

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

HCVAP 2012/004

BETWEEN:

GEORGE BLAIZE

Appellant

and

BERNARD LA MOTHE
(Trading as "Saint Andrews Connection Radio" SAC FM RADIO)

Respondent

and

THE ATTORNEY GENERAL OF GRENADA

Intervener

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. James Bristol for the Appellant
Mr. Dwight Horsford for the Respondent
Mr. Darshan Ramdhani, Solicitor General on behalf of the Attorney General

2012: October 9.

Civil appeal – Constitutionality of rule 12.13 of the Civil Procedure Rules 2000 – Default judgment – Right of access to court – Right to be heard at assessment hearing on issue of quantum – Right to make submissions and cross-examine witnesses at assessment hearing

The appellant failed to file an acknowledgement of service or a defence for a claim served on him in the court below. As a result, judgment in default was entered against him with damages to be assessed. In accordance with rule 12.13 of the Civil Procedure Rules 2000, the learned judge denied the appellant the right to participate in the assessment

hearing, except when the issue of costs was being dealt with. He was therefore unable to make submissions or cross-examine witnesses at the hearing.

The appellant appealed to this Court on the basis that his right to a fair hearing was infringed, this right being guaranteed by section 8(8) of the Grenada Constitution Order 1973. He contended that CPR 12.13 was unconstitutional as it improperly interfered with this right. The Attorney General was allowed to intervene in the proceedings, having regard to the constitutional issue raised.

Held: allowing the appeal, and declaring that CPR 12.13, insofar as it purports to restrict a defendant to be heard only on the matter of costs at the hearing of an assessment of damages following a default judgment, is unconstitutional, null and void, that:

1. Barring the right to be heard (that is, to make submissions and cross-examine witnesses) at an assessment hearing in the circumstances dictated by CPR 12.13 restricts or reduces the access which a defaulting defendant has to the court to such an extent that it impairs the very essence of that right. There is not a reasonable relationship of proportionality between the means employed and the aims sought to be achieved by CPR 12.13 in restricting the defendant's right to be heard.

Tinnelly & Sons Ltd & Others and McElduff & Others v United Kingdom (1999) 27 EHRR 249 applied; **Brown v Stott (Procurator Fiscal, Dunfermline) and another** [2003] 1 AC 681 applied; **Michael Laudat & The Attorney General of the Commonwealth of Dominica v Danny Ambo** Commonwealth of Dominica High Court Civil Appeal No. 16 of 2010 (delivered 15th December 2010, unreported) considered.

REASONS FOR DECISION

[1] **BAPTISTE JA:** This is a judgment of the Court. On Tuesday 9th October 2012 we allowed the appellant's appeal challenging the constitutionality of rule 12.13 of the Civil Procedure Rules 2000 of the Eastern Caribbean Supreme Court ("CPR 2000") and declared that:

- (a) CPR Part 12.13, insofar as it purports to restrict a defendant to be heard only on the matter of costs at the hearing of an assessment of damages following a default judgment, is in breach of the fair trial rights enshrined in section 8(8) of the Constitution and unconstitutional, null and void.
- (b) A defendant is entitled to be heard on an assessment of damages in respect of the determination of quantum thereof and to make submissions and cross-examine witnesses.

We also ordered that the assessment of damages undertaken by the learned trial judge be set aside and the matter be remitted to the High Court for directions and assessment of damages. We now give reasons for our decision.

Background

- [2] A default judgment for damages to be assessed was entered against the appellant (the defendant in the court below) for failing to acknowledge service or to file a defence. A High Court judge undertook the assessment. Relying on **Michael Laudat & The Attorney General of the Commonwealth of Dominica v Danny Ambo**¹ and consonant with CPR 12.13, the learned judge denied the appellant the right to participate in the assessment, save as to costs. The appellant therefore could not cross-examine witnesses or make submissions. Being aggrieved by the situation, the appellant filed a notice of appeal challenging the assessment on the basis that his right to a fair hearing guaranteed by section 8(8) of the **Grenada Constitution Order 1973** (“the Constitution”) was infringed. The Attorney General was allowed to intervene in the matter having regard to the constitutional issue raised.

Effect of CPR 12.13

- [3] CPR 12.13 came up for appellate scrutiny in **Michael Laudat**. The Court of Appeal held that the effect of the rule is that a defendant against whom a default judgment has been entered on a claim for an unspecified sum and who has not sought to set aside the judgment is barred from participating in the assessment hearing by cross-examining witnesses and making submissions. I note that the court was not called upon to pronounce on the constitutional validity of the rule.

¹ Commonwealth of Dominica High Court Civil Appeal No. 16 of 2010 (delivered 15th December 2010, unreported).

Submissions of the parties

- [4] In a nutshell, the appellant argued that CPR 12.13 violated the Constitution in that it improperly interfered with his right to a fair hearing guaranteed by section 8(8) of the Constitution and his right of access to justice, as it prevented him from participating in the assessment hearing except as to costs. The Attorney General's position was in sync with that of the appellant and in the written submissions argued that although CPR 12.13 pursued a legitimate objective there was no proportionality between the means employed and the aims it sought to achieve.
- [5] Mr. Horsford, the respondent's counsel, stated that the short issue arising was whether CPR 12.13 satisfies the requirements of a fair hearing provided by section 8(8) of the Constitution of Grenada. Mr. Horsford had stoutly resisted the appellant's appeal, submitting that rule 12.13, when examined in the context of the whole CPR 2000, did not constitute an infringement of the appellant's right to a fair hearing. Mr. Horsford had argued that the rules afforded the appellant avenues of redress which he did not pursue. For example Mr. Horsford pointed out that the appellant did not avail himself of the provisions of CPR 12.13 which affords a defendant against whom a default judgment had been entered under Part 12, the right to approach the court and to have the judgment set aside upon the fulfillment of the criteria set out in the rule. Mr. Horsford also argued that the avenue of an appeal was open to the appellant.
- [6] Mr. Horsford had argued alternatively that if rule 12.13 appeared to be restrictive of the right to a fair hearing, it pursued the legitimate objective of dealing with cases justly in accordance with Part 1 of CPR 2000 and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Towards the end of the hearing Mr. Horsford resiled from his position and in our view rightly conceded that rule 12.13 infringed the right to a fair hearing contained in section 8(8) of the Constitution.

The Constitutional and legal framework

[7] Section 8 (8) of the Constitution of Grenada ordains that:

“Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.”

Part 12 of the CPR 2000 contains provisions under which a claimant may obtain judgment without trial (a default judgment) where the defendant has failed to file a defence in accordance with Part 10, or an acknowledgement of service giving notice of intention to defend in accordance with Part 9. Importantly, CPR 12.13 provides:

“Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are –

- (a) an application under rule 12.10(4);
- (b) costs;
- (c) enforcement of the judgment; and
- (d) the time of payment of any judgment debt.”

For the purpose of completeness rule 12.10(4) provides that default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.

[8] Although section 8(8) of the Constitution does not confer the right of access to the courts in express terms it is generally accepted that it does. Notwithstanding that section 8 is not subject to express limitations, the right of access is not absolute. All rights are subject to the rights of others and the public interest whether expressly stated, inherent or implied. See Byron CJ in **Capital Bank**

International Limited v Eastern Caribbean Central Bank et al,² and Golder v United Kingdom.³

[9] In **Capital Bank** Byron CJ explained⁴ that section 8(8) of the Constitution is derived from section 6(1) of the European Convention for the Protection of Human Rights and the construction of the section by the European Court of Human Rights should inform the meaning given to section 8(8) of the Constitution. Byron CJ further stated that the fact that section 8(8) is regarded as conferring a right of access to the court which is subject to limitations was explained by Lord Bingham in **Brown v Stott (Procurator Fiscal, Dunfermline) and another**:⁵

“Article 6 contains no express right of access to a court, but in **Golder v United Kingdom** (1975) 1 EHRR 524, 536, para 35, the European Court held that it would be ‘inconceivable’ that article 6 should describe in detail the procedural guarantees afforded to parties in a pending law suit and should not first protect that which alone makes it possible to benefit from such guarantees, namely access to a court.”

In **Golder** the court added⁶ that the right of access to the courts is not absolute and that there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.

European Jurisprudence

[10] Although the right of access to the court is subject to limitations and calls for regulation by the State, it is recognised that the nature, extent and effect of such limitations must not unfairly or adversely affect the right of access so as to effectively impair the very essence of that right. The aim of a limitation and the issue of proportionality also fall to be considered. The limitation must pursue a legitimate aim in the public interest and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. These propositions are derived from decisions of the European Court of Human

² Grenada High Court Civil Appeal Nos. 13 and 14 of 2002 (delivered 10th March 2003, unreported) at para. 10.

³ (1975) 1 EHRR 524.

⁴ At para. 12.

⁵ [2003] 1 AC 681 at 694.

⁶ At p. 537, para. 38.

Rights. Thus in **Tinnelly & Sons Ltd & Others and McElduff & Others v United Kingdom**⁷ the court stated:

"The Court recalls that Article 6(1) embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before a court in civil matters, constitutes one aspect. However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. ... It [the Court] must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

[11] In that same vein, Lord Hope stated in **Brown v Stott**:⁸

"I would hold therefore that the jurisprudence of the European court tells us that the questions that should be addressed when issues are raised about an alleged incompatibility with a right under article 6 of the Convention are the following: (1) is the right which is in question an absolute right, or is it a right which is open to modification or restriction because it is not absolute? (2) if it is not absolute, does the modification or restriction which is contended for have a legitimate aim in the public interest? (3) if so, is there a reasonable relationship of proportionality between the means employed and the aims sought to be realised? The answer to the question whether the right is or is not absolute is to be found by examining the terms of the article in the light of the judgments of the court. The question whether a legitimate aim is being pursued enables account to be taken of the public interest in the rule of law. The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community in the realisation of that aim and the protection of the fundamental rights of the individual."

Application of principles

[12] The right of access to court not being absolute, the question is whether the limitation imposed by the rule with respect to cross-examination and the bar to counsel making submissions on the issue of quantum pursues a legitimate aim in

⁷ (1999) 27 EHRR 249, 288, para. 72.

⁸ At p. 720C.

the public interest and whether the rule is necessary and proportionate to the achievement of the aim. In **Michael Laudat**, Edwards JA stated:

“Regardless of whether or not the defendant is permitted to be heard on the issue of quantum, the court should critically carry out the assessment on the scheduled date on the evidence adduced, with the overriding objective of minimizing the costs of the assessment, ensuring that it is dealt with expeditiously and that the judicial time and resources of the court are not disproportionately allotted in assessing the quantum of damages on the claim.”

[13] The attainment of the overriding objective referred to by Edwards JA would certainly be consistent with carrying out a legitimate aim in the public interest. The inquiry, however, does not end here. The question is whether the barring of cross-examination and submissions is necessary and appropriate to achieve the aim sought. As indicated earlier, the Court in **Michael Laudat** was not taxed with the issue of the constitutionality of the rule. It is also observed that carrying out an assessment without the critical benefit of cross-examination and submissions from the defendant does not place the judge in a position to achieve a fair result.

[14] Numerous cases from the highest authorities have highlighted the pivotal importance of cross-examination to the judicial process and the fairness of the proceedings. Lord Kerr pointed out in **Al Rawi and others v The Security Service and others**:⁹

“To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one’s opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial.”

Likewise in **Tariq v Home Office**,¹⁰ Lord Kerr observed¹¹ that “[t]he right to know and effectively challenge the opposing case has long been recognised by the common law as a fundamental feature of the judicial process.” In **Lee v The**

⁹ [2011] UKSC 34 at para. 93.

¹⁰ [2011] UKSC 35.

¹¹ At para. 102.

Queen,¹² the High Court of Australia stated:¹³ “Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.”

[15] Cross-examination is undoubtedly a potent weapon in the arsenal of a lawyer and is a fundamental aspect of the judicial process. In an adversarial system such as ours, it provides a means whereby the case of the other party can be effectively challenged and undermined. It is also important to the judicial process that a party has the right to explain and comment on all the “evidence adduced or observations submitted, with a view to influencing the court’s decision.”¹⁴ Thus in **Vanjak v Croatia**,¹⁵ the European Court of Human Rights said:

“...independently of whether the case is a civil, criminal or disciplinary one, the right to adversarial proceedings has to be complied with. That right means in principle the opportunity for parties to court proceedings falling within the scope of Article 6 to have knowledge of and comment on all evidence adduced or observations submitted, with a view to influencing the court’s decision.”

[16] We are cognizant that the right of access to the court calls for regulation by the State. We are also satisfied that interference with the right may be justified on the grounds that the particular legislation may pursue a legitimate aim and if the scope of the legislation is necessary and proportionate to the achievement of the aim. We are of the opinion and hold that barring the right to be heard (cross-examination and the right to make submissions) in the circumstances dictated by CPR 12.13 effectively restricts or reduces the access left to a defaulting defendant to such an extent that it impairs the very essence of the right of access to the court. Furthermore, there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. For these reasons we allowed the appeal and granted the declarations referred to in paragraph 1 of this judgment.

¹² (1998) 195 CLR 594.

¹³ At para. 32.

¹⁴ *Vanjak v Croatia* [2010] ECHR 34 at para. 52.

¹⁵ [2010] ECHR 34 at para. 52.

