BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(Civil Jurisdiction)

Suit No. 1679 of 2011

Between:

OLYMPIAD INCORPORATED **First Claimant**

JEFFREY WINSTON CHANDLER **Second Claimant**

AND

RBTT BANK BARBADOS LIMITED **Defendant**

Before:

The Hon. Madam Justice Elneth O. Kentish **Judge of the High Court**

Appearances:

Mr. Mark W. Goodridge, Q.C. in association with Ms. Debbie Anne-Marie. Browne and Ms. Jodi-Ann Chambers of Jones & Goodridge, Attorneys-at-law for the First and Second Claimants

Mr. Garth St. E.W. Patterson, Q.C. in association with Ms. Onika E. Stewart, Ms. Tammi Pilgrim and Mr. Bartlett Morgan of Lex Caribbean, Attorneys-at-law for the Defendant

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2013: June 12

September 7

November 13

2014: March 28

DECISION

NATURE OF APPLICATION

[1] **Kentish J:** By a Notice of Application filed on 18 June 2012, the Defendant applied for an order setting aside a default judgment obtained by the Claimants on 1 March 2012 and

entered on 19 March 2012 for the sum of $10 888 867.63 together with interest at the rate of 8% per annum from the date of judgment until payment.

[2] The Defendant also sought a stay of proceedings in respect of a Writ of Execution issued by the court on 11 May 2012 for the seizure and sale of certain goods belonging to the Defendant to satisfy that default judgment, as well as the costs of and incidental to the application to set aside.

[3] On 26 June 2012, the Court by consent ordered that all proceedings for the seizure and sale of goods belonging to the Defendant be stayed until the hearing and determination of the application to set aside. Accordingly, the only issue before the Court is whether to set aside the default judgment entered on 19 March 2012.

[4] The Defendant does not deny that a certified copy of the Claim Form and statement of claim in this matter were served on it on 25 October 2011. In response, on 11 November 2011 it filed an Acknowledgement of Service in which it made no admission to any part of the claim and indicated its intention to defend.

[5] The Defendant also does not deny that it failed to file a defence within 28 days after the service of the Claim Form and statement of claim, as required by Rule 10.3(1) of the Supreme Court (Civil Procedure Rules) 2008 ("CPR"), or that it failed to make an application to extend the period for filing the same under Rule 10.3(4).

[6] Even after being called upon by the Claimants to remedy its default by Notice dated 13 December 2011 issued by Counsel for the Claimant, no Defence was filed.

[7] There is no dispute that the default judgment was regularly obtained. In these circumstances, the Defendant cannot seek to set aside the default judgment under Rule 13.2 of the CPR and it seeks to do so under Rule 13.3.

[8] In its Application, Counsel for the Defendant urged the Court to exercise its discretion under Rule 13.3 to set aside a default judgment on the following grounds:

> "i. the Claim Form and Statement of Claim disclose no cause of action against the Defendant;
>
> ii. the Claimants' claim is for damages for misrepresentation, which damages were required to be assessed by the Court before final judgment was entered;

iii. it was entered in breach of the procedural requirements of the CPR regulating the entry of a default judgment for unspecified sums of money;

iv. it was entered for interest on amounts not claimed in the Claim Form;

v. it was entered for interest at a rate not prescribed by the rules of court in accordance with section 35 of the Supreme Court Act, CAP 117A; and

vi. it was entered for interest when the Claimant was not entitled to any interest."

[9] The application to set aside the default judgment is supported by the affidavit of the Defendant's former attorney-at-law, Cleveland Allen, filed on 18 June 2012 and the affidavit and supplemental affidavit of its Senior Manager, Maureen Huque, filed on 19 June 2012 and 10 June 2013 respectively.

[10] The Claimants urge the Court to dismiss the Defendant's application to set aside the default judgment on the basis that the judgment was regularly obtained under Part 12 of the CPR and because the Defendant has provided no good explanation for its default. They also contend that the delay in making the application is sufficient to justify dismissal of the application and the Court should therefore allow the default judgment to stand.

FACTUAL BACKGROUND

[11] The First Claimant, Olympiad Incorporated, is a limited liability company incorporated and registered under the provisions of the Companies Act, Cap. 308 of the Laws of Barbados. Mr. Jeffrey Winston Chandler, the Second Claimant, is a director of the First Claimant.

[12] The Defendant, RBTT Bank Barbados Limited, is a limited liability company that is registered and incorporated under the Companies Act under the name of RBC Royal Bank (Barbados) Limited (being an amalgamation of RBC Royal Bank (Barbados) Limited and RBTT Bank Barbados Limited). It is licensed to carry on the business of a bank under the Financial Institutions Act, Cap 324A of the Laws of Barbados.

[13] On behalf of the First Claimant, the Second Claimant approached the Defendant on or around April 2005 seeking a loan of $5.6 million to assist with the construction of a

commercial office building to be erected on land situate in Garrison, Saint Michael. The Claimants allege that $1.6 million of the loan was to be used towards the purchase the land while $4 million was to be used to construct the proposed building.

[14] The First Claimant wished to construct a commercial office building for the purpose of renting the same to the Delegation of the European Community to Barbados and the Eastern Caribbean for a 10-year period at a monthly rental rate of $68 000.00 together with monthly maintenance charges of $5 521.00. To this end, the Second Claimant as director of the First Claimant had signed a Memorandum of Understanding dated 13 June 2006 with the Head of the Delegation of the European Community to Barbados and the Eastern Caribbean.

The Indicative Term Sheet

[15] In response to the Claimants' proposal, Andrew Puckerin, the Account Manager of the Defendant, issued on 8 April 2005 a letter countersigned by Maureen Huque and addressed to the directors of the First Claimant. This letter is relied upon by both parties and is, for this reason, discussed in some detail below.

[16] The Defendant described this letter of 8 April 2005 as an "Indicative Term Sheet" that sets out, for discussion purposes only, some of the terms of the proposed facility in order to establish the context, parameters and limits of the negotiations between the parties for the loan of $5.6 million. The contents of the letter support this description.

[17] The first three paragraphs of the letter, written in bold font, provide as follows:

> **"This document contains illustrative terms for discussion only. This is not an offer.**
>
> **The following terms and conditions are provided for the exclusive use of the Directors of Olympiad Inc. and may not be shown to other parties without the prior approval of RBTT Bank Barbados Limited.**
>
> **They do not constitute or imply any offer or commitment whatsoever on the part of the Bank and are subject to negotiations and satisfactory documentation. Any such offer can then be made after approval of the Bank's credit authority."**

[18] In its final paragraph the letter once again emphasized that:

"The terms outlined above are illustrative only and are subject to further negotiation and to credit approval."

[19] The letter did indeed set out some of the proposed terms of the loan facility. For example, it named the intended borrower and the intended lender. It also indicated that the proposed facility was a loan of $5.6 million, the purpose of which was to "assist with the construction of a property at the Garrison, St. Michael to be called Lexum". It made no mention of the loan being used for the purchase of the land on which the building was to be constructed.

[20] Under the heading "Availability", the Indicative Term Sheet stated that the loan facility would become available only on confirmation that all monies due in relation to the purchase of the land have been paid and all security items are in place. It also contained a term that the negotiation fees for the loan facility would be $28 000.00.

[21] The Indicative Term Sheet made clear the process by which a binding facility agreement would be concluded between the parties. First, there must have been a letter of offer issued by the Defendant to the First Claimant in duplicate.

[22] Secondly, the Indicative Term Sheet stipulated under the heading "Acceptance" the manner in which acceptance of the Defendant's offer would be signified to the Defendant, that is by furnishing to the Defendant the duplicate of the letter signed by the First Claimant together with a certified copy of a resolution of the First Claimant's Board of Directors, *inter alia*, accepting the loan on the terms and conditions stated and a copy of the by-laws of the First Claimant certified as true and correct by its secretary or a director.

[23] The Indicative Term Sheet stipulated the additional matters that the Defendant required to be satisfied before the facility would become available.

The Loan of $840 000.00

[24] In August 2005 the Second Claimant informed the Defendant that the Claimants required the Defendant's assistance to complete the purchase of the land upon which the building was to be constructed.

[25] By letter dated 22 August 2005, the Defendant offered the First Claimant a loan facility in the amount of $840 000.00 subject to the terms and conditions contained in that letter. The Second Claimant signed this letter in his capacity as director of the First Claimant, signifying the First Claimant's acceptance of the terms and conditions contained therein.

[26] This letter was described by the Defendant as a commitment letter. Its first paragraph provided that:

> **"On the basis of the information presented to us, we are pleased to advise that the Bank will make available to your company the following facility for the purpose and on the terms and conditions outlined below."**

[27] The commitment letter made it clear that the purpose of the loan was to "assist with the purchase of land at The Garrison, St. Michael".

[28] The said loan was secured by, *inter alia*, a charge over the land created by a Deed of Charge by way of legal mortgage from the Claimants to the Defendant dated 27 October 2005, recorded as deed No. 5262 of 2006 and stamped to cover $840 000.00 ("the mortgage").

[29] It was a term of the loan that the Claimants would pay the interest thereon only for twelve months after which the facility was to be converted to a loan payable on a reducing basis.

[30] It is common ground that the First Claimant defaulted in the making of the interest payments due to the Defendant under the loan.

[31] It is also common ground that that the loan of $5.6 million for the construction of the property was never approved and no Letter of Offer in relation to the application for the loan was ever sent by the Defendant to the Claimants, although the parties disagree on the reason for the failure of the Defendant to provide the First Claimant with that loan.

THE CLAIM AGAINST THE DEFENDANT

[32] By Claim Form filed on 12 October 2011, the Claimants instituted an action against the Defendant. The Claim Form provides:

> "The First and Second Claimants' [sic] claim against the Defendant for misrepresentations made on the part of the Defendant to the First and Second Claimants causing the Defendants [sic] to suffer damage…"

[33] The particulars of misrepresentation alleged by the Claimants are as follows:

> "1. The Defendant falsely representing to the First and Second Claimants that the sole injection of the sum of $600,000.00 was sufficient for the Defendant to loan the amount of $5.6 million to complete an entire project;
>
> 2. The Defendant representing to the First and Second Claimants that the Defendant [sic] should deposit the sum of $40,000.00 into a Bank Account in order to meet bridging loan payments; and
>
> 3. The Defendant falsely representing to the First and Second Claimants that in order to commence the second phase of the project aforesaid the value of $400,000.00 of work done was sufficient for the Defendant to forward to the First and Second Claimants the money necessary to complete the construction of the said property and/or phase two of the said project."

[34] In para 1 of the statement of claim, the Claimants pleaded that the First Claimant had "at all material times entered into an agreement with the Defendant pursuant to misrepresentations made on the part of the Defendant to the First and Second Claimant[s]".

[35] The Claimants further pleaded that the parties entered into negotiations with "the common understanding" that the First Claimant intended to purchase the property to construct an office to be leased to the European Community and further that:

> "6. At all material times the Defendant was aware that the purchase of the said property by the First Claimant was only the first step of the said project and that the construction of a building on the site to be rented as aforesaid was the key element of the said project and the source from which the Defendant would be repaid the loan proceeds."

[36] The Claimants also alleged that in discussions with the Defendant, the Defendant represented to the Claimants that in order to receive the loan for the construction of the building, the First Claimant was required to put $600 000.00 towards the purchase of the land, in addition to the $160 000.00 paid as deposit.

[37] The Claimants further alleged that in furtherance of representations made by the Defendant, the Defendant requested that the Second Claimant pay the sum of $40 000.00 to an account with the Defendant so that the Defendant could "debit the account from time to time with the bridging loan payments" and further that on 2 October 2006, the Defendant withdrew $28 000.00 as negotiation fees in respect of the loan of $5.6 million.

[38] At paras 14 and 17 of the statement of claim, the Claimants aver that Mr. Puckerin, an officer of the Defendant, represented to the Second Claimant first that the project was underfunded and would need the injection of $400 000.00 and second that these funds could be injected by way of work done on the foundations and infrastructure of the building. According to the Claimants, on the basis of these representations, work was duly carried out on the foundations of the building.

[39] This work was valued by C & H Associates Ltd. at $448 814.33 in its Valuation Report dated 15 November 2006 and a copy of the report forwarded to the Defendant.

[40] The Claimants alleged that on sending the Valuation Report they were of the view that they had "overcome every obstacle which had been put in its path by the Defendant in relation to the said project" but the Defendant then requested "a new contract from the European Community with a new extension" which the European Community was unwilling to provide.

[41] In its pleadings, the Claimants alleged that the Defendant decided not to offer them the loan of $5.6 million, not because of their failure to satisfy the conditions set out in the Indicative Term Sheet, but because Mr. Puckerin had approached the Second Claimant seeking to be a partner in the project and had been rejected.

[42] The Claimants therefore claimed:

> "1. Return of the sum of $800,000.00 being the aggregate sum of money paid to the Defendant in furtherance of the misrepresentations made by the Defendant to the First and Second Claimants together with interest on the said sum at 8 per cent per annum.
>
> 2. The sum of $9,360,470.00 being the rental income the First and Second Claimants would have recovered under the terms of the Memorandum of Understanding which was duly executed by the representative of the European Community.
>
> 3. The sum of $448,814.33 being the expenses and costs incurred by the First and Second Claimants to date for the construction of the building on the said property called 'Lexham';
>
> In the alternative
>
> 4. Rescission of the said Agreement; and
>
> 5. Such further orders as this Honourable Court may deem fit."

[43] On the hearing of the application, the Court ruled that para 1 of the prayer in the Claim Form and statement of claim, under which the Claimants sought "the return of the sum of $800 000.00 paid to the Defendant", could not stand as pleaded since the Claimants, on their own pleadings, had never paid any such sum to the Defendant. This portion of the prayer was therefore struck out.

THE DEFENCE

[44] The application to set aside was supported by two affidavits deposed by Maureen Huque. In the first of these she stated at paras 14 and 21:

> "14. I am further advised by the Bank's Attorneys-at-law and verily believe, that the said Claim Form and Statement of Claim filed against the Bank, discloses no or no reasonable cause of action either in contract or in tort against the Bank, as the Claimants have failed to establish the existence of an agreement which they were induced by the Bank to enter into, whether on the basis of deceit, false, reckless or negligent misrepresentations made by the Bank or any of its officers…
>
> 21. I am also advised by the Bank's Attorneys-at-Law and do verily believe, that since the Claimants have disclosed no cause of action against the Bank there is no basis for defending the claim…"

[45] In light of Rule 13.4(3) which provides that a draft of the proposed defence must be exhibited to the affidavit filed in support of an application to set aside, a second affidavit by Maureen Huque was filed in which she deposed at para 3 that she was advised and did verily believe that the Defendant has a good Defence that was likely to succeed. To this affidavit, she exhibited a copy of the proposed Defence.

[46] In its Draft Defence, the Defendant denied making any of the representations or entering into the contract alleged by the Claimants. It put the Claimants to strict proof of the same.

[47] The Defendant asserted that the negotiations between itself and the Claimants were subject to the unambiguous terms of the Indicative Term Sheet, the language of which made it plain that it was not a contract, and contained the common understanding of the parties in relation to their negotiation for the loan of $5.6 million. It stated that under the Indicative Term Sheet the purchase of the property by the First Claimant was one of the

pre-conditions to be satisfied before the loan of $5.6 million could be approved by the Defendant's credit authority.

[48] The Defendant also contended that in August 2005 the Second Claimant sought the Defendant's assistance to complete the purchase of the land. Further to this request, the Defendant approved a loan of $840 000.00 intended only to assist the Claimants with completing the purchase. The term and conditions on which this loan was granted were contained in a commitment letter sent by the Defendant to the First Claimant and signed by the Second Claimant as director of the First Claimant.

[49] One of the conditions in the commitment letter was that the Second Claimant had to assign the funds of his savings account to the Bank and these funds were used to pay the fees, expenses and interest payments related to the loan of $840 000.00 only.

[50] While the Defendant admitted receiving a deposit of $40 000.00 it asserted that this deposit was received after it sent a letter dated 25 September 2006 to the First Claimant indicating that (i) there was insufficient cashflow to meet the debt service requirements of the proposed loan for the construction project; (ii) interest payments on the loan advance were 179 days overdue; and (iii) unless it received proposals for the payment of outstanding interest and evidence of the First Claimant's ability to service the loan it would have no choice but to call in the debt.

[51] Finally, the Defendant denied requesting a further injection of $400 000.00 or receiving any Valuation Report from the Claimants. It contended that the loan for $5.6 million was never offered due to the Claimants' breach of the material terms of the commitment letter and mortgage and failure to adequately address the Defendant's concerns in relation to its loan application.

ISSUES

[52] In light of the parties' oral and written submissions, the following issues arise for my consideration:

1) Were the Claimants entitled (i) to enter default judgment for a specified sum of money within the meaning of the CPR; and (ii) to claim interest on that sum?

2) If the Claimants were not entitled to do so under the Rules, does the entry of the default judgment in breach of the provisions of Part 12 of the CPR entitle the Defendant to have the default judgment set aside?

3) Do the Claim Form and statement of claim disclose a valid cause of action and if so, has the Defendant established a real prospect of successfully defending the claim?

4) Did the Defendant provide a good explanation for its failure to file a Defence within the time required by the Rules?

5) Was there an undue delay on the part of the Defendant in applying to set aside the default judgment?

LAW AND DISCUSSION

Was the default judgment regularly entered and was it entered for the sum of $10 888 867.63 in breach of the Rules?

[53] The CPR establishes a procedure for the entry of a judgment without trial on the failure of a Defendant to acknowledge service of a claim or to file a defence within the time stipulated by the Rules. In such an event, the Claimant is entitled to make an application for a default judgment under Part 12 of the Rules and once the conditions set out in Part 12 for the entry of a default judgment have been satisfied, judgment will be entered against the Defendant. The entry of a default judgment is an administrative act that does not require the exercise of judicial discretion.

[54] Under Rule 12.10(1) a default judgment on a claim for a specified sum of money shall be judgment for payment of that amount, while a default judgment entered for a claim for an unspecified sum of money shall be judgment for payment of an amount to be determined by the court. This Rule is set out below.

[55] Rule 12.10(1) provides as follows:

> "(1) A default judgment
>
> (a) on a claim for a specified sum of money, shall be judgment for the payment of that amount or, where part has been paid, the

amount certified by the claimant and verified by affidavit as outstanding

(i) where the defendant has applied for time to pay under Part 14, at the time or times and rate ordered by the court; or

(ii) in all other cases, at the time or times and rate specified in the request for default judgment;

- **Rule 2.3 defines "a claim for a specified sum of money" and sets out the circumstances under which a claim for the cost of repairing property damaged in a road accident can be treated as such a claim.**
- **Part 65 deals with the quantification of costs.**

(b) on a claim for an unspecified sum of money, shall be judgment for the payment of an amount to be determined by the court;"

[56] So the first issue is whether in this case there was a claim for an unspecified sum of money. The parties disagree on whether the claim was one for a specified sum of money. Default judgment was entered for the sum of $10 888 867.63, the total amount claimed in the Claim Form, as if it were a claim for a specified sum of money. Counsel for the Claimants contends that it was correctly entered while Counsel for the Defendant asserted that as the claim did not satisfy the definition of "a claim for a specified sum of money", judgment should never have been entered for a specific amount but instead for damages to be assessed.

[57] In determining this issue, the Court must have regard to Rule 2.3(a) to which Rule 12.10(1) refers and which provides a definition of a "claim for a specified sum of money". This definition is reproduced below:

"'claim for a specified sum of money' means

(a) a claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract; and

(b) for the purposes of Part 12 (default judgments) and 14 (admissions) a claim for

(i) the costs of repairs executed to a vehicle;

(ii) the cost of repairs executed to any property in, or abutting a road; or

(iii) any other actual financial loss other than loss of wages or other income,

> claimed as a result of damage which is alleged to have been caused in an accident as a result of the defendant's negligence where the amount of each item in the claim is specified and copies of receipted bills for the amounts claimed are attached to the application or statement of claim;"

[58] In his submissions, Mr. Goodridge referred the Court to para 12.4.3 of the **White Book (The Supreme Court UK Practice 2011)**, which stated that "specified sum of money" was wider than the term liquidated damages used under the old Rules of the Supreme Court and applied to any case where a figure had been placed on the amount of the claim, whether the claim was for debt or damages or any other sum. He submitted that in understanding the definition provided by our Rules, one could have regard to what was said in the **White Book** in relation to the English Rules.

[59] Counsel for the Defendant, Mr. Patterson, rejected that submission, pointing out that while our Rules provides a definition of the term a "claim for a specified sum of money" the English Rules do not.

[60] Mr. Patterson argued that the Claimants had not shown that a contract existed and, even if they had, their claim was not one for a specified sum of money as what had been claimed was damages for misrepresentation.

[61] Mr. Goodridge has sought to argue that a claim for a specified sum of money applied to any claim, whether a claim for debt or a claim for damages, once a figure has been provided. His submission is grounded not in the definition in Rule 2.3(a) but on the White Book.

[62] The White Book is a commentary on the English Civil Procedure Rules. Though modelled on the English Civil Procedure Rules, the CPR of Barbados is not on all fours in all Rules with the former. Great care must therefore be taken to identify where the Rules are identical and where they are not.

[63] Part 2 of the English Rules contains no definition of "a claim for specified sum of money" in stark contrast to Part 2 of our Rules, which do. In my judgment, the Court would err in adopting the expansive interpretation given to the term under the English

Rules and not adhering to and applying the definition in Rule 2.3(a). I find and hold that I am constrained by that definition.

[64] The issue before the Court as to whether a particular claim is for a specified sum of money was one which the High Court of Trinidad and Tobago and the Court of Appeal of Jamaica also had to consider in ***Khan v Johnston (t/a as Johnston Construction) (unreported) Cv. No. 2311 of 2009, Decision of 12 April 2011*** and ***Singh v Kingston Telecom Ltd (unreported) Civil Appeal No. 48 of 2006, Decision of 10 July 2009*** respectively. The Trinidad and Tobago Civil Proceedings Rules 1998 and the Supreme Court of Jamaica Civil Procedure Rules 2002 contain a definition of the term identical to our own and, like our CPR, provided that default judgment for a claim for a specified sum of money is to be entered in that amount while default judgment for a claim for an unspecified sum of money is to be entered with damages to be assessed.

[65] In ***Khan***, Rajkumar J. described the claim as "a claim which was partly for damages– the amount of $275,848.27, which was based on the total of $184,394.89, and the sum of $83,281.18 CLAIMED AS DAMAGES FOR BREACH OF CONTRACT in the Statement of Case" and found it to be a claim for an unspecified sum of money. He observed that:

> "It is doubtful whether a claim for damages which would normally have to be assessed under Part 16, can be converted into one for a specified sum of money merely by the claimant's ascribing a figure to it. For example, if the figure ascribed were $100 million dollars, there would be no opportunity for an objective independent assessment by the court if the rule were interpreted to permit the claimant to ascribe his own value by specifying his own figure, and to enter judgment for that self created figure over the counter.
>
> This would in effect permit a claimant to perform his own assessment and bypass an assessment by the court."

[66] As a default judgment had not been entered for damages to be assessed although the claim was one for an unspecified sum of money, the Court expressed some doubts as to its regularity. However, it ultimately set it aside not on that basis but because the Defendant had shown that he had a realistic prospect of success in defending the claim and had acted as soon as reasonably practicable when he found out that the judgment had been entered against him.

[67] The claim in ***Singh*** was a claim was made by the respondent against the appellants for sums due and owing under a contract for the supply of telecommunication services, damages for breach of fiduciary duties and damages for breach of a contract for the supply of equipment under which the appellants conspired to and did wrongfully remove equipment belonging to the respondent.

[68] Smith JA, who gave the decision of the Court, observed at p. 11 that:

> "The ascertainment of the total amount to which the claimant would be entitled would, I think, clearly depend upon an examination of the extent to which the appellants have failed to supply the telecommunication services, the nature of the breach of fiduciary duties and the consequent loss, the extent to which they have failed to supply the equipment and of the unlawful loss suffered by the removal of the claimant's equipment."

[69] The Court of Appeal therefore held that the claim could not be a claim for a specified sum of money. It emphasized that simply inserting a specific sum in a claim that was really for an unspecified sum of money did not entitle a claimant to enter judgment for payment of that amount.

[70] "A claim for a specified sum of money" is not a term confined to Part 12. It is instructive to note that under Rule 8.12.1(e), a claimant is required to serve Form 4A, an application to pay by instalments, with a claim for a specified sum of money. No such form was filed or served on the Defendant, as seen from a perusal of the file.

[71] It is instructive that Rule 2.3(a) expressly provides that such claims as the cost of repairs executed to a vehicle or any property abutting a road or any other actual financial loss other than loss of wages or other income are included in a claim for a specified sum of money, solely for the purpose of Parts 12 and 14, where they are caused by negligence and the amount of each item claimed was specified and supported by evidence. The implication from the inclusion is that such claims would otherwise have fallen outside the scope of a claim for a specified sum of money.

[72] Properly construed, a claim for a specified sum of money in the CPR is a claim for a debt arithmetically ascertainable and does not include a claim for damages which must be assessed or determined by the court.

[73] The action filed in this case is not an action for the recovery of any debt. The Claimants have instituted an action in misrepresentation against the Defendant in which they have sought damages and, as an alternative, rescission. The mere fact that they have particularized the statement of claim by ascribing specific sums of money to the claim does not render their claim one for a specified sum of money. Accordingly, in so far as the default judgment has been entered for the sum of $10 888 897.63 rather than for damages to be assessed, it has been entered irregularly and in breach of the Rules and may be liable to be set aside.

Were the Claimants entitled to claim default judgment for a sum that included interest?

[74] In its application for default judgment filed on 10 January 2012, the Claimants sought default judgment in the sum of $10 888 867.63 which was broken down in the following manner:

Amount Claimed	$10 609 284.33
Court fees on Claim Form	$135.00
Attorney-at-law's fixed costs on issue	$5 875.00
Together with interest from date of issue to today At 8% (per cent) per annum	$209 278.80
Court fees on entering judgment	$63 707.00
Attorney-at-law's fixed costs on entering judgment	$587.50

[75] Counsel for the Defendant argued that for the Claimant to claim interest of $209 278.80 from the date of issue up to the date of the application for default judgment and to enter a sum for default judgment that includes this amount was in clear breach of the Rules and, further, that interest, if claimed, should have only been claimed at the rate of 6% per annum pursuant to the Supreme Court (Civil Procedure) (Amendment) Rules, 2009 (SI 2009, No. 111).

[76] Counsel for the Claimants submitted that not only were his clients entitled to claim interest but they could do so at the rate on which they claimed.

[77] Under Part 12 interest may be claimed for default judgment entered on a claim for a specified sum of money. Rule 12.11(1) deals with interest claimed under default judgment and provides:

> "A default judgment for a specified sum shall include judgment for interest for the period claimed where
>
> (a) the claim form includes a claim for interest;
>
> (b) the claim form or statement of claim includes the details required by rule 8.4(3); and
>
> (c) the request for default judgment states the amount of interest to the date on which the request was filed."

[78] Rule 8.4(3) provides that a claimant seeking interest must expressly state that he is doing so in the claim form and include details of the basis of his entitlement, the rate and period for which interest is claimed and, if the claim is for a specified sum of money, the total amount of interest claimed to the date of application and the daily rate at which interest will accrue after the date of claim.

[79] In its Claim Form, the Claimants claimed interest only on the sum of $800 000.00 allegedly paid to the Defendant in furtherance of the misrepresentations made by the Defendant. Although the Claim Form provided the rate at which interest is claimed, it neither indicated the period for which it was claimed or the basis of entitlement. This information was also absent from the statement of claim. In any event, this particular remedy was struck out.

[80] Accordingly, the Court finds that entry for default judgment for a sum that included interest was in clear breach of the Rules because (i) the claim was not a claim for a specified sum of money and (ii) no interest was claimed in the Claim Form in the manner required by Rule 8.4(3). Further, the Request For Default Judgment filed by the Claimants did not, as required, state the amount of interest to the date on which the Request was filed. To my mind, the failure to claim any interest provides another ground on which the default judgment could be set aside or at least varied.

When can the Court vary or set aside a default judgment?

[81] A default judgment is a judgment that has been pronounced without any consideration on the merits as a result of the Defendant's failure to follow the rules of the Court relating either to the filing of an acknowledgement of service or to the filing of a defence. Since such a judgment involves no consideration of the merits, the Rules permit a Defendant against whom a default judgment is entered to apply for that judgment to be set aside.

[82] Part 13 sets out the procedure for setting aside or varying a default judgment entered under Part 12 and establishes two ways in which this may be done. First, the Rules provide under Rule 13.2 that the Court must set aside a default judgment where any of the conditions established for the entry of the judgment under Rules 12.4 or 12.5 were not satisfied at the time that judgment was entered. This is the only basis on which the Court can set aside a default judgment under Rule 13.2. In this case the necessary conditions were satisfied.

[83] There has been a clear breach of Rules 12.10 and 12.11. On that, there is no doubt. However, these breaches do not entitle the Defendant to have the default judgment set aside as of right under Rule 13.2. The Court agrees that, without more, breaches of Rules 12.10 and 12.11 merely entitle the Defendant to have the judgment varied. To have the judgment set aside in its entirety the Defendant must satisfy the requirements of Rule 13.3.

[84] Rule 13.3 contains the second method by which a default judgment may be set aside. This Rule confers upon the Court a discretion to set aside or vary a default judgment which has been regularly entered under Part 12, which discretion must be exercised in the context of the overriding objective (See Rule 1.2).

[85] Rule 13.3 provides as follows:

> "(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.
>
> (2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has
>
> (a) applied to the court as soon as reasonably practicable after finding out that judgment had been entered; and
>
> (b) given a good explanation for the failure to file an acknowledgement of service or a defence as the case may be.

(3) Where this rule gives the court power to set aside a judgment the court may instead vary it."

[86] The Rule makes it quite clear that the sole ground on which the Court can exercise its discretion to set aside a default judgment regularly entered under Part 12 is that the Defendant has a real prospect of successfully defending the claim. Crane-Scott J. in ***S. P. Musson Son & Co. Ltd. v. Burke et al (unreported) High Court of Barbados Suit No. 1638 of 2001, Decision of 6 November 2008 at para 31*** called this "the primary and most important consideration" and while she may have been speaking in relation to the old Rules, her decision is equally relevant to an application under Rule 13.3 of the CPR (See ***Dipcon Engineering Services Ltd. v. Bowen and Anor [2004] 5 LRC 472 (PC)***).

[87] Although there is only one ground on which the default judgment may be set aside, there are two other factors the Court must consider, namely (i) the explanation given by the Defendant for its default; and (ii) the lapse of time between the entry of the default judgment and the application to set aside. The outcome of a consideration of these factors may justify the dismissal of an application even where the defendant establishes a real prospect of successfully defending the claim (See, for e.g., ***Clarke v. Hinds et al (unreported) Court of Appeal of Barbados Civil Appeal No. 20 of 2003, Decision of 4 June 2004)***.

[88] As to what is meant by "a real prospect of successfully defending the claim", the term was considered by the English Court of Appeal in ***Swain v. Hillman [1999] EWCA Civ 3053***, a decision concerning an application for summary judgment, in which Lord Woolf stated at para 7:

> "The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr Bidder submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."

[89] In ***International Finance Corp v. Utexafrica Sprl. [2001] CLC 1361***, Moore-Bick J. had to consider an application to set aside a judgment in default of acknowledgement of service under the English CPR, which like our Rules, required the defendant to show that he has a real prospect of successfully defending the claim. He stated at para [8]:

> "8. Mr Popplewell submitted that unless the defence was one which could be said to have no realistic prospect of success, it must follow that the test in r. 13.3(1)(a) was satisfied. However logical that proposition may be on its face, it is not one which I am able to accept. The fact is that in ordinary language to say that a case has no realistic prospect of success is generally much the same as saying that it is hopeless; whereas to say that a case has a realistic prospect of success carries the suggestion that it is something better than merely arguable. That is clearly the sense in which the expression was used in The Saudi Eagle and in my view is also the sense in which it is used in r. 13.3(1)(a). There are good reasons for that. 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 in favour of setting the judgment aside. In my view, therefore, Mr Howe was right in saying that the expression 'realistic prospect of success' in this context means a case which carries a degree of conviction."

[90] Lord Justice Potter observed in ***E D & F Man Liquid Products v Patel and Anor. [2003] EWCA Civ. 472*** at para 8:

> "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 defendant to have a case which is better than merely arguable…"

[91] In determining whether a defendant has a realistic prospect of success as opposed to an arguable case, the Court is required to examine with some care the claim and the proposed defence. Although the Court must necessarily conduct some analysis of the pleadings and evidence on which each party relies or will rely, it is not to conduct a detailed assessment of the evidence or a mini-trial and neither the defendant nor the claimant is required to prove their case (See ***E D & F Man Liquid Products Ltd v. Patel [2003] EWCA CIV 472 at para 10)***. However, if it is clear, even at this stage, that an issue has no basis, then it may be disposed of to save costs and expenses.

Has the Defendant shown a real prospect of successfully defending the claim?

[92] Mr. Patterson submitted that the Defendant has a real prospect of successfully defending the claim because the statement of claim filed by the Claimant revealed no valid cause of action against the Defendant nor any entitlement to the relief claimed therein.

[93] Relying primarily on **Halsbury's Laws of England, Volume 76 (5th Edition, 2013)**, Counsel for the Defendant pointed out that in order for a misrepresentation of fact to be actionable, it must have been made with the object and result of inducing the person to whom it was made to enter into a contract or other binding transaction with the person by whom or on whose behalf the representation was made. This, he said, was a trite principle of law from which it necessarily followed that there must have been a concluded agreement between the representor and representee.

[94] On the authority of ***Trentham Ltd v Archital Luxfer Ltd and Ors [1993] 1 Lloyd's Law Reports 25***, Mr. Patterson submitted that whether a contract existed was to be determined objectively and not on the basis of "the subjective expectations and the unexpressed mental reservations of the parties".

[95] Counsel for the Defendant argued that the Claimant pleaded no objective facts that pointed to the existence of a contract between the parties in relation to the loan of $5.6 million. He pointed out that aside from a bald assertion in the first paragraph of the statement of claim that an oral agreement had been made, the Claimants had not provided any particulars of this alleged agreement. No particulars of the agreement had been pleaded, he submitted, because no agreement had ever been made and in fact did not exist.

[96] Mr. Patterson contended that the Claimants had relied on the Indicative Term Sheet. He argued that its clear and unambiguous language, particularly when examined in contrast to the Commitment Letter, made it quite clear that it was not an agreement or evidence of an agreement but, at best, an invitation to treat.

[97] Counsel further asserted that the mere fact that the Defendant had been aware of the Claimants' reasons for seeking the loan and of their intention to service the requested loan with rental proceeds received by the EU Commission did not mean that an agreement had been made.

[98] In the alternative, Mr. Patterson argued that the Claimants had not established that they were entitled to the remedies they sought. He pointed out that not every false statement amounting to misrepresentation gave rise to damages; innocent misrepresentation was a ground for rescission of a contract only. In order to recover damages, the Claimants had

to demonstrate not only that the misrepresentation induced them to enter into the contract, but that the misrepresentation itself constituted part of the contract (See **McGregor on Damages (15th Edition) at p. 727**).

[99] Moreover, he argued fraud on the part of a maker was required in order to bring an action for misrepresentation in tort under ***Derry v Peek [1886-90] All ER Rep. 1***. The Claimants had not, however, alleged fraud or the breach of any duty of care on the part of the Defendant.

[100] Mr. Patterson posited that as a result of the failure of the Claimants to plead the essential elements of contractual or tortious misrepresentation, the claim contained no cause of action and, accordingly, as a default judgment could not rest upon a claim that contained no valid cause of action, the default judgment should be set aside.

[101] Mr. Goodridge did not disagree with the principles of law as set out by Mr. Patterson, but maintained that his client's pleadings contained a valid cause of action and any application to strike them out on the ground that they did not would be unsuccessful.

[102] In his oral and written submissions Mr. Goodridge attempted to show that the Claimants had pleaded the existence of a contract between the parties and also set out the terms of the same. He referred specifically to para 1 of the statement of claim which stated that the Claimants entered into an oral agreement with the Defendant on the basis of misrepresentations made by the Defendant to the Claimants. The Claimants, he stated, were not seeking to argue that any contract had been created by the Indicative Term Sheet but to establish that discussions were taking place between the parties in the course of which an oral agreement was made.

[103] Counsel contended that a term of the agreement was that the Defendant would provide the First Claimant with the funds to purchase the property and that after title to the property was acquired they would also provide the funds for construction of the office building and that these terms had all been pleaded. Also pleaded, said Mr. Goodridge, were the misrepresentations made to the Claimants on behalf of the Defendant.

[104] The Court does not, at this stage, necessarily need to determine whether the claim contains a viable cause of action. It only has to decide whether the Defendant has a

realistic prospect of succeeding on the Defence that it has exhibited in its supporting affidavit when this Defence is examined in the context of the Claim Form and statement of claim.

[105] The law is clear that the making of false statements or misrepresentations does not in itself give rise to an independent cause of action. The action must instead be brought in contract, either for rescission or damages for breach of contract, or under the torts of deceit or negligence. As to what constitutes actionable misrepresentation, see **Halsbury's Laws of England Volume 31 (2003 Reissue) 4th Edition at paras 701-781**.

[106] Counsel for the Claimants has not argued that the claim is brought in tort and nothing in his client's pleadings supports a conclusion that it has been so brought.

[107] On the authorities, it is clear that in order for a misrepresentation to be actionable it must have induced the party to whom the representation was made to enter into a contract with the party making the representation. In the absence of a contract between the person making an unambiguous and material representation of an existing fact and the party to whom the representation was made, there can be no action for misrepresentation.

[108] It is similarly clear that in order for a claimant to claim damages for misrepresentation, the representation must not only have been false but must have been fraudulent or negligent or made by a party who is unable to prove that he believed the representation to have been true: **See Halsbury's Laws of England at para 755**.

[109] The Court has carefully examined the Claim Form and statement of claim filed by the Claimants in this matter. It finds that the claim has not been clearly pleaded. Despite Mr. Goodridge's assertions to the contrary, the terms of the contract which were allegedly induced by the misrepresentations and the alleged misrepresentations incorporated into the contract are not readily apparent on the face of the pleadings. In my judgment, the Claimants have failed to plead critical elements of their claim.

[110] I have carefully examined the Indicative Term Sheet which appears to be at the heart of this matter, although Counsel for the Claimants has submitted that the Claimants are not relying on the Indicative Term Sheet but on an oral agreement made between the parties and induced by misrepresentations. In light of the clear language of this document that

the terms therein were for discussion purposes only and that an offer of a contract would only be made by means of a written Letter of Offer, it will not be easy for the Claimants to prove the existence of any contract into which they were induced to enter as a result of the alleged misrepresentations.

[111] In these circumstances, the Court has no doubt that there is merit in the proposed defence. The Defendant has established not simply an arguable defence, but one that has more than a realistic prospect of success.

Was there any undue delay in bringing the Application?

[112] Counsel both agree that in considering whether to set aside or vary the default judgment, the Court must determine under Rule 13.3(2)(a) whether the Defendant made the application to set aside as soon as reasonably practicable after finding out that judgment had been entered against it. They do not agree, however, on whether the Defendant in fact acted promptly in making the application.

[113] Mr. Goodridge argued that the Defendant had not only failed to act promptly in setting aside the default judgment after it had been entered but failed to file a defence despite receiving written notice on 13 December 2011 of the Claimants' intention to apply for default judgment if the Defendant did not file a defence within 14 days from that date.

[114] He submitted that in these circumstances it was reasonable to infer that the Defendant, through its attorney-at-law, was aware or, having been put on notice, ought reasonably to have been aware that a default judgment was being entered against it on 1 March 2012.

[115] Relying on the authority of the **White Book (2011)** and ***Standard Bank plc v. Agrinvest International Inc. [2009] EWHC 1692 (Comm)***, Counsel pointed out that in considering whether the application had been promptly made, the Court was required to have regard to the length of time between the entry of the default judgment and the application to set aside.

[116] Mr. Goodridge conceded that a copy of the default judgment obtained on 1 March 2012 had not been served on the Defendant. He nonetheless insisted that in considering whether the application to set aside had been promptly made, time should be counted from the date at which the Claimants gave the Defendant notice of their intention to file a

default judgment until the date at which the application to set aside was actually filed, a period, he said, of some 157 days. Given that the clear language of Rule 13.3(2)(a) requires the Court to consider whether the application to set aside was made *as soon as reasonably practicable after finding out that judgment had been entered*, Counsel's submission is misconceived (Emphasis added).

[117] Mr. Patterson argued that Mr. Goodridge's submission that it was reasonable for the Defendant to have known that the default judgment would have been entered on 1 March 2012 lacked any factual basis.

[118] Counsel submitted that in order to determine whether the Defendant had acted promptly after the default judgment had been entered, it was first necessary to determine the date on which the Defendant had knowledge of the entry of the default judgment. Counsel referred to the affidavit of Maureen Huque filed on 19 June 2012 in which she deposed at para 16 thereof that a certified copy of the default judgment was not served on the Defendant and it only became aware of the default judgment when a levy was executed by court marshals over the Defendant's goods on 7 June 2012.

[119] The application to set aside was made exactly 11 days after that date. In these circumstances, Counsel submitted that it was clear that there had been no delay in making the application.

[120] The Rules do not stipulate a specified period of time within which the application to set aside a default judgment has to be made. Rule 13.3(2)(a) merely says that the application to set aside should be made as soon as reasonably practicable after finding out that the default judgment had been entered. What is reasonably practicable will of course depend on the facts of the case.

[121] I accept that the Notice dated 13 December 2011 served on Counsel for the Defendant should have alerted the Defendant through its Counsel of the Claimant's intention to apply for a default judgment. It does not, however, follow that Counsel for the Defendant would have been aware of the application for the default judgment made on 10 January 2012 or that this application would be heard and default judgment granted on 1 March 2012. There is no evidence before me that any information relating to the filing of the application or its date of hearing was conveyed to Counsel for the Defendant.

[122] There is also no evidence before me to indicate that the Claimants served the default judgment on the Defendant or its Counsel after it had been entered. Part 12 of the CPR does not specify that a default judgment must be served on a Defendant. However, a default judgment, like any other judgment or order, must be served on every party to the proceedings in which the judgment or order is made unless the Court directs otherwise (see Rule 42.6(1)(a) of the CPR).

[123] In his affidavit filed 18 June 2012, Mr. Allen, the then Counsel for the Defendant, deposed at para 7 that the entry of the default judgment only came to his attention on or around June 2012 after the issue of the Writ of Execution.

[124] Maureen Huque, the Defendant's senior manager, similarly deposed that the first time that the Defendant became aware of the entry of the default judgment against it was when a levy was executed upon its property on 7 June 2012. It was also at this time that the Defendant became aware of the Writ of Execution issued against it.

[125] The Application to set aside the default judgment was filed on 18 June 2012, less than two weeks after the Defendant became aware of the entry of the default judgment. I therefore find that there has been no undue delay in filing the application.

Did the Defendant provide a good explanation of its failure to file a defence?

[126] The Court is also required to consider, pursuant to Rule 13.3(2)(b), whether the Defendant had a good explanation for its failure to file a defence. Unsurprisingly, Counsel for the Claimants submitted that the Defendant had not provided the Court with a good explanation, while Counsel for the Defendant argued otherwise.

[127] The Defendant's application is supported by the affidavits of Maureen Huque and Cleveland Allen. In her first affidavit, Maureen Huque deposed:

> "15. Although the Bank had issued instructions to its previous Attorneys-at-Law Hanschell and Company to file a Defence and Counterclaim, it appears that only an Acknowledgment of Service was filed by Hanschell & Company on November 11, 2011, indicating that the Bank intended to defend the Claim and that it did not admit to the whole or any part of the Claim, and no Defence and Counterclaim was ever filed."

[128] When the default judgment was entered, Cleveland Allen was the attorney-at-law with conduct of the proceedings on behalf of the Defendant. At para 3 of his affidavit, Mr. Allen confirmed that he caused the Acknowledgement of Service to be filed on behalf of the Defendant and he deposed at para 4 that he subsequently received the Notice calling upon the Defendant to remedy its default in filing a Defence within 14 days of that Notice. In response to that Notice he deposed at paras 5 and 6 as follows:

> "5. On December 15, 2011, I wrote to the Defendant indicating that I was in the process of preparing a Defence and Counterclaim for filing at the Supreme Court Registry.
>
> 6. The subsequent failure to file the Defence and Counterclaim was inadvertent as I had only received a scanned copy of the Statement of Claim from the Defendant and was awaiting the relevant exhibits."

[129] Mr. Goodridge submitted that despite the evidence of Cleveland Allen and Maureen Huque, the Defendant had not provided a good explanation for its failure to file a defence as required by Rule 13.3(2)(b). He pointed out, quite rightly, that although Mr. Allen deposed that after he received the Claimants' Notice he had written to the Claimants to inform them that he was preparing a Defence and Counterclaim, no Defence had been filed in the matter when the Claimants sought to execute its default judgment on the 8 June 2012, some 6 months after the Notice had been served on the Defendant.

[130] Mr. Goodridge contended that the Defendant was attempting to place the blame for its default on its then attorney-at-law, while the attorney-at-law was seeking to lay the blame on the Defendant. Referring to the case of ***Mullock v. Price [2009] EWCA Civ. 1222***, Mr. Goodridge argued that the action or inaction of the parties' representative should be treated as that of the party. It could not be separated and also could not, in this instance, provide a good explanation of the Defendant's failure to file a defence.

[131] On this point, Counsel for the Defendant referred the Court to the case of ***Burgoine v. Taylor (18798) 9 Ch. D. 1*** where the English Court of Appeal set aside a judgment which had been made at a trial in which the defendant had been unrepresented because his solicitor had been unaware that the matter had been transferred to another court and had therefore failed to appear. Relying on this authority, Mr. Patterson argued that a defendant who acted prudently in employing the services of a firm should not be

penalized for the mistake of his lawyer when lawyers are themselves human and cannot be expected to conduct themselves without error in every instance.

[132] While the Court accepts that errors may sometimes occur in practice through inadvertence, for which no penalty may be appropriate, it is not persuaded that the default in this case occurred through mere inadvertence. The claim was served on the Defendant on 25 October 2011. Service was acknowledged on 11 November 2011. Yet, more than 6 months after service of the claim on the Defendant, no Defence had been filed and no extension of the period by which to file the Defence had been or was being sought. This is despite the fact that Counsel for the Defendant had received notice of its default in filing a defence and the Claimants' intention to apply for a default judgment. Against this background, the explanation offered for the default appears quite inadequate indeed.

[133] Accordingly, the Court agrees with Mr. Goodridge that the explanation advanced by the Defendant to explain its default in filing the Defence leaves much to be desired. The Defendant has failed to provide a good explanation as required by the Rules. Its failure to do so is, however, not fatal to its application. The absence of a good explanation is only one factor to be considered under the CPR and, as earlier observed, it is not the primary factor governing the Court's exercise of its discretion under Rule 13.3.

[134] Against the doubtful claim by the Claimants stands the Defendant's strong prospects of success against the claim as pleaded. I therefore find that the failure to provide a good explanation for its default is not sufficient to justify the Court in refusing the relief sought by the Defendant in this application.

DISPOSAL

[135] In light of the circumstances of this case, including the procedural breaches, the doubtful nature of the claim as pleaded, and the fact that the Defendant has more than a realistic prospect of succeeding on its defence, it would be manifestly unjust and unfair to allow the default judgment to stand. My discretion under Rule 13.3 should therefore be exercised to set aside the default judgment entered against the Defendant in this matter.

[136] Accordingly, I order that:

(i) the judgment entered against the Defendant in default of defence on 19 March 2012 be and is hereby set aside pursuant to Rule 13.3 of the CPR; and

(ii) the Defendant shall file its Defence within 14 days from the date of this Order.

[137] I will hear Counsel on the question of costs.

[138] A stay of execution is granted for six weeks.

ELNETH O. KENTISH
Judge of the High Court