GRENADA

IN THE COURT OF APPEAL

HCVAP 2007/023

BETWEEN:

DR. THE RT. HON. KEITH MITCHELL

Appellant

and

[1] LLOYD NOEL
[2] CAYMAN NET LTD

Respondent

Before:

The Hon. Mr. Denys Barrow SC — Justice of Appeal

On written submissions:

Attorney General's Chambers for the Appellant
Anselm B. Clouden and Associates for the Respondents

2008: March 5.

JUDGMENT

[1] BARROW, J.A.: This appeal is against the order of Master Mathurin setting aside a judgment in default of filing a defence that had been entered against the first named defendant (the defendant) dated 24th September 2007 and the real issue is whether or not the judgment had been rightly entered.

[2] Beside that issue counsel for the appellant also takes issue with the Master's finding that the appellant had failed to prove service of the claim form and statement of claim when the appellant applied for judgment in default because, counsel submitted, the affidavit in

support of the application for default judgment exhibited an acknowledgment of service signed personally by the defendant. This material has been placed before this court and confirms the validity of the appellant's submission. I therefore uphold the submission of counsel for the appellant that the master erred in finding that the appellant had failed to prove service of the claim form and statement of claim.

[3] Another matter on which the appellant takes issue is that the master made the order setting aside the judgment acting on her own initiative, without there being a notice of application before her, and without giving any opportunity to the appellant to be heard in opposition to the proposed order to set aside the default judgment. Counsel for the appellant submitted that rule 26(2) of the Civil Procedure Rules 2000 is clear in its expression of what counsel described as the immutable and sacrosanct principle that parties must be given the opportunity to be heard. The relevant portion of the rule states:

> "26. 2 (1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.
> (2) If the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations."

[4] Again I have no hesitation in upholding counsel's submission that the master erred in failing to give the appellant the opportunity to be heard.

[5] Each of the two errors that the master made may, in certain circumstances, be sufficient in itself to lead to setting aside an order based on that error. In this case, however, as stated at the outset the true basis for the master's decision was that the judgment was wrongly obtained. If the judgment in default of defence was wrongly obtained as the respondent maintains, because the time for filing a defence had not expired, then the master's decision was the right one on the merits. Rule 13.2 (1) provides the court must set aside a judgment in default if the judgment was wrongly entered because one of the conditions for granting default judgment had not been satisfied. The rule provides that the court may set aside judgment under this rule without application.

[6] At the root of the issue is the question whether time for filing a defence runs during the court vacation. Rule 3.3 states that the court's long vacation begins on 1st August and ends on 15th September and the dates are inclusive. In this case the claim form and statement of claim were served on the defendant on 2nd August 2007. On 21st September 2007 the appellant applied for judgment in default and on 24th September judgment in default was entered. On learning of this development counsel for the defendant protested to the Deputy Registrar that the judgment was wrongly entered. Counsel for the appellant objected to the judgment being set aside, as the Deputy Registrar indicated she was proposing to do. The Deputy Registrar wisely referred the matter to the master.

[7] The master decided that time for filing a defence does not run during the long vacation. She based her decision on rule 3.5 which states:

> "3.5 (1) During the long vacation, time prescribed by these Rules for serving any statement of case other than the statement of claim does not run."

[8] A statement of case is defined in rule 2.4 to mean, among other things, a claim form, statement of claim, defence, counterclaim, ancillary claim form or defence and a reply.

[9] Counsel for the appellant referred to the old rules to show that under those rules there had been a blanket suspension of time running for serving any pleading and that in contrast, under CPR 2000, time for serving the statement of claim continues to run. Implicit in counsel's argument is that since time for serving a statement of claim continues to run during the long vacation, time in relation to a statement of claim continues to run so that the time for filing a defence in response to the statement of claim also runs.

[10] This would be a possible argument if the rule was not so clear: during the long vacation time prescribed by the rules for serving any statement of case other than the statement of claim does not run. In essence, during the long vacation time runs only for serving a statement of claim. Therefore, time for serving a defence does not run.

[11] It follows that time for serving the defence in this case, the 28 days given by rule 10.3(1), did not begin to run until the 16th day of September 2007. Therefore, the condition in rule 12.5(b) for obtaining default judgment – that time for filing a defence has expired – was not satisfied when the application for default judgment was made. Accordingly the master was right to set aside the wrongly entered judgment.

[12] In the result I dismiss the appeal with costs of $1,000.00 to the respondent.

Denys Barrow, SC
Justice of Appeal