THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: DOMHCV2008/0264

BETWEEN:

KENT SHILLINGFORD

Claimant

and

DOMINICA AGRICULTURAL INDUSTRIAL AND DEVELOPMENT BANK

Defendant

APPEARANCES**:** Ms. Rose-Anne Charles for the Claimant
Mr. Stephen Isidore, with him Ms. Ernette Kangal for the Defendant

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2019: October 14
November 19

GILL, M. (Ag.)

[1] This is the Court's ruling on an application by the defendant to set aside Judgment in Default of Defence entered on 18th February 2019.

The Background

[2] The claimant filed a claim against the defendant on 10th December 2018 for a declaration that the claimant is entitled to the renewal of a lease between the claimant and the defendant, damages for breach of contract, special damages in the sum of $967,500.00 and other relief.

- The claim form, statement of claim and other requisite documents were served on the defendant on 12th December 2018. The defendant failed to file a defence within the 28 day period stipulated for so doing by the Civil Procedure Rules (CPR 2000).

- By letter dated 22nd January 2019 to Counsel for the claimant, Counsel for the defendant requested an extension of time to file the defence on or before 1st February 2019. Counsel for the claimant agreed. The defendant failed to file the defence by 1st February 2019 as agreed.

- Therefore, on 4th February 2019 the claimant filed a Request for Entry of Judgment in Default of Defence.

- Judgment in Default of Defence was entered on 18th February 2019 with damages to be assessed.

- Meanwhile, on 6th February 2019, the defendant filed a defence. The defendant did not request a further extension of time from Counsel for the claimant and did not apply to the Court for an extension of time to file the defence out of time.

- The Judgment in Default of Defence was served on Counsel for the defendant on 28th February 2019.

- On 8th March 2019, the defendant filed the Notice of Application to set aside the Judgment in Default of Defence.

Issue

[3] The Court must decide whether or not to set aside the Judgment in Default of Defence entered against the defendant on 18th February 2019.

The Law

[4] Part 13 of CPR 2000 deals with setting aside or varying default judgment.
Rule 13.3 reads as follows:

(1) "If Rule 13.2 does not apply [dealing with cases where the court **must** set aside a default judgment] 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 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."

[5] The requirements under Rule 13.3(1) are conjunctive. In **Kenrick Thomas v RBTT Bank Caribbean Limited**,[1] Barrow JA. in highlighting the differences between CPR 2000 and the English Civil Procedure Rules, stated:

> " 'Only if' can only mean that if the three matters are not present then the court may not set aside a default judgment. The difference between the English equivalent and the provision in CPR 2000 lies in the

[1] Civil Appeal No. 3 of 2005, St. Vincent and the Grenadines at paragraph 7

> discretion. The discretion in the English CPR [in] Rule 13.3 [is] significantly unlimited; it specifies only one matter to which the court must have regard and does not even make fulfillment of that matter a condition that the defendant must satisfy. In contrast, the discretion in CPR 2000 is severely limited; it specifies three conditions that the defendant must satisfy before the court is permitted to set aside a default judgment."

Barrow JA. went on further:

> "The language that the rule makers chose to frame Part 13.3(1) was considered and deliberate; there is no possibility that its purport was unintended. Litigants and lawyers must now accept that CPR 2000 has gone significantly further than the English rules in the hardening of attitude towards the lax practice that previously prevailed in relation to the setting aside of default judgments which was an identified abuse that the new rules were intended to correct. The adherence to the timetable provided by the Rules of Court is essential to the orderly conduct of business and the importance of adherence is reflected in CPR 2000 imposing pre-conditions for setting aside a default judgment."[2]

The learned Justice of Appeal made these pronouncements before the introduction of Rule 13.3(2) which somewhat relaxed the rigidity of Rule 13.3(1). Following on from this, the application of the amendment was elucidated by Pereira CJ in the consolidated appeals of **Public Works Corporation v Matthew Nelson** and **Elton Darwton and Public Works Corporarion v Matthew Nelson**[3] when she stated:

> "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

[2] Ibid at paragraph 10
[3] DOMHCVAP2016/0007 and DOMHCVAP2016/0008, Commonwealth of Dominica at paragraph 13

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."

Analysis

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

[6] The Rules do not specify what is a reasonable time period in which the defendant should apply to set aside a default judgment. The Court must determine whether, in all the circumstances of each case, the applicant acted as soon as reasonably practicable.

[7] The default judgment was served on Counsel for the defendant on Thursday 28th February 2019. The application to set aside the default judgment was filed on Friday 8th March 2019, eight days after. The Court was informed that Monday 4th and Tuesday 5th March were public holidays so that the application was made four working days after service of the judgment.

[8] In the circumstances of this case, I conclude that the application to set aside the default judgment, having been filed eight days after service of the judgment, was made as soon as reasonably practicable. Therefore, the defendant has satisfied Rule 13.3(1) (a).

Has the defendant given a good explanation for the failure to file its defence on time?

[9] The explanation for the defendant's failure to file a timely defence is contained in an affidavit in support of the application filed on 8th March 2019 ("the first affidavit") and a supplemental affidavit filed on 10th October 2019 ("the second affidavit"). The defendant filed skeletal submissions in response to the claimant's submissions at 9:50a.m. on 14th October 2019, the date of the hearing of this application. In the interest of avoiding

delay, learned Counsel for the claimant, being presented with these two documents at the hearing, although with serious objection, opted to proceed.

[10] In the first affidavit, Glenroy Eloi, manager of the Industrial Estate Unit of the Defendant, deposed at paragraphs 3 to 6 as follows:

> **"3. Given the nature of the facts-based claim and the complexity of the issues involved, full and proper instructions were unable to be given to settle a Defence within the time prescribed by the CPR Rules. The employee who had conduct of the matter on behalf of the Defendant and who dealt with the Claimant at all material times, is no longer employed by the bank and as such time was required to search the files to source the information required in answer to the allegations made in the Statement of Claim. Further the intervening holiday season also affected my ability to secure the information to settle the Defence.**
>
> **4. Having noted that time beyond the prescribed time was required for the settling of the Defence, we were informed by our Counsel and verily believe that the Civil Procedure Rules 2000, makes provisions for parties to a claim to agree to extend the period for filing a Defence and would seek to obtain the consent of the Claimant's Counsel for an extension.**
>
> **5. By letter dated January 22nd, 2019, the Defendant caused a letter to be served on the Claimant's Counsel requesting an extension of time to February 1st, 2019 to file the Defence. The Claimant's Counsel on the 25th day of January, 2019 agreed to the said extension. ….**
>
> **6. Thereafter instructions were given to Counsel for the Defendant to settle a Defence on the Defendant's behalf and a draft had to be settled. Further particulars were however needed to complete the Defence but I being the representative to provide the information to Counsel was not able to do so to settle the Defence by February 1st, 2018 (sic). However, the said Defence was filed five (5) days after the agreed date for the aforementioned reasons and was only able to give full information by the 5th day of February, 2019 after searching the Defendant's files, to settle the Defence. The Defence was finally completed on the said date and I signed it."**

[11] In skeletal submissions filed in response to the application to set aside the default judgment, supported by the first affidavit, the claimant stated that the defendant had failed to give details as to what happened and its reasons for its failure to file the defence on time.

[12] In an attempt to expand on bald assertions made in the first affidavit, the defendant filed the second affidavit. In paragraphs 5 to 7 of the second affidavit, Mr. Eloi deposed as follows:

"5. Being to the new post, I was not all familiar with the case and trying to source all the files to collect the data for Counsel was difficult. I informed Counsel of my difficulties and was asked to try and make contact with former Manager, Mr. Ian Williams who was the one having conduct of the subject matter of this particular claim on the Defendant's behalf. Mr. Williams was the one who dealt with the Claimant at all material times and would be better able to advise me on this matter to provide input and clarifications to the assertions made by the Claimant in order to settle the Defence.

6. I tried contacting Mr. Williams via telephone on a number of occasions but my attempts were futile. None of my calls were ever returned. I thereafter made enquiries as to his place of work and residence. I visited both places on two separate occasions about 3 days apart and was informed that he was not at home but on the job. On arrival at his workplace on the first occasion, I was informed that he went to purchase building supplies and on the second occasion I was informed by persons working with him that they didn't know his whereabouts at the material time. By this time, it was brought to my attention that the time for filing the Defence was nearing and not being able to speak with Mr. Williams to retrieve the files/information with respect to this matter for the settling of a Defence was of tremendous concern to me.

7. The matter is highly facts-based and as stated before, without the input of Mr. Williams, it took me some time in gathering the information and understanding the substance of the claim. Also, in addition to devoting substantial time to this matter in my fervent searches for files and missing information, I also had to oversee the day to day operations of the IEU which was compounded with the busy Christmas and New Year season."

[13] The Privy Council, in **The Attorney General v Universal Projects Limited**[4]in considering whether the applicant had disclosed a good explanation for failure to file a defence, had this to say:

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

[4] [2001] UKPC 37 at paragraph 23

[14] In the **Public Works Corporation** (PWC) cases,[5] the PWC affidavits in support of the applications to set aside the default judgments attempted to justify the failure to file a defence in compliance with the time requirements of the Rules by stating *inter alia* that twenty members of staff had been laid off, including persons with information of certain facts and circumstances and this made it difficult to get the necessary information to instruct Counsel to file the defence in time. In the Court below the learned Master found that the reasons proffered by the PWC were "quite reasonable" but went on to find that there was no good explanation for the failure to file the defence on time as the PWC had failed to take steps to obtain an extension of time available under the Rules. The learned Chief Justice ruled that having accepted that the administrative difficulties of the PWC were quite reasonable, it was erroneous for the learned Master, without more, to treat the failure to obtain an extension of time as determinative as to whether there was a good explanation for the failure to file the defence on time.

[15] This error allowed the Court of Appeal to consider whether the reasons advanced by the PWC provided a good explanation. The learned Chief Justice expounded as follows:

> "The administrative difficulties relied on by PWC seems to me to be a resort to administrative inefficiency of the kind which was rejected by the Privy Council in **Universal Projects** as affording a good explanation….I am satisfied, having regard to the pleaded claims of the respondent and the evidence put forward by PWC in seeking to explain its failure to timely file its defence, that its administrative difficulties or deficiencies, though they may be a common occurrence, do not amount to a good explanation. As this Court reminded us in **Michael Laudat et al v Danny Ambo:**

[5] Supra at note 3

> '[C]ounsel do not have a good explanation which will excuse non-compliance with a rule or order or practice direction where the explanation given for the delay is misapprehension of the law, mistake of the law…, lack of diligence, volume of work, difficulty in communicating with client, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence or inadvertence.'
>
> In short, **the giving of a full and detailed explanation does not thereby make the explanation one that is good or, put differently, excusable**. PWC in my view, for the reasons given, fails on this second limb of rule 13.3(1)."[6] (my emphasis)

[16] Whether an explanation for the late filing of a defence is a good one is subjective and depends on the particular circumstances of each case. The Court accepts that not all cases of administrative inefficiency can be deemed fatal as a good explanation. Learned Counsel for the defendant urged the Court to give credence to the reasoning in **Ken-I Young v The Attorney General of Saint Vincent and the Grenadines**[7] in which Henry J., in ruling on an application for leave to set aside an interlocutory order to set aside judgment in default, said, "…it is not every instance of administrative inefficiency which would be considered unacceptable as a good explanation for delay in filing a defence."

[17] Learned Counsel for the claimant submitted that the excuses proffered by the defendant are not reasonable. She argued that is untenable that a well-established institution such as the defendant cannot access its data to file a defence on time because an employee leaves its employment. Further, she contended that a defence is a pleading in which the defendant is required to provide the parameters of its defence which can then be augmented in witness statements and exchange of documents. In support of her submissions, she relied on the

[6] Paragraphs 18 and 19 of the judgment
[7] SVGHCV2014/0226 at paragraph 6

rulings in **Ruth James and Henry James v Phillip McDougal and Carol Attidore**[8] and **Alvin G. Edwards and Cyril Maundy v Willoughby Bay Beach Resort Limited et al**.[9] She asserted that the absence of information from the former employee should not have prevented the defendant from filing the defence on time. I agree.

