18] Ground 4 alleges that the Judge failed to pay due regard to the application for an extension of time to file the defence and misapplied the test for such an application, thereby wrongly denying the Appellants' extension application.

[19] I will now deal with the grounds of appeal.

Grounds 1 to 3, 5 and 6 – The explanation for non-compliance with rule 13.3

² [2011] UKPC 37.

[20] In dealing with these grounds of appeal I make the preliminary observation that the challenge to the Judge's finding that the Appellants had not provided a good explanation for the delay in filing the defence is a challenge to a finding of fact by the Judge in the exercise of his case management powers. It is trite that appellate courts are generally reluctant to interfere with findings of fact and the exercise of discretion by a trial judge, even more so when the finding that is challenged is a case management decision. The reason for the appellate courts' reluctance to interfere in the context of case management decisions is the recognition that the managing judge is usually far more acquainted with the details of the case than the appellate court and is considered to be in a better position to make decisions dealing with interlocutory issues and generally progressing the case to trial expeditiously and in the most cost-effective way. This principle has been expressed in various ways in numerous decisions of this Court.³

[21] The amended application was supported by the affidavits of Ms. Davinia Bartlette, senior legal assistant in the chambers of Cozier & Associates, Mr. Dwight Cozier, corporate law consultant to the chambers of Cozier & Associates, and Mr. Ajal Harvey, freelance information technology technician who provides services to Cozier & Associates. The synopsis of their evidence is that the defence and counterclaim was prepared and signed on behalf of the Appellants ten days before the deadline for filing of 26th June 2020. However, on 16th June 2020 there was an electricity outage in the area of the chambers of Cozier & Associates caused by work being done by the electricity company in Nevis. On the resumption of the electricity service, the internet service at Cozier & Associates was intermittent and the lawyers were unable to upload the defence and counterclaim to the E-litigation portal. The problem was reported to the internet service provider, but it was not solved immediately, and full internet service was not restored until 29th June 2020, resulting in the failure to meet the deadline. Learned counsel for the Appellants, Mrs. Angela Cozier, submitted that the difficulties were caused by third parties and that

³ See for example *Ikana Holdings S. DE R.L. et al v Putney Capital Management Ltd. et al* BVIHCP2021/0027 (delivered 24th January 2022, unreported) at paragraphs 25 - 28.

this was a good and substantial reason for not meeting the deadline. Further, the delay was very short and there was no evidence that the Bank would suffer any real prejudice by an extension of time to file the defence. In the circumstances, the Judge erred in finding that there was no good explanation for the delay in filing the defence.

[22] Mrs. Cozier also submitted that the Judge's approach was incorrect in that he applied a 'very subjective and personal test' in considering the reason for the delay. Instead, he should have applied the objective test for a good explanation as stated by Lord Dyson in the **Attorney General v Universal Projects Ltd**. At paragraph 23 of the opinion of the Board, Lord Dyson stated that 'if the explanation for the breach... connotes real or substantial fault on the part of the Defendant, then it does not have a 'good' explanation for the breach'. Put another way, there must be a good or substantial explanation for the failure to meet the deadline.

[23] It is not clear what is meant by the Judge applying a 'subjective and personal test' in considering the evidence. The Judge had to consider the evidence and decide whether there is a good or substantial explanation for the delay. It is not a case of whether he is applying a subjective or objective test. It is simply that the Judge must consider the evidence and decide whether it connotes a good or substantial reason for the delay. In paragraph (j) of his decision, the Judge decided that there was ample time after the interruption of the electricity services on 16th June 2020 for the lawyers for the Appellants to file the defence and counterclaim before the deadline of 26th June 2020.

