IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/1022

B E T W E E N

EPHRAIM B.E. MORLEY

Claimant

AND

TEACHERS AND SALARIED WORKERS COOPERATIVE CREDIT UNION LIMITED

Defendant

Before: Assistant Registrar Jonathan Z.N. Deal

Appearances: Roshar Brown for the Claimant
Candice Ferguson for the Defendant

Hearing date(s): On the papers

RULING

ASSISTANT REGISTRAR DEAL

[1.] This is a ruling on an application made by Notice of Application filed on 30 September 2024 to set aside an Order for Judgment in Default of Appearance filed on 20 October 2023 (the "Order for Judgment in Default") which has been heard on the papers. The application is supported by the Affidavit of Jamison Davis filed on 30 September 2024 and written submissions dated 4 October 2024 and 18 October 2024. The Claimant opposes the application by written submissions dated 11 October 2024.

The Application

[2.] The Defendant's Notice of Application provides *inter alia*:

> "1. The Defendant...makes application for the Order for Judgment in Default of Appearance be set aside on the ground that the Defendant has a good and arguable defence and a real prospect of successfully defending this claim and that the Defendant be at liberty to defend this action pursuant to Order 13.3(1) of the Supreme Court Civil Procedure Rules, 2022. The Defendant further believes the Claimant is statute barred pursuant to Sections 5 and 9 of the Limitation Act, 1995, failing to bring an action on 15 February 2007 or prior to the expiration of the limitation period for negligence and/or breach of fiduciary duty.
>
> 2. The grounds of the application are:
> i. In accordance with Part 13 of the Supreme Court Civil Procedure Rules 2022 ("CPR") the Court may set aside/vary a Judgment in Default (Rules 13.2, 13.3 and 13.4 of the CPR).
> ii. Rule 12.4 of the CPR, a Defence was filed on 12 September, 2023, prior to the filing of the Order on October 20, 2023 and therefore the set aside Application may be granted.
> iii. The application was made as reasonably as practicable after finding out the judgment has been entered,
> iv. The Claimant's claim is statute barred pursuant to Sections 5 and 9 of the Limitation Act, 1995,
> v. the Defendant has a good and arguable defence, and
> vi. The Defendant has a real prospect of successfully defending this claim.
>
> 3. The following written evidence will be used at the hearing of the application:
> The Affidavit of Jamison Davis attached hereto which sets out the following:
> i. The Statement of Claim does not identify what term(s) (expressed or implied) which the Defendant is alleged to have breached to ground a claim in breach of fiduciary duty or negligence.
> ii. Judgment was filed one month after the Defence was filed and served on the Claimant. The Claimant therefore knew the Defendant's intention to defend this claim. The Claimant should have set the matter down for case management for a trial.
> iii. Set aside of the Judgment in Default of Appearance is sought for the following reasons:
> (i) the Defendant has a good and arguable Defence,
> (ii) the Claims of the Claimant are statute barred by virtue of Sections 5 and 9 of the Limitation Act, 1995, failing to bring an action on 15 February 2007 or prior to the expiration of the limitation period for negligence and/or breach of fiduciary duty,
> (iii) a Defence was filed
> (iv) the Claimant was aware from a letter as early as November 18, 2021 that the Defendant intended to defend this claim,

(v) the Statement of Claim does not identify what term(s) (expressed or implied) which the Defendant is alleged to have breached. The material terms of the share account and the fixed deposit account which are relied in this matter should have been set out in the Statement of Claim,

(vi) the Claimant did not bring the withdrawals to the attention of the Defendant within a reasonable time (or at all), and

(vii) the Claimant was not reasonably diligent in failing to monitor his account(s) and failing to alert the Credit Union from 2007 to 2018/2019 (a period of 11/12 years)."

The background

[3.] The Claimant, a member and customer of the Defendant, commenced these proceedings by a specially endorsed Writ of Summons filed on 9 September 2021 alleging breach of fiduciary duty and negligence on the part of the Defendant. The Claimant alleges that, between 15 February 2007 and 19 August 2015, the Defendant facilitated several unauthorised withdrawals from his fixed account maintained with the Defendant totalling some $14,000, which he only noticed in or around late 2018.

