

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**SAINT LUCIA
COMMERCIAL DIVISION
CLAIM NO. SLUHCM2019/0028**

BETWEEN:

ROYAL BANK OF CANADA

Claimant/ Respondent

And

- 1. AUGUSTIN JOSEPH**
- 2. CECELIA JOSEPH**

Defendants/ Applicant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr. Deale Lee with Ms Zinaida McNamara for the Claimant/ Respondent
Mr. Lorenzo Francis for the Second Defendant/Applicant

2020: July 1; 6; 8

DECISION IN CHAMBERS

- [1] **ST ROSE-ALBERTINI, J. [Ag]:** This is an application by the second defendant/applicant, Mrs. Cecilia Joseph ("Mrs. Joseph") to set aside judgment in default of acknowledgment of service, dated 24th July 2019 ("the default judgment") obtained against her by the claimant/respondent, Royal Bank of Canada ("RBC").

- [2] In the substantive claim commenced on the Electronic Litigation Portal (“the e-portal”), RBC claimed jointly and severally against Augustin Joseph, the first defendant, and Mrs. Joseph the sum of \$274,458.05 together with fees, charges and interest thereon at the rate of 11.5% per annum from 29th March 2019 until payment in full. The claim is premised on a loan agreement dated 29th July 2005, Hypothecary Obligation dated 7th September 2005 and Additional Hypothecary Obligation dated 4th June 2007. The Hypothecary Obligations are collectively referred to as “the hypothecs”. In the alternative, RBC claimed the sum of \$148,000.00 as money had and received by the defendants together with interest at such rate as the court deems appropriate, plus court fees, cost of service of the claim, and legal practitioners’ fixed costs.

The Issues

- [3] Two simple issues arose for consideration: -
1. Is the default judgment irregular and liable to be set aside?
 2. If the answer to the first question is no, should the regularly obtained judgment be set aside?

Chronology

- [4] The Court’s record reveals the following chronology of events: -
- 1) On 4th April 2019, RBC filed its claim form and statement of claim against Mr. Joseph and Mrs. Joseph on the e-portal.
 - 2) On 25th April 2019, an affidavit of service was filed, indicating personal service of the claim form, statement of claim and attendant documents on Mrs. Joseph on 19th April 2019.
 - 3) On 24th July 2019, a request for entry of judgment in default of acknowledgement of service was filed by RBC and in response thereto, a query was raised by the Registrar

- of the High Court on 25th July 2019, requesting proof of service of the authorization code on the defendants. This code enables the opposing litigant to gain access to the case file on the e-portal.
- 4) On 29th July 2019 and again on 5th August 2019 two identical acknowledgements of service dated 29th April 2019 were filed on the e-portal on Mrs. Joseph's behalf.
 - 5) On 8th August 2019, RBC filed an amended affidavit of service stating that the authorization code issued on 4th April 2019 was served personally on Mrs. Joseph on 19th April 2019 along with the other documents referred in the affidavit of service of 25th April 2019.
 - 6) Judgment in default of acknowledgement of service, dated 24th July 2019, in the terms requested, was granted in favour of RBC and was filed on 21st August 2019.
 - 7) On 27th August 2019, Mrs Joseph filed a defence.
 - 8) On 19th November 2019, Mrs. Joseph filed this application together with affidavit in support. RBC filed an affidavit in answer on 10th December 2019.
 - 9) On 23rd March 2020, another affidavit in support of the application was filed.
 - 10) Both parties filed written submissions in respect of the application.

The Application

[5] The application is said to be made pursuant to CPR13.3 but appears to be conflated with CPR13.2, which concerns setting aside an irregular judgment. The notice of application and affidavit in support are the same in all material respects. Mrs. Joseph avers that: -

1. When she was served with the claim on 19th April 2019, she was unaware that the filing was done on the e-portal. RBC never provided her with the authorization code as

evidenced by its affidavit of service filed on 25th April 2019. Further, the requisite training as it pertained to use of the e-portal and filings by attorneys and legal secretaries was still ongoing, and use of the e-portal was proving extremely problematic for all practicing attorneys.

