IN THE SUPREME COURT OF BELIZE A.D. 2017
(CIVIL)

CLAIM NO. 621 of 2017
BETWEEN

LINDSAY GARBUTT — **Claimant/Respondent**

AND

MAHEIA'S UNITED CONCRETE AND SUPPLIES LTD. — **Defendant/Applicant**

Before: **The Honourable Madame Justice Griffith**
Date of hearing: **1st February, 2018; 1st March, 2018 (Oral Ruling)**
Appearances: **Ms. Stevanni Duncan, Barrow & Williams LLP for the Defendant/Applicant and Ms. Pyal Ganwani, Estevan Perera & Co. LLP, for the Claimants/Respondents.**

RULING

CPR 2005 Rules 13.2 and 13.3 - Application to set aside Default Judgment – Service of Claim Form – Effective service - Whether Judgment irregular due to ineffective service – Set Aside of Regular Judgment, Rule 13.3(1)(b) - Good explanation for failure to acknowledge claim.

Introduction

1. This is the Defendant's application to set aside a judgment in default of acknowledgment of service of the claim herein, entered against it on the 30th September, 2017. The default judgment was entered in the sum $373,305.55 being the sum of damages and loss suffered by the claimant as a result of negligence alleged on the part of the defendant, in the performance of works under a contract. The application to set aside was filed on alternate bases, in the first instance pursuant to CPR 13.2 - that the default judgment was irregularly obtained; and in the second instance, in respect of a regularly obtained judgment, pursuant to CPR 13.3. The default judgment was said to be irregularly obtained for reason that service of the claim form was not validly effected on the Defendant. Alternatively, the Defendant claims that it satisfies the requirements of Rule 13.3(1) so as to be entitled to have the default judgment set aside. The Claimant of course resists the application and asks the Court to affirm its default judgment as having been lawfully and properly obtained.

Issues

2. The following issues arise for determination on the Application:-

   (i) Was service of the claim form improperly effected on the Defendant, thus rendering the default judgment irregular?

   (ii) If service was properly effected and the judgment regular, has the Defendant satisfied the requirements of Rule 13.3(1) in order to have the default judgment set aside?

The Application and Submissions

Issue (i) – Irregular Judgment, Service of the claim form

3. The Defendant's objection to the service of the claim form is based on facts undisputed by both parties, save that the material facts beyond a certain point are solely in the knowledge of the Defendant. According to the evidence filed on behalf of the Defendant, on 12th October, 2017 a process server delivered a sealed envelope to the registered office of the Defendant and handed it to the Defendant's receptionist. Later in the day however, the process server returned to the office, retrieved the envelope previously delivered and substituted another. The first envelope had been incorrectly delivered, however the second was that which was intended to be delivered to the company and contained the claim form. The second envelope addressed to the company, was received by the same receptionist, who states that she placed it on the desk of the accountant to be opened, as was their administrative practice. The envelope remained unopened until the 6th November, 2017, after a search conducted as a result of the default judgment having been served on the Defendant on 2nd November, 2017. According to the Defendant's employees they were unaware that the envelope contained court documents as the process server did not convey this fact and the envelope itself contained no mark or information to identify its contents.

4. As a result, the envelope is said to have been treated as ordinary mail and placed on the accountant's desk for opening, as opposed to having been taken immediately to the Defendant's Managing Director, which would have been the case, had the contents been identified as court documents. The submission of ineffective service was based on these facts and in short argued thus – in order for service to be effective, the contents of the document being served must come to the attention of the recipient, particularly in the case of documents in respect of which personal service is required. Counsel for the Defendant relied upon **Christine Perriott v Belize Telecommunications Ltd**.[1] which considered the question of effective service (of a contempt of court order). Counsel commended the dictum of Muria J. to the Court,[2] insofar as the officer of the defendant company therein, having refused to accept service, was found to have been notified of the proceedings and sufficiently apprised of the nature of those proceedings, after the order was shown to him by the marshal and left on the ground. In this regard, Counsel for the defendant asserted that personal service must go beyond mere delivery of the document - the document must be sufficiently brought to the attention of the recipient. It was also asserted that this requirement for a document to be brought to the attention of a recipient was no less applicable to a company, than a natural person.

5. Counsel for the Defendant also cited **Re a Company (No. 008790 of 1990)**[3], particularly a reference therein to a decision of Nourse J, in ***Re a company [1985] BCLC 37***, wherein it was said that '*the object of service is to bring a document to the attention of the company*.' In the instant case, it is contended that the facts of delivery of the envelope were such that (i) there was no information given by the person delivering the envelope that it concerned legal proceedings; (ii) there was no indication on the envelope itself that the documents concerned legal proceedings; and (iii) there was nothing to identify the person who delivered the document with any legal process.

[1] Belize Supreme Court, Claim No. 142 of 2007
[2] Ibid. @ pg 11
[3] [1991] BCLC 561 @

In these circumstances, it was submitted, there was no effective service as the nature of the contents of the envelope were not brought to the attention of the company. On the other hand, Counsel for the Claimant submitted that given that CPR Rule 5.7 provides for one of the modes of service of a claim form on a company by leaving it at the registered office, there was no requirement for anything beyond the ordinary meaning of delivering the document at the company's office, for service to be effectively satisfied.

Issue (ii) – Regular judgment, Satisfaction of Rule 13.3(1)

6. Rule 13.3(1) sets out the three conditions to be satisfied in order for a default judgment to be set aside. Having regard to the evidence filed in support of the application to set aside and the written submissions of both Counsel, at the hearing, the Court required oral submissions only in respect of Rule 13.3(1)(b) – i.e. that there was a good explanation for the Defendant's failure to file an acknowledgement of service. In this regard, Counsel for the Defendant readily accepted that the term 'good explanation', has generally been judicially interpreted to exclude negligence or administrative oversight. However, Counsel referred to the case of **Sylmord Trade Inc. v Inteco Beteiligungs AG**[4], firstly to an excerpt of ***Lord Dyson in Attorney-General v Universal Projects Ltd***[5]. as cited therein. This reference was to the effect that if the explanation connotes '*real or substantial fault on the part of the Defendant, there is not a good explanation for the breach'*[6]. In the circumstances of the instant case therefore, it was submitted that there was no such real or substantial fault on the part of the Defendant in not filing the acknowledgment of service. The failure to file was due to a genuine error, which was brought about by the manner in which the Claimant delivered the envelope containing the claim. It was therefore suggested that the circumstances of the case ought to remove the Defendant from the usual case of inadvertence or other deliberate act on the part of a defendant.

[4] Eastern Caribbean Court of Appeal BVIHCMAP2013/0003

[5] [2011] UKPC 37

[6] The case concerned an application for relief from sanctions hence the reference to 'breach'.

7. Counsel for the Defendant also specifically acknowledged as unhelpful to her application to set aside, the further words of Lord Dyson in *AG v Universal Projects Ltd*, as referred to in ***Sylmord Trade Inc***., where it was said that '*it is difficult to see how inexcusable oversight or administrative efficiency can ever amount to a good explanation*'[7]. This notwithstanding Counsel made the further submission, arising from a reference in the appeal to the first instance decision of ***Sylmord***. Counsel drew the Court's attention to paragraph 24 of the appeal judgment, in which the Court referred to the trial judge's definition of 'good explanation'. That reference is extracted as follows:-

> *"…an account of what has happened since the proceedings were served which satisfies the court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix up, are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered."*

In particular, Counsel for the Defendant directed the Court's attention to the statement to the effect that '…*muddle, forgetfulness, an administrative mix up are all capable of being good explanations…'* Going further in the appellate judgment of ***Sylmord***, Counsel pointed out that at paragraph 26 therein, the Court of Appeal stated that as none of the parties to the appeal took issue with the [trial] judge's definition of 'good explanation', there would be no attempt at that time to interfere with it. On this point also however, Counsel for the Defendant candidly referred to the decision of **Ephraim Usher v Bernaldo Jacobo Schmidt**[8] in which the trial judge's definition in ***Sylmord*** was commended unto Young J., on the basis that it had been upheld by the OECS Court of Appeal.

8. Counsel readily acknowledged that Young J. in ***Ephraim Usher***[9] firstly found it to be incorrect to state that the Eastern Caribbean Court of Appeal upheld the trial judge's definition of 'good explanation' in ***Sylmord***;

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[7] Cited in **Sylmord** supra @ para 23.
[8] Supreme Court of Belize Claim No. 99 of 2017
[9] Ibid paras 6-7.

but instead noted that on two separate occasions, that Court refrained from treating with the correctness or not of the definition, as it was not before them. Further, that Young J. thereafter declined to rely upon or apply that definition on the basis, inter alia, that it would render the threshold for finding of a 'good explanation', too low. Having acknowledged all this, Counsel for the Defendant invited the Court to come to its own conclusion with respect to the trial judge's definition of 'good explanation' in ***Sylmord***. Additionally, Counsel for the Defendant submitted that a common thread running through the various dicta was that of a defendant's indifference, fault or deliberate action in failing to answer a claim. In this regard, it was submitted that to the contrary, the Defendant in the case at bar had demonstrated anything but indifference or failure as a result of a deliberate choice or action. This was so, as having been served with the default judgment on the 2nd November, 2017, the Defendant (as evidenced by the affidavit of its Managing Director), proceeded immediately engage its attorneys, locate relevant documentation, instructed its attorneys and filed the application to set aside the default judgment on the 17th November, 2017.

9. Further, it was submitted that the failure by the Claimant's process server to identify the nature of the documents contained in the envelope resulted in the Defendant not treating the documents with the attention they would have had they been aware of the contents of the envelope. In the circumstances, it was submitted that the Defendant should be found to have provided a good explanation for its failure to acknowledge and thereby defend the claim. Added to this fact, the Defendant has a good defence, as evidenced by a draft defence and counterclaim appended in support of the application. Finally, counsel for the Defendant referred to the fact that a claim concerning the same issues and subject matter had been filed by the Claimant in 2015 but was discontinued after the Defendants filed an application to strike out the claim for failure to disclose any reasonable grounds for bringing the claim against the Defendant. With respect to these latter considerations Counsel suggested that the question of the prejudice to be occasioned the defendant by not being allowed to defend the claim should also be a factor in the exercise of the Court's discretion to set aside the default judgment;

as well as the fact that the Claimant could be compensated in costs. In response to the issue of whether or not the Defendant had a good explanation for failing to acknowledge the Claim, Counsel for the Claimant submitted that the facts before the Court reveal nothing other than the Defendant's administrative inefficiency.

10. Counsel pointed out what she viewed as a damning fact - that the envelope (as mail received in an office), sat untouched in the exact position it was placed by the receptionist, for some 25 days before it was discovered. Moreover, that it was discovered at that time only as a consequence of a search for it having been triggered by the service of the default judgment on the Defendant. Counsel referred to **Vasquez v Belize Western Energy Ltd**.[10]in support of the submission specifically, that an 'administrative mix-up' is not to be regarded as a good explanation for purposes of satisfying Rule 13.3(1)(b). In this case the Defendant alleged that it had no knowledge of the claim until Court Marshalls appeared at its office for a writ of execution; and that the claim never came to its attention due to an '*administrative oversight and change in administrative staff*.' In particular, Counsel referred to the specific words of Legall J. which dubbed the reasons given by the Defendant as '*a failure to put in place effective systems for dealing with and receiving written communication*' and further that the '*basis of the failure may have been the result of some negligence*. Legall J. as pointed out by Counsel for the Claimant, went on to hold that negligence cannot be included in the meaning of the phrase 'a good explanation' as required by Rule 13.3(1)(b). Counsel for the Claimant therefore strongly submitted that the application to set aside the default judgment should be dismissed.

Discussion and Analysis

Issue (i) Irregular Judgment - Service of the Claim Form

11. The first recourse in considering the question of whether or not service was effective is CPR Rule 5.7 which is the Rule applicable to service of a claim form against a company. The Rule provides for several modes of service, including the following:-

> *"(b) by leaving the claim form at the registered office of the company;…"*

[10] BZ 2009 SC 7

The intended reading of the Rule in the Court's view is clear - the claim form is served if left at the registered office of the company, as it was in this case. The Court however understands Counsel for the Defendant's submission as being that the true question is one of application of the Rule. It is accepted, that implicit in 'service', is the question of 'good' or 'effective' service, and anything short of either would not suffice. The Court must therefore examine the circumstances in the instant case and determine whether or not those circumstances meet the implicit standard of 'good' or 'effective' service.

12. Considering the authorities relied upon by Counsel for the Defendant, first is that of **Christine Perriott v Belize Telecommunications Ltd.**[11] The learning extracted from this case by Counsel for the Applicant is accurate, but it is doubted to be applicable. The Court agrees with Counsel for the Claimant, that it is not applicable for reason primarily that the subject matter under consideration was personal service on an individual (being a director of a company), in proceedings for contempt of court. Personal service on an individual is not defined in any way, thus whether or not service is properly effected has to be fact specific, hence, as counsel for the Defendant observed – the trial judge's meticulous narration of the facts alleged to give rise to service in that case. On the other hand, the requirement of leaving a claim form at a company's registered office ought to be considered according to a standard appropriately applicable to bodies corporate, given the difference from a natural person in relation to operational systems and structure, capacity as well as the potential consequences to a natural person following a finding of contempt.

13. The Court also considers the authority of **Re a company**, from which Counsel for the Defendant borrowed the phrase that *'…the object of service is to bring a document to the attention of the company…'*[12]. This phrase is unobjectionable. However it leaves us no further in determining the issue of whether or not the claim form in the instant case was properly served on the Defendant. The Defendant asserts that the manner of delivery did not allow for the claim form to properly come to their attention.

[11] Belize Supreme Court Claim NO. 142 of 2007
[12] *Supra.* @ pg. 2

The Court examines two authorities which offer useful guidance on the question of interpretation of service on a company by leaving documents at its registered office. First, there is the issue of the claim form being delivered in a sealed envelope, also that its contents were unannounced, and the process server not identifiable with legal process. Reference is made to UK Court of Appeal decision in **Venables v MGN Ltd. et anor**.,[13] which concerned a challenge to service of a writ delivered by a courier service prior to its expiry (period of the writ's validity), but discovered by the defendant after its expiry. It is useful to highlight the facts and the arguments which arose in this decision. The plaintiff needed to serve his writ for libel proceedings on the defendants (a newspaper company and one of its journalists) by midnight on Saturday 11th January when it was due to expire.

14. The defendants' office was in a commercial building containing forty-five floors and numerous tenants. The server for the plaintiff's solicitors attended the building on Friday 10th January to deliver two sealed envelopes (which contained the writs), addressed to the defendants respectively. The server failed to notice a display in the reception area of the building, which indicated the floor and office number the defendants occupied. Instead, after inquiry, the server left the envelopes at a courier service in the basement of the building, which was regularly used to make deliveries within the building. The envelopes were discovered by the defendant (journalist) on his desk the Monday morning (the life of the writ would have expired at midnight on the Saturday). The defendants applied to set aside the writs for having not been served within the term of their validity. The order was granted, but later set aside on appeal from which the defendants then appealed the order upholding the validity of service of the writs. As part of the argument that the writ was not properly served, the defendants inter alia submitted, that the writ had not been properly delivered to the company, having been delivered when no one was present (on the weekend) and it was not possible to assume that it had been delivered before the time of expiry.

[13] [1998] All ER (D) 668

15. The Court of Appeal referred to a test for good service, applied in an earlier decision of that court with respect to service of a notice to quit under the Agricultural Holdings Act. It was held that this test stated in respect of service of a notice under the Agricultural Holdings Act was equally applicable to service on a company. This test will be discussed shortly, however the point extracted from ***Venables*** is that service of the writs was upheld in circumstances which saw the writs contained in sealed envelopes, addressed to the recipients, delivered at the company's office, not received personally by the addressees, and the delivery made by a courier service as opposed to a person connected to service of legal process. In other words, no issue was taken with respect to the manner of delivery of the writs, which was not dissimilar to the delivery of the claim form in the case at bar. Reference is also made to **Newborough (Lord) v Jones**[14], which is the prior Court of Appeal decision referred to that concerned the Agricultural Holdings Act.

16. The issue for determination in that case was singularly whether a notice under the Act was properly served. The circumstances were such that the plaintiff landlord went to the defendant tenant's farmhouse to serve a notice to quit. There was no one at the premises at the time the landlord went to serve the notice, so the landlord pushed it under the main entry door to the premises, which had no mailbox. On the subsequent action for possession of the farmhouse (approximately seven months later) the tenant disputed service as the notice had in fact been concealed under the linoleum of the premises and remained undetected for the next five months. The service was upheld and on appeal against that finding, the Court of Appeal stated the test for effective service of a notice under the Act as follows:-

> *"…to serve a notice by leaving it at the proper address of the person to be served pursuant to … it must be left there in a manner which a reasonable person, minded to bring the notice to the attention of the person to whom it was addressed would adopt; and that in the present case, the landlord, in putting the notice under the door, had adopted such a manner."*

[14] [1975] Ch. 90

It is this test for service that was endorsed by the Court of Appeal in ***Venables*** above, and it was expressly affirmed as being equally applicable to a company[15].

17. In the circumstances, this is the test the Court will apply in the instant case in order to determine whether the claim form was properly served. With respect to this case it is found that the delivery of the claim form – i.e. – by a process server (whether identified as such or not) in a sealed envelope without indication as to its contents, provides no basis for the Defendant to dispute effective service. It is also found that the manner of delivery, i.e., the envelope being handed to the receptionist at the office of a company which is expected to have administrative procedures in place for the receipt and other processing of mail – would satisfy the test as stated above in ***Lord Newborough***. In the circumstances, it is therefore found that the service of the claim form on the Defendants was valid and effective with the result that the default judgment obtained against them was regular.

Issue (ii) Regular Judgment – Good Explanation

18. The set aside of a regular default judgment pursuant to CPR Rule 13.3 has been widely litigated and forms the subject matter of a body of jurisprudence in Belize and the Caribbean, particularly in the Eastern Caribbean[16]. As referred to by both counsel, the decision of **Belize Telecommunications Ltd. v Belize Telecom Ltd et al.[17]** serves as the benchmark from which to launch any consideration of an application to set aside a regular default judgment. The three grounds of Rule 13.3 are in fact preconditions which all must be satisfied in order for the court to exercise its discretion to set aside a default judgment. Rule 13.3 is set out as follows:-

> *13.3 (1) Where 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 the judgment had been entered;*
> *(b) gives a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be; and*

[15] Venables v MGN Ltd et anor *supra*. @ 668
[16] Eastern Caribbean CPR 2000 Part 13 (identical to Belize's CPR 2005 Part 13).
[17] Belize Civil App. No. 13 of 2007

(c) has a real prospect of successfully defending the claim.

(2) Where this Rule gives the Court power to set aside a judgment, the Court may instead vary it.

As per Morrison JA in **Belize Telecommunications Ltd[18].** (paras 24-26), the above three conditions of Rule 13.3(1) are conjunctive. Therefore, the Defendant in this case was obliged to persuade the Court that all of these conditions were satisfied.

19. The Defendant filed evidence from three of its employees detailing the events surrounding the service of the claim form, its subsequent discovery after the default judgment was entered, and the steps taken by the Defendant upon becoming seized with the default judgment. At the hearing of the Application, the Court indicated that no submissions were required on the first and third grounds as on the face of the affidavits and written submissions (from both sides) the Court was satisfied that these grounds had been made out. For completeness however, the Court addresses its findings made on paper in relation to those two grounds. In relation to the first – that the application to set aside was made to the Court as soon as reasonably practicable after discovery of the default judgment - the default judgment was served upon the Defendant on the 2nd November, 2017. The application to set aside was filed on the 17th November, 2017. The period of time elapsed is about two weeks which can be accepted as a short time, however time is always relative to circumstances, thus the circumstances alleged must be examined.

20. The Defendant by evidence (affidavit of Carla Hart, filed 17.11.17) averred that the matter (as is borne out by the facts pleaded in the statement of claim) dated back to 2012 thus it was necessary for the Defendant to retrieve and go through their records to be able to instruct their attorneys. In the circumstances of the allegations pleaded and the matter indeed occurring since 2012, the Court considered that the two weeks elapsed between the receipt of the default judgment and filing of the application to set aside, satisfied the requirement of 'as soon as reasonably practicable', as prescribed by Rule 13.3(1)(a).

[18] *supra*

With respect to the third ground to be satisfied – the real prospect of successfully defending the claim, Counsel for the Claimant contended that the Defendant could not satisfy this ground. (A draft defence, as required had been appended to the application to set aside). The claim is one for damages for the Defendant's negligence in the loss of the Claimant's heavy equipment (a barge) which the Defendant rented from the Claimant for certain works, as well as consequential loss ensuing as a result of the loss of the barge. The Defendant in its draft defence disputed the respective responsibilities of the parties in the works thereby denying liability for the loss of the barge, and asserted that the barge was in a poor condition and not fit for the purpose for which it was rented.

21. The Defendant also alleged a failure by the Claimant to perform its works and services under the contract, and the existence of a debt by monies had and received, arising out of the performance of the same works. A counterclaim for damages as a result of the Claimant's negligence in repairing and maintaining the barge, formed part of the draft defence. The interpretation of 'real prospect of success' generally countenanced against the standard set in **Swain v Hillman**[19], (this in relation to summary judgment, but equally applicable to applications to set aside default judgments) is that the defence must not be fanciful. Particularly, that the facts alleged by the defendant must be capable, if proven, of amounting to a defence to the claim. With respect to the application of this standard, ***Swain***[20] further held, (as endorsed by Morrison JA in ***Belize Telecommunications Ltd***.)[21] that the Court ought not to engage in a 'mini trial' of the facts, but may subject the material put forward by the defendant to analysis in order to ascertain whether there is any real substance to the defence. The draft defence exhibited by the Defendant attains the standard of a realistic prospect of success, as it provides alternate versions of the existence of respective obligations under the parties' agreement, the discharge of those obligations and the respective duties of care. The allegations pleaded in the draft defence are as such that the determination of the matter in favour of one party or the other, will have to depend on the view taken by the Court of the respective facts, at trial.

[19] [2001] 1 All E.R. 91
[20] @ para 95
[21] @ para 29

22. It was in these circumstances that the Court adjudged (on the basis of affidavit evidence and written submissions), that the first and third conditions of Rule 13.3(1) were satisfied. The question of the existence or not of a good explanation is now considered. The arguments have already been set out. The Court entirely agrees with Counsel for the Defendant that there is no set definition of what amounts to a good explanation. Instead, there are by illustration of judicial decisions, many examples of what may or may not suffice as a good explanation. Counsel for the Defendant seemed to readily appreciate, (short of the objection to service which was maintained), that the Defendant's circumstances fell to be categorized as an administrative oversight, which as submitted by Counsel for the Claimant[22], has not been accepted as a good explanation. Counsel however urged upon the Court that the distinguishing factor in the instant case, should be the absence of any deliberate disregard of the court process on the part of the Defendant. This was said to be evidenced by the quick and urgent attention paid to the matter after the default judgment was served.

23. Additionally, the Court considers Counsel's submission that given the absence of a contrary view expressed by the Eastern Caribbean Court of Appeal, it is open to the Court to adopt the trial judge's definition in ***Sylmord***,[23] that a good explanation is capable of arising from '*muddle*, *forgetfulness,* [or] *an administrative mix up…'* However, this Court entirely agrees the view of Young J in **Ephraim Usher v Bernaldo Jacobo Schmidt[24]**and declines to adopt any such definition, as it would indeed be reducing the value of a default judgment to practically naught. Instead, this Court prefers to acknowledge, that borne out of judicial precedent, a general rule exists that administrative oversight, negligence, deliberate disregard of the court process, inattention, to name a few, all fail to meet the standard of good explanation.

[22] Vasquez v Belize Western Energy Ltd. BZ 2009 SC 7
[23] supra
[24] *supra*

The judgment of Lord Dyson in **Attorney General v Universal Projects Ltd**[25], to which there was brief reference by the Court of Appeal in *Sylmord Trade*[26], is considered a forcefully persuasive guide to the question of what suffices as good explanation. The brief reference in *Sylmord* was as follows:-

> *"…if the explanation for the breach… connotes real or substantial fault on the part of the defendant, then, it does not have a good explanation for the breach."*

The reference also included Lord Dyson in effect stating that '*it is difficult to see how inexcusable oversight or administrative inefficiency can ever amount to a good explanation.'*

24. The true import of this judgment (***Attorney-General v Universal Projects Ltd***.) goes beyond the brief reference at paragraph 23 in *Sylmord* thus in order to provide context, the case is examined in some detail as set out below:-

(i) The Government of Trinidad and Tobago appealed against a default judgment in excess of thirty-two million dollars ($TT32m) which had been entered pursuant to permission granted by the first instance judge to do so;

(ii) The permission (as required for default judgments against the Government), had been granted pursuant to an order extending time to file a defence (the time for entering a defence had long expired), and this order imposed a sanction in the form of permission to the Claimant to enter the default judgment, in the event of failure by the Defendant to file within the time extended;

(iii) The Government failed to file their defence within the time extended, the claimant entered its default judgment and the Government applied for the default judgment to be set aside and for further extension of time to file their defence;

(iv) The reasons given by the Government for failing to file their defence within the extended time included a litany of woe arising from staffing shortages, administrative misplacements of the claim, a need to instruct and retain outside counsel, absence of a substantive solicitor general required for authorizing the retention of outside counsel, time delays in obtaining authority from the Attorney-General given the absence of a solicitor general, …;

[25] [2011] UKPC 37
[26] @ para 23 therein

(iv) Instead of as an application to set aside a default judgment, the judge treated the application as one for relief from sanctions and inter alia determined (upon the applicable rule in the same terms as CPR Rule 26.8 in Belize), that there had been no good explanation for the breach of the order, thus the judgment was allowed to stand;

(v) The Government appealed to the Court of Appeal and thereafter to the Privy Council against both the treatment of the application as one for relief from sanctions, and the adjudged failure to satisfy the conditions of the rule.

25. The Board, (judgment delivered by Lord Dyson), upheld in the first instance, the judge's determination that the application was properly treated as one for relief from sanctions as opposed to an application to set aside the default judgment. The difference is important in the context of Trinidad and Tobago as unlike Belize's Rule 13.3, its counterpart in Trinidad and Tobago omits the requirement for a defendant to show a 'good explanation' for the failure to acknowledge or defend, and requires only a realistic prospect of success and reasonable promptitude in applying to set aside. The applicability of the judgment however, is borne out of the Board's discussions and decision in relation to the good explanation required to be shown, having upheld the application as one for relief from sanctions. The road to that determination is not relevant to the instant case. The trial judge had found that the failure to file a defence was both intentional and lacked a good explanation. The Court of Appeal overturned the finding that the failure was intentional but upheld the finding that there was no good explanation provided by the Government.

26. On the appeal, the statements of Lord Dyson as referred to at paragraph 23 above, were preceded by what was termed the very 'detailed and skillful' submissions of Queen's Counsel, which on the point of 'good explanation' were laid out as follows:-

> *"…But more importantly, Mr Knox submits that the court's reasoning proceeded on the mistaken premise that in law a "good explanation" requires the party in default to show that he was not at fault, with the result that he cannot rely on such things as administrative inefficiency, oversight or errors made in good faith. To interpret "good explanation" as requiring absence of fault would impose an unreasonably high test, because in practice virtually all breaches are the result of some fault.*

Rather, he submits, a "good explanation" is one which "properly explains how his breach came about, which may or may not involve an element of fault such as inefficiency or error in good faith" (para 26 of the defendant's written case in the present appeal). Any other interpretation would be inconsistent with the overriding objective of dealing with cases justly and should therefore be avoided under rule 1.1(2)."

"Applying that test, Mr Knox submits that the State did have a good explanation for its failure to serve a defence by 13 March. It needed to instruct outside counsel (given the size of the claim), but this took some time with the result that they were not instructed until 10 March because the matter had to be passed to the Attorney General."

27. Now with the context of those submissions, Lord Dyson's response was as follows (emphasis mine):-

*"The Board cannot accept these submissions. First, if the explanation for the breach ie the failure to serve a defence by 13 March connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how **inexcusable** oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency."*

What this Court regards as the forceful guidance from the above extracts is the very clear indication that a failure borne out of real or substantial fault on the part of the defendant does not amount to a good explanation. To suffice as real or substantial fault, this Court is of the opinion that some degree of intentional action is involved. Separate and apart from real and substantial fault however, Lord Dyson spoke in relation to oversight, which this Court interprets to mean albeit attributable as per fault, to have arisen however unintentionally. In this regard, Lord Dyson found that oversight may be excusable in certain circumstances, but inexcusable in others and the latter (inexcusable oversight), would not amount to a good explanation. Thereafter Lord Dyson added in effect, that administrative inefficiency would be similarly regarded in the same manner as inexcusable oversight – i.e., lacking in good explanation.

28. With that dictum in mind, as well as numerous other examples in which administrative inefficiency has been found not to provide a good explanation, the Court now examines the Defendant's explanation in the instant case. The facts have already been summarized, but are now contextualized, with reference to the Court's consideration of the matter. The service of the claim form was effected on the 12th October, 2017 and according to the Defendant's evidence, the unopened envelope was placed on the accountant's desk to be opened as general mail. The envelope remained unopened until the 6th November, 2017 when it was discovered pursuant to a search triggered by the receipt of the default judgment on the 2nd November, 2017. As pointed out by Counsel for the Claimant, the time elapsed between service of the claim form and discovery of the envelope was 25 days (actually 16 working days). The Court firstly accepts, as contended on behalf of the Defendant, that the failure to open the envelope was not intentional. The Court also accepts (without reference to any reason therefor), that the envelope was treated as ordinary mail, instead of with the due attention it would have been had it been identified as containing court documents.

29. Within the context of an office of a company carrying on business, 16 working days (with no interruption to business), of ordinary mail remaining unopened, falls at first glance to be regarded by the standard of any reasonable person, as administrative inefficiency. Alternatively, the Court considers the circumstances from the standpoint of oversight. In applying the words of Lord Dyson, the question is whether the oversight is to be regarded as excusable or inexcusable. In this respect, the oversight is considered by the Court to be inexcusable, on the basis that the Defendant was a company carrying on business. Perhaps if it were a company barely functioning, with principals and staff infrequently in attendance at the office, the lapse might have been capable of being accepted as an excusable oversight. However, the evidence from the Defendant itself, suggests that the company is fully functional and staffed at the very least by a receptionist, a secretary, an accountant, as well as a managing director. Further, there was an identifiable administrative system by which mail was received by the receptionist and opened by the accountant.

The receptionist was absent on the day of service, but the company's resources allowed for an in house substitution by the secretary, who upon receiving the envelope, carried out the same act that the receptionist would have, and placed the envelope on the accountant's desk to be opened.

30. Thereafter, an unfortunate but initially excusable oversight occurred, whereby the envelope went undetected by the accountant and not opened. That oversight however went from excusable to inexcusable when it remained that way for over three weeks, in a place of business. According to the Defendant' s own evidence, upon the search having been conducted after receipt of the default judgment – the envelope was found in the same place, where the secretary who received it, had put it. This failure, as stated before, was not intentional, but nonetheless the Court finds that for a company carrying on business, if dubbed an oversight, the oversight is inexcusable or in any event, amounts to administrative inefficiency. In these circumstances, the explanation proffered by the Defendant for failing to acknowledge the claim is not accepted as a good explanation. This being the case, the application to set aside the default judgment fails.

Final Words

31. As has been acknowledged by the Courts in several dicta, the effects of the regime of having to satisfy all three conditions of Rule 13.3 in order for the Court to exercise its discretion to set aside a default judgment, are draconian. As alluded to in ***AG v Universal Products Ltd.*** however, the purpose of the stringency of the rule (there relief from sanctions but equally applicable to an application to set aside a default judgment), is to improve the efficiency of litigation[27]. Lord Dyson also makes the point that the overriding objective of the rules (Belize CPR Rule 1.1) is not available in aid of correcting a clear breach of the rules[28].

[27] *Supra* @ para. 16

[28] *c.f.* **Braithwaite et anor v Potter & Potter Grenada Civ App. No. 18 of 2002** @ para. 9; Belize Telecommunications Ltd v Belize Telecom Ltd. *supra.* per Morrison JA. @ para 29.

Finally, the point was made by Counsel for the Defendant, as is often made in applications of this kind, of the injustice of the Defendant being deprived of the opportunity to defend the claim on its merits. In this regard, the Court acknowledges an appeal to its inherent jurisdiction as the means by which to remedy such an injustice.

32. This specific question was addressed by Lord Dyson in ***AG v Universal***[29]following the learned Queen's Counsel's submission therein that given the defendant's strong defence and the large judgment, it would be an abuse of process for the Government not to be allowed to defend the claim. This submission was rejected on the basis of the existence of specific provision in the rules for the set aside of a default judgment, so that it was not proper for the Court to seek recourse to its inherent jurisdiction. Lord Dyson supported this statement by reference to the Board's decision in ***Texan Management v Pacific Electric Wire and Cable Co Ltd.***[30], to the effect that it would be wrong to exercise the inherent jurisdiction where it would be inconsistent with the rules.

Disposition

33. In light of the forgoing, particularly the Court having found (i) the claim form was properly served on the Defendant and (ii) the Defendant has not provided a good explanation for its failure to acknowledge the claim:-

    (i) The Application to set aside the Default Judgment is dismissed; and

    (ii) Costs are awarded to the Claimant in the agreed sum of **three thousand dollars** ($3,000).

Dated this 16th day of May, 2018.

Shona O. Griffith
Supreme Court Judge.

[29] *Supra*. Paras 26 - 27
[30] [2009] UKPC 46 at para 57