[4.] The Claimant's Statement of Claim, so far as it is material, is in the following terms:

> "3. On or about the end of 2018 or the beginning of 2019 the Plaintiff went into the Defendant's main office to enquire about his fixed account.
> 4. The Plaintiff did not become aware of the Defendant's actions on his account until sometime around the end of 2018 or the beginning of 2019.
> 5. Sometime in or around the 15th February 2007, the Defendant facilitated a withdrawal from the Plaintiff's account in the amount of $5,000.00 to an unknown person or entity. The Plaintiff did not request and/or authorize this transaction.
> 6. Sometime in or around the 23rd November 2011, the Defendant facilitated a withdrawal from the Plaintiff's account in the amount of $700.00 to an unknown person or entity. The Plaintiff did not request and/or authorize this transaction.
> 7. Sometime in or around the 31st January 2021 [sic], the Defendant facilitated a withdrawal from the Plaintiff's account in the amount of $5,000.00 to Providence Advisors Ltd. The Plaintiff did not request and/or authorize this transaction.
> 8. Sometime in or around the 22nd January 2015, the Defendant facilitated a withdrawal from the Plaintiff's account in the amount of $3,000.00 to an unknown person or entity. The Plaintiff did not request and/or authorize this transaction.
> 9. Sometime in or around the 19th August 2015, the Defendant facilitated a withdrawal from the Plaintiff's account in the amount of $300.00 to an unknown person or entity. The Plaintiff did not request or authorize this transaction.
> 10. In the premises the Defendants had no authority to pay the said amounts to any individual or company on the Plaintiff's behalf.
> 11. Alternatively, the said sum of $14,000.00 is payable to the Plaintiff by the Defendant as money wrongly debited to the Plaintiff's account by the Defendant without the authority of the Plaintiff.
> Breach of Fiduciary Duty
> 12. At all material times the Plaintiff was a customer of the Defendant and operated a share account and a fixed deposit account facility held at the Defendant's main branch since approximately 1977.

13. In wrongly debiting the Plaintiff's account the Defendant was in breach of its duty of care to the Plaintiff.

14. Particulars of Breach of Fiduciary Duty

a. Employees, agents and/or servants of the Defendant failed to identify and detect that the signature on withdrawal requests was not the signature of the Plaintiff;
b. Employees, agents and/or servants of the Defendant failed to inform and notify the Plaintiff about the fraudulent signature;
c. Employees, agents and/or servants of the Defendants failed to address the Plaintiff's written concerns in a missive delivered to the Defendant's corporate office sometime in or around February 2019;
d. Employees, agents and/or servants of the Defendant failed to reimburse the Plaintiff for the Defendant's breach;
e. The Defendant failed to have security processes in place and/or sufficient security processes in place to detect the above-mentioned withdrawals were not made by the Plaintiff; and
f. The Defendant failed to inform the Plaintiff about the withdrawals mentioned above.

Negligence

...

17. In facilitating the numerous and various withdrawals the Defendant was negligent toward the Plaintiff.

18. Particulars of Negligence

a. Employees, agents and/or servants of the Defendant failed to identify and detect that the signature on withdrawal requests was not the signature of the Plaintiff;
b. Employees, agents and/or servants of the Defendant failed to inform and notify the Plaintiff about the various unauthorized withdrawals;
c. Employees, agents and/or servants of the Defendants failed to address the Plaintiff's written concerns in a missive delivered to the Defendant's corporate office sometime in or around 2019;
d. Employees, agents and/or servants of the Defendant failed to reimburse the Plaintiff for the Defendant's breach;
e. The Defendant failed to have security processes in place and/or sufficient security processes in place to detect the above-mentioned withdrawals were not made by the Plaintiff; and
f. The Defendant failed to inform the Plaintiff about the withdrawals.