[18] The Court has reviewed the authorities submitted by Counsel and several others on this point. The mound of authorities steers the Court to the view that the explanation advanced by the defendant in this case will not suffice as a good and/or proper reason for the failure to file a timely defence. The Court does not accept the reasons of the defendant in the first and second affidavits in support of the application as good and proper reasons for the failure to file a timely defence. In making its determination on this issue, the Court is not concerned with the fact that the defendant did not apply for an extension of time from Counsel for the claimant or the Court. What is material at this time is the reason or explanation for the delay. The defendant has cited what amount to administrative difficulties and deficiencies as such reasons or explanations. In the particular circumstances of this case, this Court is bound by voluminous precedent. The defendant has failed to satisfy the requirement in Rule 13.3(1) (b).

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

[19] The claim is based on a letter dated 12th July 2013 from Ian Williams, Industrial Estate Manager of the defendant, purporting to renew a lease agreement between the claimant and the defendant for a period of five years. By letter dated 16th October 2013, through its solicitors, the defendant demanded that the claimant vacate the premises on or before 30th November 2013. A further solicitor's letter dated 25th November 2013 indicated to the claimant that his tenancy would be terminated in November 2013. As stated at the outset, the claimant is suing for a declaration that the claimant is entitled to renew the lease and damages for breach of contract, special damages and other relief.

[8] Claim No. DOMHCV2016/0259, delivered June 21, 2017, Commonwealth of Dominica
[9] Clam No. ANUHCV2011/0427, delivered February 17, 2014, Antigua and Barbuda

[20] The defence asserted that Ian Williams, by agreeing to enter into the renewed lease on the terms of the letter dated 12th July 2013, did so without the authority of the defendant and in breach of its rules, procedures, general policy and course of dealings with tenants. Mr. Williams was responsible only for negotiating the terms of the lease on behalf of the defendant. Further, the renewed lease did not contain provisions for termination thereof so that the defendant was entitled to terminate the lease by one month's notice, that is, with reference to the manner in which the rent was paid.

[21] In response, the claimant averred that Ian Williams, who represented the defendant in its dealings with the claimant, can be considered to have had "apparent authority". In addition, it is incorrect that the defendant was justified in giving the claimant one month's notice to terminate the lease.

Apparent Authority

A definition of apparent authority was provided by Lord Diplock in **Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd**[10] as follows:

> "An 'apparent' or 'ostensible' authority, …, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when

[10] [1964] 2 QB 480, 503

> acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."

[22] It is evident that Ian Williams, the manager of the Industrial Estates Unit of the defendant, at all material times, was acting with the authority of the defendant in its dealings with the claimant in relation to the renewal of the lease. Ironically, the defendant used this fact in its affidavits in support of the application before the Court. I repeat parts of the said affidavits thus:

> "The employee who had conduct of the matter on behalf of the Defendant and who dealt with the Claimant at all material times, is no longer at the bank…." (at paragraph 3 of the first affidavit)

> "I informed Counsel of my difficulties and was asked to try and make contact with former Manager Mr. Ian Williams who was the one having conduct of the subject matter of this particular claim on the Defendant's behalf." (at paragraph 5 of the second affidavit)

Termination of the Lease

[23] The defence submitted that even if the former employee is deemed to have had apparent authority, in the absence of a termination clause, the defendant was entitled to terminate the renewed lease upon the service of one month's Notice to Quit, as the lease provided for the monthly payment of rent. The claimant asserted that the agreement for the lease shows that the lease was for a term of five years with an option to renew so that the claimant held an equitable five year term and not a monthly tenancy. It would be inequitable for a Court to hold otherwise especially as the claimant undertook significant improvements to the premises.

The Court must consider the prospects of the defence.

[24] In **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**,[11] in addressing the issue whether the defence had a real prospect of success in a matter in which summary judgment had been entered, George-Creque JA. enunciated:

> "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."

[25] Dealing specifically with the setting aside of a judgment in default, Michel JA., in **Sylmord Trade Inc. v Inteco Beteiligungs Ag**,[12] adopted this reasoning and stated that in the context of rule 13.3(1), it would be open to the court to set aside default judgment.

[26] In the circumstances of this case, it is difficult to see how the defendant can establish that Ian Williams cannot be considered to have had apparent or ostensible authority when he entered into the renewed lease with the claimant. On the defendant's affidavit evidence before the Court, Ian Williams, was in a senior position as manager of the Industrial Estate Unit of the defendant, "who had conduct of the matter on behalf of the Defendant and who

[11] SLUHCVAP2009/008, delivered January 11, 2010, at paragraph 21
[12] BVIHCMAP2013, delivered March 24, 2014, at paragraph 35

dealt with the Claimant at all material times". To my mind, it is reasonable to be of the view that the defendant would be estopped from terminating the lease in this case. Likewise, it is difficult to see how the defendant can convince a Court on a balance of probabilities that a five year tenancy, in the context of the claimant's circumstances, can be terminated by one month's notice, or as here, six weeks' notice. Therefore, I am of the view that the defendant does not have a real prospect of successfully defending the claim.

[27] The Court is mindful of the overriding objective of CPR 2000 to enable the Court to deal with matters justly and the power to exercise any discretion given to it to achieve that objective. Part 1 is often cited to convince a Court not to adhere strictly to the Rules where hardship would be caused to the unsuccessful party.

Gordon JA. in **Kenneth Harris v Sarah Gerald**,[13] in reiterating the view of the Court, stated at paragraph 9 of the judgment:

> "It cannot be said often enough that the overriding objective is not a plaster to cover all sores of omission. Where CPR places an obligation to act in a particular way, failure to act in that way will, in most cases, result in a sanction."

[28] The Court finds most instructive an excerpt from Civil Procedure (The White Book), 2003 Vol. 1 quoted by Thomas J. in **Louise Martin (as widow and executrix of The Estate of Alexis Martin, deceased) v Antigua Commercial Bank**.[14] The learned judge refused an application to set aside a default judgment when he found that the defendant **had** satisfied **two** of the three requirements of Rule 13.3(1), including the limb that the defendant had a real prospect of successfully defending the claim. He reproduced the following:

[13] Civil Appeal No. 3 of 2003, Montserrat
[14] Claim No. ANUHCV1997/0115, Antigua and Barbuda, at paragraph 31

> "The discretionary power to set aside is unconditional. The purpose of the power is to avoid injustice. The major on an application to set aside is whether the defendant has shown a real prospect of successfully defending the claim or some other compelling reason why judgment should be set aside or he should be allowed to defend the claim. The defendant is seeking to deprive the claimant of a regular judgment which the claimant has validly obtained in accordance with Pt 12: this is not something which the court will do lightly."

[29] The Claimant has validly obtained judgment in default. The defendant has not satisfied the requirements of the Rules to set it aside. The defendant did not put forward any argument pursuant to Rule 13.3(2) to demonstrate that exceptional circumstances exist in this case. In any event, the Court finds that there are none.

Conclusion

In summary, I find as follows:

1. The defendant applied to the Court to set aside the default judgment as soon as reasonably practicable after finding out that judgment in default had been entered.
2. The defendant did not give a good explanation for the failure file the defence on time.
3. The defendant does not have a real prospect of successfully defending the claim.

This means that the defendant has not satisfied the conjunctive requirements of Rule 13.3(1). Rule 13.3(2) was not invoked. The Court will not set aside the default judgment.

ORDER

1. The application to set aside judgment in default is refused.
2. The defendant shall pay the claimant costs of this application in the sum of $2500.
3. The matter shall be listed for assessment of damages on a date to be notified by the Court Office.

Tamara Gill

Master (**Ag**.)

BY THE COURT

REGISTRAR