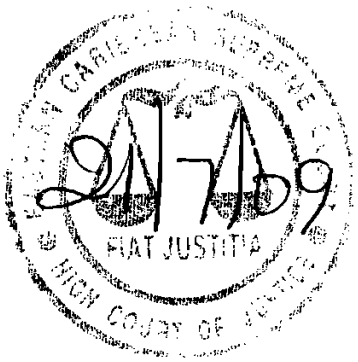

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 124 OF 2005

BETWEEN:

Verbina Adams

Claimant

V

Othniel Browne

Defendant

Appearances:
Ms N. Fraser for the Claimant
Ms. Kay Bacchus-Gill for the Defendant

2009: 17th June;
21st July

RULING

[1] **JOSEPH Monica J.:** Claim: This is an application applying to set aside the judgment of default granted by the Registrar on 4th February 2009 and for leave to be granted to the applicant defendant to file a defence out of time.

[2] A ground of the application is: that the applicant has a real prospect of successfully defending the claim as can be seen from the draft defence exhibited with the application: Another ground appears in an affidavit where the applicant states that, upon receipt of the claim form, he had to leave the country urgently for medical attention in New York and Philadelphia. He was away for about three months. Upon his return he completely forgot about the claim form until he was served with the judgment in default of defence.

HISTORY

[3] An Amended claim form was filed on 25th March 2006 claiming damages in respect of the negligent driving of a motor vehicle. An affidavit of service filed on 25th May 2006 shows that on 24th May 2006 the claim form, defence (form) and Acknowledgement of service (form) were served on the applicant. Notice to claimant of the filing of acknowledgement of service was filed on 8th June 2006 indicating that an Acknowledgement of service was filed on 8th June 2006.

[4] The next time the matter came before the Court was on 17th November 2008, at the instance of the Court Office, in listing suits for status report in respect of matters outstanding for a long period of time. On the second adjournment on 12th January 2009, the court adjourned to 2nd March 2009 for parties to report to the court. Claimant and legal representative were present but the applicant was absent.

[5] On 17th June 2009 Ms Bacchus-Browne submitted that the Court should set side the judgment in default in the interests of justice. Ms. Fraser, in objecting to the application, submitted that **CPR 13.3 (1)** is not satisfied and referred the Court to St. Vincent and the Grenadines Civil Appeal No. 3/2005: Kenwick Thomas v RBTT Caribbean Ltd. where the Court of Appeal emphasised the necessity of an applicant satisfying all the limbs of **Rule 13.3 of CPR 2000** . That rule reads:

> "(1) If rule 13.2 does no 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 the case may be; and
>
> (c) has a real prospect of successfully defending the claim.

[6] The Court of Appeal is very clear on the interpretation of the rule stating that the use of the phrase 'only if' signifies that all three limbs must be satisfied before a judgment in default can be set aside. In Kenrick Thomas v RBTT case (ab0ve), Barrow J.A. said:

> "....."Only if" can only mean that if the three matters are not present then the court may set aside a default judgment.....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 than 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 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 in 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."

[7] The Justice of Appeal stated that there is no possibility that the purport of the rule was unintended and that the authors of the rule intended that all limbs must be satisfied. The use of "only if" is emphasized (though emphasis is not required) by the placing of the word "and" after the penultimate paragraph. Learned Author G.C. Thornton on Legislative Drafting, third edition page 66:

> "Where the series of paragraphs is either conjunctive or disjunctive it is usual to insert the 'and' or 'or' after the penultimate paragraph only."

[8] I look at what has been advanced by the applicant. Miss Fraser takes no issue with paragraph (a) of the rule but submitted that paragraph (b) of the rule is not satisfied. The explanation given by the defendant that he traveled for medical attention, and on his return forgot about the claim form until he was served with the judgment in default is not a good reason, she submitted.

[9] I agree that that is not a good reason, particularly when one looks at how long the applicant forgot about the claim.. That length of time may be seen in paragragh 5 of his affidavit. He went away about three months after the claim form was served on him (24th May 2006) and then forgot about the claim until judgment of default was served on him (March 2009).

[10] I follow the Court of Appeal's decision in Kenrick Thomas v RBTT Bank Caribbean Ltd and do not grant the application to set aside the judgment in default.

ORDER;

1. Judgment in default of defence granted on 4th February 2009 is not set side.
2. Applicant defendant to pay costs of $900.00 to the Claimant Respondent.

Monica Joseph
High Court Judge (Acting)
13th July 2009.