IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2022/CLE/gen/01554

OCEAN BREEZE AIR CONDITION & REFRIGERATION

Claimant

AND

SEAN LYNES

First Defendant

AND

S & L CONSTRUCTION LTD.

Second Defendant

AND

GODFREY BETHELL
AND
SHANELLE BETHELL

Third Party

AND

CAY CAPITAL SOLUTIONS LTD.

Fourth Party

Before: Assistant Registrar Jonathan Deal

Appearances:
(14 November 2024) Lashanda Bain for the Claimant

Darell Taylor for the Defendants

Dawson Malone and Miquel Cleare (watching brief) for the Third Party

Andrew Smith (watching brief) for the Fourth Party

Hearing dates: 11 September 2024, 4 October 2024, 14 November 2024

RULING

ASSISTANT REGISTRAR DEAL

[1.] This is an application made by the First and Second Defendants to set aside a default judgment filed on 21 December 2022 (the "Default Judgment") on the ground that the Defendants have a good defence to the action. It is made by Summons filed on 11 January 2023 (the "Set Aside Summons"), supported by the Affidavit of Sean Lynes filed on 9 March 2023 (the "Lynes Affidavit") and was substantively heard on 14 November 2024.

Background

[2.] The Claimant commenced these proceedings by a Writ of Summons filed on 8 November 2022 to recover damages, interest and costs for an alleged breach of contract by the Defendants in respect of a contract for the provision and installation of an air conditioning system at the residence of the Third Parties (the expression "Third Parties" is used in this Ruling to refer to Godfrey and Shanelle Bethell, who are described together as the "Third Party" in the pleadings).

[3.] The Claimant filed and served its Statement of Claim in the proceedings on 6 December 2022. In the Statement of Claim, it is alleged that:

(i) the First Defendant was at all material times the proprietor of the Second Defendant carrying on and conducting business for and on behalf of and with the authority of the Second Defendant. The Second Defendant is a company.

(ii) the relationship between the parties was governed by an amended proposal dated 17 June 2021 (defined as "the Contract") for the Claimant to provide and install an air conditioning system at a residence being constructed by the Second Defendant. The amended proposal required the payment of $74,890.60 over five stages.

(iii) the amended proposal was submitted to the Defendants at the request of the Defendants after the Claimant submitted a proposal dated 15 June 2021 for the total sum of $87, 216.63, which the First Defendant acknowledged as received on 15 June 2021. The amended proposal was submitted after a change in the specification of the air conditioning units.

(iv) the Defendants paid the Claimant the total sum of $63,934.36 in respect of the Mobilization and Phases 1 and 2 but payment in respect of Phase 3 ($6,478.12) and the Final Phase ($4,478.12) in the total sum of $10,956.24 was not made.

(v) on or about 22 September 2021, the Claimant forwarded Invoice 2359 to the First Defendant and requested payment of the $10,956.24 by 1 October 2021. However, the Defendants failed and/or refused to make payment.

(vi) as a result of the Defendants' failure and/or refusal to pay the $10,956.24, the Claimant was unable to progress the installation and commissioning of the air conditioning system at the residence as agreed.

(vii) the Claimant has suffered loss and damage in the sum of $10,956.24 by the Defendants' failure to adhere to the terms of the Contract, failure to make payments pursuant to the terms of the Contract and failure to take any or all reasonable steps to pay the $10,956.24.

[4.] On 21 December 2022, the Claimant entered Judgment in Default of Defence against the Defendants under **Order 19** of the **RSC** for the sum of $10,956.24 and interest at the statutory rate from the date of judgment with costs to be taxed if not agreed. The Default Judgment was not served on the Defendants until 3 January 2023. It appears to be accepted by the Defendants that the Default Judgment was regularly entered, and no point has been taken about the fact that judgment in default was entered against both company and proprietor.

[5.] On 22 December 2022, the Defendants filed a Third Party Notice dated 20 December 2022 pursuant to **Order 16, Rule 1** of the **RSC**. The Defendants claim in the Third Party Notice that:

(i) the Claimant did not complete Phase 3 or the Final Phase of the scope of work and therefore was not entitled to the payment claimed of $10,956.24.

(ii) Invoice 2359 was incorrectly dated 22 September 2021 instead of 22 September 2022 and it was in fact submitted to the Defendants on 22 September 2022.

(iii) in or about May 2022, the Third Parties altered and/or amended the Construction Agreement between the Third Parties and the Second Defendant to the effect that the Third Parties would henceforth make payments directly to all subcontractors inclusive of payments to the Claimant. All monies outstanding and owing to the Claimant for works completed should be paid to the Third Parties.

(iv) if in fact the contract sums of $6,478.12 for Phase 3 and $4,478.12 for the Final Phase were due and payable to the Claimant, the Third Parties agreed and were obliged to satisfy the payments directly to the Claimant, as Invoice 2359 was forwarded to the Third Parties for payment following the payment protocol established by the Third Parties. However, the Third Parties failed and/or refused to pay the invoiced amounts to the Defendants or to the Claimant as agreed.

[6.] By virtue of the matters set out in their Third Party Notice, the Defendants purport to claim damages, "loss in contract for breach of contract and/or breach of a service arrangement" and related relief against the Claimant and the Third Parties.

[7.] The Set Aside Summons was filed by the Defendants on 11 January 2023 invoking **Order 19, Rule 9** of the **RSC**. However, the Defendants failed to file any evidence in support of the Set Aside Summons until 9 March 2023 when steps preliminary to the enforcement of the Default Judgment were taken by the Claimant.

[8.] On 18 January 2023, the Third Parties filed a Fourth Party Notice against the Fourth Party seeking to be indemnified by the Fourth Party against the Defendants' claim. The main allegations in the Fourth Party Notice are, in summary, that:

(i) the Fourth Party provided administration services under the Construction Agreement mentioned in the Third Party Notice.

(ii) in accordance with the Construction Agreement, the Third Parties received payment applications ("pay-apps") from the Defendants and the Fourth Party on a monthly basis and payment was made into the Fourth Party's nominated bank account. This protocol was later varied in or around May 2022 following breaches of contract by the Defendants and the Fourth Party.

(iii) the Defendants contracted directly with the Claimant for the provision and installation of an air-conditioning system and the Claimant was not in a contractual relationship with the Third Parties nor did the Third Parties ever do anything which would have created a contractual relationship between them and any of the Defendants' or the Fourth Party's subcontractors.

(iv) the fixed price due and payable by the Third Parties under the Construction Agreement in respect of the air-conditioning system was $81,914.45 inclusive of contractor's overhead and profit and VAT. The Third Parties were requested by the Defendants and the Fourth Party to pay the sum set out in the Construction Agreement for the air conditioning system in two instalments, which they did on 16 November 2020 and 15 May 2021 respectively.

(v) notwithstanding that the Third Parties paid the full sum of $81,914.45 to the Fourth Party, the Fourth Defendant and the Defendants failed and/or refused to pay the Claimant.

(vi) neither the Claimant, the Defendants nor the Fourth Party ever submitted an invoice from the Claimant to the Third Parties for payment in relation to the Contract.

[9.] By virtue of the matters set out in their Fourth Party Notice, the Third Parties seek an indemnity or contribution from the Fourth Party in respect of the Defendants' claim.

The applicable rules

[10.] The preliminary issue of whether the **Supreme Court Civil Procedure Rules, 2022** ("**CPR**") or the **RSC** should be applied to the Set Aside Summons was raised with the parties. The issue arose because the Default Judgment was entered prior to the commencement of the **CPR** and the Set Aside Summons was filed prior to the commencement of the **CPR** but the application was only heard after the commencement of the **CPR**. Following some discussion, the parties proceeded under the **CPR**.

Setting aside default judgments under the CPR

[11.] **Part 13.3** of the **CPR** provides for the variation and setting aside of default judgments in the following terms:

> "(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."

[12.] The wording of **Part 13.3** of the **CPR** permits the Court to set aside a default judgment in narrower circumstances than was the case under the **RSC**. In **Ephraim B.E Morley v Teachers and Salaried Workers Cooperative Credit Union Limited** 2021/CLE/gen/1022 (1 November 2024), the Court stated at [28] when discussing **Part 13.3(1)**:

> "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)."

[13.] No reliance was placed by the Defendants on **Part 13.3(2)** in their effort to set aside the Default Judgment. The provisions of **Part 13.3** of the **CPR** are such that, in the absence of "exceptional circumstances" engaging **Part 13.3(2)**, a defendant seeking to set aside a default judgment must:

(i) apply to the Court as soon as reasonably practicable after finding out that judgment has been entered;

(ii) give a good explanation for the failure to file an acknowledgement of service or a defence (as the case may be); and

(iii) have a real prospect of successfully defending the claim.

[14.] **Part 1.2(1)** of the **CPR** mandates that the overriding objective of dealing with cases justly and proportionate cost must be taken into account when the Court exercises any discretion under the **CPR**, and this would include the discretion conferred by **Part 13.3**. As part of considering the overriding objective, the Court must weigh the use of its coercive powers where there is a failure to follow procedure against the need for the Court to hear cases on their merits: **Victor Gayle v Jamaica Citrus Growers & Anr** Claim No. 2008 HCV 05707 (Supreme Court of Jamaica, 4 April 2011) per Edwards J (Ag) at [73].

Discussion and analysis

Issue 1: Did the Defendants apply to the Court as soon as reasonably practicable after finding out that the Default Judgment had been entered?

[15.] The first issue that arises under **CPR 13.3(1)** is whether the Defendants applied to the Court to set aside the Default Judgment as soon as reasonably practicable after finding out that the Default Judgment had been entered.

[16.] Counsel for the Defendants contended that this pre-condition was satisfied. While Ms. Taylor conceded that the Set Aside Summons was filed "late", she submitted that the lateness was "not unreasonable". Ms. Taylor implored the Court to look at what she called the "time factor" and what she described as a "rush to judgment" by the Claimant. Ms. Taylor highlighted that the timeframe under the **RSC** gave the Defendants only a 12 day period in which to file a defence, excluding weekends, and that the Default Judgment was filed one day after the period of time for serving a defence expired, during the "height of the festive season", without the usual professional courtesy of a warning.

[17.] Counsel for the Claimant submitted that the Defendants failed to proceed with their application to set aside the Default Judgment in a prompt manner. Ms. Bain did not shy from acknowledging the date when the Set Aside Summons was filed, but emphasized that it was not supported by any evidence when it was filed and that nothing was done by the Defendants to pursue it until they were served with an Order for Examination. Ms. Bain noted that the Claimant was only made aware of the Set Aside Summons some two months after it was filed and invited the Court to find that, but for the Order for Examination, no steps would have been taken by the Defendants to move the application along. Ms. Bain dismissed the Defendants' criticisms about "rushing to judgment" on the basis that no breach of the **RSC** had been alleged.

[18.] The Court takes the date upon which the Defendants' application was filed as the date upon which it was made for the purposes of **Part 13.3(1)(a)**. The Defendants filed the Set Aside Summons a mere eight days after service of the Default Judgment. In **Earl Hodge v Albion Hodge** Claim No. BVIHCV 2007/0098 (12 March 2008), Charles J (as she then was), sitting as a judge of the High Court of the British Virgin Islands, accepted that a defendant had applied "as soon as reasonably practicable" where there had been a delay of thirteen days between service of the

default judgment and the application to set aside. In the circumstances of this case, the Court is satisfied that the Defendants applied as soon as reasonably practicable after finding out about the Default Judgment and thus that the threshold condition in **Part 13.3(1)(a)** is satisfied.

[19.] In the interest of completeness, the Claimant's allegations of undue delay in moving the application to set aside the Default Judgment and lack of *bona fides* are not directly relevant to **Part 13.3(1)(a)** and are better taken into account at a later stage of the analysis, if necessary. The case of **National House Building Council v Relicpride Limited** [2009] EWHC 1260 (TCC) relied on by the Claimant on this issue is distinguishable on its facts. There, Akenhead J found that defendants had not applied "promptly" ("with all reasonable celerity") to set aside a default judgment when they had waited over seven weeks after the default judgment had been entered to do so. That is not the case here.

Issue 2: Have the Defendants given a good explanation for the failure to file a defence?

[20.] The second issue that arises under **CPR 13.3(1)** is whether the Defendants have provided a good explanation for their failure to file a defence. The (potentially fatal) point that no explanation for the Defendants' default was given in evidence was not taken by the Claimant. Regard shall therefore be had to the explanation given in submissions.

[21.] Counsel for the Defendants submitted that the Defendants' explanation for the failure to file a defence was "what took place" or "the factual aspect" of the matter. As the Court understood Ms. Taylor, she relied on the time of year when the Statement of Claim was served and the Default Judgment was filed (the Christmas and New Year holidays) and the fact that the Defendants' litigation strategy at the time was to join the Third Parties to the proceedings because they believed the Third Parties ought to have been the persons responsible for paying the Claimant. The Defendants further explained (in their written submissions) that they filed their Third Party Notice before filing a defence in order to avoid requiring the leave of the Court to issue a third party notice under **Order 16, Rule 1** and that they fully intended to file a defence thereafter.

[22.] Counsel for the Claimant submitted that the Defendants failed to provide a good explanation for their failure to file a defence. Ms. Bain drew attention to the fact that the Third Party Notice was filed by the Defendants on 22 December 2022 and therefore, the Defendants could have filed a defence notwithstanding the "festive season". Ms. Bain submitted that there has been no explanation presented as to why, in the process of filing their Third Party Notice, the Defendants did not, within the allotted time period, also file a defence. Ms. Bain submitted that the only possible explanation why the defence was not prepared is because the Defendants do not deny the Claimant's entitlement to the funds due and owing but merely who should be obligated to make payment. Counsel for the Claimant made further submissions in connection with this aspect of the matter but upon review they appear to be more pertinent to the merits or the overall

exercise of the Court's discretion than the question of whether the Defendants have provided a good explanation for their failure to file a defence.[1]

[23.] The Court is unable to accept the submission that the only possible explanation why a defence was not prepared is because the Defendants do not deny the Claimant's entitlement to the funds due and owing. The Third Party Notice expressly denies the Claimant's entitlement to the funds.

[24.] The Court accepts the genuineness of the Defendants' explanation that they filed their Third Party Notice before filing a defence in order to avoid the need to seek the leave of the Court to issue a third party notice under **Order 16, Rule 1**. The Court also accepts the genuineness of the Defendants' assertion that they intended to file a defence after filing the Third Party Notice when they filed the Third Party Notice.

[25.] The Court does not find that the Defendants' failure to file a defence was attributable to the fact that they did not dispute liability or were indifferent to the question of whether or not the Claimant obtained judgment against them. Nor does the Court find that the Defendants' explanation for failing to file a defence connotes real and substantial fault on the very specific facts of this case.

[26.] In the Court's view, there was something of a "rush to judgment" on the part of the Claimant in this case. In reaching this conclusion, the Court has attached significance to (i) the time of year when the relevant events occurred, around which time of year it is noticed many law firms customarily slow operations; (ii) when the Default Judgment was filed relative to when the entitlement to do so arose; and (iii) the fact that the Default Judgment was entered without warning, contrary to **Rule XVI, commentary 3** of the **Code of Professional Conduct**.

[27.] In the circumstances, the Court finds that the Defendants have provided a good explanation for the failure to file a defence and therefore the threshold condition in **Part 13.3(1)(b)** is satisfied.

Issue 3: Do the Defendants have a defence with a real prospect of success?

[28.] The third issue under **CPR 13.3(1)** is whether the Defendants have a real prospect of successfully defending the claim. A "real" prospect is to be distinguished from a prospect which is "fanciful" or "imaginary". It does not require establishing a probable case.

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[1] In brief, Counsel for the Claimant submitted that (i) setting aside the Default Judgment would be "premature" and "inefficient" because the Default Judgment is necessary for the Defendants' claim against the Third Parties (citing **Hordern-Richmond Ltd v Duncan** [1947] 1 All ER 427); and (ii) the Defendants' third party claim is a separate and independent part of the proceedings which ought not to affect the Claimant's claim.

[29.] In **Alpha Aviation Limited v Randy Larry Butler** [2021] 1 BHS J. No. 42, a case decided under the **RSC** but relied on by both parties, Klein J made the following observation at [58] which continues to be relevant under the **CPR**:

> " ... the primary consideration, as a matter of legal principle and common sense, is whether the defendant has a meritorious defence. If the defendant cannot establish that he could mount a defence with merits, it would be fruitless to set aside a default judgment; but if there were a serious defence, the court would not countenance a judgment on which there had been no adjudication. ..."

[30.] In **ED & F Man Liquid Products Ltd v Patel** [2003] EWCA Civ 472, the English Court of Appeal considered the test to be applied by a court when determining whether a defendant has a "real prospect of successfully defending the claim" when asked to set aside a default judgment under **Part 13.3.(1)** of the **UK CPR 1998**. The following principles can be distilled:

(i) the use of the phrase "real prospect of successfully defending the claim" in the tests for setting aside a regularly entered default judgment and for entering summary judgment suggests that a similar test was contemplated under each rule.

(ii) "real" distinguishes fanciful prospects of success and directs the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success. This reflects the observation in the **Saudi Eagle** case that the defence sought to be argued must carry "some degree of conviction". Both approaches require the defendant to have a case which is better than merely arguable.

(iii) the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. Although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, in particular cases, a defendant applying to set aside a default judgment may encounter a court less receptive than if he were a timely defendant trying to resist an application for summary judgment.

(iv) where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents.

[31.] **ED&F Man Liquid Products Ltd v Patel** [2003] EWCA Civ 472 was cited with apparent approval by Fraser Sr J in **North Bimini Bay Condominiums Ltd v Myron Saunders** 2020/CLE/gen/FP/00950 (18 March 2024) at [25] and **Cordelia Delores Ward v FML Group of Companies Ltd** 2022/CLE/gen/00484 (3 September 2024) at [26] in connection with **Part 13.3** of the **CPR**. The principles stated are therefore relevant to **Part 13.3**.

[32.] The essence of the claim in this matter is that the Claimant began work pursuant to a contract constituted by an amended proposal dated 17 June 2021 and the Defendants paid the Claimant the total sum of $63,934.36 in respect of the first three stages of work but, in breach of contract, failed to pay the sum of $10,956.24 when due in respect of the two final stages of work. The Claimant initially claimed that the $10,956.24 related to work completed but its Statement of Claim pleads that the Defendants' failure to pay the $10,956.24 prevented the Claimant from progressing the installation and commissioning of the air conditioning system as agreed.

[33.] Counsel for the Defendants submitted that the Defendants have a good and arguable defence to the claim. Relying primarily on the Third Party Notice, Ms. Taylor submitted that:

(i) it is disputed that a contract existed between the Claimant and the Defendants as the Defendants deny personally paying the Claimant.

(ii) there is a dispute between the parties as to the date when the Claimant's invoices were submitted and whether the Claimant was entitled to payment because the work was not completed; and

(iii) there is a dispute as to whether the Third Parties varied the Construction Agreement which affected payments to the Claimant and whether the Third Parties failed to pay the Claimant as they ought to have.

[34.] Counsel for the Defendants submitted that these allegations are only capable of being decided upon if the Defendants are able to present their defence.

[35.] It is to be noted that the Defendants argued that they have a defence with a real prospect of success but the Lynes Affidavit inexplicably does not depose to Defendants' version of events or the merits of the Claimant's claim, despite the fact that it was sworn by the First Defendant personally. It contents itself with referring to the existence of the Third Party Notice and the fact that it was responded to. It states:

> "3. I am duly advised by Counsel that the First and Second Defendants ("the Defendants") have an arguable defence to the claims in the Statement of Claim filed herein on the 6th December, 2022 based on the fact that the Defendants filed a Third Party Notice herein on the 22nd day of December, 2022 claiming an indemnity against the Plaintiff's claim. There is now produced and shown to me marked as 'SL-1' a true copy of the aforesaid Third Party Notice.
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> 4. As a result, the Third Party, namely Godfrey Bethell and Shanelle Bethell, entered an appearance to the Third Party Notice and filed a Fourth Party Notice claiming an indemnity against Cay Capital Solutions Ltd. There is now produced and shown to me marked as 'SL-2' a true copy of the aforesaid Fourth Party Notice., to which, as far as am I aware, there has not been an Appearance or Defence filed.
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> 5. Based on the matters noted above the Defendants are of the view that this action contains triable issues and the Court should decide on the merits of the action.

> 6. In the premises, the Defendants are seeking an Order pursuant to Order 19, Rule 9, Rules of the Supreme Court, that the Judgment in Default of Defence filed herein on the 21 December, 2023 be set aside on the ground that the Defendants have an arguable defence/third party claim as set out in the Third Party Notice filed herein."

[36.] The Lynes Affidavit also fails to properly exhibit a draft defence. There is attached to the Lynes Affidavit a draft defence but it is without explanation not mentioned in the affidavit nor is it accounted for in the notarial certificate. (It was also hardly, if at all, mentioned in submissions.) The notarial certificate refers to there being two exhibits "SL-1" and "SL-2" whereas there are three documents purportedly exhibited to the Lynes Affidavit. Counsel for the Claimant submitted that the draft defence is not properly before the Court and the Court concurs.

[37.] Under the **RSC**, courts usually required that an application to set aside a regularly entered default judgment be supported by an "affidavit of merits", though this rule could be departed from in "rare but appropriate cases" or, as it was said in one of the earlier cases on the subject, for "very sufficient reason": **Farden v Richter** [1889] 23 QBD 124; **Evans v Bartlam** [1937] AC 473; **Hanna v Lausten** [2018] 1 BHS J No. 172.

[38.] The Claimant's written submissions put the point in this way:

> "47. In the case relied upon by the Defendant, specifically, Evans v Bartlam, Lord Atkin stated 'that where judgment was obtained regularly, there must be an Affidavit of Merits meaning that the applicant must produce to the court evidence that he has a prima facie defence…'"

[39.] Under the **CPR**, there has been no relaxation in the requirement that there must normally be an affidavit of merits. Indeed, the requirements of the **CPR** are arguably stronger. **Part 13.3** requires a defendant to demonstrate a real prospect of successfully defending the claim. By **Part 13.4**, a defendant who seeks to set aside a default judgment is obliged by the rules to support their application with affidavit evidence which exhibits a draft defence.

[40.] Illustratively, in **Belize Telecommunications Limited v Belize Telecom Limited et al** Civil Appeal No. 13 of 2007 (13 March 2008), an appeal before the Court of Appeal of Belize, Morrison JA stated:

> "32. Rule 13.4(1)(2) and (4) require that an application to set aside a default judgment must be supported by evidence and that the defendant's affidavit in support 'must exhibit a draft of the proposed defence.' In this case, it was submitted, neither of the affidavits filed on behalf of the respondent referred to the merits of the proposed defence, with a view to showing a real prospect of a successful defence, nor was a draft of the proposed defence exhibited, as required by the rules. Arana J herself recognized this by her comment that the proposed defence 'should in fact have been exhibited to the affidavit,' but she obviously did not think that this omission was sufficiently grave to prevent her giving the application to set aside consideration on such merits as there might have been. As a result, the appellant contended in this court, the learned judge erred in law, or in the existence of her discretion under Rule 13.3(1), 'by taking into account a proposed defence … not exhibited to any affidavit, as required by CPR 13.4(3).'

> 33. In my view, this ground must also succeed. Given the significance that the rule attaches to the defendant having a real prospect of successfully defending the claim, affidavit evidence speaking specifically to the merits of the claim, as well as the proposed defence, are critical to a proper judicial assessment of the application to set aside. The requirement that the proposed defence be exhibited to the affidavit is stated in mandatory terms ('must exhibit') and is to be so treated by courts hearing such applications. The affidavit evidence must, in my view, vouchsafe the contents of the draft proposed defence, as a consequence of which it is not enough to produce a draft unconnected to the affidavit evidence (as was done in this case)."

[41.] In **B&J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2 (15 February 2013), an appeal before the Court of Appeal of Jamaica, Morrison JA stated:

> "[47] In the instant case, rule 13.3(1) required the appellant to show 'a real prospect of successfully defending the claim'. In my judgment in Attorney General v McKay (with which the other members of the court agreed), after referring to the Evans v Bartlam requirement that the affidavit of merit should be sufficient to demonstrate a 'prima facie defence, I observed as follows (at para. [23]): 'The language in the CPR is obviously stronger, with the result that, as Mr Stuart Sime puts it in "A Practical Approach to Civil Procedure" (10th edn, para. 12.35), "the written evidence in support of the application to set aside will have to address [the relevant] factors, and in particular the alleged defence on the merits"."

[42.] In **Anthony Ramkissoon v Mohanlal Bhagwansingh** Civil Appeal S-163 of 2013 (19 July 2013), an appeal before the Court of Appeal of Trinidad and Tobago, Jamadar P (as he then was) stated at [8] and [9]:

> "8. Rule 13.3 (1) requires that the defendant demonstrate that he 'has a realistic prospect of success' in defending the claim. Part 12 CPR, 1998, deals with the general rules concerning applications for court orders. It provides that generally every application must be in writing; it must include certification that any facts stated are true; and where evidence in support of an application is required it must be contained in an affidavit.
>
> 9. In this application the defendant did certify in the application that the facts stated in the defence are true, but did not depose to those facts in his affidavit. In my opinion, on an application pursuant to Rule 13.3 to set aside default judgments – the affidavit in support of the application must condescend to deposing to the facts which substantiate the requirements of both limbs of the rule. An affidavit of merits is required. It is not enough to rely on the certificate to the application and to simply attach the defence."

[43.] In the present case, the result of the deficiencies in the Lynes Affidavit is that, on the material before the Court, the Court cannot be satisfied that the Defendants have a defence with a real prospect of success or, what is the same thing, a defence with some conviction. There is no proper affidavit of merits before the Court and no circumstances have been suggested to justify the omission of one.

[44.] The Court has not overlooked [33] and [34] above. However, having regard to the fact that the relationship between the Claimant and the Second Defendant was clearly one of subcontractor and contractor, the Defendants do not suggest that the Claimant was privy to the contract between the Second Defendant and Third Parties, and the Claimant's invoice was, on the Defendants' own

version of events, received prior to the commencement of this action, the only defence raised with any potential merit is the defence that the Claimant was not entitled to payment of the sum claimed when this action was commenced because the work had not yet been completed.

[45.] With respect to that defence, Counsel for the Claimant confirmed on instructions that Phase 3 and the Final Phase were only completed in or about October 2023. That concession is not, however, in and of itself sufficient to found a real prospect of successfully defending the claim. The Statement of Claim is not pleaded on the basis that the work was completed prior to the Claimant claiming payment, the Claimant did not concede its entitlement and the Defendants assert in their Third Party Notice that they presented the Claimant's invoice to the Third Parties for payment, which is potentially consistent with payment being required in advance of completing the work. No evidence of any substance was led by the Defendants to cast doubt on the claim.

[46.] In the circumstances, the Court finds that the Defendants have not discharged the onus upon them of establishing that they have a defence with a real prospect of success, with the result that the precondition in **Part 13.3(1)(c)** for setting aside the Default Judgment under **Part 13.3(1)** is not satisfied.

Conclusion

[47.] As the Court has found that the Defendants failed to establish that they have a defence with a real prospect of success, it would not be appropriate to set aside the Default Judgment notwithstanding the speed with which the Defendants applied to set aside the Default Judgment and the Defendants' explanation for not filing a defence within the time prescribed for doing so.

[48.] In **International Finance Corporation v Utexafrica S.p.r.l.** (2001) CLC 1361, a decision of the English High Court cited in **ED&F Man**, Moore-Bick J said at page 1363:

> "A person who holds a regular judgment, even a default judgment, has something of value, and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside."

[49.] In the premises, the Defendants' application fails. The Set Aside Summons is dismissed.

[50.] In accordance with the usual rule that costs follow the event, the Defendants must pay the Claimant's costs of the application to be fixed upon the filing of a brief statement of costs by the Claimant by 5:00 pm on 14 February 2025. Any objections or representations on quantum shall be filed by 5:00 pm on 28 February 2025. The amount of costs to be allowed for the application shall be determined on the papers.

Dated the 3rd day of February 2025

Jonathan Deal
Assistant Registrar