2. An acknowledgement of service was filed on her behalf at the Court Office on 3rd May 2019. It remained on a file there and it was only on 23rd July 2019 that it was returned to her attorney with instructions to obtain the authorization code from RBC's attorney.
3. On 24th July 2019, one day after her attorney's request for the authorization code, RBC, upon becoming aware that her attorney was attempting to file the acknowledgement of service, quickly requested the default judgment. Unaware that a request for judgment had been made, she proceeded to file her acknowledgement of service on the e-portal.
4. She avers that on 8th August 2019, RBC then filed an amended affidavit of service indicating that the authorization code had been served together with the claim form. Additionally, the default judgment was granted after her acknowledgement of service was filed.
5. She says that she has a real prospect of successfully defending the claim. RBC has been fully aware of her defence since February or March 2018 when discussions were held between the parties. She alleges fraudulent misrepresentation, fraud and forgery in respect of the loan agreement and hypothecs in which RBC and/or its attorneys are implicated, in that they did not take the necessary precautions to ensure that the person who signed the documents purporting to be her was in fact her. She only learned from a friend sometime in 2010, that her husband had mortgaged their family home without her knowledge or consent. She then made enquiries of RBC and informed them that she had never seen or signed any mortgage documents or hypothecary obligations. RBC's officials confirmed having no record of her identification or signature, and having obtained 2 forms of identification from her, they compared the signatures on the documents and assured her that they did not match.

6. She says she was further assured that the necessary steps would be taken to ensure that the loan agreement and hypothecs would be made solely in Mr. Joseph's name and she would be in no way implicated in the transaction or her matrimonial property encumbered. On the faith of these representations, she relied on RBC to relieve her of the fraudulent transactions. Thus, she was surprised when she was served with the claim.
7. She also says that she has filed this application at the earliest.

RBC's Response

- [6] Ms. Brenda St. Ville ("Ms. St. Ville") deposed the affidavit in answer on behalf of RBC. She stated that she was informed by RBC's counsel and believes that in December 2009, Mrs. Joseph contested the validity of the hypothecs. As a result of the allegations that her signature was fraudulent, a meeting was convened with her counsel at the time, the executing notary royal of the hypothecs, and Mr. Joseph, following which RBC was satisfied that the signatures were authentic. Mrs. Joseph took no further action in that regard until RBC issued a demand for payment of the debt by letter dated 29th September 2017¹. In response, RBC received correspondence from Mrs. Joseph's counsel at that time, and the same allegations of fraud were made. Following a further review of the matter, RBC's attorney communicated to Mrs. Joseph's attorney that RBC and the executing Notaries remained satisfied that the hypothecs were properly executed.
- [7] Ms St Ville asserts that defendants failed to comply with the demand, consequently the claim was filed. It was served on both defendants on 19th April 2019, together with all the accompanying documents including the authorization code. This, she says, is evidenced by affidavit of service filed on 8th August 2019. The authorization code was entered at the top of the claim and would undoubtedly have been visible to Mrs. Joseph. Thus, she would have had notice of the filing of the claim on the e-portal.

