ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. SVGHCV153 / 2001

BETWEEN:

EDEN FRASER

Claimant/Respondent

and

JOSIAH RODNEY

Applicant/Defendant

Appearances:

Mr. Olin Dennie for claimant/respondent
Mr. Richard Williams and Miss Roxann Knights for the defendant/applicant

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2002:October 11, 18

JUDGMENT

ALLEYNE J.

[1] The claimant filed his Writ in this matter under the Rules of the Supreme Court 1970 on May 2nd, 2001and filed his statement of claim on July 25th 2001. The defendant/applicant entered appearance to the Writ through his then Attorney-at-Law Dr. Kenneth John, but failed to file a defence within the time limited by the Rules for so doing. The claimant, by his Attorney-at-Law Mr. Olin Dennie applied for judgment in default of defence, but at the hearing of that application before me on 16 November 2001, by which time the Civil Procedure Rules 2000 were in full effect, the court ordered by consent that the time for filing the defence be extended to 23 November 2001. The matter was fixed for further consideration on 23 November, on which date, quite early in the morning's sitting, Mr. Dennie

appeared for the claimant before me, and there was no appearance of or for the defendant. Judgment was entered in default of defence for the claimant, that the claimant is entitled to possession and quiet enjoyment of the subject land, mandatory injunctions relating to the fence on the property, for damages to be assessed, and for costs to be agreed or assessed.

[2] It has since become apparent that at about 2.00 p.m. on that very day, Dr. John filed a defence, within the time limited by the consent order, but after the court had ordered the entry of the default judgment. It is clear that the conditions of Rule 12.5(b) or 12.5(c)(i) had not been satisfied at the time that the order of the court was made on 23 November, and that the order for entry of the default judgment was premature.

[3] Dr. John applied on the ground of non-compliance with the rules for an order to set aside the judgment in default. That application came on for hearing before Mr. Justice Frederick Bruce-Lyle on 15 February 2002, but was refused on the ground that the application, in point of form, had been made under the Rules of the Supreme Court 1970, and was not in compliance, therefore, with the then operative Civil Procedure Rules 2000. Dr. John made further application which came on for hearing once again before Justice Bruce-Lyle on 19 April 2002. Once again the application was dismissed. Once again the form of the application was not in compliance with the CPR 2000. However, unlike what occurred in February, on this occasion neither the judge's note nor the minute on the court file jacket indicates the ground on which the application was dismissed. Mr. Dennie asserts that it was dismissed on the merits. Mr. Williams, now appearing for the applicant in this third application, says it was dismissed once again for want of form. I quote the judge's note of that proceeding on 19 April in full;

> "Mr. Olin Dennie for Plaintiff, Dr. Kenneth John for Defendant. Order:- Application to set aside Judgment in Default is dismissed. Judgment in Default entered by the court on the 23rd November 2001 against the Defendant is to stand."

[4] The judge's note does not in any way suggest that the merits of the matter were considered by the judge on that occasion.

[5] The defendant, having changed his Attorneys-at-Law by substituting the firm of Williams & Williams for Dr. Kenneth John, has now, by Notice of Application filed on September 25, 2002, applied in proper form under CPR 2000, for an order to set aside the default judgment. A draft defence and counterclaim, and an affidavit in support of the application, are filed with the application.

[6] Prior to that application, however, the claimant/respondent had, on July 23, 2002, filed a Notice of Application, seeking an assessment of damages pursuant to the order of November 23, 2001. The date for the hearing of that application was fixed for September 20, 2002, on which date, on the application of counsel for the defendant Miss Roxann Knights of the firm of Williams & Williams, the hearing of the application for assessment of damages was adjourned to October 11 2002.

[7] In the circumstances, the question for the court is whether the judgment in default of defence can, and if so, whether it should, be set aside to enable the defendant to defend the claim.

[8] Rule 13.2(b) of the **Civil Procedure Rules 2000** reads as follows;

> "13.2(1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of -
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> (b) judgment for failure to defend – any of the conditions of rule 12.5 was not satisfied."

[9] I have expressed the view that Rule 12.5(b) and (c)(i) had not been complied with at the time that the order was made for the entry of judgment in default. In the circumstances, Rule 13.2 renders it mandatory that the default judgment be set aside. The judgment is accordingly set aside and it is ordered that the defence

and counterclaim filed on November 23, 2001, do stand as the defence and counterclaim in this action.

[10] It is further ordered that this matter be referred for case management at the earliest opportunity.

[11] In all the circumstances of the case, I make no order as to costs.

Brian G.K. Alleyne
High Court Judge