EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2024/0063

BETWEEN:

REPUBLIC BANK (EC) LIMITED

Claimant/ Respondent

And

1. **CARE SERVICES (2008) LIMITED**
2. **CARE SERVICES LIMITED**

Defendants/ Applicants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini — High Court Judge

Appearances:

Ms Iyka Dorival, for the Claimant/ Respondent
Mr Horace Fraser, for the Defendant/ Applicants

2025: July 3
October 10

DECISION

[1] **ST ROSE-ALBERTINI, J. [Ag]:** The defendants have applied to set aside a judgment in default of acknowledgement of service, obtained by the claimant on 24th October 2024 ("the default judgment")

[2] By way of affidavit of service filed on 9th October 2024 the claimant's process server attests to service of the claim form and attendant documents on a director of the defendants, Kurt

Phillip (Mr Phillip) on 6th October 2024. The defendants failed to file acknowledgment of service within 14 days of the date of service. The claimant filed a request for entry of default judgment on 24th October 2024, which was granted, and served on the defendants on 12th December 2024.

[3] The defendants filed acknowledgment of service on 25th October 2024. Mr Phillip claimed that he had a genuine misconception regarding the date of service of the claim form. A defence was filed on 4th November 2024. On 21st February 2025, the defendants filed this application, initially stating that the default judgment was irregular and should be set aside as of right, and that the defence which was filed, should be deemed properly filed for the purposes of these proceedings. Thereafter the defendants confirmed by way of a supplemental affidavit, that the date of service is accepted as the date given by the claimant, and that the application should proceed in relation to a regular default judgment. .

[4] The grounds of the application which are relevant to this application are that:

(1) Arrangements were made by Mr Phillip to give instructions to Counsel on record, at the time, for filing an application to set aside the default judgment. A meeting was scheduled with Counsel for 28th November 2024 and rescheduled to 5th December 2024. The director was unable to meet with Counsel because of family emergencies.
(2) Counsel withdrew services and on 14th January 2025 an application was filed to be removed from the record as legal practitioner. Mr Phillip was served with the application on the same day, and immediately spoke to and instructed alternative Counsel.
(3) In the circumstances the delay in filing the application was not inordinate and the reason for the delay was not due to deliberate conduct on the part of the defendants.
(4) The claimant will suffer no prejudice should the application be granted.
(5) The filed defence has a reasonable prospect of success.

[5] The application is supported by affidavit of Mr Phillip, and supplemental affidavit of Daniella Primus (Ms Primus), Legal Secretary employed at the firm which currently represents the defendants. Mr Phillip's affidavit repeats the grounds stated in the application. In so far as is relevant he stated that he arranged meetings with Counsel to provide instructions for filing the application, but was unable to attend due to personal and family emergencies. Details of the emergencies were not provided, save that on 5th December 2024 he had to take his mother to the hospital.

[6] He says as Counsel on record later indicated an intention to withdraw from the matter and ultimately filed an application to be removed from the record, he immediately set about engaging new Counsel. He stated that any delay in filing the application was neither excessive nor intentional. He further says that the claimant will suffer no prejudice as it was not entitled to the default judgment, and the defendants have filed a defence, which has a reasonable prospect of success.

[7] Ms Primus' affidavit addressed Mr Phillip's change in posture, regarding the date of service of the claim, and states that he labored under a misapprehension regarding the date of service. However, he now accepts that he was served on 6th October 2024. Thus, the default judgment was not irregular and the applicable rules for this application should be CPR 13.3(1) and 13.3(3).

[8] The claimant resists the application on the ground that the defendants have not satisfied the conditions for setting aside a regular default judgment, and relied on the affidavit of Nichola Evans (Ms Evans), Client Relationship Manager of the claimant.

