MONTSERRAT

IN THE COURT OF APPEAL

HCVAP 2008/006

BETWEEN:

[1] MINISTRY OF COMMUNICATIONS & WORKS
[2] THE ATTORNEY GENERAL

Appellant

and

CLEMENT CASSELL

Respondent

HCVAP 2008/007

BETWEEN:

[1] MINISTRY OF COMMUNICATIONS & WORKS
[2] THE ATTORNEY GENERAL

Intended Appellant/Applicant

and

LAURETTA DALEY

Respondent

Before:

The Hon. Denys Barrow, SC — Justice of Appeal

Representation:

The Attorney General's chambers for the Intended Appellants/Applicants
Mr. David Brandt for the Respondents

2008: June 19.

Civil Appeal- Extension of time to apply for leave to appeal-Leave to appeal- Setting aside judgment in default of defence against the Crown- rule 13.2 of the CPR-rule 13.3 of the CPR-scope and object of rule 12.3 (1) (b) -whether rule 12.3 (1) (b) applies where default

judgment sought against the Crown-whether "a State" under Rule 12.3 (1) (b) of the CPR includes the Crown-whether permission of the court necessary before default judgment may be entered against the Crown.

The intended appellants applied for an extension of time within which to apply for leave to appeal and if granted, for leave to appeal the decision of the master refusing to set aside the judgments in default of defence entered against them in the High Court. In support of this application, the intended appellants contended that rule 12.3(1)(b) of the Civil Procedure Rules required a claimant to obtain the permission of the court before applying for judgment in default of defence against the Crown. The intended appellants argued that the requirement was necessary to comply with section 29 (2)(c) of the Crown Proceedings Ordinance which required that rules of court should provide such mandatory protection to the Crown. Rule 12.3(1)(b) not having been complied with, the intended appellants submitted that under rule 13.2 of the CPR the judgments in default must be set aside. The main issue before the Court of Appeal was whether the use of the term "a State" in rule 12.3(1)(b) included the Crown.

Held: refusing the intended appellants' application for an extension of time within which to apply for leave to appeal and refusing leave to appeal, that:

(1) Rule 12.3(1)(b) of the CPR 2000 did not require a claimant to obtain the permission of the court before applying for judgment in default of defence against the Crown and so the judgments would not be set aside under rule 13.2 of the CPR 2000;

(2) The reference in rule 12.3(1)(b) was to a State rather than to the State or the Crown. Rule 12.3(1) referred to four classes of defendants for whom special provision was made, namely, minors, patients, states and diplomatic agents; it made no provision for the Crown. The rules that made special provision in respect of the Crown were contained in Part 59 and there was no provision in this Part to the effect that permission first had to be obtained before judgment in default of defence could be entered against the Crown; and

(3) There was no realistic prospect of the intended appellants succeeding on appeal in setting aside the judgments in default of defence under rule 13.3 of the CPR 2000.

JUDGMENT

[1] BARROW, J.A.: This application by the intended appellants (the Crown) for an extension of time within which to apply for leave to appeal and, if the extension is granted, for leave to appeal, raises the question whether judgment in default of

defence can be entered against the Crown in the usual way or whether such judgment may only be entered if permission is first obtained.

Judgment in default against the Crown

[2] Judgment in default of defence was entered against the Crown on 20th November 2007 in each of the underlying High Court proceedings, for damages for trespass in the sum of $165,110.00 and in the sum of $187,704.00, respectively. I use the expression the Crown in the usual way to refer to the Government of Her Majesty the Queen. This usage derives from the fact that it is the government which in practice exercises the executive powers vested in Her Majesty as the head of state. The Crown applied to Master Lanns to set aside the judgments in default of defence on the basis that rule 12.3(1)(b) of the Civil Procedure Rules 2000 (CPR 2000) had not been complied with because the respondents had not applied for and obtained permission of the court before entering judgment in default of defence against the Crown.

