

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

DOMHCV 2013/0201

BETWEEN:

LAWRENCE ANSELM

Claimant/Respondent

AND

**HILDRETH BALTHAZAR
JOHN BALTHAZAR**

Defendants/Applicants

APPEARANCES:

Ernette Kangel of Counsel for the Claimant/ Respondent

Anthony Commodore of Counsel for the Defendant/Applicants

2014: April 9
2014: May 19

RULING

GLASGOW M (ag): The present ruling relates to an application filed by the defendants/applicants (hereinafter the applicants) on February 14, 2014 for the Court to set aside a default judgment entered against the applicants on January 20, 2014. The judgment ensued from the applicants' failure to file an acknowledgement of service.

BACKGROUND

1. The Claimant/ respondent (hereinafter the respondent) is a construction contractor by profession. The parties are related. The 1st applicant is married to the 2nd applicant. The 1st applicant is the respondent's sister and therefore, the 2nd applicant is his brother – in - law;
2. Sometime in January 2011, the parties entered into an agreement whereby the respondent was engaged to construct a dwelling house for the applicants at Fond St. Jean, Dominica. The parties disagree as to the contract price for the job but they all agree that by September 2011, the respondent was paid a total of about \$29,000.00 (E.C);
3. The respondent asserts in his statement of claim that the works were completed by September 2011 and the building was handed over to the applicants who refused to pay the remaining sums due. The respondent got his attorney to write a letter dated January 7, 2013 and delivered to the applicants on January 14, 2013 formally demanding the moneys owed to him. The applicants' attorney responded almost immediately on January 16, 2013 denying that the applicants owed any money to the respondent. In fact, the applicants complained in their letter in response that it was the respondent who owed them because he walked off the job in August 2011. The applicants had to hire an assessor and were put to the additional expense of hiring persons to complete the job;
4. The respondent was not satisfied with the applicants' letter in response to his demand for payment. Accordingly, he filed a claim seeking payment of the balance due, costs and interest. This claim along with a statement of claim was filed on June 3, 2013. There is an affidavit of service which was filed on August 20, 2013 by one Ivor Emmanuel which states that he is a bailiff of the magistrate's Court in Roseau, Dominica. It goes on to state that on June 10, 2013, Mr. Emmanuel served the applicants personally with a "claim form, statement of claim, certificate of exhibit, defence form and acknowledgment of service which was filed on June 3, 2013 and had been issued out of the Registry of the High Court of Justice ...".

5. There is much contention surrounding whether the acknowledgment of service form and defence form (hereinafter referred to as the response forms) were actually served on the applicants. Suffice it to say that the applicants did not file an acknowledgement of service¹. Consequently, on November, 18 2013, the respondent requested the entry of a judgment in default of acknowledgment of service. A default judgment was entered on January 20, 2014. The default judgment was served on the applicants on January 23, 2014. The applicants contacted the same attorney who wrote the response letter for them and this application to set aside the default judgment was filed on February 14, 2014. ²Affidavits in support of the application and opposing the application were filed by both sides along with submissions and authorities both for and against the grant of the application;

Contention of the parties

6. The affidavit in support of the application tells the applicants' story. The applicants were served with the statement of claim and a claim form at their home. They read the claim form which included a Notice to the defendant. On reading the Notice to the defendant, they asked the bailiff for the response forms. He promised to get back to them but he never did. They did nothing with the documents which were served because they awaited the return of the bailiff with the response forms. The bailiff never returned until he served the applicants with the default judgment.
7. The grounds of the application can be restated very simply. The applicants contend that the mandatory provisions of rule 8.14(1) of the Civil Procedure Rules 2000 (hereinafter the CPR) require service of the response forms along with the claim form. This was not done. Accordingly, the default judgment was irregularly obtained. The applicants were not obliged to file an acknowledgement of service since the proceedings were a nullity for non-compliance with the requisites of CPR 8.14 (1). The default judgment ought to be set aside as irregularly obtained.