AND the Plaintiff claims:

i. A declaration that the Defendants are not entitled to debit the Plaintiff's account with the amount of the said cheque;
ii. Special damages of $14,000.00;
iii. General Damages
iv. Interest on the sum of $14,000.00 at such other rate as the Court shall think just;
v. Costs; and
vi. Any further remedy the Court deems fit and just."

[5.] The Claimant's Writ of Summons was served on the Defendant on or about 27 October 2021. In a letter dated 18 November 2021, the Defendant's attorneys informed the Claimant's attorneys that they intended to "file the necessary documents in response" to the claim. However, nothing was filed by the Defendant in acknowledgment of the proceedings by the end of November 2021. Consequently, by a Summons filed on 7 December 2021, the Claimant applied for Judgment in Default of Appearance and Defence under **Order 19, Rule 3** of the **Rules of the Supreme Court, 1978** ("RSC").

[6.] By a Summons filed on 15 December 2021, the Defendant applied *ex parte* for leave to enter a conditional appearance under **Order 12, Rule 6** of the **RSC** on the ground that the Claimant's claim is statute barred. For reasons that are not in evidence, the application was not heard until May 2023. On 1 May 2023, leave was granted to the Defendant to enter a conditional appearance in the action. On 9 May 2023, a Notice of Conditional Appearance was filed on behalf of the Defendant. A memorandum of conditional appearance ought to have been filed, but nothing has been made of this.

[7.] The Claimant's Summons for Judgment in Default of Appearance and Defence was amended on 6 February 2023 to include a request for judgment for special damages in addition to general damages, interest and costs. The Summons in its amended form came on for hearing on 30 August 2023, at a hearing at which only Counsel for the Claimant appeared. At that hearing, the Court made the following order (the Order for Judgment in Default):

> "1. Judgment in Default of Appearance is awarded to the Plaintiff as pleaded in the Statement of Claim contained in the Specially Indorsed Writ of Summons filed on the 9th September, 2021;
>
> 2. The Plaintiff is awarded the sum of $14,000 in Special Damages as against the Defendant;
>
> 3.The Plaintiff is awarded General Damages as against the Defendant to be assessed;
>
> 4. The Plaintiff is awarded interest on the sums claimed at the rate of 6.5%; and
>
> 5. The Plaintiff is awarded costs in the amount of $1,500.00."

[8.] There is no evidence on the court file that notice of the hearing on 30 August 2023 was ever given to the Defendant.

[9.] The Order for Judgment in Default was not drawn up and perfected until 20 October 2023. While the Claimant applied for judgment under **Order 19** of the **RSC** (judgment in default of pleadings), the perfected order refers to "Judgment in Default of Appearance". No application has ever been made to correct the Order for Judgment in Default under **Order 20, rule 10** of the **RSC** or **Part 42.10** on the basis that it contains a clerical mistake or an error arising from an accidental slip or omission.

[10.] Before the Order for Judgment in Default was perfected, the Defendant's attorneys filed a Defence without leave on 12 September 2023. The Defence was served on the Claimant the same day. In its Defence, the Defendant denies that the Defendant wrongly debited $14,000 of the Claimant's money, denies the alleged breaches of duty of care and fiduciary duty, and contends that the Claimant's claim is statute barred.

[11.] The Defendant admits to having been served with the Order for Judgment in Default sometime around 25 October 2023. Nonetheless, save for correspondence dated 25 January 2024 in which the Defendant's attorneys threatened to move to have the matter dismissed if the Claimant did not prosecute it, matters rested with the Defendant's irregularly filed Defence until February 2024 when the Claimant applied for directions for the assessment of damages by means of a Notice of Application filed on 12 February 2024.

[12.] The Claimant's Notice of Application filed on 12 February 2024 came on for hearing before me on 8 August 2024, at which time the Claimant indicated a desire to move forward with striking out the Defendant's Defence. I adjourned the matter and gave directions including that any applications be filed by 28 August 2024. On the adjourned date of 9 September 2024, the Defendant sought an adjournment to apply to set aside the Order for Judgment in Default. A further adjournment was granted to 4 October 2024 and directions were given. Those directions were not complied with by the Defendant. At the hearing on 4 October 2024, the parties agreed to the disposal of the Defendant's application on the papers.

The applicable law

[13.] The preliminary provisions of the **CPR** provide that the **CPR** does not apply to matters commenced prior to 1 March 2023 except where a trial date has not been fixed for those proceedings or a trial date has been fixed and has not been adjourned. Although this matter was commenced prior to 1 March 2023, a trial date had not been fixed as at 1 March 2023. Accordingly, the **CPR** applied to these proceedings, including all interlocutory applications heard in these proceedings, from the coming into force of the **Supreme Court Civil Procedure (Amendment) Rules 2023** which amended **Rule 2(2)(a)**.

[14.] Under the **CPR**, provision is made for the setting aside of default judgments in **Part 13**.

[15.] Under **Part 13.2** of the **CPR**, the Court must set aside a default judgment entered under **Part 12** of the **CPR** where there has been non-compliance with **Parts 12.4** or **12.5** in entering the default judgment. **Part 13.2** provides:

> "(1) The Court must set aside a judgment entered under Part 12 if judgment was wrongly entered because, in the case of — (a) a failure to file an acknowledgement of service, any of the conditions in rule 12.4 was not satisfied; or (b) judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied.
>
> (2) The Court may set aside a judgment under this rule on or without an application."

[16.] **Part 13.3** of the **CPR** confers a discretion upon the Court to set aside a default judgment where **Part 13.2** of the **CPR** does not apply, provided either that three enumerated preconditions set out in subparagraph (1) are met or there are exceptional circumstances under subparagraph (2).

[17.] **Part 13.3** provides:

> "(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 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."

Discussion and analysis

Must the Order for Judgment in Default be set aside under Part 13.2?

[18.] The Defendant submits that the Order for Judgment in Default should be set aside under **Part 13.2(1)(a)** of the **CPR** on the ground that judgment was wrongly entered when the conditions set out in **Part 12.4** were not satisfied because, by the time the Order for Judgment in Default was entered, the Defendant had already filed its Defence in the matter.

[19.] The Defendant submits that no application has been filed by the Claimant to set aside the Defence post its filing and service and invites the Court to find that the Defence is valid, citing **Chapman v Chapman** [1985] 1 All ER 757 approved by *Fraser SJ* in **Syla Ltd v Real Estate Funding Ltd.** 2020/COM/com/00015 (11 March 2024), where a defence was filed prior to the entry of default judgment. In **Chapman v Chapman,** *Megarry VC* stated:

> "During the argument, I took the view that a failure to comply with the rules, including a failure to serve a notice to proceed, did not by itself invalidate the proceedings or any step taken in them, despite the irregularity. Until anything has been set aside, it remains valid, despite being irregular."

[20.] I accept that the Order for Judgment in Default is potentially susceptible to **Part 13.2** of the **CPR** notwithstanding that it was granted pursuant to a Summons filed under the **RSC** and it was drawn up with the **RSC** in mind. As the **CPR** applied to these proceedings when it was entered, it seems to me that the Order for Judgment in Default must be treated as having been granted pursuant to **Part 12** of the **CPR**, which by then had replaced **Order 13** and **Order 19** of the **RSC**.

[21.] The Defendant's submission is founded upon the proposition that a default judgment is only "entered" for the purposes of **Parts 12** and **13** once the Court's order is perfected. I have difficulty with that proposition in this case where an Order "awarding" default judgment was pronounced after a hearing. **Part 42.8** of the **CPR** states that a judgment or order takes effect on and from the day it is given or made, unless the Court specifies that it is to take effect on a different

date. In this case, the Court "awarded" judgment in default at a hearing before the Defendant filed its Defence. The Defendant's Defence therefore does not avail it.

[22.] The Defendant submits further that the Order for Judgment in Default is an abuse of process and is irregular because an appearance was entered prior to the entry of the Order for Judgment in Default. Relying on **Gertrude Peter v Ahmed Maheer Abouelenin** 2007/CLE/gen/FP/00213 and **Great Lakes Insurance SE v Briland Gas and Oil Company Limited** [2021] 1 BHS J. No. 65, which cited and approved it, the Defendant submits that its Notice of Conditional Appearance filed on 9 May 2023 is properly before the Court and should be treated as an unconditional and complete appearance.

[23.] The Defendant's Notice of Application did not foreshadow its reliance on its Notice of Conditional Appearance as a ground for setting aside the Order for Judgment in Default, contrary to **Part 11.7(1)(a)** of the **CPR**. That is a matter that I will take into account when dealing with the issue of costs. It is not, however, something that I consider should bar the submission from being considered at all. The Claimant had time to respond or object to the submission but has not done so. Furthermore, **Part 13.3(1)** of the **CPR** is expressed to apply if **Part 13.2** does not apply, and I approach the matter through whether **Part 13.2** is engaged.

[24.] Under the **RSC**, a conditional appearance operated as a complete appearance to the action for all purposes subject to the right of the defendant to apply to set aside the writ or service. Complexity arises in this matter due to the fact that it is the **CPR** that applied when permission was granted for the Defendant to enter a conditional appearance, when the Defendant filed a notice of conditional appearance and when the Order for Judgment in Default was made. Under the **CPR**, the proper document for acknowledging service of proceedings is an acknowledgment of service in **Form G9**, which operates as an appearance. **Form G9** requires certain information that was not required under the **RSC**.

[25.] Inasmuch as the Defendant's Notice of Conditional Appearance was filed with the permission of the Court, such permission was granted at a time when the **CPR** applied, the plain intention in context was to signal the Defendant's intention to appear and participate, and no steps have been taken to set the Notice of Conditional Appearance aside, I consider that the Notice of Conditional Appearance should be treated as being that which it ought to have been, namely, an acknowledgment of service, notwithstanding that it does not contain all of the information required by **Form G9**. In the same way, the Order for Judgment in Default, which awarded the Claimant "Judgment in Default of Appearance", was granted at a time when the **CPR** applied, ought to be treated as having been granted for failure to file an acknowledgment of service.

[26.] It follows from the conclusions I have come to that the Order for Judgment in Default is irregular and must be set aside under **Part 13.2(1)(a)** of the **CPR** because it was wrongly granted

on the basis that there had "no appearance", i.e., a failure to file an acknowledgment of service. The Claimant submits that the Order for Default Judgment is not "improper" because the Claimant provided proof of service of his specially endorsed Writ of Summons, applied for judgment before the Defendant filed a conditional appearance and the Defendant never obtained an extension of time to file a defence. None of these matters, to my mind, addresses the irregularity.

Should the Order for Judgment in Default be set aside under Part 13.3(1)?

[27.] I turn next to consider whether the Order for Judgment in Default ought to be set aside as a matter of discretion under **Part 13.3(1)** of the **CPR** in the event that I have determined wrongly that it must be set aside under **Part 13.2** because it is irregular (i.e. in the event that it is in fact a regular judgment).

[28.] As *Fraser SJ* noted in **Cordella Delores Ward and another v FML Group of Companies Limited** 2022/CLE/gen/00484 (3 September 2024) at [23], **Part 13.3(1)** specifies "three conjunctive preconditions" and, if they are not satisfied, the Court has no discretion to set aside the default judgment under **Part 13.3(1)**. The same point was made by *Darville Gomez J* in **Dupuch & Turnquest v Reverend Mitchell Jones as pastor of Annex Baptist Church 2021/CLE/gen/00961** (31 July 2024).

Has the Defendant applied to the Court as soon as reasonably practicable after finding out that judgment had been entered?

[29.] The first "precondition" under **Part 13.3(1)** is that the defendant must have applied to set aside the default judgment as soon as reasonably practicable after finding out that judgment had been entered. The **CPR** prescribes no specific period within which the application must be made. What is "as soon as reasonably practicable" is therefore left flexible, to be determined in the circumstances of the particular case. The introduction of a specific requirement to apply "as soon as reasonably practicable" suggests that some degree of alacrity or promptness is required, however.

[30.] The Claimant submits that the Defendant has not applied to the Court to have the Order for Judgment in Default set aside in a timely fashion. I agree. I consider that, whatever the elasticity of the phrase "as soon as reasonably practicable", it cannot be said that the Defendant applied to the Court as soon as reasonably practicable after finding out that judgment had been entered here. The Defendant was served with the Order for Judgment in Default in October 2023, the grounds the Defendant relies upon have been available to the Defendant since service, and the Defendant was represented at two hearings before me prior to finally applying.

[31.] The Defendant relies on *inter alia* **Charis Manolakaki v John Constantinides** [2003] EWHC 401 (Ch) to submit that, even if the Court is not satisfied that the Defendant's application

was made promptly, its application was made in time for it to be just that the Order for Judgment in Default should be set aside. That case was decided under **Part 13.3** of the English **Civil Procedure Rules 1998**. Those rules only require the court to "have regard" to whether an application has been made promptly in deciding whether to set aside the default judgment. **Part 13.3** of the **CPR** is differently structured. "Exceptional circumstances" are required if an application to set aside has not been made as soon as reasonably practicable after finding out about the default judgment.

Does the Defendant have a good explanation for the failure to file an acknowledgment of service or defence?

[32.] The second "precondition" under **Part 13.3(1)** is that the defendant must provide a good explanation for the failure to file an acknowledgement of service or a defence. It has been suggested that a "good explanation" is one which satisfies the Court that the reason for the failure is something other than mere indifference to the risk that judgment might be entered: **Sylmord Trade Inc. v Inteco Beteiligungs Ag** BVIHCMAP2013/0003 (24 March 2014) at [24]. However, it is clear that if the explanation connotes real and substantial fault on the part of the defendant, then it is not a "good" one, regardless of the fullness of the explanation provided: **Public Works Corporation v Matthew** Nelson DOMHCVAP2016/0007 (29 May 2017) at [14].

[33.] The Defendant maintains that it did not file an acknowledgment of service because it believed the Claimant's claim to be statute barred. As I understand the Defendant's affidavit evidence and submissions on this point, the Defendant did not file an unconditional appearance because it wished to apply to strike out the proceedings on the ground that they are statute barred. To that end, the Defendant sought the leave of the Court to enter a conditional appearance and applied for a date in December 2021 but there was delay in getting the application set down and heard, and it was not set down and heard until May 2023.

[34.] I do not consider the explanation proffered by the Defendant for its delay in filing an appearance or acknowledgment of service to be a good one. Whether the Defendant entered a conditional appearance under the **RSC** or not, the Defendant could have raised the issue of limitation in its Defence, as it has done. Moreover, despite the passage of in excess of a year between the date a hearing date was applied for and the date that the application for leave to enter a conditional appearance was actually set down and heard, there is no evidence before the Court of any chasers or follow up to secure a date for the hearing of the application after the initial application to the Listing Office for a hearing date in December 2021. No explanation at all has been provided for the Defendant's delay in filing a defence after filing its Notice of Conditional Appearance in May 2023.

Does the Defendant have a reasonable prospect of successfully defending the claim?

[35.] The third requirement under **Part 13.3(1)** is that the defendant must have a real, as opposed to a fanciful, prospect of successfully defending the claim. The relevant principles were discussed in **North Bimini v Myron Saunders** 2020/CLE/gen/00950 (18 March 2024) and **Cordelia Ward v FML Group of Companies** 2022/CLE/gen/00484 (3 September 2024). The burden of establishing a realistic prospect of success lies on the defendant. There must be a "substantive" rather than merely arguable defence. The defence must carry some degree of conviction. The requirement of a defence with a real prospect of success is intended to eliminate cases which are not fit for trial.

[36.] The Defendant submits that it has a real prospect of successfully defending the Claimant's claim because:

(i) the Statement of Claim does not identify what term(s) (expressed or implied) which the Defendant is alleged to have breached to ground a claim in breach of fiduciary duty or negligence (**Scotiabank (Bahamas) Limited v Maschula Pinder** SCCiv App No. 73 of 2021 and **Glendon Rolle v Scotiabank (Bahamas) Limited** SCCivApp & CAIS No. 112 of 2022).

(ii) the claims of the Claimant are statute barred by virtue of **Sections 5** and **9** of the **Limitation Act** and the Claimant failing to bring an action on 15 February 2007 or prior to the expiration of the limitation period for negligence and/or breach of fiduciary duty.

(iii) the Claimant was aware of the Defendant's intention to defend this claim from 18 November 2021.

[37.] The Claimant submits that his claim is not statute barred and the Defendant has no real prospect of successfully defending the claim because:

(i) he did not become aware of the Defendant's actions respecting his account until sometime around the end of 2018 or the beginning of 2019. **Section 41** of the **Limitation Act** postpones the limitation periods prescribed under the **Limitation Act** where the action is based upon fraud or mistake until the claimant discovered the fraud or mistake or could with reasonable diligence have discovered it.

(ii) the Defendant's Defence is a bare denial. The Defendant offers no real defence to the claims set out in the Statement of Claim. None of the affidavit evidence filed by the Defendant offers any alternative explanation as to how the Claimant's funds were

removed from his account or any evidence that the Claimant authorised the transactions about which he now complains.

[38.] Having considered the Statement of Claim, the Defence and the submissions of the parties, in my judgment, the Defendant has not only a real but a strong prospect of successfully defending the claim.

[39.] The ordinary relationship of banker and customer is not a fiduciary one nor one of trustee and beneficiary but one of creditor and debtor: **Glendon Rolle v Scotiabank (Bahamas) Limited** SCCivApp & CAIS No. 112 of 2022 at [20]. The Claimant's pleaded complaint is a complaint of negligence and the particulars of breach of fiduciary duty are virtually the same as the particulars of negligence. The limitation period applicable to the action is six years under **Section 5** of the **Limitation Act**. All of the withdrawals to which this action relates occurred more than six years before the action was commenced. On the face of the pleadings, the Claimant's claim is barred.

[40.] It would be for the Claimant to demonstrate that his claim is not statute barred. **Section 41(1)(a)** of the **Limitation Act** provides that where a claim is based upon the fraud of the defendant or is for relief from the consequences of a mistake, the limitation period does not begin to run until the claimant discovered the fraud or mistake or could with reasonable diligence have discovered it. In **Barry Meador v Taino Beach Limited** 2014/FP/CLE/gen/00264 (23 March 2022), *Hanna-Adderley J* considered the provision in some detail in the context of fraud at [61] to [65] and I have had regard to that discussion.

[41.] These proceedings were commenced less than six years after the Claimant claims he first became aware of the allegedly unauthorised withdrawals. However, the Claimant's claim as it is currently pleaded is not based upon the fraud of the Defendant nor any mistake on his part. If the pleadings are amended to assert a clear and positive case of fraud against the Defendant and the Claimant seeks the postponement of the limitation period, the Claimant will have to persuade the Court that the fraud could not have been discovered sooner through the exercise of reasonable diligence. That is a factual matter, but one would expect it to be a challenging burden to discharge.

[42.] Although I am satisfied that the Defendant has more than a realistic prospect of successfully defending the claim, I conclude that the Order for Judgment in Default cannot be set aside under **Part 13.3(1)** because the Defendant failed to apply to set it aside as soon as reasonably practicable after finding out about it and failed to provide a good explanation for its failure to more timely respond to the Claimant's claim.

Should the Order for Judgment in Default be set aside because there are exceptional circumstances?

[43.] The Court may set aside a judgment entered under **Part 12** of the **CPR** under **Part 13.3(2)** if the defendant satisfies the Court that there are exceptional circumstances. In **Meyer v Baynes** [2019] UKPC 3, the Judicial Committee of the Privy Council approved the approach taken by the Eastern Caribbean Court of Appeal towards **Part 13.3(2)** of the **Eastern Caribbean Civil Procedure Rules 2000** which is in terms identical to **Part 13.3(2)** of the **CPR**.

[44.] *Lord Kitchin* summarised the approach of the Eastern Caribbean Court of Appeal at [12], stating:

> "...Pereira CJ turned to the question of exceptional circumstances. She explained at para 26 of her judgment that what amounts to exceptional circumstances must be decided on a case by case basis and expressed her full agreement with the view of Bannister J in Inteco Beteiligungs AG v Sylmord Trade Inc (BVIHCMAP 2013/0003, unreported) (para 31) that there must be something amounting to 'a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained'. She continued that 'exceptional circumstances' are not the same as a 'realistic prospect of success', and that rule 13.3(2) is reserved for those cases where the circumstances are truly exceptional and warrant depriving a claimant of his judgment where a defendant applicant has failed to satisfy rule 13.3(1). In her view exceptional circumstances would include those cases where it was shown that a claim was not maintainable or a defendant had a 'knock out' point, or where a remedy sought by a claimant was not available."

[45.] *Lord Kitchin* then said at [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. The question for the Court of Appeal was therefore whether, as Mr Dorsett submitted, Mr Meyer's contention that he had sold the car to Mr Hernandez before the accident constituted a knock out blow or in some other way constituted a compelling reason for setting the judgment aside."

[46.] The Claimant suggests that there are no exceptional circumstances why the Order for Judgment in Default should be set aside. I do not agree. The Defendant's plea of limitation appears to me to be the sort of "knock out blow" contemplated by *Pereira CJ* in **Carl Baynes v Ed Meyer** ANUHCVAP2015/002 (30 May 2016). The plea is *prima facie* a complete defence to the action, subject to the Claimant successfully relying on **Section 41** of the **Limitation Act** or some other basis for tolling the limitation period. It would be unjust for judgment to stand against the Defendant without permitting it to argue limitation. In my judgment, the Order for Judgment in Default ought to be set aside, as the Defendant has not delayed to such an extent that it would be unjust to set aside judgment at this stage.

Failure to file seek an extension of time in the Notice of Application

[47.] As a final matter, the Defendant failed to seek an extension of time to file a defence in its notice of application although it included an order regularising its Defence as a part of the relief it sought in a draft order that it laid over after filing its application. It is arguable that, in those circumstances, **Part 11.14** of the **CPR** is engaged. In the interest of disposing of the matter expeditiously, and being mindful of the Court's duty to actively manage cases under **Part 25.1** of the **CPR**, I find it appropriate, having determined to set aside the Order for Judgment in Default, to entertain what was in effect a request for an extension of time in the Defendant's draft order and to grant the Defendant a retrospective extension of time to file a defence pursuant to **Part 10.3(8)** and **Part 26.1(2)(k)** of the **CPR**.

Conclusion

[48.] In the premises, I accede to the Defendant's application and order that:

(i) the Order for Judgment in Default is hereby set aside.

(ii) the Defendant's Defence filed on 12 September 2023 shall stand as the Defendant's Defence and is hereby validated. It need not be re-served.

(iii) the Claimant may file and serve a Reply to the Defendant's Defence by 5:00 pm on 18 November 2024.

(iv) the Claimant shall apply for a date for a case management conference as soon as practicable.

[49.] Both parties addressed the Court on the issue of costs in their written submissions. The award of costs is in the discretion of the Court. I have considered **Parts 71.6**, **71.10** and **72.26** of the **CPR**. The Defendant succeeded in having the Order for Judgment in Default set aside, but it has done so partly on the strength of grounds not set out in its Notice of Application. The Defendant also failed to comply with the Court's directions, and its conduct and failure to act diligently impacted upon the orderly and timely progress of these proceedings. I make no order as to costs in the circumstances, including in respect of the hearing on 4 October 2024.

Dated the 1st day of November 2024

Jonathan Z.N. Deal
Assistant Registrar