[3] Rule 12.3 (1)(b) provides as follows:

> "(1) A Claimant who wishes to obtain a default judgment on any claim which is a claim against a:-
> (a)…
> (b) State as defined in any relevant enactment relating to state immunity;
> must obtain the court's permission." (Counsel's emphasis)

[4] The Crown argued before the master that if permission had not been obtained in accordance with rule 12.3(1)(b), then the judgment in default of defence did not satisfy the requirement of rule 12.5(d) that made obtaining such permission a pre-condition. By virtue of rule 13.2, the Crown argued, the judgment in default must be set aside.

[5] Rule 13.2, which is headed "Cases where court must set aside default judgment" provides as follows:

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

It was the Crown's submission that rule 13.2 of the CPR 2000 places a mandatory requirement on the court.

[6] Counsel emphasised that rule 13.2 of CPR 2000 does not give the court discretion on whether or not to set aside the judgment in default if that judgment is entered in contravention of rule 12.5. Nor was the court required to be satisfied that the defendant has a real prospect of successfully defending the claim, as is required when the application to set aside is being dealt with under the discretion given in rule 13.3 of the CPR 2000.

[7] On the Crown's submissions, the issue at the centre of the application before the master and the issue at the centre of the intended appeal is the interpretation to be given to rule 12.3(1)(b) of the CPR 2000. Clarification of this issue would determine whether the respondents obtained judgment in default of defence in contravention of the relevant rules, the Crown urged.

[8] Before the master the Crown had argued that in the Crown Proceedings Ordinance[1] it was provided in section 29(2)(c) that:

> "(2) Provisions shall be made by rules of court and Magistrates' Courts rules with respect to the following matters—
> (a)…
> (b)…
> (c) for providing that in the case of proceedings against the Crown the plaintiff shall not enter judgment against the Crown in default of appearance or pleading without the leave of the court to be obtained on an application of which notice has been given to the Crown;" (Counsel's emphasis)

[9] The Crown had argued before the master that rule 12.3(1)(b) gave effect to this requirement of the Ordinance that rules of court should provide that no judgment in default of pleading should be entered against the Crown without leave of the court, to be granted only on notice to the Crown.

[10] The master decided that rule 12.3(1)(b) did not make the provision that the Ordinance required. By referring to 'State' but not 'Territory', the master held, the

[1] Cap. 22 of the Revised Laws of Montserrat, 1962.

rule omitted to extend its benefit to Montserrat. In effect, the master decided that rule 12.3(1)(b) made the provision, required by the Ordinance, in relation to states but not in relation to territories. The master apparently agreed with the submission of counsel for the intended appellants that this was not intended but was an oversight. While advertent[2] to the argument for the Crown, that if the alleged omission were accepted as fact it would be a "travesty", and that if the protection of the Crown against default judgments was not extended to Montserrat "it would have political implications for Montserrat", the master concluded, in effect, that rule 12.3 (1) (b) did not require a claimant to obtain permission before entering default judgment against the Crown.

Applicability of the permission requirement

[11] In support of the Crown's argument that it should be given leave, counsel repeated the contention below that the interpretation of rule 12.3(1)(b) would have serious political implications as it relates to Montserrat and the other Overseas Territories and their status in the OECS. Counsel argued that a number of questions need to be answered in relation to rule 12.3(1). Principally, what does "State" for the purposes of Rule 12.3(1)(b) mean? Does it relate specifically to State Immunity and the rules of state immunity which concern the protection which a State is given from being sued in the Courts of another State? Or is "State" being used in a more generic sense, to mean Governments, and is reference to the relevant enactment a reference to those pieces of legislation which provide Governments with certain types of immunities? Also does "State" mean only independent states? Counsel for the Crown submitted these are questions which only the appeal court can answer.

[12] Counsel for the Crown in answer to the questions posed submitted that "State" for the purposes of rule 12.3(1)(b) does not mean Member State. Counsel noted that whereas "Member State" is defined in Part 2 of the CPR 2000, "State" is not

[2] At paragraph [17] of the judgment.

defined therein. Counsel argued that if the intent was that this provision was only to apply to the "Member States" as defined under the rules, the rule would have stated such. By the same token if it was intended for the said rule to apply only to the "Territories" as defined, it would have stated such.

[13] It was the submission of the Crown that "State" for the purposes of rule 12.3(1)(b) is intended to have a generic meaning. It is intended to mean Governments on a whole (i.e. those of the Member States and those of the Territories) and the relevant enactment relating to state immunity which would define a State, would be any legislation which would provide a Government immunity from certain types of actions or from certain steps being taken against it during proceedings in which the Government is a party. To interpret it otherwise, counsel submitted, would make nonsense of the Rule.

[14] In support of the Crown's argument as to the application of rule 12.3(1)(b), counsel stated that apart from rule 12.3(1)(b) there is no other rule in CPR 2000 which speaks to judgment in default against the Crown, (which, as s. 3(2) of the Ordinance provides, includes a claim against the Government of Montserrat).

[15] Further, counsel submitted, rule 12.3(1)(b) was made by the Court in furtherance of a mandatory obligation placed upon it by the crown proceedings legislation. If that is not the case then, counsel suggested, the rules, in failing to provide such mandatory protection for the Crown, are *ultra vires* the Crown Proceedings Ordinance, and rule 12.3 should be interpreted so as to give effect to section 29 (2)(c) of the Crown Proceeding Ordinance. For the reasons stated, counsel for the Crown indicated, the Crown was seeking leave to appeal the judgment of the master as it was their submission that in interpreting rule 12.3 as she did, the master erred in law.

Application of the rule requiring permission

[16] Counsel for the Crown acknowledged the familiar principle that the test governing the grant or refusal of leave to appeal is whether the proposed appeal has a realistic prospect of success. Applied to this case, the question I need to decide is whether the Crown has a realistic prospect of succeeding on appeal with the argument that rule 12.3(1)(b) required the respondents to have obtained permission before applying for default judgment against the Crown.

[17] It seems to me that the argument in support of leave to appeal perpetuates the common failure in the proceedings below to appreciate the object and scope of rule 12.3(1)(b). Rule 12.3 provides that permission is needed before obtaining default judgment against a minor[3], a patient[4], a State[5] and a diplomatic agent.[6] The reference in the rule to "a State" is to a foreign state, which enjoys state immunity, hence the reference in rule 12.3(1)(b) to a "State as defined in any relevant enactment relating to state immunity". The reference in that rule is not to the State but to a State and, therefore, to states generally. The rule, it must be observed, makes provision in respect of four types of defendants and does not make provision in respect of a specific defendant – the Crown.

[18] A separate rule deals with proceedings against the Crown or State. Guidance to this fact is helpfully provided in CPR 2000 by a note below rule 12.3(1)(b), which refers the reader to Part 59 which is headed 'Proceedings by and against the Crown'. The opening provision of this Part establishes its scope, by stating:

> "59.1(1) This Part deals with claims to which the Crown or the State is a party."

[19] In the immediately following rule, (rule 59.1(2)), the rule making authority meticulously identifies the Crown Proceedings Act or its equivalent in each of the

[3] Rule 12.3 (1)(a)
[4] Rule 12.3 (1)(a)
[5] Rule 12.3 (1) (b)
[6] Rule 12.3 (2)

nine States and Territories that are members of the Eastern Caribbean Supreme Court. It could not be clearer, therefore, that it is this Part that deals with proceedings to which the Crown Proceedings Ordinance applies. It is also helpful to note that in this Part, and throughout CPR 2000, the State is consistently referred to as 'the Crown'[7] so it is simply incongruous to regard the reference in rule 12.3(1)(b) to 'a State' as a reference to the Crown. The consistency of this reference is underscored by the provision in the general definitions contained in rule 2.4, and repeated in rule 59.2, that "Crown" means for the purpose of Dominica[8], the State. In short, throughout CPR 2000 the State is referred to as the Crown, and in the one instance where such a reference would be constitutionally incorrect the meaning of 'the Crown' is altered to make it applicable and so preserve the uniformity of the reference.

[20] The conclusion that the reference in rule 12.3(1)(b) to 'a State' is a reference to a foreign state, and not to the Crown or the Government in any of the nine Member States and Territories, shows the distinction between States and Territories to be

[21] irrelevant to a consideration of that rule. It follows that the reference in the rule to state immunity is a reference to the immunity of foreign states from suit and has nothing to do with any immunity of the Crown from certain steps being taken against it in proceedings in which the Crown is a party. Further, since all Member States and Territories are equally subject, so far as CPR 2000 is concerned, to having judgment in default of appearance or pleadings entered against them without permission to do so first having been obtained, no political implications arise because Territories are treated no differently and therefore no less favourably than Member states.

[7] Rule 18.7, rule 40.7, and rule 46.6

[8] The Commonwealth of Dominica does not have Her Majesty the Queen as the Head of State but has, instead, a President.

The requirement of the Crown Proceedings Act

[22] Much of the confusion that has attended this matter stemmed from the assumption that rule 12.3(1)(b) was intended to satisfy the requirement stated in section 29(2)(c) of the Crown Proceedings Ordinance that rules of court must provide that a claimant must first obtain leave before he can obtain judgment against the Crown. The Crown Proceedings Act or Ordinance of each Member State and Territory of the Eastern Caribbean Supreme Court is a replication of the English enactment of the same or similar name. The former Rules of the Supreme Court of England provided, in Order 77 rule 9, for permission to first be obtained before entering judgment in default of defence against the Crown. So did the former Eastern Caribbean Rules of the Supreme Court 1970, in Order 54 rule 7(1).

[23] The present Rules in England do not contain the requirement for permission to obtain judgment in default against the Crown. It is stated in Blackstone's Civil Practice 2007 at 20.7, that

> "Default judgment in claims against the Crown may now be entered upon filing a request for judgment. An application is no longer necessary. However, a request for a default judgment against the Crown must be considered by a master or district judge, who must be satisfied that the claim form and particulars have been properly served on the Crown in accordance with the Crown Proceedings Act 1947, s. 18, and CPR, r. 6.5 (8)." (Emphasis added.)

[24] Similarly, the present Rules of the Eastern Caribbean Supreme Court do not contain a requirement for permission to obtain judgment in default against the Crown. We have followed the English position. It may be noted, as regards the English position, that the permission requirement in the English Crown Proceedings Act 1947 was expressly removed by legislation that repealed[9], among other things, paragraph (c) of section 35 (2) of the English Act, which was the provision that the Montserrat Crown Proceedings Ordinance replicated in

[9] Civil Procedure (Modification of Crown Proceedings Act 1947) Order 2005

section 29(2)(c). It does not appear that there has been a corresponding amendment to the Montserrat legislation.

[25] It is well beyond the competence of this court to determine the reason why the Crown Proceedings Ordinance in Montserrat (or, indeed, the legislation in any of the other States and Territories) has not been amended by the repeal of the permission requirement. Whether there is any intention to do so and whether it is desirable to do so are issues that fall exclusively within the purview of the executive and the legislature and, distinctly, are not matters for the consideration of the court. Even to consider the question whether CPR 2000 is ultra vires, as counsel for the Crown suggested in the court below, in making no provision that permission must first be obtained before judgment in default may be entered against the Crown, is no part of the exercise that I am permitted to perform on the dual applications for an extension of time and for leave to appeal. My duty is only to decide whether the proposed appeal has a realistic prospect of success and to do so by reference to the relevant rule of CPR 2000, as it exists, rather than by reference to what one side or the other thinks should exist.

Conclusion

[26] As I have indicated, in my view rule 12.3 (1)(b) does not extend to the Crown and therefore does not establish that permission must first be obtained before judgment in default may be entered against the Crown. There is no such rule anywhere in CPR 2000. Therefore, I am satisfied that the intended appeal, predicated on the existence of such a rule, has no prospect of success. Accordingly, I refuse the applications, with costs of $1,000.00 to each respondent.

Denys Barrow, SC
Justice of Appeal