EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2013/0003

BETWEEN:

SYLMORD TRADE INC.

Appellant

and

INTECO BETEILIGUNGS AG

Respondent

BEFORE:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Moverley-Smith, QC with him Mr. Andrew Willins for the Appellant
Ms. Barbara Dohmann, QC with her Mr. Brian Lacy for the Respondent

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2013: September 19;
2014: March 24.

Civil appeal – Commercial law – Interlocutory appeal – Rule 13.3 of the Civil Procedure Rules 2000 – Setting aside a default judgment

The respondent, in pursuance of a joint venture agreement between it and the appellant, made seven loans to the appellant, which loans were to be repaid, with interest at the rate of 7.7% per annum, between 17th April 2011 and 12th September 2012.

The appellant defaulted on the loan agreement. On 2nd November 2012, the respondent's lawyers wrote to the appellant demanding repayment of the loans and stating that, unless the loans were repaid or the appellant agreed to go to arbitration by 16th November 2012, proceedings would be issued against the appellant in the British Virgin Islands (hereafter "the BVI") where the appellant is registered. The appellant failed to respond to the letter.

Subsequently, on 20th November 2012, the respondent filed and served legal proceedings against the appellant. The respondent later made a request for entry of default judgment after the appellant failed to file an acknowledgement of service or a defence to the claim.

Judgment in default was entered for the respondent and was served on the appellant. Thereafter, the appellant filed an application to set aside the default judgment. The learned judge dismissed the application and entered judgment for the respondent.

The appellant appealed, alleging that the learned trial judge erred in (1) deciding that the appellant had not advanced a good explanation for its failure to acknowledge service; (2) holding that the appellant did not have real prospects of successfully defending the claim; and (3) finding that a commencement of proceedings in breach of contract, and an express provision which provided for arbitration, was not of itself a sufficient reason to set aside the default judgment.

Held: dismissing the appeal and awarding costs to the respondent, that:

1. The appellant failed to provide a good explanation for the failure to file an acknowledgement of service of the claim within the definition of CPR 13.3(1)(b). The appellant's apparent indifference to the legal proceedings instituted in the BVI court connotes real or substantial fault on its part, therefore, the learned trial judge was correct to hold that the appellant did not proffer a good explanation for the breach.

   Rule 13.3(1)(b) of the Civil Procedure Rules 2000 applied; The Attorney General v Universal Projects Limited [2011] UKPC 37 cited.

2. A court has to consider the context of the pleadings and such evidence as there is before it and determine on this basis whether a defence has a real (as opposed to a fanciful) prospect of success and if at the end of that exercise the court arrives at 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 judgment against the defendant. In the case at bar, on an assessment of the appellant's evidence and taking into account the appellant's defence, this Court must agree with the learned judge that the appellant's defence does not have a real prospect of success. Accordingly, CPR 13.3(1)(c) has not been satisfied.

   Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste Saint Lucia High Court Civil Appeal SLUHCVAP2009/0008 (delivered 11th January 2010, unreported) followed.

3. The filing of claims arising from contracts with compulsory arbitration clauses is far from being an exceptional circumstance, within the meaning of CPR 13.3(2), for a court to set aside a default judgment.

   Vann et al v Awford et al (1986) 83 LSG 1725 applied.

JUDGMENT

[1] MICHEL JA: This is an interlocutory appeal, being an appeal from an interlocutory judgment of Bannister J [Ag.] delivered in the Commercial Division of the High Court in the British Virgin Islands on 9th May 2013.

[2] Although the legal issues involved in this case are quite simple, the facts underpinning these legal issues are quite complex. I shall essay a summary of the relevant facts containing only such detail as is necessary to make the judgment intelligible.

[3] Two Russian entrepreneurs, Elena Nikolaevna Baturina and Alexander Nikolaevich Chistyakov, made an agreement in February 2008 to embark on a joint business enterprise which was intended to lead to the establishment of a joint venture company to undertake a hotel development in Morocco. It was intended that Ms. Baturina would contribute 65% of the cost of the joint business enterprise and would become the owner of 65% of the shares in the joint venture company, while Mr. Chistyakov would contribute 35% of the cost and would become the owner of 35% of the shares.

[4] The proposed joint venture company, referred to in the court below as 'Andros', was incorporated in Morocco, with the appellant being its sole shareholder.

[5] Pursuant to the joint venture agreement, a company affiliated with Ms. Baturina advanced project finance of 71 million Euros by way of convertible loans to Sylmord Trade Inc. as payment for her 65% shareholding in Andros. It was agreed (as reflected in a supplementary agreement between Ms. Baturina and Mr. Chistyakov dated 29th October 2010) that upon transfer to Ms. Baturina or her nominee of the 65% shareholding in Andros, Sylmord Trade Inc. would cease to be liable for repayment of the convertible loans. In effect, the loans – the proceeds of which were used as project finance for the joint venture – would be converted into shares in the joint venture company.

[6] Further to the supplementary agreement between Ms. Baturina and Mr. Chistyakov, seven loans (amounting in aggregate to just over 3.7 million Euros) were made by the respondent (a company beneficially owned by Ms. Baturina) to the appellant (a company beneficially owned by Mr. Chistyakov) for the purpose of project development. These loans were made between 24th February 2010 and 1st August 2011 and, in accordance with their terms, were to be repaid between 17th April 2011 and 12th September 2012, with interest at the rate of 7.7% per annum.

[7] The loans not having been repaid by the appellant, on 2nd November 2012 the respondent's lawyers wrote to the appellant demanding repayment of the loans and stating that, unless the loans were repaid or the appellant agreed to go to arbitration by 16th November 2012, proceedings would be issued against the appellant in the British Virgin Islands (hereafter "the BVI") where the appellant is registered.

[8] There being no response from the appellant by 16th November, proceedings were issued by the respondent against the appellant on 20th November 2012 and served on its registered office in the BVI on the same day.

[9] On 6th December 2012, no acknowledgement of service or defence having been filed by the appellant, the respondent made a request for entry of judgment in default. On 28th January 2013, default judgment in the sum of 4,449,054 Euros (being the aggregate amount due on the seven loans, together with accrued interest) and costs of US$5,100 was entered against the appellant. The judgment was served on the appellant on 31st January 2013 and on 28th February 2013 application was made by the appellant to set aside the default judgment. The application to set aside the judgment was amended on 23rd April 2013.

[10] In its amended application, the grounds on which the appellant (who was the defendant in the court below) sought to set aside the judgment were as follows:

(1) The defendant has applied to the court as soon as was reasonably practicable after finding out that judgment had been entered;

(2) The defendant has a good explanation for its failure to file an acknowledgement of service;

(3) The defendant has a real prospect of successfully defending the claim, which has been brought in breach of an arbitration agreement;

(4) Alternatively, exceptional circumstances exist within the meaning of CPR 13.3(2) specifically the fact that the claimant has brought these proceedings in breach of an arbitration agreement.

[11] The application was heard by Bannister J [Ag.] on 30th April 2013 and, in a reasoned judgment delivered on 9th May 2013, he dismissed the appellant's application to set aside the default judgment.

[12] On 10th May 2013, leave was given to the appellant to appeal against the judgment of Bannister J [Ag.] and a stay was granted of the judgment until 14 days after the delivery of this judgment.

[13] On 4th June 2013, the appellant filed a notice of appeal with the following grounds of appeal:

1. In deciding that [the appellant] had not advanced a good explanation for its failure to acknowledge service, the judge erred, as a matter of fact and/or law, in -
   (a) Deciding that Ms. Babirenko's knowledge and/or actions were not to be imputed to [the appellant];

   (b) Deciding that by the letter of 26th November 2012 [the appellant] and/or Ms. Babirenko evinced an intention to wilfully disregard the BVI proceedings, in circumstances where the letter suggested no such thing; and

   (c) Reaching that conclusion without inviting submissions on the point, and in circumstances in which that was not argued.

