EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2017/ 0574

BETWEEN:

CARIBBEAN METALS LIMITED

Claimant

And

DAVID MAURICETTE

Defendant

Before:

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

Appearances:

Ms Mertle John holding papers for Ms Raquel Willie-Trotman for the Claimant/ Respondent
Mrs Shervon Pierre for the Defendant/Applicant

2018: June 13
October 3

Application to set aside regular default judgment – Rules 13.3(1) and 13.3(2) of the Civil Procedure Rules 2000 ("CPR") – impecuniosity – lack of knowledge – exceptional circumstance

DECISION

[1] **ST ROSE-ALBERTINI, J. [Ag]:** The defendant Mr David Mauricette ("Mr Mauricette") is a building contractor, who has applied to the Court to set aside a default judgment obtained against him for unpaid sums of money owed to the claimant, Caribbean Metals Limited ("CML"). The application is made pursuant Rule 13.3 of the Civil Procedure Rules 2000 ("CPR").

The Issues

[2] The sole issue for determination is whether Mr Mauricette has satisfied the prescribed conditions of CPR13.3 to cause the Court to set aside the default judgment.

Background

[3] CML is locally registered private company which engages in the sale of roofing and other building materials in Saint Lucia. In September 2017 CML filed a claim for recovery of sums owed by Mr Mauricette, for goods sold to him. The claim was served on him in October, 2017. No acknowledgment of service or defence was filed, which led to CML's request for judgment in default of acknowledgment of service. Judgment was entered on 21st November, 2017 in the following terms:- ***"****NO ACKNOWLEDGMENT OF SERVICE having been filed by the Defendant herein, it is this day adjudged that the defendant do pay to the Claimant the sum of* ***EC$362,853.93 together with interest on the said sum at the rate of 12% per annum from 18th February 2016*** *to the date of payment and cost in the sum of $2,510.50"*.

[4] CML moved to enforce the judgment by way of a judgment summons filed on 13th March, 2018 which was served on 23rd March, 2018. Six days later on 29th March, 2018 a copy of the judgment was served on Mr Mauricette.

[5] On 18th April, 2018 Mr Mauricette attended the first hearing of the judgment summons without legal representation and agreed to pay an initial sum of $1,500.00 towards the debt by 30th April, 2018 and to file an affidavit of means by 2nd May, 2018. He also requested time to retain Counsel and the matter was adjourned to 9th May, 2018 for further consideration.

[6] His set aside application which was filed on 2nd May, 2018 seeks the following orders:-

(1) that the default judgment entered on 21st November, 2017 be set aside;

(2) that the order made on 18th April, 2018 be set aside;

(3) that he be permitted to file his defence within 14 days of the date of a set aside order;

(4) in the alternative the default judgment be varied to a judgment in an amount to be decided by the Court;[1]

(5) that he be granted an extension of time to file and serve his affidavit of means;

(6) that the matter be adjourned for assessment of damages and the parties comply with Part 16 of the CPR.

The Law

[7] The applicable law is found at CPR 13.3. 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.*
>
> *(2) In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.*
>
> *(3) Where this Rule gives the court power to set aside a judgment, the court may instead vary it."*

[1] [Form 32 Order]

[8] It is well settled that the three conditions set out in sub-rule 13.3 (1) above are conjunctive. Failure to satisfy any one condition is fatal to the application[2] unless an applicant can come within sub-rule 13.3(2) by establishing exceptional circumstances. It has been said that what may or may not amount to an exceptional circumstance will vary from case to case depending on the facts of each case.[3]

Analysis

Was the application filed within a reasonably practicable time after finding out that judgment had been entered?

[9] Mr Mauricette deposed that as soon as he was served with the judgment he hastened to gather funds to pay for legal advice. At that time his financial situation was so dire that he was unable to meet his regular day to day expenses. It took some 5 weeks to secure sufficient funds and having done so by 30th April, 2018 he retained Counsel and had his first consultation on the same day. Counsel acted promptly and the application was filed two days later. He says that filing the application some 4 - 5 weeks after receiving notice of the judgment is not unreasonable, in light of his circumstances.

[10] Counsel for Mr Mauricette, Mrs Shervon Pierre told the Court that time starts to run from the date on which Mr Mauricette was served with the judgment which is 29th March, 2018.[4] She referred the Court to the case of **Glen Guiste v New India Assurance Co. (T&T) Ltd**.[5] where the court acknowledged that a period of 20 - 22 days was not an unreasonable lapse of time. She submits that consideration should be given to Mr Mauricette's inability to understand and appreciate the effect of the documents served on him, but more so that impecuniosity had left him unable to retain counsel sooner.

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[2] Kendricks Thomas v RBTT Ltd Grenada Civil Appeal No. 3 of 2005

[3] 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); 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)

[4] Normandi Investments Co Ltd v Royston Andrew DOMHCV2015/0090

[5] SLUHCV2016/0171 delivered on 1st March, 2017, unreported

[11] In response Counsel for CML Ms Mertle John stated that Mr Mauricette had a duty to accord sufficient importance to the claim, the default judgment and the rules of the court. While the authorities require that the Court examines the circumstances of each case to determine what a reasonably practicable time is, it is important to remember that one of the overriding objectives of the CPR is to deal with cases expeditiously. She submits that Mr Mauricette had knowledge of the debt from as early as April 2017 when a demand was issued, then in October 2017 when the claim was served; and again in March 2018 when the default judgment was served. His conduct in response to the claim and the judgment was unhurried and characterized by indifference, because he took no steps after receiving any of the documents. He attended the hearing of the judgment summons and gave certain undertakings to the Court which he failed to keep. He has provided no evidence to substantiate the true state of his finances and the Court is unable to assess whether he is indeed impecunious. Against this backdrop she argues that 5 weeks should not be considered reasonable. She reminded the Court that periods of 20–23 days are generally accepted as reasonable however 34 days in this case is in excess of the generally accepted period.

[12] I accept that CPR 13.3(1) (a) requires a judgment debtor who has knowledge of a judgment to act promptly in challenging it, because the opportunity to defend the claim on the merits has already been lost and the judgment debtor is now seeking to deny the judgment creditor of the benefit of the regularly obtained judgment. Apart from considerations of disadvantage to the judgment creditor the sentiments expressed in **Martin v Chow** are instructive, where it was siad that :-

> *"'Courts are today loath to drive litigants from the Judgment seat without affording them, within reason, an opportunity to fully ventilate their cause; but, at the same time, the courts must, of necessity, seek to balance this against their paramount duty to insist upon observance of the rules, or otherwise there would be 'no timetable for the conduct of litigation……Each case must be looked at on its own particular facts and the discretion must be exercised in relation to those particular facts.[6]"*

[6] (1985) 34 WIR 379 at page 385-386

[13] It is correct to say that when considering promptitude the Court is required to compute the length of time which has elapsed from the date of service of the judgment. Here the judgment was served on 29th March and the application filed on 2nd May, which amounts to 34 days after service. The authorities[7] suggest that periods extending up to 21 days, in the ordinary course, would generally be considered reasonable. The reasons advanced by Mr Mauricette for the lapse of time were his state of penury and ignorance of the legal process. The Court must be in a position to ascertain the truthfulness of these assertions from the evidence. While Mr Mauricette has said that he was having difficulty meeting his financial obligations, he has not provided any cogent evidence from which the Court could glean the true state of his finances or the reasons for the purported financial difficulties. He indicated that he was incurring business and personal expenses, yet he provided no information on his earnings for the period in question.

[14] I am not persuaded that impecuniosity or ignorance played a crucial role in the time lapse of 34 days and find no reason to depart from the generally accepted period. I therefore conclude that 34 days in the circumstances of this case is inordinate and CPR 13.3(1)(a) was not satisfied.

Is there a good explanation for the delay in filing acknowledgment of service or defence?

[15] On this issue Mr Mauricette deposed that when he received the claim he was unsure of how to deal with it and intended to consult his attorney. He did not read it in entirety and immediately took steps to schedule an appointment. Because of his attorney's extremely busy schedule he was unable to secure a meeting within a reasonable time. Shortly thereafter his financial circumstances worsened, and he could not afford to pay for legal representation.

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

[16] He deposed that his main source of income is from building contracts, which is contingent upon his ability to secure such contracts. There are "slow periods" when he does not earn any income, as was the case when he received the claim.

[17] He deposed further that he was also being pursued by his bank for outstanding mortgage payments and exhibited a draft copy of a claim form dated 19th April, 2017 from his banker's attorney, as a threat of legal action. Because of this, he says he was forced to divert his efforts towards saving his family home and surviving from day to day. He gave his monthly expenses as $6,120.00 for personal spending and $23,970.00 for business overheads[8]. He said he had no knowledge of the availability of legal aid and was only able to secure funds some 6 months after the claim was served.

[18] He averred that he was not indifferent to the claim but was completely ignorant of the need to read through the documents. He did not know what was meant by acknowledgment of service, was not aware of deadlines for filing the relevant documents and did not appreciate the adverse effect of not responding to the claim. He assumed that he was obliged to retain his own attorney and was unaware that he could have contacted CML or its attorney to discuss and resolve the claim.

[19] Mrs Pierre in support stated that the Court need only be satisfied that Mr Mauricette has given a good explanation for his failure to file an acknowledgment of service or defence.[9] It is only if the explanation connotes real or substantial fault on his part, would it not amount to a good explanation for the breach.[10] A good explanation is an account of what has happened since the proceedings were served which satisfies the Court that the reason for the breach is something more than mere indifference to whether or not judgment is obtained. In that regard the explanation may be banal and yet good for the purposes of the CPR13.3 (1)(b).[11]

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[8] See para 11 of Affidavit filed on 30th May, 2018
[9] C.A.R.E. Nevis Inc v The Nevis Housing and Land Development Corporation - NEVHC2016/0066
[10] The Attorney General v Universal Projects Limited [2011] UKPC 37
[11] Interco Beteiligungs AG v Sylmond Trading Inc - BVICM 120 of 2012 - delivered 9th May, 2014

[20] She maintained that he acted promptly to secure legal advice by taking steps to contact his former attorney. Although the claim form contains notes to a defendant, a lay person may not be aware of it and he has admitted that he did not read the entire document because he intended to seek legal advice. She made the point that the extent of his monthly obligations showed that he was not in a position to afford legal representation and the threat of legal action by his bank supports this contention. She surmised that it was unreasonable to expect that a defendant who can barely meet daily expenses would have taken steps to secure an attorney and the fact that he continued in business does not mean that he was able to divert funds to defend the claim. Further, considering that he did not understand the documents it was unreasonable to expect that he would have been able to take the necessary actions on his own. Mrs Pierre urged the Court to find that the reasons advanced albeit banal, were sufficient to amount to a good explanation for the delay.

[21] In response Ms John stated that there was ample time to secure legal representation from the time the claim was served in October 2017. When Mr Mauricette learnt that his attorney was busy and could not meet with him, he took no further steps to engage another attorney. Such conduct shows that he was tardy and apathetic in attending to the claim and he chose instead to blame the failure on the unavailability of his attorney. Considering the magnitude of the claim such response could not be considered proportional or appropriate.

[22] She submits further that Mr Mauricette could have attempted to answer the claim himself by filing the relevant documents which accompanied the claim form. These documents are designed to facilitate a layperson and capable of being completed and filed without the assistance of an attorney. The notes to defendant, served along with the claim, provided clear instructions on how to proceed and gave fair warning of the consequences for failure to take the necessary steps. It clearly stated that judgment may be entered without further notice. He failed to comply with these instructions, has not deposed that he is illiterate or otherwise unable to read and complete the forms on his own and it was only at the first hearing of the judgment summons that he requested time to retain an attorney.

[23] Ms John further contends that aside from bald assertions of impecuniosity Mr Mauricette has not provided any evidence which satisfactorily proves his means. He has not furnished any bank statements or information on his cash flow. He failed to file the affidavit of means ordered by the Court and instead seeks an extension of time to file a defence almost 7 months after the claim was served. The expenses he disclosed shows that he continued to transact business, with wage payments being the largest item of expenditure. She opined that given the magnitude of the claim he ought to have made the sacrifice to divert some funds to meet legal expenses, if he was really interested in defending it. Further if he was incompetent to take action on his own he ought to have taken the steps expected of a reasonable man by seeking legal representation promptly. She submitted that the draft claim form threatening legal action by his banker only serves to confirm that he had other debt and perhaps had a propensity for non-payment of his debts.

[24] She referred the court to the case of **Harold Simon v Carol Henry et al**[12] where the Court of Appeal refused an application for leave to extend the time to file an appeal on the basis that the reason for delay was a bare assertion of the appellant's temporary impecunious state. Singh JA writing for the court stated:-

> *"I have already set out in this judgment the applicant's reason for the delay, that is, his temporary impecunious state. In my view, this assertion of the applicant without more is insufficient to establish an acceptable reason for the delay. This assertion is really the conclusion that this Court should be asked to reach based on evidence of sufficient material in the applicant's affidavit as to his financial circumstances. The applicant's affidavit disclosed no more than this bare assertion*."

[25] In concluding this point Ms John expressed that when Mr Mauricette finally retained counsel CML had already exercised its legal right to secure judgment and had taken steps to enforce it. He attended the first hearing without legal representation and gave undertakings to the court to make an initial payment and to file an affidavit of means. By

[12] Civil Appeal No. 1 of 1995

these actions he demonstrated that he did not intend to take any steps to comply with the rules or defend the claim. He neglected to retain counsel to assist with the claim or to take whatever steps he could on his own, which connotes substantial and inexcusable fault on his part. To deny CML its judgment at this time would be nothing more than relieving him of the consequences of his wrongdoing while CLM suffers further deprivation of the sums owed.

[26] Mrs Pierre attempted to distinguish the **Harold Simon** case on the premise that it concerned an application for leave to extend the time to file an appeal and urged the Court to look instead to **Graham Thomas v Wilson Christian**[13] which concerned a set aside application where a default judgment was set aside on the basis of the applicant's impecuniosity. I note here that the factors which a court is required to consider on an application for extension of time to file an appeal (length of delay, reason for delay, chances of success and degree of prejudice) are very similar to those stipulated in CPR13.3(1). Further the court in **Greaham Thomas** appeared to have been satisfied from the evidence that the applicant's financial incapacity was genuine.

[27] The Court of Appeal in **Harold Simon** applying dicta from **Evelyn v Williams**[14] also said :-

> *"……..., it is not sufficient for an applicant to make a bare statement that he was financially embarrassed…… He must set out in his affidavit sufficient material to satisfy the court of his financial circumstances and that they were such as to constitute such an exceptional circumstance as entitles him to ask the indulgence of the court and that he may be relieved of the legal bar which arises under the rules by lapse of time……..First of all, circumstances which create financial embarrassment are in the personal knowledge of the applicant and it must, therefore, be for him to allege and prove them; secondly, it is the duty of the applicant to satisfy the court that his allegation is correct and for that reason, as I have said before, it is necessary for him to set out a sufficiency of material."*

[13] ANUHCV 2011/0629 [delivered on 13th July 2012, unreported
[14] *(1962) 4 WIR 265 at page 266*

[28] I am guided by these authorities and accept that an applicant who relies on impecuniosity as an explanation for delay has a duty to set out sufficient facts to enable the Court to evaluate the truthfulness of the assertion. This rule is of general application irrespective of the nature of the application.[15]

[29] In my opinion it is insufficient for Mr Mauricette to simply say that a slow period in the construction industry brought him to a state of penury. Being pursued by his bank for non-payment of a loan is also not a good explanation. I agree with Ms John that cogent evidence in relation to his means should have been provided, to facilitate the Court's inquiry into the veracity of the assertion. A reasonable inference to be drawn from the expenses he disclosed is that he had in fact some level of financial resources at his disposal. It was his responsibility to arrange his affairs during thriving periods of business, so as to meet his obligations during slow periods. It was also his responsibility to leverage whatever funds he had in hand to attend to the claim in a timely manner. That he failed to do so can only be attributed to his own fault.

[30] The authorities clearly state that an assertion of impecuniosity with insufficient evidence to prove it, does not amount to a good explanation. Mr Mauricette has not established the plea of impecuniosity, neither has he demonstrated that did not understand the nature of the documents he received, or the effect of his failure to act. Consequently, the requirement of CPR13.3(1)(b) was not met.

Is there a real prospect of successfully defending the claim?

[31] In order to satisfy this limb of the sub-rule the draft defence put forward by Mr Mauricette must amount to more than an arguable case. In that regard the Court is required to examine all the evidence proffered to determine whether there is a real, as opposed to fanciful prospect of succeeding at defending the claim.[16]

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[15] See also *Hing v Hing* (1978) 25 WIR 39, Aggraram Maharaj v Dhanraj Jagroo And Another (1985) 37 WIR 398

[16] Swain v Hilman [2001] 1 ALL ER 91; St Kitts Urban Development Corporation Limited v The Marina Village Limited SKBHCV2014/0150 - delivered on 18th March 2015, unreported; The Marina Village Limited v St. Kitts Urban Development Corporation Limited SKBHCVAP2015/0012 delivered 19th May 2016, unreported

[32] His draft defence in summary avers that (i) Mauricette's Construction Company Limited which is owned and managed by Mr Mauricette may be the proper party to the claim because the registration number for that company was inserted on the credit application form from which the debt flowed, thus he may not be personally liable for the debts; (ii) discussions were held with the Credit Comptroller of CML and it was agreed that CML would review the amounts claimed; (iii) a copy of the agreement which forms the basis of the claim was not provided; (iv) the claim which is for a specified sum on money is supported by an unsigned, unstamped, word/excel spreadsheet without any proper verification such as invoices or audited statements; and (v) based on monies already paid to CML, the balance owed whether by him personally or by his company is approximately $125,000.00.

[33] Mr Mauricette deposed that the documents relied on by CML referred to him and were signed by him because CML would have had to deal with him as a representative of his company. The registration number of his company was inserted at item 5 of the form as 164/1999 and that information would not have been required for an application in his personal capacity. In support he provided an undated online e-Registry search sheet for a company called "David Mauricette Construction Company Limited No:1999/ C164[17]. He said further that in 2016 he signed an audit "Confirmation Request of Accounts Receivable" on behalf of CML, which confirmed that the sum of $312,269.43 was owed by his company as at 31st December, 2015 thus the liability is that of the company.

[34] He stated that when he received the initial demand letter he immediately contacted CML's Credit Comptroller to query the amount. She agreed to review the relevant documents but that review remained pending up to the time that the claim was filed.

[35] Mrs Pierre posited that from all appearances no formal contract was executed and the application form was the basis for the credit facility granted to Mr Mauricette. It is a simplistic form which captures basic details of the applicant and has no credit limit. Thus it was not surprising that no express reference was made to Mr Mauricette as director of his

[17] See Exhibit "DM2".

company. She says the form is inadequate as the document which creates contractual relations between the parties, on which credit was extended for substantial sums over several years. In any event the form clearly reflects the registration number of Mr Mauricette's company which corresponds to the information in the audit confirmation letter produced by CML and together they show that the debt belongs to the company.

[36] Counsel maintained that the application form and the audit confirmation letter were signed by Mr Mauricette on behalf of the company and relied on sections 22 and 23 of the Companies Act[18] in support of her argument that a contract made on behalf of a company is effective in law and binds the company and the other party to the contract. Further that a bill of exchange or promissory note is presumed to be made, accepted or endorsed on behalf of a company if made or expressed to be made on behalf or on account of the company.

[37] Mrs Pierre argued further that a strong defence exists with respect to the quantum of the debt because apart from an unverified statement attached to the claim form CML has failed to provide the relevant records to substantiate the amounts claimed. In addition Mr Mauricette never agreed to a 12% late payment charge and the judgment comprises of compound interest which is prohibited by Article 1009 of the Civil Code[19]. These matters, she says, should be adjudicated and not conceded by default. In that regard CML would not be prejudiced by extending the time to file a defence since interest will continue to accrue on the final sum owed. In the alternative she asked that the judgment be varied to an amount to be assessed by the Court.

[38] CML in response deposed that Mr Mauricette was already a customer when he contracted the credit facility in November 2011. He completed their "Individual Credit Application Form"[20] in his name and signed it in his personal capacity. At all material times he negotiated and transacted business with CML in his personal capacity. All invoices which

[18] Cap 13.01 of the Revised Edition of the Laws of Saint Lucia
[19] Cap 4.01 of the Revised Edition of the Laws of Saint Lucia
[20] Exhibit CML2

flowed from the facility were in his name and four such invoices have been produced to show that the goods were sold to him and not to a company[21].

[39] CML further contends that when Mr Mauricette signed the audit confirmation letter in 2016 he accepted that the debt was owed to CML and it was the first and only occasion where he stated that he was the Manager of a company called David Mauricette's Construction Company Limited[22]. The debt is supported by statement of sales generated from CML's computer system for account number 1218235 which is Mr Marricette's account.[23] Counsel submits that pursuant to Article 1009A of the Civil Code a party is permitted to claim interest in excess of the statutory rate, once there is agreement to that effect. The application form contained a clear provision for incurring a late payment charge at 12% per annum calculated daily on invoices overdue by 30 days, which is captured on page 2 of the form.

[40] Ms John maintained that the signatory to an agreement is the party who is obligated to discharge any liabilities arising from it. She relied on the case of **Hamid (t/a Hamid Properties) v Francis Bradshaw Partnership** to support this proposition. In that case a court at first instance addressed the issue of identification of parties to a contract in circumstances where the defendant claimed that the claimant's company was the proper party to a contract because the claimant had signed an engagement letter on behalf of his company. The claimant's signature appeared at the foot of the letter in the conventional place immediately above his printed name. The court held inter alia that the claimant and not his company was the party who engaged the defendant because (i) the claimant signed the letter without making it clear that he was not contracting personally and (ii) where the issue is whether someone contracted personally or as agent, there is not to be imputed to the other party knowledge which he did not have.

[21] See Exhibit CML3
[22] See Exhibit CML4
[23] See Exhibits CML 1 & CML2

[41] On appeal the appellate court upheld the trial judge's decision and came to the following conclusions[24]:-(i) that the claimant's signature at the foot of the letter is, as it were, his seal upon the contract and he therefore became a contracting party unless he qualified his signature or otherwise made it plain that the contract did not bind him personally, (ii) the claimant did not effectively qualify his signature or make it plain that the contract did not bind him personally and the mere reference to a trade name, without any indication that this was the trading name of his limited company was not an effective qualification, and (iii) the test must be the same whether the individual is contending (a) that he was the principal or (b) that he was signing as agent or as company officer, as in many cases where this issue arises the individual is arguing that he should escape contractual liability by sheltering behind the company.

[42] I have given due consideration to the contending arguments. The application form was headed "Individual Credit Application" and was completed in Mr Mauricette's sole name. It contained other data which included an NIC[25] number, addresses and telephone numbers. It was signed by him without any qualification. Save for the inclusion of what appears to be a company number at item 5 of the form there is nothing to confirm that it was completed on behalf of a company. No evidence was provided to establish a nexus between Mr Mauricette and Mauricette's Construction Co. Ltd or David Mauricette's Construction Company Limited. He did not provide basic corporate information or at the very least a copy of the latest filed annual returns to confirm that the company number referenced on the application form belonged to a company owned by him, as a shareholder. Instead he relies on a search sheet which is devoid of the critical information required to advance the defence he relies on. He could also have provided a certificate of good standing from the Registry of Companies to confirm the status of the company but that was not done.

[43] No documentation was provided from which the Court could deduce any business dealings between CML and the company which Mr Mauricette says he owns. There was no evidence to show that Mr Mauricette at any time informed or explained to CML that he was contracting on behalf of a company and the invoices produced by CML were billed in his

[24] See para 64 – 66 of the judgment
[25] National Insurance Corporation

sole name. The audit confirmation letter also does not assist, because it was not in my view a variation or addendum to the application form which contained the terms of the obligations to CML. I have examined the sections of the Companies Act referred to by Counsel and do not see how these sections avail, as the application form was never made or expressed to have been made on behalf of a company.

[44] As explained in **Hamid (t/a Hamid Properties** when Mr Mauricette signed the form without qualification that was his seal upon the contract and he became the contracting party. The mere insertion of a company number on the form, with no indication of its purpose could not have been an effective qualification. Consequently the evidence clearly supports that Mr Mauricette is the contracting party and liable for the debts.

[45] The disparity in the sums claimed by CML and what in Mr Mauricette belief is owed could have been resolved by a formal request for further and better particulars under Part 34 of the CPR but that was never done. In the end result if he felt that he had a good chance of refuting the sum claimed he ought to have filed his defence in time.

[46] On the issue of compound interest CML's claim was for a principal sum of $362,853.93 plus interest of $65,313.54 at the rate of 12% per annum from 18th February, 2016 to 31st August, 2017. Judgment was entered by the court office for the principal balance only, with interest accruing at 12% from 18th February, 2016 as stated in paragraph 3 above. I accept that this rate was agreed between the parties as one of the conditions of the credit facility and was clearly stated on the application form as a late payment charge.

[47] Article 1008 of the Civil Code stipulates that damages resulting from the late payment of money owed shall consist of interest at the rate legally agreed by the parties. In the circumstances I am satisfied that judgment was correctly entered with interest properly applied to the principal sum only, at the agreed rate of 12% per annum, from 18th February 2016 until payment. There was therefore no basis on which the Court could consider varying the judgment.

[48] For the above reasons I considered the draft defence to be tenuous at best, thus CPR 13.3 (1) (c) was not satisfied.

Are there any exceptional circumstances to warrant setting aside the judgment?

[49] I agreed with Ms John that on the strength of the pronouncements in **Carl Baynes v Ed Mayer**[26] CPR 13.3 (2) is not a cure-all for failures under 13.3(1). Unless the circumstances can be said to be truly exceptional the rule does not avail. It must be remembered that Mr Mauricette has lost the right to attack the merits of the claim by failing to make use of his opportunity to defend the claim. The default judgment was the price he paid for such failure.[27]

[50] In the absence of a credible defence there was no need to give further consideration to this issue and the application failed in all respects.

The Judgment Summons

[51] It has become necessary to take a closer look at the judgment summons filed on 13th March, 2018 if only to determine the fate of the order of 18th April, 2018 which flowed from it. That order was stayed pending determination of this application.

[52] A judgment summons is one method of enforcing a judgment or final order of the court. The judgment debtor is summoned to appear, to show cause why he should not be committed to prison, on the premise that he is aware of the judgment and has taken no steps to satisfy it. There is no dispute that the judgment summons was served on Mr Mauricette before the judgment itself was served.

[53] The Court of Appeal ruling in **Anison Rabess et al v National Bank of Dominica**[28] in my view remains good law on this point. It is that a judgment creditor should not commence enforcement proceedings unless the judgment has been served on the judgment debtor

[26] ANUHCVAP2015/0026 - delivered 30th May 2016, unreported

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

[28] HCVAP2011/030 delivered on 13th July, 2012 at para 7 & 12 of the Judgment

and proof of service filed. Here the court found that enforcement proceedings were "***defective, null, void and of no effect***" in part because the judgment had not been served on the judgment debtors.

[54] Applying this reasoning to the present case I am prepared to hold that the judgment summons was a nullity, having been filed prior to service of the judgment. Accordingly, the order made on 18th April, 2018 which flowed from it should be set aside and I will so order. CML is at liberty to file fresh enforcement proceedings, having since served the judgment and filed proof of service.

Conclusion

[55] I therefore make the following orders:-

1. The defendant's application is dismissed.
2. The order of the Court made on 18th April, 2018 is set aside.
3. Cost is awarded to the claimant in the sum of $1,500.00.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar