THE EASTERN CARIBBEAN SUPRME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2011/0629

BETWEEN:

GRAHAM THOMAS

Claimant

and

WILSON CHRISTIAN trading as
WILCON CONSTRUCTION

Defendant

Appearances:

Ms. C. Debra Burnette and Ms. Stacey-Ann Saunders-Osbourne for the Claimant
Ms. Alincia Williams-Grant for the Defendant

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2012: May 8
July 6, 13

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JUDGMENT

[1] MICHEL, J.: Prior to the coming into effect of the amended Civil Procedure Rules on 1st October 2011, the law as to the setting aside of a regularly-obtained default judgment in the Eastern Caribbean was very clear and very rigid, and no better expression of its clarity and rigidity can be

found than in the following words of Barrow, J.A. in the case of Kenrick Thomas v RBTT Bank Caribbean Limited[1]:

> "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. The court has clarified that the overriding objective does not allow the court to ignore clear rules. 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 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 preconditions for setting aside a default judgment. The rule makers ordained a policy regarding default judgments. It is as simple as that."

[2] These words also serve to distinguish our Rules on the setting aside of default judgments from the English Rules, which give greater latitude to the judge in a setting-aside application to do justice between the parties rather than to constrain himself by the rigid determination of the presence or absence of three specific conditions. The flexibility of the English court in the setting aside of

[1] Civil Appeal No.3 of 2005 (Saint Vincent and the Grenadines)

default judgments was clearly articulated by Lord Wright in the House of Lords' case of Evans v Bartlam[2] where he stated that –

> "The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication... the Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in respect can, be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."

[3] It is reasonable to conclude that it was primarily to dilute the rigidity of our own Rule 13.3 (1) and to bring it more in line with the English Rule by providing greater latitude to our judges to find the justice of the case rather than merely to find the presence or absence of three set prerequisites that the new sub-rule (2) of Rule 13.3 was introduced. The amended Rule 13.3, after setting out the rigid provisions of 13.3 (1), then introduces a new 13.3 (2) which states that – "In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances."

[4] In the present case, I believe that the requirements of Rule 13.3 (1) (b) and (c) have been satisfied, in that the Defendant has given a good explanation for his failure to file an acknowledgement of service within the stipulated time, and he does have a real prospect of successfully defending the claim, but I do not believe that he has satisfied the requirement in sub-rule (1) (a) of having applied to the court as soon as reasonably practicable after finding out that judgment had been entered.

[2] [1937] AC 473,489

The facts are that:

- Judgment in Default was entered against the Defendant on 3rd November 2011;
- The judgment was served on the Defendant on 16th November 2011;
- A Judgment summons was filed on 27th February 2012 to enforce the judgment;
- The judgment summons and affidavit in support were served on the Defendant on 8th March 2012.

Yet it was only on 1st May 2012 that the Defendant eventually made application to set aside the default judgment - approximately 6 months after it was entered, approximately 5 ½ months after service of it on the Defendant, and approximately 8 weeks after the application to enforce it was served on him. The requirement of Rule 13.3 (1) (a), taken on its own, cannot be said to have been satisfied.

[5] I do however believe that the Defendant's defence (as reflected in the draft defence exhibited with his affidavit in support of his application) does have merits, and the claim against him should be properly adjudicated rather than be determined by the default of the Defendant in filing an acknowledgment of service. I do also believe that there are exceptional circumstances in this case, brought about by the juxtaposition of the Defendant's impecuniosity, ignorance and indisposition, which together conspired to strip him of the financial capacity, the legal familiarity and the mental acuity to do that which the Rules required of him within a determined timeframe.

[6] I do not accept the submission of Counsel for the Claimant that it is clear from the application that the Defendant is not relying on Rule 13.3 (2) and that no evidence was led that there are any exceptional circumstances that this Court should consider. The Defendant's application states that

it is an application to set aside the Judgment in Default of Acknowledgement of Service and it states as one of the grounds of the application that it is just and equitable to do so. I am minded to set aside the judgement on the ground that it just and equitable to do so, having regard to the exceptional circumstances identified. There is also evidence that was led - via the Defendant's affidavit in support of his application - that there are exceptional circumstances that the Court should consider. Having sworn to the circumstances of his impecuniosity, ignorance and indisposition, the Defendant stated at paragraph 9 of the affidavit that –

> "I humbly pray that given the extenuating circumstances that this Honourable Court would exercise its discretion to set aside the Default judgment against me and allow the matter to proceed to determination on its merits and not allow the Claimant to wrongly benefit due to procedural irregularity."

[7] In all the circumstances, I make the following orders:

(1) The Judgment in Default of Acknowledgement of Service dated the 3rd day of November 2011 is hereby set aside.

(2) The Defendant shall file a Defence in this matter within 14 days of the date of this order.

(3) The Defendant shall pay to the Claimant costs in the sum of $1,000.

Mario Michel
High Court Judge