SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.3 OF 2005

BETWEEN

KENRICK THOMAS

Appellant

and

RBTT BANK CARIBBEAN LIMITED
[Formerly Caribbean Banking Limited]

Respondent

Before:
The Hon. Mr. Denys Barrow, SC — Justice of Appeal

On Written Submissions
Marks Martin & Associates for the Appellant
Hughes and Cummings for the Respondent

2005: October 13;

JUDGMENT

[1] **BARROW, J.A.:** This appeal from the Master's decision to set aside a default judgment spotlights the differences between the provisions for setting aside judgment contained in the English **Civil Procedure Rules** (**CPR**) and the **Civil Procedure Rules 2000** (**CPR 2000**) of the Eastern Caribbean Supreme Court.

[2] Rule 13.3 of the English **CPR** reads as follows:

> "(1) In any other case the court may set aside or vary a judgment entered under Part 12 if (a) the defendant has a real prospect of successfully defending the claim; or (b) it appears to the court that there is some other good reason why a judgment should be set aside or varied.
>
> "(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether

> the person seeking to set aside the judgment made an application to do so promptly"

[3] The English practice on setting aside, under the former **Rules of the Supreme Court** (RSC), was comprehensively discussed in **Thorn Plc v Macdonald** [1999] WL 809060 (CA (Civ Div)), C.P.L.R. 660, 10-15 1999 Times 809.060). A major plank in the decision was the court's express rejection of the notion that the absence of a good reason for delay in applying to set aside is always and in itself sufficient to justify the court in refusing to exercise its discretion. After making that express pronouncement Brooke LJ concluded:

> "Considering the matter afresh, bearing in mind that the defendants have shown on the face of it a triable defence, that the claimants would suffer minimal prejudice, and that the delay was only a delay of nine days, and also taking into account the fact that the defendants have given no reason for that nine day delay, I am completely satisfied that justice demands that this default judgment is set aside and the appeal allowed." [1]

[4] The judge went on to consider, obiter dicta, the position that would obtain under the English **CPR** (which did not apply to that case) and stated:

> "I can see nothing in rule 13.3 or in the overriding objective in Part 1 to suggest that, if a defendant does not give a reason for the delay, that is somehow or other a knockout blow, on which a claimant is entitled to rely in support of an irresistible submission that there is no material on which the court can exercise its discretion in the defendants' favour."[2]

[5] Rule 13.3 (2), by specifying promptitude of the application to set aside as one of the matters to which the court must have regard, implies that there are other matters to which the court may have regard in considering whether to set aside. These other matters are unspecified and, therefore, are at large. It is left to the court's discretion to decide what matter is relevant and what weight is to be given to a matter. This is reflected in the observation of Brooke LJ in the **Thorne** case:

> "The fact that the defendants have given no reason for a delay is, of course, one of those matters which a court may wish to take into account if there is a long, unexplained delay, and if the claimant would be prejudiced, if judgment were set aside."[3]

[1] Paragraph 32 of Judgment Thorn plc v Macdonald (ibid)
[2] Paragraph 44 of Judgment Thorn plc v Macdonald (ibid)
[3] Paragraph 45 of Judgment Thorn plc v Macdonald (ibid)

No judicial discretion is absolute, of course, but the discretion under rule 13.3 of the English CPR seems fairly wide.

[6] Notwithstanding the similarity in numbering, the provision of rule 13.3 of **CPR 2000** is starkly dissimilar to the English provision. The Eastern Caribbean rule reads as follows:

> "(1) If rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –
>
> (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
>
> (b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and
>
> (c) has a real prospect of successfully defending the claim."

[7] The appellant submitted that this provision specifies three conjunctive pre-conditions for setting aside. The submission is sound. "Only if" can only mean that if the three matters are not present then the court may not set aside a default judgment. The difference between the English equivalent and the provision in CPR 2000 lies in the discretion. The discretion in the English CPR is Rule 13.3 significantly unlimited; it specifies only one matter to which the court must have regard and does not even make fulfilment of that matter a condition that the defendant must satisfy. In contrast, the discretion in CPR 2000 is severely limited; it specifies three conditions that the defendant must satisfy before the court is permitted to set aside a default judgment.

[8] In his written decision the Master found that the defendant had not applied promptly to have the judgment set aside. He also found that the explanation of the defendants that they had needed additional time to research the defence to be less than convincing as a reason for delay in defending in time. Nonetheless, the Master concluded:

> "Despite these however I considered that the draft defence disclosed a good defence. I considered CPR 2000 part 13.3 but decided that, based

on the case of Thorne v McDonald PLC (sic), that I would exercise my discretion in favour of the defendant upon payment to the claimant of the costs thrown away."

[9] In my view, having decided that the defendant had failed to satisfy two of the three conditions that Part 13.3 (1) of **CPR 2000** specifies a defendant must satisfy, it was not open to the Master to set aside a judgment that the rule says may be set aside only if the three conditions are satisfied. The obiter dicta pronouncement in **Thorne** rested upon the scope of the English provisions. The discretion to proceed as **Thorne** suggests does not exist under the relevant provisions of **CPR 2000**.

[10] The overriding objective, contained in Part 1 of CPR 2000, which requires the court to apply the rules so as to deal with cases justly, is often invoked to relieve against the hardship that a strict application of the rules may cause. This court has clarified that the overriding objective does not allow the court to ignore clear rules.[4] The language that the rule makers chose to frame Part 13.3 (1) was considered and deliberate; there is no possibility that its purport was unintended. Litigants and lawyers must now accept that CPR 2000 has gone significantly further that the English rules in the hardening of attitude towards the lax practice that previously prevailed in relation to the setting aside of default judgments which was an identified[2] abuse that the new rules were intended to correct. The adherence to the timetable provided by the Rules of Court is essential to the orderly conduct of business and the importance of adherence is reflected in CPR 2000 imposing pre-conditions for setting aside a default judgment. If the pre-conditions are not satisfied the court has no discretion to set aside. The rule makers ordained a policy regarding default judgments. It is as simple as that.

[4] Kenneth Harris v Sarah Gerald (unreported) Civil Appeal No. 3 of 2003

[2] See Supreme Court Practice 1999 Volume 1, "…the major consideration is whether the Defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false, citing Vann v Awford (1986) 83 L. S. Gaz 1725; (1986) The Times, April 23 CA.

[11] In the circumstances I allow the appeal and reverse the Master's order setting aside the judgment in default of defence. The judgment is accordingly restored. The respondent must pay costs of $XXX to the appellant.

Denys Barrow, SC
Justice of Appeal [Ag.]