[9] Ms Evans' affidavit mirrored the issues canvassed in the notice of opposition filed by the claimant. She explained that the claim is for recovery of debts owed under two commercial loans inherited from the Bank of Nova Scotia, consequent upon the acquisition of its banking business under a Banking Business Vesting Order[1]. The defendants were required to file acknowledgments of service by 23rd October 2024, but failed to do so. Thus, the claimant filed a request for entry of judgment in default. Although initially filed on 23rd October 2024, the request was withdrawn and refiled on 24th October 2024. The defendants filed acknowledgement of service on 25th October 2024. The defaulted judgment was granted and subsequently perfected. It was served on the defendants on 12th December 2024.

[10] Ms Evans stated that the defendants have not demonstrated a real prospect of successfully defending the claim and have not exhibited a draft defence as required by the rules. She noted that in the defence which was filed the defendants admitted the existence of the loan facilities and the debt, and their contention that the appointment of a receiver/manager

[1] See Exhibit NE4

absolved them of liability for the debt is unfounded. She stated that the receiver/ manager's final accounts which showed the amount repaid and what remained due and owing was sent to Mr Phillip in September 2021. Further, the receivership concluded in August 2021, and cessation was properly documented.

[11] Ms Evans further deposed that the defendants had not applied to set aside the judgment as soon as was reasonably practicable, as the application was filed 70 days after they became aware of the default judgment. She claimed that the reason for delay given by Mr Phillip, as personal and family emergencies, was vague and inadequate. She maintained that the defendants failed to satisfy the criteria for setting aside the default judgment and asks that the application be dismissed, with costs.

ISSUE

[12] The sole issue for resolution is whether the default judgment should be set aside pursuant to CPR 13.3(1), or alternatively pursuant to CPR 13.3(3).

LAW AND ANALYSIS

[13] The rules which govern this application are contained in CPR 13.3 which states:

> ***"13.3**—(1) The court may set aside a judgment entered under Part 12* ***only if the defendant has a real prospect of successfully defending the claim.***
> *(2) In determining whether to set aside under paragraph (1), the court may consider if the defendant —*
> *(a) applied to the court as soon as reasonably practicable after finding out that judgment has been entered; and*
> *(b) gives a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.*
> *(3) 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.*
> *(4) Where this rule gives the court power to set aside a judgment, the court may instead vary it."*

[14] CPR 13.4 states:

> ***"13.4 —**(1) An application may be made by any person who is directly affected by the entry of judgment.*
> *(2) The application must be supported by evidence on affidavit.*
> *(3)* ***The affidavit <u>must</u> exhibit a draft of the proposed defence****."*

CPR 13.3(1) - Real prospect of successfully defending the claim

[15] Counsel for the claimant took the preliminary point that the defendants failed to exhibit a draft defence as mandated by CPR13.4(3). Counsel for the defendants countered that a defence has been filed and is on the record, hence, there was no need to exhibit a draft with the affidavit in support.

[16] I note that CPR13.4(3) is couched in mandatory terms. It does not appear to permit a defendant to rely on a defence which is improperly filed, to deploy this application. As the defendants have conceded that the date of service of the claim was 6th October 2024, the claimant's request for entry of judgment would have precluded them from filing a defence, unless leave was granted in appropriate circumstances. It has been said that such flaw in the application process is sufficient to warrant outright dismissal of the application, unless the affidavit in support provides ample evidence to enable the court to determine the strength and character of the defence being raised.[2]

[17] In this regard, the defendants affidavits fail to disclose any details of the proposed defence, which would enable the court to evaluate the merits the application in a meaningful way. The evidence merely chronicles events spanning service of the claim, to filing of the application, and contains a bald statement that the defence which has been filed has a reasonable prospect of success. The obligation imposed by CPR13.4(3) has become even more stringent, as the rules[3] now place the central focus on the existence of a defence which has a real, as opposed to fanciful or imagined chance of success, in order to succeed at setting aside a regular default judgment.

[18] Nonetheless, despite this deficiency, in the interest of fairness and justice, I will undertake an assessment of the filed defence to determine whether it is evidence based, or legally sound, and has any real likelihood of success, at defending the claim.

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2 Doreen Leslie v Bradley Davis et al – SVG Civil Claim No. 47 of 1998 (delivered 21st September 2006, unreported).