¹ At paragraph 5 of the affidavit in support of the application to set aside the judgment, the Applicants depone that they awaited the return of the bailiff with the response forms and did nothing in response to the claim

² A defence and counterclaim were also filed on February 14, 2014

8. Several authorities were submitted to buttress the applicants' argument that "in cases where a judgment in default of appearance or defence has been entered before the proper time, or there has been no service or sufficient service, or it has been entered for a greater amount than is due, or there has been a breach of good faith, it will be set aside ex debito justitiae, apart from any consideration as to whether there is a good defence on the merits, and the plaintiff is usually ordered to pay the costs occasioned by the judgment or order." The "failure to take steps to have the judgment corrected within a reasonable time after notice of it cannot preclude the defendant from having the judgment set aside."³ In **Posner v Collector for Interstate Destitute Persons**, a case involving the non-service of a summons, discussion centered on the distinction between procedural irregularities which render judgments or orders a nullity and therefore, void and those irregularities that are merely voidable. It was noted that a distinction could be drawn between those cases where judgment was obtained where the defendant was not served with the originating process and those in which there was a defect in service but the writ came to the knowledge of the defendant. In the former instance, the judgment should be set aside ex debito justitiae.
9. **Craig v Kanssen**⁴ was submitted as another authority where it was held that the failure to serve process in circumstances where it was mandatory renders any order flowing from it void and liable to be set aside ex debito justitiae. In that case, an affidavit of service was produced indicating that summons had been served on the defendant at his known postal address. It turned out that the address stated was not the address for service given by the defendant in the proceedings. He never resided there and as such he never received the summons. The Court there recited the principle in **Anlaby v Praetorius**⁵ which involved the entry of a judgment in default of defence before the expiration of the time limited for entry of a default judgment. The Court in **Anlaby** distinguished "between setting aside a judgment for irregularity, in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error

³ The Applicant's authority for this posture is taken from Halsbury's Laws of England, 4th Edition, Volume 26 at paragraphs 557 to 565

⁴ [1943] 1 All ER 108

⁵ **20. Q.B.D 764**

on the part of the defendant in which case the Court has a discretion to impose terms as a condition of granting relief.”⁶

10. The respondent opposes the application and his submissions can be summed up as follows—

- i. the claim was properly filed and served on the applicants. The affidavit of service shows what documents were served. Once the applicants were served, they were obliged to respond to the claim in the manner prescribed by the CPR. They did not respond and as such the default judgment was properly entered;
- ii. Even though the CPR made it clear that the response forms must be served with the claim form and statement of claim, the applicants were not left helpless if it is the case that the response forms were not served on them. This is due to the fact that the applicants were put on notice by receipt of the Notice to the defendant attached to the Claim Form which advised of the need to file and serve an acknowledgment of service;
- iii. Even though the CPR provides that the response forms must be served, the CPR does not prescribe a sanction for the non compliance with the rules on service of the response forms. There are mandatory rules in respect of what a defendant should do when the claim form and statement of claim are received. In contrast to the rules on service of the response forms, a sanction may be imposed when a defendant fails to take the necessary steps after the claim form and statement of claim are served. Non service of the response forms does not absolve the applicants of their obligations under the rules and the sanction was properly attached for their failure to act;
- iv. If the applicants wish to have the sanction reversed, they must comply with the provisions of Part 13 of the CPR. In particular the applicants must satisfy Part 13.3(1). None of the criteria in that rule have been met and as such the application to set aside the default judgment should be refused.

