SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.6 OF 2002

BETWEEN:

ST. KITTS NEVIS ANGUILLA NATIONAL BANK LIMITED

Appellant

and

CARIBBEAN 6/49 LIMITED

Respondent

Before:

The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]
The Hon. Mr. Adrian Saunders	Justice of Appeal [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal [Ag.]

Appearances:

Mr. C. Wilkin Q.C. for the Appellant
Mr. T. Byron with Dr. H. Browne for the Respondent

2003: January 28;
March 31.

JUDGMENT

[1] **GEORGES J.A. [AG.]:** I have had the advantage of reading in draft the judgment of Saunders J.A. [Ag.] and I too fully agree that the appeal should be allowed and that the order of the learned trial judge dated 10th July, 2002 should be set aside.

[2] As I see it, an application under Part 9.7 of the Civil Procedure Rules, if made within the period for filing a Defence, operates as a stay of the proceedings until the application is heard and determined. That view is reinforced by paragraph 7 (b) of Part 9.7 which stipulates that: "If on application under this rule the court does not make a declaration, it ……. (b) must make an order as to the period for filing a Defence".

[3] Further, paragraph 8 provides that if a defendant makes an application under this rule the period for filing a Defence is extended until the time specified by court under paragraph 7 (b).

[4] The instant application together with affidavit in support was filed on 20th February, 2002 i.e. within the period of 28 days after service of the Claim Form and Statement of Claim which was effected on 23rd January, 2003. The application was therefore filed within the period for filing a Defence.

[5] I am therefore fully satisfied that the application thus effectively stayed the proceedings until it was heard and determined and would have taken precedence over any other application or request since its determination in favour of the appellant/defendant could result in the matter being brought to an end.

Ephraim Georges
Justice of Appeal [Ag.]

[6] **SAUNDERS, J.A. [AG.]:** This Appeal was heard and an oral decision given on 28th January, 2003. The matters of law involved relate to the interpretation of the new Civil Procedure Rules and we therefore thought that we should give written reasons for our decision.

[7] In June, 2001, Caribbean 6/49 Limited [referred to as "Caribbean" in this judgment], instituted proceedings by writ of summons against the St. Kitts-Nevis-Anguilla National Bank ["the bank"] for US$1,364,031.29 allegedly due and owing. An Appearance was entered for the bank on 24th August, 2001. That suit was commenced in conformity with the old Rules of the Supreme Court.

[8] In October, 2001, pursuant to Part 15 of the new Rules, Caribbean filed a Notice of Application for summary judgment supported by affidavit. The Master who heard

this Application refused it and granted leave to Caribbean "to file and serve the appropriate Claim Form for the purpose of this case, the same to be filed on or before the 16th day of January, 2002".

[9] Caribbean did not comply with this Order. Instead, on 22nd January, 2002, its solicitors filed a new suit with a Statement of Claim attached seeking the same relief as had been claimed in the old suit. I must say in passing that, during the appeal, in the course of argument, counsel hinted that the reason why a new suit was filed was that Caribbean's solicitors were in somewhat of a dilemma regarding the proper way of complying with the Master's Order. It was eventually thought by them that it would be more expedient to re-institute proceedings. When this was done however, Caribbean neglected to terminate the old suit commenced pursuant to the old Rules. The natural result was that there were two extant suits between the same parties with the very same cause of action.

[10] The claim form in respect of the new suit was served on the bank on the 23rd January, 2002. On 4th February, 2002, the bank filed an acknowledgment of service indicating an intention to defend. In keeping with Part 10.3 of the new Rules, in the ordinary course of things, the period limited for filing a Defence should have expired on 21st February, 2002. However, on 20th February, 2002 the bank filed an Application to the court, supported by an affidavit, to strike out the Statement of Claim. The bank contended that this new suit was an unnecessary duplication of the earlier suit and should be struck out as being an abuse of the process of the Court

[11] One of the central issues in this Appeal is whether the mere fact of the filing of that Application to strike out stopped time from running in relation to the period within which a Defence should have been filed by the bank. A completion of the chronology of events is however important so as to put the issues at stake in greater perspective.