2. In deciding that [the appellant] did not have real prospects of successfully defending the claim, the judge erred, as a matter of fact and/or law, in:

   (a) Deciding that it was the proposed event of novation of the loans from Inteco-Sylmord, to Inteco-Andros that was agreed to release [the appellant] from its liability to [the respondent] under the loans, whereas on a true construction of the supplementary agreement it was the transfer of 65% of the Andros shares from [the appellant] to [the respondent] that was the trigger for [the appellant's] release;

   (b) Deciding that [the appellant] must "treat the novation… as having already occurred" in order to rely upon the material terms of the supplementary agreement;

   (c) Deciding that once [the appellant] had obtained an order compelling Ms. Baturina to accept the Andros shares, [the appellant's] release from liability under the loans would further depend on Andros "[accepting] the liability to [the respondent] in place of [the appellant]";

   (d) In any event, failing to consider and/or attach sufficient weight to the fact that, following the transfer of the Andros shares, Ms. Baturina (the beneficial owner of [the respondent]) would be able to procure the novation of the liability from [the appellant] to Andros;

   (e) Deciding that "the immediate commercial consequences" would be the same whether or not [the appellant] was released from liability under the loans;

   (f) Alternatively, even if the above were correct, according any, alternatively excess, weight to that fact, where the relevant criterion is whether [the appellant] has a real prospect of successfully defending the claim;

(g) Failing to consider the evidence adduced and submissions made by [the appellant] in relation to the obligation to pay interest under the loans;

(h) Alternatively, failing to give any or any sufficient weight to such evidence and/or submissions;

(i) In any event, failing to give any or any proper reasons for dismissing [the appellant's] submissions in relation to interest and refusing to vary the judgment so as to disallow interest when he was invited to do so.

4. The learned judge erred in fact and/or in law and/or in the exercise of his discretion in finding that a commencement of proceedings in breach of contract, and an express provision which provided for arbitration, was not of itself a sufficient reason to set aside the default judgment, whether under rule 13.3(2) of the Civil Procedure Rules 2000 ("CPR") or otherwise.

5. There is otherwise a compelling reason why the appeal should be heard.

[14] Although filed outside of the time limited for filing notice of appeal, the appellant's notice of appeal was deemed by the Court to have been properly filed.

[15] The appellant's application to set aside the default judgment was made pursuant to CPR 13.3(1) and (2). CPR 13.3(1) provides that:

> "… the court may set aside a [default] judgment… only if the defendant –
> (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
> (b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and
> (c) has a real prospect of successfully defending the claim."

CPR 13.3(2) provides that:

> "(2) In any event the court may set aside a [default] judgment… if the defendant satisfies the court that there are exceptional circumstances."

[16] The evidence of the appellant in support of its application came in the form of a witness statement made by Mr. Chistyakov's in-house lawyer, Irina Victorovna Babirenko, in which she avers that she is duly authorised to make the witness statement on behalf of the appellant. She also avers that she first became aware of the default judgment on 1st February 2013 (the day after it was served on the appellant) and contacted Appleby (the appellant's BVI lawyers) on the same day to take legal advice as to the effect of the judgment and any steps that could be taken in respect of it. She averred too that she was asked to sign an engagement letter, which she did on 4th February 2013 and sent it to Appleby on 7th February. She related the fact that there were several significant documents in the matter, many of which were lengthy and technical and required to be translated from Russian to English. She averred that the further loans were governed by Austrian law and advice on their effect had to be sought and obtained from an Austrian lawyer. In the circumstances, she averred that the appellant acted with all due alacrity in preparing the application to set aside the judgment.

[17] As to the good explanation for the failure to file an acknowledgement of service, Ms. Babirenko alleged that there were delays in the receipt of documentation in Russia, that some of the court documents were not transmitted to her by the appellant's registered agent in the BVI and that she erroneously believed that the procedural law in the BIV was similar to Russian law which would have required a judicial act before a defendant becomes obliged to take any part in the proceedings and notification to the defendant by the court of the steps it must take to answer the claim. Ms. Babirenko also contended that the loan agreements which are the subject of this case contained binding arbitration clauses conferring exclusive jurisdiction on a sole arbitrator chosen by the parties, with the seat of the arbitration being Vienna. Proceedings in this case therefore were instituted in

breach of the arbitration clauses and the court in the BVI had no jurisdiction to determine this claim without it first being submitted to arbitration.

[18] On the issue of the appellant's prospect of successfully defending the claim, Ms. Babirenko contended that the grant of the loans was a mechanism agreed to by the parties for the provision of ongoing financing of Baturina's share of the running cost of the joint venture and it was never intended by the parties, meaning the appellant, the respondent and their beneficial owners, that the loans would be repaid by the appellant to the respondent.

[19] Ms. Babirenko also contended that the loan agreements were to be construed under Austrian law, in accordance with which the respondent, not having a banking licence, would not be entitled to recover interest on any commercial loans it might make.

[20] Finally on the issue of the appellant's prospect of successfully defending the claim, Ms. Babirenko contended that the respondent and its beneficial owner agreed to release the appellant from its liability for the loans in exchange for a transfer of the additional 35% holding in Andros and the appellant has always been ready and able to effect the transfer but has been frustrated by Ms. Baturina's refusal to nominate a recipient. The respondent, she therefore contended, relied upon its own breach of contract and that of its beneficial owner in bringing the claim against the appellant.

[21] In his judgment, the learned trial judge concluded that he was quite unable to say that the application to set aside the judgment was not made as soon as reasonably practicable after the appellant learned that judgment had been entered against it. He therefore ruled, in effect, that the first condition of rule 13.3(1) of the CPR had been satisfied by the appellant. There was no appeal against this finding by the trial judge and so this issue need not trouble us further.

[22] As to the second condition to be satisfied by a defendant seeking to set aside a regularly-obtained judgment, that is, that the defendant gives a good explanation

for the failure to file an acknowledgement of service or a defence as the case may be, there are no cases from our court, at least none that I have come across, which define good explanation in the context of rule 13.3(1)(c) of the CPR.

[23] The Judicial Committee of the Privy Council addressed the issue of good explanation in the context of an application under rule 26.7 of the Civil Procedure Rules of Trinidad and Tobago (the equivalent of our rule 26.8) for relief from sanctions in the case of The Attorney General v Universal Projects Limited.[1] The Board did not, however, define the term "good explanation" but instead referred to explanations which it would not consider to be good explanations. At paragraph 23 of the judgment, Lord Dyson stated that "if the explanation for the breach … connotes real or substantial fault on the part of the defendant, then it does not have a good explanation for the breach." Lord Dyson also stated in paragraph 23 that it is difficult to see how inexcusable oversight or administrative inefficiency can ever amount to a good explanation.

[24] In the present case, the learned trial judge defined "good explanation' in the context of rule 13.3(1) as follows:

> "… an account of what has happened since the proceedings were served which satisfies the Court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix up, are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered."[2]

[25] The learned trial judge then determined that, in the present case, no good explanation had been given by or on behalf of the appellant for its failure to file an acknowledgement of service or to serve a defence. He arrived at this conclusion by firstly doubting whether the opinions and reactions of Ms. Babirenko, as Mr. Chistyakov's in-house lawyer, should be taken account of by the court in

[1] [2011] UKPC 37.
[2] See para. 15 of the judgment.

determining whether there was a good explanation by the appellant for its failure to file an acknowledgement of service within the stipulated time and then by concluding that, even if it was legitimate to do so, he did not consider that Ms. Babirenko's belief that - based upon what she alleged were the procedures in the Russian courts - it was unnecessary to respond to the respondent's claim until the court had made a determination that the claim should proceed, was a good explanation for the failure of the appellant to file an acknowledgment of service. He concluded that, if it is legitimate to attribute her thought process to the appellant, Ms. Babirenko's handling of the claim seemed to indicate a conscious decision on her part to ignore the proceedings in the BVI and point in the direction of indifference to, rather than forgetfulness about, the proceedings until she found out about the judgment.

[26] None of the parties to this appeal took issue with the judge's definition of "good explanation" and so I will not attempt, for present purposes, to interfere with it.

[27] I agree with the submission of learned counsel for the appellant that it is difficult to understand the learned trial judge's doubts as to whether the opinions and reactions of Ms. Babirenko were relevant to the determination by the court as to whether there was a good explanation for the appellant's delay in filing an acknowledgement of service of the claim. The evidence before the court would appear to indicate that Ms. Babirenko was, from the first receipt of the claim to the application to set aside the judgment, the agent of the appellant in the BVI proceedings. When the claim was issued and served on the appellant's BVI registered agent on 20th November 2012, the first response came in the form of an email on 22nd November 2012 from Ms. Babirenko to the respondent's lawyers requesting copies of the agreements relating to the disputed loans; then on 23rd November the respondent's lawyers replied to Ms. Babrienko's email and sent her copies of the claim form and statement of claim; then there was a letter from the appellant dated 26th November (which Ms. Babirenko apparently drafted) addressed to the respondent's English solicitors disputing the claim for repayment of the loans; then on 29th November Ms. Babirenko emailed a copy of the 26th

November letter to the respondent's lawyers; then on 1st February 2013 Ms. Babrienko, having become aware of the default judgment entered against the appellant the previous day, instructed BVI lawyers in relation to the process leading to the application to set aside of the default judgment; and then on 28th February she made the witness statement in support of the appellant's application to set aside the default judgment. The opinions and reactions of Ms. Babrienko were therefore very relevant to the determination by the court as to whether there was a good explanation for the failure by the appellant to file an acknowledgement of service and had to be taken account of by the court in its determination of this issue.

[28] Having differed with the learned trial judge on the legitimacy of Ms. Babrienko's opinions and reactions in the determination of the sufficiency of the appellant's explanation of its failure to file an acknowledgement of service, I do not however differ with him on his conclusion that the handling of the claim by Ms. Babrienko on behalf of the appellant seemed to indicate a conscious decision on her part to ignore, or at least pay scant regard to, the proceedings in the BVI until she found out that judgment was entered against the appellant in the BVI court. How else to interpret the unverified determination by a Russian lawyer that the procedural law of an English overseas territory in the distant Caribbean was the same as that of Russia, but when it came to the commercial law of a kindred territory from the same general area of Europe as Russia, namely Austria, she sought legal advice from an Austrian lawyer as to what the law was in Austria. How else too to construe the language of the letter of 26th November 2012 apparently drafted by Ms. Babrienko after the institution of proceedings in the BVI by the respondent against the appellant that - "In case you are still intended to refer this matter to a competent court … we hereby ask you to save your own funds … and settle this matter on an extrajudicial basis as soon as possible."

[29] I categorically reject the submission by counsel for the appellant that this language was entirely consistent with Ms. Babrienko's mistaken belief that the court would first need to decide whether to accept jurisdiction and that it was unlikely that it

