THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2017/0391

BETWEEN:

TANZANIA TOBING TANZIL

Claimant /Respondent

and

1. LINDSAY F.P. GRANT
2. JONEL F.H. POWELL

Defendants/Applicants

Appearances:

Mr. Sylvester Anthony, Mrs. Angelina Gracy Sookoo Bobb and Ms. Renal Edwards for the Claimant
Mr. Brian Barnes for the Defendants

2019: September 26
(Written Supplemental Submissions filed on 21 October)
October 28

JUDGMENT

[1] VENTOSE, J.: The Claimant on 22 December 2017 filed a claim against the Defendants seeking the following:

1. An order that the Defendants have breached their fiduciary duty and/or their duty of trust owed to the Claimant as his Solicitors and escrow agents and/or acted fraudulently in receiving, using and/or failing to account for the sum of US$460,000.00 which was

transferred to the Defendants' bank account numbered 0106966680 at First Caribbean International Bank (Barbados) Limited, Basseterre branch in Saint Kitts, in or about May 2013, for the specific purpose namely, to purchase a condominium unit under the Citizenship By Investment Programme, and secure title to the property;

2. An order that the Defendants have misappropriated funds belonging to their then client, the Claimant, in the sum of US$460,000.00 which funds were paid into the Defendants' bank account numbered 0106966680 at First Caribbean International Bank (Barbados) Limited, Basseterre branch in Saint Kitts, initially on trust, and thereafter in escrow for the purchase a condominium unit under the Citizenship By Investment Programme, and to obtain title to the property in breach of the contract for professional services entered into between the parties;

3. Damages

4. An order requiring the Defendants to return immediately the sum of US$460,000.00 paid to them in trust and/or in escrow for the purchase and execution of title of condominium unit R-228 with interest thereon pursuant to section 29 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act CAP 3:11 of the Revised Laws of Saint Christopher and Nevis

5. Costs

6. Such further or other relief as the Court deems just.

[2] The claim was therefore for *inter alia* breach of fiduciary duty and/or breach of trust as the Claimant's solicitors, misappropriation of client funds and for damages caused by the failure of the Defendants to pay out the purchase price entrusted to them as solicitors by the Claimant.

[3] The claim form and the statement of claim were served on each Defendant personally on Friday, 22 December 2017, at 7:35 p.m. On 5 January 2018, both Defendants filed, and personally signed, an Acknowledgment of Service in which they state that they were served on 22 December 2017 and that they intend to defend the claim. On 8 January 2018, Daniel Brantley, the Attorney-at-Law for the Defendants filed another Acknowledgement of Service which stated that the Defendants were both served on 22 December 2017 and that they intended to defend the claim.

[4] On 23 January 2018, the Claimant filed an *ex parte* application with supporting affidavit for default judgment against the Defendants for failure to file a defence. On 31 January 2018, the Defendants filed an application with supporting affidavit to strike out the claim form and statement of claim. On 1 February 2018, the Defendants filed an application with supporting affidavit to set aside the default judgment.

[5] The matter came before the master on 9 October 2018 where she had three applications before her, noting that the proper procedure is that applications are to be dealt with in the order in which they are filed. The court held that the application to set aside default judgment was premature and dismissed it because judgment had not yet been entered at the time the Defendants filed the application to set aside default judgment. The court also dismissed the application to strike out the claim form and statement of claim because the application for judgment in default had not yet been determined in accordance with the CPR 2000. In addition, on 9 October 2018, the master granted the request for judgment in default on terms to be determined by the court. The court ordered the Claimant to file a supplemental affidavit with supporting evidence to substantiate the reliefs claimed in the statement of claim and in the request for judgment in default, and that the terms will be determined on paper.

[6] On 16 October 2018, the Defendants filed an application with supporting affidavit to set aside the default judgment. On 11 February 2019, the court determined the terms of the default judgment and ordered the Defendants to pay damages to be assessed by the court. The Defendants filed an application with supporting affidavit to stay the court order of 11 February 2019. On 19 July 2019, the court gave directions for filing submissions and authorities on the application to set aside default judgment with a hearing date of 26 September 2019.

Setting Aside Default Judgment

[7] CPR 13.3 contains the governing principles relating to setting aside default judgments. It provides as follows:

> Cases where the court may set aside or vary default judgment
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> 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 –
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> (a) Applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
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> (b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and
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> (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.
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> *Rule 26.1(3) enables the court to attach conditions to any order.

[8] The cases and learning on CPR 13.3(1) state clearly that the defendant must satisfy the three conditions before the court is permitted to set aside the default judgment. In Public Works Corporation v Nelson (DOMHCVAP2016/0007 dated 29 May 2017), the Court of Appeal stated (at [13]) that:

> It is now well settled that, unlike the English CPR, the discretion granted under our CPR 13.3(1) is more limited than the broad discretion which is given under the English Rules. A failure to satisfy any one of the three conditions is fatal unless a defendant manages to bring himself within the rule 13.3(2) by demonstrating exceptional circumstances warranting the exercise of the discretion in his favour. A number of decisions from this Court have considered what may amount to exceptional circumstances.

[9] There is no question that the Defendants satisfied condition (a) in that the Defendants applied to the court as soon as reasonably practicable after finding out that judgment had been entered. Judgment was entered on 9 October 2018 and the Defendants applied to set it aside on 16 October 2018, a mere 7 days later.

[10] The next question is whether the Defendants have given a good explanation for the failure to file a defence. The Defendants have provided two main reasons for the failure to file a defence namely: (1) time began to run on 27 December 2017

rather than on 23 December 2017; and that (2) they were unable to make contact with their Attorneys-at-Law during the Christmas holidays.

[11] In Attorney General v Universal Projects Limited [2011] UKPC 37, the Privy Council stated that:

> 23. The Board cannot accept these submissions. First, if the explanation for the breach ie the failure to serve a defence by 13 March 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.

[12] The Court of Appeal in Sylmord Trade Inc v Inteco Beteiligungs AG (BVIHCMAP2013/0003 dated 24 March 2014) considered the statements made by the Privy Council in Universal Projects Limited. The Court of Appeal stated as follows:

> [24] In the present case, the learned trial judge defined "good explanation' in the context of rule 13.3(1) as follows:
>
> > "... an account of what has happened since the proceedings were served which satisfies the Court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix up, are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered."
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> [26] None of the parties to this appeal took issue with the judge's definition of "good explanation" and so I will not attempt, for present purposes, to interfere with it.

[13] In Public Works Corporation v Nelson (DOMHCVAP2016/0007 dated 29 May 2017), the Court of Appeal, citing from its previous decision of Laudat et al v Ambo (DOMHCVAP2010/0016 dated 15 December 2010), explained that:

> … [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.

[14] In Marina Village Limited v St. Kitts Urban Development Corporation Limited (SKBHCVAP2015/0012 dated 19 May 2016), the Court of Appeal explained as follows:

> [25] CPR 13.3(1)(b) requires that an applicant who seeks to engage the discretion of the court to set aside a default judgment must give a good explanation for failing to file the acknowledgement of service or defence. The explanation given by the appellant as set out in the affidavit of its director is essentially that it was not aware of the claim form and statement of claim. The reasons advanced why it was not aware of the claim are: (i) the P.O. Box was not manned regularly, rather periodic checks were made by one Ms. Morton who was not an employee of the appellant; (ii) the respondent was aware that the appellant's directors and shareholders are based in New York and in the past they communicated with the appellant by sending correspondence to the New York address; (iii) on receiving the claim form and statement of claim on 17October 17 2014, the appellant immediately sought assistance from counsel in St. Kitts to deal with the claim but was only able to get assistance on 19 November 2014 and the acknowledgement and defence were filed on 21 November 2014.
>
> [26] The learned judge having considered the explanation found it was not a good explanation. She found the reason why the appellant did not become aware of the claim form until October 2014, was in effect due to its own administrative inefficiency.
>
> [27] Every company incorporated in St. Kitts is required by law to have a registered office in St. Kitts and whenever there is a change in the address of the registered office, the company is required to notify the Registrar of Companies of its new address. The registered office is the official place at which the public is able to communicate with the company. It is the place at which service of legal process may be effected on the company. CPR 5.7 specifically states that:
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> > "Service on a limited company may be effected –
> >
> > (a) by leaving the claim form at the registered office of the company; (b) by sending the claim form by telex, FAX or prepaid post or cable addressed to the registered office of the company."

> 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. The appellant cannot rely on the consequences of its own deliberate action as a good explanation. In these circumstances, I find that there is no merit in this ground of the appeal.

[15] In Pendragon International Limited et al v Bacardi International Limited (ANUHCVAP2007/0003 dated 23 November 2007), the appellant stated that they failed to comply with CPR 62.5(c), which requires an appellant to file an appeal, which is not a procedural appeal or an appeal for which leave is required, within 42 days of the date when the judgment appealed against was served on the appellant, because their solicitors misapprehended when the time for appealing started to run. The appellant further stated that after they studied the judgment, they sought legal advice as to the timeframe for issuing the appeal and that they concluded therefrom that the 42 clear days limited for appealing expired on 9 July 2007. The Court of Appeal stated (at [15]) that:

> … It was my view, however, that the applicants did not provide a good explanation for this failure to comply with rule 62.5(c) of CPR 2000. Their explanation of their misapprehension of law was not convincing. A plea based on that misapprehension of the law is unavailing.

[16] The Defendants submit that the relevant test for a good explanation is whether by their actions or inaction, the Defendants have demonstrated indifference to the risk of having judgment entered against them. This test seemingly originates from the decision of the Court of Appeal in Sylmord Trade Inc where it noted that since none of the parties to the appeal took issue with the trial judge's definition of "good explanation", it would not attempt, for present purposes, to interfere with it.

[17] The Defendants rely on a theory that CPR 6.6(2), relating to deemed date of service, applies to service of the claim form to submit that since the claim form and statement of claim were served after 4:00 p.m. on 22 December 2017, the next two days being the weekend, and the next two, 25 and 26 December, both public holidays, time started to run from 27 December 2017, not 23 December 2017.

[18] CPR 6.6(2) and (3) provides as follows:

> (2) Any document served after 4 p.m. on a business day or at any time on a day other than a business day is treated as having been served on the next business day.
>
> (3) In this rule "business day" means any –
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> (a) day other than a Saturday, Sunday or Bank Holiday; or (b) other day on which the court office is closed;
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> and is to be determined by reference to the relevant enactment of the Member State or Territory in which the document is to be served.

[19] CPR 6.6(2) and (3) are found in Part 6 of the CPR which makes provision for "service of other documents". The Defendants' approach is misconceived since Part 6 relates to documents other than the claim form. In fact, CPR 5.3 expressly provides for personal service of the claim form, stating that a claim form is served personally on an individual by handing it to or leaving it with the person to be served. There is no question that the claim form was served personally on both Defendants on 22 December 2017. CPR 5.5 makes provision for proof of personal service to ensure that the issue of service is not in doubt by outlining the details that need to be included in the affidavit of service. CPR 5.5(1) states that personal service of the claim form is proved by an affidavit sworn by the server stating – (a) the date and time of service; (b) the precise place or address at which it was served; (c) the precise manner by which the person on whom the claim form was served was identified; and (d) precisely how the claim form was served. CPR 5.5 also makes provision for what must be included in the affidavit where: (1) the person served was identified by another person (CPR 5.5(2)); and (2) the server identified the person to be served by means of a photograph or description (CPR 5.5(3)).

[20] Part 5 of the CPR says nothing about the time when the claim form must be served. It deals with "service of claim form within jurisdiction". It does not contain any provision mirroring CPR 6.6(2) which provides for the deemed date of service of any document in Part 6, which deals with "service of other documents". That Part 6 focuses on service of other documents, suggests that it was meant to apply to documents separate and apart from the claim form which is specifically dealt with in Part 5. The Defendants seek impermissibly to incorporate the

provisions of CPR 6.6(2) and (3) into CPR 5.19. When Part 5 requires any Rule in CPR 6 to be applicable to it, it says so expressly; for example, CPR 5.19(1) states as follows:

> 5.19 (1) A claim form that has been served within the jurisdiction by pre-paid post is deemed to be served, unless the contrary is shown, on the day shown in the table in rule 6.6.

[21] This provides a clear example to show that the Rules in Part 6 are only applicable to Part 5 where Part 5 expressly so provides. In addition, CPR 5.19 makes express provision for deemed date of service of the claim form. CPR 5.19(3) states that:

> (3) If an acknowledgment of service is filed, whether or not the claim form has been duly served, the claimant may treat –
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> (a) the date of filing the acknowledgment of service; or
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> (b) (if earlier) the date shown on the acknowledgment of service for receipt of the claim form; as the date of service.

[22] The Defendants' approach is also inconsistent with CPR 5.19(3) which permits a claimant to treat: (1) the date of filing of the acknowledgement of service as the date of service; or (2) (if earlier) the date shown on the acknowledgement of service for receipt of the claim form (irrespective of whether or not the claim form has been duly served) as the date of service. The deemed date of service in respect of the claim form do not relate to the time of service; in fact, it has nothing to do with any aspect of actual time of service of the claim form by a claimant. It focusses on the actions of the defendant – his or her filing of the acknowledgement of service, and the date that he or she includes in that acknowledgement. The important consideration is that the defendant is acknowledging service of the claim form and statement of claim and including a date on which he or she was served in it. In my view, there is no scope for the incorporation of CPR 6.6(2) and (3) (that deal with other documents) into CPR 5.19 that deals with the deemed date of service of the claim form.

[23] The Court of Appeal in Nelson stated that the giving of a full and detailed explanation does not thereby make the explanation one that is good or, put

differently, excusable (at [19]). The Defendants took a calculated risk based on their (mis)interpretation of the CPR 2000. The cases have made it clear that misapprehension of the law provides no refuge to a person who does not comply with any CPR rule. The Court of Appeal in Pendragon International Limited rejected a similar argument stating that a plea based on a misapprehension of the law is unavailing. Likewise, here, the Defendants' misapprehension of the requirements for the date of service of the claim form and statement of claim do not avail them. The inability to contact their lawyers cannot ever amount to a good explanation as the courts have repeatedly stated. Consequently, it cannot be said that the Defendants have a good explanation for the failure to file a defence within the time stipulated by the CPR.

[24] Since the Defendants must satisfy all three requirements under CPR 13.3(1), and have failed the second requirement, it is not strictly necessary to consider the third requirement of whether the Defendants have a real prospect of successfully defending the claim. However, I consider it only for completeness. In Sylmord Trade Inc, the Court of Appeal explained (at [35]) that:

> The approach taken by our court to the issue of "real prospect of successfully defending the claim" in the case of Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste [SLUHCVAP2009/0008 dated January 2010), albeit in the context of summary judgment, would appear to vindicate the conclusion reached by trial judge in the present case. George-Creque JA, who delivered the judgment of the Court, opined that the court had to consider the issue in the context of the pleadings and such evidence as there is before it and determine on this basis whether the defence has a real (as opposed to a fanciful) prospect of success and that if at the end of the exercise the court arrives at the view that it would be difficult to see how the defendant could establish its case then it is open to the court to enter summary judgment. In the context of rule 13.3(1), it would be open to the court to refuse to set aside a default judgment.

[25] The Court of Appeal in Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste [SLUHCVAP2009/0008 dated January 2010) stated as follows:

> [21] The principle distilled from these authorities by which a court must be guided may be stated thus: Summary judgment should only be granted in

> cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in Swain v Hillman is that the claim or the defence has no "real" (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case then it is open to the court to enter summary judgment.

[26] The Defendants contend that the defence, as contained in their draft defence exhibited to the application to set aside the default judgment, is not fanciful but shows that the Defendants have a real prospect of successfully defending the claim. The Defendants further contend that the central issue is whether the claim made by the Claimant is one in which the court can grant those reliefs because when the claim was filed the claimant had already received the relief for which he had no standing to apply for in the first place. The essence of the defence is that the Defendants had been actively trying to pay over the funds to the vendor and the Claimant, and that while there was a delay in the completion of the transaction, all the delays were resolved and all payments required under the agreements were made and the Claimant was in a position to close the transaction prior to the filing of the claim. Based on the defence, while the Defendants have shown that the Claimant is not entitled to the order requiring the return to him of the sum of US$460,000.00, they have not shown that they have a real prospect of successfully defending the other aspects of the claim.

[27] CPR 12.10(4) states that default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim. It must be noted that the court, in its order dated 11 February 2019, the court did not grant the Claimant *that* order but only awarded damages to be assessed by the court. It was clear that the court was satisfied that the Claimant was not entitled to the order requiring the return to him of the sum of US$460,000.00. The Defendants have in fact shown no prospect at all since they

have not fully answered the specific claims of the Claimant in respect of breach of trust, breach of fiduciary duty, failing to account or misappropriation of monies belonging to the Claimant.

[28] The Defendants, having failed to establish two of the three conjunctive requirements of CPR 13.3(1), are not entitled to an order setting aside the default judgment. However, the court may set aside the default judgment if the Defendants satisfy the court, pursuant to CPR 13.3(2), that there are exceptional circumstances. The Defendants submit that the following are exceptional circumstances: (1) the reason why the application to strike was not filed within the time limited for filing a defence; (2) it would be grossly unfair to the Defendants to be punished for a grey area in the CPR as to when time starts to run; (3) that the Defendants have fulfilled their obligations to the vendor as escrow agent; (4) that the vendor ought properly to be joined as a party to the action as the matter cannot be fairly resolved without the input of the vendor; and (5) evidence that the transaction was completed before the claim was filed was given to the Claimant and that it was impossible for the court to grant the very relief sought.

[29] In Wyre (Personal Legal Representative of the Estate of Arnold Wyre, Deceased) et al v Edwards et al (ANUHCVAP2014/0008 dated September 2014), the Court of Appeal explained as follows in relation to CPR 13.3(2):

> [32]. As stated above the court has a discretion under sub-rule 13.3(2) to set aside a default judgment "[i]n any event... if the defendant satisfies the court that there are exceptional circumstances". The new rule was introduced in 2011 to give the court a flexible approach in dealing with applications to set aside default judgments. The new approach is illustrated by the judgment of Michel J in Graham Thomas v Wilson Christian trading as Wilcon Construction. The applicant/defendant delayed 5½ months after the default judgment was served on him and approximately 8 weeks after an application to enforce the judgment was served, to apply to set aside the judgment. The learned judge found that the defendant/applicant had not applied as soon as reasonably practicable after finding out that the judgment had been entered. Prior to 2011 the judge would have been obliged to follow the decision in Kenrick Thomas v RBTT Bank Caribbean Limited and dismiss the application for failure to comply with the three conditions in rule 13.3(1). However, the judge found that the defendant had a real prospect of successfully defending the

claim and that there were exceptional circumstances related to the defendant's personal situation. He therefore exercised his discretion under sub-rule 13.3(2) and set aside the judgment. He commented on the court's new approach in paragraph 3 as follows -

> "It is reasonable to conclude that it was primarily to dilute the rigidity of our own Rule 13.3 (1) and to bring it more in line with the English Rule by providing greater latitude to our judges to find the justice of the case rather than merely to find the presence or absence of three set prerequisites that the new sub-rule (2) of Rule 13.3 was introduced. The amended Rule 13.3, after setting out the rigid provisions of 13.3 (1), then introduces a new 13.3 (2) which states that – "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"."

[33] Sub-rule 13.3(2) is a welcome addition to the court's powers in dealing with default judgments but it should not be seen as a panacea for defaulting defendants as is illustrated by the judgment of Bannister J in Inteco Beteiligungs AG v Sylmord Trade Inc. The learned judge rejected the defendant's attempt to treat the filing of the claim in breach of an express arbitration clause in the loan contract between the parties as an exceptional circumstance. The defendant's remedy was to apply to the court for a stay of the proceedings, not to stand by and allow a default judgment to be entered and then ask the court to set it aside. On appeal the Court of Appeal endorsed the judge's approach and dismissed the appeal.

[30] The Court of Appeal in Nelson stated (at [23]) that:

> 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.

[31] The most recent examination of CPR 13.3(2) by the Court of Appeal occurred in Baynes v Meyer (ANUHCVAP2015/0026 dated 30 May 2016). It is not necessary to rehearse the facts except to focus on the meaning given by the Court of Appeal to the words "exceptional circumstances" when used in CPR 13.3(2). The Court of Appeal stated as follows:

> [26] 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. I am in full agreement with the reasoning of Bannister J, as approved by this Court, that it 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'. 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. Indeed I would have been prepared to hold, had the learned master been correct as to the non-viability of the claims herein, that such could be regarded as an exceptional circumstance. In the exercise of the discretion afresh, and for the reasons set out above I find no basis for holding that the bases put forward by Mr. Meyer, amount to exceptional circumstances warranting Mr. Baynes being deprived of his default judgment. I would accordingly restore the default judgment.

[32] The principles I distill from that paragraph are as follows: (1) what amounts to exceptional circumstances must be decided on a case by case basis; (2) there must be a compelling reason to permit the defendant to defend the proceedings; (3) exceptional circumstances under CPR 13.3(2) do not equate to showing realistic prospects of success under CPR 13.3(1)(c); (4) it is impermissible to dress up matters that have failed under CPR 13.3(1)(c) as amounting to exceptional circumstances; and (5) CPR 13.3(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 CPR 13.3(1).

[33] On appeal to the Privy Council ([2019] UKPC 3, [2019] All ER (D) 90 (Jan)), the Privy Council held that:

> 17. The Board can see no reason to question the approach taken by the Court of Appeal to the meaning of the phrase "exceptional circumstances" in the context of rule 13.3(2) of the CPR. The structure of the rule suggests that the phrase calls for something more than a real prospect of

success and the Board respectfully endorses the reasoning of Pereira CJ at para 26 of her judgment as to its meaning in this context.

[34] At the hearing on 26 September 2019, the court requested the parties to file supplemental submissions on the decision of the Court of Appeal and Privy Council in Meyer on or before 10 October 2019 which was subsequently extended by the court to 21 October 2019. Both parties complied. The Defendants, however, broadened the supplemental submissions beyond the scope of the court's order. It is clearly unfair to the Claimant for the Defendants to file what seems to be submissions relating to matters already covered in the original submissions filed by the parties before the hearing. Consequently, I have not read any part of the Defendants' supplemental submissions that fall outside the narrow scope of the order of the court.

[35] I agree with the Claimant that, first, the Defendants have not provided reasons which can properly be considered as exceptional circumstances. Second, the two reasons advanced by the Defendants in support of their claim that there are exceptional circumstances do not amount to a "knock out" point or indicate that the claim is not viable as a matter of law. Third, the explanations advanced under exceptional circumstances were the same reasons advanced by the Defendants under CPR 13.3(1). Fourth, the Defendants sought to interchange the grounds advanced under CPR 13.3(1) and CPR 13.3(2) which is exactly what the Court of Appeal warned against in Meyer.

[36] The reasons advanced by the Defendants in my view do not amount to exceptional circumstances because they merely repeat arguments that I have already rejected as a good explanation and "real prospect of successfully defending the claim" under CPR 13.3(1).

Disposition

[37] For the reasons explained above, I make the following orders:

(1) The application to set aside default judgment is hereby refused.

(2) The Claimant shall file and serve witness statements, submissions and authorities in respect of the assessment of damages within 21 days of today's

date.

(3) The Defendants, if interested in participating in the assessment of damages, shall file and serve Form 31 within 7 days of service by the Claimant and shall comply with CPR 12.13 and 16.2.

(4) Submissions shall be also be emailed in Microsoft Office WORD format to the Registrar of the High Court (and copied to the Civil Clerk at shalisha.welcome@gov.kn) on the dates referred to above.

(5) The hearing of the assessment of damages shall take place on 12 December 2019 at 2:00 p.m.

(6) Costs to the Claimant in the sum of $750.00 to be paid by the Defendants within 14 days of today's date.

Eddy D. Ventose
High Court Judge

By the Court

Registrar