[12] Having filed their Notice of Application to strike out, the bank's solicitors did not file any Defence to the action. They took the view that they were entitled to a hearing of their Application to strike out before the requirement for the filing of a Defence could arise. In the mean time however, their Application was not served on Caribbean's solicitors. In May, 2002 the secretary to the bank's Board deposed that "As at the time of writing, no date has been given for the hearing of the said Application, and the Application has not been returned to the Applicant/Defendant for service on the Respondent/Claimant.

[13] By late February, 2002 therefore, as far as Caribbean's solicitors were concerned, there was simply a blatant failure to file a Defence. Accordingly, on the 27th February, 2002 Caribbean sought and obtained a default judgment. That default judgment was served on the bank's solicitors on 25th April, 2002.

[14] On 2nd May, 2002 the bank applied to set aside the default judgment on the ground that the judgment in default had been entered before the time limited for entering a Defence under the Rules had expired. On 9th May, 2002 at 3.29pm an affidavit in opposition to the application to set aside the default judgment was filed. Among other things, this affidavit makes mention of the fact that no draft Defence was exhibited with the bank's original affidavit. On the 9th May, 2002 the bank filed what was stated to be an amended Notice of Application in which it specifically invoked Part 9.7 and requested the court not to exercise jurisdiction. On 10th May, 2002 at 9.00am, the very morning of the hearing to set aside the judgment, the bank's senior Manager filed an affidavit in reply exhibiting a draft Defence.

[15] The draft Defence indicates that there are very serious triable issues between the parties. The bank denies that it is indebted to Caribbean and indicates that Caribbean may even be owing monies to the bank. This then is the background to this matter and the material before the learned trial judge at the time he was requested to exercise his discretion in favour of setting aside a default judgment granted to Caribbean for sums of money exceeding US$1,000,000.00.

[16] In a written judgment the learned trial judge took the view that the bank's application to strike out did not operate as a stay of the requirement to file a Defence; that the time limited for filing a Defence had expired; that the judgment obtained by the bank was a regular judgment and that it ought not to be set aside. The learned Judge may not have seen nor had his attention called to the bank's affidavit filed on the morning of the hearing because he also opined in his judgment that the defendant should have exhibited a draft of its proposed Defence. The purported amended Notice of Application also appears not to have figured in the hearing before the learned judge. The bank now appeals to this court.

[17] Before examining the learned Judge's reasons it is important to re-emphasise an important philosophical change that has been brought about by the new CPR. It is that fundamentally, responsibility for the active management of cases now resides squarely with the court. Here we had a situation where an application was filed and was awaiting the fixing of a hearing so that a Judge in Chambers could decide whether or not the statement of claim should be struck out as being an abuse of the court's process. This application was followed by a later application or request to the Registrar to enter a judgment in default of Defence. If the earlier application to strike out the Claim had been heard first and decided in the bank's favour then there would have been no claim for which to enter default judgment. The suit would have been put to an end. That possible outcome was sufficient in itself to have dictated that the striking out application should have been heard first. Because the later application/request was first entertained, the result was to conclusively deny the bank of its right to a hearing of what was a serious application and one that could have resulted in the dismissal of Caribbean's entire claim.

[18] The overriding objective of the Rules is not furthered when the course and result of litigation can be severely influenced and indeed definitively determined by the

vagaries of the court office in determining which of two extant applications should be heard first in time. Chronologically and logically the bank's application was prior in time and should have been first determined. The failure of the court office to ensure that sequence resulted in a denial of justice to the bank.

[19] When seen in that light it is clear that the learned judge ought to have exercised his discretion in favour of setting aside the default judgment so as to relieve the bank of the prejudice it had suffered. The learned judge was persuaded that the time limited for the filing of a Defence had expired because the application to strike out did not stop time from running the time limited for the filing of a Defence. But, as a matter of law, was that a correct conclusion?

[20] In order to answer this question one has to examine the provisions of Part 9.7 of the Civil Procedure Rules. Paragraph 1 states that:

> "A defendant who –
>
> (a) disputes the court's jurisdiction to try the claim; or
>
> (b) argues that the court should not exercise its jurisdiction;
>
> may apply to the court for a declaration to that effect".

Paragraph 8 states that:

> "If a defendant makes an application under this rule, the period for filing a defence is extended until the time specified by the court under paragraph 7 (b) and such period may be extended only by an order of the court".

Paragraph 7(b) states that on hearing such an application, if the court does not make the declaration sought, it must, inter alia, make an order as to the period for filing a Defence.

[21] The learned trial Judge held that an application to strike out a statement of claim as being an abuse of the process of the court was not a Part 9.7 application. Counsel for Caribbean argued before us that there was nothing on the face of the

bank's application that indicated either that the court was being asked not to exercise its jurisdiction or that the application before the court fell within Part 9.7.

[22] I have to respectfully disagree with each of these contentions. In my view, the bank here is saying to the court, yes you have jurisdiction but you should not exercise it because there is another case, earlier in time, between the same parties dealing with the identical matter. Let us deal with the earlier case but do not exercise your jurisdiction to hear this later one while that other one is still extant. Instead, we are asking, even before you consider its contents, that the Statement of Claim should be struck out pursuant to Part 9.7(6)c of the rules".

[23] If a striking out application such as this one does not fall under Part 9, where else in the rules does it fall? It cannot fall under the Part that addresses summary judgment (Part 15) because, far from asking for any type of judgment, the litigant is really saying that this case should not be heard at all! A judgment, summary or otherwise, on the other hand is a conclusion arrived at after a consideration of the statement of case. Although the bank's application did not expressly refer to Part 9.7 of the rules, I would regard that merely as a matter of form and look instead at the substance. In substance it really was a plea to the court to decline to exercise its jurisdiction given that there was already filed a previously existing case between the parties.

[24] I think this case demonstrates that, as a matter of good practice and common sense, it is important for solicitors who have filed applications to the court not to wait for a hearing date before serving the other side. Part 11.11(1) of the rules actually enjoins practitioners to serve their applications on the other side "as soon as practicable after the day on which it is issued". It seems that many court offices retain the filed documents until a hearing date is obtained. The prudent course for a solicitor to take however is to retrieve some or all of the documents as they are filed so that they might serve the other side as soon as the application is filed. When a hearing date is provided one can always notify the other side of that date.

[25] In all the circumstances I would allow the appeal, set aside the default judgment and remit to the Master for determination the merits of the striking out application. Of course, if that application is unsuccessful the Master will, in accordance with the Rules give a date for the filing of a Defence. I would also order costs of $5,000.00 to be paid by the respondent to the appellant.

Adrian Saunders
Justice of Appeal [Ag.]

[26] **BARROW, J.A. [AG.]:** The facts have been set out with great clarity in the opinion of Saunders J.A. [Ag.] and I rely fully on them. I, also, agree that the strike out application should have been heard before the court office processed the request for a default judgment.

[27] Part 12.5 states that the court office at the request of the claimant must enter judgment for failure to defend if the stated conditions are satisfied. It has been said that this process involves no judicial decision or discretion, that it does not even require approval, and that the entry of default judgment is rather more in the nature of an administrative act than of a judicial character, see 14 Atkin's Court Forms 2nd edition, 1996 issue, at 323. Even under the former Rules of the Supreme Court I doubt that the process was always purely mechanical because the Registry was required at least to ensure that the claim was properly made and that the documents tendered were in order. It is known registry practice, in some jurisdictions, for the Registrar to refuse to enter a default judgment when the defendant has applied to strike out the suit. It appears that something along this line may have occurred in this Claim because at page 68 of the Record of Appeal there appears a letter dated March 23, 2002 from the solicitors for Caribbean to the Registrar requesting the signature and sealing of the Default Judgment for which Caribbean had applied. That letter presented a well crafted submission showing Caribbean's entitlement.

[28] Under the new rules it is one of the overriding objectives that the court must actively manage the conduct of litigation. Part 25 states that it is the duty of the court to 'further the overriding objective by actively managing cases. This may include -

…

'(f) deciding the order in which issues are to be resolved; [and]

(j) fixing timetables or otherwise control the progress of the case; '

Part 2.5 makes clear that the functions of the High Court may be exercised by a registrar and Part 2.6 (3) expressly provides for the court staff to consult a judge, master or registrar before taking any step under the rules and for the judge, master or registrar to take the step instead of a member of the court staff.

[29] I am of the view that the court office would have been not only enabled and entitled, in the performance of its duty to decide the order for resolving issues and control the progress of the case, but obliged, to refuse to enter the default judgment that had been requested after the defendant had earlier applied to strike out the claimant's entire case. Until the strike out application had been heard it was wrong to enter default judgment which had the ineluctable effect of denying the Bank of its right to a hearing of its application. If the court office had any doubt as to whether it was entitled so to act there was clear procedure for them to refer the matter to the judge or master to decide.

[30] The primary basis upon which counsel for the bank argued that the judgment ought to have been set aside was that the time for filing a Defence had not expired because time had stopped running upon the filing of the bank's application to strike out. If, indeed, time had stopped running then the default judgment was wrongly entered and its setting aside was mandatory, according to Pt. 13.2**.** Counsel for the bank says that time stopped running by virtue of Part 9.7.

[31] Mr. Byron for the bank argued, however, that even if the effect of Part 9.7 is to stop time from running, the bank's application was not made under that part. His contention, he said, was supported by the fact that on May 9th the bank filed an Amended Notice of Application in which, for the first time, the bank asked the court to **not** exercise its jurisdiction and thus, for the first time, sought to trigger the benefit of Pt. 9.7. It was precisely because the earlier application had not been brought under Pt. 9.7 that the bank purported to amend, Mr. Byron argued. But this was too late, argued counsel, because the time for filing a Defence had already expired. Also, counsel argued, the bank could not get an order that it had not asked for in its original application.

[32] There is force in Mr. Byron's argument that the bank's strike out application was not a Part 9.7 application because on its face there was nothing that indicated that it was. It is not only that the Notice nowhere used the word and figures 'Part 9.7', but neither the formulation of the complaint nor the order that it sought appeared to make it such. Hence, it seems, the amended notice filed by the bank and hence, on appeal, Mr. Wilkins' argument that definitionally a strike out application is a Part 9.7 application. The difficulty in the way of the former is that if the Amended Notice filed on May 9th is what made the bank's application a Part 9.7 application and, therefore, what stopped time for filing a Defence from running, then by the date it was filed time had already expired and its effect of stopping the running of time was too late because default judgment had already been entered. The latter argument, that a strike out application is by its very nature a Part 9.7 application, is quite sweeping. If I understand it correctly this argument amounts to saying that to strike out a claim for abuse of the court's process is one way in which a court refuses to exercise its jurisdiction and the decision in **Turner v Grovit** [1999] 1 W.L.R. 794 was cited as supporting the argument.

[33] **Turner v Grovit** involved a claim being made first in England and then in Spain by the same claimant against the same defendants in respect of the same issue. The English court of appeal decided that the multiple proceedings in different

jurisdictions were as much an abuse of the court's process as if they had been both made within the English jurisdiction. Laws L.J. said:

> "….. the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation….."

The particular relief sought was an "anti-suit injunction", that is an order commanding the claimant not to further prosecute the other proceedings. That case was therefore more analogous to an application to strike out for abuse of process under our Part 26.3 and bore no resemblance to an application under Part 9.7. The application distinctly prayed the English court to exercise its jurisdiction. I do not see that **Turner v Grovit** is of any assistance to the bank.

[34] I have been much exercised by the question whether Part 9.7 was intended to apply to a strike out application. There are two limbs to this part and it seems that the first limb, which speaks to a defendant disputing the existence of the court's jurisdiction to try the claim, indicates the intention of the second limb, which speaks to a defendant urging the court that although as a matter of law it possesses jurisdiction, as a matter of discretion the court ought not to exercise its jurisdiction. Areas of private international law, such as convenience of forum and connection of local law with the subject matter of the litigation, readily offer themselves as examples of how Part 9.7 may be employed. But it is now clear that asking the court to refuse to exercise jurisdiction is not confined to the court yielding jurisdiction to a foreign court but encompasses as well, for instance, the court giving effect to an arbitration clause. The court has universal and unrestricted control over its own jurisdiction and this includes the power to decide when it will not exercise jurisdiction, see **Canada Trust Co. v Stolzenberg** (1997) 1 W.L.R. 1582. I can, therefore, see merit in the argument that Part 9.7 is sufficiently ample to subsume a strike out application such as the one filed by the defendant and that if the way how it was worded, as originally filed, did not display the mantle of that provision nonetheless the substance of the application was sufficient to bring it within Part 9.7. On this point it should be noted that there is

considerable overlap in the scope of the various provisions dealing with striking out, summary judgment and refusal to exercise jurisdiction.

[35] Having noted the overlap, however, I should also note that a strike out application falls distinctly within the ambit of Part 26.3 which reads:

> "26.3 (1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –
>
> …
>
> (d) the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;"

The text book examples given of abuse of process include issuing a claim after the expiry of the limitation period, bringing a private law action instead of proceedings for judicial review, starting a case with no intention of pursuing it further, bringing a case which is known to be incapable of proof, re-litigating a matter that has been decided and bringing a second action based on the same cause of action as forms the basis for proceedings in existence at the time of filing the second action. Striking out for abuse of process will usually be a distinct application from an application asking the court to refuse to exercise a jurisdiction that the court possesses.

[36] The only reason why the defendant invoked Part 9.7, it seems to me, was to find a platform for its assertion that time for filing a Defence had stopped running. On one view, the opposite of the bank's invocation may be the truth; the defendant wanted the court to exercise jurisdiction, it wanted the court to say that the court was already seised of Caribbean's claim and that the court would not allow this second Claim to exist or to proceed while the first Claim was still extant.

[37] It was a proper application to make and Mr. Byron's argument that the bank should instead have applied to strike out the earlier Suit goes against the weight of authority which indicates that it is the later Claim that will normally be attacked as constituting an abuse of process, see **Buckland v Palmer** (1984) 1 W.L.R. 1109.

It seems to me that the bank's strike out application, as originally formulated, was not a true Part 9.7 application. But, equally, it seems to me that a litigant in the bank's position, who makes a genuine application to strike out a claim, ought not to be required, purely to stop time from running, to file a Defence to the very claim that said litigant is asking the court to strike out. Nor should a defendant be required to dress his application in the garb of Part 9.7 so as to forestall the entry of judgment in default of Defence.

[38] It would no doubt be helpful if our CPR 2000 contained an express provision equivalent to the English CPR, rule 12.3 that:

> "(3) The claimant may not obtain a default judgment if –
> (a) the defendant has applied for summary judgment under Part 24, and that application has not been disposed of; ….."

[39] The absence of an equivalent provision, addressed to undisposed of strike out applications, is not determinative in my view. The effect of filing a strike out application must be the same even in the absence of such a provision. That effect must be to prevent the entering of judgment in default. It does not matter whether expression is given to the effect of filing a strike out application by saying that time has stopped running or that a new timetable operates pursuant to the court's case management powers under Part 26 or otherwise. That is not of importance for the present. The overriding objective of CPR 2000, to enable the court to deal with cases justly, dictates that the effect of filing an application to strike out a claim as an abuse of the court's process is to oblige the court office to refuse to enter default judgment. Because the default judgment ought never to have been entered in these circumstances the learned judge ought to have set aside the default judgment.

[40] The learned trial Judge refused to set the default judgment aside because he was not treating that judgment as having been wrongly entered. He was treating the judgment as falling within Part 13.3 (1) which says that a default judgment may be set aside **only** if, among other things, the defendant has a real prospect of

defending the claim. It has already been noted that the judge seemed completely unaware that the bank had at the last minute filed a further affidavit that exhibited a draft Defence by which to show that it had a real prospect of defending the claim. Unaware that the bank had filed a draft Defence, the judge decided that the requirements to enable him to exercise his discretion had not been satisfied. In fact, the bank had satisfied the requirement.

[41] Because the default judgment ought not to have been entered and because, having been entered, it ought to have been set aside both as a matter of justice and as a matter of the exercise of the court's discretion, I agree that the appeal ought to be allowed with costs to the appellant in the sum of $5,000.00.

[Sgd.]
Denys Barrow, SC
Justice of Appeal [Ag.]