would do so given the existence of a binding arbitration clause. This flies in the face of the clear language of the court documents received by Ms. Babrienko that unless acknowledgement of service of the claim form is filed within fourteen days then judgment may be entered against the defendant. Further, even if Russian court procedures were similar to those in the BVI, the court in the BVI would still be competent to determine whether to accept jurisdiction in the case and presumably to try the case if it decided to accept jurisdiction. It is to be noted too that the letter mentioned referring the matter to "a competent court in violation of all previous arrangements and existing agreement", so the incompetency of the court (as determined by Ms. Babrienko) did not arise by virtue of the proceedings being instituted in breach of arbitration and other arrangements and agreements between the parties, but rather by virtue of its location. There can be no other justification for the use of the language of referring the case to a competent court, after proceedings had already been instituted in the High Court in the BVI, other than a prior determination of the incompetency of a court in the BVI to adjudicate matters between the individuals and companies involved in the dispute. Such indifference to the BVI court cannot be condoned by the setting aside by the same court of a default judgment resulting from the very indifference. The learned trial judge was therefore justified in reaching the conclusion that he did that there was no good explanation for the appellant's failure to file an acknowledgement of service and to decline to set aside the default judgment.

[30] I do not consider that anything is added to the appellant's case by the ground that the trial judge did not invite submissions from counsel in the court below before reaching a conclusion on his interpretation of the words used in the letter apparently authored by Ms. Babrienko. It was part of the function of the trial judge to construe the documents forming part of the evidence in the case and he carried out this function when he correctly construed the letter sent to the respondent by the appellant.

[31] Still on the question of whether there was a good explanation for the failure of the appellant to file an acknowledgement of service, the learned trial judge concluded

that the existence of the arbitration clauses in the loan agreements did not assist the appellant in this regard because, firstly, the appellant had been requested by the respondent to agree to arbitration by a named date but failed to respond to the request, secondly, in its letter of 26th November 2012 the appellant had denied that the loan agreements containing the arbitration clauses amounted to agreements at all and, thirdly, at no stage before the making of the application to set aside the judgment did the appellant seek to invoke or even refer to the arbitration clauses.

[32] On the issue of delays in the receipt of documentation in Russia, the trial judge merely observed that no explanation of any sort had been offered by the appellant for the delays. He did not otherwise treat with this issue with any more importance than was accorded to it by the parties themselves.

[33] In deciding that the appellant had not advanced a good explanation for its failure to acknowledge service, the trial judge did not therefore err as a matter of fact and/or law and the appellant's first ground of appeal is accordingly dismissed.

[34] Having upheld the trial judge's conclusion and ruling that the appellant did not give a good explanation for the failure to file an acknowledgement of service, which is one of the preconditions under rule 13.3(1) of the CPR to the setting aside of a default judgment, there really is no need to address the issue of the prospects of success by the appellant if the default judgment were to be set aside. If I had to address it though, I would simply adopt the reasoning and conclusions of the trial judge contained in paragraphs 22 to 29 of his judgment. The reasoning of the trial judge, stripped to its barest essentials, is (in effect) that a defence does not have a real prospect of success if it is based on the premise that an agreement does not mean what it says and that the court should ignore the clear words of the agreement and determine a claim founded on it on the basis that if a person who is not a party to the agreement had taken an agreed course of action in another agreement then the defendant in the claim before the court would not have been bound to perform his obligations under the first-mentioned agreement.

[35] The approach taken by our court to the issue of "real prospect of successfully defending the claim" in the case of Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste,[3] albeit in the context of summary judgment, would appear to vindicate the conclusion reached by trial judge in the present case. George-Creque JA, who delivered the judgment of the Court, opined that the court had to consider the issue in the context of the pleadings and such evidence as there is before it and determine on this basis whether the defence has a real (as opposed to a fanciful) prospect of success and that if at the end of the exercise the court arrives at 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 rule 13.3(1), it would be open to the court to refuse to set aside a default judgment.

[36] This was the approach taken by the trial judge in the present case and his approach cannot be faulted. The appellant's second ground of appeal is accordingly dismissed.

[37] The appellant's third ground of appeal was to the effect that the learned judge erred in failing to find that the institution of proceedings by the respondent notwithstanding an express provision in the loan agreements for arbitration of disputes was a sufficient reason to set aside the default judgment. The appellant had argued in the court below that, in accordance with rule 13.3(2) of the CPR, the court may set aside a default judgment in any event if it is satisfied that there are exceptional circumstances, and that the filing of the claim in this case in breach of the arbitration clause is an exceptional circumstance justifying the setting aside of the default judgment. The learned trial judge rightfully rejected this argument on the basis that the filing of claims arising from contracts with compulsory arbitration clauses, far from being an exceptional circumstance, is a usual occurrence which is normally addressed by the aggrieved party seeking a stay of the proceedings pending recourse to arbitration.

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

[38] The criticism of this finding in the written submission by counsel for the appellant is interesting. Paragraph 37 of the written submission reads as follows:

> "Whilst it might be the case that litigants do on occasion ignore their contractual obligations in relation to arbitration, that does not mean that the fact that proceedings have been begun in breach of contract does not amount to an exceptional circumstance for the purpose of CPR 13.3(2) as it goes to the propriety of the proceedings, which is an exceptional circumstance that can properly be brought into account and is entirely in keeping with the policy of the courts that parties should be held to their contractual bargains."

It is interesting because it effectively says that a party acting in breach of contract is an exceptional circumstance that justifies a court in setting aside a regularly-obtained judgment, which is an extraordinary argument. It is interesting too because it is made on behalf of a party whose case is founded on the court not holding the parties to their contractual obligations, in particular, the obligation of the appellant to repay the loans granted, at the times stated, with the interest stipulated. So it is not the circumstance which is exceptional, but it is the advancing of this argument by the appellant which, in the circumstances, is exceptional.

[39] There is also case law directly on point, such as the case of Vann et al v Awford et al,[4] in which the English Court of Appeal rejected the submission that the existence of an arbitration clause provided any arguable defence which could lead to the setting aside of a default judgment. Of course, if the instituting of proceedings notwithstanding the existence of a binding arbitration clause does not constitute even an arguable defence to satisfy one of the requirements for setting aside a default judgment, then it can hardly constitute an exceptional circumstance to justify on its own the setting aside of the judgment.

[40] I can find no reason therefore to interfere with the judge's conclusion and finding on this issue and so the appellant's third ground of appeal is dismissed.

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[4] (1986) 83 LSG 1725.

[41] Before addressing the appellant's fourth ground of appeal, I should mention an issue raised by the appellant on the interest component of the default judgment. In its notice of appeal, the appellant put forth as part of its second ground of appeal that the learned trial judge failed to consider the evidence adduced and submissions made by the appellant in relation to the obligation to pay interest under the loans or, alternatively, that he failed to give any or any sufficient weight to such evidence and/or submissions. This contention appears to be based on expert evidence filed by the appellant to the effect that if the respondent had commercially extended loans to the appellant then it would require a banking licence under Austrian law in order to be entitled to recover interest on the loans. The expert further opined, according to the appellant, that what the respondent had done could be considered as falling within that definition.

[42] The expert evidence filed by the respondent was, however, to the effect that the respondent's provision of the loans to the appellant does not qualify as banking business within the meaning of the Austrian Banking Act. There was also a document put in evidence by the respondent in which its director confirmed that it is not and has never been in the business of granting loans. This evidence, the respondent submitted, was uncontradicted.

[43] The learned trial judge concluded that - "it is plain on the uncontradicted evidence that [the respondent] was not carrying on and has never carried on any business of that sort"[5], referring to "unlicensed banking business". I can find no fault with this conclusion and with the trial judge's consequential determination that "[t]here is nothing in the point".

[44] The appellant's fourth ground of appeal reflects either a "cutting and pasting" gone wrong or a typographical/keyboarding error which resulted in the word "heard" being keyed/typed instead of "upheld" or "allowed". Either way, there is nothing to it. The appeal has been heard and there is no compelling reason why it should be upheld or allowed.

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[5] See para. 29 of the judgment.

[45] The appeal is dismissed with costs to the respondent to be agreed within 21 days of the date of this judgment or otherwise assessed.

Mario Michel
Justice of Appeal

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Don Mitchell
Justice of Appeal [Ag.]