IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
Claim No. 2023/CLE/gen/00046

BETWEEN:

BEL AIR BAHAMAS LIMITED

Claimant

AND

ABELINO AVILA

Defendant

Before:	The Honourable Mr. Justice Leif Farquharson
Appearances:	Eugeina Butler for the Claimant Mary Bain-Charlton for the Defendant
Hearing date:	30 June 2025

RULING

1. This is an application by the Defendant brought by Notice of Application filed on 16 April 2025, seeking an order pursuant to CPR 13.3 setting aside a judgment dated 13 April 2023 and entered against him in default of acknowledgement of service and defence. Relatedly, the Defendant seeks an order pursuant to CPR 10.3(8) and/or under the inherent jurisdiction of the Court extending the time for the filing of his Defence.

2. The grounds for the application may be summarised as follows:

   (i) there has been no unreasonable delay on the part of the Defendant in filing the current application;
   (ii) the Defendant has a reasonable explanation for not responding to the proceedings sooner or filing a Defence;
   (iii) the Defendant reasonably believed that the action was previously settled or otherwise resolved;

(iv) the Defendant believed the action to be misconceived given that it was the Claimant who actually owed him sums of money pursuant to the parties' agreement; and

(v) the Defendant has reasonable prospects of successfully defending the substantive claim.[1]

Factual Background and Procedural History

3. By way of background:

(i) The present action was commenced by specially indorsed Writ filed on 23 January 2023. According to the Statement of Claim, the Claimant is the developer of a 50-acre resort project near the settlement of Gregory Town in Eleuthera. Pursuant to the terms of a contract dated 9 September 2022 (the "***Master Contract***"), the Claimant engaged the services of the Defendant in connection with the clearing and grading of the project site. It is averred that the Defendant cleared approximately 24.31 acres of the project site, for which he was paid a total sum of $144,000.00. The Claimant says that the Defendant was overpaid as he was only entitled to receive $94,809.00 (i.e. $3,900.00 per acre for the clearing phase, multiplied by 24.31). The amount of the overpayment is stated to be $49,191.00. The Claimant terminated the services of the Defendant on 5 December 2022 after he allegedly unilaterally ceased work on the project. After issuing a demand letter, the Claimant commenced proceedings for recovery of the overpaid sum, plus interest and costs.

(ii) The Defendant was served with the Claimant's Writ in Eleuthera on 18 February 2023.[2]

(iii) Judgment in default of appearance and defence was entered on 13 April 2023. This adjudged the Defendant liable to pay the Claimant the sum of $49,191.00, interest on the said sum at the statutory rate from the date of judgment to the date of payment and costs.

(iv) The Claimant subsequently obtained an order requiring the Defendant to attend Court on 11 June 2024 to be examined as a judgment debtor. Notably, the affidavit in support of the application to examine the Defendant as a judgment debtor, which referred to and exhibited a copy of the default judgment, was served on the Defendant in Eleuthera on 15 March 2024.[3] The order for examination itself was also served on this date.

(v) According to the notes on the Court's file, it appears that the Defendant did not attend the examination as scheduled on 11 June 2024. The Judge seised of the matter accordingly adjourned the examination to 1 October 2024, directing that a warrant for the arrest of the Defendant be issued in the event of his failure to appear on this date. The learned Judge also directed that the Defendant be allowed to appear at the adjourned hearing via video link. It appears that the hearing on 1 October 2024 was either adjourned or vacated, with the examination subsequently being set down for 25 March 2025, which is when the matter first came before me. By this time the Defendant had appointed Messrs. Ian D. Cargill

[1] See Defendant's Notice of Application

[2] Affidavit of Police Corporal Antoine Ellis filed 12 April 2023, para.2

[3] Affidavit of Sergeant 3132 Walker filed 3 May 2024, para.2

& Co. to represent him, a Notice of Appointment having been filed by the firm on 25 October 2024.

(vi) At the hearing on 25 March 2025, counsel for the Defendant expressed a concern as to whether the Defendant properly understood the nature of the proceedings as English was not his native language. She also indicated that her firm had only recently been engaged and she was still in the process of taking instructions. The examination was accordingly adjourned to 24 April 2025.

(vii) The current application was filed just prior to the adjourned hearing date. There was short service on the Claimant, who understandably objected to the application being heard. So as to avoid further court time being wasted, it was agreed by both sides that the examination proceed on 24 April 2025 as scheduled, with the present application being set down to be heard in the future and a temporary stay of enforcement being issued, if warranted, to facilitate the proper disposition of the Defendant's application. The Defendant participated in the examination without the need for an interpreter, answering a series of fairly standard questions in relation to his background, earnings, assets, liabilities and outgoings.

The Defendant's Affidavit in Support

4. The Defendant swore two affidavits in support of his application. These were filed, respectively, on 16 April 2025 and 10 June 2025.

5. In his first affidavit, the Defendant materially deposed:

> *"3. That, the grounds for the Application are as follows but not limited to:-*
> *(1) Not unreasonably delaying in making the application to set aside the judgment:-*
> *(a) I applied as soon as was reasonably practicable after gaining knowledge through consultation with my new counsel, who explained the seriousness of the matter and that I was required to respond, so that the court could hear me.*
> *(2) Reasonably believing that the matter was resolved prior to particularly as:-*
> *(a) I had legal counsel, who told me and after I instructed him, that he would take care of the matter. I was made to believe that the matter was resolved.*
> *(3) Having a reasonable explanation for not responding to the proceedings or filing a defence:-*
> *(a) After finding out from my new counsel, that the matter was not resolved, I still did not understand or comprehend why the Respondents/Plaintiffs filed an action against me, claiming that I failed to fulfill my obligation under the Contracts, knowing it not to be the truth. I did perform my obligations, in clearing and grading the land, as per the Contracts.*
> *(b) I thought that surely this must be a mistake and that the Respondent/Claimants had and/or would realise their error and cancel the action. After all, I was constructively dismissed &/or unfairly dismissed &/or wrongfully terminated.*
> *(c) Somehow, I still thought that, the Respondents/Plaintiffs, would advise the court of their error. Maybe I am just ignorant. Ignorant in not knowing and/or understanding this type of business culture that I found myself in.*
> *(4) I worked as quickly as I could to gather information and documentation however, I had to rely on the assistance of others and this caused a delay.*

People were like me and couldn't understand why I was being sued. They were all a part of the work and are witnesses to the fact that, I did perform under the Contracts. This has resulted in the witnesses statements, photos and the iPhone message from the Plaintiff's Engineer "Mario", authorising them to pay me, after he checked the work, towards the end of the project, as I was waiting for my pay. There now shown and exhibited are true copies of the Contract, representative payments, witness statements, photos and message from Mario's iPhone to alain@belairresortsgroun...@1more... Marked ***"Exhibit AA.2."***

6. The Defendant also exhibited a draft Defence and Counterclaim to his first affidavit. In a nutshell, he admitted that he and the Claimant entered into the Master Contract as alleged. However, he asserted that the Master Contract did not comprise the entire agreement between the parties and that there was also a separate oral contract pursuant to which he was to receive the sum of $19,500.00 weekly. He further asserted that he cleared and graded the 24.31 acres referred to in the Statement of Claim, thereby fulfilling his obligations under the Master Contract. On this basis, he claimed that he was entitled to be paid $189,618.00; that is, $7,800.00 per acre for each of the 24.31 acres. Having only received $136,500.00, he asserted that he was actually owed a further $53,118.00 pursuant to the Master Contract. He accordingly denied having been overpaid any sums, inadvertently or otherwise. Relying on the alleged oral contract, he further claimed that the Claimant owes him an additional $58,500.00 representing three weeks' pay at $19,500.00 per week, which he never received. He thus claimed that the Claimant owes him $111,618.00 in the aggregate, which sum he counterclaimed for. He denied having unilaterally ceased work, contending instead that he only ceased working after the Claimant failed to pay him sums already owed. The Defendant relied on an unsigned copy of the Master Contract, banking records, photos, statements from other contractors and a project manager, and a text message as documentary exhibits to support his various contentions.

The Claimant's Affidavit in Response

7. In resisting the application, the Claimant relied on an affidavit sworn by its project manager, Mr. Mario Guevara, filed on 30 May 2025.

8. For immediate purposes, it suffices to note that Mr. Guevara took grave issue with the timing of the Defendant's application – which was filed over two years after judgment in default was entered. He maintained that the no viable explanation for the delay had been provided. He further contended that the Defendant only engaged counsel when the Claimant served him with an order for examination with a penal notice attached. He also questioned the veracity of the earlier suggestion that the Defendant may not have understood English sufficiently to participate in the examination as to his means, indicating that this was simply an attempt to *"buy time"* to enable the Defendant to file the current application. The Claimant further suggested that the Defendant's assertion that he believed the matter had been resolved by his former attorney was dubious and ought not be accepted as a basis for setting aside the default judgment made two years prior.

9. In responding to the Defendant's proposed Defence and Counterclaim, the Claimant denied the existence of any oral contract as alleged and contended that the Master Agreement represented the entire agreement between the parties. The Claimant further denied that the Defendant completed the grading of the 24.31 acres and as such

maintained that he was only entitled to half of the $7,800.00 per acre contract sum; that is, $3,900.00 per acre for each of the 24.31 acres, for an aggregate of $94,809.00. The Claimant asserted that the Defendant could not have completed grading the 24.31 acres prior to termination of the Master Contract as the requisite approvals had not yet been obtained from the Ministry of Works. Given the foregoing, the Claimant denied owing the Defendant $53,118.00 as alleged or any other sum and maintained that the Defendant had been overpaid. The Claimant relied on an executed copy of the Master Contract, a text message, banking records, plans, a surveyor's report and other documentary exhibits to support its various contentions.

The Defendant's Affidavit in Reply

10. To broadly summarise, in his affidavit in reply the Defendant purported to speak to the circumstances under which the Master Contract was executed by him. He reiterated that this did not represent the full agreement of the parties and that there was also an oral contract as alleged. He further repeated that he believed that his former attorney was addressing the matter after he provided him with the documents served upon him. He asserted that notwithstanding the delay, he would be more prejudiced than the Claimant if the default judgment is allowed to stand and he is not afforded an opportunity to defend the claim. He denied that the earlier request for an adjournment of the examination was an attempt to *"buy time"* and maintained that he deserved an opportunity to fully instruct counsel. He reiterated that he both cleared and graded the 24.31 acres, which was corroborated by persons familiar with the site. He also described the Claimant's reference to the need for approved drawings or plans as unfair and a *"technical point"*. He observed that the surveyor's report relied on by the Claimant only addressed the size of the area cleared and was entirely silent on the issue of grading. In conclusion, he stood by the averments in his draft Defence and Counterclaim and maintained that he was entitled to be paid the sums mentioned therein.

Analysis

11. No suggestion has been made that the default judgment in the present case was wrongly entered. The main issue for determination is therefore whether the Court, in the exercise of its discretion, should set aside the default judgment, which for all intents was properly obtained.

12. CPR 13.3, which is relied on by the Defendant, provides as follows:

> ***"13.3 Cases were Court may set aside or vary default judgment.***
> *(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."* (Emphasis supplied)

13. It has been accepted by our local courts that the three conditions set out in rule 13.3(1) are to be read conjunctively.[4] Rule 13.3(2) further enables the Court to set aside a default judgment entered under Part 12 where the defendant establishes the existence of "*exceptional circumstances*". As is perhaps to be expected, the Rules do not provide a definition of what constitutes "*exceptional circumstances*" for this purpose.

14. The provisions of rule 13.3 are not unique to The Bahamas. They appear to be derived from the corresponding provisions of the ***Eastern Caribbean Supreme Court Civil Procedure Rules, 2000.***[5] To this end, I have found the case of ***Forest Springs Ltd. v. Blue Waters St. Lucia Ltd.***[6] (and the authorities referred to therein) to be instructive in its examination of the three stated conditions appearing in rule 13.3(1), and in explaining their interrelationship with the "*exceptional circumstances*" requirement appearing in rule 13.3(2). In this regard, the Court stated (at paras.13-15):

> *"[13] Learned Chief Justice, Pereira CJ gave guidance on the application of these rules in Public Works Corporation v Matthew Nelson consolidated with Elton Darwton et al v Matthew Nelson when she said:-*
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> > *"The discretion granted under CPR 13.3(1) to set aside a default judgment is relatively limited. A failure to satisfy any one of the three conditions of rule 13.3(1) is fatal unless a defendant manages to bring himself within CPR 13.3(2) by demonstrating that there were exceptional circumstances warranting the setting aside of the default judgment entered against him.....The existence of an exceptional circumstance under CPR 13.3(2) trumps the requirement to fulfill the criteria in CPR 13.3(1)."*
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> *[14] Legal authorities from this jurisdiction recognise that CPR13.3 (2) which was introduced some eleven years after the promulgation of the CPR gave Judges the ability to depart from the rigidity of the conjunctive requirement of CPR13.3 (1), once satisfied that exceptional circumstances exist and the justice of a case requires it. It has however been said that whereas "the sub-rule is a welcome addition to the court's powers in dealing with default judgments it is not to be seen as a panacea for defaulting defendants."*

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[4] See, for example, *Lam and Anor. v. Osprey Construction Co. Ltd.* 2023/CLE/gen/00748, per Fraser, SJ at para.22.

[5] Rule 13.3 of the EC Rules of 2000 provides:

> ***"Cases where the court may set aside or vary default judgment***
>
> *13.3(1) If Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –*
>
> *(a) Applies to the court as soon as reasonably practicable after finding out that judgment had been entered;*
>
> *(b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and*
>
> *(c) Has a real prospect of successfully defending the claim.*
>
> *(2) In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.*
>
> *(3) Where this Rule gives the court power to set aside a judgment, the court may instead vary it."*

[6] Claim No. SLUHCV2017/0137 (Unreported)

> *[15] The Rules are silent on what constitutes an exceptional circumstance. Several decisions from our Court of Appeal have examined the application of CPR13.3 (2) and it is now well accepted that what may or may not amount to an exceptional circumstance will vary from case to case depending on the facts of each case."* (Emphasis supplied)

15. In ***Baynes v. Meyer***,[7] the EC Court of Appeal affirmed that the three conditions in CPR 13.3(1) are cumulative. The Court also analysed the requirement as to *"exceptional circumstances"* appearing in CPR 13.3(2). In a unanimously approved judgment, which was subsequently upheld on appeal by the Privy Council,[8] Pereira CJ relevantly explained (at para.26):

> *"What amounts to an exceptional circumstance is not defined by the Rules and no doubt, for good reason. What may or may not amount to exceptional circumstances must be decided on a case by case basis. I am in full agreement with the reasoning of Bannister J, as approved by this Court, that it must be 'one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained'. It must be something more than simply showing that a defence put forward has a realistic prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR 13.3(1)(c). They are not to be regarded as interchangeable or synonymous. CPR 13.3(2) is not to be regarded as a panacea for covering all things which, having failed under CPR 13.3(1), can then be dressed up as amounting to exceptional circumstances under sub-rule (2). Sub-rule (2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed, to satisfy rule 13.3(1). A few examples come to mind. For instance, where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or the defence being put forward is a "knock out point" in relation to the claim; or where the remedy sought or granted was not one available to the claimant. This list is not intended to be exhaustive. ..."* (Emphasis supplied)

16. It also bears pointing out that whilst the merits of any proposed defence remains an important factor in the consideration of an application to set aside a default judgment, this must now be viewed in the context of the imperatives of promoting efficiency and avoiding delay which are fundamental to the application of the CPR. Although stated in the context of the specific provisions of the English CPR Part 13, the following observations of Moore-Bick LJ in ***Standard Bank plc and Anor. Agrinvest International Inc. and Ors.***[9] are nonetheless worth noting:

> *"[21] Before the introduction of the Civil Procedure Rules judgment could be entered in default of notice of intention to defend under ord 13 of the Rules of the Supreme Court. Applications to set aside default judgment were governed by ord 13, r 9, which provided as follows "Without prejudice to r 7(3) and (4) the court*

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[7] Claim No. ANUHCVAP2015/0026 (Unreported), at para.25

[8] [2019] UKPC 3, para.17

[9] [2010] EWCA Civ 1400, at paras.21-24

may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order."

[22] The authorities relating to setting aside default judgments laid considerable emphasis on the desirability of doing justice between the parties on the merits. Delay in making an application to set aside rarely appears to have been a decisive factor if the Defendant could show that he had a real prospect of successfully defending the claim against him. …

[23] The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in r 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. …."

17. I now turn to considering whether the Defendant's application satisfies the various criteria identified in CPR 13.3.

(i) Did the Defendant apply to the Court as soon as reasonably practicable after finding out that judgment in default had been entered (Rule 13.3(1)(a))?

18. To briefly recap, the Writ in the present action (which was specially indorsed) was filed on 23 January 2023 and served on the Defendant on 18 February 2023. The Defendant ought to have filed an acknowledgement of service on or about 6 March 2023 and ought to have filed a defence on or about 20 March 2023. Judgment in default was entered on 13 April 2023. A copy of the judgment was served on the Defendant on 15 March 2024 when the Claimant was seeking to secure his attendance at Court to examine him as a judgment debtor. The current application was nevertheless only filed on 16 April 2025.

19. Based on this chronology, the current application is exceedingly late by any possible standards. No authority has been cited by the Defendant to suggest otherwise.

20. The Defendant's affidavit evidence also provides little to no assistance in justifying a delay of over one full year in applying to set aside the default judgment, particularly in the context of a claim that was commenced and served over two years prior in early-2023. In this regard, the Defendant suggests that he assumed that the action had been resolved on his behalf by his former attorney and states that he only understood *"the seriousness of the matter"* and that he had an obligation to respond to the claim upon consulting his present attorneys.[10] However, his affidavit evidence is conspicuously silent in providing details of the alleged communications between himself and his purported former attorney. There is no evidence of a formal retainer agreement having been executed. No dates of any communications with the former attorney are provided. And no details of any enquiries made of the former attorney are provided, even after a copy of the default judgment was served upon the Defendant.

21. In addition, the Defendant confirms having sought legal consultation elsewhere on or about 24 October 2024, when he engaged new attorneys. By this time, the Defendant

[10] First Affidavit of Abelino Avila, paras.3(1)(a), 3(2)

would have had notice of the default judgment for a period in excess of seven months (i.e. since 15 March 2024) and the Claimant was actively taking steps with a view to enforcing judgment. Even if this accepted, the Defendant took almost six months after consulting his new attorneys to file the current application.

22. In conclusion, I am unable to accept that the Defendant applied to set aside the default judgment *"as soon as reasonably practicable"* after finding out that judgment had been entered against him.

23. Given that the conditions in rule 13.3(1) are to be read cumulatively, this would appear to be dispositive of the Defendant's application, unless of course he is able to establish the existence of *"exceptional circumstances"* for the purposes of rule 13.3(2). For completeness, I shall nonetheless make some brief comments on the other requirements of CPR 13.3(1).

(ii) Has the Defendant provided a good explanation for his failure to acknowledge service and file a defence (CPR 13.3(1)(b))?

24. This issue can be addressed relatively briefly. The procedural history of this action has already been discussed. The gist of the Defendant's explanation for his failure to acknowledge service or to file a defence comes out in paragraph 3 of his first affidavit. This may be summarised thus: he thought the action had been resolved; he could not comprehend why the Claimant sued him; he assumed the Claimant would *"realise their error"* in suing him, withdraw their action and advise the Court accordingly; and he gathered information and documentation as quickly as he could, however, he had to rely on the assistance of others, which caused delay.

25. As pointed out, the Defendant's affidavit evidence surrounding the engagement of his purported former attorney is exceedingly sparse. It also provides little detail of any communications with the former attorney. It provides no dates of any such communications. It is unclear whether the Defendant actually instructed the former attorney to file an acknowledgement of service or a defence, or even enquired as to the necessity of doing so. It is unclear what steps, if any, were taken by the Defendant to monitor the progress of the action, or what enquiries were made in this regard.

26. The Defendant's assertion to the effect that he could not comprehend why the Claimant had sued him and that he expected them to withdraw their action, in my view, defies credulity. This is especially so in light of the Claimant having taken steps to serve him with various court documents in Eleuthera, and the subsequent steps taken by the Claimant with a view to enforcing its judgment.

27. The Defendant's reference to challenges and delays associated with gathering necessary information to prepare a defence also appears to be, at a minimum, grossly overstated. This action involves a relatively simple dispute. The main area of disagreement between the parties is whether the Defendant both cleared and graded the relevant tract of land as he contends, or whether he merely cleared it as the Claimant contends. There are also secondary issues relating to the existence or non-existence of a separate oral contract, termination and payment. It is difficult to accept that the process of gathering information and documentation necessary to prepare a defence to such a claim would have been unduly prolonged or burdensome. The Defendant himself would have also likely been the repository of much of the information required to prepare any defence. On his own

evidence, he was the counterparty to any contractual agreement(s) entered into with the Claimant, he performed services pursuant to the Master Contract and he was the recipient of any payments received. Moreover, if difficulties were encountered, the Defendant could have acknowledged service and sought an extension of time for filing a defence much sooner.

28. In all the circumstances, the assertion that the Defendant has provided *"a good explanation"* for his failure to acknowledge service and file a defence is simply not borne out by the evidence.

(iii) Does the Defendant have a real prospect of successfully defending the claim (CPR 13.3(1)(c))?

29. The legal arguments in reference to this issue were not extensively developed by either side. Both sides nonetheless filed affidavits setting out their respective positions on the substance of the claim. As indicated, the Defendant also provided a draft of his proposed Defence and Counterclaim.

30. It is generally accepted that the requirement to establish a *"real prospect of successfully defending the claim"* for the purposes of rule 13.3(1)(c) is analogous to the test to be applied to summary judgment applications.[11] As such, the defendant must show more than an arguable defence; there must be a real, as opposed to fanciful, prospect of success. I am also mindful that at this stage it is not the Court's role to conduct a mini-trial of the action.[12]

31. While the English rule relating to the setting aside of a default judgment in the exercise of the court's discretion contains a number of important distinctions from its Bahamian counterpart, it similarly includes reference to a defendant establishing *"a real prospect of successfully defending the claim"*.[13] To this end, I have found the following passage in the judgment of the Court of Appeal in ***ED & F Man Liquid Products Ltd. v. Patel and Anor.***,[14] at paras.7-10, to provide useful guidance:

> *"7. What is clear is that, in drafting the Civil Procedure Rules the draftsman adopted the phrase "real prospect of successfully defending the claim" for the purposes of both CPR 13.1(1) and 24.2 and, subject to the question of burden of proof, may be taken to have contemplated a similar test under each rule. It was stated by Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 92j that:*
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> > *"7. The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real' distinguishes fanciful prospects of success ... they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."*
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> *8. I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in the Saudi Eagle that the defence sought to be argued must carry some degree of conviction. Both approaches require the*

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[11] See *2024 White Book, Vol.1*, p.455, indorsing *Swain v. Hillman* [2001] 1 All ER 91

[12] *Lam and Anor. v. Osprey Construction Co. Ltd.*, para.27

[13] See English CPR 13.3(1)(a)

[14] [2003] EWCA Civ 572

defendant to have a case which is better than merely arguable, as was formerly the case under R.S.C. Order 14. …

9. …

10. It is certainly the case that under both rules, 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: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95in relation to CPR 24. 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. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: …" (Emphasis supplied)

32. Based on the material before me, there is plainly a sharp disagreement between the parties as to whether the Defendant both cleared and graded the 24.31 acre tract or whether he merely cleared the property. Both parties seemingly accept that the resolution of this issue is central to determination of the question as to the compensation the Defendant was entitled to receive under the Master Contract and whether, as the Claimant maintains, he was overpaid or whether, as he says, he was underpaid and is actually owed sums by the Claimant.

33. In his proposed Defence and Counterclaim the Defendant asserts that he cleared and graded the 24.31 acre tract, thereby fulfilling all of his contractual duties. In his affidavit evidence, he exhibits a series of photographs to support his position. He also exhibits statements from three persons, two of whom are contractors who worked on the project with him and the third a project manager, confirming that he both cleared and graded the property.

34. The Claimant, on the other hand, contends that under the terms of the Master Contract, grading was to be done in accordance with approved plans.[15] As its plans only received final approval on 11 March 2024 (which was long after the parties severed ties), it maintains that the Defendant could not have graded the 24.31 acre tract in compliance with the Master Contract. It also disputes factually that the property was graded, relying primarily on a report from a surveyor.

35. There appears to be some substance to the Claimant's contention that any grading activity was to be done accordance with approved drawings or plans. The provisions of the Master Agreement, and in particular those within Exhibit A addressing the *"Scope of Work"*, appear to bear this out. What is less clear, at this stage at least, is what exactly the approved drawings or plans actually required of the Defendant by way of 'grading' and whether the work done by him, such as it was, met these requirements. There is also a question as to whether the Claimant can rightly assert the Defendant's non-compliance with approved plans which it only seemingly obtained in March of 2024, well after execution of the Master Agreement and the commencement of work. Although the term 'estoppel' does not appear anywhere in the Defendant's affidavit evidence or draft Defence and Counterclaim, there are also questions as to whether having released

[15] See for example page 7 of Master Agreement under "Scope of Work"

payment to the Defendant following an approval or certification process of sorts, the Claimant could subsequently resile from its position and assert overpayment. Albeit, it must also be acknowledged that clause 2.3 of the Master Contract declares that no payment made under the contract shall be conclusive evidence of performance by the contractor, either wholly or in part.

36. The Defendant's reliance on an oral contract pursuant to which he was to be paid $19,500.00 weekly is, in my view, problematic. The date and full particulars of this alleged oral contract are not provided in the draft Defence and Counterclaim or addressed in the Defendant's supporting affidavits. The consideration to be provided for the alleged $19,500.00 weekly payments, if different from the consideration provided by him under the Master Contract, is not specified. Moreover, the Master Contract comprehensively addresses both parties' obligations with respect to the clearing and grading of the project site.

37. In the final analysis, I do not regard the Defendant's proposed defence as fanciful. There is a significant factual dispute between the parties on the issue of grading of the 24.31 acre tract. The Defendant has presented photographic evidence and statements from other persons to support his position. The Defendant further maintains that the Claimant's engineer approved the payments made to him. The provisions of the Master Contract were also not the subject of detailed argument. Finally, I am reminded that it is not the Court's function at this stage to conduct a mini-trial of the action.

38. In all the circumstances, I am prepared to accept that the Defendant has a *"real prospect of successfully defending the claim"* for the purposes of rule 13.3(1)(c).

(iv) Has the Defendant established the existence of exceptional circumstances (CPR 13.3(2))?

39. As indicated by Pereira, CJ in ***Baynes***, showing exceptional circumstances for this purpose *"must be something more than simply showing that a defence put forward has a realistic prospect of success",* and the requirements of CPR 13.3(1)(a) and CPR 13.3(2) are not synonymous.

40. In short, the Defendant has not identified any exceptional circumstances or even sought to argue the point. I am equally unable to identify any such circumstance on the face of the documents before me.

(v) The inherent jurisdiction of the Court and other matters

41. The Defendant has also invoked the Court's inherent jurisdiction in his Notice of Application. This does not take the matter any further. Part 13 of the CPR constitutes an express, self-contained framework governing the issue of setting aside or varying default judgments. It would therefore be inappropriate in my view to allow this to be circumvented by recourse to the Court's inherent jurisdiction.[16]

42. In light of my refusal to set aside the default judgment, the issue of extending time for the filing of the Defendant's Defence is moot. In any event, I would not have been minded to

[16] See *Belgravia International Bank & Trust Co. Ltd. v. Sigma and Anor.* SCCivApp No. 75 of 2021 (CA), at para.62

grant such an extension given the procedural history and circumstances of this matter as already discussed.

Conclusion and Disposition

43. Having considered the parties' affidavit evidence, submissions and authorities in their entirety, I am unable to accept that the Defendant applied to set aside the default judgment *"as soon as reasonably practicable"* after finding out that judgment had been entered against him, or that he has provided *"a good explanation"* for his failure to acknowledge service and file a defence. I am also not satisfied that there exist *"exceptional circumstances"* sufficient to warrant depriving the Claimant of its judgment, which I repeat was entered on 13 April 2023. All of the cumulative conditions in rule 13.3(1) are not therefore satisfied, and the overriding power in rule 13.3(2) is not engaged.

44. I am not entirely unsympathetic at the plight the Defendant finds himself in. Notwithstanding the valiant efforts of Mrs. Bain-Charlton, I am constrained nonetheless to dismiss the present application, which I hereby do. I also direct that the Claimant be awarded its reasonable costs of the application, which are to be summarily assessed if not agreed.

L. Farquharson

FARQUHARSON, J.
9 September 2025