3 Civil Procedure Rules (Revised) 2023

[19] Counsel for the defendants relied on paragraphs 6, 7, 9, 10, and 11 of the defence to advance the nub of the defendants case, which in essence amounts to assertions that the claimant appointed a receiver/manager who disposed of immovable property (Parcel No. 1256B 3) which secured the loans, at an undervalue, and mismanaged the business operations of the first defendant, thereby failing to fully liquidate the debt. Further, when the loan went into default the defendants offered the claimant additional security in the form of land situated at Laborie, to the value of $4,000,000.00, which the claimant did not acknowledge. Thereafter the claimant rejected a proposal from the defendants to sell a portion of Parcel No. 1256B 3, to reduce the debt. The defendants contend that such conduct amounts to breach of an implied duty of good faith on the part of the claimant, and constitutes abuse of the claimant's contractual rights. It was further submitted that the claimant has not established a legal basis for instituting a claim against the defendants, in relation to the same loan facilities, when their property was sold at half the market price, and without fixing an upset price. Having exercised the right to seize and sell immovable property held as security under the hypothec, the claimant now seeks to sue the defendants again, and is precluded from doing so.

[20] Counsel for the claimant submitted that CPR 2023, unlike its predecessor CPR 2000, centers the major question for determination on whether the defendants have disclosed a sufficiently convincing defence which can defeat the claim. Counsel submitted that while a court is not required to conduct a mini trial, an examination of the pleadings, sufficient to assists in narrowing the issues to determine whether the defence carries a sufficient degree of conviction must be undertaken. In support Counsel relied on the case of **Easyair Ltd (T/A Openair) v Opal Telecom Ltd**[4], where it was said that a defence must be shown to carry some degree of conviction and must be more than merely arguable. Further, if a defence is bad in law, it cannot be said to possess a real prospect of success.

[21] Counsel further submitted that the claim concerned outstanding sums owed by the defendants under two commercial loan agreements, secured by a hypothecary obligation. Upon default the claimant exercised its contractual right to demand payment which became

[4] [2009] All ER (D) 13, para 15.

immediately due and payable, under clause 7 of the hypothec,. In their defence, the defendants admitted signing the facility letters and hypothec, but deny liability for the debts on the premise that the appointment of the receiver/manager in 2018 deprived the first defendant of access to its property and business operations. Counsel further submitted that the defendants belief that the loans had been fully extinguished through the sale of the immovable property is without merit and is contradicted by the defence, in which they acknowledge receipt of the final accounts[5] from the receiver/manage, which showed an outstanding debt still owed to the claimant, after the sale of certain assets and distribution of the proceeds. Thus, the defendants were fully aware that the sums claimed remained due and owing.

[22] Counsel submitted that the defence has not established that the debt has been repaid or otherwise settled, and relied on Articles 1, 95, 917, 1677, 1825 of the Civil Code[6] to say that the defendants have not pleaded any of the legal bases required to show that the contract was rescinded or that they have extinguished their obligations. Accordingly, Counsel contends that the proposed defence does not raise any triable issues and discloses no real prospect of succeeding at defeating the claim.

Discussion

[23] CPR 13.3(1) provides a broad discretion to set aside a default judgment, if the defendants can demonstrate that there is a real prospect of successfully defending the claim. In this regard a draft defence should raise substantial issues, which cannot be resolved summarily, and require investigation and determination at trial. The prevailing law was stated succinctly by Carter J in **St Kitts Urban Development Corporation Limited v The Marina Village Limited**[7] as follows:-

> *"……………..The authorities establish that "something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside". It is the applicant who must convince the court that a defence has a reasonable prospect of*

[5] See Exhibits NE4 and CSL2.
[6] Cap 4.01 of the Revised Edition of the Laws of Saint Lucia
[7] SKBHCV2014/0150 - delivered on 18th March 2015, unreported

success and is not a merely arguable defence. The court must consider the totality of the evidence that it has before it, in considering this aspect of the application.[8]

[24] **Blackstone's Civil Practice**[9] provides the following guidance on this threshold in this way:

> *"The approach to be taken by the court was summarized by Moore-Bick J in International Finance Corporation v Utexaficia Spril [2001] CLC 1361: '**A person who holds a regular judgment, even a default judgment, has something of value, and in order to avoid injustice, he should not be deprived of it without good reason. Something more than a merely arguable case is needed** to tip the balance of justice in favor of setting the judgment aside... the expression "realistic prospect of success" in this context means **a case which carries a degree of conviction.' "***

[25] Moreover, the approach taken by the Court of Appeal in **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste**,[10] a case from this jurisdiction, is equally instructive, on the threshold for achieving "*a real prospect of success*" albeit in the context of an application for summary judgment. There, it was said that the court must consider the matter in the context of the pleadings and evidence before it and determine on that basis ***whether the defence has a real (as opposed to a fanciful) prospect of success***. If at the end of the exercise the court takes the view that it would be difficult to see how the defendant could establish its case, then it is open to the court to enter summary judgment. In the context of this application, it would be open to the court to refuse to set aside the default judgment.

[26] The present claim is for recovery of outstanding sums due under two commercial loan agreements[11] after the claimant exercised the right to appoint a receiver pursuant to clause 7 of the hypothec. The receiver managed the business operations of the first defendant for a period of 6 months and undertook the sale of certain assets, including the immovable property registered as Parcel No. 1256B 3, belonging to the first defendant, which secured the loans, under the hypothec. It is averred that when the loan went into default, the defendants offered additional security to the claimant in the form of land located at Laborie,

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[8] See paragraph 22 of the Judgment

[9] 2020 Edition at page 470.

[10] Saint Lucia High Court Civil Appeal SLUHCVAP2009/0008 (delivered 11th January 2010, unreported).

[11] Pursuant to a Facility Letter dated 13th June 2008 and Hypothecary Obligation Mortgage Debenture and Floating Charge dated 3rd October 2008 and registered at the Land Registry as Instrument Number 5559/2008, both annexed to the statement of claim.

which the claimant refused. Thereafter, the defendants procured a sale of a portion of land at the true market value and brought this to the attention of the receiver/manager. However, that proposal was refused, and the property was sold at an undervalue.

[27] The defendant exhibited a valuation of the said property[12] done by David Emmanuel, Quantity Surveyor, as at 7th July 2015, in which the market value was estimated at $5,167,047.00[13] I note that the only evidence of an offer to purchase the said property, is shown as exhibit CSL1, which contains an offer price of $523,320.00 for a portion of land to be dismembered from Parcel No. 1256B 3, which is significantly below the market value as shown in the valuation for the entire parcel of land.

[28] Counsel for the defendants, in oral submissions, took the point that the claimant is precluded from pursuing a personal claim against these defendants, having exercised its rights under the hypothec to realize the security for the loan. Counsel relied on the Privy Council decision in **Nelson and others v FirstCaribbean International Bank (Barbados) Limited**[14] to support this proposition. In that case the Privy Council clearly stated that the personal obligation of the appellants to repay the loan was amplified by clause 3 of the hypothec, in which the principal debtor and surety, undertook to pay the loan together with interest and charges, on demand. The Privy Council found that the hypothec contained both personal obligations of the principal debtor and the surety, as well as the security remedy, and that the former could be enforced by a personal action. Further, it was said that the security was accessory to the loan and the bank had the option of enforcing the loan without seeking to realize the security. The case does not support the defendant's contention that the claimant is confined to choosing only one of the methods of enforcement, or is unable to pursue a personal claim, after having exercised the right to appoint a receiver/ manager who disposed of the immovable property belonging to the first defendant. Notably, clause 3 of the hypothec, in the present case, is in identical terms to that of the **Nelson** case, and the claimant has the option of pursuing a personal claim against the defendants, and/or realizing the security.

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[12] Parcel No. 1256B 3

[13] See Exhibit CSL3.

[14] [2014] UKPC 30

[29] It is clear from the receiver's report that the sum of $2,350,000.00 which was derived from the sale of Parcel No.1256B 3, did not fully liquidate the debts of these defendants. In any event, I observe from the hypothec that the second defendant as surety undertook to repay the debts of the first defendants and also has its immovable property situate at Laborie as security for the loans under the hypothec. It appears that this property was not sold by the receiver, and is still available for enforcement. There is nothing that was said in the **Nelson** case, which lends support to the position advanced by Counsel for the defendants.

[30] The defence seeks to attack the receivership, without engaging with the claimant's primary contention that the balance which remained outstanding on conclusion of the receivership, is still recoverable by law. Counsel for the claimant highlighted clause 7 (c) of the hypothec in relation to the appointment of the receiver. I note that the clause states unequivocally that a receiver appointed in accordance with the terms of the hypothec shall be the agent of the first defendant as principal debtor, and that the first defendant alone shall be liable for all acts, defaults, remuneration costs, charges and expenses of the receiver. It is difficult to see how any liability can be attributed to the claimant for any complaints that the defendants may have in relation to the conduct of the receiver, who acted as agent of the first defendant, in undertaking the receivership.

[31] The evidence reveals that the defendants duly executed the facility letter[15], and admitted the existence of the loans with Bank of Nova Scotia. The Banking Business Vesting Order[16] crystallized the claimant's interest in the loans. The defendants admitted receiving the receiver's final accounts which showed the outstanding balance due to the claimant after distributing the proceeds of sale derived from sale of assets, including Parcel No.1256B 3. The defence has not addressed the debt as having been extinguished, or otherwise not owed to the claimant, nor has it been shown on any legal footing, that the sale was unlawful. In essence, the defendants have conceded the factual basis of the claim, and provide no support for their assertion that they were of the belief that the obligations had been fully extinguished, on conclusion of the receivership.

[15] See Document Number 1 annexed to the statement of claim.
[16] See Exhibit NE1 – BBVO - Statutory Instrument No. 143 of 2019

[32] The averment of abuse of contractual rights was a bare assertion, with no details by way of pleadings, or affidavit evidence to constitute a defence which raised plausible legal or factual arguments, capable of having a realistic prospect of defending, or displacing the claim. On the other hand, the claim is supported by undisputed agreements and instruments, and the evidence confirms that outstanding balances were known to the defendants.

[33] It is said that no upset price was fixed for the sale of Parcel No. 1256B 3. I note that the sale by the receiver was not a judicial sale, and there is no requirement in law for fixing an upset price in these circumstances. Even in instances of a judicial sale, fixing an upset price is entirely within the discretion of a judgment creditor.[17] The defendants have failed to provide any evidence which demonstrates on its face, that the property was not sold at a fair value. The receiver's duty is to obtain the fair value for the property at the time of sale. In these circumstances a receiver is not required to get the absolute best price, but must act reasonable.[18]

[34] There can be no basis for imputing breach of an implied duty of good faith to the claimant, or that the claimant was responsible for the property being sold at an undervalue, if that was indeed the case. In this scenario the receiver was the defendants agent, and from all indications, a final account[19] was rendered and provided to the defendants on conclusion of the receivership.

[35] On the totality of the averments, the defence has not risen to the threshold of being more than merely arguable, and is fanciful at best. It lacks substance and particulars, and does not disclose any triable issues, capable of succeeding at defending the claim, as established by the leading authorities on this issue.[20] Failure to satisfy the requirement of CPR 13.3(1) will have dire consequences for the application.

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[17] See: Article 511A of the Code of Civil Procedure.
[18] Bell v Long and Ors [2008] EWHC 1273 (Ch), [12] - [14].
[19] See Exhibit NE4
[20] See Swain v Hilman [2001] 1 ALL ER 91; St Kitts Urban Development Corporation Limited v The Marina Village Limited SKBHCV2014/0150 - delivered on 18th March 2015, unreported; The Marina Village Limited v St. Kitts Urban Development Corporation Limited SKBHCVAP2015/0012 delivered 19th May 2016, unreported

[36] The requirements of CPR13.2(2) are no longer conjunctive, and may only be considered if deemed necessary, where an applicant has surmounted the first hurdle under CPR13.3(1). Nonetheless, for completeness, these requirements will be addressed briefly.

CPR 13.3(2) (a) - Promptitude in filing the application

[37] The default judgment was served on the defendants on 12th December 2024. The application to set it aside was filed on 21st February 2025.

[38] Having considered the evidence and respective submissions on this issue, it is worth noting that CPR 13.3(2)(a) does not specify a timeframe within which to file the application, but requires that it be done as soon as is reasonably practicable. Thus a defendant who has knowledge of a default judgment must move promptly to set it aside, because the opportunity to defend the claim on the merits has already been lost, and the defendant is now seeking to deny the claimant of the benefit of a regular judgment. Each case must be examined on its own peculiar facts and the discretion must be exercised in relation to those particular facts.[21]"

[39] In this case, there is no need to engage in a strenuous exercise to determine when or how the defendants became aware of the default judgment. Courts routinely rely on service of judgments as the surest method of confirming that a defendant has received notice. The rules also requires that a default judgment be served on a party who is to be affected by it. Promptitude is computed as the length of time which has elapsed between the date of service of the judgment and the date the application is filed. Mr Phillip took no issue with service having been effected on 12th December 2024, and that date would be the starting point. A total of 71 days elapsed between service and filing the application. The authorities[22] suggest that periods up to 21 days, for this application, will generally be considered

[21] 1985) 34 WIR 379 at pages 385-386

[22] Milliner Enterprises Limited v Don Cameron et al - Claim No.BVIHCV2012/332 (delivered on 12th June 2013, unreported); Clement Johnson v Peter Celaire et al - DOMHCV2014/0130 (delivered on 5th June 2015, unreported); Gentry v Miller & Anor [2016] EWCA Civ 141, [33]; Forest Springs Ltd v Blue Waters Ltd – SLUHCV2017/0137 (delivered on 7th March 2018, unreported)

reasonable, while periods exceeding 60 days will be considered unacceptable, unless a plausible reason is provided.

[40] Here, the reasons given were personal emergencies, logistical difficulties in keeping scheduled meeting with Counsel, and transition between legal practitioners. No evidence is given of the extent of these personal emergencies or what caused the difficulty in keeping meetings. Although it appears from the chronology that the defendant became aware of the judgment before it was formally served and began taking steps to address it, there is nothing in the evidence which demonstrates diligent or proactive steps on the part of the defendants, in the period immediately following service of the judgment. It was open to them to retain alternative counsel immediately upon learning of the intention of former Counsel to withdraw services. This would have obviated the need for a formal application for removal, once a notice of acting was filed by new Counsel, and served on former Counsel. The fact that new Counsel was retained only after the previous Counsel was removed from the record by order dated 14th January 2025 does not explain or excuse the preceding period of inaction. Having retained new Counsel, it took a further 38 days to file the application. On the totality of the evidence, the conduct of the defendants lacked urgency and showed no effort to address the default judgment with alacrity.

[41] I therefore conclude that the application was not made as soon as was reasonably practicable after the defendants became aware of the default judgment.

CPR13.3(2) (b) - Good Explanation for the failure to file an acknowledgement of service

[42] CPR13.3(2)(b) requires that an applicant who seeks to engage the discretion of the court to set aside a default judgment should provide a good explanation for failing to file the acknowledgement of service within the time prescribed.

[43] The authorities confirm that the threshold is a high one. Farara JA in **SAG Motors Ltd et al v National claimant of Dominica**[23] opined that it is only in the rarest and most extraordinary cases where the reasons for the delay are truly cogent, a court may be persuaded to

[23] Claim No. DOMHCVAP2022/0001 (unreported, delivered on 28th July 2023) at paragraph 30.

consider setting aside the judgment even if the debtor has essentially slept on its rights. The courts have repeatedly affirmed a strict approach to rule breaches, particularly concerning the failure to file an acknowledgment of service or defence, which are considered fundamental procedural obligations.

[44] What amounts to a good explanation in this regard was explained by the Privy Council in **The Attorney General v Universal Projects Limited**[24] where Lord Dyson stated:

> *"First, if the explanation for the breach i.e. the failure to serve a defence ... connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency*."[25]

[45] The defendants explanation, as set out in the affidavit of Ms Primus, was that Mr Phillip mistakenly believed the claim was served on 12th October 2024, which led to the acknowledgment of service being filed outside the 14-day period set by the rules.[26] I note that Mr Phillip's account of the date of service shifted multiple times, initially asserting that service took place on 17th October 2024, then later claiming that it was on 12th October 2024, and then ultimately admitting that it was in fact on 6th October 2024, as stated in the claimant's affidavit of service. These inconsistencies completely undermine the reliability of his explanations and are indicative of a casual indifference, rather than a genuine and excusable mistake or oversight.

[46] As explained in the **Universal Projects Limited** case, an explanation that connotes real or substantial fault on the part of a defendant, does not amount to a good explanation. Misapprehension about the date of service connotes a failure to properly record or verify

[24] [2011] UKPC 37 at paragraph 23.
[25] 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.
[26] See paragraph 3(i) of Supplementary Affidavit of Daniella Primus.

when the documents were received. This falls squarely within the scope of a fault on the part of Mr Phillip, who was served as the lawful director of the defendants, and was duty bound to ensure compliance with the rules. No evidence was adduced to prove that he took any steps to record or clarify the date of service, or that he immediately sought legal advice on procedural timelines and requirements for adherence to the rules, noting that the claim was for substantial sums of money. These failures can only be attributed to internal or administrative lapses, which are not generally considered as excusable or unavoidable. Taken together, they signal a failure to exercise the level of diligence expected in these circumstances.

[47] The defendants may not rely on their own inefficiencies to justify non-compliance, and have failed to provide a good or cogent explanation for failing to file their acknowledgment of service on time.

CPR 13.3(3) – Exceptional Circumstances

[48] The leading authority on this issue is still **Carl Baynes v Ed Meyer**[27]**,** which establishes that an exceptional circumstance 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."* Examples were given of such circumstances, which included (i) that the claim is not maintainable as a matter of law, or (ii) it is one which is bound to fail, or (iii) there is a high degree of certainty that the claim would fail, or (iv) the defence being put forward is a "knock out point" in relation to the claim, or (v) where the remedy sought or granted is not one available to the claimant. Thus, CPR 13.3 (3) will only avail where the circumstances can be said to be truly extraordinary.

[49] It has been said that default judgment is the price paid for failure to make use of the opportunity to acknowledge or defend the claim.[28] Thus, a defence must demonstrate that it is truly exceptional and has the potential to trump the claim, to warrant depriving a claimant

[27] ANUHCVAP2015/0026 (delivered 30th May 2016, unreported), paragraph 26.

[28] Public Works Corporation v Matthew Nelson and Elton Darwton et al v Matthew Nelson DOMHCVAP2016/2007 & 2008 - delivered on 29th May 2017, unreported at para 24-25

of a properly obtained default judgment. The court must be convinced that the defence has a realistic prospect of defeating the claim, to the extent that the legal issues being raised completely erodes the basis of the claim, or there is some other compelling reason which makes it imperative that the judgment be set aside, in order to avoid a miscarriage of justice. In other words, it must be evident that setting aside the judgment is the only fair and reasonable outcome.

[50] In the present case there is a notable absence of a strong credible defence, or any compelling reason to warrant setting aside the default judgment. Thus, there is no reason to engage further with CPR13.3(4).

[51] Having failed to establish that the defence has a real prospect of successfully defending the claim, or that some exceptional circumstance exists to warrant setting aside the default judgment, the application is bound to fail.

[52] I therefore make the following orders:

1. The application is dismissed.
2. Cost is awarded to the claimant in the sum of $1,500.00.

Cadie St Rose-Albertini
High Court Judge

EASTERN CARIBBEAN SUPREME COURT
SEAL
HIGH COURT

By the Court

Deputy Registrar