⁶ See also Lord Wilberforce in Pritchard v Deacon and others [1963] Ch. 502

Analysis

Whether the response forms were served

11. Before deciding whether the default judgment should be set aside, I think it is appropriate to comment on whether the documents were indeed served. If I find that the required documents were served, as is indeed the posture taken by the respondent, the arguments about whether the default judgment should be set aside will be settled. As stated above, this is an area of disagreement between the parties. The process server, Ivor Emmanuel, filed an affidavit of service on December 9, 2013 wherein he asserts, among other things, that he served the claim form, statement of claim, certificate of exhibit with exhibit (letter), defence form and acknowledgment of service on the applicants on June 3, 2013. He was able to identify the applicants from previous service of documents on them. Tellingly, he asserts in paragraph 4 of the affidavit that on June 10, 2013 he endorsed on the copy of those documents, "the day of the month and year of the said service." In their affidavit in support of the application to set aside the default judgment filed on February 14, 2014, the applicants strongly deny receiving the response forms.
12. The respondent filed an affidavit on March 11, 2014 in which he opposes the application to set aside the default judgment on the grounds that all the required documents were served. He also relies on Mr. Emmanuel's affidavit of service filed on December 9, 2013 and another affidavit filed by Mr. Emmanuel on March 24, 2014 wherein Mr. Emmanuel reiterates that he did serve the documents in question and endorsed each of them accordingly.
13. While the process server and the respondent have proffered evidence by affidavit, I think it was incumbent on them to present the Court with the entire record. The process server has asserted more than once in these proceedings that not only did he serve the documents in question but that he also endorsed the copies which he returned to the respondent's solicitors. The Court has not been presented with the endorsed copies to verify this assertion. Considering that the applicants are severely attacking the sworn assertions of the process server, it would have been entirely helpful for the respondent to produce these documents that are assumedly in their possession. The applicants' insistence that they did not receive these documents may have been countered by producing the endorsed documents. In the

circumstances, I am constrained to find that the respondent has not shown that the response forms were served on the applicants.

Whether the judgment in default should be set aside

14. The provisions of the CPR on what documents must be served when a claim is initiated in proceedings of this sort are clear. Part 8.14(1) of the CPR reads –

When a claim form is served on a defendant, it must be accompanied by –

- (a) a copy of any order made under rule 8.2 or 8.13;*
- (b) a defence form (Form 5);*
- (c) a form of acknowledgment of service (Form 4 or 4(A));*
- (d) if the claim is for money – an application to pay by installments (Form 3); and*
- (e) the prescribed notes for defendants (Form 1A).*

15. It is noteworthy that endorsed on Form 1 (the claim form) is a Notice to the defendant which, among other things, advises that judgment may be entered against the defendant if he or she fails to fill out the acknowledgment of service form served with the claim form. The Notice to the defendant also clearly advises that the defendant should seek legal advice;

16. Parts 9.1 of the Rules sets out what steps should be taken by a defendant if he or she wishes to respond to a claim. Parts 9.1 (1) and (2) read –

(1) This Part deals with the procedure to be used by a defendant who wishes to contest proceedings and avoid a default judgment being entered.

(2) The defendant does so –

(a) by filing –

- (i) a defence in accordance with Part 10; and
- (ii) an acknowledgment of service in Form 3 or 4 containing a notice of intention to defend within the time limit under rule 9.3; or

(b) by filing a defence in accordance with Part 10 within the time limit under rule 9.3.

17. The defendant may, however overlook the filing of the acknowledgment of service where he or she files a defence within the time limited for filing of the acknowledgment of service.⁷ Something must be done nonetheless. A defence or acknowledgment of service must be filed. If this is not done within the time limited, the rules prescribe severe consequences. The sanction is that judgment may be entered pursuant to Part 12 if the defendant fails to file an acknowledgment of service or a defence.⁸

18. Parts 12.4 and 12.5 of the Rules set out the conditions on which the Court must enter a default judgment –

Conditions to be satisfied – judgment for failure to file acknowledgment of Service

12.4 The Court office at the request of the claimant must enter judgment for failure to file an acknowledgment of service if –

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

Conditions to be satisfied – judgment for failure to defend

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

- (a) (i) the claimant proves service of the claim form and statement of claim; or
- (ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;

⁷ See CPR 2000 Parts 9.1(2)(b) and 9.2(4). See also Pereira CJ in Bilzerian v Weiner and Weiner SKBHC2012/00028 at paragraph 9

⁸ See Parts 9.2(5) and 10.2(5) of the Rules

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

(b) the defendant has not –

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

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

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

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

19. That is not the end of the matter. A judgment in default of acknowledgment of service or defence is not a conclusive or final act against the defendant. The lawmakers enacted rules that permit the Court to set aside a default judgment. Part 13 of the CPR outlines the approach to be taken when an application is made to set aside a default judgment. Part 13.2 states the circumstances in which the Court must set aside a default judgment. Where these provisions do not apply, the Court has a discretionary power to set aside a default judgment pursuant to Part 13.3 but the discretion is circumscribed by the conditions set out in that rule.

Cases where Court must set aside default judgment

13.2 (1) The Court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of —

(a) a failure to file an acknowledgment of service any of the conditions in rule 12.4 was not satisfied; or

(b) judgment for failure to defend — any of the conditions in rule 12.5 was not satisfied

(2) The Court may set aside judgment under this rule on or without an application.

Cases where Court may set aside or vary default judgment

13.3 (1) If rule 13.2 does not apply, the Court may set aside a judgment entered under Part 12 only if the defendant —

(a) applies to the Court as soon as reasonably practicable after finding out that judgment had been entered;

(b) gives a good explanation for the failure to file an acknowledgment 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.

20. In arriving at what should occur in these proceedings, the applicants submit that the mandatory provisions of Part 8.14(1) were not obeyed. Their assessment is that the non service of the response forms under Part 8.14(1) renders the default judgment one which ought to be aside ex debito justitiae. No reference is made to any of the provisions of the CPR for this proposition for if I am to understand the applicants' position, this irregularity renders the process a nullity and as such the default judgment must be set aside without more. Several authorities as recited above were supplied for this proposition.

21. I must say something about this approach taken by the applicants. The authorities recited above in this judgment in support of the applicants' posture reveal the pre - CPR debate on whether a judgment was a mere nullity or a mere irregularity. The unsuitability of utilizing the pre-CPR principles on setting aside a default judgment been pointed out on several occasions.

22. In **Nelson and another v Clearsprings (Management) Ltd**⁹ Sir Anthony Clarke MR. after reviewing a number of decisions dealing with the pre – CPR distinction between a regular judgment and irregular judgment and the post – CPR approach, repeated the useful insight of Brooke LJ in **Akram v Adam**¹⁰ where he remarked in respect of the new civil procedural rules that “the rule makers had the pitfalls of earlier practice well in mind when they made their new procedural code”. In **Akram**, the English Court of Appeal refused to set aside a default judgment which was obtained in circumstances where the claim form had been posted to the defendant's usual address but the defendant never received the claim form. The Court there observed that under the pre-CPR practice a distinction was drawn between judgments which are irregular and as such had to be set aside as of right and those which were regularly obtained but which could be set aside where the defendant showed a defence on the merits. Brooke LJ, after setting out in detail the steps by which a default judgment would be obtained observed at paragraph 32 that the new

⁹ [2006] EWCA Civ 1252

¹⁰ [2004] EWCA Civ 1601.

rules – “made it clear that the difference between a default judgment wrongly entered (which must be set aside – see CPR 13.2) and any other default judgment (which may only be set aside if one of the conditions set out in CPR 13.3(1) are satisfied and the application was made promptly) depends on whether the procedural steps required by CPR 12.3 were or were not followed (so far as relevant in the particular circumstances) or whether the whole of the claim had been satisfied before the judgment was entered...”¹¹

23. Nelson and another v Clearsprings (Management) Ltd itself was also another case in which the defendant applied to set aside a judgment entered in circumstances where there was no knowledge of the claim. In that case, the address for service on the claim form was a mistake. The claim form was served at an address which was not the defendant's address for service. In Nelson, the Court refused to find that “under the CPR the defendant is entitled to have the judgment set aside as of right, ex debito justitiae, or indeed that, if there is a discretion it can be exercised in only one way”. The Court recited and utilized the comprehensive provisions of the “new procedural code” to determine the applicable mechanism to address the difficulty which it confronted.

24. With those useful instructions in mind, I turn to see what the CPR has to say about the matter. The case of Rajval Constructions v Bestville Properties Ltd¹² is a decision of the English Court of Appeal, wherein that Court had to consider an appeal involving the sections in the English civil procedure rules similar to Part 8.14 (1) of the CPR¹³. In that case the English rules mandated that forms similar to the ones under discussion (commonly referred to as the “response pack”) must be served on a defendant along with the claim form and statement of claim. This was not done. No acknowledgment of service was filed and the time limited so to do expired. The Claimant applied for and obtained judgment in default of acknowledgment of service. The Claimant then applied to set aside the judgment on the grounds that the mandatory requirement for the service of the response pack was not complied with. In that case, the Court looked at the rules on setting aside a default judgment. It was found that the provisions regarding the circumstances where the Court must set aside a default judgment were not applicable. I pause here to point out that in the OECS, the same applies. Where an application is filed to set

¹¹ [2004] EWCA Civ 1601 at paragraph 33

¹² [2010] EWCA Civ 1621

¹³ English CPR 7.8(1)

aside a judgment obtained in default of an acknowledgment of service, the conditions wherein the Court must set it aside are pellucid. As in the Rajval decision, I do not see any of those conditions applying here. The time limited for an acknowledgment of service has expired and no acknowledgment of service has been filed.

25. The Court in Rajval, then, rightly so in my view, looked at the discretionary powers set out in those rules to consider whether it may set aside the judgment in default. The discretionary remedies are not in exact terms as in the O.E.C.S.¹⁴ but the point is underscored that the Court may proceed to exercise a discretionary jurisdiction were the requisites of the mandatory rules on setting aside are not met.¹⁵ In APC Asia Pacific Cargo (HK) Ltd & Ors v Hanhin Shipping Co. Ltd & Ors¹⁶, Clarke J had this to say about the non – service of a response pack, “***The failure to serve a response pack was a failure to comply with the rules but of itself , it signifies no more than that that which ought to have been done on service was not done. It was a procedural irregularity: a technical mistake of the kind that in Harrigan v Harrigan ... was not treated as affecting the real substance of the matter.***”
26. My opinion is that it cannot be an insubstantial matter that the CPR places an obligation on the Claimant to serve the response forms along with the claim form and statement of claim. The forms are to assist the defendant, especially one who may a litigant in person, to file the necessary responses to the claim. The provisions of the CPR on service of the response forms are not enacted in superfluity or for parties to obey at their whims. Parties must comply with all relevant rules of the CPR when conducting proceedings in the Courts.
27. The foregoing notwithstanding, the question arises as to what is to happen when there is non-compliance with the provisions of the rules. A distinction must be drawn between those cases in which the rules prescribe a sanction and those in which it does not do so. Clearly, the CPR does not prescribe a sanction for non compliance

¹⁴ See Barrow J.A in Kenrick Thomas v RBTT Bank Caribbean Limited Civ. App. 3 of 2005 (Saint Vincent and the Grenadines)

¹⁵ See also Hafiz J in Perez v Banner, Belize High Court decision delivered January 21, 2009

¹⁶ [2005] EWHC 2443 (Comm)

with the rules on service of the response forms. As was said by the Privy Council in the **AG of Trinidad v Kieron Mathews**¹⁷, “Sanctions imposed by the Rules are consequences which the Rules themselves explicitly specify and impose”.

28. In this context, the CPR imposes specific consequences for non compliance with the provisions on filing an acknowledgment of service and defence; a default judgment may be obtained. The CPR then sets out comprehensive stipulations on when and how the default judgment ought to be set aside. Parts 13. 2 and 13.3 of the CPR have already been set out above in this judgment. They apply thus. The default judgment was entered due to the fulfillment of the requirements of Part 12.4 of the rules, that is to say, the respondent proved service of the claim form and statement of claim. The applicants did not file an acknowledgment of service or a defence or otherwise satisfy the claim which is a claim for a specified sum of money. Most importantly, the time limited to file the acknowledgment of service had expired. As was pointed out in **Rajval**, in these circumstances, the judgment is not one that must be set aside in accordance with Part 13.2. If the delinquent party wishes to have the judgment set aside, resort may be had to Part 13.3 of the rules.
29. The approach to be taken in exercising the discretion set out in Part 13.3(1) was elucidated by Barrow J.A in **Kenrick Thomas v RBTT Bank Caribbean Limited**¹⁸ His Lordship had this to say when explaining that the conditions in the Rule 13.3(1) are conjunctive and that all three conditions must be met before the Court exercises its discretion in favor of setting aside the default judgment – “ *The language that the rule makers chose to frame Part 13.3 (1) was considered and deliberate; there is no possibility that its purport was unintended. Litigants and lawyers must now accept that CPR 2000 has gone significantly further than the English rules in the hardening of attitude towards the lax practice that previously prevailed in relation to the setting aside of default judgments which was an identified⁽²⁾ abuse that the new rules were intended to correct. The adherence to the timetable provided by the Rules of Court is essential to the orderly conduct of business and the importance of adherence is reflected in CPR 2000 imposing pre-conditions for setting aside a default judgment. If the pre-conditions are not satisfied the Court has no discretion to set aside.*”
30. I have indicated above at paragraph 23, that I do not find that the conditions set out in Part 13.2 of the CPR have been satisfied to permit the mandatory setting aside of the default judgment. Therefore, with the guidance of His Lordship Barrow J.A in

¹⁷ [2011] UKPC 38

¹⁸ Civ. App. 3 of 2005 (Saint Vincent and the Grenadines)

mind, I will now examine the evidence against the conditions set out in Part 13.3 (1) to ascertain whether the judgment may be set aside.

Whether the applicants have applied to the Court as soon as reasonably practicable

31. The applicants were served with the default judgment on January 23, 2014. The application to set aside the default judgment was filed on February 14, 2014, some 22 days later. Thomas J. in **Lousie Martin v Antigua Commercial Bank**¹⁹ observed that no specific time limit having been set out in the rules, reasonableness therefore deposes on the facts. This would suggest that all the circumstances of the case must be considered including the conduct of the parties.
32. One of the more glaring features of the applicants' conduct is the fact that they exhibited a clear understanding of the need for a timely response when legal proceedings are served on them. On January 14, 2014 they were served with the pre action letter of January 7, 2014 demanding payment and warning of legal consequences if they did not comply. They immediately contacted their attorney. They ensured that the attorney responded to the pre action letter within (2) days of receipt, that is, on January 16, 2014. These are not litigants who are ignorant of legal proceedings and the need for suitable prompt action.
33. Another glaring feature is the fact that the applicants, in their affidavit, assert that they read the documents with which they were served. It was, in their own words, the basis on which they requested the response forms from the process server. Reading the documents with which they were served would have informed them that they had to file an acknowledgment of service. It would have highlighted the consequence of not doing so. It would have also advised of the propriety of seeking legal counsel. Suffice it to say, the applicants knew what to do with legal processes previously served. They contacted an attorney and instructed him to immediately respond. In this instance, they chose to do nothing. They awaited the return of the process server. Even when he returned with a default judgment, the same alacrity with which they approached the pre-action letter was not adopted. They and their attorneys waited 22 days to file an application to set aside the judgment obtained in default of an acknowledgment of service.
34. A default judgment is not a matter to be taken lightly. In light of all the peculiar facts of this case, I find that the applicants have not demonstrated the urgency commensurate with the spirit and intendment of the rules. They have impressed the

¹⁹ Claim No. ANUHCv 1997/0115

Court that they were fully conversant with the necessity of retaining legal representation and pursuing expedient action in responding to legal proceedings previously served on them. Nonetheless, when served with the claim, they took a certain view of matters even ignoring the written advice stated in the notice attached to the claim. Having taken that view, they took an even more lax approach when served with the judgment which flowed from their default. They took 22 days to take action. The conduct was deliberate. Accordingly, I find that 22 days was an inordinate lapse of time in which to file an application to set aside the default judgment. The applicants have not satisfied the first limb of Part 13.3(1) of the rules.

35. Having so found, this should be the end of matters since the conditions attaching to the discretion I may exercise are conjunctive. However, I will go on to discuss the other features of CPR 13.3(1) for the sake of completeness.

Reason for failure to file an acknowledgment of service

36. Mere inadvertence is not the reason given for failure to comply with the rules. Lack of understanding of the process was not pleaded in aid. Rather, it is the bold evidence of the applicants that they chose not to follow the clear guidelines set out in the Notice to the defendants with which they were served. They took a stance that they should await the return of the process server before they took any action. Without exploring the point, I am prepared to venture that it may have been a matter of different considerations if these applicants were persons who exhibited total inability to comprehend the significance of legal processes. That has not been demonstrated on these facts.

37. As stated above in this judgment, the applicants are persons who have impressed the Court that they appreciate the importance of addressing legal processes served on them. Their evidence is that at the time of service of the claim on them, they read the documents with which they were served including the Notice to the defendants in sufficient details to make certain enquiries of the process server. Having read the documents and being notified of the consequence of failing to file an acknowledgment of service, it is not a good reason that they failed to do anything about the documents which they were served because they took they took a certain view of those documents. They only contacted a solicitor after receiving the default judgment. Such a disposition towards the rules of Court is intolerable and should not

be endorsed. There can be no sympathy for such a cavalier attitude. The application also fails for the reason that the applicants have not shown a good reason for failing to file an acknowledgment of service.

Real prospect of successfully defending the claim

38. Much guidance may be found in the case law from our jurisdiction and further afield on the approach that the Court should take on this issue. A helpful summary of the principles is restated by Her Ladyship Harriprasad – Charles J in **Earl Hodge v Albion Hodge**²⁰ Quoting from his Lordship Moore-Bick J in **International Finance Corporation Utexafrica S.p.A** -

“The fact is that in ordinary language to say that a case has no realistic prospect of success is generally much the same as saying it is hopeless, whereas to say that the case has a realistic prospect of success suggests something better than that it is merely arguable. That is clearly the sense in which the expression was used in the *Saudi Eagle* and, in my view, it is also the sense in which it was used in Rule 13.3.1(a). There are good reasons for that. 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 to set the judgment aside. In my view, therefore, Mr Howard is right in saying the expression “realistic prospect of success” in this context means a case which carries a real conviction.”

39. The question may be put in several ways leading to the same analysis. Can it be said that the defendants have better than a merely arguable case? Or as it is said, a case that carries a real conviction or one which is meritorious to which the Court should pay heed? A defence which has realistic, rather than fanciful prospects of success? As His Lordship Thomas J opined in the **Louise Martin** decision, at paragraphs 18 to 19 –

In BLACKSTONE'S CIVIL PRACTICE 2002 at paragraph 34.10 the matter is addressed in these terms in relation to summary judgment under Rule 24.2 of the English Civil Procedure Rules. However, this provision contains the phrase “real prospect of succeeding” hence the relevance.

“In *Swain v Hillman* [2001] 1 All ER 91, Lord Woolf said that the words ‘no real prospect of succeeding’ did not need any amplification as they spoke for themselves. The word ‘real’ directed the Court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success. Nor does it mean that summary judgment will be granted if the claim or defence is ‘bound to be dismissed at the trial’. The Master of the Rolls went on to say that the summary judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. A claim may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based (*Three Rivers District Council v Bank of England* (No.3)). The judge should have regard to the witness statements and also to the question of whether the case is capable

²⁰ BVIHCV2007/0098; See also Thomas J in **Louise Martin v Antigua Commercial Bank** ANUHCV 997/0115

of being supplemented by evidence at the trial (*Royal Brompton Hospital NHS Trust v Hammond* [2001] BLR 297)".

Specifically to the issue of setting aside a default judgment, the learned authors of BLACKSTONE'S¹ at paragraph 20.11 record the following learning:

"The wording of rule 13.3 (1) (a)2 mirrors the test established in *Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc* [1986] 2 Lloyd's Rep 221 that the defendant must have a case with a reasonable prospect of success, and that it is not enough to show a merely arguable defence."

40. The burden is on the defendant against whom the default judgment has been entered to demonstrate that the defence meets these standards²¹.
41. A defence and counterclaim were filed on the same date of filing the application to set aside the judgment in default. The utility of filing a defence and counterclaim at this stage is not readily apparent when one considers that the default judgment was already in place and had been served on the applicants. Attaching a draft defence and counterclaim to the application to set aside the default judgment would have been the fitting step to take in these circumstances²².
42. The basis of the defence is that the respondent did not complete the construction of the house. The applicants complain that the respondent walked off the job before it was finished leaving the applicants with the burden of employing other persons to finish the task for which the respondent had already received moneys. The applicants were also put to expense to correct the various defects to the building especially a leaking roof. Additionally, the respondent did not account for a deposit received of some \$9,500.00. The respondent also caused the applicants to purchase excess materials which were never used on their property but which the respondent used on another project. Bags of cement were purchased and never used. The applicants could not recover the cost of the bags of cement because they had become "calcified" and had to be thrown away.
43. The applicants deny that they owed any moneys to the respondent. The counterclaim, which incidentally is not in the form prescribed by Part 18 of the CPR, repeats the allegations set out in the defence. In addition it complains that the respondent has not demonstrated how he spent the deposit he received. The counterclaim asks for a refund of the deposit, damages for the incomplete works and

²¹ See Potter LJ in *ED & F Man Liquid Products Ltd v Patel and Another* [2003] ALL ER 75 at paragraph 9

²² Part 13.4(3) of the CPR

materials removed from the worksite. It also seeks refund of the amounts paid to the (3) builders and other workers employed to correct and complete the incomplete structure left by the respondent.

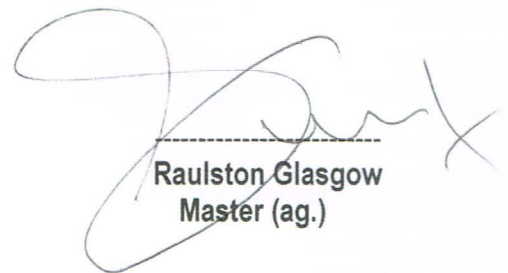
44. The applicants are complaining of the tremendous loss they suffered at the hands of the respondent but, astonishingly, nowhere in the defence have the nature of the losses or the amount of money expended been particularized. There is the singular mention of the leaking roof. No other defect is set out on the pleadings. There is also the bland assertion of the purchase of excess material and the cost thereof which are again just merely mentioned and not specified.
45. The defence refers to the applicants' letter sent to the respondent's solicitor in response to the respondent's demand for the balance of the moneys owed to him. In that letter reference is made to an assessment conducted by one Felix Thomas, licensed professional building consultant. According to the letter, it is based on Mr. Thomas' assessment that the applicants have proceeded to claim that the respondent produced incomplete and deficient work. The letter states that the findings of the assessment were disclosed to the respondent. The response indicates that as soon as the applicants receive Mr. Thomas' assessment of the amount of money that should be paid to them for the deficient work and incomplete structure, they would demand the same from the respondent along with sums paid for excess materials, additional workmen plus the unaccounted for deposit.
46. The respondent disclosed Mr. Thomas' report as part of his response to the application to set aside the default judgment. The report is indeed informative. The conclusion drawn by the professional employed by the applicants is repeated verbatim – “ *The works having been practically completed by the builder on or about August 16, 2011, is due for full payment. Full payment in this case means that the builder is responsible for making good the remedial works as estimated. Should the owners meet these expenses, the same shall be deducted from the amount due to the builder.*” The remedial works to be done as found by the applicants' expert were –

- “ 1. repairs to roof where protruding steel rods were cut off and the concrete slab hacked below the surface of the roof into the concrete slab;
2. Allow for waterproofing of the selected surface areas with an approved roof concrete sealer”

47. There cannot be any serious dispute by the applicants of the opinion expressed by their own expert. His opinion comports with the respondent's argument that indeed the works were substantially complete and barring a few remedial issues, the builder was entitled to be paid the contract price. The applicants' expert also found that the completed works were done in a good workmanlike manner. Even if one does not rely on the expert opinion, there is little by way of specificity of the bland averments of the various complaints made by the applicants. It must be recalled that the Court is looking at the pleadings to ascertain whether it is satisfied that the defense has a reasonable prospect of success.
48. What then remains of the defence? I have already alluded to the lack of specificity in the pleadings in respect of the purchase of excess materials or the taking away or wastage of materials by the respondent. None of these matters have been particularized in a proper fashion to assist the Court in determining their viability. Additionally, it is beyond comprehension how the applicants can complain about the expenditure of the deposit when they have received a building that according to their expert is "practically completed".
49. In the final analysis, I find that the applicants have not demonstrated that they have a defence that has a reasonable prospect of succeeding.

Conclusion

50. The default judgment was entered in accordance with Part 12.4 of the CPR. If the applicants wished to have it set aside, they had to comply with Part 13.3(1) of the rules. The applicants have not shown that they have satisfied the conjunctive stipulations of Part 13.3(1) of the CPR 2000. The application for setting aside the default judgment is therefore refused. The applicants are to pay the costs of this application to the respondent in the sum of \$1500.00.



Raulston Glasgow
Master (ag.)