IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

9:49 6

Claim No. DOMHCV2003/0424

Between

Kieron Pinard-Byrne

Claimant/Respondent

and

Lennox Linton

1st Defendant/Applicant

Island Communications Corporation

2nd Defendant/Applicant

Raglan Riviere

3rd Defendant/Applicant

Roysdale Ford, Duncan Stowe and Dr. William Riviere for the Applicants
Hazel Johnson and Lisa de Freitas for the Respondent

2008: February 1
March 7

RULING

[1] **BAPTISTE J:** The applicants apply for leave to set aside judgment in default of defence. They also apply to set aside judgment in default of defence and for extension of time to file and serve amended defence.

[2] The applications flow from an order of Ross J dated 17 October 2007 wherein it was ordered, inter alia, that:

> "The claimant shall file and serve a fresh as amended statement of claim by the 2nd day of November 2007. The defendant to defend

by November 30, 2007. No further application without leave and only upon proper notice."

In compliance with the order, the claimant filed an amended statement of claim on 1 November 2007. The defendants defaulted and judgment was entered on 13 December 2007 on the basis that no defence was filed in the action in accordance with the order of Ross J. The request for entry of judgment was on the basis of default of defence. The claimant's solicitor certified that "the time for the defendants to file and serve their defence has expired (including any extension of time agreed between the parties)".

[3] With respect to the application for leave, Mr. Ford stated that leave ought to be granted because judgment was wrongly entered. Mr. Ford referred to rules 13.2, 13.3, and 13.4 of the Civil Procedures Rules (CPR) 2000 as authority for the application and stated that they do not provide that leave be obtained. The rules do not provide expressly that an application for leave must be filed. Mr. Ford stated that the application for leave was filed out of an abundance of caution. Mrs. Johnson argued that the request for leave is a pre-condition, in keeping with the order of Ross J. That order would govern any future application. The order of Ross J contemplated that the defendants required leave to make the application. Mrs. Johnson pointed out that the application for leave is not supported by any affidavit evidence and the notice of application does not set out the grounds on which the application is made. Mrs. Johnson submitted that this was an irregularity which constituted an abuse of process and the application should not be entertained at all.

[4] I note that Part 13 does not provide expressly or impliedly for leave to be obtained as a pre-condition for an application to set aside a default judgment. Rule 13.2 (2) of the CPR 2000 states that the court may set aside

judgment under this rule on or without an application. There being no need for an application to set aside judgment under rule 13.2 of the CPR 2000, it certainly would not be just to deny the application for leave on the grounds urged by Mrs. Johnson. I accordingly grant the application for leave.

[5] The way is now clear to consider the application to set aside the default judgment. It is patent that the application runs foul of rule 11.7 (1) of the CPR 2000 in that it fails to state the grounds on which the applicant is seeking the order. Rule 11.7 (1) (a) states that an application must state briefly the grounds on which the applicant is seeking the order. Contrary to that rule, the Notice of Application states that the grounds of the application is set out in the affidavit in support of the application. In **Beach Properties Barbuda Limited and Laurus Master Fund Ltd.** Civil Appeal No. 2 of 2007 of Antigua and Barbuda, paragraph 19 page 8, Barrow JA described this "as a completely unacceptable practice" and stated that "it is an abuse of the process of the court that should attract condign consequences". Barrow JA also stated that "the requirement of stating grounds also serves to clarify for the judge and the opposing party the basis on which the applicant claims to be entitled to the order sought. When an application states no ground it raises the suspicion that the application may be groundless, not just in form, but also in substance". Even if one were permitted to state the grounds in the affidavit, a perusal of the affidavit in the instant matter shows that absolutely no grounds are therein stated.

[6] In his written and oral submissions Mr. Ford urged several grounds upon the court in support of the application to set aside the default judgment. In his written submission Mr. Ford advanced ten issues for the court's

consideration. I intend no discourtesy to counsel if I only refer to two of those issues. They are: (1) whether there was a failure to file a defence in accordance with Part 10 of the CPR 2000 and; (2) whether Part 12 of the CPR 2000 permits the filing of a default judgment in the circumstances of this case.

[7] Mr. Ford submitted that there was no failure to file a defence in accordance with Part 10 of the CPR 2000 as the defences filed remain on record. The first and second defendants filed their defence on 2 December 2003, the statement of claim having been filed on the 5 November 2003. Thus the defence was filed within 28 days. Mr. Ford argued that the claimant cannot establish that the period for filing a defence established in Part 10 has expired without the defendants filing a defence. Further, no extension of time provided in Part 10 was granted for the filing of a defence. No extension of time provided by Part 10 for the filing of a defence was granted by the court. Mr. Ford submitted that the claimant has failed to satisfy any of the conditions to satisfy the requirement for the grant of a judgment in default of defence.

[8] Mrs. Johnson argued that judgment was not obtained irregularly and the claimant complied with rule 13.2 (1) (b) of the CPR 2000. The defendants having failed to file a defence, judgment was entered. Mrs. Johnson contended that the defendants can only properly move the court under rule 13.3 (1). It is only after these requirements have been satisfied that the court can exercise its discretion. Mrs. Johnson stated that the defendant has not satisfied two of the requirements of rule 13.3 (1).

[9] Rule 10.2 of the CPR 2000 states that a defendant who wishes to defend all or part of a claim must file a defence. Rule 10.3 (1) of the CPR provides

that the period for filing a defence is the period of 28 days after the date of service of the claim form. It is not disputed that a defence was filed within 28 days of the service of the claim form. That being the case, on what basis could judgment in default of defence be properly entered? Does the failure to comply with the order of Ross J in terms of defending the matter, that is, filing an amended defence within the time stipulated, provide a proper basis for entering a judgment in default of defence when the original defence remains on the record properly filed? I would think not.

[10] Rule 12.5 (b) of the CPR 2000 provides that the court office at the request of the claimant must enter judgment for failure to defend if the period for filing a defence and any extension agreed by the parties or ordered by the court has expired. In this case the original defences were filed within the 28 days. In my judgment, there was no failure to file a defence in accordance with Part 10. To my mind a failure to file an amended defence may lead to a situation where there is no defence or answer to part of the statement of claim as amended, with the attendant consequences. From rule 10.2 of the CPR 2000 it can be seen that a defendant may defend all or part of a claim. By not filing an amended defence it may mean that a defendant may not be defending part of a claim. That would not provide authority to invoke the provision of rule 12.5 (b) and enter judgment in default of defence.

[11] Rule 10.7 (1) provides that the defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission. Rule 10.7 (3) states that the court may not give the defendant permission after the case management conference unless the defendant can satisfy the court that

there has been a significant change in circumstances which became known only after the date of the case management conference.

[12] Rule 12.5 (b) does not contemplate the present situation where the issue is really a failure to file an amended defence in time, pursuant to a court order, where the original defences which were previously filed on time, remain as defences. Rule 12.5 (b) could not be interpreted in such a manner so as to authorize the filing of a judgment in default of defence in those circumstances. That would be unjust. In interpreting rule 12.5 (b) one has to give effect to the overriding objective of the Rules, which is to enable the court to deal with cases justly.

[13] The court's jurisdiction to set aside a default judgment is found in Part 13 of the CPR 2000. Rule 13.2 (1) (b) provides that the court must set aside a judgment entered under Part 12 if the judgment was wrongly entered, because in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied. I am satisfied that rule 12.5 (b) has not been satisfied. The defendants are entitled to have the judgment set aside as of right. Judgment in default of defence was wrongly entered and is accordingly set aside.

[14] The application for extension of time to file and serve the amended defence now falls to be considered. The principles which guide the court's exercise of discretion are contained in rule 26.8 of the CPR 2000 dealing with relief from sanctions for non-compliance. An application for relief from sanction imposed for a failure to comply with any rule, order or direction must be made promptly and supported by evidence on affidavit. (Rule 26.8 (1) (a) and (b)). Rule 26.8 (2) provides that the court may grant relief only if it is satisfied that - (a) the failure to comply was not

intentional; (b) there is a good explanation for the failure; and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions. The rule restricts the court from exercising its discretion if the applicant does not satisfy the criteria. The court is no longer able to exercise an unfettered discretion and relieve against sanctions where the defaulter fails to satisfy a particular criterion. (See Barrow JA in **Dominica Agricultural, Industrial and Development Bank and Mavis Williams** Civil Appeal No. 20 of 2005). Rule 26.8 imposes mandatory conditions. Rule 26.8 (1) states that the application must be made promptly and it must be supported by evidence on affidavit. The application here is supported by evidence on affidavit. It however was not made promptly. The application was filed on 10 December 2007. The defendants were to defend by 30 November 2007.

[15] Was the failure to comply intentional? To answer that question I turn to the affidavit evidence of Duncan Stowe. Mr. Stowe indicated that he and Mr. Roysdale Ford of Guyana had conduct of the matter and due to his pending departure from Dominica three days after the order of Ross J, he had instructed Mr. Ford to draft the amended defence. Mr. Ford informed him that he prepared an amended defence and returned it to his (Mr. Stowe's) office by email on or about 23 November 2007. On his return to Dominica on 6 December 2007 he inquired of his office whether the amended defence had been filed. He was informed that no defence had been filed. His secretary informed him that she had never received the said defence by email prior to going on vacation leave on 22 November 2007. In the circumstances the amended defence was filed within the period specified by the court. Mr. Stowe also deposed that he was unable to prepare the necessary documents for the application for leave to apply to set aside the judgment in default prior to 3 December 2007. The reason

he advanced was his departure from the State for dental treatment two days after being served with the said documents and in addition due to a subsequent attack of the flu.

[16] I make the following observations about Mr. Stowe's evidence. When Mr. Stowe left Dominica he was fully seised of the order of Ross J. There is no evidence from Mr. Stowe that before 30 November 2007 he made any effort to inquire from his chambers whether the amended defence was received or filed and served. It was only after his return to Dominica on 6 December 2007 that he started inquiries as to whether the amended defence was filed. There is no evidence that during his absence from Dominica Mr. Stowe had any communication with Mr. Ford in respect of the amended defence. While it may be difficult to conclude from the evidence that the failure to comply was intentional, I have no doubt that the matters advanced by Mr. Stowe do not provide a good explanation for the failure to comply. Further there is no evidence from Mr. Stowe's affidavit that the party in default has generally complied with all other relevant rules, practice directions, orders and directions. The position is that all of the mandatory requirements of rule 26.8(1) and (2) have not been satisfied. The application to extend time to file and serve amended defence is dismissed.

[17] Dr. Riviere appeared for the third applicant. He adopted all the arguments of Mr. Ford. For the reasons articulated earlier with respect to the other applicants, I would also grant leave to the third applicant to set aside the judgment in default of defence. I also set aside the judgment in default of defence. The application for extension of time and relief from sanctions was not made promptly. The affidavit of Dr. Riviere has not really addressed any of the mandatory criteria imposed by rule 26.8(2) of

the CPR 2000. These requirements have not therefore been satisfied. The application to extend time to file and serve amended defence is dismissed.

[18] In conclusion it is ordered that the judgment in default of defence is set aside. It is also ordered that the application for extension of time to file and serve amended defence is dismissed.

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DAVIDSON KELVIN BAPTISTE
HIGH COURT JUDGE