[24] The Court raised with Mrs. Cozier the possibilities of consulting counsel on the other side regarding an extension of time and/or going to the Service Bureau at the High Court Registry during the period immediately after the electrical outage and the resumption of full internet service and uploading the defence and counterclaim using the facilities at the Service Bureau. Mrs. Cozier's did not give a clear response to the former query, and as to the latter she said that there were concerns about confidentiality using the Service Bureau. She did not elaborate on what this means

and how confidentiality would have been affected. In the absence of satisfactory answers to these queries I find that they are additional reasons why the Appellants do not have a good explanation for the delay in meeting the deadline. The Judge no doubt had them in mind when he said at paragraph (l) of his decision – ‘Yet, without so much as an attempt to communicate with the other side, or the court for that matter, a decision was simply taken to ignore the deadlines outlined in the rules. This is not good enough’.

[25] Learned counsel submitted further that the Judge took irrelevant matters into consideration in finding that there was no good explanation for the delay. Counsel attempted to support this submission by reference to the fact that the Judge relied on the case of **America 2030 Capital Limited et al v Sunpower Business Group PTE Ltd et al**⁴ which he described as a case where counsel put forward a similar excuse (electricity failure and internet problems) as a good reason for failing to meet a deadline, and the Court of Appeal ‘frowned upon such an excuse’.⁵ The Court of Appeal did not use the words ‘frowned upon’, but it is clear from the judgment that the Court of Appeal rejected the excuse proffered by the applicant/appellant, coupled with the failure to apply for an extension of time, as a good explanation for the delay. Counsel’s submission in this appeal, relying on **America 2030**, is entirely without merit. The Judge was entitled to consider cases that he regarded as having similar facts and principles to guide him in the exercise of his discretion. He obviously thought that **America 2030** was such a case. The Judge, in the same paragraph and on the same point, also referred to **The Marina Village Limited v St. Kitts Urban Development Corporation Limited**⁶ and quoted the following extract from the judgment of the Court of Appeal –

“The appellant by its own deliberate action did not ensure that there were adequate administrative arrangements in place to assess correspondence sent to it in a timely manner. Accordingly, the appellant cannot rely on the consequences of their own deliberate action as a good explanation.”

⁴ SKBCVAP2020/0015 (delivered 30th October 2020, unreported).

⁵ Paragraph (k) of the Judge’s decision.

⁶ SKBHCVAP2015/0012 (delivered 19th May 2016, unreported).

[26] The Judge was entitled to rely on these cases in coming to his decision and the fact that learned counsel submitted that they are distinguishable or irrelevant is not the point. Counsel has not demonstrated to this Court why the cases are irrelevant other than suggesting, at least in **America 2030** in which she appeared as counsel, that the Judge's reference to the case is an indication of bias on his part. I reject the suggestion and the submission as being unsubstantiated and speculative. The Judge was entitled to rely on these cases as relevant matters to the decision that he had to make.

[27] In the circumstances, I find that the Judge's finding that there was no good explanation for the delay in filing the defence is unimpeachable and I would affirm the finding. This means that the Appellants have failed to satisfy the second condition in rule 13.3(1) of the CPR and the Judge did not err in not going on to consider whether the Appellants have a real prospect of successfully defending the claim.

Exceptional circumstances

[28] Mrs. Cozier's alternative position was that the Judge should have set aside the default judgment because there are exceptional circumstances in the case. The test for what constitutes exceptional circumstances under rule 13.3(2) was comprehensively stated in the decision of this Court in **Carl Baynes v Ed Meyer**⁷ by the learned Chief Justice –

“What amounts to an exceptional circumstance is not defined by the Rules and no doubt, for good reason. What may or may not amount to exceptional circumstances must be decided on a case by case basis. I am in full agreement with the reasoning of Bannister J, as approved by this Court, that it must be ‘one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained’. It must be something more than simply showing that a defence put forward has a realistic prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR 13.3(1)(c). They are not to be regarded as interchangeable or synonymous. CPR 13.3(2) is not to be regarded as a panacea for covering all things which,

⁷ ANUHCVP2015/0026 (delivered 30th May 2016, unreported).

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"⁸

On appeal to the Privy Council, Lord Kitchin, writing for the Board, endorsed the Chief Justice's treatment of what constitutes exceptional circumstances: "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".⁹

- [29] Mrs. Cozier referred to **Baynes v Meyer** and submitted that the defence has reasonable prospects of success and that there are exceptional circumstances in that (borrowing from the Chief Justice's phraseology) the defence is a 'knock out point' in relation to the claim. The alleged knockout point is that the judgment cannot be enforced against the Appellants (who were the defendants in the court below) because the Bank's representative, Mr. Benjamin Wey, who negotiated the Agreements on behalf of the Bank, is not a director or officer of the Bank. Therefore, the Agreements are not binding. The relevant portion of the defence is paragraph 8 which reads as follows:

"It was with Mr. Benjamin Wey that the 2nd Defendant negotiated the terms of the agreement and it was with Mr. Benjamin Wey that the 2nd Defendant communicated and the 1st Defendant agreed to perform the work specified

⁸ Ibid at paragraph 26.

⁹ Meyer v Baynes [2019] UKPC 3 at paragraph 17.

in the invoice number E4199, which was signed by the 2nd Defendant but not signed by any representative of the Claimant company, because Mr. Benjamin Wey was not at the material time a director, officer or other employee of the Claimant and therefore could not contract on behalf of the Claimant because he had no corporate authority to bind the company.”

[30] This submission is rejected. It is common ground that Mr. Wey acted throughout as the Bank’s representative and, as a matter of law, it is not necessary for him to be a director or officer of the Bank to make binding contracts on its behalf. He was held out by the Bank as its agent and his authority as such was never disputed. He was the person responsible for managing and coordinating the works contemplated by the Agreements on behalf of the Bank. Further, the pleadings are one way as to who are the contracting parties – they are Digital and the Bank. The invoices evidencing the terms of the Agreements were issued by Digital to the Bank; the security system and the wireless system were installed at the Bank’s premises; the defence pleads that the Agreements are between the Digital and the Banks; and significantly, the Appellants have counterclaimed against the Bank for amounts due under the Agreements.

[31] I am satisfied that the defence, viewed in its best light, creates nothing more than a triable issue in relation to Mr. Wey’s authority to make binding contracts on behalf of the Bank. The issue falls far short of the standard required to satisfy the requirement for exceptional circumstances within the meaning of rule 13.3(2) of the CPR and the test in **Baynes v Meyer**.¹⁰

Ground 4 – the application for extension of time

[32] The Appellants complained in ground 4 that the Judge failed to pay due regard to the application for an extension of time to file the defence and misapplied the test for such an application, thereby wrongly denying the Appellants’ extension application. Mrs. Cozier expanded this point in her oral submissions by saying that the Judge should have dealt with the application for extension of time before the

¹⁰ Supra Note 9.

application to set aside the default judgment. This submission and the ground of appeal are rejected for two reasons. First, the application to set aside the default judgment was filed before the extension application and the court's usual practice is to deal with applications in the order in which they are filed. Second, and more important, the court cannot deal with an extension of time to file a defence in the face of a regularly entered default judgment. As long as the default judgment remains on record the court does not have jurisdiction to extend the time for filing a defence. The hearing and disposal of an application to extend time to file a defence can only be in respect of a claim where the filing of a defence is still a live issue. Where a judgment in default of defence has been entered (as in this case) the option of filing of a defence is closed and the court must deal with the default judgment first. It is only if the judgment is set aside that the court can go on to consider whether a defendant should be given an extension of time to file a defence.

[33] This ground of appeal also fails.

Disposal

[34] Having considered the evidence, the submissions of counsel and the relevant legal principles, there is no basis for this Court to interfere with the decision of the Judge to deny the application to set aside the default judgment and to extend the time for filing the defence. I would dismiss the appeal with costs to the Bank of \$1,000.00, being two-thirds of the amount awarded in the lower court.

Order

[35] I would accordingly dismiss the appeal with costs to the Bank of \$1,000.00.

I concur.

Mario Michel

Justice of Appeal

I concur.

Gerard St. C. Farara

Justice of Appeal

By the Court

Chief Registrar