EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2013/0116

BETWEEN:

SHEFTON CROSSE

Applicant/Defendant

and

VICTOR WILLIAMS

Respondent/Claimant

Appearances:

Mr. McClure Taylor holding for Mr. Dane Victor Elliott-Hamilton for the Applicant
Ms. Felicia J. Johnson for the Respondent

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2017: June 22;
2018: January 24.

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DECISION IN CHAMBERS

Introductory

[1] **LANNS, J. [AG]:** The Claimant Victor Williams obtained a default judgment dated 5th July 2013 against the Defendant Shefton Crosse for damages for libel in an amount to be decided by the court upon assessment. Hearing of the assessment of damages was fixed for the 22nd June 2017 after the defendant had been granted several adjournments and extensions of time within which to comply with the order of Carter J. dated 6th June 2016. That order required counsel for the parties to file submissions and or witness statements in respect of the assessment on or before the 12th September 2016.

[2] The claimant complied with the order of Carter J. in a timely manner. The defendant did not. His submissions in respect of the assessment were eventually filed on the 29th May 2017 after he had retained new counsel. Concurrent with the filing of the submissions in respect of the assessment, the defendant, through his new counsel (in ambush style), filed an application asking for an order setting aside the default judgment obtained since the 5th July 2013. The application was given a hearing date of 22nd June 2017, the same date fixed for hearing of the assessment of damages.

Relevant Background Facts

[3] The facts so far as relevant are gleaned from the record. The claimant is an architect. He is also the owner of Williams Architectural, a company engaged in providing architectural and planning service to its clientele. At all times material, the claimant was the Chairman of the Board of Planning and Control, working in conjunction with the Ministry of Sustainable Development in St Christopher and Nevis.

[4] The defendant is said to be an accountant by profession, but he is now retired. He owns a piece or parcel of land at Kelly Crescent, Mattingly Heights in the island of St Christopher.

[5] On the 18th September 2012, there was a live call-in Programme on WINN FM called 'Voices' The Voices' programme was also broadcasted on the internet. The defendant called in and made certain comments and statements concerning the claimant. On the 17th April 2013, the defendant again called in on the 'Voices' programme and made certain statements and comments concerning the claimant. The statements made no reference to the claimant by name. The statements appeared to be alleging among other things that the claimant, in his capacity as Chairman of the Board of Planning and Control, overruled a policy decision[1] in relation to land situate at Mattingly Heights. The defendant alleged that the claimant had firsthand knowledge of the matter as his (claimant's) sister was involved in the sale of land to one of the land owners at Mattingley Heights. The defendant also appeared to be alleging impropriety on the part of the claimant. The claimant was aggrieved by the statements made by the defendant. He felt that his reputation was under attack by the defendant and thus, he decided to take a certain course of action.

(1) Commencement of Proceedings

[1] It is said that the defendant stated that even though the government informed the public that no one was allowed to build on the land familiarly known as 'the ghaut' located at Mattingly Heights, the claimant as head of the Building Board overruled the decision made by the Board barring persons from building on the land known as 'the ghaut'

[6] On the 25th April 2013, the claimant instituted proceedings against the defendant for damages, including aggravated and exemplary damages for libel, and for an injunction restraining the defendant 'from further voicing, broadcasting, communicating declaring, disclosing disseminating divulging or publishing/republishing on WINN FM or on the world wide web on www.winnfm.com or elsewhere, the said libelous broadcast complained of, or any further libelous allegations or similar words defamatory of the claimant in reference to his professional and or business reputation'.

[7] The claimant, in paragraph 10 of the statement of claim sets out the contents of the statements and comments spoken by the defendant, and in paragraphs 11 and 12, the claimant sets out what in his view the words meant and were understood to mean.

[8] Mrs. Angela Inniss-Hodge was the lawyer who was retained by the defendant to have conduct of the proceedings on his behalf. On the 23rd May 2013, an acknowledgement of service (signed by the defendant and Mrs. Inniss- Hodge) was filed in which the defendant indicated an intention to defend the claim. However, the defendant failed to file a defence and thus, judgment in default of defence was entered up against him for damages to be assessed. The matter had progressed to the stage of directions on the assessment,[2] and a date was fixed for the assessment hearing. As stated before, the defendant has now applied to set aside the default judgment. The defendant also asks the court to stay the order of this court dated 4th May 2017,[3] and he seeks an order granting leave to file his defence within 7 days, or an order that the draft of the proposed defence be treated as properly filed. The court deferred hearing of the assessment of damages, and heard arguments on the defendant's application.

Consideration of the Application to set aside the Default Judgment

(1) Grounds of Application

[9] Seven grounds of application are put forward. In summary, they are:

(1) The defendant retained Mrs. Angela Inniss-Hodge to represent him in the matter and she acknowledgement service of the claim.

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[2] Directions given by Justice Marlene Carter

[3] The order of 4th May 2017 granted the defendant an extension of time to the 24th May 2017 to file witness statements and submissions in respect of the assessment of damages; to retain counsel if necessary. The order fixed the 22nd June 2017 for the hearing of the assessment.

(2) The defendant did not receive adequate counsel from Mrs. Inniss-Hodge who

(a) failed to explain to the defendant the nature of the case made against him;

(b) failed to explain any possible defence available to the defendant;

(c) failed to alert the defendant as to the defence under the CPR;

(d) failed to prepare a defence in the matter;

(e) failed to inform the defendant of the judgment in default of failure to defend and the nature of the judgment;

(f) failed to notify the defendant of multiple court hearings and failed to appear in court or make alternative arrangements on multiple occasions;

[3] The defendant learnt of the stage of the proceedings when he personally attended court in February 2017;

(4) The defendant had difficulty seeking alternative legal representation, and is now making the application to set aside the judgment 4 days after retaining new counsel.

(5) The defendant has a real prospect of successfully defending the claim

. [10] As can be seen, the defendant only addressed one of the three conditions that must be satisfied in his grounds of application that is, 'the defendant has a real prospect of successfully defending the claim'.

[11] The defendant swore to and filed an affidavit in support of the application to set aside the default judgment, with thirteen documents exhibited thereto including a draft of the proposed defence, four receipts of payments made to his lawyer, allegedly for consultation/legal representation, amounting to $1,000.00. Counsel for the defendant filed submissions and authorities, along with the application. The claimant did not request an opportunity to file an affidavit in response to the affidavit in support of the defendant. Counsel for the claimant, Felicia Johnson (Ms. Johnson), expressed that the application to set aside the judgment took her by surprise, since the next step in the matter was expected to be hearing of the assessment. However, after having been served with

the application, Ms. Johnson, on her own volition, filed submissions in opposition to the application, together with supporting authorities, and both counsel amplified their submissions at the hearing.

Bases upon Which an Application Can be Made to Set Aside a Default Judgment

[12] There are two bases upon which a default judgment can be set aside. The first is where the defendant can establish that the correct procedures have not been followed in obtaining judgment, in which case the defendant can have judgment set aside as of right without the requirement of establishing a defence to the claimant's claim. Here, the court may set aside judgment on or without an application.[4]

[13] On the other hand, if the judgment is regularly obtained and the defendant is asking the court to exercise its discretion under CPR 13.3 to set aside the default judgment and allow the defendant to defend the claimant's claim, a number of conditions must be satisfied.

[14] The first situation which is in the context of CPR13.2 is inapplicable in these proceedings. It is therefore necessary to consider whether the defendant has satisfied the conjunctive requirements of rule 13.3. None of the requirements trumps the other. So failure to satisfy any one, will bar the defendant from relief under rule 13.3, unless the defendant satisfies the court that there are exceptional circumstances.

CPR13.3 (1) (a): Whether the Defendant has Applied to the Court as Soon as Reasonably Practicable After Finding out that Judgment had Been Entered

(1) Position of the Defendant

[15] In summary, the submissions of Mr. Elliott-Hamilton, learned counsel for the applicant/defendant on this issue are grounded on the following points:

[4] (Royal Trust Corporation of Canada v Dunn 60 OR 3rd 468); (CPR 13.2 (2)

1. The defendant applied to the court as soon as reasonably practicable after finding out that the judgment had been entered;
2. The defendant deposed that he was in the jurisdiction at the time the default judgment was served on his legal practitioner, and she did not inform him of the entry or the existence of the judgment;
3. Once the applicant learned of the judgment, he made attempts to seek alternative legal advice;
4. He filed the application four days after consultation with his new legal practitioner;
5. The applicant could not have reasonably applied to set aside the default judgment without the benefit of legal advice because defamation is a peculiar tort, and its defenses are not ordinarily within the conception of the ordinary man;
6. The applicant had not been advised of the nature of the claim or any possible defence until his consultation on the 15th May 2017 with his new legal practitioner. Once the applicant had the benefit of legal advice, he promptly made the application.
7. The defendant should not be penalised as a result of his former counsel's negligence. The applicant/defendant moved with expedition to have action taken by alternative counsel

(2) Position of the Claimant

[16] The submissions of Ms. Johnson, learned counsel for the respondent/claimant can be summarised as follows:

1. The defendant falls short of satisfying the requirement of CPR 13.1 (a).
2. The application to set aside was filed 105 days after the defendant claimed to have learnt of it. The defendant was aware that an assessment hearing was imminent and thus, the delay of 105 days is excessive and cannot be held to be reasonable;
3. The defendant indicated that he had already obtained his file and taken it to another counsel, prior to the court hearing on 3rd February 2017. This casts serious doubt over his claim to have been unaware of the default judgment until it was mentioned by Justice Ward on 3rd February 2017.
4. The defendant has attempted to cast blame on his former counsel for his purported lack of knowledge. There has been no effort shown by the defendant over the expanse

of years to obtain information or ascertain the status of his matter. He cannot seek to use his former attorney as a shield to block the court from his own intentional or negligent shortcomings.

5. There has been excessive and inexcusable delay between the period when the Defendant claims to have discovered the default judgment and the filing of the application to set aside. Claimant did not diligently pursue the matter
6. The authorities cited by counsel for the defendant to support the contention that the defendant should not be penalised as a result of his former counsel's negligence, are distinguishable as they point to defendants who were themselves diligent in pursuing their matter.
7. The defendant was not diligent in pursuing his matter. He was grossly indifferent or negligent, and did not actively pursue the filing of his defence;
8. In a status report filed on the 27th March 2014, Mrs. Inniss-Hodge indicated among other things that the defendant left the Federation some time after the acknowledgment of service was filed; that the defendant was presently out of the jurisdiction; and she (Mrs. Inniss-Hodge) was having difficulty obtaining instructions from the defendant

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. **Discussion and Disposition on the Promptitude Requirement**

[17] I do not find that the applicant has cleared the threshold requirement of CPR 13.3 (1) (a).

[18] What is reasonably practicable is a question of fact. According to an affidavit of service filed on 15th July 2013, on the 10th July 2017, the law offices of Inniss and Inniss were served with a copy of the judgment in default of defence. The defendant denies knowledge of the judgment until 3rd February 2017 when he appeared before Ward, J. The question arises as to whether the default judgment should have been personally served on the defendant.

[19] Notably, CPR 42.6 directs that the court office **must** serve every judgment or order on (a) any person on whom the court orders it to be served;[5] and (b) every party to the claim in which the judgment or order is made. 'Party' includes both the party to the claim and any legal practitioner on record for that party unless any rule specifies or it is clear from the context that it relates to the

[5] Subrule (a) is not applicable as the court did not order the judgment to be served on anyone.

client or to the legal practitioner only (CPR 2. 4). In my judgment, it is clear from the context that 'party' relates to either the defendant or his legal practitioner. The judgment was therefore properly served on Innis and Inniss, and her awareness or knowledge must be imputed to him. Notably, in his acknowledgment of service, the defendant at question 10 (what is your address for service/?) answered thus: "c/o Inniss and Inniss,11 A, Cayon Street, Basseterre, St Kitts." The practice in this jurisdiction is that where a party is unrepresented by counsel that party is served personally with the judgment or order. Ordinarily, where a defendant is represented by a legal practitioner, the judgment or order is served on the legal practitioner who is expected to inform his or her client[6]. As Mitchel J.A stated in **Anison Rabess et al v National Bank of Dominica**[7] at paragraph 7, the court office does not have the resources in every case to seek out the parties and to serve them personally,

[20] I find that the defendant was always represented by experienced counsel up until at least February 2017 when, in his own words, he requested and took his file from Mrs. Inniss-Hodge[8] There is no affidavit of Mrs. Inniss-Hodge who had carriage of the matter up until May 2017. Mrs. Innis-Hodge did not make any application to come off the record. It was not until the 17th May 2017 that a notice of change of legal practitioner was filed by Mr. Dane Victor C. Elliott-Hamilton, thereby effectively and formally removing Mrs. Inniss-Hodge from the record as legal practitioner for the defendant.

[21] The defendant has laid the blame for his purported unawareness of the existence of the judgment at the feet of his former counsel. He says in essence that the delay in making the application to set aside was caused by a lack of diligence on the part of his former attorney, who he said assured him that his matter was going to be dealt with. His former counsel is not a party to these proceedings. To my mind, if the defendant has a grievance with Mrs. Inniss-Hodge concerning his matter, perhaps he ought to find another forum to deal with it, or bring separate proceedings.

[22] As stated before, the court is satisfied that the default judgment was properly served on the chambers of Inniss and Inniss, who was counsel on record for the defendant and whose address was the defendant's appointed address for service. But what the court finds difficult to accept, and

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[6] But 42.6 gives the court a discretion, which is frequently exercised of ordering one of the legal practitioners instead of the court office to serve the judgment or order, but it must be remembered that the defendant gave his legal practitioner's address as his address for service, and the judgment was served at his legal practitioner's chambers

[7] GDA HCVAP030

[8] A change of legal practitioner was filed on 17th May 2017.

does not accept, is that the defendant only became aware of the judgment on 3rd February 2017. The court also finds it difficult to accept, without more, that Mrs. Inniss-Hodge told the defendant that he was free to leave the jurisdiction on the 31st July 2013, without informing him of the entry of the default judgment, and without discussing the next possible step to be taken in the matter, or without taking, or attempting to take further instructions. This is a situation where application is made to set aside a judgment obtained on the 5th July 2013 – approximately four years later, and 105 days after the defendant claimed to have found out about the judgment, and almost one year after the defendant returned to the jurisdiction[9]. In **Louise Martin v Antigua Commercial Bank[10]** a delay of 15 days was held to be reasonable. In **Earl Hodge v Albion Hodge[11]**, a delay of 13 days was held to be reasonable.

[23] The onus lies on the applicant to satisfy the court under CPR 13.3 (1) (a) that he applied as soon as reasonably practicable after finding out that the default judgment had been entered. I am not satisfied.

[24] In **Chastanet ETS a Teissedre Bordinet Export v Stanley Leonaire trading as LNJ Trading Food Distributoors[12]**, where there was a delay of 41/2 years and a series of adjournments in the matter before the defendant had applied to set aside the default judgment, the court stated:

> " … There comes a point where mere delay causes prejudice. … There would be prejudice to the claimant if the case were reopened. The overriding objective meant that the matters had to be dealt with expeditiously and fairly and there has already been a great deal of court time spent on the instant case. Even if the defendant had a real prospect of successfully defending the claim, there were numerous factors which militate against setting aside the default judgment.

[25] In my opinion, that comment is applicable to the instant case. This case has taken up a lot of the court's time and resources. There had been several adjournments of the assessment of damages to allow the claimant to retain new counsel. The claimant has waited over four years for the assessment to be heard, and now faces an application to set aside, and further delay in the disposition of the matter. This does not mean that the defendant was not entitled to apply to set

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[9] At paragraph 12 of his supporting affidavit, the defendant stated that he had a consultation with Ms. Inniss, at which time he took his file from her. Apparently, that that was the first time the defendant consulted Ms. Inniss after returning to the jurisdiction on 19th March 2016.

[10] Claim No 0115 of 1997, Antigua and Barbuda, delivered in 2007

[11] BVIHCV2007/0098

[12] Claim No SLU1997/566

aside the default judgment, since there had been no adjudication on the merits in relation to liability.

[26] However, it has been settled in our courts that parties are expected to stay in touch with their attorneys when they are being sued. The scope therefore for them to say they were unaware of the entry of judgment or a court date is very limited. In this case, the delay in making the application was excessive, coming as it did approximately four years after the acknowledgment of service was filed, approximately four years after the default judgment was entered, and 105 days after the defendant allegedly found out that judgment had been entered. The evidence shows that the defendant returned to the jurisdiction in March 2016, yet it was only in February 2017- (11 months later), he contacted, and consulted with his lawyer. It would seem that the defendant expected his lawyer to call him while he was away, but he has not said he called her once in the close to three years he was out of the jurisdiction. His lawyer would not have known he had returned to the jurisdiction unless he contacted her. He has not said why he waited so long to contact her about his matter. If he had contacted her, he would have found out that judgment had been entered against him. In any event, I do not accept that he only found out about the judgment when he attended before Ward J in February 2017 because he had already, before 3rd February 2017 obtained his file from his lawyer and his lawyer was aware that judgment had been entered. And even if it can be said he only became aware of the judgment on 3rd February 2017 when he appeared before Ward J, it still took three months before the application was made. So the requirement of rule 13 .3 (1) (a) taken on its own, cannot be said to have been satisfied, and thus, on the facts, I have no jurisdiction to set aside the default judgment under that rule.

[27] Since no requirement trumps the other, it is not strictly necessary for me to consider the other two requirements. However, for completeness, I will go on to consider them.

CPR13.3 (1) (b): Whether the Defendant has Given a Good Explanation for the Failure to File a Defence

(1) **Position of the Defendant**

[28] Counsel for the defendant submits that the defendant has given a good explanation for the failure to file a defence. He points to the efforts purportedly made by the defendant to find out the status of

his file. He described the representation of the defendant's former counsel as 'inadequate' and "negligent". In support of his contention that the defendant's former counsel's representation was inadequate and negligent, counsel cited the case of **Westerhall Point Residents Association Limited v Dabreo**[13] and quoted Michel J as saying:

> "Inasmuch as the Court has stated that the lack of diligence of an attorney is not a good reason for delay, the fact is that if a party to a suit has done what ought reasonably to have been expected of him in a given circumstance and his lawyer has, unknown to him simply failed to act, and upon discovering the failure of his lawyer to act, he moves with relative expedition to have the action initiated for him by alternative Counsel, it would be plainly unreasonable to effectively penalise the litigant for the failure of his lawyer."

[29] Counsel next repeated the grounds of the application and was critical of the conduct of Mrs. Inniss-Hodge, and in the end, invited the court to infer indifference and /or negligence on the part of Mrs. Inniss-Hodge in respect of the representation of the defendant.

(2) **Position of the Claimant**

[30] In summary, the submissions of counsel for the claimant are grounded on the following points:

1. The defendant has not provided a good reason for the failure to file a defence.

2. His failure to file a defence is that he had inadequate and /or negligent representation by his former counsel;

3. The defendant would have known at the time of signing the acknowledgement of service that the defence was due within one week, therefore he cannot seek to blame his counsel for not informing him of a deadline to file the defence.

4. The defendant's inaction over the subsequent four years shows a stark disinterest and disregard for the filing of a defence and or defending the matter.

5. The defendant cannot use former counsel's alleged failing as an excuse for his own inaction over approximately four years

6. Former counsel filed a status report wherein she referred to difficulties in obtaining instructions from the defendant. This report cannot be disregarded

[13] GDAHCV2008/0622 paragraph 15

Discussion and Disposition of the Second Requirement of a Good Explanation

[31] The explanation given by the applicant for the failure to file a defence is outlined in paragraphs 8, 9, 11 and 16 of his affidavit in support filed on 19th May 2017. In those paragraphs, the defendant states in relevant parts:

> "8. I would pass by the office occasionally to inquire as to the progress in my case. I **received no significant up date** (My bold). I was scheduled to travel on the 31st day of July 2013. ... I visited the office of Angela Inniss and enquired if there were (sic) anything that I was required to do in relation to the case, and whether or not I am free to leave. …"
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> "9 I was informed by Ms. Inniss … that I was free to leave the jurisdiction and I left … on the 31st day of July 2013." … Before I left the jurisdiction, I ensured that I left all of my contact information with Ms. Inniss and I asked that she contact me when the case begins so I could make my travel arrangements to attend the court hearings."
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> "11. I returned to the jurisdiction on the 19th day of March 2016."
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> "16. I was never informed of the deadline to file a defence."

[32] In my opinion, the explanation given by the defendant is not good enough. What exactly does he mean by the bald statement 'I would pass by the office occasionally to inquire as to the progress in my case? I received no significant up date.' One is left to speculate as to the date and time he passed by the office, and what exactly he was told about the progress of his case. As noted by Barrow J A. in **Ferdinand Frampton v. Ian Pinard et al**[14], the court is not permitted to guess and supply omissions in the application.

[33] However, the main thrust of the explanation given by the defendant for the failure to file a defence is essentially the same as that given for his lack of expediency in making the application, that is, lack of diligence on the part of his former attorney who allegedly failed to inform him of the judgment and failed to inform him of the date to file a defence and failed to file a defence; and told him he was free to leave the island. Our courts have said that lack diligence of an attorney is not a good explanation[15]. Also, bad advice from a lawyer, or assumptions by the defendant based on that bad advice, are also not good reason for failure to file a defence. However, it is clear to me that the defendant failed to provide any evidence of his involvement in his case during the almost

[14] DOM Civil Appeal No 15 of 2005,
[15] Per Sir Dennis Byron CJ in Rose V Rose, SLU Civil Appeal No 19of 2003.

three years he migrated to the US[16]. What steps, if any were taken to make contact with his attorney? The record shows that Mrs. Inniss-Hodge, in a status report, stated that the defendant left the jurisdiction shortly after the acknowledgement of service was filed and that she was having difficulty taking instructions from the defendant. The defendant on the other hand stated that when he was leaving the jurisdiction, he left his address and contact information with his lawyer, and she never contacted him. Obviously, the defendant seems to think that it is the lawyer's duty to contact him, but there is no duty for him to contact her. In this regard, the observations of Justice Barrow as set out below are apt.

[34] Justice Barrow [Ag] (as he then was) in the case of **St Bernard v The Attorney General of Grenada et al[17]** stated:

> "The excuse that Chambers have been unable to contact clients contains the premise that it is the duty of chambers to contact the client, but there is no duty on the client to contact chambers. That premise is false. When a litigant is going to become unreachable at his previous address or by previous methods, the litigant has a duty to make proper arrangements to enable his lawyer to reach him. The litigation belongs to the litigant, not the lawyer. The client needs at all times to be involved with the litigation."

[35] I adopt that statement. It cannot be said that the defendant had at all times been involved with the litigation. Nowhere has he stated that he contacted his lawyer at any time since he left the jurisdiction on 31st July 2013. It bears repeating that parties are expected to stay in touch with their attorneys when they have been sued. The litigation belongs to them. It is essentially their own business. Their obligation does not stop at instructing their lawyer.

[36] Learned counsel Mr. Elliott-Hamilton has cited the case of **Westerhall Point Residents Association Limited v Dabreo** as authority for his submission that the defendant should not be penalised for the failure of his lawyer. The difficulty I have with that submission is that in **Westerpoint,** the circumstances were different. In the particular circumstances of that case, there was little else the defendant could have done. The defendant there did what was reasonably required of him. He took the documents served on him to the insurance company as he was wont to do (since he was covered), and he heard nothing else until the default judgment was served on her. He did not go off island and failed to keep in touch with his lawyer, and having returned, allowed eleven months to elapse before he contacted and met with his lawyer (who was still on

[16] He stated that the left the island on 31st July 2013 and returned on 19th March 2016.
[17] Grenada High Court Civil Suit No 84 of 1999

record) to find out about his case. I must therefore go along with counsel for the claimant that **Westerpoint** is distinguishable from the instant case.

[37] The claim form, statement of claim, a form of acknowledgement of service (Form 5), and a form of defence (Form 6) were personally served on the defendant on the 1st May 2013. The acknowledgement of service would have been due on the 16th May 2013. It was filed on the 23rd May 2013.[18] It indicated that the defendant intended to defend the claim. Immediately below question 6 - "Do you intend to defend the claim?" there is a note in square brackets which reads:

> "[If so, you must file a defence within 28 days of the service of this Claim Form on you]"

[38] Having answered 'Yes' to the question "Do you intend to defend the Claim?" the defendant, along with his lawyer signed the acknowledgement of service. So the defendant cannot be heard to say that he was never informed of the deadline to file a defence. The object of the notes to the defendant contained in the acknowledgment of service is to assist defendants in the steps they need to take and in what time.

[39] Pursuant to CPR 10.3 (1) the defence should have been filed 28 days after the date of service of the claim form and statement of claim. Accordingly, it should have been filed by the 30th May 2013. It was not filed. It was open to counsel to seek a consensual extension of time as permitted by CPR 10. 3 and (6) or apply to the court for an order extending time to file a defence under CPR 10.3 (9) or CPR 26.1(2) (k). None of this was done.

[40] If the defendant is to be believed, he was in the jurisdiction at the time of entry of the default judgment. He said he went to Inniss and Inniss chambers to make enquiries about his case, but nothing significant was said to him; yet he said Mrs. Inniss-Hodge told him he can leave. Further, he said he went to the court office to find out if there was anything preventing him from leaving the jurisdiction. If his lawyer already told him he can leave, why did he need to go to the court office? And if in fact he went to the court office to find out if there was anything preventing him from leaving, it seems odd that he did not requisition a search or inspection of his file (as he was entitled to do by virtue of CPR 3.14 (2)) to find out what documents had been filed in it. I do not believe him.

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[18] Nothing turns on this.

[41] If Mrs. Inniss-Hodge's status report[19] is to be given any weight, she knew that the defendant had left the jurisdiction, after he signed the acknowledgement of service, but she seemed uncertain as to the date on which he left. The difficulty I have with this situation is that after the acknowledgement of service was signed, there was only about 7 days left before the defence was due; so it seems strange that the defendant did not give instructions for the defence at the same time he signed the acknowledgement of service. As an alternative and prudent step, rather than filing an acknowledgement of service at that late stage, the defence could have been filed within the time limited for filing the acknowledgment of service, since the defendant was contemplating travelling. Then, there was the option of filing a witness summary. That course was not pursued.

[42] The evidence leads to the conclusion that there had been laxity on the part of both the defendant and his lawyer. They are expected to know the consequences of not filing a defence. Accordingly, I cannot under these circumstances be satisfied that the defendant has provided a good explanation for his failure to file a defence within the time limited by the rules to avert the entry of judgment in default. His lawyer was aware of the judgment.

[43] In Michael **Laudat v. Danny Ambo[20]** Edwards J.A. reminded legal practitioners that there were some specific explanations that may be offered by a defendant which would not amount to a "good explanation" which will excuse non-compliance of the rules. According to the learned judge, these explanations include misapprehension of the law, mistake of the law by counsel, lack of diligence, volume of work, difficulty in communicating with client, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence, or inadvertence.

[44] While I understand the defendant to be saying that he had been given assurances by his former legal counsel that his matter would be dealt with, and believed that a defence had been prepared on his behalf, I fail to understand why the defendant absented himself from the jurisdiction for almost three years without giving instructions to file a defence, or even attempting to contact his former counsel. I am far from impressed with his explanation that his former counsel told him he could leave. His explanation still amounts to lack of diligence on the part of his counsel which is not accepted.

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[19] It is difficult for this court, without the benefit of the notes of Carter J or Ward J of the discussions surrounding the difficulty of Ms. Inniss in taking instructions from the defendant.
[20] HCVAP 2010/016, at paragraph 14.

[45] I agree, to some extent with Ms. Johnson that the defendant was indifferent to his matter and took little interest therein. However, while I find the defendant, initially, had been willing to take action, and showed interest in the matter by paying fees, and signing an acknowledgement of service, I also find there are two competing versions of what happened after signing of the acknowledgement of service. The defendant left the jurisdiction after the acknowledgement of service was signed, but after the judgment had been entered, and never looked back or contacted his lawyer until almost three years later. Upon his return to the jurisdiction three years after, he seemed most anxious to pursue his case. After a series of adjournments to afford him an opportunity to retain alternative counsel, to comply with the directions in respect of the hearing of the assessment of damages, he eventually retained alternate legal representation[21] and according to him, within four days of so doing, he was able not only to file submissions and witness statements in support of the assessment, but also an application to set aside the default judgment, which he said was the earliest time available.

[46] The defendant's former counsel stated in her report (which came before Ward, J. QC) that the defendant left the jurisdiction after the acknowledgment of service was filed and she was having difficulty taking instructions from him. The report does not disclose the nature of the difficulties. Even if the defendant's former counsel experienced difficulty[22] in obtaining instructions from the defendant, there were options available to her. She could have filed a defence and then seek to amend it if necessary. Or she could have filed a witness summary. I am unable to see what prevented counsel from taking advantage of this provision in the CPR. Likewise, I am unable to appreciate the defendant's lack of involvement in his matter after he signed the acknowledgement of service, after he left the jurisdiction in July 2013; and after his return to the jurisdiction. This lack of involvement during those periods remains unexplained. As I have said, his obligation goes beyond giving instructions to counsel or paying fees. I do not find the explanation is good enough, in that it shows not only lack of diligence on the part of his attorney but also lack of his own involvement in the matter for about three years. I was minded to give the defendant the benefit of the doubt in regards to his explanation in respect of the apparent laxity of his lawyer. However, he was lax too, and the explanation is not a good explanation having regard to the authorities from our

[21] After being turned down by three after he took his file from former counsel
[22] The court itself found the defendant to be a difficult person. He exhibited repulsive conduct in chambers which prompted me to ask him to leave.

Court of Appeal on the points raised; and thus, I find that the defendant has failed to satisfy the second requirement of the test set out in CPR 13.3 (1) (b).

[47] As I have said, in order to set aside the default judgment, the defendant must satisfy the three requirements of CPR 13.3 which are conjunctive; failure on the part of the defendant to satisfy one is fatal to the application to set aside. Accordingly, that would dispense of the application and it would not be necessary for me to proceed further. However, for completeness, I go on to consider the third requirement as to whether the defendant has a real prospect of successfully defending the claim.

Whether the Defendant has a Real Prospect of Successfully Defending the Claim

[48] In order to satisfy the requirement, to set aside the default judgment, the defendant must advance a defence that has a real prospect of success on the merits. The court is to interpret "real" as the opposite of fanciful and should not indulge in a mini trial.[23]

[49] In his statement of claim, the claimant pleads libel. He alleges that the defendant, by innuendo defamed him on two occasions by making statements in the course of a call-in program on WINN FM (and disseminated it to a larger audience via the internet) to the effect that the claimant had inappropriately influenced the decision making of the Board of Planning and Control to the benefit of his sister.

[50] The proposed defence admits the defendant spoke and published the words as set out in paragraph 10 of the statement of claim; but 'denies that the words bore, or were understood to bear, or were capable of bearing any of the meanings as alleged in paragraph 11 of the statement of claim, or any meaning defamatory of the claimant.'

[51] Additionally, the defendant pleads that 'if, and in so far as the words complained of bear the meaning that the claimant may have inappropriately influenced the decision making of the Board, they are fair comment on a matter of public interest, namely the decision of the Board of Planning and Control to permit one, James Warner … to construct a three floor building in a watercourse.' The defendant went on to particularise the facts and matters on which the comments were based. The particulars of facts and matters on which the comments are based are set out as follows:

[23] The Caribbean Civil Court Practice 2011, Note 12.4

"**PARTICULARS OF FACTS AND MATTERS ON WHICH THE COMMENTS ARE BASED"**

"8.1. The Defendant lives adjacent to the watercourse (a "ghaut"). Water flows down the water course when it rains heavily notably during the hurricane season.

"8.2 No person shall develop land in Saint Christopher and Nevis unless an application for development permission is authorised under the Development Control and Planning Act.

"8.3. The Board of Planning and Control is required under the Development Control and Planning Act … to assess applications for a grant of development permission under section 22 of the said Act.

"8.4 On or about July 2012, construction had begun in the watercourse adjacent to the property of the Defendant. The construction had been approved by the Board of Planning and Control. It is the sole building in the watercourse."

"8.5 The decision of the Board was unreasonable in that no public body could have come to such a decision as it failed to take into consideration the environmental impact of the construction of the building in the said watercourse."

"8.5.1 As a result of the decision of the Board and the subsequent construction … water settles between the Defendant's building and the building that was constructed in the watercourse thereby causing significant health risks."

"8.5.2 The decision of the Board … failed to take into consideration the rock formation in the water course, which prevents faecal materials from the building's septic system from properly soaking away. This has resulted in an unbearable stench."

"8.6 The claimant is the Chairman of the Board of Planning and Control."

"8.7 The Claimant's sister Joycelyn Glasford was the real estate agent, who sold the land to James Warner."

"9 … [T]he Defendant denies that the statement referred to the Claimant.

"9.1 The statements complained of referred to the Head of the Building Board"

"9.2 The position of the Chairman of the Board of Planning and Control is not a position of such public notoriety that the average reasonable and ordinary listener would have known at the time of listening that the statements referred to the Claimant."

[52] The defendant has not complied with the requirement of CPR 69.3 requiring that he pleads which of the words complained of are alleged to be statements of facts and not comment, and based on this, it is probable that the defence of fair comment cannot be sustained.

[53] After setting out the facts on which the statements were allegedly based, the defendant went into a discourse challenging the claimant's entitlement to damages, and alleging deficiencies in the claimant's pleadings. (See paragraph 9 of the proposed defence). Learned counsel for the defendant has submitted that the facts on which the defamatory inference is based are facts which the defendant has a reasonable prospect of establishing at trial in relation to the 2012 and 2013 statements.

[54] Learned counsel for the claimant does not agree that the defendant has established that he has a realistic prospect of successfully defending the claim. Counsel submitted that the defendant has failed to show in his defence that the words spoken to him are actual comments. Counsel said that the way in which the words were spoken formed words of a factual basis and not comments. If the facts on which the comments purport to be made do not exist, the defence of fair comment must fail.[24] In similar vein, the defendant should not enter a plea of fair comment unless he is satisfied that the facts which are relied upon in support of the claim are true, and he has reasonable evidence to support them or reasonable grounds for supposing that sufficient evidence to prove them will be available at the trial at which he intends to support the evidence. Counsel for the claimant has pointed to falsities in the proposed defence such as referring to a watercourse which has been dormant for over 100 years, as a ghaut.

[55] Reference was made to the defendant's lack of remorse; his failure to retract or to apologise, which counsel submits goes to the issues of malice and aggravation.

[56] I have had an opportunity to peruse the draft defence, and in many respects it seems to be akin to a claim for judicial review against the decision of the Board of Planning and Control, and is at best a fanciful defence. It is apparent too that paragraph 9 of the defence is inconsistent with

[24] Vaughn Lewis v Kenny Anthony; SLU Civil Appeal No 2 of 2006, Per Barrow, J.A

paragraphs 8.3, 8.4, 8.5, 8.5.1, 8.5.2, 8.6 and 8.7. It follows that I am not convinced that the defendant has a realistic prospect of successfully defending the claim. However, in relation to other aspects of the defence, (for example paragraphs 5, 7, 8, 8.1 and 8.2), I find that it is not possible to say definitively that the defendant has no realistic prospect of defending the claim because there are issues of fact raised in the pleadings which require a trial for their determination including:

(a) Whether the words complained of (which the defendant admits he uttered) referred to the claimant;

(b) Whether the words were capable of being defamatory; and if the answer is yes:

(c) Whether the words are in fact defamatory in the circumstances of this case;

(d) Whether the matters pleaded are truth or simply comments;

(e) Whether the defendant was actuated by malice or any indirect motive;

(f) Whether, having regard to the learning in the case of **Paul Lewis a Native of Canouan Island et al v Canouan Resorts Development Ltd et al**[25] and certain cases cited therein,[26] the National Development Control and Planning Act Cap 20.07 affords protection to the defendant; or whether the defendant is among the class of persons who can approach the court for infarction of any of the provisions of that Act.

[57] These issues can only be decided after trial with the aid of evidence, elicited in examination, reexamination and cross examination, as well as an examination of the Development Control and Planning Act.

[58] It follows that I am not in a position, at this stage to say, definitively whether the defendant has a realistic prospect of successfully defending the claim against him for libel.

Exceptional Circumstances

[59] CPR 13.3 (2) empowers the court to set aside a default judgment if the defendant satisfies the court that there are exceptional circumstances. The applicant did not in his application mention exceptional circumstances as a ground. However, Mr. Elliott-Hamilton in his submissions

[25] , Claim No SVGHCV408 of 2010

[26] See paragraphs 13, 14, 23, 24, 2526, 2728. See also paragraphs 31-43; See also Cariaccess Communications (St Lucia ltd v Cable and Wireless (West Indies) Ltd et al, paragraphs 77 to 93.

addressed it. Counsel referred to the dicta of Dame Janice Pereira C.J. in **Baynes v Meyer**[27] wherein the Chief Justice gave examples of what may amount to exceptional circumstances[28].

[60] Counsel's main submission was that there are exceptional circumstances in respect of the 2012 statement in that the 2012 statement is not capable of bearing the meaning alleged, and in so far as it does, it is not actionable as a defamatory statement as the damage to the claimant's reputation is highly likely to be non-existent or minimal, and it is highly likely that the claim would fail in respect of the 2012 statement. My short answer to that submission is to refer to the case of **Abraham Mansoor** Claim No ANUHCV2004/0408 wherein Blenman J. at paragraph [77] stated in effect, ultimately, it is for the jury to decide whether the words were capable of being defamatory of the claimant, and whether the words in their natural and ordinary meaning were capable of having the meaning attributed to them by the claimant. So I am not inclined to agree with learned counsel for the defendant that this would be an exceptional circumstance to set aside the default judgment. On the contrary, having examined the defence, I seriously doubt the defence could be regarded as a 'knock out point' in the sense suggested by the Hon Chief Justice.

[61] However, even if it were found that the defendant has a realistic prospect of successfully defending the claim, inasmuch as I have already ruled that the first and second requirements were not satisfied, it follows that the defendant's application cannot succeed and must be dismissed.

Conclusion

[62] The defendant has not satisfied two of the conditions necessary to set aside the default judgment. And I do not discern from the affidavit evidence or the submissions that there are any exceptional circumstances to which I must have regard for the purpose of setting aside the judgment. In the result, the application to set aside the default judgment obtained on the 5th July 2013 fails, and it is accordingly dismissed with costs to the claimant assessed summarily in the sum of $1000.00.

The order of the court is as follows:

1. The application to set aside the default judgment entered on the 5th July 2012 against the defendant Shefton Crosse be and the same is refused.
2. Costs awarded to the claimant in the sum of $1,000.00 to be paid in 30 days.

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[27] ANUHCVAP2015/0026

[28] At paragraph 26 of the Baynes judgment Dame Janice Pereira states: 'A few examples come to mind. For instance the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or the defence being put forward is a 'knock out point' in relation to the claim; or where the remedy sought or granted was not one available to the claimant. The list is not intended to be exhaustive.'

3. The assessment of damages is to be fixed by the court office on a date in February 2018.

[63] I am grateful to counsel for their industry and assistance.

Pearletta E. Lanns
High Court Judge [Ag]

By the Court

Registrar