¹ Served on Mrs Joseph on 23rd March 2018

- [8] RBC filed its request for default judgment on 24th July 2019 and received a query from the Registrar of the High Court for confirmation of proof of service of the authorization code on the defendants. Hence an amended affidavit of service was filed on 8th August 2019.
- [9] Ms. St. Ville says that Mrs. Joseph filed her acknowledgement of service on the e-portal on 29th July 2019 and again on 5th August 2019, outside the period for doing so. She asserts that Mrs. Joseph's attorney requested the authorization code from RBC's attorney on 30th July 2019, which was provided on the same day by email². Furthermore, when Mrs. Joseph filed the acknowledgement of service on the e-portal that was evidence that she had knowledge of the code from then.
- [10] On 21st August 2019, RBC filed the default judgment on the portal, thereby giving notice to Mrs. Joseph and her attorney. Several attempts were made to serve the defendants personally but were unsuccessful. Thereafter, Mrs. Joseph filed a defence on 27th August 2019 also outside the period for doing so and she has failed to provide a good explanation for the late filing. Although she claims that the e-portal was proving extremely problematic, she has not said what issues were experienced and has not provided evidence of the steps taken to resolve the alleged problems; nor did her attorney communicate with RBC's attorney regarding the inability to file or take the necessary actions.
- [11] Ms. St. Ville deposed further that Mrs. Joseph filed the application some 90 days after notification of the default judgment, which is unreasonable in the circumstances, particularly as she had filed a defence 6 days after the default judgment was perfected.
- [12] She stated that Mrs. Joseph has no real prospect of successfully defending the claim, as the requisite action to challenge the validity of the hypothecs has not been taken and as such, she is precluded from relying on the allegations contained in the defence. Having contested the validity of the hypothecs on the same grounds in 2009 and having taken no further steps, a cause of action in that regard is now prescribed. She asks that the application be dismissed with costs.

² See Exhibit BS9 and CJ4

Analysis

- [13] In his written submissions on behalf of RBC, Mr. Lee took issue with the affidavit in support filed on 19th November 2019. However, at the hearing, he elected to forego the arguments on the basis that he accepted the applicant's explanation that the incorrect affidavit was initially filed and the correct one was filed on 23rd March 2020. He proceeded with his arguments in relation to the substance of the application to set aside the default judgment.

CPR 13.2 - Is the default judgment irregular?

- [14] Although the application was made pursuant to CPR 13.3, the Court is obliged to consider CPR 13.2 if it appears that the conditions for doing so arise. Mrs. Joseph has said that she was not served with the authorization code. The rules require that it be served on a defendant when the claim form is served. She further says that she filed an acknowledgement of service on 3rd May 2019 which was within the time specified by the rules. These averments require that I consider whether the judgment is irregular and ought to be set aside.
- [15] CPR 13.2(2) states: "*The court may set aside judgment under this rule with or without an application.*"
- [16] CPR 13.2 (1) provides as follows:
*"(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..."*
- [17] CPR 12.4 provides:
*"12.4 The court office at the request of the claimant must enter judgment for failure to file an acknowledgment of service if –
(a) the claimant proves service of the claim form and statement of claim;
(b) the defendant has not filed –
(i) an acknowledgment of service; or
(ii) a defence to the claim or any part of it;*

- (c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;*
- (d) the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;*
- (e) the period for filing an acknowledgment of service under rule 9.3 has expired; and***
- (f) (if necessary) the claimant has the permission of the court to enter judgment.”*

[18] The **Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) (Amendment) Rules³**, section 4 which amends Rule 13 of the Principal Rules⁴ provides:

- “(3) Where proceedings have commenced —*
- (a) service must be effected in accordance with the applicable rules of court; and*
- (b) the filing party must at the same time serve the authorization code generated by the Electronic Litigation Portal in the form set out in Schedule 2.***
-
- (4) Where the authorization code generated by the Electronic Litigation Portal is not served on a party in accordance with sub-rule (3), service is deemed not to have been effected.”***

[19] If, in fact, Mrs. Joseph was not served with the authorization code, service would not have been effected and the first condition of CPR 12.4 would not have been satisfied, thereby causing the judgment to be irregular.

[20] Mr. Lee has argued for RBC that at the time of service, the rules did not specify the method of service of the code and the firm developed the practice of having it stamped in a conspicuous area on the claim form, prior to service. Mr. Francis says that is simply not the case and the authorization code was not stamped on the claim form which was served on Mrs. Joseph.

[21] Mrs. Joseph and Ms. St. Ville’s evidence regarding service of the code stand in sharp contrast. A copy of the claim form shown as Exhibit BS4 of Ms. St. Ville’s affidavit contains the respective code for each defendant stamped at the top left corner. Mrs. Joseph on the

³ SI # 43 of 2019

⁴ Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, No. 87 of 2018

other hand has not presented any evidence in support of her contention that she was not served with the code in that manner, at the time that the claim was served on her. Her affidavit merely contains a bare denial.

[22] It is public knowledge that the e-portal went live in the Commercial Division on 26th November 2018. At the time of filing on 4th April 2019, the e-portal had been in operation for five months. It is also common knowledge that training had taken place for users during the 12 months prior to the e-portal going live. The claim was served on 19th April 2019 at which time the form set out in Schedule 2 had not been enacted. The rule cited at paragraph 19 above was introduced by an amendment published on 29th April 2019 and took effect on that date⁵.

[23] The authorization code for each defendant is visibly stamped at the top left-hand section of the claim form exhibited by RBC. This, to me, was a clear indication to Mrs. Joseph and her attorney that the claim was filed on the e-portal and all subsequent filings were to be done there. It also means that the affidavit of service filed on behalf of RBC on 8th August 2019 in response to the Registrar's query remained uncontroverted, where it says that the authorization code was served on Mrs. Joseph on 19th April 2019, together with the claim form. Mrs Joseph has not exhibited the claim which she says was served on her and did not contain the code. I therefore accept RBC's method of service of the authorization code as proper service. The amendment clearly came after the claim was filed and served. The time for filing acknowledgment of service is 14 clear days from the date of service. Thus, the last day for filing an acknowledgment of service on the e-portal was 4th May 2019.

[24] Counsel for Mrs. Joseph erroneously attempted to file the acknowledgment at the Registry of the High Court on 3rd May 2019 at which time the Registry had no legal authority to receive or file documents in relation to a claim commenced on the e-portal. It was Counsel's responsibility to be attentive to the correct procedure for filings on the e-portal and to undertake the necessary follow-up of the matter in a timely manner. In the circumstances,

⁵ See section 14(1) of the Interpretation Act - Cap 1.06 of the Revised Edition of the Laws of Saint Lucia

the acknowledge of service which was sent to the Registry on 3rd May 2019 could not constitute or amount to filing of same.

- [25] The acknowledgement was first filed on the e-portal on 29th July 2019 and again on 5th August 2019, by which time the period for doing so had expired, with RBC having filed a request for judgment in default of acknowledgment of service on 24th July 2019. There can be no doubt in these circumstances, that the Registrar is mandated by the rules to enter judgment, and this was done after having sought clarification from RBC regarding service of the authorization code. Consequently, the default judgment is regular, and CPR 13.2 does not apply.

CPR 13.3 - Should the default judgment be set aside

- [26] CPR 13.3 provides as follows:

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

(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.

(3) Where this Rule gives the court power to set aside a judgment, the court may instead vary it.

****Rule 26.1(3) enables the court to attach conditions to any order.”***

- [27] It is well established that the three conditions of Rule 13.3(1) are conjunctive, and each limb must be satisfied before the Court can set aside a default judgment.⁶ Failure to satisfy any one condition is fatal to the application.

⁶ Kenrick Thomas v RBTT Bank Caribbean Limited [Formerly Caribbean Banking Limited] Civil Appeal No. 3 of 2005 (delivered October 13, 2005); Lystra Omar Ewen (as Personal Representative of the Estate of Sheba Jones, deceased) v Charles Sylvester Liddie AXAHCV 0042/2007 (delivered 30th October 2010), paragraph 43.

Did Mrs. Joseph apply to the Court as soon as reasonably practicable after finding out that judgment had been entered?

- [28] CPR13.3(1)(a) does not specify any timeframe which constitutes 'as soon as reasonably practicable'. The Court must examine all the circumstances in determining whether an applicant has complied with this condition.⁷ Reasonableness includes not only the length of delay but the conduct of the defendant once he or she has found out about the existence of the judgment.⁸ The burden of proof rests on the applicant.⁹
- [29] Mrs. Joseph's affidavit does not say when she became aware that judgment had been entered. Mr. Francis acknowledged this in oral submissions and proceeded to give the date and circumstances in which she found out. He states that he was informed of this by the Registrar on 5th November 2019 and the application was filed a mere two weeks after becoming aware of the default judgment. He also says that to date, the default judgment has never been served on Mrs. Joseph.
- [30] Mr. Lee, on the other hand, argued that according to the relevant rule, Mrs. Joseph received notice of the default judgment when it was filed on the e-portal on 21st August 2019 at 14:33 hours. He says, in determining promptitude time starts to run from that date.
- [31] On such application, the Court may only consider Mrs. Joseph's sworn evidence as contained in her affidavit in support of the application. As it stands, she has no evidence to satisfy this requirement and the oral submissions made by Mr Francis in that regard, are of no moment.

⁷ Ruth James and Henry James v Phillip McDougall and Carol Attidore Claim No.: DOMHCV2016/0259 (delivered 21st June 2017), paragraph 30; Lystra Omar Ewen (as Personal Representative of the Estate of Sheba Jones, deceased) v Charles Sylvester Liddie Claim No.: AXAHCv 0042/2007 (delivered 30th October 2010) at paragraph 44.

⁸ James et al v McDougal et al, paragraph 33; Ashandi Edwards (By his mother and next friend Alma Edwards) v Rholda Bhola and Lenore Bhola Claim No. GDAHCV2006/0587 (delivered 24th January 2012, unreported), paragraph 38.

⁹ Linda (Lindy) Tamn (Dba Lindy Tamn Realty Listing) v The Fountain Beach and Tennis Club Limited Claim No. AXAHCv 0067/2009, paragraph 51.

[32] It was Mrs Joseph responsibility to address these matters in her affidavit as the court is not permitted to speculate on omissions in the application. Of note is the pronouncement of Pereira CJ in Issa **Nicholas v. Time Bourke Holdings**¹⁰ that:

“The court is not permitted to guess and supply the omissions in the application. An applicant who must be taken to be seized of the importance of its case and thus the evidence it requires to make good its case, must never leave it up to the court where an opportunity given to address it was not utilized, to find a way to fill the void in its favour.”

[33] Mrs. Joseph asserts that the default judgment was granted on 12th August 2019. I considered this an error, as the record shows that it was granted on 24th July 2019 and filed on 21st August 2019. Contrary to Mr. Francis submissions, it was served in accordance with section 4 of the **Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) (Amendment) Rules 2019** which amends section 13 of the Principal Rules. Rule 13(9) as amended provides as follows:

“(9) A document to which the Court’s stamp and date of filing information has been applied by the Electronic Litigation Portal is deemed to be served on the date and time that the document was submitted to the Electronic Litigation Portal, if the date and time of submission is within business hours.”

[34] I therefore accept that service of the default judgment took place on 21st August 2019 at 14:33 hours and Mrs Joseph and her attorney were deemed to have had notice or knowledge of it from that date. Her application was filed on 19th November 2019 some 91 days (3 months) after the date of service, with no reason provided for the delay. There is also no evidence of the steps taken to file the application in a timely manner after receiving notice of the judgment. Additionally, as Mr. Lee pointed out, Mr Francis would have had access to the portal from 29th July 2019 when the acknowledgement of service was first filed. From that date, he would have been able to view all documents filed in the matter, including the request for entry of default judgment and the perfected judgment. I therefore conclude that Mrs Joseph has failed to satisfy CPR13.3(1)(a), and the failure is fatal to her application under COR13.3(1).

¹⁰ GDAHCVAP2015/0029 at paragraph 17.

Has Mrs. Joseph given a good explanation for failure to file an acknowledgement of service within the prescribed time?

- [35] In considering what amounts to a good explanation, the courts have repeatedly relied upon the Privy Council decision in **The Attorney General v Universal Projects Limited**¹¹, where Lord Dyson stated:

*“First, if the explanation for the breach i.e. the failure 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.”*¹²

- [36] Counsel for Mrs. Joseph relied on the case of **Sylmord Trade Inc v Inteco Beteiligungs AG**, where the Court of Appeal referred to the definition of a good explanation given by the trial judge in the Court below, which suggests a lower threshold than the standard in **The Attorney General v Universal Projects**. The trial judge in **Sylmord Trade** defined a good explanation as: -

*“... 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 CPR13.3. 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.”*¹³

- [37] However, Mr. Francis has overlooked the fact that in **Sylmord Trade**, the Court of Appeal commented that as none of the parties took issue with the judge’s definition of “good explanation” it would not attempt to interfere with it.¹⁴ That court in fact referred to and

¹¹ [2011] UKPC 37 at paragraph 23.

¹² Followed in *Yates Associates Construction Co. Ltd. v Brian Quammie* Claim No.: BVIHCVAP2014/0005 (delivered 5th May 2015), paragraph 15; *Sylmord Trade Inc v Inteco Beteiligungs AG* Claim No.: BVIHCMAP2013/0003 (delivered 24th March 2014), paragraph 23.

¹³ *Sylmord Trade Inc v Inteco Beteiligungs* Claim No.: BVIHCMAP2013/0003 (delivered 24th March 2014), at paragraph 24.

¹⁴ At paragraph 26.

accepted the Privy Council's examples of what would amount to a good explanation in **AG v Universal Projects** at paragraph 23 of the judgment.

[38] The explanation given by Mrs. Joseph for the failure is that she did in fact file an acknowledgment of service within the specified period, albeit at the Registry and not on the e-portal. She was not aware that the matter was one that ought to have been filed on the e-portal and the acknowledgement was not returned until 23rd July 2019, with instructions to file it on the e-portal. Her Counsel requested the authorization code on 23rd July 2019, and by the following day RBC filed its request for default judgment. She says it was only on 8th August 2019 that RBC filed an amended affidavit of service indicating that she had been served with the authorization code on the same date she was served with the claim. On this point, Mr. Francis submits that the failure to register the acknowledgement or to recognize that it had been filed prior to the request for default judgement was totally beyond Mrs. Joseph's control and can neither be attributed to her, nor her Attorney.

[39] The law is well established that a good explanation is not one which simply "properly" explains how the breach came about. It must be devoid of real or substantial fault on the part of the applicant or legal counsel and should not amount to inexcusable oversight. As counsel for RBC puts it, Mrs. Joseph's "explanation boils down simply to: (a) her attorney was unaware that the claim had been filed on the portal and (b) her attorney had difficulties filing matters on the portal." In my view this equates to administrative inefficiency of the kind reproached in **AG v Universal Projects** and has consistently been held not to amount to a good explanation.

[40] It ought to have been apparent to Mr Francis, on the face of the documents served on Mrs. Joseph, that they had been filed on the e-portal, given their very distinctive markings. It was incumbent on counsel to then inquire of the Court Office how to properly file the acknowledgement of service on the e-portal and to do so in a timely manner, particularly as he complains that the portal was problematic and training for attorneys was still ongoing. Alternatively, counsel could have sought RBC's agreement or applied to the Court for an extension of time within which to file the acknowledgment.

- [41] As to Mrs. Joseph's allegation that the authorization code was not served on her, this has been addressed at paragraph 23 above and adds no value to her explanation for the failure. She has also failed to satisfy CPR 13.3(1)(b).

Does Mrs. Joseph have a real prospect of successfully defending the claim?

- [42] CPR 13.4(3) requires that the affidavit in support of the application must exhibit a draft of the proposed defence. A draft defence is relevant to the assessment of whether an applicant has a real prospect of successfully defending the claim under CPR 13.3(1)(c).
- [43] Mrs Joseph did not comply with this requirement and Counsel for RBC relied on **Fortune Foods Company Limited v Ian Calliste (Trading as Just Plastics)**¹⁵ in which the failure to exhibit the draft defence was treated as fatal to the application. In that case the defendant attached his draft defence to his notice of application, but not his affidavit, and did not refer to it in his affidavit. It was held that the procedural requirements in 13.4(2) and (3) are mandatory and any application under Rule 13.3 must adhere strictly to those requirements. As a result of the failure, the court was unable to determine whether under CPR 13.3(1)(c), that applicant had a real prospect of successfully defending the claim.
- [44] In my view, the **Fortune Foods Company case** can be distinguished from the present, in that, whilst it was not open to Mrs. Joseph to refrain from exhibiting a draft defence with her affidavit, the nature of the defence is set out therein, and the Court is in a position to consider that evidence.
- [45] To satisfy CPR 13.3(1)(c), an applicant must demonstrate a real prospect of successfully defending the claim as opposed to a merely arguable defence. That is so because the applicant is seeking to deprive the claimant of a regular judgment, which has been validly obtained.¹⁶ The Court of Appeal has held that this requires the defendant to show a real, as opposed to fanciful, prospect of success.¹⁷

¹⁵ Claim No. GDAHCV 2010/0105, at paragraphs 20-27.

¹⁶ *Alpine Bulk Transport Co v Saudi Eagle* [1986] 2 Lloyd's Rep. 221 at page 223; *Edwards v Bhola et al*, paragraph 44.

¹⁷ *Sylmord Trade Inc v Inteco Beteiligungs AG*, paragraph 35.

[46] Mr. Francis cites the cases of **Earl Hodge v Albion Hodge**¹⁸, in which it was stated that “the major consideration is whether there is a defence on the merits”; and the case of **Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc**¹⁹ where he says the court stated several formulations of the test, including: whether it is a “prima facie” defence, a “serious” defence, or that it has merits to which “the Court should pay heed.” He states further that Mrs. Joseph is illiterate, impecunious and lacks legal familiarity. He also submits that it is highly irregular for a hypothec to be executed in respect of immovable property when the loan being secured is to purchase a vehicle. He states that it is mandatory for an executing attorney to be satisfied of the identity of the person who comes before him to sign a notarial instrument and that he or she is the person referred to therein. Further it is a requirement that the identification information of such person be captured in the instrument. He states that this is stipulated by an amendment to the **Civil Code**²⁰ (“the Code”), though he could not refer the Court to the said amendment.

[47] Counsel for RBC submits that Mrs. Joseph’s defence does not reveal any grounds on which she can successfully defend the claim as she has taken no steps to improbate the hypothecs. He relies on article 1141 of the Code which provides that authentic writings are complete proof between the parties to them of the obligations contained therein. Article 1139 establishes that notarial documents are authentic writings and article 1142 provides how such authentic writings can be impugned and set aside. As Mrs. Joseph has not complied with that procedure, he argues that the hypothecs remain authentic writings and cannot be challenged on parole evidence. Further, her challenge to the hypothecs is prescribed as she has been aware by her own admission of their existence for over 10 years since December 2009 or early 2010. He submits that pursuant to article 2119 of the Code, Mrs. Joseph would have been required to make any challenge to the validity of the hypothecs, on the basis of fraud, within 10 years of the date of discovery of the alleged fraud. This period has already elapsed, and she has failed to take any action to improbate the hypothecs. Mr. Lee further submitted that there is no requirement in law that hypothecs must capture the identification information of the persons signing. It is accepted as good practice and tends to be the norm,

¹⁸ Claim No. BVIHCV2007/00098

¹⁹ [1986] 2 Lloyd’s Rep. 221

²⁰ Cap 4.01 of the Revised Laws of Saint Lucia

but the only obligation is for a notary to satisfy himself or herself that persons are who they say they are. But in any event, the second hypothec captures Mrs. Joseph's social security number and her residential and postal addresses.

[48] I have been unable to find the amendment to which Mr. Francis refers, that mandates the identification information to be captured in the hypothec, although the practice has been adopted in this jurisdiction

[49] Counsel for Mrs. Joseph countered that her allegations of fraud, misrepresentation and professional negligence are not prescribed, as they had been revived by RBC's demand letter issued in 2017. In any event, he says she made inquiries of the bank on learning of the hypothecs but received RBC's assurance that the matter would have been resolved internally and she relied on this representation. Thereafter, she received no further correspondence from RBC until the claim was filed.

[50] It is true that Mrs. Joseph was required to take certain steps if she wished to improbate the hypothecs, but this does not invalidate or affect the merit of her defence. She has not made a claim or counterclaim for improbation to which the issue of the prescription period under article 2119 of the Code would apply. She is merely providing a defence to the claim, upon which the court would have to hear evidence and weigh such evidence on a balance of probabilities, to determine whether RBC's claim is made out against her or whether she has proven that she did not in fact sign the deeds. I find in all the circumstances that she has raised a serious defence.

[51] Notwithstanding failure to satisfy the conjunctive requirements of CPR 13.3(1), the Court may set aside the default judgment under CPR 13.3(2), if satisfied that there are exceptional circumstances which justify doing so.²¹

²¹ Public Works Corporation v Matthew Nelson

CPR 13.3(2) – Exceptional Circumstances

[52] On the authorities, an exceptional circumstance must be “one that provides a compelling reason why the defendant should be permitted to defend the proceedings...”²² It contemplates the existence of circumstances which trump the requirement for fulfillment of the criteria in Rule 13.3(1) and for this the court must embark on a case by case inquiry.²³ It is therefore appropriate to examine what the courts have generally accepted as exceptional circumstances.

[53] The Court of Appeal decision in **Carl Baynes v Ed Meyer**²⁴ is instructive on this point. There it was said: -

*“What may or may not amount to exceptional circumstances must be decided on a case by case basis.²⁰... It must be something more than simply showing that a defence put forward has a realistic prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR 13.3(1)(c). They are not to be regarded as interchangeable or synonymous. **CPR 13.3(2) is not to be regarded as a panacea for covering all things which, having failed under CPR 13.3(1), can then be dressed up as amounting to exceptional circumstances under sub-rule (2). Sub-rule (2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed, to satisfy rule 13.3(1)...** 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...”*

[54] This decision was appealed, and the Privy Council confirmed and reiterated the above pronouncements.²⁵

[55] Counsel for Mrs. Joseph submits that the exceptional circumstances in this case are that the introduction of the e-portal commenced in 2018 and was being done in a phased manner

²² Carl Baynes v Ed Meyer ANUHCVP2015/0026 (delivered 30th May 2016, unreported), paragraph 26.

²³ Public Works Corporation v Matthew Nelson DOMHCVP2016/0007 (delivered 29th May 2017); paragraph 23.

²⁴ ANUHCVP2015/0026

²⁵ Meyers v Baynes [2019] UKPC 3

with training scheduled for users throughout 2019. Further, that most of the Principles, Guidelines, Rules and Directives were still being developed, and most of the court staff were unfamiliar with the e-portal. These challenges, he submits, are clearly exceptional circumstances that the Court should consider. In addition, he says Mrs. Joseph has a realistic prospect of successfully defending the claim as she has maintained from 2009 that she was not a signatory to the hypothecs and never attended the office of any notary to sign these documents. He says she should be afforded the opportunity to defend the claim against her, on the basis that her signature was forged

- [56] I agree with counsel for RBC, that repeating the reasons given as a good explanation under CPR 13.3(1) does not equate to exceptional circumstances, to warrant depriving a claimant of its judgment, particularly where these reasons have been rejected as providing a good explanation for the breach. In my judgment there is nothing outstanding in relation to the defence which signifies with a high degree of certainty that the claim is bound to fail, or that the defence is so strong that it is sure to trump the claim at trial. Indeed, it is RBC's evidence that all parties and their respective Counsels met, at least on two previous occasions when it was concluded that the signature was that of Mrs Joseph. Furthermore, Mrs Joseph has not taken any steps during this time to actively seek to impugn the hypothecs which she says are fraudulent. At the very least she could have filed an action for improbation of the hypothecs and seek to have the present claim against her stayed, pending determination of that action. In my judgment, taken in the round, these are not circumstances which amount to exceptional, for the purposes of CPR13.3(2). All that is before the Court are opposing versions of the facts, such that I am unable to say with a high degree of certainty that the claim is bound to fail or that the claimant is not entitled to the remedy sought. In the circumstances, Mrs. Joseph has not satisfied the Court of the matters which would warrant exercising discretion under the sub-rule and the application also fails on this ground.

Conclusion

- [57] In concluding, I therefore make the following orders: -

1. The application is dismissed.
2. I make no order for costs.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar