EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2017/0137

BETWEEN:

FOREST SPRINGS LIMITED

Claimant/ Respondent

And

BLUE WATERS ST. LUCIA LIMITED

Defendant/ Applicant

Appearances:
Mrs Petra Jeffrey-Nelson for the Claimant/ Respondent
Ms Renee St Rose for the Defendant/Applicant

2017: February 28
March 7

Setting aside default judgment – Rules 13.3(1) and 13.3(2) of the Civil Procedure Rules 2000 ("CPR")

DECISION IN CHAMBERS

[1] ST ROSE-ALBERTINI, J. [Ag]: Before this court is an application by the defendant Blue Waters St Lucia Ltd ("Blue Waters") to set aside a default judgment which was properly obtained by the claimant Forest Springs Limited ("Forest Springs").

[2] Blue Waters contend that it has surmounted all the hurdles of CPR13.3 (1) and additionally there are exceptional circumstances for setting aside the judgment under CPR13.3 (2).

[3] Forest Springs opposes the application on the premise that the default judgment was regularly obtained and should not be set aside because Blue Waters has not satisfied any of the requirements of the Rules.

The Issue

[4] The single issue for determination is whether the Court should set aside the default judgment which was properly obtained by Forest Springs.

Background

[5] The following chronology of events which led to this application places the matter in context.

[6] On 6th March, 2017 Forest Springs filed a claim form and statement of claim seeking to recover from Blue Waters (i) special damages of $2,616,566.14, (ii) damages for breach of contract and loss of projected profits, (iii) interest, and (iv) costs which it alleges arose from a written Conversion and Distribution Agreement between the parties, for the purchase, marketing and distribution of its bottled water locally and regionally.

[7] The claim was served on 8th March, 2017. Acknowledgment of service was filed within the prescribed time and the defence was due for filing on 7th April, 2017. Blue Waters requested an extension of time to 10th April, 2017 to which Forest Springs agreed.

[8] The defence was presented for filing on 13th April 2017, three days after the agreed deadline, by which time Forest Springs had already filed a request for judgment in default of defence

[9] Default judgment was entered on 26th April, 2017 and contained directions that the matter was adjourned to Chambers for determination of the terms of the judgment on 14th June, 2017.

[10] An Affidavit in Support of Damages to be Assessed was filed by Forest Springs on 7th June, 2017 and served on Blue Waters along with a copy of the default judgment on the same day. On 14th June 2017 Blue Waters filed this application to set aside the default judgment and the matter came on for hearing before the Master on the same day. Directions were given for advancing the application and the matter was adjourned. At a subsequent hearing the case was transferred to the Commercial Division and the application was ventilated on 28th February, 2018.

The Law

[11] CPR13.3 (1) contains three conjunctive conditions, all of which must be satisfied to succeed in setting aside a default judgment. It states:-

> *"13.3 (1) If Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –*
>
> *(a) Applies to the court as soon as reasonably practicable after finding out that judgment had been entered;*
>
> *(b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and*
>
> *(c) Has a real prospect of successfully defending the claim."*

[12] CPR13.3(2) goes on to say:-

> "(2) *In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.*"

[13] Learned Chief Justice, Pereira CJ gave guidance on the application of these rules in Public Works Corporation v Matthew Nelson consolidated with Elton Darwton et al v Matthew Nelson[1] when she said:-

> "*The discretion granted under CPR 13.3(1) to set aside a default judgment is relatively limited. A failure to satisfy any one of the three conditions of rule 13.3(1) is fatal unless a defendant manages to bring himself within CPR 13.3(2) by demonstrating that there were exceptional circumstances warranting the setting aside of the default judgment entered against him…….The existence of an exceptional circumstance under CPR 13.3(2) trumps the requirement to fulfill the criteria in CPR 13.3(1).*" [2]

[14] Legal authorities from this jurisdiction recognize that CPR13.3 (2) which was introduced some eleven years after the promulgation of the CPR gave Judges the ability to depart from the rigidity of the conjunctive requirement of CPR13.3 (1), once satisfied that exceptional circumstances exist and the justice of a case requires it.[3] It has however been said that whereas "*the sub-rule is a welcome addition to the court's powers in dealing with default judgments it is not to be seen as a panacea for defaulting defendants.*" [4]

[15] The Rules are silent on what constitutes an exceptional circumstance. Several decisions from our Court of Appeal have examined the application of CPR13.3 (2) and it is now well accepted that what may or may not amount to an exceptional circumstance will vary from case to case depending on the facts of each case.[5]

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[1] DOMHCVAP2016/0007 & DOMHCVAP2016/0008 [delivered on 29th May 2017, unreported]

[2] See paragraphs 1 & 5 of the headnote and paragraph 13 of the Judgment

[3] Graham Thomas v Wilson Christian ANUHCV 2011/0629 [delivered on 13th July 2012, unreported]

[4] Elvis Wyre etal v Alvin G Edwards etal ANUHCVAP2014/0008 [delivered on 3rd September 2014-unreported]

[5] See: Elvis Wyre (Personal Legal Representative of the Estate of Arnold Wyre, Deceased) et al v Alvin G. Edwards et al ANUHCVAP2014/0008 (delivered 3rd September 2014, unreported); Deidre Pigott Edgecombe et al v Antigua Flight Training Centre ANUHCVAP2015/0005 (delivered 26th June 2015, unreported); The Marina Village Limited v St. Kitts Urban Development Corporation Limited SKBHCVAP2015/0012 (delivered 19th May 2016, unreported); Carl Baynes v Ed Meyer ANUHCVAP2015/0026 (delivered 30th May 2016, unreported); and Public Works Corporation v Matthew Nelson and Elton Darwton et al v Matthew Nelson DOMHCVAP2016/2007 & 2008 (delivered on 29th May 2017, unreported)

Analysis

Did the Blue Waters apply to set aside the judgment as soon as was reasonably practicable, after finding out that judgment was entered - CPR13.3(1) (a)

[16] Mrs Nelson argued on behalf of Forest Springs that the application was made is in excess of seven to eight weeks from the date the request for judgment was filed (13th April) or judgment was entered (26th April). Such period she says is inordinate and falls outside the scope of CPR13.3 (1) (a). Additionally Blue Waters has not responded to Forest Springs assertion that from 13th April when the attempt was made to file its defence it would have discovered that a request had been filed. From that time Forest Springs became entitled to default judgment, which was imminent and Blue Waters through its Counsel knew that default judgment was entered from 26th April.

[17] Blue Waters response is that even if it was aware of the filing of a request, no further step could have been taken until judgment was entered and duly served. Ms St Rose submitted that the application was filed seven days after service of the judgment, which conforms to what is considered as reasonably practicable. Further, there is no other evidence before the Court concerning notice of the judgment, apart from the date on which the judgment was served.

[18] She relied on the reasoning of Mitchell JA in Anison Rabess v National Bank of Dominica[6] to support Blue Waters position that no step can be taken until judgment is served. She invited the Court to regard to the date of service as the starting point in determining the period within which the application was made and to disregard 13th April (date request was filed) or 26th April (date the judgment was entered).

[19] Mrs Nelson's rebuttal was that Counsel's paraphrasing had misconstrued the ruling in the that case because it concerned enforcement proceedings where a default judgment was entered for an excessive amount and had not been served on the defendant, when the claimant sought to enforce it. The ruling, she says, is not applicable to the instant case

[6] HCVAP2011/030 delivered on 13th July, 2012

because it is it is only in instances of enforcement that service is mandatory, so that a final judgment cannot be enforced unless it is personally served. She submitted that for the present application knowledge is what is important because the sub-rule refers to "*finding out"* as opposed to "*being served"*.

[20] I have considered the contending positions and accept unreservedly that merely filing a request could not have trigger the application and consequently 13th April could not be the commencement date for calculating promptitude. I agree with Ms St Rose that a request is not a judgment, even if a claimant becomes entitled to receive judgment upon filing same. Since judgment must be entered before an application can be filed to set it aside, it follows that time for making the application can only commence from the date on which a defendant discovers that judgment has been entered.

[21] I found the reasoning of Mitchell JA in the Anison Rabess case instructive and applicable to service of default judgments and court orders in general. To place it in perspective the full text is reproduced below:-

> *"Mr. and Mrs. Rabess also complain against the enforcement of the default judgment that it was never served on them. They say they found out about its existence after making inquiries at the court office. Such an inquiry by a defendant does not substitute in law for the service of a judgment or order as required by the rules. It is a long established principle of civil procedure that a final judgment or order may not be enforced unless it is served personally on the party against whom it is sought to be enforced. This principle finds modern reflection in CPR 42.6. This provides that, unless the court otherwise directs, the court office is to serve every judgment or order* ***on the parties to the claim. In this context, "unless the court otherwise directs" does not confer a discretion as to whether or not to serve the*** *judgment on the unsuccessful party. The provision 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. The court office does not have the resources in every case to seek out the parties and to serve them personally. The*

provision in CPR 42.2 that a party who is notified of the terms of an order by telephone, etc., is to be bound by the terms of the order whether or not it is served has relevance to contempt and other similar proceedings. This does not provide an alternative to the requirement for service in CPR 42.6."[7] *(Emphasis added)*

[22] Following on from this there two ways in which a defendant may find out about a default judgment; namely through inquiries at the court office or personal service of the judgment. A defendant may proceed to make an application to set it aside upon finding out through inquiry, without necessarily awaiting service, because the rule requires that one must act speedily and a party may readily admit to such knowledge in the absence of service, as was done in the Anison Rabess case. The Court is not required to engage in a strenuous exercise to discover when or how a party came to have notice of a default judgment. Our Courts routinely rely on service of judgments as the surest method of confirming that a defendant has received notice. The CPR also requires that judgments and orders be served on a party who is to be affected by it. Thus in my view the use of the words "finding out" in CPR13.3 (1) (a) encompasses both knowledge through inquiry and personal service and cannot be said to exclude or minimize the latter.

[23] Blue Waters at paragraph 16 of its affidavit states that the judgment was served on 6th June. Forest Springs reply at paragraph 11 states that the judgment was served on 7th June. I did not considered this to be a serious discrepancy and accepted the evidence of Forest Springs, considering that its affidavit in support of assessment of damages filed on 7th June was also served together with the judgment. No other evidence was proffered to establish that prior to service Blue Waters had knowledge that judgment was entered. In the circumstances I am satisfied that Blue Waters found out about the judgment when it was served on 7th June and the starting point for calculating promptitude would be the date of service.

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[7] See paragraph 7 of the Judgment

[24] I accept that having filed the application on 14th June that step was taken seven days after service and in that regard there was nothing dilatory in the conduct of Blue Waters. In this jurisdiction periods of 11 to 15 days are accepted as being reasonably practicable, whereas periods in excess of 21 days are considered inordinate.[8] Having filed the application seven day after service I concluded that it was made within a reasonable time and first limb of CPR13.3 (1) is satisfied.

Has Blue Waters given a good explanation for failure to file its defence on time – CPR 13.3(1) (b)

[25] Blue Waters contend that its acknowledgment of service was filed on time and clearly stated its intention to defend the claim. The defence was presented for filing a mere three days after the agreed date and the delay in filing is given at paragraph 10 of its affidavit in support deposed by Ramon George Esper. It reads:

> "*My office was asked questions by Counsel for the Defendant in relation to email correspondence with the former managing director of the Defendant that was attached to the Statement of Claim. We took some time to download emails from the server and provided Counsel with a bulk of emails for review. I am informed by Ms St. Rose and I verily believe that due to the voluminous nature of the emails we provided, the defence was not completed until 12 April 2017. I attended to the Offices of the defendant on 12 April 2017 to sign the Defence." (Emphasis added)*

[26] Mr St Rose explained in oral submissions that the Blue Waters had always demonstrated an intention to defend the claim. When the request for extension was made the defence was ready but a few things needed to be reviewed. The statement of claim exhibited several documents including email exchanges with a former manager of Blue Waters dating as far back as 2013 and there were several allegations which made it necessary to review further emails between the parties before and after that time. New emails were

[8] See Milliner Enterprises Limited v Don Cameron et al - Claim No.BVIHCV2012/332 (delivered on 12th June 2013, unreported)

furnished on 10th April and the necessity to review them was critical. Counsel encountered delay sifting through the voluminous emails and the defence was not completed until 12th April and presented for filing on 13th April.

[27] Forest Springs agrees that an initial extension was given but the defence was not filed by the agreed date. A request for entry of judgment was filed on 13th April by reason of this default. Mr Esper's affidavit stated the reason for the delay as simply that it took time to retrieve emails from their server. That reason has been rejected by the Courts as sufficient reason for delay and cannot be accepted as a good reason for failure to file a defence on time or for non-compliance with the other rules of court.

[28] Mrs Nelson argued that upon Blue Waters recognizing that it was not in a position to comply with its own timeline, there was need to request a further extension verbally or in writing which could have been extended up to 56 days or make an application to the court to extend the time. That was not done and when Blue Waters attempted to file the defence on 13th April it would have found out from then Forest Springs was entitled to receive judgment.

[29] She contends further that in Elvis Wyre et al v Alvin G Edwards et al[9] which Blue Waters has relied on, the reason advanced by the appellants for delay in filing a defence was the challenges experienced in obtaining documents necessary to avoid embarrassment in the defence. The Court of Appeal agreed with the trial judge finding that a search for facts which may or may not support a possible defence could not be a reason for failing to defend, when the appellants could have applied for a further extension of time to file their defence.

[30] I have reviewed the authorities on this point and agree that administrative inefficiency is not regarded as good reason for delay. This was clearly stated in the Public Works Corporation[10] case where the appellant had relied on administrative difficulties and

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[9] ANUHCVAP2014/0008 , delivered on 3rd September 2014, at paragraph 28 of the Judgment
[10] DOMHCVAP2016/0007 & DOMHCVAP2016/0008 [delivered on 29th May 2017, at paragraph 14 of the Judgment

deficiencies as the reason for delay in filing his defence. The Learned Chief Justice adopted the ruling in The Attorney General v Universal Projects Limited[11] in which the Privy Council said:-

> "*The Board cannot accept these submissions. First, if the explanation for the breach ie 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." (Emphasis added)*

[31] She went on to say:-

> "*The administrative difficulties relied on by PWC seems to me to be a resort to administrative inefficiency of the kind which was rejected by the Privy Council in Universal Projects as affording a good explanation…….*
>
> *……..I am satisfied, having regard to the pleaded claims of the respondent and the evidence put forward by PWC in seeking to explain its failure to timely file its defence, that its administrative difficulties or deficiencies, though they may be a common occurrence, do not amount to a good explanation***." *As this Court reminded in Michael Laudat et al v Danny Ambo: "[C]ounsel do not have a good explanation which will excuse non-compliance with a rule or order, or practice direction where the* ***explanation given for the delay is misapprehension of the law, mistake of the law …,*** *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.*
>
> *In short, the giving of a full and detailed explanation does not thereby make the explanation one that is good or, put differently, excusable. PWC in my view, for the reasons given, fails on this second limb of rule 13.3(1)."*[12] *(Emphasis added)*

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[11] [2011] UKPC 37

[12] See paragraphs 18 & 19 of the Judgment

[32] It is not unusual that a defendant might encounter difficulty in filing a defence within the time stipulated by the CPR. Once this becomes apparent a defendant is obligated to protect its right to properly file a defence by securing an extension of time to do so.

[33] In my view, the reasons being advanced for failing to file the defence on time is about administrative difficulties and deficiencies because the extent of the allegations in the statement of claim would have been known to Blue Waters from the time it was served on March 8. The issue for the Court at this time is not the length of delay in filing the defence or why the Blue Waters did not apply for a further extension of time. It is the substance of the reasons advanced for not filing the defence by the agreed filing date which must be examined.

[34] I am persuaded on the settled state of the law that Blue Waters explanation for the delay hinged solely on administrative difficulties and deficiencies which can hardly be said to amount to a good reason and therefore fails to satisfy the second limb of CPR 13.3(1).

Does Blue Waters have a reasonable good prospect of successfully defending the claim – CPR13.3(1) (c)

[35] Ms St Rose submitted that the draft defence denied all the allegations made in the statement of claim which includes Forest Springs interpretation of the agreements between the parties. The statement of claim refers to intentions between the parties which are not stated in the agreements and these are also denied. Responsibility for the obligations under the agreement and any liability flowing from this are denied, as these obligations were intended to be undertaken by a third party. The terms of the contract were incapable of performance which brought the contractual relations to an end and the defence contains a counterclaim for monies owed. These matters disclose a viable defence which has a realistic prospect of success to warrant adjudication on the merits, rather than by default.

[36] She submitted further that the Rules do not require a defendant to exhibit documents with its pleadings and all that is needed at this stage is to plead the facts that it relies on to

defend the claim. Paragraph 5 of the defence fully sets out the facts concerning a sub-contract with a third party to undertake its obligations under the main agreement and the basis of these facts will flow from disclosure of documents.

[37] She relied on pronouncements made by Singh JA in Gregory Bowen v Dipcon Engineering Services Limited[13] which I am satisfied have been overtaken by the current state of the law as can be gleaned from recent authorities.[14]

[38] Forest Springs in answer says the court will have to look at the draft defence against the statement of claim and documents exhibited to arrive at certain findings of fact. Mrs Nelson contends that the defence is merely a blanket denial of the allegations in the statement of claim and does not contain much substance. It seems to suggest that the agreement between the parties was novated by a sub-contract between Blue Waters and a third party. However it is clear on the face of the main agreements before the Court that the sub-contract was intended merely to assist Blue Waters in meeting its obligations under the main contract and ultimate responsibility for fulfilling these obligations remained with Blue Waters. She contends further that no documents were exhibited to provide a clear insight into what the defence is about, despite having stated that the delay in filing it was to source emails and documents to answer and support the defence. If an agreement exists with a third party it ought to have been exhibited but that was not done. She concludes by saying that Blue Waters is required to show that it has a reasonable prospect of successfully defending the claim which amounts to more than an arguable defence and that burden has not been discharged.

[39] I have considered the pleadings, affidavit evidence and submissions of Counsels. The prevailing law is stated by Carter J in St Kitts Urban Development Corporation Limited v The marina Village Limited[15] as follows:-

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[13] Civil Appeal No. 9 of 2001 -delivered on 14th January, 2002, unreported

[14] See: Carl Baynes v Ed Meyer ANUHCVAP2015/0026 - delivered 30th May 2016, unreported; Public Works Corporation v Matthew Nelson and Elton Darwton et al v Matthew Nelson DOMHCVAP2016/2007 & 2008 - delivered on 29th May 2017, unreported

[15] SKBHCV2014/0150 - delivered on 18th March 2015, unreported

"……...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 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.[16]

[40] It is not disputed that by written agreement between the parties in 2013 Blue Waters assumed the role of exclusive distributor for the Forest Springs bottled water, locally and regionally for a term of 15 years. That agreement was revised in 2014 and supplemented by a new one. They were both exhibited with the statement of claim and are similar in wording except that the 2014 agreement contained an additional clause 12 which granted Blue Waters the right to engage a third party to have exclusive responsibility for the distribution of Forest Springs product on their behalf and for fulfilling the obligations specified in clauses 9, 10 and 11 of the main agreement. These clauses concerned marketing, advertising, brand development and customer service. Forest Springs alleges that it provided its list of customers to Blue Waters as per the agreement and incurred certain costs in meeting its obligations, which included a loan to purchase plant and equipment to secure the supply of bottled water to Blue Waters and to augment its human resource personnel to fulfill these responsibilities. It is alleged that further terms and conditions were agreed in verbal and written communications between the parties, one of which was that Blue Waters agreed to purchase a specified quota of the products monthly so that Forest Springs would realize a gross profit margin to maintain its monthly overheads and remain in business. Blue Waters reneged on all the terms of the contract which caused Forest Springs to incur further expenses by way of mitigating its losses.

[41] Blue Waters avers that on account of clause 12 in 2014 agreement it entered into a ten year contract with AJB Distributors ("AJB") to deal exclusively with Forest Springs products locally and regionally. That was because Forest Springs did not wish to terminate the relationship although it was understood that the distribution of its products was

[16] See paragraph 22 of the Judgment

unsuccessful under the 2013 agreement. Under that sub-contract AJB then became the exclusive distributor of Forest Springs products and assumed all of the obligations to Forest Springs which had existed under the main contract. Based on the terms of this sub-contract there is a credible and reliable defence which will refute the claim to show that Blue Waters had no responsibility for any the obligations for the periods stated therein. Further the main agreement made no provision for purchase of a monthly quota of the products and a consistent quantity of the products were never produced and supplied by Forest Springs. Blue Water supplied raw materials to Forest Springs totaling $500,000.00, which remains unpaid and is counterclaimed.

[42] From the defence it appears the contract between AJB and Blue waters contain the nub of the defence but that document is not before the Court. There is nothing in the defence or the affidavit in support from which the court can glean the true nature of this contract or the full effect of the terms which it is alleged conveyed the obligations and liabilities to AJB. Forest Springs was not a party to that contract and maintains on the authority of the main contract that clause 12 only permitted Blue Waters to be assisted by a third party in meeting its responsibilities but accountability and proper performance of the obligations remained with Blue Waters.

[43] In my view the onus is on Blue Waters to satisfy the Court sufficiently of the matters stated in the contract with AJB which it says have a reasonably good prospect of successfully defending the claim. In addition no information was given on the facts which could have led to non-performance or repudiation of the agreements. It behooves an applicant seeking to set aside the judgment to satisfy the court that the defence advanced is one which on its face has a realistic prospect of succeeding. In the absence of the requisite facts the court is left questioning the basis of the contract with AJB and whether it may in fact succeed at all in defeating the claim.

[44] On such an application it is not enough to simply say the contract affords a credible defence, the basis of which will flow from disclosure. The court should at the very least be afforded an opportunity to examine what this credible defence is so as to weigh the

balance of justice in deciding whether to set aside the judgment. CPR10.5 (1) requires a defendant to set out all the facts on which it relies to dispute a claim and additionally these matters could also have been deposed in the affidavit in support. This has created a lacuna in Blue Waters defence as presented, which has cast doubt on the strength of the defence and counter claim. The Court is simply not armed with sufficient facts on which to assess the true nature of the defence in relation to the contract with AJB.

[45] Consequently I considered the defence to be merely at the threshold of an arguable one and that the Blue Waters has shown that it has a reasonably good prospect of successfully defending the claim. The requirement of CPR13.3(1) (c) was not attained.

[46] Having satisfied only one limb of CPR 13.3(1), the conjunctive requirement of the sub-rule has not been achieved.

Has Blue Waters demonstrated that exceptional circumstances exist - CPR 13.3(2)

[47] The exceptional circumstances cited by Blue Waters are as follows: (1) an initial extension of time was granted and the defence was only three days late; (2) there was no delay in filing the application to set aside (3) the claim is for a substantial sum which is in excess of $2.0 million and there is a counterclaim to be considered; (4) there are issues of agency and proper parties to the claim which make it necessary to determine where liability lies and the correct parties in relation to the agreement; (5) there are issues concerning interpretation of the agreement; and (6) the matter concerns complex contractual issues which can only be resolved through trial. Taken together Counsel says these are cogent reasons for finding that exceptional circumstances exist to have the judgment set aside and the claim adjudicated on its merits, to do justice between the parties. The delay of three days has caused no prejudice to Forest Springs and should not be considered as a reason to deny Blue Waters its day in court to defend the claim.

[48] Forest Springs has argued that while it is accepted that CPR13.3 (2) is intended to relax the rigidity of 13.3 (1) the cases are clear that a reason such as failure to download emails

from a server and sift through it within the time prescribed by the Rules can never be a circumstance which is exceptional. What was accepted by the Court of Appeal as exceptional in the Elvis Wyre case was that the claim on which the judgment was premised could have been dismissed in entirety because the nature of the remedies sought by the claimants were not open to them in law.[17]

[49] Mrs Nelson argued further that exceptional circumstance must also bear some correlation to the circumstances which caused the delay. Matters such a short delay in late filing, quantum of the claim or complexity of contractual issues are irrelevant and do not amount to anything exceptional for the purposes of CPR13.3 (2). The first agreement is a short one which is very clear and the wording is simple. The main issue is also simple and it is either that Blue Waters performed or it did not. The second agreement had the same wording as the first with the exception of clause 12 which was introduced because Blue Waters was unable to perform its obligation in relation to marketing and distribution under the first agreement. The new clause was added to permit Blue Waters to engage a third party to assist in carrying out its obligations. Forest Springs was not a party to the contract with AJB and would not be in a position to provide that document to the court. In short Forest Springs has shown that it has a sustainable claim, while Blue Waters has not shown anything which may amount to exceptional circumstances.

[50] I found the law on this issue to be aptly stated in Carl Baynes v Ed Meyer[18] where Chief Justice Pereira CJ again opined as follows"

> *"…….Inasmuch as sub-rule (1) requires, as one of the conditions, that a party seeking to set aside a regularly obtained judgment must demonstrate (together with the other two conditions) that his defence has a realistic prospect of success, a party may, however, fail in setting aside a default judgment even where this is shown, having failed in satisfying the other two conditions. It must follow that* ***the 'exceptional circumstance' limb contained in sub****-rule (2) is not to be understood or applied as a substitute to condition (c) under sub-rule (1)*

[17] See paragraphs 23, 33 & 34 of the Judgment
[18] ANUHCVAP2015/0026 - delivered on 30th May 2016, unreported

What amounts to an exceptional circumstance is not defined by the Rules and no doubt, for good reason. What may or may not amount to exceptional circumstances must be decided on a case by case basis……It must be something more than simply showing that a defence put forward has a realistic prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR 13.3(1)(c). They are not to be regarded as interchangeable or synonymous. CPR 13.3(2) is not to be regarded as a panacea for covering all things which, having failed under CPR 13.3(1), can then be dressed up as amounting to exceptional circumstances under sub-rule (2). Sub-rule (2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed, to satisfy rule 13.3(1). A few examples come to mind. For instance, where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or the defence being put forward is a ***"knock out point" in relation to the claim; or where the remedy sought or*** *granted was not one available to the claimant. This list is not intended to be exhaustive."*[19] *(Emphasis added)*

[51] One year later in the Public Works Corporation case the Chief Justice had this to say:-

"……In any event an exceptional circumstance contemplates the existence of circumstances which, though failing to satisfy the criteria set out in rule 13.3(1), trumps the requirement for the fulfilment of those criteria……...

……..It is of the very essence of a default judgment that the defaulting party has lost the opportunity to attack the merits of a claim as it relates to liability. There is nothing unusual or disproportionate about that. It cannot be said that PWC has been deprived of an opportunity to be heard. Rather, it is the

[19] See paragraphs 25 & 26 of the judgment

case that PWC has simply failed to make use of its opportunity to be heard. The default judgment may be said to be nothing more than the price one pays for one's failure to defend. Timelines must be imposed to regulate the time frame within which a party must be made to answer to a claim failing which the claimant is entitled to treat his claim as no longer being open to dispute. Were this not the case claims would be left hanging without resolution, whether by default or otherwise, in an indefinite comatose state which does nothing for the promotion of certainty and the finality of disputes. The fact that PWC has lost its opportunity due to its own default does not give rise to an exceptional circumstance."[20]

[52] It is clear from these pronouncements that setting aside a regular default judgment under this sub-rule in not to be approached casually. The defence must show clearly on its face that it truly exceptional and warrants depriving the claimant of a properly obtained judgment. Upon examining the pleadings and affidavit evidence the Court must be left with the clear conviction that setting aside the judgment is the only plausible result.

[53] The Court of Appeal has at times been willing to overlook even excessive delay in filing an application or a bad reason for failing to file a defence on time, but that is only in instances where the exceptional circumstance is shown to go beyond a realistic prospect of successfully defending the claim, to the extent that the legitimacy of the defence completely erodes the basis of the claim or there is some other compelling reason which has made it imperative that the judgment be aside to avoid a miscarriage of justice.

[54] I found no compelling reason for setting aside the judgment. Blue Waters could have applied to extend the time for filing its defence as permitted by the rules but failed to do so. A good reason was not given for late filing of the defence. The defence only came up to the threshold of an arguable one and did not demonstrate that there was a high degree of certainty that the claim would fail or that for some reason in law the claim was unsustainable.

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[20] See paragraphs 23 & 24 of the Judgment

[55] I concluded that there were no exceptional circumstances to satisfy the sub-rule.

Conclusion

[56] In the circumstances it is ordered as follows:-

1. The application to set aside the judgment is refused.
2. The applicant will pay the respondent's cost of this application in the sum of $2,500.00 to be paid within 21 days of the date of this order.
3. The matter is to be listed by the Court Office for further directions on assessment of damages.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar