EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2018/0522

BETWEEN:

JP SERVICES CORPORATION

Claimant/ Respondent

And

HARLEQUIN BOUTIQUE HOTEL LIMITED

Defendant/ Applicant

Before:

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

Appearances:

Mr. Deale Lee for the Claimant/ Respondent
Mr. Garth Patterson QC with Mr. Mark Maragh for the Defendant/ Applicant

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2019: September 23; 30

DECISION IN CHAMBERS

[1] **ST ROSE-ALBERTINI, J. [Ag]:** Harlequin Boutique Hotel Ltd ("HBH"), by its Joint Liquidators, filed an application on 20th August 2019 seeking to set aside a default judgment obtained by JP Services Corporation ("JPS") by order dated 14th November 2018 ("the default judgment"). The claim which was filed on 23rd October, 2018 is premised on

alleged breach of a management contract in which JPS undertook to operate and manage a hotel property owned by HBH. The default judgment is for "*the sum of $14,364,000.00 with interest at the rate of 6% percent per annum from 8th December, 2017 to date of payment and costs in the sum of $2,850.00.*"

[2] The grounds of the application are that HBH has satisfied the requirements of rule 13.3(1) of the Civil Procedure Rules 2000 ("CPR") and in any event, there are exceptional circumstances which justify setting aside the default judgment in accordance with CPR 13.3(2). HBH's evidence is contained in the affidavit of Ms. Lisa Taylor, one of the Joint Liquidators, filed on 20th August 2019. JPS objects to the application on the grounds that none of the conditions for setting aside a default judgment have been satisfied. JPS' evidence is contained in the affidavit of Mr. Jeffery Coyne filed on 6th September 2019.

The Law

[3] CPR13.3 states:

> ***"Cases where the court may set aside or vary default judgment***
> *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.*
>
> **Rule 26.1(3) enables the court to attach conditions to any order.*

Applications to vary or set aside judgment – procedure
13.4
(1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence."

Analysis

[4] It is well established that the conditions of CPR13.3(1) are conjunctive, and all three limbs **must** be satisfied before the Court may set aside a default judgment.[1]

Did HBH apply to the court as soon as reasonably practicable after finding out that judgment had been entered?

[5] Ms. Taylor in her affidavit in support of the application says that the Liquidators became aware of the default judgment on 27th December 2018 after they were appointed as joint provisional liquidators. At that stage they did not have the opportunity to investigate the default judgment or the claim because they were focusing HBH's limited resources on defending an application to discharge their appointment as provisional liquidators. In addition, there was the intervening delay of the Christmas holidays. Once that application was dismissed and they were appointed as Joint Liquidators on 14th January, 2019, they commenced inquiries into the default judgment as they were concerned about its timing and quantum. They sought legal advice as to the validity and effect of the claim and the default judgment in the months following. In the interim, they also engaged JPS with a view to settling the matter out of court, in keeping with the Liquidators' duty to preserve HBH's limited assets, so as to maximize distribution to creditors. Ms. Taylor says the negotiations proved futile, as Counsel for JPS by letter dated 11th June, 2019 indicated that JPS was

[1] Kenrick Thomas v RBTT Bank Caribbean Limited [Formerly Caribbean Banking Limited] Civil Appeal No. 3 of 2005 (delivered October 13, 2005); Lystra Omar Ewen (as Personal Representative of the Estate of Sheba Jones, deceased) v Charles Sylvester Liddie AXAHCV 0042/2007 (delivered 30th October 2010), paragraph 43.

unwilling to compromise or set aside the default judgment. The Liquidators, still believing that they could not in good faith agree to use HBH's limited assets to satisfy the default judgment in priority and to the prejudice of unsecured creditors, obtained further legal advice and gave instructions to file this application. Ms. Taylor says that in these circumstances the application was made as soon as reasonably practicable.

[6] JPS in response says that the Liquidators of HBH have been aware of the claim for almost 10 months and have only now sought to challenge it. They have delayed until the last minute to bring this application, therefore the first condition of CPR 13.3(1) has not been satisfied.

Discussion

[7] The rules do not specify a timeframe which constitutes 'as soon as reasonably practicable' and it is for the Court to examine the circumstances of the case to determine whether a defendant has satisfied this condition.[2] The burden of proof falls to the applicant.[3] Reasonableness includes not only the length of delay but the conduct of a defendant once he has found out about the existence of the judgment.[4]

[8] It is not disputed that 27th December 2018 is the date on which, the joint provisional liquidators, first became aware of the judgment. This was admitted by Ms. Taylor and is the relevant date from which the court ought to calculate promptitude of the application.[5] From that date to the date of filing the application on 20th August 2019, about 33 weeks or 8 months had elapsed. The courts in this jurisdiction generally accept that such period is

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[2] Ruth James and Henry James v Phillip McDougall and Carol Attidore Claim No.: DOMHCV2016/0259 (delivered 21st June 2017), paragraph 30; Lystra Omar Ewen (as Personal Representative of the Estate of Sheba Jones, deceased) v Charles Sylvester Liddie Claim No.: AXAHCV 0042/2007 (delivered 30th October 2010) at paragraph 44.

[3] Linda (Lindy) Tamn (Dba Lindy Tamn Realty Listing) v The Fountain Beach and Tennis Club Limited Claim No. AXAHCV 0067/2009, paragraph 51.

[4] James et al v McDougal et al, paragraph 33; Ashandi Edwards (By his mother and next friend Alma Edwards) v Rholda Bhola and Lenore Bhola Claim No. GDAHCV2006/0587 (delivered 24th January 2012, unreported), paragraph 38.

[5] Linda (Lindy) Tamn (Dba Lindy Tamn Realty Listing) v The Fountain Beach and Tennis Club Limited Claim No. AXAHCV 0067/2009, paragraph 59.

inordinate. In **Lystra Omar Ewen v Charles Sylvester Liddie**[6], a period of 122 days (over 17 weeks) was considered unduly lengthy and failed to satisfy the threshold.

[9] I note that at the time judgment was entered on 14th November, 2019, provisional liquidators had not yet been appointed. However, they were so appointed on 20th November 2018 and as of that date would have had the capacity and duty to bring, defend or proceed with any action or other legal proceedings on behalf of HBH. On becoming aware of the default judgment on 27th December, 2018, they admit that due to limited resources, a decision was made to prioritize other litigation over inquiring into and applying to set it aside. They made efforts on 14th January 2019 but were unable to access documents relevant to the claim. They do not detail what these efforts were or the time it took to do so. Then they sought legal advice but do not say when they did so or when they received such advice. Instead of immediately filing the application to set aside, they proceeded to negotiate with JPS. On the evidence, their earliest and only written correspondence with JPS is dated 29th May 2019. It therefore took some 20 weeks from the date they became aware of the judgment to arrive at the stage of negotiation, to which JPS responded unfavorably. From the date of JPS's letter of refusal to compromise, the Liquidators took a further 12 weeks to file this application.

[10] In **James et al v McDougal et al**[7], the defendants took 17 days to file their application to set aside default judgment. Their evidence was that they made contact with their lawyer regarding their defence but they were informed that counsel was ill. Blenman J held that their affidavit was devoid of any explanation as to what transpired between the time of being served with the default judgment and making the application. They therefore failed to adduce any facts upon which the Court could properly decide whether or not their application was made as soon as was practicable and failed to meet the first obligation of CPR 13.3(1).

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[6] Claim No.: AXAHCV 0042/2007 (delivered 30th October 2010), paragraphs 46-47.
[7] Claim No.: DOMHCV2016/0259 (delivered 21st June 2017), paragraph 34.

[11] In **Linda Tamn v The Fountain Beach and Tennis Club Limited**[8], the defendant stated that he immediately caused the default judgment to be taken to his lawyer. It took 5 weeks between that time and the time at which the application was filed. The court held that this period of time for any application is a very long one as the sub-rule requires promptitude. Even making provision for the fact that the defendant resided abroad, a delay of 5 weeks was considered very long and outside of the time frame in which a court could properly conclude that a defendant has acted with promptitude to satisfy the sub-rule.

[12] In the cases cited above, where the length of delay was considerably less than the delay here, the courts did not accept the period of time or conduct as having satisfied CPR 13.3(1)(a). Here, the length of delay and the Liquidators' conduct does not display the sort of diligence required. It is only when JPS obtained a judicial hypothec, by registration of the judgment on 8th and 9th August, 2019 to gain the advantage of attachment of its judgment to the immovable properties of HBH, that the Liquidators sought to make this application. While it is generally accepted that limited financial resources of the liquidation estate ought to be safeguarded for the benefit of creditors and not wasted on unnecessary litigation, such expenditure is equally justified where it appears that a creditor may be attempting to gain an unfair advantage over other creditors, particularly after winding-up has commenced. The Liquidators took the deliberate decision to forgo filing the application, in favor of negotiating with JPS, even though they were alarmed by the timing and quantum of the judgment. In these circumstances they cannot be said to have applied as soon as reasonably practicable. It cannot be overemphasized that a defendant must act with promptitude after finding out that default judgment has been entered. The sub-rule has not been satisfied.

[13] As the conditions of CPR 13.3(1) are conjoint, failing to satisfy one condition is fatal to the application and there is no need to consider the other conditions. However, for completeness, all three are addressed.

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[8] Claim No. AXAHCV 0067/2009, paragraph 62.

Has HBH given a good explanation for its failure to file an acknowledgement of service?

[14] Ms. Taylor says as at 23rd October, 2018 when the claim was filed, the petition to wind up HBH had already been filed. The sole director Mr David Ames had effectively abandoned HBH some two years prior and the state of affairs of HBH was very poor. Acknowledging or defending the claim would largely have been for the benefit of the creditors. The Liquidators are therefore of the belief that the sole director of HBH as the only person who had the capacity to acknowledge the claim, had little motivation to do so, as he would have incurred this expense at a time when it was apparent that the company would be wound up.

[15] Mr. Coyne says that the Liquidators have not provided any explanation for HBH's failure to file an acknowledgement of service or defence, beyond their own speculation as to its sole director's motives and that is not a good explanation.

Discussion

[16] In considering what amounts to a good explanation for failure to file acknowledgment of service or defence, the Privy Council decision in **The Attorney General v Universal Projects Limited**[9] is instructive. There Lord Dyson stated:

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

[9] [2011] UKPC 37 at paragraph 23.

to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency."[10]

[17] A consistent approach to '*a good explanation'* was taken by the Court of Appeal in the case of **Marina Village Ltd v St. Kitts Urban Development Corporation[11]**, where the court found that the appellant by its own deliberate action determined not to ensure that there were adequate administrative arrangements in place to access correspondence sent to it in a timely manner; and therefore held that the appellant cannot rely on the consequences of its own deliberate action as a good explanation. Additionally, the Court of Appeal has on several occasions admonished that lack of diligence on the part of an attorney[12], secretarial incompetence[13], or inadvertence[14] are not good reasons for delay.[15]

[18] In **Sylmord Trade Inc v Inteco Beteiligungs AG**, the Court of Appeal did not interfere with the finding of the trial judge in the court below where that judge defined a good explanation in the context of CPR13.3(1)(a) as:-

> *"… an account of what has happened since the proceedings were served which satisfies the Court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix up, are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered."[16]*

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[10] Followed in Yates Associates Construction Co. Ltd. v Brian Quammie Claim No.: BVIHCVAP2014/0005 (delivered 5th May 2015), paragraph 15; Sylmord Trade Inc v Inteco Beteiligungs AG Claim No.: BVIHCMAP2013/0003 (delivered 24th March 2014), paragraph 23.

[11] Claim No.: SKBHCVAP2105/0012

[12] Rose v Rose, SLUHCVAP2003/0029, delivered 22nd September 2003; Casimir v Shillingford (1967) 10 WIR 269.

[13] Mills v John [1995] 3 OECS Law Reports 597; Anthony Clyne v The Guyana and Trinidad Mutual Insurance Company Limited Claim No.: GDAHCVAP2010/0011, delivered 5th May 2010.

[14] Vena Mc Dougal v Reno Romain, DOMHCVAP2008/0003, delivered 7th April 2008.

[15] Glen Guiste v New India Assurance Co. (T&T) Ltd. Claim No.: SLUHCV2016/0171

[16] Sylmord Trade Inc v Inteco Beteiligungs Claim No.: BVIHCMAP2013/0003 (delivered 24th March 2014), at paragraph 24.

[19] That definition appears to suggest a lower threshold than the definition of the Privy Council in **The Attorney General v Universal Projects**, which has generally been adopted by our Court of Appeal. In the circumstances, the definition of the Board in **The Attorney General v Universal Projects** is preferable.

[20] In my opinion, by any definition, HBH has failed to satisfy the requirement of a good explanation for failure to file an acknowledgement of service. The explanation given by the Liquidators is that the director of HBH was indifferent to what transpired with the claim, having already abandoned HBH and knowing that winding up was imminent. It means therefore that this explanation would fail even on the lower threshold of "*something other than mere indifference to the question whether or not the claimant obtains judgment*."

Does HBH have a real prospect of successfully defending the claim?

[21] Ms. Taylor's evidence on this point is that the quantum of the claim was for the alleged breach of an agreement, which had only existed for a little over 2 months or 10 weeks, at the date of termination. Under the agreement, JPS was to be paid 3% of the gross revenue and 7.5% of the gross operating profit for the fiscal year, therefore compensation was dependent on performance. The default judgment far exceeds HBH's gross revenue and operating profit for the ten week period and more so the portion to which JPS would have been entitled. In the circumstances the default judgment does not correspond to the actual loss suffered and the judgment sum even exceeds the value of the hotel property that JPS was contacted to manage. She says she has been advised and believes that the quantum of the default judgment amounts to a penalty, which would not be upheld if tested by a court. Further, the judgment sum is unjust and inequitable and HBH has a real prospect of successfully defending the claim.

[22] Counsel argued on behalf of HBH that there is a very real prospect of successfully defending the claim, as the value of the claim being $14,364,000.00 was calculated pursuant to a liquidated damages clause contained in the agreement and is disproportionate to any loss that JPS could have incurred for 2 months of service under the

contract. Counsel relied on the test laid down in **Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited**[17] where the court said *'[i]t will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach."* On that basis, counsel submitted that the liquidated damages clause is a penalty and is unenforceable.

[23] Mr. Coyne says the Liquidators have offered no legitimate defence to the claim. He says the default judgment is fair and appropriate as JPS has suffered significant loss and incurred expenses as a result of the breach of the agreement. He deposed that the tasks and investment by JPS to turn around the hotel was front loaded such that monies spent early would not be repaid for years. It was therefore important that the agreement was long term and required substantial compensation for breach. Expenditures included accounting system, draft budget, marketing plan, physical inspections and repairs. Funds were also advanced for salaries as well as to maintain water and electricity services. Despite repeated promises, the sole director never remitted funds for the benefit of the hotel as required under the agreement and JPS was never paid for its services or reimbursed the funds advanced. Staff members were taken away from other long term employment to fill positions under the agreement and JPS was required to maintain their employment for one year. Some of these persons could not readily regain employment after the termination. JPS itself turned away another project with a substantial monthly payment by a solvent party to devote time to the management agreement with HBH. Further, Mr. Coyne says the Liquidators have rejected proposals made by JPS with a view to compromise, which would allow distribution to all creditors and a prompt sale.

[24] Counsel for JPS submitted that the case of **Cavendish Square Holding BV v Talal El Makdessi**[18] is the modern and proper test for whether a liquidation clause is a penalty, which states:

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[17] [1915] A.C. 79.
[18] [2015] UKSC 67

"*The true test for a penalty was whether the impugned provision was a secondary obligation which imposed a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party could have no proper interest in simply punishing the defaulter. His interest was in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest would rarely exceed beyond compensation for the breach*."

[25] Counsel for JPS argued further that CPR 13.4(3) requires a draft defence to be exhibited to the affidavit in support and HBH has not complied with this provision. Without the draft defence, the Court is unable to address its mind to the issue of whether HBH has a real prospect of successfully defending the claim. Counsel relied on the case of **Fortune Foods Company Limited v Ian Calliste (Trading as Just Plastics)**[19], in which the defendant attached his draft defence to his notice of application but did not exhibit it to his affidavit. He made no reference to the draft defence in his affidavit in support. The court held that the defendant failed to comply with one of the procedural requirements for bringing the application. The procedural requirements in 13.4(2) and (3) are mandatory and any application under Rule 13.3 must adhere strictly to those requirements. As a result of this failure, the court was unable to determine whether under CPR 13.3(1)(c) the defendant had a real prospect of successfully defending the claim and that was fatal to the application.

[26] Counsel for HBH's response is that if the default judgment is set aside, there would be no need to file a defence, as the claim is now stayed by virtue of Section 394 of the Companies Act[20] (the Act") and could not proceed without the leave of the court. Rather, any claim and distribution to JPS should be addressed under the winding up procedure which has now overtaken the civil claim.

[27] I agree that the requirement of CPR13.4(3) to exhibit a draft defence is mandatory. It was therefore not open to HBH to determine that one was not relevant and not file it in breach

[19] Claim No. GDAHCV 2010/0105, at paragraphs 20-27.
[20] Cap 13.01 of the Revised Edition of the Laws of Saint Lucia

of the rules. The draft defence is in fact relevant to the Court's assessment of whether HBH has a real prospect of successfully defending the claim under CPR 13.3(1)(c).

[28] Nonetheless, Ms. Taylor's affidavit in support does set out the nature of the anticipated defence, which allows the Court some opportunity to consider it. JPS would also have been aware of the nature of the defence and be in a position to answer it.

[29] To satisfy CPR 13.3(1)(c), it has been said that the defendant's obligation is to show not merely an arguable defence but a real prospect of successfully defending the claim, since he seeks to deprive the claimant of a regular judgment, which has been validly obtained.[21] The Court of Appeal has held that satisfying this condition requires the defendant to show a real, as opposed to fanciful, prospect of success.[22] Ms. Taylor's evidence as to what HBH's defence would have been, had one been exhibited, suggests that HBH would have had a real prospect of successfully defending the claim, as the defence would have had merit on the basis of the **Dunlop Pneumatic Tyre Company case.**

[30] In the **Cavendish case**, the question is still whether the liquidation clause is proportionate to JPS' legitimate interest, which is either performance or an alternative to performance, and would rarely ever exceed reasonable compensation for the alleged breach. Applying this slightly more liberal test, it appears that HBH would still have had a real as opposed to fanciful prospect of successfully defending the claim or at the very least, convincing the Court that the judgment should be varied to an amount to be assessed by the Court.

[31] In the absence of a draft defence exhibited to the affidavit in clear disregard of the rules and having failed to satisfy the two earlier limbs of CPR13.3(1), a real prospect of successfully defending the claim would not assist HBH.

Has the HBH satisfied the court that there are exceptional circumstances to justify setting aside the default judgment?

[21] Alpine Bulk Transport Co v Saudi Eagle [1986] 2 Lloyds Rep. 221 at page 223; Edwards v Bhola et al, para 44.
[22] Sylmord Trade Inc v Inteco Beteiligungs AG, paragraph 35.

[32] The exceptional circumstance averred by Ms. Taylor is that the claim was filed, and default judgment obtained at a time when HBH was vulnerable to such actions. On 20th November 2018, an application was made to appoint provisional liquidators while the petition for winding up was pending. This was done in order to protect HBH against actions such as the JPS claim, by causing an automatic stay of such proceedings once provisional liquidators were appointed. However, unknown to the provisional liquidators, at the time of their appointment on 20th November, 2018, JPS' claim had already been filed and default judgment entered. Thus, the claim was filed after the commencement of winding up proceedings, but before liquidators could be appointed to safeguard HBH from incurring undefended liabilities, to the severe prejudice of HBH's creditors.

Discussion

[33] Notwithstanding that the defendant has failed to satisfy the three conditions under Rule 13.3(1), the Court may set the default judgment aside pursuant to Rule 13.3(2), if satisfied that there are exceptional circumstances which justify doing so.[23] On the authorities, an exceptional circumstance must be *"one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained."*[24] An exceptional circumstance contemplates the existence of circumstances which trump the requirement for fulfillment of the criteria in Rule 13.3(1) and requires a case by case inquiry.[25] Some context may be given by examining what the courts have generally accepted as exceptional circumstances.

[34] The leading authority is **Carl Baynes v Ed Meyer[26].** There, the appellant, Mr. Baynes, applied for and obtained a default judgment in a personal injury claim for which he sought damages against the respondent, Mr. Meyer. Mr. Baynes claimed he suffered injury and loss as a result of negligent driving by one Mr. Hernandez, as servant of Mr. Meyer of a motor vehicle said to be owned by Mr. Meyer. Mr. Meyer applied to set aside the default

[23] Public Works Corporation v Matthew Nelson
[24] Carl Baynes v Ed Meyer ANUHCVAP2015/0026 (delivered 30th May 2016, unreported), paragraph 26.
[25] Public Works Corporation v Matthew Nelson DOMHCVAP2016/0007 (delivered 29th May 2017); paragraph 23.
[26] Supra note 22

judgment pursuant to CPR 13.3(1) and CPR 13.3(2), which was granted by the Master. Mr Baynes appealed the Master's decision.

[35] Her Ladyship Periera CJ writing for the court ruled inter alia that:- (i) an exceptional circumstance must be one that provides a compelling reason why the defendant should be permitted to defend the proceedings; (ii) it does not equate to showing realistic prospects of success under CPR 13.3(1)(c); (iii) it is not to be regarded as a panacea for covering all things which have failed under CPR 13.3(1); (iv) the rule 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). Some examples were given of such circumstances and included (a) that a claim is not maintainable as a matter of law, or (b) it is one which is bound to fail, or (c) there is a high degree of certainty that the claim would fail, or (d) the defence being put forward was a "knock out point" in relation to the claim, or (e) where the remedy sought or granted was not one available to the claimant. That list was not intended to be exhaustive. She found that even if the car might not have been owned by Mr. Meyer at the time of the accident that did not constitute an exceptional circumstance.

[36] Mr. Meyer appealed this decision to the Privy Council[27] and the Board reiterated and confirmed the statement of the principle by Her Ladyship, in the court below, stating:-

> *"The Board is prepared to accept that it established that Mr Meyer had a defence to the claim for breach of statutory duty which had a realistic prospect of success, but it certainly did not amount to a knockout blow or constitute a compelling reason to set the default judgment aside. What is more, it was, at best, only peripherally relevant to the claim based upon vicarious liability and either claim was sufficient to provide a basis for the default judgment.*[28]

[27] Meyers v Baynes [2019] UKPC 3
[28] Meyers v Baynes [2019] UKPC 3, at paragraph 19

[37] In **Public Works Corporation v Matthew Nelson**[29] the Court of Appeal also found that the existence of an exceptional circumstance under CPR 13.3(2) trumps the requirement to fulfill the criteria in CPR 13.3(1) and highlighted that:-

> *"……..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 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."*

[38] In **Sylmord Trade Inc v Inteco Beteiligungs AG**, the appellant had argued in the court below that the filing of the claim in breach of the arbitration clause was an exceptional circumstance justifying the setting aside of the default judgment. The Court of Appeal upheld the learned trial judge's rejection of this argument on the basis that the filing of claims arising from contracts with compulsory arbitration clauses, far from being an exceptional circumstance, is a usual occurrence which is normally addressed by the aggrieved party seeking a stay of the proceedings pending recourse to arbitration.

[39] In **Elvis Wyre (Personal Legal Representative of the Estate of Arnold Wyre) and another v Alvin G Edwards and another**[30], Webster JA found that there were exceptional circumstances where the default judgment gave judgment to the 2nd

[29] Paragraphs 23-24
[30] ANUHCVAP2014/0008

respondent even though he had not applied for judgment. He held that as a matter of principle, a default judgment that is entered on the application of one of several claimants granting relief in respect of that claimant should not include relief in respect of another claimant who is seeking separate relief on the pleadings but who has not applied for judgment. As such, the claims of the 2nd respondent for declarations that he owns shares in the Company and that the Company is indebted to him was divisible from those of the 1st respondent. The portions of the default judgment declaring his rights to the shares and the monies should not have been entered on the 1st respondent's application for judgment.

[40] The case of **Marina Village Limited v St. Kitts Urban Development Corporation Limited** was relied upon by counsel for HBH to support the contention that there are exceptional circumstances in the present case. In particular, great reliance was placed on dictum of Thom JA, where in concluding that there were no exceptional circumstances, she commented *"this is not a case of unjust enrichment on the part of the government or a situation where a grave injustice would result if the default judgment is not set aside."* Counsel for HBH reasoned that this dictum suggests where there would be unjust enrichment or grave injustice if the default judgment is not set aside, this constitutes an exceptional circumstance justifying setting aside default judgment. I do not agree with the analogy, as such significance cannot be attributed to that single statement in the context in which it was made. Case law makes clear that such a finding could not be applied as a general criterion in any event.

[41] Applying the authorities to the facts of this case, the mere vulnerability of HBH at the time the claim was filed and judgment was obtained, and the prejudice to the creditors would not amount to exceptional circumstances for the purposes of CPR 13.3(2). It only serves to highlight that HBH ought to have been diligent and timeous in acknowledging and defending the claim and failing that, in seeking to set aside the default judgment.

[42] HBH's submissions did not end there. Ms. Taylor deposed that the claim was filed, and default judgment obtained after the commencement of winding up and is therefore invalid for the purposes of the Act. This is worth investigating in the context of the relevant

provisions of the Act to determine whether it creates an exceptional circumstance. The relevant timeline is as follows:-

i) the petition for the winding-up of the Company was filed on 5th October 2018;
ii) on 23rd October 2018, JPS commenced the action and on 14th November 2018, judgment in default of acknowledgment of service was entered against HBH in favour of JPS;
iii) on 20th November 2018 the provisional liquidators were appointed; and
iv) on 14th January 2019, the Company was ordered to be compulsorily wound up and the joint liquidators were appointed.

[43] The question therefore is whether the filing of the action and obtaining the default judgment is a nullity under the provisions of the Act or the default judgment was not a remedy available in law to JPS at the time it was obtained. If that can be successfully argued, the cases discussed above support a finding that such circumstances ought to be considered exceptional, to warrant setting aside the default judgment.

[44] The Act provides that there are certain actions that cannot be taken once winding up has commenced. Sections 390 and 391 for example, provide as follows:-

> ***"390. Avoidance of dispositions of property, etc. after commencement of winding-up***
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> *In a winding-up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, is, unless the court otherwise orders, void.*
>
> ***391. Avoidance of attachments, etc***
>
> *Where any company is being wound up by the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up is void.*

[45] Section 392(2) of the Companies Act provides that:-

> *"(1) ……..*
> *"(2) In any other case, the winding-up of a company by the court is deemed to commence at the time of the presentation of the petition for winding-up."*

[46] I do not consider the filing of the claim and obtaining judgment in default is prohibited by any of these sections. It cannot be said that obtaining a default judgment constitutes a disposition of property or in and of itself constitutes attachment, sequestration, execution, or distress against the estate or effects of HBH. It is the law that entry of judgment ordering payment of a specified sum of money does not immediately attach to immovable property and only takes effect as an attachment when it is registered at the Office of Deeds and Mortgages.[31] The default judgment itself is therefore not an automatic attachment to immovable property, until it is registered.

[47] Section 394, in similar vein, provides:-

> ***"394. Actions stayed on winding-up order***
>
> ***When a winding-up order has been made, or a provisional liquidator has been appointed,*** *no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose." [Emphasis added]*

[48] The important distinction in section 394 is that it only applies from the date the winding up order is made and not when the winding up is deemed to commence (see section 392(2) above). In this case, the claim was filed and judgment obtained prior to the date on which the provisional liquidators were appointed (20th November, 2018) or the date the Court made the order that HBH be wound up (14th January, 2019). It cannot be said that there has been any breach of this section which renders the default judgment irregular or invalid, or that the judgment was a remedy that was not available in law to JPS at that time, so as to amount to an exceptional circumstance.

[31] See Article 1923 and 2002 of the Civil Code, Cap 4.10 of the Revised Edition of the Laws of Saint Lucia

[49] Section 389 of the Act which was available to HBH to protect and safeguard the company from such actions being taken at a time when it was vulnerable and to the prejudice of creditors provides:-

> ***"389. Power to stay or restrain proceedings against company***
>
> *At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may, where any action or proceeding is pending against the company, apply to the court to stay or restrain further proceedings, and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit."*

[50] It is unfortunate that, neither HBH nor its creditors availed themselves of the recourse provided by this section and that is what the Liquidators have inherited. Such conditions are not unusual in liquidations. Professional liquidators are trained to navigate this and it cannot be said to amount to exceptional circumstances.

[51] HBH has therefore failed to satisfy the Court that there are any exceptional circumstances to justify setting aside the default judgment pursuant to CPR13.3 (2). JPS will have its default judgment.

[52] However, in the related application for cancellation of the judicial hypothec registered on 8th and 9th August, 2019 on the basis of the default judgment, the Court has already determined that it is void by operation of law and has ordered the cancellation of same at the Office of Deeds and Mortgages and the Land Registry.

[53] Nonetheless, JPS will also the opportunity to continue to negotiate a fair and reasonable compromise with the Liquidators. There is ample opportunity to approach the Court for a ruling in the liquidation proceedings, if JPS is dissatisfied with the outcome of negotiations with the Liquidators. The parties are essentially in the same position as they were at the date that the winding up order was made and may proceed from there.

Conclusion

[54] In concluding I make the following orders:-

1. The application to set aside default judgment is refused.
2. No further proceedings shall be taken in the claim except with the leave of the Court.
3. Cost is awarded to JPS in the sum of $2,500.00.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar