THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
MONTSERRAT

CLAIM NO. MNIHCVAP2018/0009

BETWEEN

THE ATTORNEY-GENERAL
THE OFFICE OF THE PREMIER — APPLICANTS/ CLAIMANTS

AND

ROVIKA INC.
MANISH VALECHHA
DENNISON DALEY — RESPONDENTS/DEFENDANTS

NOTICE OF APPLICATION

The Applicants apply to the Court for Orders that:

1. Leave is granted to appeal the following interlocutory decisions made by the High Court on November 5, 2018:

   (a) To hear an application for extension of time to file a Defence which was filed on November 5, 2018 in Claim No. MNIHCV2018/0037 at the hearing of Claim No. MNIHCV2018/0032 on November 5, 2018;

   (b) To grant an extension of time to file a Defence in Claim No. MNIHCV2018/0037 *The Attorney-General and the Office of the Premier v Rovika Inc., Manish Valechha and Dennison Daley* in all the circumstances of the case;

2. The proceedings in Claim No. MNIHCV2018/0037 *The Attorney-General and the Office of the Premier v Rovika Inc., Manish Valechha and Dennison Daley* are stayed pending the hearing and determination of this interlocutory appeal.

3. This interlocutory appeal shall proceed as a summary appeal.

4. The Notice of Appeal is deemed to be filed.

A draft of the Order sought is attached.

The grounds of the Application are that –

(1) Under Rule 62.2 of the Civil Procedure Rules 2000 the Claimants may seek leave to appeal the interlocutory decision made by the High Court on November 5, 2018 to grant the Defendants an extension of time to file their Defence;

(2) In breach of Rule 11.11 of the Civil Procedure Rules 2000 and the overriding objective, during the hearing of the related matter Claim No. MNIHCV2018/0032 *Attorney-General v Rovika Inc.*, the High Court heard the Defendants' Notice of Application for extension of time to file a defence in this matter Claim No. MNIHCV2018/0037 on the same day that the Notice of Application was filed;

(3) The High Court heard the application seeking an extension of time to file the defence which was filed on November 5, 2018 despite the fact that this application was later in time that the Claimants' Notice of Application for default judgment filed on October 24, 2018, which was set for hearing before the master on November 15, 2018;

(4) The High Court heard the application seeking an extension of time to file the defence which was filed on November 5, 2018 and received supporting authorities on the same day that it was filed, not giving the Claimants sufficient time to review the authorities filed in support and to file an affidavit in response to the evidence presented with the application;

(5) The Claimants have a realistic prospect of success and their intended grounds of appeal are as follows:

Grounds of Appeal

A. The Claimants rely on the following procedural grounds of appeal:

The High Court erred procedurally in deciding to hear the Notice of Application for extension of time filed on November 5, 2018 on the day that it was filed because:

I. The High Court heard the Notice of Application filed in this matter although it was Claim No. MNIHCV2018/0032 and not Claim No. MNIHCV2018/0037 that was set before the High Court, the matters not having been consolidated;

II. The High Court heard the Notice of Application for extension of time filed on November 5, 2018 although there was a Notice of Application for default judgment filed by the Claimants on October 24, 2018 which should have been heard first because it was filed earlier in time;

III. The High Court did not review or even consider the contents of the Notice of Application for default judgement filed by the Claimants which was at that time listed for hearing before the Master on November 15, 2018;

IV. In breach of Rule 11.11(1) of the Civil Procedure Rules 2000 and the overriding objective, the High Court heard the Notice of Application for extension of time filed on November 5, 2018 although the Claimants' counsel had only been served with the documents relating to the application in Court on November 5, 2018 and had not been given 7 days' notice of the application;

V. The High Court refused counsel for the Claimants' request for time to respond in writing to the affidavit in support of the application, although counsel for the Claimants brought it to the Court's attention that the contents of the affidavit were disputed and that it was necessary that there be time to review the documents and respond in writing;

VI. The High Court did not allow the Claimants' counsel sufficient time to review the three authorities relied upon by the Defendants in their application as well as other relevant authorities to the application being made;

B. The Claimants rely on the following substantive grounds of appeal:

The High Court erred in its substantive decision to grant an extension of time for the filing of the Defence in that:

I. The High Court erred in its application of the relevant Eastern Caribbean Supreme Court (ECSC) Civil Procedure Rules 2000. The application for extension of time should only have been granted if the Defendants could have satisfied the requirements in Rule 13.3 of the ECSC Civil Procedure Rules for setting aside a default judgment.

However, the High Court applied the Trinidadian authorities of *The Attorney-General of Trinidad and Tobago v Keron Matthews* [2011] UKPC 38, Civil Appeal No. 44 of 2014 *Roland James v The Attorney-General of Trinidad and Tobago* and *Allison-John De Coteau v Louise Maynard-Paul*, to Montserrat.

The Trinidadian authorities were based on the fundamentally different Rule 13.3 of the Trinidad and Tobago Civil Procedure Rules. They should have been found to be inapplicable to Montserrat in present circumstances.

The Trinidadian Civil Procedure Rules have a lower threshold for setting aside default judgment and this grounded the reasoning of the Courts in the Trinidadian authorities.

II. The High Court erred in failing to recognize that in the circumstances no good explanation was being given for the failure to file the Defence within the time.

The affidavit in support presented by the Defendants indicated that counsel was instructed in the matter by October 5, 2018. The date for filing the Defence was October 15, 2018.

The inadvertence of counsel is not a good explanation for failure to file a defence within the meaning of Rule 13.3 of the Civil Procedure Rules.

III. **The High Court, in granting the extension of time to the Defendants to file a defence when an application for default judgment has been filed, has prejudiced the Claimants in their prosecution of the Claim. The Claimants, in order to fulfil the requirements of Rule 12.10 of the Civil Procedure Rules, have submitted affidavit evidence in relation to their claim. The Defendants have now had sight of the evidence which would normally have been submitted as part of the exchange of witness statements in the normal course of civil proceedings.**

(6) Without a stay of proceedings, the interlocutory appeal would be rendered nugatory as the Defendants have filed their Defence on November 9, 2018 pursuant to the extension of time granted by the High Court on November 5, 2018 and trial is set for March 15, 2019.

(7) Under Rule 62.6 an appeal may proceed as a summary appeal where the appeal relates to specific issues of law and can be heard justly without the production of the full record.

A copy of the Order against which leave to appeal is sought is attached.

An affidavit in support accompanies this application. A draft Notice of Appeal is attached.

Dated: 30th day of November, 2018

Signed:.....
Renée A.R.D. Morgan
Legal Practitioner for the Applicant

NOTICE:

This application will be heard by..... on the .....day of.....2018 at ..... in the..... noon. **If you do not attend this hearing an Order may be made in your absence.**

The court office is at Government Headquarters, Brades, Montserrat telephone number 491-2129, FAX 491-8866. The office is open between 8 a.m. and 4 p.m. Monday to Friday except public holidays.

NOTICE:

This application will be heard by [the Judge in Chambers] [Master .....] on day the ..... day of,..... at ..... am/pm at [.....]

If you do not attend this hearing an order may be made in your absence.

OR

The [Judge in Chambers] [Master] will deal with this application by — NB This notice of application must be served as quickly as possible on the respondent to the application.

The Court Office is at Brades, Montserrat, Telephone number (664) 491-2129, FAX (664) 491-8866. The office is open between [8.00 a.m.] and [4:00 p.m.] Monday to Friday except public holidays.

This document was filed by Renée A.R.D. Morgan, Senior Crown Counsel, on behalf of the Applicants/Claimants whose address for service is Attorney General's Chambers, Valley View, Brades, Montserrat. Tel. (664) 491 4686, Fax (664) 491 4687.

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
MONTSERRAT

CLAIM NO. MNIHCVAP2018/0009

BETWEEN

THE ATTORNEY-GENERAL THE OFFICE OF THE PREMIER	APPLICANTS/ CLAIMANTS

AND

ROVIKA INC. MANISH VALECHHA DENNISON DALEY	RESPONDENTS/DEFENDANTS

NOTICE OF APPLICATION

THE EASTERN CARIBBEAN SUPREME COURT
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THE ATTORNEY-GENERAL
THE OFFICE OF THE PREMIER — APPLICANTS/ CLAIMANTS

AND

ROVIKA INC.
MANISH VALECHHA
DENNISON DALEY — RESPONDENTS/DEFENDANTS

AFFIDAVIT IN SUPPORT

I, VANESSA MARK, whose address for these purposes is in care of the Attorney-General's Chambers, Valley View, Brades, Montserrat, being duly sworn make oath and say as follows:

1. I am a Clerical Officer within the Attorney-General's Chambers.

2. A review of the file relating to Claim No. MNIHCV2018/0037 *The Attorney-General and the Office of the Premier v Rovika Inc., Manish Valechha and Dennison Daley* shows that:

   (a) The Claim Form and Statement of Claim in Claim No. MNIHCV2018/0037 *The Attorney-General and the Office of the Premier v Rovika Inc., Manish Valechha and Dennison Daley* were filed on September 12, 2018;

   (b) The Defendants acknowledged service of the Claim Form and Statement of Claim as of September 17, 2018;

   (c) An application for default judgment was filed, with supporting evidence on October 24, 2018, and set for hearing before the Master on November 15, 2018;

   (d) An application for an extension of time to file a defence with supporting affidavit was filed by the Defendants on November 5, 2018;

   (e) The High Court made an Order on November 5, 2018 in Claim No. MNIHCV2018/0037 *The Attorney-General and the Office of the Premier v Rovika Inc., Manish Valechha and Dennison Daley* granting an extension of time to the Defendants until November 9, 2018 to file their Defence and setting a trial date for March 15, 2019. This Order is exhibited hereto as Exhibit VM-1.

3. I am informed by counsel in this matter Miss Renée Morgan and verily believe that the application filed on November 5, 2018 was served on counsel in Court on November 5, 2018.

4. I am informed by counsel in this matter Miss Renée Morgan and verily believe that the affidavit in support of the application for extension of time was disputed in that the deponent, Mr.

Williams swore that he had contacted counsel, Miss Morgan, and requested an extension of time within which to file the Defence. I am informed by Miss Morgan and verily believe that an oral request for an extension of time was not made.

5. I am also informed by counsel Miss Renée Morgan and verily believe that at the hearing of Claim No. MNIHCV2018/032, the application filed by the Defendants for an extension of time to file the Defence in Claim No. MNIHCV2018/037 was brought to the Court and the Court heard and determined the application, despite counsel for the Claimants indicating to the Court that:

   (i) there was insufficient time to review and respond to the authorities submitted, *The Attorney-General of Trinidad and Tobago v Keron Matthews* [2011] UKPC 38, Civil Appeal No. 44 of 2014 *Roland James v The Attorney-General of Trinidad and Tobago* and *Allison-John De Coteau v Louise Maynard-Paul;*

   (ii) she required time to prepare an affidavit in response; and

   (iii) the application for default judgment, being filed earlier, should have been dealt with first.

6. A further review of the file relating to Claim No. MNIHCV2018/0037 *The Attorney-General and the Office of the Premier v Rovika Inc., Manish Valechha and Dennison Daley* shows that the Claimants on November 15, 2018 filed a Notice of Application in the High Court seeking leave to appeal the Order of the High Court granting the Defendants an extension of time to file the Defence.

7. I am further informed by counsel in this matter Miss Renée Morgan and verily believe that at the hearing of Claim No. MNIHCV2018/0037 on November 23, 2018 the High Court refused leave to appeal its decision to grant the Defendants an extension of time to file the Defence. The High Court also ordered the following timetable to trial:

   (a) To file lists of documents by February 1, 2019
   (b) To file witness statements by February 15, 2019
   (c) To file skeleton arguments by March 1, 2019
   (d) Trial on March 15, 2019
   (e) Submissions to be filed by March 22, 2019

8. I swear that the contents of this Affidavit are true to the best of my knowledge, information and belief.

Sworn to before me at the)
)
Registry , this 30th day of)
.....November, 2018.)

.....
VANESSA MARK

This document was filed by Renée A.R.D. Morgan, Senior Crown Counsel, on behalf of the Applicants/Claimants whose address for service is Attorney General's Chambers, Valley View, Brades, Montserrat. Tel. (664) 491 4686, Fax (664) 491 4687.

Commissioner for Oaths
Montserrat, West Indies

VM-1

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
MONTSERRAT

CLAIM NO. MNIHCV 2018/0032

BETWEEN: **The Attorney General** ✓ **Claimant**

AND: **Rovika Inc.** **Defendant**

Before: **His Lordship, The Hon. Justice Iain Morley QC**

Dated: **The 5th day of November, 2018**

Entered: **The 7th day of November, 2018**

Appearances:
Ms. Renee Morgan for the Claimant
Mr. Farid Scoon for Defendant

AMENDED ORDER

Upon Hearing Ms. Renee Morgan and Upon Hearing Mr. Farid Scoon

It is hereby Ordered:

1. Application for Extension of Time to File a Defence by Defendant on 5th November 2018 is hereby granted.
2. Defendant to file its Defence by Friday 9th November 2018.
3. Claimant to file its Reply to the Defence within 14 days after service of the Defence on the Claimant.
4. Matter adjourned to 23rd November 2018 for timetables to be fixed for the further progress of the matter.
5. Trial fixed for 15th March 2019.
6. Costs to be costs in the cause.

CMeade

Collin Meade
REGISTRAR

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
MONTSERRAT

CLAIM NO. MNIHCVAP2018/0009

BETWEEN

THE ATTORNEY-GENERAL THE OFFICE OF THE PREMIER	APPLICANTS/ CLAIMANTS

AND

ROVIKA INC. MANISH VALECHHA DENNISON DALEY	RESPONDENTS/DEFENDANTS

SUBMISSIONS

1. Service of the Claim and Statement of Claim in Claim No. MNIHCV2018/0037 was acknowledged as of September 17, 2018. Therefore, under Rule 10.3(1) of the Civil Procedure Rules 2000 the Claimants had until October 15, 2018 to file a Defence.

2. The time for filing the Defence passed. On October 24, 2018 the Claimants filed an application for default judgment which was set for hearing on November 15, 2018.

3. On November 5, 2018, the Defendants filed an application for extension of time to file a Defence in Claim No. MNIHCV2018/0037, with supporting affidavit of Mr. Criston Williams, attorney-at-law.

4. The High Court had the related Claim No. MNIHCV2018/0032 before it and heard the application in Claim No. MNIHCV2018/0037, in which the Defendants made submissions relying on the Trinidadian authorities of *The Attorney-General of Trinidad and Tobago v Keron Matthews* [2011] UKPC 38, Civil Appeal No. 44 of 2014 *Roland James v The Attorney-General of Trinidad and Tobago* and *Allison-John De Coteau v Louise Maynard-Paul.*

5. Counsel for the Claimants submitted that there was insufficient time to review the authorities, the contents of the affidavit of Mr. Criston Williams were disputed and that the default judgment application should be dealt with first.

6. The Court, however, did not deal with the default judgment application, but granted an extension of time for filing the Defence on the same day that the application was filed.

7. The Claimants now seek leave to appeal this interlocutory decision on basis that the procedure followed by the Court was contrary to the overriding objective in that:

   (a) The Claimants' application, although filed earlier, was not heard before a later application;

   (b) The Claimants' counsel was not given sufficient time to review the Defendants' authorities or to respond to the Defendants' application and affidavit in writing;

   (c) The matter was heard on the hearing of a separate claim;

   (d) The Claimants were given inadequate notice of the application to be made by the Defendants in breach of Rule 11.11;

8. The Claimants also seek leave to appeal the interlocutory decision on the basis that it was wrong in all the circumstances to grant an extension of time in that:

   (a) The circumstances were such that the Defendants should have been required to meet the criteria for setting aside a default judgment if the application for extension of time was to be granted;

   (b) The Defendants did not have a good explanation for failure to file their Defence by October 15, 2018 as required by Rule 13.3 for the setting aside of a default judgment;

   (c) The Trinidadian authorities, based on application of Rule 13.3 of the Trinidadian Civil Procedure Rules that unlike Rule 13.3 of the Eastern Caribbean Supreme Court Civil Procedure Rules, does not contain a requirement for a good explanation for filing a defence in order to set aside a default judgment, should not have been applied to this matter;

   (d) There was prejudice to the Claimants in that matters of evidence were disclosed in the application for default judgment which in the normal course would have been disclosed closer to the time of trial.

9. The Claimants submit that the requirement in considering whether to grant leave to appeal is that there must be a real prospect of success (see Blackstone's *Civil Practice 2013,* at page 1197, attached).

10. There is a real prospect of success on appeal due to the procedure followed by the Court below as well as the differences in Rules concerning setting aside default judgment in Trinidad and Tobago and the Eastern Caribbean Supreme Court Civil Procedure Rules.

11. The Claimants also seek a stay of the Order of the Court made on November 5, 2018 with respect to the trial date. The Claimants' appeal would be rendered pointless if the trial progressed while this appeal is yet to be heard. Meanwhile, damages are an adequate remedy for the Defendants if there is a delay.

12. In considering a stay, the Court may have regard to the principles outlined in Claim No ANUHCV2009/014 *Marie Makhoul v Cicely Foster* in which the Court found that the essential principle is to balance the risk of harm to either party.

13. The Claimants also believe that, if leave is granted, this matter is suitable for progress as a summary appeal as it requires determination of selected legal issues:

    (a) Was the procedure followed in breach of the overriding objective?

    (b) Should the Trinidadian authorities have been applied so that the application for extension of time could be heard ahead of the application for default judgment, and the application for extension of time could have been granted without regard to the requirements under Rule 13.3 of the Civil Procedure Rules for setting aside default judgments?

14. The Claimants therefore seek leave to appeal, a stay, and an order that the matter proceed as a summary appeal.

Dated the 30th day of November, 2018

.....

Renée A. R. D. Morgan
Legal Practitioner for the Applicants/Claimants

This document was filed by Renée A.R.D. Morgan, Senior Crown Counsel, on behalf of the Applicants/Claimants whose address for service is Attorney General's Chambers, Valley View, Brades, Montserrat. Tel. (664) 491 4686, Fax (664) 491 4687.

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Applications for permission to appeal sought from the lower court are made orally at the end of the hearing, usually as the last item of business after costs have been determined. A party who needs more time to decide whether to appeal can ask the lower court to adjourn, in which event the application for permission can be made to the lower court at the relevant hearing, albeit at a later date. If permission is not sought at the hearing in the lower court (perhaps because of a change of mind), the only option, given the wording of **r. 52.3(2)**, is to seek permission from the appeal court (*Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 2228 (Comm), LTL 6/9/2006). Permission that is sought from the appeal court is asked for initially by seeking permission in writing in the appeal notice (**r. 52.3(2)(b)**) and is normally considered without a hearing (**PD 52, para. 4.11**). If permission is granted the parties are notified in writing (**para. 4.12**). If permission is refused, the appellant can request the matter to be reconsidered at an oral hearing (see **71.17**). Short reasons are usually all that is given on a refusal of permission. Just because they are short does not mean they infringe the requirement for a reasoned decision in the European Convention on Human Rights, **art. 6**, in the **Human Rights Act 1998, sch.1** (*Hyams v Plender* [2001] 1 WLR 32 at [17]).

An appellant is under a duty to inform the Civil Appeals Office in writing of any facts affecting the giving or refusing of permission to appeal (*Walbrook Trustees (Jersey) Ltd v Fattal* [2008] EWCA Civ 427, LTL 11/3/2008). If such facts arise after permission is granted, the appellant should write to the Civil Appeals Office and seek directions.

Commentary

Test for granting permission

71.14 CPR, r. 52.3(6), provides that permission to appeal may be given only where either:

(a) the court considers that the appeal would have a real prospect of success; or
(b) there is some other compelling reason why the appeal should be heard.

Lord Woolf MR said in *Swain v Hillman* [2001] 1 All ER 91 that a 'real' prospect of success means that the prospect of success must be realistic rather than fanciful. The court considering a request for permission is not required to analyse whether the grounds of the proposed appeal will succeed, but merely whether there is a real prospect of success (*Hunt v Peasegood* (2000) *The Times*, 20 October 2000). Its function is limited to a review of the decision of the court below (see **72.5**) to see whether a prospective appellant has an arguable case, fit to present to the full court on appeal, that the decision below was plainly wrong or unjust through a serious irregularity (see **72.6** and *Re W (Children) (Permission to Appeal)* [2007] EWCA Civ 786, [2007] Fam Law 897). Even hopeless appeals may be allowed to proceed where the area of law in question is the subject of considerable controversy (*Beedell v West Ferry Printers Ltd* [2001] EWCA Civ 400, [2001] ICR 962).

A failure by a judge to address an issue may be a compelling reason within **r. 52.3(6)** (*Sofola v Lloyds TSB Bank* [2005] EWHC 1335 (QB), LTL 5/7/2005). There may be a compelling reason for the appeal where the lower court's decision has been overtaken by a subsequent authority, but there is unlikely to be a compelling reason if the lower court was not informed of a binding authority due to a failure by the appellant's advocate (*Sofola v Lloyds TSB Bank*). Apparently, the court should take into account an appellant's strong feelings of injustice when considering whether to grant permission, at least where those feelings are arguably objectively justified (*Malcolm v MacKenzie* [2004] EWCA Civ 584, LTL 18/5/2004).

There is some reluctance in giving permission to appeal against case management decisions, such as disclosure orders and orders dealing with the timetable of the claim. In these cases the court will also consider whether the issue is of sufficient significance to justify the costs of an appeal; the procedural consequences of an appeal (such as losing a trial date); and whether it would be more convenient to determine the point after trial (**PD 52, para. 4.5**).

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2009/014

MARIE MAKHOUL

Appellant/Applicant

and

CICELY FOSTER

Respondent

Before:

The Hon. Mde. Janice George-Creque — Justice of Appeal

On written submissions of:

Sir Gerald Watt, QC and Dr. David Dorsett for the Respondent

2009: August 26.

Civil Appeal – Civil Procedure – stay of execution – risk of injustice – whether applicant will be financially ruined – equitable considerations

The applicant (Ms. Makhoul), the claimant in the court below, sought a declaration of entitlement to a building standing on the respondent's land. The claim was dismissed, judgment was given on the respondent's counterclaim and Ms. Makhoul was ordered to pay mesne profits of $700.00 and prescribed costs. Ms. Makhoul appealed and sought a stay of execution pending determination of the appeal. Ms. Mahkoul states that she will be financially ruined if a stay is refused as her only source of income is derived from rental of the building, without which she would be unable to meet her loan obligations or afford the cost of her medical treatment. The respondent (Ms. Foster) argues that if the stay is granted she would be out of possession of her land and the building and would lose the rental income. It is further argued that if the appeal subsequently fails there is the real risk that Ms. Foster may be unable to recover any losses incurred in respect of rental income for the period she was out of possession given Ms. Makhoul's circumstances.

Held, refusing the stay of execution with costs in the appeal:

(1) Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if the stay is granted or refused. This

calls for an examination of the nature of the case and the consequences flowing from enforcement of the judgment.

(2) The burden is on the applicant to satisfy the court that she will be personally and financially ruined without a stay. It is not enough for the applicant to merely make a bald assertion to the effect that she will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay. The applicant has failed to provide such evidence.

(3) The exercise of the discretion to grant a stay engages equitable considerations. The applicant has not made full and frank disclosure to the court having failed to provide a reason for non payment of the costs ordered in the court below.

(4) Having considered all the factors and circumstances, the court is satisfied that the risk of injustice in granting a stay would be greater to the respondent than to the applicant.

Linotype-Hell Finance Ltd. v Baker [1993] 1 WLR 321 considered. **Hammond Suddard Solicitors v Agrichem International Holdings** [2001] EWCA 1915 applied.

JUDGMENT

[1] **GEORGE-CREQUE, J. A.:** The applicant (Ms. Makhoul) has applied for a stay of execution of the judgment of the trial judge delivered on 28th May 2009, wherein she dismissed in its entirety Ms. Makhoul's claim against the respondent (Ms. Foster) pending a determination of the appeal against the said decision.[1] Ms. Makhoul's claim was for a declaration of entitlement to a building standing on the respondent's (Ms. Foster) land, situate in St. John's, Antigua. The trial judge also discharged an interim injunction which was previously granted in Ms. Makhoul's favour against Ms. Foster, and further gave judgment on Ms. Foster's counterclaim and ordered Ms. Makhoul to pay mesne profits in the sum of $700.00 and prescribed costs.

[2] The applicant contends in her grounds for a stay that if execution is undertaken, before the appeal is heard, then the appeal would be rendered nugatory and that without a stay she would be ruined. In her affidavit in support filed on 3rd June

[1] Counsel for the applicant made clear at the Case Management hearing that no stay was being sought in relation to the 2nd named respondent.

2009, Ms. Makhoul states that the rental from the building is her only source of income and that she is not employed. She further states that she maintains herself from that income as well as meets her loan obligations to Royal Bank of Canada, and her various medical expenses as she suffers from ovarian cancer the treatment of which is very expensive and which involves frequent trips to Trinidad and Tobago. She states that without a stay of execution she will be financially and personally ruined and that she will not be able to afford further treatment. Nothing further is said or produced to establish the extent of her loan obligations, or the cost of her medical treatment.

[3] The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favour particularly after a full trial on the merits.

[4] The modern authority on the guiding principles the court employs in exercising its discretion to grant a stay is the case of **Linotype-Hell Finance Ltd. v Baker**[2] where Staughton L.J. opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success. It must be emphasised that it is not enough to merely make a bald assertion to the effect that an applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.

[5] The authority of **Hammond Suddard Solicitors - Agrichem International Holdings**[3] is grounded in the same principle though formulated differently. In that case the court pointed out that the evidence in support of a stay needs to be full, frank and clear[4] [see para 13]. They went on to state the principle thus:

> "...Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of

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[2] [1993] 1 W.L.R. 321 at pg. 323
[3] [2001] ECWA Civ 1915, LTL 18/12/2001
[4] Supra at paragraph 13

the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent?"[5]

[6] I propose to approach the circumstances of this case based on the formulation of the principle as set out in the **Hammond Suddard** case as to my mind it affords a more pragmatic approach in keeping with the overriding objective of **Civil Procedure Rules 2000 (CPR)** which is to deal with cases justly. This calls for an examination of the nature of the case and the consequences flowing from enforcement of the judgment.

[7] Ms. Makhoul's claim was basically for an order declaring her to be the owner of the building and consequentially the ability to earn an income from the rental of the building. The ownership and entitlement of the land on which the building stands is not in dispute and belongs to Ms. Foster. I also bear in mind the fact that Ms. Makhoul's relationship with Ms. Foster was, or is, one of landlord and tenant in respect of the land on which the building exists. The building has been adjudged to be part and parcel of the land the trial judge having found that it was affixed to the land and not capable of being removed without more.

[8] If a stay is not granted then Ms. Makhoul would lose possession of the building and the ability to earn a rental income from sub-letting to a third party provided this could be lawfully done, in light of the fact that it is not in dispute that Ms. Foster is the owner of the land on which the building stands[6]. If she turns out to be successful on appeal, then subject to the caveat aforesaid, Ms. Foster may be required to compensate her for the loss in rental income sustained during the time she was kept out of possession. I do not consider that the fact that she is out of possession of the building would in any way stifle her appeal or render the appeal nugatory given the nature and subject matter of the claim which has given rise to the appeal. Further, were no stay granted and the appeal was successful, the

[5] Supra at paragraph 22
[6] The permission to sublet was at the heart of the proceedings below in respect of the notice to quit.

risks of the applicant being able to recover from the respondent appears minimal since the land on which the building stands is in any event, Ms. Foster's. Save for a relationship in the nature of landlord and tenant, or some like relationship, the applicant would not be in a position to lawfully remain in occupation of Ms. Foster's land. On the other hand, if a stay was granted, it would appear that Ms. Foster would be out of possession of her land and the building and would lose the rental income from the property, and in the event that the appeal failed then Ms. Foster will be able to enter into possession. However, there is the real risk that she may be unable to recover any losses incurred in respect of rental income for the period she was out of possession as according to Ms. Makhoul such sums would be expended by her in meeting her medical and other obligations.

[9] Unfortunately, the bald assertions by Ms. Makhoul that she will be personally and financially ruined, without establishing a factual basis for the assertion is most unhelpful in the exercise of a discretion to grant a stay and in assessing fairly, where the justice of the case lies. The burden is on her, as the applicant for the stay, to satisfy the court in this regard, the respondent having a judgment on the merits in her favour. This she has failed to do.

[10] Another disturbing factor which ought to be taken into account is the fact that Ms. Makhoul was ordered to pay costs and expenses occasioned by the vacation of the earlier trial date on 29th October 1988 all together totalling $10,100.00. To date, those costs have not been paid. Ms. Makhoul in her affidavit of 29th July 2009 stated at paragraph 5 that it was "mainly an oversight that this sum was not paid as we had expressed in January 2009, an intention to pay prior to trial." She then exhibited a letter from her solicitors dated 16th January 2009 but that letter refers to costs and expenses and the fact that they were awaiting instructions from Ms. Makhoul in providing a time frame for their payment. No reason for non payment was put forward then or in her affidavit.

[11] This failure coupled with the bald statements from Ms. Makhoul has inexorably led to the conclusion that Ms. Makhoul has failed to be full and frank with the court in respect of this application. The exercise of the discretion to grant a stay engages equitable considerations. It would appear to me, having considered all the factors and circumstances that the risk of injustice in granting a stay would be greater to the respondent rather than to the applicant and I am inclined to refuse a stay in the circumstances.

[12] Whilst I do not consider it necessary to delve too deeply in the likelihood of success of the appeal, suffice it to say that the bulk of the grounds of appeal, as counsel for the respondent has rightly pointed out, fail to identify the basis on which the trial judge is said to have erred and begs the question whether they amount to grounds of appeal at all. Taking the first ground of appeal as an example, it simply states "that the Learned Trial Judge erred in dismissing the Claim of the Claimant without more", but that takes the matter nowhere since you are not told what the error is said to be.

Conclusion

[13] The application for a stay is hereby refused. The costs of this application shall be costs in the appeal.

[14] I am grateful for the assistance rendered by counsel for the first respondent in their written submissions. Despite CPR, PD No. 3 of 2008, and also the further directions given at case management on 23rd July 2009, no written submissions were received from counsel for the applicant.

Janice George-Creque
Justice of Appeal

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
MONTSERRAT

CLAIM NO. MNIHCVAP2018/0009

BETWEEN

THE ATTORNEY-GENERAL THE OFFICE OF THE PREMIER	APPLICANTS/ CLAIMANTS
AND	
ROVIKA INC. MANISH VALECHHA DENNISON DALEY	RESPONDENTS/DEFENDANTS

DRAFT ORDER

UPON READING the Application of the Claimants filed on the 28th day of November, 2018 and having heard Counsel for the Claimants and Counsel for the Defendants:

IT IS HEREBY ORDERED THAT:

1. Leave is granted to appeal the following interlocutory decisions made by the High Court on November 5, 2018:

   (a) To hear an application for extension of time to file a Defence which was filed on November 5, 2018 in Claim No. MNIHCV2018/0037 at the hearing of Claim No. MNIHCV2018/0032 on November 5, 2018;

   (b) To grant an extension of time to file a Defence in Claim No. MNIHCV2018/0037 *The Attorney-General and the Office of the Premier v Rovika Inc., Manish Valechha and Dennison Daley* in all the circumstances of the case;

2. The proceedings in Claim No. MNIHCV2018/0037 *The Attorney-General and the Office of the Premier v Rovika Inc., Manish Valechha and Dennison Daley* are stayed pending the hearing and determination of this interlocutory appeal.

3. This interlocutory appeal shall proceed as a summary appeal.

4. The Notice of Appeal is deemed to be filed.

Dated this ..... day of 2018

BY ORDER OF THE COURT
REGISTRAR

This document was filed by Renée A.R.D. Morgan, Senior Crown Counsel, on behalf of the Applicants/Claimants whose address for service is Attorney General's Chambers, Valley View, Brades, Montserrat. Tel. (664) 491 4686, Fax (664) 491 4687.

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNIMCRAP2018/0007

BETWEEN:

[1] RONDELL MEADE
[2] KARINA WEST
[3] JENNIFER MEADE

Appellants

and

THE COMMISSIONER OF POLICE

Respondent

CONSOLIDATED WITH:

MNIMCRAP2018/0008

KARINA WEST

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

MNIMCRAP2018/0009

RONDELL MEADE

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

MNIMCRAP2018/0010

JENNIFER MEADE

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Dame. Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]
The Hon. Mr. Terrence F. Williams — Justice of Appeal [Ag.]

Appearances:

Mr. Kharl Markham, with him Ms. Chivone Gerald for the Appellants, Mr. Rondell Meade and Ms. Jennifer Meade
Mr. David Brandt for the Appellant Ms. Karina West
Mr. Oris Sullivan, Director of Public Prosecutions for the Respondents

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2018: November 28.

Criminal appeal – Starting the case de novo, (anew) – Whether new Magistrate had the jurisdiction to try the case anew – Whether new Magistrate had jurisdiction to try the matter anew on original charges – Whether new criminal charges had to be laid for the de novo trial – Validity of criminal charges – Interlocutory appeal from Criminal matters – Criminal Procedure Code Cap 4.01 Revised Laws of Montserrat 2013 – Supreme Court Act Cap. 2.01 Revised Laws of Montserrat 2013 – Magistrates Court Act Cap. 2.02 Revised Laws of Montserrat 2013

REASONS FOR DECISION

Introduction

[1] **WILLIAMS JA [AG.]**: These consolidated appeals arose from the same proceedings at the Magistrate's Court and raised issues concerning interlocutory appeals to this Court from the Magistrate's Court in a criminal matter and the procedure in a case left part heard upon the ending of a magistrate's tenure. The facts of the case are unimportant for the determination of these issues.

[2] The appellants were charged on the 29th January 2015 with assaulting a police officer, indecent language, disorderly conduct, and damage to property. The trial started before Magistrate, His Honour Mr. Wickramasooriya on the 9th June 2015 but was adjourned on the 29th March 2016, at the instance of the prosecution who were desirous of appealing the Magistrate's decision not to admit disputed

evidence. On 16th May 2017 the prosecution withdrew their appeal.

[3] At the resumption of proceedings at the Magistrate's Court, Magistrate Wickramasooriya had demitted office and was replaced by the newly appointed Magistrate, Her Honour Ms. Chatoor. On the 1st June 2018, the incoming Magistrate took charge of the matter and decided that she would hear the case *de novo*. The appellants objected, arguing that for Magistrate Chatoor to have jurisdiction, new charges would have to be laid. The prosecution submitted that there was no need for new charges.

Background

[4] The appellants gave oral notice of appeal of the Magistrate's decision. The Magistrate stated a case which asked primarily whether her decision to assume jurisdiction on the existing charges was correct in law. These were the questions:

(a) Whether the decision taken in the case as stated above was correct in Law;

(b) If not, what is the correct interpretation?

(c) Given section 201 of the Criminal Procedure Code, if a matter is to begin de novo on a new complaint, what is the ultimate effect?

(d) Was the interpretation given to **Except where a longer time is specifically allowed by law**, correct;

(e) If this interpretation is incorrect how is it to be interpreted and what is the ultimate effect?

(f) Can a nolle prosequi be entered accompanied by a voluntary bill? (This being a procedure used in indictable matters)

[5] When these matters came up for hearing before this Court, the DPP submitted that the Court had no jurisdiction to hear the appeals. The appellants contended

that their appeals were brought pursuant to s. 242 of the **Criminal Procedure Code**[1] which provides:

> "242. (1) Save as hereafter in this Code provided, a person who is dissatisfied with a **judgment, sentence or order** of the magistrate's court in a criminal cause or matter to which he is a party may appeal to the Court of Appeal against the judgment, sentence or order either by motion on matters of law or fact (or both), or by way of case stated on a point of law only, as hereafter provided and the Court of Appeal shall have jurisdiction to hear and determine any appeal in accordance with the provisions of this Part." (Emphasis added)

[6] In oral submissions, the appellants stressed that their appeals were by motion and not by way of the case stated by the learned Magistrate. This is inconsistent with the written submissions filed on behalf of Rondell Meade, Jennifer Meade, and Karina West which, in the first paragraph, states "The Appeal is by way of case stated. The case stated was filed 21st June 2018". Nevertheless, there is no moment in this distinction as the grounds of appeal are fully consistent with the case stated.

[7] The Court asked the appellants to consider the DPP's objection and to explain why they contended that the incoming Magistrate could not try the matter on the original charges. The appellants eventually conceded that she could. The appeal was dismissed. This judgment explains this Court's reasons.

Interlocutory Appeals in Criminal Matters?

[8] The jurisdiction of the Eastern Caribbean Court of Appeal to hear appeals from criminal proceedings in the Magistrate's Court is governed, in addition to s.242 of the **Criminal Procedure Code**, by s. 30 of the **Supreme Court Act**[2] and by s. 108 of the **Magistrates Court Act.**[3] Section 242 is already set out above. These are the other provisions:

> "30. (1) Subject to the provisions of the Magistrate's Court Act, the Criminal Procedure Code and to rules of Court, an appeal shall lie to the

[1] Cap 4.01, Revised Laws of Montserrat, 2013.
[2] Cap. 2.01, Revised Laws of Montserrat 2002.
[3] Cap 2.02, Revised Laws of Montserrat, 2013.

Court of Appeal from any **judgment, decree, sentence or order** of a magistrate in all proceedings.

108. An appeal shall lie to the Court of Appeal from any **judgment, sentence or order** of the Magistrate's Court in any criminal cause or matter in accordance with, and subject to the provisions of Part 10 of the Criminal Procedure Code." (Emphasis added)

[9] The referenced sections all refer to appeals from "judgment, sentence or order", while s. 30(1) adds the word "decree". The crucial question is whether these sections, on their true construction, are confined to decisions of the Magistrate which are dispositive, i.e. which conclude the case, or whether they include any decisions that are made during the course of proceedings in the Magistrate's Court.

[10] The words "judgment, sentence, and order" clearly refer to the final decisions of a Magistrate. By the **Supreme Court Act**, s.2, "order" includes "decision and rule". In legal terms a "rule" is a declaration deciding on a point of law. In **R v Recorder of Oxford, Ex parte Brasenose College**[4] the decision of justices to dismiss a complaint was held to be an "order" for the purposes of s.31 and 72 of the **Offices, Shops and Railway Premises Act 1963**[5] permitting an appeal to Quarter Sessions as the justices were entitled to determine the complaint in this manner.

[11] In England and Wales s. 111(1) of their **Magistrates Court Act (1980)** provides:

"(1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the **conviction, order, determination or other proceeding** of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices com-posing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved; but a person shall not make an application under this section in respect of a decision against which he has a right of appeal to the High Court or which by virtue of any enactment passed after 31 December 1879 is final." (Emphasis added)

[12] Linguistically, section 111(1)'s "conviction, order, determination or other

[4] [1969] 3 All ER 428.
[5] Act of the Parliament of the United Kingdom.

proceeding" imports a broader access to appeal than the phrase "judgment, sentence or order" in the Montserratian statutory provisions extracted earlier. It shall shortly be explained that the Courts of England and Wales have construed s.111 (1), and its precursor, s.87 of the **Magistrates Court Act 1952**, to deny appeals of interlocutory decisions. The English authorities hold that applying for judicial review is the appropriate course. Determining the true construction and settling on the appropriate procedure is especially important in the instant case as although the England Wales Queen's Bench has jurisdiction, at first instance, in judicial review and, on appeal, from the Magistrates Court, this Court does not have first instance jurisdiction in judicial review.

[13] The appropriate starting point is the majority decision of the House of Lords in **Atkinson v. U.S. Govt.**.[6] The case concerned a committal for extradition which applied the ordinary rules for committal for local crimes. Their lordships opined that the statute was a consolidation of pre-existing law and that the phrase "conviction, order, determination or other proceeding" was to be construed as confined to final decisions. Lord Morris of Borth y Gest dissented. Lord Reid put it this way (at pg.235):

> "So the case for the respondents is that they were parties to the litigation in the magistrates' court and are therefore entitled to question the decision of the court by applying for a stated case. If this subsection is to have a limited meaning it must be because "conviction, order, determination or other proceeding" has a limited meaning. I think it must be limited at least to this extent: it frequently happens that a court has to make a decision in the course of the proceedings - e.g., whether certain evidence is admissible - but it cannot have been intended that the proceedings should be held up while a case on such a matter is stated and determined by the superior court. So application for a case can only be made when the litigation or "proceeding" is at an end. But, as Lord Goddard pointed out in Card v. Salmon [1953] 1 Q.B. 392, 396, examining magistrates do not come to a final decision. If they decide to commit for trial the case goes on, and if they decide not to commit that is not a ground for a plea of autrefois acquit."

[6] [1971] A.C. 197.

[14] Lord MacDermott agreed with Lord Reid without elaboration. Lord Guest, at page 244, and Lord Upjohn, at page 248, concluded that an appeal was only competent from a magistrate's final determination. They did so by interpreting "other proceeding" ejusdem generis with the words "conviction, order or determination" which, in their view, contemplated terminal decisions.

[15] In **Streames v. Copping**[7] the English Divisional Court was asked to consider whether s. 111(1) of their **Magistrates Court Act (1980)** permitted appeals of interlocutory decisions. In that case the defendant's counsel had unsuccessfully submitted to the justices that the informations were bad for duplicity. A case was stated to appeal that decision and the proceedings adjourned sine die awaiting the Divisional Court's determination. The Divisional Court held that there was no jurisdiction to hear interlocutory appeals in criminal matters.

[16] In **Streames v Copping** the respondent argued that "other proceeding" should be read ejusdem generis with the other expressions that imported final determination. The Court applied **Atkinson** and held that the section 111 conferred no power for an appeal until the justices had reached a final determination on a matter before them, and that the Court had no jurisdiction to hear the appeal as the Justices decision did not finally determine the proceedings before them. May, LJ reading the unanimous decision of the Court concluded (pages 928-929):

> "To summarise, I think that the legal position in this field is as follows. Where either party contends that justices have no jurisdiction to hear and determine an information or complaint, and the justices uphold that contention, then the remedy available to the party aggrieved is to ask for leave to apply for judicial review seeking a finding from the Divisional Court that the justices were wrong to decline jurisdiction and an order for mandamus directing them to hear the information or complaint. Where, upon such a contention, justices decide that they do have jurisdiction to hear and dispose of the matter, they should not accede to an application there and then by the party against whom they have decided to adjourn any further hearing and state a case on the jurisdiction point. They should in general proceed to hear and determine the matter before them on whatever evidence is adduced and then, if either party is dissatisfied, he

[7] [1985] QB 920.

can apply to the justices to state a case under section 111(1). The party against whom the justices decided that they did have jurisdiction at the outset of course always has the concurrent right to apply to the Divisional Court for leave to seek judicial review in the nature of prohibition. In some cases, if the party aggrieved did take that course, it might be desirable for the justices to adjourn their further hearing of the substantive matter until after the determination of the judicial review proceedings; in most cases, however, nothing will be lost if the justices do complete their hearing. It may be that on the facts they will decide the substantive issue in favour of the party contending that they had had no jurisdiction. If they do not, then all the issues can be determined by the Divisional Court on a case stated, at a substantial saving of time and money."

Apart from questions of jurisdiction, where justices are asked to, and do rule on a point of law in the course of a hearing before them - for instance, on a question of the admission of evidence, or the construction of a statute or document - they should not at that stage, with nothing more, accede to an application by the party against whom they have ruled for an adjournment and for them to state what I can describe as an "interlocutory" case. If they purport to do so, then for the reasons I have given I do not think that this court has jurisdiction to hear it. The justices, having made their ruling, should complete the hearing and determination of the matter before them, and then state a case thereafter if they are asked to do so. In a very special instance, if the party aggrieved sought and obtained leave to apply for prohibition, then the justices might be wise to adjourn the matter pending the hearing of the application for judicial review, but they should not state a case under section 111(1) until after their final de-termination of the information or complaint before them."

[17] A recent case on this point is **Highbury Poultry Farm Produce Ltd v Crown Prosecution Service; R (on the application of Highbury Poultry Farm Produce Ltd) v Telford Magistrates Court.**[8] Before the start of the defendant's trial at the Magistrates Court, the defendant raised a preliminary point as to whether the offence charged required proof of *mens rea*. The District Judge ruled that it did not. The defendant applied under s.111(1) for an appeal by case stated and for judicial review. The dual application was based upon the uncertainty as to the correctness of the decision in **Streames v Copping**.

[18] The Divisional Court applied **Atkinson** and **Streames v Copping** and reiterated

[8] [2018] EWHC 3122 (Admin), [2018] All ER (D) 80 (Nov).

that If the effect of the Magistrate's ruling being questioned was that the proceedings remained extant, an appeal under section 111 (1) was inappropriate. The Court distinguished its earlier decision in **R (oao Donnachie) v Cardiff Magistrates' Court**[9] which included dicta that a district judge had wrongly declined to state a case in circumstances where he had decided that various informations had been laid in time by noting *inter alia* that the comments were *obiter* and had not considered **Streames**. The Court also applied the reasoning in **Downes v RSPCA**[10] where it was held that an appeal by way of case stated was not the appropriate where the district judge had made a preliminary ruling to the effect that the charges were laid in time, and that the Magistrates' Court therefore had jurisdiction to consider them.

[19] We therefore concluded that s.242 of the **Criminal Procedure Code**, s. 30 **Supreme Court Act**, and s. 108 **Magistrates Code** only permit appeals to this Court from final decisions, i.e. decisions that finally adjudicate the matter. Appeals are not permitted from interlocutory rulings. Further, that it makes no difference whether the appeal is by motion or by case stated. Nevertheless, we next considered the primary issue of this appeal.

Can the Magistrate Try the Case de novo On the Existing Charges?

[20] The parties did not contest that the trial could continue upon the departure of the first Magistrate. The issue of contention was whether, for the *de novo* trial, new charges had to be laid. The issue is of real importance as new charges would be barred for exceeding the time limit for bringing charges.

[21] The answer may be found in the **Criminal Procedure Code** which provides, at s12.

> "A summons, arrest warrant, search warrant or other judicial process issued in due form under law by a Court, judge, magistrate or justice of the peace is valid in all parts of Montserrat without the need for further

[9] [2007] 1 WLR 3085
[10] [2018] 2 Cr. App. R. 3

> authentication, backing or endorsement by a person before execution, and shall remain valid although the person who issued it died or ceased to hold office."

It cannot be disputed that a charge is a "judicial process issued in due form under law by a Court, judge, magistrate" as, by s. 26 of the Code a Magistrate draws up the charge upon receiving a complaint.

[22] A prosecution commences once the charge is properly laid.[11] A summary criminal trial begins when the first witness is called. It is the trial, not the proceedings, which are terminated by the departure of a judge who had part heard the trial evidence.

[23] A Magistrate has jurisdiction to try summarily any person charged with a summary offence (Magistrates Court Act s. 22(iv)). How the Magistrate should treat with matters heard before another Magistrate was explained by the Privy Council in **Beswick v R**.[12] The appellant had pleaded guilty before Resident Magistrate, Her Honour Ms. Francis, and the case was adjourned for trial. On the next date the appellant appeared before another Resident Magistrate, His Honour Mr. Lopez. He changed his plea to guilty and was sentenced. Thereafter, he was summoned to appear before Ms. Francis whereupon his sentence was vacated, he was tried, and convicted. On appeal, the Jamaican Court of Appeal held that Mr. Lopez had no jurisdiction as he had "intermeddled" in a case that had been commenced by Ms. Francis. Thus, the proceedings before Mr. Lopez was a nullity. The Court of Appeal upheld the conviction by Ms. Francis.

[24] The appellant appealed to the Privy Council. Their lordships allowed the appeal. They opined that Mr. Lopez clearly had jurisdiction to have acted as he did. It would have been different if Ms. Francis had started to take evidence. In that event Mr. Lopez could not have simply continued the trial from where Ms. Francis left it,

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[11] Thorpe v. Priestnal (1897 1 QB 159.
[12] (1987) 36 WIR 318.

he would have to restart the trial and hear for himself all the evidence and witnesses.

Conclusion

[25] In conclusion on the instant appeals the answer to the first question stated is yes. The termination of the initial trial by the end of the original Magistrate's tenure did not affect the validity of the charges. Secondly, the incoming Magistrate Chatoor may restart the trial on the existing charges but must, of course, only rely on evidence examined or tendered before her. In the circumstances the other questions are no longer germane.

I concur.
Janice M. Pereira
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
MONTSERRAT

CLAIM NO. MNIHCVAP2018/0009

BETWEEN

THE ATTORNEY-GENERAL THE OFFICE OF THE PREMIER	APPELLANTS
AND	
ROVIKA INC. MANISH VALECHHA DENNISON DALEY	RESPONDENTS

FURTHER SUBMISSIONS FOR INTERLOCUTORY APPEAL

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THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
MONTSERRAT

CLAIM NO. MNIHCVAP2018/0009

BETWEEN

THE ATTORNEY-GENERAL THE OFFICE OF THE PREMIER	APPELLANTS
AND	
ROVIKA INC. MANISH VALECHHA DENNISON DALEY	RESPONDENTS

FURTHER SUBMISSIONS

I. The Decision

1. The decision appealed was not the simple exercise of case management discretion but rather involved:

   (a) refusal to apply Part 12 of the Eastern Caribbean Supreme Court Rules (the "Rules")
   (b) failure to consider Part 13 of the Rules and
   (c) several breaches of natural justice

   all of which were bolstered and underpinned by a misunderstanding and misapplication of the Rules and relevant case-law.

2. In this context, the Appellants further submit that:

   (a) The applicable threshold for success on appeal is whether there was a misapplication of the law by the judge below, rather than whether the judge was "plainly wrong".

   (b) Neither the overriding objective nor general case management powers should be abused to render specific Rules ineffective or void, which would be the result if the decision of the Court below is upheld;

   (c) The proper application of Parts 12 and 13, as specific Rules, would have meant that the default judgment application would have been heard first and granted, or at least would only have been heard simultaneously if the requirements for setting aside a default judgment under Rule 13.3 were met;

(d) The Respondents' arguments are premised on misapplication of the foreign jurisdictions' Civil Procedure Rules and case-law to the distinct Eastern Caribbean Supreme Court jurisprudence on our clearly distinct Rules. The Respondents further misapply the case-law concerning applications for permission to seek default judgment.

(e) The several breaches of natural justice could not be cured in the ways the Respondents suggest.

II. The Applicable threshold

3. The present appeal concerns findings of law. It does not concern either solely findings of fact or an exercise of judicial discretion based solely on findings of fact. Therefore, the applicable threshold for success on appeal is that the judge below misapplied the law, not that the judge was "plainly wrong".

4. The Respondents have asserted that the applicable threshold for success is that the judge was "plainly wrong". This erroneous assertion rests on authorities which are not applicable to the present circumstances. In those cases, the appellate courts, in setting this threshold, were addressing matters in which they had been asked to review either findings of fact by a first-instance judge or the exercise of judicial discretion based mainly on such findings of fact.

5. The Respondents have relied on *Beacon Insurance Company Limited (Respondent) v Maharaj Bookstore Limited (Appellant)* [2014] UKPC 21. Paragraphs 11 to 17 of that judgment, in the Respondents' submissions, which come under the sub-title "*The role of the appellate court*" are premised on the notion that the appellate court is reviewing findings of fact, not findings of law. This is evidenced by the following excerpts from those paragraphs:

(a) Paragraph 12

> "*It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'…This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts…Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. ..Occasions meriting appellate intervention would include when a trial judge failed to analyze properly the entirety of the evidence.*"

(b) Paragraph 13

> *"…the rule that a court of appeal will only rarely even contemplate reversing a trial judge's findings of primary fact….*
>
> *'This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges.'"*

(c) Paragraph 15

> *"…In McGraddie v McGraddie [2013] UKSC 58…Lord Reed…cited observations adopted by the majority of the Canadian Supreme Court in Housen v Nikolaisen [2002] 2 SCR 235…*
>
> *'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal…'."*

(d) Paragraph 16

> *"In Piglowska v Piglowska [1999] 1 WLR…Lord Hoffmann referred to the advantage that a judge at first instance had in seeing the parties and the other witnesses when deciding questions of credibility and findings of primary fact. He suggested that an appellate court should also be slow to reverse a trial judge's evaluation of the facts."*

6. It is clear also that the "discretion" referred to in *Piglowska v Piglowska* [1999] UKHL 27, also relied on by the Respondents was one exercised based on just such findings of fact that a trial judge could make which the appellate court would be loath to reverse. The headnote of this case in the Respondents' submissions states:

> *"In considering appeals related to the exercise of judicial discretion an appellate court had to bear in mind a number of factors: (i) the advantage which the first instance judge had in seeing the parties and the other witnesses; (ii) the exigencies of daily court room life…(iii) the exercise of the discretion under s 24 of the Matrimonial Causes Act 1973 in accordance with s 25 of the Act required the court to weigh up a large number of different considerations, and the appellate court had to be willing to permit a degree of pluralism in these matters (iv) there was a principle of proportionality between the amount at stake and the legal resources of the parties and the community which it was appropriate to spend on resolving the dispute. In in the instant case, the matter had been considered by five differently constituted tribunals, including the screening of*

appeals…In the instance case it was difficult to say that the judge had been plainly wrong in her findings"

7. The headnote for *Piglowska* makes it clear that discretion exercised below was one based on extensive findings of fact. It also indicates that the discretion was governed by the particular statutory factual considerations under the Matrimonial Causes Act 1973 in relation to which the Court of Appeal was minded, as a matter of policy, to admit "a degree of pluralism".

8. The threshold for a successful appeal in *Beacon Insurance v Maharaj* or *Piglowska* should not be applied to the instant appeal. This appeal deals with findings of law in terms of the Court's procedure in dealing with an application for extension of time where an application for default judgment was already set for hearing, and other findings of law. The Court of Appeal is not limited in the same way as those appellate tribunals as here there were no witnesses examined and there were limited findings of fact.

9. The judicial discretion that the appellate court was loath to disturb in *Piglowska* was therefore exercised on findings of fact such as only a first-instance judge could make.

10. The discretion exercised in *N'Dow v Homebase Ltd* [2002] EWCA Civ 1461, also cited by the Respondents, was entirely based on a finding of fact. At paragraph 3 of that judgment Keene LJ stated:

> *"The judge,,,applied the well established principles for the exercise of his discretion under the Employment Appeal Tribunal Rules for granting an extension of time. Those principles were set out by Lord Justice Mummery (as he then was) in United Arab Emirates v Abdul Gaffar [1995] ICR 65, 71-72…it is unnecessary to set out those principles in detail…**Suffice it to say they require an applicant to show a full, honest and acceptable explanation for the delay and they established that the time limit will be relaxed in only rare and exceptional cases.**"*

11. It can be seen that the discretion reviewed in *N'Dow* was based on a factual finding by the first-instance court as to whether the appellant had given an acceptable explanation for the delay that, on the facts, met the threshold of a "rare and exceptional case" within the context of employment law.

12. The discretion reviewed in *Director of Public Prosecutions v Leaford Washington Norman* [2017] JMCA Civ 15 was exercised in the absence of procedural rules (see paragraph 14 of the judgment). This would explain the appellate court's reluctance there to disturb the exercise of the discretion, which is quite different from this present matter in that the decision here was taken in a context of existing procedural rules.

13. However, the Jamaican Court of Appeal did make certain general observations concerning the role of the appellate court that apply here, stating, at paragraph 29 of the judgment, that:

> *"Interference can only be justified where it is proved that the learned judge misunderstood or misapplied the law; misconceived facts; or that there was a change in circumstances sufficient to show that the learned judge in exercise of his discretion was 'demonstrably wrong'"*

14. In *DPP v Washington* there was no relevant specific law that the judge below could be said to have misunderstood or misapplied. The Court of Appeal therefore endorsed the principles stated by McDonald-Bishop J, cited, at paragraph 31, in *The Hon Mrs Portia Simpson-Miller and Others v the Attorney-General of Jamaica* that:

> *"It is my view that he specific rules governing proceedings under the MACMA are needed so as to avoid controversy like this in the future. The special procedural regime is imperative because it is not a common occurrence within our jurisdiction…Clear guidance is, therefore, required.*
>
> *…It seems to me that in the absence of the Rules of Court for the conduct of proceedings under the MACMA, resort would have to be had, for the time being, to the existing practice and procedures governing applications to the Supreme Court for court orders coupled with the procedures relative to the taking of evidence from witnesses within the context of the general law of evidence. All this would be subject, of course, to the specific requirements of the MACMA; the discretion of the judge in hearing the evidence; and what is ultimately required in the interest of justice. The judge taking the evidence would have to be guided by his own professional judgment as to what is necessarily required to meet the ends of justice…"*

15. Therefore, the court acknowledged that, in the absence of procedural rules, the discretion of the judge would have to be relied upon, and the decision taken there, not being based on application of law, is equated with one based on findings of fact and exercise of the judge's professional judgment as to what was necessary. This was not thought to be a desirable position for the court to be in, but in the absence of "clear guidance" it was the best that could be done.

16. In cases closer to the present circumstances, such as *Dr. Miranda Fellows v Carino Hamilton Development Company Limited* HCVAP2011/006 at Tab F of our previous submissions filed on December 4, 2018, the Court of Appeal simply reviewed the matter to see whether the court below had misapplied the law. A similar approach was taken in *Attorney-General of Trinidad and Tobago v Keron Matthews* [2011] UKPC 38.

17. The Appellants therefore submit that the applicable threshold for this appeal is whether it can be shown that the learned judge misapplied the law.

III. Proper Relationship of the Overriding Objective and General Powers to Specific Rules

18. The Appellants submit that the Respondents' suggestion that the overriding objective or general powers of case management justify the decision taken would lead to an abuse of both. Case-law establishes that the overriding objective and the general powers of case management may not override specific Rules. This would be the effect if the decision complained of is upheld.

The Overriding Objective

19. In the Eastern Caribbean Court of Appeal judgment of *Kenrick Thomas v RBTT Bank Caribbean Limited* Civil Appeal No. 3 of 2005, Barrow JA stated at paragraph 10:

> *"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.* ***This 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."*

20. The Respondents have relied on *Karey Hugh Powell v Philbert Mullings* [2016] JMSC Civ 194 as being a case in which the Jamaican Supreme Court used the overriding objective to endorse non-application of Rule 13.3 of the Jamaican Civil Procedure Rules in setting aside default judgments. However, this authority is misapplied, because the overriding objective there was not applied in a way that endorsed the non-application of specific Rules.

21. In *Karey Hugh Powell* the Court summarized the test from the Jamaican Rules at paragraph 5 as being that the defendant seeking to set aside a default judgment should show the Court that he can successfully defend the claim on the facts and the applicable law, setting out his case, that there is a good explanation for the failure to file a response to the claim and that the application was made as soon as was reasonably practicable.

22. These criteria, on their face, appear to be the same as those in Rule 13.3(1) of the Eastern Caribbean Civil Procedure Rules. However, the actual Jamaican Rule 13.3(2) was not set out in the judgment, and perhaps has been misunderstood by the Respondents. The Jamaican Rule 13.3(2) is different from the Eastern Caribbean Supreme Court Rule 13.3 in that the only requirement for setting aside a default judgment is whether the defendant can show a real prospect of success. The other requirements in the Eastern Caribbean Supreme Court Rule 13.3 exist only as afterthoughts under the Jamaican Rules, and the decision is governed by the overriding objective.

23. This is shown by the reasoning of Sykes J (as he then was) in the Jamaican Supreme Court case Claim No. 2005 HCV 2868 *Sasha-Gaye Saunders v Michael Green et al.*

24. Sykes J stated in *Saunders* that:

> *"16. Shortly after the Civil Procedure Rules ("CPR") a number of cases came before the courts on this question of setting aside judgments properly obtained. The then rule 13.3 was framed as follows:*
>
> > *Where rule 13.2 does not 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 our that judgment had been entered;*
> > *(b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and*
> > *(c) Has a real prospect of successfully defending the claim.*
>
> *17. This provision was consistently interpreted by the Judges of the Supreme Court to mean that all conditions stated in three conditions had to be met before the discretion to set aside the judgment could be set aside (sic). This interpretation was confirmed by the Court of Appeal in Ken Sales & marketing Ltd v James & Company (A firm) SCCA No. 3/05 (delivered December 20, 2005), Harrison P. emphasized the defects of the past and welcomed the new approach at pages 5-6. The President accepted that these rules were to be interpreted more strictly than the previous law on setting aside. This rule was in response to the complaint that there was wholesale disregard of procedural rules by counsel and litigant. It was felt that the stringent new standard would produce greater alacrity on the part of litigants. The message was getting through and there was a small but perceptible change in litigation culture and we were heading in the right direction.*
>
> *18. There were complaints about the stringency with which the rules were being interpreted. The argument that won the day was that there was the risk of injustice to some deserving litigant.*
>
> *19. The response of the Rules Committee was to enact a new rule 13.3 which relaxes the law. Rule 13.3 now reads:*
>
> > *(1) The Court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.*
> > *(2) In considering whether to set aside or vary a judgment under the rule, the court must consider whether the defendant has:*
> > *(a) Applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.*

(b) Given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.

20. This new rule no longer has the strict gate keeping provisions as the previous rule 13.3. The lethargic litigant has been given new vigour to continue his old ways. Happily, the Committee did not embrace the liberality of the English rule on this point. The English rule reads:

(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –

(a) The defendant has a real prospect of successfully defending the claim, or

(b) It appears to the court there is some other good reason why –

(i) The judgment should be set aside or varied; or

(ii) The defendant should be allowed to defend the claim.

(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.

*21. The English rule provides two grounds for setting aside default judgments properly obtained. These two grounds are independent of each other. The first is whether there is a real prospect of success. The second is whether there is some other good reason. The rule then indicates that the court should consider whether the party has acted promptly. **By contrast, the new rule in Jamaica has only one ground and that is whether there is a real prospect of successfully defending the claim…***

…

*25. **Rule 13.3 does not set out the criteria to be used when deciding to set aside a judgment properly obtained. Rule 13.3(2) refers to two factors that must be considered by these factors do not and could not represent all the factors to be considered. In the absence of any stated criteria, I have to go back to rules 1.1(2) and 1.2.** The former requires, inter alia, that I have regard to saving of expense… **The latter requires that I seek to give effect to the overriding objective when interpreting or exercising any power under the rules."***

25. *Saunders* therefore explains, that in Jamaica, a default judgment is set aside based on one requirement being satisfied, a real prospect of success. There is some similar wording with the ECSC Rules in that the court should consider whether there is a good explanation for failure to file a defence and application made as soon as reasonably practicable. However, in Jamaica these are not requirements but afterthoughts to the question of whether there is a real prospect of success and only two of many

considerations, within the realm of the overriding objective, which may be taken into account.

26. This is the Rule and jurisprudence which the Jamaican Supreme Court in *Karey Hugh Powell* was bound by and followed. Therefore, the Court in *Karey Hugh Powell* could hold that there was no good explanation for the delay of counsel, attributable to the defendant, in filing the defence (see paragraph 25), yet invoke the overriding objective.

27. What is clear from *Saunders* is that the Jamaican Rules and jurisprudence admit a different approach to setting aside default judgments than the ECSC approach. Also, within the Jamaican jurisprudence, if the Jamaican Rules not been amended, there would have been a different result in *Karey Hugh Powell.*

28. Therefore, *Karey Hugh Powell* when properly read does not support the use of the overriding objective to ignore specific Rules but illustrates how overriding objective can be used to inform the exercise of a discretion given under the Rules.

General Case Management Powers

29. General case management powers in Part 25 also should not be called upon to circumvent the application of specific Rules.

30. General CPR Rules should not be used to override Rules that are specifically applicable to the circumstances (see *Vinos v Marks & Spencer plc* [2001] 3 All ER 784).

31. Part 25.1(f) which empowers the Court to determine the order in which issues are decided, is a general rule.

32. However, the circumstances below presented the Court with the applicability of Part 12 of the Rules, specific to default judgment applications.

33. The Appellants say that the literal meaning of Part 25.1(f) does not mean that the Court is empowered to change the order of applications.

34. The Appellants also say that the application of Part 25.1(f) advocated by the Respondents in this appeal should not be supported because it would lead to ignoring the plain meaning of Part 12 of the Rules.

35. In *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 at 789 the English Court of Appeal held that:

> ***"Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored."***

36. It is submitted that this dictum applies to general case management powers as well. General case management powers cannot enable specific Rules to be ignored.

IV. Proper Application of Parts 12 and 13 of the Civil Procedure Rules

37. In this case, the Court was aware that an application for default judgment had been filed. The overriding objective and general case management powers do not allow for the plain meaning of Part 12 to be ignored. It is submitted that these concepts also do not allow for the Court to use case management powers or the overriding objective to effectively dismiss an application for default judgment. This is ignoring the plain meaning of Rule 12.5, which speaks to the mandatory nature of default judgments sought as of right.

38. Further, the Rules do not speak to any intervention that is allowed for default judgment applications, except, once they are heard, setting aside under Part 13. This suggests that the process of filing for default judgment is not meant to be interrupted by other applications.

39. We note that in *Keron Matthews* the Privy Council did not remark negatively on the changing of the order of the applications. However, it is submitted that where the gatekeeping provisions of Part 13 are as stringent as in the present Rules, different reasoning would apply.

40. It is submitted that, given that Part 13 is the only guidance the Rules provide in terms of setting aside default judgments, that it should have been considered. Part 13 speaks only to setting aside default judgments after they are granted precisely because the implication of Parts 12 and 13 is that, once the default judgment application has been filed and should be granted of right, it will be granted and then it is left for the defendant to satisfy the requirements for setting aside. There is no provision in Parts 12 or 13 for the defendant to oppose the default judgment process in terms of the grant of the judgment itself where the criteria in Rule 12.5 are satisfied.

41. The Respondents' submissions would lead to the undesirable result that Part 12 would not, in effect, be applied for non-money judgments as such applications could potentially be defeated by applications for extensions of time determined at lower thresholds than the requirements for setting aside default judgments.

42. This, it is submitted, was not the intent of the Rules.

V. Misapplication of the Rules and Case-law

43. The Respondents' submissions are based on misapplication of case-law.

44. The Jamaican Rules on setting aside default judgments and the relevant case-law have been already reviewed.

45. The Trinidadian Rules on setting aside are different from both the Jamaican Rules and the ECSC Rules. The Trinidadian Rules require that a defendant wishing to set aside a default judgment show a real prospect of success and act as soon as reasonably practicable; the two criteria are treated as conjunctive (see *Francis Vincent v Merlene Vincent and AG* CV 2008-01217 at paragraph 5). It is to be noted that "reasonably practicable" is a lower threshold than "good explanation" in that it takes account of the busyness and inadvertence of attorneys. In *Vincent v Vincent* the Trinidadian Court noted (at paragraph 15) that:

> *"Reasonably practicable is 'a much lower standard and it acknowledges that there will be…glitches in the attorneys' office…that you may not get in…you might see an attorney and that is not his area of the law, he doesn't want to take it and he refers you to another attorney; you might go with no documents, it might be your first court matter…It's a less trying standard than, say, if you have to have an exceptional reason…'reasonably practicable' seems to me to suggest a more mundane type of standard that you will look at these things and the way things might work. Per Kangaloo JA in Rohini Khan.'"*

46. The ECSC Rules, by contrast, maintain what Sykes J in *Saunders* called strict gatekeeping (see paragraph 20 of *Saunders*). The Court of Appeal in *Kenrick Thomas* stated:

> *"…the provision of rule 13.3 of CPR 2000 is starkly dissimilar to the English provision. The Eastern Caribbean rule reads as follows:*
>
> *(1) If rule 13.2 does not 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 acknowledgement of service or a defence as the case may be; and*
>
> *(c) Has a real prospect of successfully defending the claim.*
>
> *[7] The appellant submitted that this provision specifies three conjunctive pre-conditions for setting aside. The submission is sound. 'Only if' can only mean that if the three matters are not present then the court may not set aside a default judgment. The difference between the English equivalent and the provision in CPR 2000 lies in the discretion. The discretion in the English CPR …is significantly unlimited…In contrast, the discretion in CPR 2000 is severely limited; it specifies three conditions that the defendant must satisfy before the court is permitted to set aside a default judgment.*

[10] ...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."

47. A review of the different Rules and case-law shows that the availability of discretion widens significantly in the other jurisdictions. Where there is a wider discretion, it is submitted, there is more room for insertion of the overriding objective. The width of the discretion available, it is submitted, underpins the reasoning of the courts outside the Eastern Caribbean in Trinidad and Tobago and Jamaica in considering setting aside default judgments, such as in *Karey Hugh Powell,* as well as determining whether a judge wrongly exercised that discretion in changing the order of applications in *Keron Matthews* and *Roland James.*

48. It is further submitted, in any event, that there is a distinction where the application is for permission to apply for default judgment, as in *Matthews.* The Appellants are not saying that this is another form of default judgment. However, the application for permission, where there defendant is a State, for instance, is a procedural barrier that shapes the process of obtaining default judgment differently than when it is obtainable as of right. **All the Civil Procedure Rules provide for interruption of the process of obtaining permission to apply for default judgment, in that such applications may fundamentally be opposed, but make no such provision for interruption of the process of applying for default judgment as of right.**

49. These distinctions, should, it is submitted, be borne in mind in considering whether to apply this jurisprudence to the Eastern Caribbean. Otherwise, several inconsistencies would result, in that a non-money default judgment would no longer be obtainable as of right. Such judgments would also be liable to being defeated before they are granted by a simple application for extension of time, decided on the basis of a much wider discretion than now exists in Rule 13.3. This is clearly not the intent of the rule makers in setting and retaining Rule 13.3 as it now exists in the ECSC Civil Procedure Rules.

VI. Natural Justice

50. Further, the Appellants have highlighted several breaches of natural justice.

51. The Appellants submit that these breaches should be corrected, and that it is not suitable, as the Respondents appear to be saying, in response to such breaches to say that the Appellants may appeal. That, in our view, underscores the inappropriateness of the procedure used below, including service of the application for extension of time in Court and then hearing the application at the same time.

52. Also, the Appellants submit that, on interpretation of the dictum of Saunders JA(as he then was) in *St Kitts Anguilla Nevis Bank* that it was clear that logic was not being separated from chronology when he opined that "Chronologically and logically" one application should have allowed to go in order as filed before the other.

53. The Appellants say also that, if logic here is be considered, in *St Kitts Anguilla Nevis Bank* the Court was saying that the application for striking out should be heard first because it would bring the suit to an end. Applications for striking out are considered the "nuclear option" (see paragraph 17, *Real Time Systems Limited (Respondent) v Renraw Investments Limited*) as their effect is to shut out a litigant without having a day in court. Yet, according to the Court, the logic of the matter meant that this was to be pursued first, precisely because it would have brought the suit to an end.

54. Therefore, logic would also require, in this case, that the application for default judgment, where it is filed first, be heard by the Court first, as it would also have brought the matter to an end.

55. The Appellants have sought default judgment against the Respondents. The procedure used below was punitive towards the Appellants in that it interrupted their access to a default judgment which, in the circumstances, they were going to obtain. It is not simply that the Respondents have been allowed to file a defence, but rather that the Appellants have been deprived of a default judgment, which, on their part, was "something of great value" (see paragraph 24, *Saunders*).

56. Further, the Rules did not provide for the application for default judgment to be so interrupted. The Appellants submit that the decision below puts the law in a state of uncertainty by allowing foreign jurisprudence based on different Rules, abuse of the overriding objective and abuse of case management powers to interfere with the deliberately chosen Rules in the Eastern Caribbean Supreme Court and its jurisprudence.

Dated this the 18th day of January, 2019

Renée A. R. D. Morgan
Legal Practitioner for the Appellant

This document was filed by Renée A.R.D. Morgan, Senior Crown Counsel, on behalf of the Appellant whose address for service is Attorney General's Chambers, Valley View, Brades, Montserrat. Tel. (664) 491 4686, Fax (664) 491 4687.

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.3 OF 2005

BETWEEN

KENRICK THOMAS

Appellant

and

RBTT BANK CARIBBEAN LIMITED
[Formerly Caribbean Banking Limited]

Respondent

Before:
The Hon. Mr. Denys Barrow, SC — Justice of Appeal

On Written Submissions
Marks Martin & Associates for the Appellant
Hughes and Cummings for the Respondent

2005: October 13;

JUDGMENT

[1] **BARROW, J.A.**: This appeal from the Master's decision to set aside a default judgment spotlights the differences between the provisions for setting aside judgment contained in the English **Civil Procedure Rules** (**CPR**) and the **Civil Procedure Rules 2000** (**CPR 2000**) of the Eastern Caribbean Supreme Court.

[2] Rule 13.3 of the English **CPR** reads as follows:

> "(1) In any other case the court may set aside or vary a judgment entered under Part 12 if (a) the defendant has a real prospect of successfully defending the claim; or (b) it appears to the court that there is some other good reason why a judgment should be set aside or varied.
>
> "(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether

the person seeking to set aside the judgment made an application to do so promptly"

[3] The English practice on setting aside, under the former **Rules of the Supreme Court** (RSC), was comprehensively discussed in **Thorn Plc v Macdonald** [1999] WL 809060 (CA (Civ Div)), C.P.L.R. 660, 10-15 1999 Times 809.060). A major plank in the decision was the court's express rejection of the notion that the absence of a good reason for delay in applying to set aside is always and in itself sufficient to justify the court in refusing to exercise its discretion. After making that express pronouncement Brooke LJ concluded:

> "Considering the matter afresh, bearing in mind that the defendants have shown on the face of it a triable defence, that the claimants would suffer minimal prejudice, and that the delay was only a delay of nine days, and also taking into account the fact that the defendants have given no reason for that nine day delay, I am completely satisfied that justice demands that this default judgment is set aside and the appeal allowed." [1]

[4] The judge went on to consider, obiter dicta, the position that would obtain under the English **CPR** (which did not apply to that case) and stated:

> "I can see nothing in rule 13.3 or in the overriding objective in Part 1 to suggest that, if a defendant does not give a reason for the delay, that is somehow or other a knockout blow, on which a claimant is entitled to rely in support of an irresistible submission that there is no material on which the court can exercise its discretion in the defendants' favour."[2]

[5] Rule 13.3 (2), by specifying promptitude of the application to set aside as one of the matters to which the court must have regard, implies that there are other matters to which the court may have regard in considering whether to set aside. These other matters are unspecified and, therefore, are at large. It is left to the court's discretion to decide what matter is relevant and what weight is to be given to a matter. This is reflected in the observation of Brooke LJ in the **Thorne** case:

> "The fact that the defendants have given no reason for a delay is, of course, one of those matters which a court may wish to take into account if there is a long, unexplained delay, and if the claimant would be prejudiced, if judgment were set aside."[3]

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[1] Paragraph 32 of Judgment Thorn plc v Macdonald (ibid)
[2] Paragraph 44 of Judgment Thorn plc v Macdonald (ibid)
[3] Paragraph 45 of Judgment Thorn plc v Macdonald (ibid)

No judicial discretion is absolute, of course, but the discretion under rule 13.3 of the English CPR seems fairly wide.

[6] Notwithstanding the similarity in numbering, the provision of rule 13.3 of **CPR 2000** is starkly dissimilar to the English provision. The Eastern Caribbean rule reads as follows:

> "(1) If rule 13.2 does not 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 as the case may be; and
>
> (c) has a real prospect of successfully defending the claim."

[7] The appellant submitted that this provision specifies three conjunctive pre-conditions for setting aside. The submission is sound. "Only if" can only mean that if the three matters are not present then the court may not set aside a default judgment. The difference between the English equivalent and the provision in CPR 2000 lies in the discretion. The discretion in the English CPR is Rule 13.3 significantly unlimited; it specifies only one matter to which the court must have regard and does not even make fulfilment of that matter a condition that the defendant must satisfy. In contrast, the discretion in CPR 2000 is severely limited; it specifies three conditions that the defendant must satisfy before the court is permitted to set aside a default judgment.

[8] In his written decision the Master found that the defendant had not applied promptly to have the judgment set aside. He also found that the explanation of the defendants that they had needed additional time to research the defence to be less than convincing as a reason for delay in defending in time. Nonetheless, the Master concluded:

> "Despite these however I considered that the draft defence disclosed a good defence. I considered CPR 2000 part 13.3 but decided that, based

on the case of Thorne v McDonald PLC (sic), that I would exercise my discretion in favour of the defendant upon payment to the claimant of the costs thrown away."

[9] In my view, having decided that the defendant had failed to satisfy two of the three conditions that Part 13.3 (1) of **CPR 2000** specifies a defendant must satisfy, it was not open to the Master to set aside a judgment that the rule says may be set aside only if the three conditions are satisfied. The obiter dicta pronouncement in **Thorne** rested upon the scope of the English provisions. The discretion to proceed as **Thorne** suggests does not exist under the relevant provisions of **CPR 2000**.

[10] 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. This court has clarified that the overriding objective does not allow the court to ignore clear rules.[4] 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[2] 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 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.

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[4] Kenneth Harris v Sarah Gerald (unreported) Civil Appeal No. 3 of 2003

[2] See Supreme Court Practice 1999 Volume 1, "...the major consideration is whether the Defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false, citing Vann v Awford (1986) 83 L. S. Gaz 1725; (1986) The Times, April 23 CA.

[11] In the circumstances I allow the appeal and reverse the Master's order setting aside the judgment in default of defence. The judgment is accordingly restored. The respondent must pay costs of $XXX to the appellant.

Denys Barrow, SC
Justice of Appeal [Ag.]

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2005 HCV 2868

BETWEEN	SASHA-GAYE SAUNDERS	CLAIMANT
AND	MICHAEL GREEN	FIRST DEFENDANT
AND	WENDEL HART	SECOND DEFENDANT
AND	ARMAN WHITE	THIRD DEFENDANT
AND	MICHAEL BAILEY	FOURTH DEFENDANT

IN CHAMBERS
Duane Thomas instructed by Thomas and Company for the claimant
Kadia Wilson instructed by Taylor, Deacon and James for the second defendant

February 8, 12 and 27, 2007
APPLICATION TO SET ASIDE JUDGMENT, RULE 13.3 OF THE CIVIL PROCEDURE RULES

SYKES J.

1. This is an application by Mr. Wendel Hart, the second defendant, to set aside a default judgment that was properly entered against him. He failed to file an acknowledgment of service as well as a defence within the required time and there was no extension of time. Judgment was entered against him on March 27, 2006.

2. This is the background to the entry of judgment. On February 10, 2005, Miss Saunders, a young lady of nineteen years and on the threshold of adulthood was a passenger in a public passenger vehicle, namely, a Toyota Coaster Motor Bus bearing registration number PB 5837 driven by Mr. Michael Green, the first defendant. Mr. Hart is the owner and operator of the bus. The bus collided with a motor car, bearing registration number 5995 DG, driven by Mr. Michael Bailey, the fourth defendant, and owned by Mr. Arman White, the third defendant. Judgment was entered against the fourth defendant as well.

3. The accident occurred on 2E Main Road in Greater Portmore, in the vicinity of an intersection. It is agreed that the motor car drove from the minor road on to the road in which the bus was travelling. During the case management conferences held since last year, Miss Saunders and Mr. Bailey, the driver of the car, have maintained that Mr. Green the driver of the bus was speeding. Miss Saunders goes further and alleges that he was racing with another bus; travelling at high speeds with the door open and on impact she was thrown from the bus, through the open door and received serious injuries. Mr. Green has denied all of these allegations.

He says he was travelling within the speed limit, with the door closed and it was the car that struck his vehicle and caused it to overturn, thereby causing the injury to Miss Saunders. Mr. Hart was not at the scene of the accident and from his proposed defence he is simply relying on Mr. Green's proposed evidence.

4. Miss Saunders' right arm has been badly injured. I have been advised that the neurological damage is so severe that modern surgical techniques can do very little for her.

5. Mr. Hart's liability is derivative, that is, his liability depends on whether Mr. Green is found liable at the trial to come. There is no independent basis of liability. This fact has played a large part in my decision to set aside the judgment. I now turn to the applicable law.

The affidavit evidence

6. Mr. Carlton Manning, a process server swore in an affidavit that he personally served Mr. Wendell Hart at 7 Hampton Crescent, Kingston 3, in the parish of St. Andrew on February 5, 2006, at 3:30pm. Mr. Hart was not known to him before but he (Hart) acknowledged that he was Mr. Hart and accepted service.

7. Mr. Hart, in an affidavit dated October 5, 2006, in support of an application to set aside judgment, claims that he was not served with the claim form and particulars of claim but they came to his attention on February 8, 2006. He said that after he was aware of the claim form and particulars of claim he filed an acknowledgment of service on March 29, 2006.

8. He filed a second affidavit on November 3, 2006, in which he says that his place of abode is 305 5 West, Greater Portmore, St. Catherine but his mailing address in 7 Leithrim Avenue, Vineyard Town, Kingston 3. This address is quite different from that at which the process server said that he served Mr. Hart. 7 Leithrim Avenue, according to Mr. Hart, is the address of his mother. According to him, he got the documents and took them to N.E.M. Insurance Company ("NEM") three days after he became aware of them. This would be February 11, 2006. He does not say why he took them to NEM three days later. He says that he was told by Mr. Joseph Murray, an officer at NEM, that the documents were mislaid and this resulted in the acknowledgment of service being filed on March 29, 2006. He adds that the acknowledgment of service should have been filed by February 22, 2006, and the defence by March 22, 2006. This is not so, the acknowledgment should have been filed by February 19, 2006.

9. I observe that in none of the applications for setting aside the judgment was it never a ground that Mr. Hart was not served. It was not in the original application filed on October 6, 2006, and neither was it a ground in the amended application filed November 3, 2006. It does seem odd that a litigant who has a ground that

would, if established, secure the result he desires chooses a more difficult route. Non-service goes to the root of any judgment obtained in default of acknowledgment of service or defence. If judgment was obtained in such circumstances, it would have to be set aside as of right. Why rely on a discretionary power when the more direct and obvious one is available? This conduct is more consistent with the assertion by the process server that Mr. Hart was served personally. I therefore find that Mr. Hart was served at the time, place and manner indicated by the process server.

10. Mr. Hart is seeking to absolve himself of any responsibility by placing all the blame on NEM. This is no excuse at all. Mr. Hart is the person sued. It is his servant or agent who is alleged to have committed a tort. Mr. Hart has a responsibility to see that he complies with the court procedures. The documents that accompany the claim form and particulars of claim are in the plainest of language. It spells out the consequences of failure to file an acknowledgment of service or a defence. There is no evidence that Mr. Hart is illiterate or has any comprehension difficulties.

11. Mr. Hart has failed to indicate what communication he had with NEM between February 8, 2007, when he claims he got the claim form and particulars of claim and the date of judgment was entered. There is no evidence that he was in consistent contact with NEM or Mr. Murray to prompt them to act. In my view, Mr. Hart received the documents and did nothing much after that. As is customary, it is the knowledge that judgment has been entered that brings him to court.

12. There is credible evidence showing that NEM was told of the proceedings from as early as September 2005, when a notice of proceedings was served on them by the claimant's former attorneys. The claimant has done all required of her. She had Mr. Hart and the insurers properly served with the requisite documents.

13. Mr. Hart said in his affidavit filed November 3, 2006, that he was not served with the claimant's change of attorney. That is not true because it was sent by registered post to his address at which he was served, namely, 7 Hampton Crescent, Kingston 3. Proof of this was furnished by the registered slip dated March 17, 2006. There is no evidence that the registered article was returned unclaimed.

14. Mr. Hart adds that he did not know of the interlocutory judgment entered against him until October 3, 2006. According to him NEM had instructed the firm of Taylor, Deacon and James to appear for him by virtue of its subrogation rights under the contract of insurance. If I understand Mr. Hart, he knows nothing, did nothing because NEM was doing everything. If this is the position then NEM's knowledge must be his knowledge. There is no evidence that NEM did not know of the judgment in default of acknowledgement of service. I therefore conclude that

Mr. Hart knew of the judgment from at least the first case management conference held on August 4, 2006. Mr. Hart was represented by counsel at the case management conference held on July 13, 2006. Mr. Hart's position is that the attorney was there at the behest of NEM which was exercising its subrogation rights. The implicit argument being that the attorney did not represent him. That is unacceptable. As far as I am concerned Mr. Hart was properly represented by counsel and counsel's knowledge is his knowledge. Using August 4, 2006, as the date of knowledge, the application to set aside was made quite late. The time lapse between August 4, 2006, and October 6, 2006, is too long to be ignored. In the modern era of civil litigation where there is much emphasis on speed and efficiency, that time lapse is inordinate. It is reflective of a culture of lassitude and sluggishness, the implacable enemies of the new ethos propounded by the new rules.

15. The defence relied on by Mr. Hart is that Mr. Green was not negligent and if he was not negligent then Mr. Hart cannot be liable. He adds that there is still time to meet the trial date if the defence were allowed to come in at this stage and since there still has to be a trial in respect of the liability of Mr. Green, he should have the judgment set aside. I now turn to the law.

The amended rule 13.3 of the Civil Procedure Rules

16. Shortly after the Civil Procedure Rules ("CPR") a number of cases came before the courts on this question of setting aside judgments properly obtained. The then rule 13.3 was framed as follows:

> *Where rule 13.2 does not 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 as the case may be; and*
>
> *(c) has a real prospect of successfully defending the claim.*

17. This provision was consistently interpreted by the Judges of the Supreme Court to mean that all conditions stated in three conditions had to be met before the discretion to set aside the judgment could be set aside. This interpretation was confirmed by the Court of Appeal in ***Ken Sales & Marketing Ltd v James & Company (A firm)*** SCCA No. 3/05 (delivered December 20, 2005), Harrison P.

emphasized the defects of the past and welcomed the new approach at pages 5 - 6. The President accepted that these rules were to be interpreted more strictly than the previous law on setting aside. This rule was in response to the complaint that there was wholesale disregard of procedural rules by counsel and litigant. It was felt that the stringent new standard would produce greater alacrity on the part of litigants. The message was getting through and there was a small but perceptible change in litigation culture and we were heading in the right direction.

18. There were complaints about the stringency with which the rules were being interpreted. The argument that won the day was that there was the risk of injustice to some deserving litigant.

19. The response of the Rules Committee was to enact a new rule 13.3 which relaxes the law. Rule 13.3 now reads:

> *(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.*
>
> *(2) In considering whether to set aside or vary a judgment under the rule, the court must consider whether the defendant has:*
>
> *(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.*
>
> *(b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.*
>
> *(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.*

20. This new rule no longer has the strict gate keeping provisions as the previous rule 13.3. The lethargic litigant has been given new vigour to continue his old ways. Happily, the Committee did not embrace the liberality of the English rule on this point. The English rule reads:

> *(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if--*
>
> *(a) the defendant has a real prospect of successfully defending the claim, or*
>
> *(b) it appears to the court there is some other good reason why --*
>
> *(i) the judgment should be set aside or varied; or*
>
> *(ii) the defendant should be allowed to defend the claim.*
>
> *(2) in considering whether to set aside or vary a judgment*

entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.

21. The English rule provides two grounds for setting aside default judgments properly obtained. These two grounds are independent of each other. The first is whether there is a real prospect of success. The second is whether there is some other good reason. The rule then indicates that the court should consider whether the party has acted promptly. By contrast, the new rule in Jamaica has only one ground and that is whether there is a real prospect of successfully defending the claim. I need to point this out because the change in the rule has led to the erroneous view that we are back in the bad old days of litigation when the defendant could apply even at the eleventh hour to have the judgment set aside and the only question would be whether he had a good defence on the merits.

22. In the new rule 13.3 the sole question is whether there is a real prospect of successfully defending the claim. This test of real prospect of successfully defending the claim is certainly higher than the test of an arguable defence (see ***ED&F Man Liquid Products v Patel & ANR*** [2003] C.P. Rep 51). Real prospect does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the court, where available, to look at contemporaneous documents and other material to see if the prospect is real. The court pointed out that while a mini-trial was not to be conducted that did not mean that a defendant was free to make any assertion and the judge must accept it. This, in my view, is good sense and good logic. Lord Justice Potter said at paragraph 10:

However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable...

23. This passage should be noted with great care. It is clearly suggesting that the judge must conduct some evaluation of the proposed defence and decide whether it has a real prospect of success. If the defence has substantial contradictions then that may be an indication that the prospect of success is not real. In another case, documentary evidence may make it very difficult for the defence to succeed. So too may expert evidence. Thus in spite of the greater relaxation of the rules it would be grave mistake to think that a defendant, without much thought, can simply cobble a defence and all will be well.

24. I should also point out that rule 13.3 (2) says that the court must consider the factor set out in that paragraph. This would suggest that in the absence of some explanation for the failure to file the acknowledgment of service or the defence, the prospect of successfully setting aside a properly obtained judgment should diminish some what. Similarly, if the application is quite late, then that would have a negative impact of successfully setting aside the judgment. This approach is consistent with recognising that a claimant who has properly secured judgment has something of great value. This value in Jamaica is enhanced by the certain knowledge that a successful application to set aside judgment translates into a twenty four month to forty eight month wait for the trial to take place. In that time the claimant bears the risk of losing witnesses and evidence might not be available at the date of trial. During that time he has to incur the costs of retaining counsel. There is the stress and anxiety of waiting for the trial.

25. Rule 13.3 does not set out the criteria to be used when deciding to set aside a judgment properly obtained. Rule 13.3 (2) refers to two factors that must be considered but these factor do not and could not represent all the factors to be considered. In the absence of any stated criteria, I have to go back to rules 1.1 (2) and 1.2. The former requires, inter alia, that I have regard to saving of expense, ensuring that the case is dealt with expeditiously and fairly and consumes its appropriate share of resources. The latter requires that I seek to give effect to the overriding objective when interpreting or exercising any power under the rules.

26. There is a discussion in the case I am about to cite that is helpful to the resolution of the case before me. That is the case of ***Salfraz Hussain v. Birmingham City Council, Coral George Coulson, Governors of Small Heath Grant Maintained School*** [2005] EWCA Civ 1570 (delivered February 25, 2005). In that case, the claimant sued a number of defendants after falling from a window of a building in which he was attending martial arts classes. Judgment was entered against one of the defendants who defaulted by not filing an acknowledgment of service or defence. The particular defendant applied to have judgment set aside. The Court of Appeal accepted that he did not act promptly in applying to set aside the judgment but he did have a defence that had a real prospect of success. The court found that had the default judgment stood the trial court would still have to explore issues had the defendant participated. In other words, his non-participation did not relieve the court from exploring factual issues which involved that particular defendant. The Court of Appeal distinguished the situation before the court from that in which a single defendant was sued and a judgment in default of either acknowledgment of service or defence would mean that there would be no trial if the judgment stands. Lord Justice Chadwick said at paragraph 36:

But it must be kept in mind that discretionary powers are to not to be exercised in order to punish a party for incompetence -- they must be exercised in order to further the overriding objective.

27. I conclude from the decision, that in cases where there are multiple defendants and a default judgment has been entered against one and that judgment does not relieve the court, at any subsequent trial, from exploring issues directly involving that particular defendant, the court should favourably consider any application to set aside judgment provided this can be done without serious risk of injustice to the claimant. The risk of injustice to the claimant must be considered because justice cannot be for the defendant alone or for one party. The court should also consider whether conditions ought to be imposed to minimise any harm to the claimant if there is such a risk. I have deliberately stated the principle this narrowly since any wider statement may receive the unwanted warm embrace of the dilatory and slothful litigant.

28. This decision of the English Court of Appeal is consistent with my view of how the rule ought to be applied. The application of the rule to any given set of facts requires that the overriding objective be kept in view and the judge must make a serious effort to ensure justice between the litigants.

Application to facts

29. There are a number of factors to be acknowledged. In this particular case, Mr. Green and Mr. White have filed defences and a trail date has been set for October 29, 30 and 31, 2008. The issue at trial involves the issue of whether Mr. Green was negligent. If he was not, then there is no liability in the defendant against whom judgment has been entered. The claimant has already received an interim payment in excess of JA$4,500,000.00. Mr. Bailey has not sought to set aside judgment although he has appeared at the case management conference held on July 13, 2006. Mr. Bailey admitted his negligence. He said that he thought he could have crossed the road on which the bus was travelling before it came to where he was. In that assessment, he was mistaken. The defence of Mr. Arman White is that Mr. Bailey was not his servant or agent at the time of the accident.

30. I have also considered the explanation advanced by Mr. Hart for the delay in applying to have the judgment set aside as well has his explanation for the failure to file an acknowledgement of service and defence. I find the explanations unsatisfactory and had there been an independent basis of liability I would not have set aside the judgment but the circumstance here compels me to do so.

31. The position is that only Mr. Green is contesting the way in which the accident occurred. Since that is the case, then it would seem that Mr. Hart ought to be permitted to defend the claim since it cannot be said that Mr. Green's defence has no reasonable prospect of success. Therefore it cannot be said that Mr. Hart's

defence has no real prospect of success. Mr. Hart's liability is contingent on Mr. Green's and there can be no injustice to the claimant if the judgment is set aside. I say this because, the practice in circumstances like this is to await the trial at which time damages are assessed as part of the trial. It is for these reasons I have decided to set aside the judgment and permit the defence filed on March 29, 2007, to stand. Costs of $40,000.00 to the claimant to be paid on or before March 15, 2007.

Vinos v Marks & Spencer plc

COURT OF APPEAL, CIVIL DIVISION
PETER GIBSON AND MAY LJJ
8 JUNE 2000

Claim form – Service – Extension of time for service – Whether court having general power to extend time for service of claim form where application for extension made after expiry of time prescribed for service – CPR 1.2, 3.1(2), 3.10, 7.6(3).

The claimant, V, suffered injuries in an accident at work. After lengthy negotiations with the defendant's insurers had failed to produce a final settlement, V's solicitors issued proceedings about a week before the expiry of the limitation period. Due to an oversight, however, they did not serve the claim form until nine days after the expiry of the four-month period prescribed by the CPR. V subsequently applied for an extension of time for serving the claim form, while the defendant applied to set aside service. Under CPR 7.6(3)[a], where a claimant applied for an order to extend the time for service of the claim form after the end of the prescribed period for service, the court could make such an order 'only if' (a) the court had been unable to serve the claim form, or (b) the claimant had taken all reasonable steps to serve the claim form but had been unable to do so, and (c) in either case, the claimant had acted promptly in making the application. The district judge held that he had no discretion to extend time since the case fell outside paras (a) and (b) of r 7.6(3). Accordingly, he dismissed V's application and granted the defendant's application. The district judge's decision was upheld by the circuit judge, and V appealed to the Court of Appeal. On the appeal, V accepted that he could not rely on r 7.6(3) or on r 3.1(2)[b] which gave the court a power to grant a post-expiry application for an extension of time for complying with a rule except where the CPR provided otherwise. He nevertheless contended that the court had power to grant the extension under CPR 3.10[c] which provided that where there had been an error of procedure, such as a failure to comply with a rule, the court could make an order to remedy the error. In particular, V contended that r 3.10 contained a general power to rectify matters where there had been an error of procedure, that a failure to serve the claim form within the prescribed period was an error of procedure and that the only restriction on the power in r 3.10 was that to be derived from the CPR's overriding objective, namely to enable the court to deal with cases justly. Alternatively, he contended that r 1.2[d], which required the court to give effect to the overriding objective when interpreting any rule, meant that any conflict or ambiguity between rr 3.10 and 7.6(3) was to be resolved by a liberal interpretation of r 3.10 which achieved the overriding objective.

Held – Where a claimant, after the expiry of the time limit for serving a claim form, applied for an order extending the time for service, the court had no power

a Rule 7.6(3) is set out at p 787 *c d*, below
b Rule 3.1 provides, so far as material: '… (2) Except where these Rules provide otherwise, the court may—(a) extend … the time for compliance with any rule … (even if an application for extension is made after the time for compliance has expired) …'
c Rule 3.10 is set out at p 788 *g*, below
d Rule 1.2 provides: 'The court must seek to give effect to the overriding objective when it—(a) exercises any power given to it by the Rules; or (b) interprets any rule.'

to make such an order if the circumstances fell outside CPR 7.6(3). The general words of r 3.10 could not extend to enable the court to do what r 7.6(3) expressly forbade, nor to extend time when the specific provision of the rules which enabled extensions of time specifically did not extend to making that extension of time. Interpretation to achieve the overriding objective did not enable the court to say that provisions which were quite plain meant what they did not mean, nor that the plain meaning should be ignored. Even though r 3.10 differed from r 3.1(2) in not having wording to the effect of 'except where these rules provide otherwise', that was too slight an indication to make r 3.10 override the unambiguous and restrictive conditions of r 7.6(3). Accordingly, the appeal would be dismissed (see p 789 *g* to *j*, p 791 *e*, p 792 *a* to *c*, below).

Cases referred to in judgments

Amerada Hess v Rome [2000] TLR 185.

Boocock v Hilton International Co [1993] 4 All ER 19, [1993] 1 WLR 1065, CA.

Cases also cited or referred to in skeleton arguments

Baker v Bowketts Cakes Ltd [1966] 2 All ER 290, [1966] 1 WLR 861, CA.

Battersby v Anglo-American Oil Co Ltd [1944] 2 All ER 387, [1945] KB 23, CA.

Biguzzi v Rank Leisure plc [1999] 4 All ER 934, [1999] 1 WLR 1926, CA.

Bua International Ltd v Hai Hing Shipping Co Ltd, The Hai Hing [2000] 1 Lloyd's Rep 300.

Doble v Haymills (Contractors) Ltd (1988) 132 SJ 1063, CA.

Easy v Universal Anchorage Co Ltd [1974] 2 All ER 1105, [1974] 1 WLR 899, CA.

Heaven v Road and Rail Wagons Ltd [1965] 2 All ER 409, [1965] 2 QB 355.

UCB Corporate Services Ltd v Halifax (SW) Ltd [1999] CPLR 691, CA.

Appeal

The claimant, Michael Vinos, appealed with permission of Judge McDowall from his decision at the Ilford County Court on 8 December 1999 dismissing Mr Vinos' appeal from the decision of District Judge Thomas on 17 November 1999 whereby he (i) dismissed Mr Vinos' application for an order extending time for the service of the claim form in his action for personal injuries against the defendants, Marks & Spencer plc, and (ii) granted the defendants' application for an order setting aside service of the claim form. The facts are set out in the judgment of May LJ.

Oliver Peirson (instructed by *Cornish & Co*, Essex) for Mr Vinos.

Timothy Lord (instructed by *Beachcroft Wansboroughs*) for the defendants.

PETER GIBSON LJ.

1. May LJ will give the first judgment.

MAY LJ.

2. This is an appeal from a decision and orders of Judge McDowall in the Ilford County Court on 8 December 1999. The judge then dismissed the claimant's appeal from the decisions of District Judge Thomas made on 17 November 1999.

3. The appellant, Mr Vinos, was employed by Marks and Spencer plc, the defendants, as an operations supervisor at their premises in High Street, Kensington. On 28 May 1996, he was unloading pallets from the store's goods lift. As he wheeled a pallet out of the goods lift it toppled over and the pallet and the stock on it fell onto him causing him injury. He consulted solicitors on

6 June 1996 and they wrote on his behalf on 20 June 1996 to the defendants notifying a prospective claim for personal injury. The defendants passed the matter to their insurers. On 24 December 1996, the insurers wrote to Mr Vinos' solicitors saying that, without admitting liability, they were willing to compensate him in full for his injuries. They asked for medical evidence to be provided when it was available.

4. Mr Vinos had been quite badly injured in the accident. He suffered injury to his left knee, straining to his back and had bruising to the front of his chest. The back and chest injuries resolved themselves quite quickly, but he continued to have trouble with his left knee. A consultant orthopaedic surgeon diagnosed him as suffering a degenerative tear in the posterior horn of the medial meniscus with fluid within the joint. He continued to have pain and discomfort and limited movement in the knee. He had various treatment and had a course of physiotherapy, but unfortunately by the early summer of 1999 the prognosis was that his injury and symptoms were permanent.

5. There were co-operative negotiations between Mr Vinos' solicitors and the defendants' insurers and the defendants made interim payments to him amounting to £5,000. However, in May 1999, the negotiations were not concluded and the three-year statutory limitation period for bringing proceedings was about to expire. So on 20 May 1999, about a week before the expiry of the limitation period, Mr Vinos' solicitors issued a claim form on his behalf in the Ilford County Court. The claim form gave brief details only of the claim. The value of the claim was stated to be in excess of £250,000. The claim form said that particulars of claim were to follow. These were prepared. The copy which this court has bears the date of 15 July 1999. A schedule of special damages was then prepared. The court's copy of this has the date of 17 September 1999.

6. Mr Vinos' solicitors did not serve the claim form on the defendants when it was issued. They wrote to the defendants' insurers telling them that proceedings had been issued. The insurers apparently had some problems finding their papers. It was agreed that the solicitors would serve the proceedings on the defendants directly. But they did not do so until they posted a letter enclosing the claim form, the particulars of claim and the schedule of special damages on 27 September 1999. This resulted under CPR 6.7 in deemed service being effected on 29 September 1999. It is accepted on behalf of Mr Vinos that this was nine days after the expiry of the four-month period after the date of issue within which r 7.5 stipulates that the claim form had to be served. The solicitors have no explanation for this failure other than that it was an oversight. By this stage, of course, the statutory limitation period had run out.

7. On 21 October 1999 Mr Vinos applied for an extension of time for serving the claim form and for an order remedying the error which his solicitors had made. On the same day, the defendants applied for service of the claim form to be set aside and for costs on the ground that the claim form was not served within the four month period. The district judge dismissed Mr Vinos' application for an extension of time and acceded to the defendants' applications. Judge McDowall dismissed Mr Vinos' appeal against the district judge's decision, made costs orders which by agreement were not to be enforced unless Mr Vinos recovered compensation from the Solicitors' Indemnity Fund, and ordered repayment of the interim payment of £5,000. He also gave permission to appeal to this court, notwithstanding that the appeal would be a second appeal, which the terms of the then current Court of Appeal Practice Direction discouraged, where both the district judge and the judge had reached the same conclusion.

8. CPR 7.5 provides, subject to exceptions which do not apply in this case, that a claim form must be served within four months after the date of issue. It is accepted that the claim form was not served within that four months. Rule 7.6(1) provides that the claimant may apply for an order extending the period within which the claim form may be served. Rule 7.6(2) provides as a general rule that an application to extend the time for service must be made within the period for serving the claim form specified by r 7.5 or within the period for service specified in an order extending the initial period. So the general rule is that an application for an extension has to be made before the stipulated period for service has run out. In the present case the application was made after the stipulated period had run out.

9. Rule 7.6(3) provides:

> 'If the claimant applies for an order to extend the time for service of the claim form after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if—(a) the court has been unable to serve the claim form; or (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and, (c) in either case, the claimant has acted promptly in making the application.'

10. In the present case, the judge held that Mr Vinos had acted promptly in making the application, but the court had not been unable to serve the claim form—it had not been asked to do so—and Mr Vinos by his solicitors had not taken all reasonable steps to serve the claim form but been unable to do so—the solicitors had simply made an error and had allowed the time to run out. So r 7.6(3) not only did not empower the court to extend the time but, by virtue of the words 'only if', positively precluded the court from doing so. This was the essence of the district judge's and the judge's reasoning. The judge held that the court had no discretion to consider whether to extend time. He noted that r 3.1(2)(a) empowers the court to extend time for compliance with any rule even if an application for extension is made after the time for compliance has expired. But that power is expressed to apply 'except where these rules provide otherwise' and r 7.6(3) does provide otherwise in that it prescribes the only circumstances in which the court is able to extend the period for serving the claim form if the application is made after the period for service has expired.

11. The judge said this on the subject of discretion:

> 'It is accepted by the defence that if the court had a discretion the court would only realistically exercise it in favour of the claimant, because it is not suggested for a moment that any prejudice has arisen or that any other considerations would apply to say that any kind of injustice would be done to the defendant.'

12. Having discussed the meaning of r 7.6, the judge said this:

> 'In this matter I find myself distinctly unhappy as to the correct approach. The instinct that one has is to say, "No harm is done, let the action proceed", so that the appropriate person, that is the defendants' insurers, can meet the claimant's apparently justified claim for compensation. But on the other hand it does seem to me that where the rules have specifically provided for failure to serve a claim form within a set time and provided two, and only two, circumstances under which extensions can be given, that it would be wrong to ignore those. It seems to me, therefore, that I am persuaded that

a rigid interpretation is called for, and that accordingly the district judge was right in the decision which he made. I wish to repeat, for the avoidance of any doubt at all, that it is not merely a matter of the defendants' concession, that I would make it clear that if and in so far as I was persuaded that I did have a discretion, it seems to me overwhelmingly a case where I would have exercised it in favour of the claimant. I think that if I had been exercising such a discretion it would have been my concern to make sure that the appropriate person bore the costs of this unfortunate hiccup in the progress of the claimant's case—in other words I would have needed a lot of persuading not to make the solicitors pay the entire costs of what was their fault. But as it is, it seems to me that the order which I must make is to refuse this appeal. I record again, as a side observation, that I am comforted to this extent in terms of overall justice: that it is quite plain that the claimant, Mr Vinos, is going to receive 'an appropriate level of compensation', and that the only live question in one sense was whether it was going to be recovered from the defendant's insurers or from the Solicitors' Indemnity Fund.'

13. The unease which the judge expressed in the earlier part of this last passage from his judgment no doubt influenced him in giving permission to appeal even though the appeal would be a second appeal. Although it is of largely historic interest only, now that there is a new structure for appeals to be found in CPR Pt 52 and its Practice Direction which came into force on 2 May 2000, I am inclined to think that the judge was right to do so, even though, as will appear, I consider that his decision was correct and that this appeal should be dismissed. (Under s 55 of the Access to Justice Act 1999 and CPR 52.13, for second appeals permission may now, subject to transitional provisions, only be given by the Court of Appeal.)

14. Mr Vinos' essential case on this appeal is that the overriding objective of the CPR, r 1.2 and r 3.10 give the court a discretion to extend the time for serving the claim form and that the judge was wrong to decide otherwise. The overriding objective of the rules is to enable the court to deal with cases justly. By r 1.2, the court is obliged to give effect to the overriding objective when it exercises any power given to it by the rules or when it interprets any rule. Rule 3.10 provides:

> 'Where there has been an error of procedure such as a failure to comply with a rule or practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error.'

15. Mr Peirson on behalf of Mr Vinos accepts that the application to extend time could not be made under r 7.6(3) nor under r 3.1(2)(a). But he submits that the judge was wrong to hold, as he did, that r 3.10 did not give the court a discretion, which the judge would clearly have exercised in Mr Vinos' favour if he had decided that there was a discretion.

16. Mr Peirson submits that r 3.10 contains a general power to rectify matters where there has been an error of procedure. Not serving the claim form within the period prescribed by r 7.5 was an error of procedure. The judge was wrong to hold that r 7.6(3) positively prevented him from extending time. The power conferred by r 3.10 is not restricted to provisions in other rules, as is r 3.1(2) by its introductory words 'except where these rules provide otherwise'. The only restriction on the power in r 3.10 is that to be derived from the overriding objective. Alternatively, Mr Peirson submits that r 1.2 obliges the court to give

effect to the overriding objective when it interprets the rules, and any conflict or ambiguity between rr 3.10 and 7.6(3) should be resolved by a liberal interpretation of r 3.10, which achieves the overriding objective. The discretion which, it is submitted, r 3.10 gives is a general discretion whose ambit is not limited to the considerations to be found in r 7.6(3). To the extent that Colman J decided otherwise in *Amerada Hess v Rome* [2000] TLR 185, he was, it is submitted, wrong.

17. Mr Lord, on behalf of the defendants, made written submissions and Mr Peirson made oral submissions by reference to what they submit the position would have been under the former Rules of the Supreme Court. In my judgment, these submissions are not in point. The CPR are a new procedural code, and the question for this court in this case concerns the interpretation and application of the relevant provisions of the new procedural code as they stand untrammelled by the weight of authority that accumulated under the former rules. The court is not in the first instance concerned with the exercise of a discretion. Decisions about the exercise of the court's discretion to strike out cases for delay are not in point. There is, in my judgment, no basis for supposing that r 7.6 in particular was intended to replicate, or for that matter not to replicate, the provisions of former rules as they had been interpreted.

18. Mr Lord emphasises that the words 'only if' in r 7.6 expressly limit the circumstances in which the court has power to extend time, when the application is made after the period has run out, to circumstances which do not apply in this case. He submits that Pt 3 is concerned with case management decisions and that r 3.10 does not come into play until proceedings are properly started by service of the claim form; that the power under r 3.10 cannot extend to enable the court to do what r 7.6 specifically provides it may not do; that r 3.10 cannot extend to enable the court to extend a time period when the part of Pt 3 which specifically provides for extending time periods—r 3.1(2)—does not apply because of the words 'except where these rules provide otherwise'; that an interpretation of r 3.10 wide enough to make r 7.6(3) nugatory would also render ineffective many, if not all, of the other requirements of the rules expressed in mandatory terms; that interpretation of the rules to give effect to the overriding objective should not result in the court making exclusively discretionary decisions unregulated by any structure; and that a main element of the overriding objective is that civil litigation should be conducted without delay. If necessary, Mr Lord seeks to withdraw the concession made before the judge that, if there were a discretion, it would be bound to be exercised in Mr Vinos' favour.

19. In my judgment, the judge's conclusions were correct essentially for the reasons which he gave, which I express in my own words as follows.

20. The meaning of r 7.6(3) is plain. The court has power to extend the time for serving the claim form after the period for its service has run out 'only if' the stipulated conditions are fulfilled. That means that the court does not have power to do so otherwise. The discretionary power in the rules to extend time periods—r 3.1(2)(a)—does not apply because of the introductory words. The general words of r 3.10 cannot extend to enable the court to do what r 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time. What Mr Vinos in substance needs is an extension of time—calling it correcting an error does not change its substance. Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored. It would be erroneous to say that, because Mr Vinos' case is a

deserving case, the rules must be interpreted to accommodate his particular case. The first question for this court is, not whether Mr Vinos should have a discretionary extension of time, but whether there is power under the CPR to extend the period for service of a claim form if the application is made after the period has run out and the conditions of r 7.6(3) do not apply. The merits of Mr Vinos' particular case are not relevant to that question. Rule 3.10 concerns correcting errors which the parties have made, but it does not by itself contribute to the interpretation of other explicit rules. If you then look up from the wording of the rules and at a broader horizon, one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with proper expedition. Criticism of Mr Vinos' solicitors in this case may be muted and limited to one error capable of being represented as small; but there are statutory limitation periods for bringing proceedings. It is unsatisfactory with a personal injury claim to allow almost three years to elapse and to start proceedings at the very last moment. If you do, it is in my judgment generally in accordance with the overriding objective that you should be required to progress the proceedings speedily and within time limits. Four months is in most cases more than adequate for serving a claim form. There is nothing unjust in a system which says that, if you leave issuing proceedings to the last moment and then do not comply with this particular time requirement and do not satisfy the conditions in r 7.6(3), your claim is lost and a new claim will be statute-barred. You have had three years and four months to get things in order. Sensible negotiations are to be encouraged, but protracted negotiations generally are not. In the present case, there may have been an acknowledged position between the parties that the defendants' insurers would pay compensation; but it is not suggested that they acted in any way which disabled the defendants in law or equity from relying on the statutory limitation provisions and on the CPR as properly interpreted.

21. In the *Amerada Hess* case, Colman J had to consider in complicated circumstances whether 40 writs had been effectively served on defendants who were Lloyds' underwriters. He concluded that none of them had been effectively served. All the relevant events took place before the CPR came into force, but applications on behalf of the claimants to recover the position were made after they came into force. These included both applications under the former Rules of the Supreme Court and under CPR 3.10. Counsel presented the applications on the basis of the provisions of the former Rules of the Supreme Court and I read Colman J's decision to be under those provisions. He made extensive reference to authorities decided under the former rules; but he also considered what the position would be under the CPR and specifically considered rr 7.6 and 3.10. Of these he said:

> 'In a case where the claimant has effected service ineffectively prior to expiration of the period for validity for service under r 7.5 and, after that period, applies to remedy that "error of procedure" under r 3.10, there is no reason why the court should not exercise its discretion to grant what is in substance and in effect an extension of time for service by reference to the considerations identified in r 7.6(3) and every reason why it should. The overriding objective in r 1.1 does not, in my judgment, lead to any different approach. For there to be different or wider discretionary considerations in relation to granting what is in substance the same relief under r 3.10 from those under r 7.6 would be open to those very objections in principle which

have persuaded me that the decision in *Boocock v Hilton International Co* [1993] 4 All ER 19, [1993] 1 WLR 1065 should not be followed.'

22. Having decided that the applications failed under the Rules of the Supreme Court, Colman J then said:

'If one approaches the problem by way of r 7.6(3), the difficulties confronting AH are no less insuperable. They have to establish that they took all reasonable steps to serve the claim form but were unable to do so and that they acted promptly in making the application. They are unable to establish either. They did not take any steps to effect service, reasonable or otherwise, between 2 February and 26 March. Nor did they act promptly in making an application. They ought to have applied at the very latest on 22 March, but failed to do so.'

23. I am not sure that Colman J's interpretation of rr 7.6 and 3.10 and their relationship is entirely clear. In the first passage to which I have referred he is, I think, clearly saying that, in cases to which r 7.6(3) applies, there is a discretion under r 3.10 to grant what in substance is an extension of time, but the exercise of the discretion is limited to the considerations in r 7.6(3). In the second passage, he may have been saying that, if the conditions in r 7.6(3) are not fulfilled, there is no discretion and the application fails. There may be little or no practical difference between the two interpretations. But, in my judgment, for the reasons which I have given, the second is correct. On the simple facts of the present case, the conditions in r 7.6(3) were not fulfilled and the court has no discretion. It is not therefore necessary to consider Mr Peirson's submission that, if there were a discretion, Colman J's analysis of its ambit was erroneous.

24. For these reasons, I would dismiss this appeal.

PETER GIBSON LJ.

25. The question raised by this appeal is a question of construction of the CPR. Does the court have the power to extend time for service of a claim form if the claimant only applies after the period provided for in r 7.6(2) has expired and the conditions in r 7.6(3) are inapplicable?

26. The construction of the CPR, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the CPR, unlike their predecessors, spell out in Pt 1 the overriding objective of the new procedural code. The court must seek to give effect to that objective when it exercises any power given to it by the rules or interprets any rule. But the use in r 1.1(2) of the word 'seek' acknowledges that the court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischiefs which the CPR were intended to counter were excessive costs and delays. Justice to the defendant and to the interests of other litigants may require that a claimant who ignores time limits prescribed by the rules forfeits the right to have his claim tried.

27. A principle of construction is that general words do not derogate from specific words. Where there is an unqualified specific provision, a general provision is not to be taken to override that specific provision. Rule 7.6 is a specific sub-code dealing with the extension of time in all cases where the time limits in r 7.5 have not been or are likely not to be met. The sub-code sets out in some

detail what the claimant must do if he wants an extension of time and the circumstances in which the court may exercise the discretion conferred on it to extend the time: r 7.6(3). That the circumstances specified in sub-paras (a), (b) and (c) of r 7.6(3) are the sole relevant conditions for the discretion to be exercisable seems to me to be made crystal clear by the words 'only if'. It is plain that the general power in r 3.1(2)(a) to extend time cannot override r 7.6. Nor, in my judgment, could the general power in r 3.10 to remedy a failure to comply with a rule be pressed into service to perform the like function of, in effect, extending time. Even though r 3.10 differs from r 3.1(2) in not having wording to the effect of 'except where the rules provide otherwise', that is too slight an indication to make r 3.10 override the unambiguous and restrictive conditions of r 7.6(3).

28. I reach that conclusion on the wording of the CPR alone. Like May LJ, I have not found helpful reference to the Rules of the Supreme Court, couched as they were in different and less strong language, nor the cases decided thereunder. For these as well as the reasons given by May LJ, I also would dismiss this appeal.

Appeal dismissed.

James Wilson Barrister (NZ).

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2008-01217

BETWEEN

FRANCIS VINCENT

Claimant

AND

MERLENE VINCENT

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

****

Before: Master Alexander

Appearances:

For the claimant: **Mr Asaf Hosein**

For the defendant: **Mr Kijana M De Silva**

REASONS

1. These reasons relate to an application to set aside default judgment (hereinafter "the judgment") entered against the first defendant for failure to file an appearance. The judgment was obtained on 16th June, 2008 for the payment of an amount of money to be decided by the court. The application to set aside was made on 13th July, 2011.

2. On 14th April, 2003, as a result of complaints made by the first defendant, the claimant was arrested for breach of a protection order (1602/02). The claimant appeared before the Couva Magistrate's Court where he was granted bail in the sum of $2,000.00. He attended court on a number of occasions until 3rd June, 2004 when the first defendant indicated that she no longer wished to pursue the matter and it was dismissed. The claimant claims that the first defendant knowingly made a false and malicious complaint against him for the purpose of having him

arrested and kept incarcerated and as a result of this, he was put to stress and inconvenience and suffered loss and damages. On 11th January, 2010 the matter was withdrawn against the second defendant by consent.

3. There are two issues to be resolved in this matter. The first issue is whether the court is satisfied that the judgment was properly obtained. If so, the second issue which arises is whether the first defendant has satisfied the court that she has a defence which has a realistic prospect of success and she acted as soon as reasonably practicable when she found out that the judgment had been obtained against her.

Whether the judgment was properly entered?

4. I have found that the first defendant had notice of the instant high court proceedings and, therefore, the judgment was properly obtained. The first defendant claims in her affidavit in support of the application that she was never served and that she first became aware of these proceedings when she received a letter dated 8 March, 2010 from the claimant's attorney at law advising her of the assessment date. In a supplemental affidavit filed on 16th November, 2011 she maintained that she was not served but stated that, "*I do recall being in my sister's shop on an occasion when the claimant walked in. The claimant had some papers in his hand and he threw them at me. Given the history between the claimant and me, I immediately walked out of the shop.*" It is clear that the person served was the one intended to be served. The relevant **Part 5.3 of the Civil Proceedings Rules, 1998 as amended** (hereinafter referred to as "**the CPR**") states that a document is personally served on an individual by handing it to or leaving it with the person to be served. Therefore, proper service was in fact effected on the first defendant and the judgment entered was a regular judgment.

PART 13 CPR APPLICATIONS

5. When making an application to set aside a judgment pursuant to **Part 13, CPR** a defendant must establish that he had a realistic prospect of success in the claim, and that he acted as soon as reasonably practicable when he found out that judgment had been entered against him. See

Nizamodeen Shah* v *Lennox Barrow*[1].** Kokaram J in ***Des Vignes* v *Manning and Gordon H.C.1867/2007 explained:

> *Although, the overriding objective of the CPR is to deal with cases justly, it is now well accepted that the exercise of the discretion to deal with cases justly under rule 13.3 (1) CPR is limited to considering only those two factors. Accordingly our rule 13.3 (1) CPR lies in stark contrast to the English CPR equivalent in which the discretion is wider and the fact that the defendants have given no reason for a delay is, not always and in itself sufficient to justify the court in refusing to exercise its discretion and refusing relief. Barrow JA in* ***Kenrick Thomas v RBTT Bank Caribbean Ltd****. made the following useful observations in reconciling the stricter approach advocated in our rules with the overriding objective:*
>
> > *"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. This 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 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."*
>
> *Therefore, if the Defendant fails to satisfy the Court of any one of the conditions set out in 13.3(1) the CPR his application fails. Accordingly,* ***a Defendant can have a realistic prospect of success in defending the claim but because he failed to act as soon as reasonably practicable after he found out that judgment had been entered against him the judgment cannot be set aside****. Similarly the Defendant can act promptly, immediately after he found out that judgment had been entered, but if he has no realistic*

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1 *Nizamodeen Shah* v *Lennox Barrow Civ App No 209 of 2008 at page 3 para 11*

prospect of success in defending the claim the judgment remains. Both conditions are critical to the success of any application under Part 13.3 CPR. [Emphasis mine]

6. In ***Rohini Khan*** **v** ***Neville Johnston***[2] the Court of Appeal re-emphasized that applications to set aside judgments, like the instant one, are not subject to an implied sanction imposed by the rules and that a defendant did not have to satisfy the conditions stipulated in **Part 26.7, CPR** in addition to **Part 13.3, CPR**. See also ***The AG*** **v** ***Keron Matthews***.[3]

Reasonable Prospect of Success

7. The first defendant's obligation at this stage is to establish a realistic prospect of success in the claim, being a prospect of success that is real and not false, fanciful or imaginary. In circumstances where a decision was taken by her not to even enter an appearance, it cannot be sufficient for a court to exercise its discretion without some material from the first defendant as to the nature of the defence that she wishes to raise. She does not have to prove her case at this stage, merely to establish that the defence has a realistic prospect of success.

8. This term was defined by Moosai J in ***John*** **v** ***Mahabir***[4] et al as, "*[A] realistic prospect of success means that the defendant has to have a case which is better than merely arguable (International Finance Corporation v Utexafrica Sprl (2001) CLC 1361 and ED&F Man Liquid Products Ltd v Patel (2003) EWCA Civ 472). The Defendant is not required to show that his case will probably succeed at trial. A case may be held to have a real prospect of success even if it is improbable: White Book 2007 Vol 1 para 24.2.3. In determining whether the Defendant has a realistic prospect of success,* ***the court is not required to conduct a microscopic assessment of the evidence nor a mini trial.*** *In Royal Brompton Hospital NHS Trust v Hammond, the Times, May 11, 2011, CA, it was held that, when deciding whether a defence had a real prospect of success, the court should not apply the same standard that would be applicable at trial, namely the balance of probabilities.* ***Instead, the court should also consider the evidence that could reasonably be expected to be available at trial****: See O'Hare and Brown, Civil Litigation 12th Edn (2005), para 15.017.*" [emphasis mine]

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2 *Rohini Khan* v *Neville Johnston Civ App No 56 of 2011*
3 *The AG* v *Keron Matthews* [2011] UKPC 38
4 *John* v *Mahabir* HCA No 866 of 2005

9. The first defendant has exhibited an affidavit in support of the instant application in which she states that she has a realistic prospect of success in defending the claim. The claim is for damages for: the procuring of an arrest warrant against the claimant; false arrest; wrongful imprisonment and malicious prosecution arising out of a complaint by the first defendant that was dismissed on 3rd June, 2004. She explains that the claimant breached the protection order by breaking the lock on the gate to the former matrimonial home and entering the compound. Further, he broke the lock of the door to the said home and went into the house. She claims that the claimant was arrested on the compound whilst he was committing the act and as such, her complaint was based on reasonable and probable cause.

10. At this stage, it is not required to test the full strength of the defence. The first defendant has exhibited to her affidavit the protection order, as well as an answer and cross petition and other documents from previous matrimonial proceedings, but has not brought any other evidence to the court to establish the truth of her version of the facts, such as the police report or other corroborating evidence. To my mind, this is not fatal. The question is would this evidence be available at trial since, as noted in ***John*** **v** ***Mahabir*** (supra), the court should also consider the evidence that could reasonably be expected to be available at trial. Further, it is to be noted that a case may be held to have a real prospect of success even if it is improbable.

11. The first defendant has satisfied the test laid down in ***John*** **v** ***Mahabir*** (supra), which is a lower standard than on a balance of probabilities. She has shown that she has a defence with a realistic prospect of success. I will now look at the second limb of **Part 13, CPR**.

As Soon as is Reasonably Practicable

12. As a rule, a defendant who wishes to apply to set aside a judgment under **Part 13, CPR** must act reasonably promptly, and where there is delay it must be explained in his affidavit of merit. In ***Thorn plc*** **v** ***MacDonald***[5] the following principles on delay were outlined:

    i. while the length of any delay by the defendant must be taken into account, any pre action delay is irrelevant;

    ii. any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but it is not always a good reason to refuse to set the judgment aside;

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5 *Thorn plc* v *MacDonald* (1999) The Times, October 15, 1999

iii. the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done;

iv. prejudice (or absence of) to the claimant should also be taken into account.

13. The first defendant denies that she was served with the claim form and statement of case filed on 4th April, 2008. She claims that the first time she became aware of these proceedings was when she received a letter dated 8th March 2010 from the claimant's attorney. However, she has not stated the date of receipt. It can be assumed that she received notice that judgment was entered against her (via this letter) sometime between 8th March, 2010 and 10th June, 2010. She asserted that she acted as soon as reasonably practicable when she found out that judgment had been entered against her. She retained Mrs Seecharan Scott, attorney at law, on 10th June, 2010.

14. A defendant against whom a judgment has been entered because of the failure to comply with the timelines set in the rules must act swiftly to set aside that judgment and do so in as reasonably practicable a way as possible. Of utmost relevance is the timeframe between learning of the judgment and the application to set aside. I accept that the conduct of the first defendant is material only after she became aware of the default judgment. In the instant case, however, the application to set aside was dated and filed on 13th July, 2011 over one year after retaining counsel and after finding out that an assessment was proceeding against her on the basis of a judgment. In these circumstances, did the first defendant act as soon as reasonably practicable and/or promptly?

15. Reasonably practicable is "*a much lower standard and it acknowledges that there will be … glitches in the attorneys' office ... that you may not get in … you might see an attorney and that is not his area of the law, he doesn't want to take it and he refers you to another attorney; you might go with no documents, it might be your first court matter, he sends you back, he fixes an appointment for another two, three days .. It's a less trying standard than, say, if you have to have an exceptional reason or a very good reason. … 'reasonable practicable' seems to me to suggest a more mundane type of standard that you will look at these things and the way things might work.*" Per Kangaloo JA in ***Rohini Khan*** (supra) at page 4.

16. In ***Nizamodeen Shah*** (supra) Mendonca JA in commenting on an application that was made at least 2 months after it was found out that judgment was taken up stated, "*[T]his delay does not fall into that category of case where you can simply look at it and say that the Appellant acted as soon as reasonably*

practicable after finding out that the judgment was entered. In those circumstances what then is the obligation on the Appellant. The obligation to put some material before the Court on which the Court can come to the conclusion that he has acted as soon as reasonably practicable."

17. The first defendant insists that she has acted as soon as reasonably practicable. She claims to have secured legal representation shortly after receiving notice of the assessment proceeding against her and/or finding out that judgment was entered. She provides no date when she received actual notice. She was advised by her attorney at law that the delay in finalizing her affidavit was occasioned by the need to search the proceedings and to obtain office copies of both these proceedings and the former matrimonial proceedings. No mention was made of any attempts to secure the requisite documents from the claimant's attorney or of any administrative difficulties in her attorney's office that stymied the process. The delay of over 1 year was occasioned by the waiting on office copies.

18. Given the above, I bear in mind the Court of Appeal decision of ***Rohini Khan*** (supra) where it was noted that in terms of satisfying the overriding objective to do justice between the parties, the first limb of the **CPR Part 13.3** is more important and as such, will carry more weight. Kangaloo JA stated that, "*When the language is such as "reasonably practicable," when that is the language that is used, then it gives you a range of behaviour on the part of the person, but if the person satisfies what can be considered the more important limb of 13.3 and you get to the other one and you find that he is, all right, he is within the range of behaviour, maybe he is at one end or the other, but he is within the range, in other words, he didn't take too long, you know what he did, he could have done a little quicker, but he did it fairly quickly and he put it in the hands of his attorneys, who thereupon had difficulties, then why should he be deprived of having his day in court?*"[6]

19. Kangaloo JA also further explained, "… *So they did everything they could, they put it in the hands of their attorneys. And if the attorneys, thereafter, have difficulties, they acted as soon as reasonably practicable after finding out about … now, I am not saying that the attorneys could sit on it forever and a day, but if the attorneys go on affidavit and say what the problems are, and the problems are understandable, although understandable problems sometimes could be avoided, why should the litigant suffer?*"[7] [Emphasis mine]

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6 Court of Appeal Transcript dated 18th April, 2011, page 7

7 Court of Appeal Transcript dated 18th April, 2011, page 3

20. It must be noted that although there is no prescribed timeline to define the meaning of "as soon as reasonably practicable"[8], this cannot be used to cover excessive and/or unreasonable periods of delay such as in the instant case. I accept also as the Court of Appeal has emphasized that the applicant does not have to account and give an explanation for every day of the delay, however, affidavits cannot be thin but must give some particulars. In the instant case, the court was not provided with any affidavit from the attorneys of the first defendant explaining the delay in the retrieval of office copies or with respect to any administrative issues in the attorney's office. It was her responsibility, as the litigant seeking to set aside this judgment, to put in evidence all the steps taken to satisfy the court that the fault was due to administrative or other hurdles. Simply saying that she was awaiting office copies for over a year, without more, is not enough. Whilst I accept that the first defendant has provided some reasons for the delay in making the application, including that she was only made aware of the proceedings at the assessment stage, in my view, the present matter does not fall into the category of cases described by the learned judge in ***Rohini Khan*** (supra). She has failed to pass the threshold test for 'reasonably practicable'.

21. Thus, in these circumstances, the first defendant has not satisfied the requirements of the **CPR Part 13.3(1) (b)**.

22. It is, therefore, ordered that -

    1. The application to set aside the default judgment is dismissed.
    2. Costs of the application in the sum of $1,000.00 to be paid by the first defendant to the claimant.

Dated 24th May, 2012

Martha Alexander
Master (Ag)

Judicial Research Assistant: Ms Kimberly Romany

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8 See *Louise Martin (as widow and executrix of the estate of Alexis Martin, deceased)* v *Antigua Commercial Bank* ANUHCV 1997/0115 and *Rohini Khan* v *Neville Johnston* CV 2009-02311 (unreported) at pages 2-3

[2014] UKPC 6
Privy Council Appeal No 0056 of 2012

JUDGMENT

Real Time Systems Limited (Respondent) *v* (1) Renraw Investments Limited (2) CCAM and Company Limited (3) Austin Jack Warner (Appellants)

From the Court of Appeal of Trinidad and Tobago

before

Lord Mance
Lord Clarke
Lord Sumption

JUDGMENT DELIVERED BY

Lord Mance

ON

3 March 2014

Heard on 18 February 2014

Appellants
William McCormick QC
Om Lalla

(Instructed by Carter Ruck)

Respondent
Geoffrey Robertson QC
Amy Rogers
Neal Bisnath
(Instructed by Howard Kennedy FSI)

LORD MANCE:

1. This appeal, by permission of the Court of Appeal, raises a short but important point on the interpretation of the Civil Proceedings Rules ("CPR"), in force since 2005.

2. Real Time Systems Ltd ("Real Time"), the respondent before the Board, claim that in October and November 2007 it paid the appellants, who trade as Dr Joao Havelange Centre of Excellence ("the Centre"), sums totalling just over TT$1.5m by way of loan repayable by 28 February 2008, in respect of which no repayments have been made.

3. In answer to a pre-action protocol letter dated 17 March 2010 demanding repayment in similarly general terms, the Centre through its attorneys wrote on 1 April 2010 requesting particulars of the loan, namely (i) whether the agreement was oral or in writing, (ii) when it was made and who were the parties and (iii) if it was oral what were its specific terms and conditions.

4. Real Time's response on 15 April 2010 was to issue proceedings, by a claim form and statement of case both again generally framed, to write on 16 April 2010, referring to the Centre's letter of 1 April and advising the Centre of the issue of the proceedings, and on 3 May 2010 to make an application for summary judgment, supported by an affidavit which vouchsafed no further details.

5. The Centre resisted this application by solicitor's affidavit alleging that the TT$1.5m had been a gift made pursuant to conversations between Mr Austin Jack Warner, the Centre's principal directing mind, and Mr Krishna Lalla, in which the latter had indicated his desire to make such a gift, for reasons which the affidavit did not explain.

6. On 22 July 2010 it was ordered by consent that the proceedings should stand as the lead matter for 22 other actions, involving further alleged loans totalling over TT$26.5m made to the Centre or in five such cases to Jamed Ltd.

7. On 10 August 2010 the Centre applied to have the proceedings struck out as an abuse of the process for, inter alia, failure to identify proper particulars of the alleged loans and non-compliance with CPR Part 8.6.

8. The applications were decided on the papers by Rampersad J, who on 8 November 2011 gave a judgment, in which he held that the statement of case did not comply with Part 8.6. But he went on to say that

> "…. the court further upholds the defendants' attorney's submission that a request for information pursuant to Part 35 would be premature at this stage since the sanction for non-compliance with such a request is not exercisable before the time for serving of witness statements has expired …. In any event, the claimant refused to respond positively to the defendant's written request made on 1 April 2010 for details of the alleged loan so that in any event, no further information seems forthcoming. As such, the court strikes out the statement of case pursuant to Part 26.2 of the CPR."

9. Real Time appealed, relying on a presumption of a loan arising it submitted from the payment itself. Only in submissions before the Court of Appeal, did Real Time say in answer to the Court that it was ready, willing and able to provide the details. The Court of Appeal regarded the Centre's pre-action request for particulars as eminently reasonable, and considered that, if there was no power to order particulars, the judge's decision could not be said to be plainly wrong. But, in a judgment given by Jamadar JA, it went on to take a different view of the CPR, and in particular of the inter-relationship of Parts 25, 26 and 35. It concluded that the judge was plainly wrong to hold that he could not, in particular under Part 26.1(1)(w), order particulars of a statement of case at the stage when the matter came before him, although it noted Real Time's failure at any time prior to the Court of Appeal hearing to offer to supply particulars, or indeed to make any specific submission contrary to the judge's view of Part 35. The Court of Appeal thus reversed the judge's decision to strike out the statement of case, and remitted the matter to him for reconsideration of the appropriate order to make on the striking out application.

10. The Civil Proceedings Rules include these:

> "*The overriding objective*
>
> 1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly, …
>
> *Claimant's duty to set out his case*

8.6 (1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies.

Changes to statements of case

20.1 (1) A statement of case may be changed at any time prior to a case management conference without the court's permission.

(2) The court may give permission to change a statement of case at a case management conference.

(3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to change a statement of case can satisfy the court that the change is necessary because of some change in circumstances which became known after that case management conference.

Court's duty to manage cases

25.1 The court must further the overriding objective by actively managing cases, which may include—

(a) identifying the issues at an early stage; …

Court's general powers of management

26.1 (1) The court (including where appropriate the court of Appeal) may—

….

(w) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

(2) When the court makes an order or gives a direction, it may make the order or direction subject to conditions.

Sanctions—striking out statement of case

26.2 (1) The court may strike out a statement of case or part of a statement of case if it appears to the court—

(a) that there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings;

(b) that the statement of case or the part to be struck out is an abuse of the process of the court;

(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

Court's general power to strike out statement of case

26.3 (1) Where a party has failed to comply with any of these Rules or any court order in respect of which no sanction for noncompliance has been imposed the other party may apply to the court for an 'unless order'....

(5) If the defaulting party fails to comply with the terms of any 'unless order' made by the court his statement of case shall be struck out.

Court's powers in cases of failure to comply with rules, orders or directions

26.6 (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.

(2) Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply.

(Rule 26.7 deals with the circumstances in which the court may grant relief from a sanction, Part 66 deals with the power to make orders as to costs by way of sanction)

Relief from sanctions

26.7 (1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.

(2) An application for relief must be supported by evidence.

(3) 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 breach; and

(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

General power of the court to rectify matters where there has been an error of procedure

26.8 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party.

Right of parties to obtain information

35.1 (1) This Part enables a party to obtain from any other party information about any matter which is in dispute in the proceedings.

(2) To do so he must serve a request for information that he wants on that other party.

(3) He must state in his request precisely what information he wants.

Orders compelling reply to request for information

35.2 (1) If a party does not give information which another party has requested under rule 35.1 within a reasonable time, the party who served the request may apply for an order compelling him to do so.

Time limits for compelling reply

35.3 An application for an order compelling a reply to a request for information may not be made before the time for serving witness statements has expired nor less than 42 days before the date fixed for the trial.

(The time for serving witness statements will be specified in directions given by the court under Part 27)"

11. At the core of the Centre's case, advanced with force and realism by Mr McCormick QC, is the proposition that a claimant must under rule 8.6 include in its statement of case all facts on which it relies, that the drafters of Part 35 deliberately restricted the right to request information before exchange of witness statements, that the corollary is that they cannot have intended a statement of case which is from the outset deficient in facts to be capable of remedy by a request or order for further information, and that they cannot have intended rule 26.1(1)(w) to be used "to circumvent the clear words" of rule 35.3. Mr McCormick points out that in proceedings against (or it seems by) the State, rule 58.4(2) does exceptionally permit a defendant to request information under rule 35.1 "at any time during the period for entering an appearance". That, McCormick submits, underlines the more restrictive choice made by rule 35.3.

12. More generally, Mr McCormick underlines the problems of progressing civil litigation in Trinidad and Tobago, which Jamadar JA has himself highlighted in *Trincan Oil Ltd v Schnake* (Civil Appeal No 91 of 2009) and which the Board recognised in its decision in *Bernard v Seebalack* [2010] UKPC 15, [2011] 2 LRC 176 when interpreting rule 20.1(3), which was in terms more stringently framed than its English equivalent, with the aim of seeking to address those problems.

13. It is clear from the location of Part 35 and the wording of rule 35.3 that its focus is on information which one party is likely to want at a relatively late stage of the proceedings, after the time for serving witness statements, though not less than 42 days before trial. Its subject matter is "information about any matter which is in dispute in the proceedings". While it is capable of being used to elicit more about the matters pleaded, the normal expectation is that, by the time of exchange of witness statements, the pleadings would have been settled and the issues would be being explored in greater depth at the evidential level. The State (and it may be any defendant in proceedings by the State) is enabled to ask for details under rule 35.1 at an earlier stage than other litigants, but, whatever the reason for that indulgence, it does not, in the Board's view, shed any real light on the present issue.

14. It does not follow from rule 35.3 that, if the pleadings are not satisfactory prior to exchange of witness statements, there is nothing that can be done about it. That would be a very strange conclusion, particularly under a new system of rules designed to enable matters to proceed smoothly and efficiently. Mr McCormick pointed out that, even after a claim has been struck out, a claimant can apply for relief from the sanction under rule 26.7 or commence fresh proceedings (as rule 26.2(2) contemplates). But the conditions for obtaining relief under rule 26.7 are stringent, and it is far from clear that they could or would be satisfied. The ability to commence fresh proceedings (during

the limitation period, which is in practice now long expired) is a double-edged factor, raising the question whether it is in the circumstances really proportionate to put the parties to the expense of a fresh start.

15. The present proceedings have never reached the stage of a case management conference. Rule 20.1 enables a party at any time prior to a case management conference to change its statement of case. Since Real Time's statement of case was insufficiently particularised, it seems that it could without permission have changed it by adding the required details: see *Bernard v Seebalack*, para 27. And, even if a more restricted view of "change" were taken, that would lead to the odd consequence, on the Centre's case, that a party could, without permission, correct a major omission by "changing" its statement of case under rule 20.1, but could not remedy a more minor error consisting of failure to include sufficient details in its statement of case.

16. In the Board's opinion, the Centre's submissions involve a misconception as to the scheme of the Civil Proceedings Rules and the role of the court under them. Rule 35.3 involves a restriction on the ability of a party to request information. But it says nothing about the court's powers. In the present case, the Centre is not applying for information. It is applying to strike out, and it is in these circumstances for the court to decide upon the appropriate response.

17. In that connection, the court has an express discretion under rule 26.2 whether to strike out (it "may strike out"). It must therefore consider any alternatives, and rule 26.1(1)(w) enables it to "give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective", which is to deal with cases justly. As the editors of *The Caribbean Civil Court Practice* (2011) state at Note 23.6, correctly in the Board's view, the court may under this sub-rule make orders of its own initiative. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate to specify the consequences (which might include striking out) if the details or amendment were not duly forthcoming within that period.

18. The Centre could in the present case have applied not under rule 26.2 to strike out, but under rule 26.3 for an "unless" order, requiring Real Time to serve an amended statement of case or adequate details within a specified period, failing which the statement of case would be struck out. Since the Centre's interest was in getting rid of the proceedings, it did not so apply. But it would again be very strange if, by choosing only to apply for the more radical than the more moderate remedy, a defendant could force the court's hand, and deprive it of the option to arrive at a more proportionate solution.

19. The judge was concerned about Real Time's reticence and made some references in paragraphs 49 to 51 to the court's role in relation to "any transaction tinged by illegality" to the transactions not being "at arm's length" but carrying "some deeper purport", to the proceedings having been filed just prior to local national elections held on 24th May 2010 and to the transactions calling in the circumstances for "greater details and greater explanation and greater vigilance". These were speculations going beyond any evidence before the judge; moreover, whatever the background, the Centre's case that there were large unexplained gifts fails to give any account of it as much as Real Time's case that they were loans. Now that Real Time has offered to provide details, the focus is in any event likely to shift to its compliance with that offer, which can always be tested by an "unless" order.

20. For the reasons given, the Board considers that the Court of Appeal was clearly right in the decision it reached, and this appeal is dismissed accordingly. There has been no cross-appeal seeking any order other than that made by the Court of Appeal for remission to and reconsideration by the judge.

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
MONTSERRAT

CLAIM NO. MNIHCVAP2018/0009

BETWEEN

THE ATTORNEY-GENERAL THE OFFICE OF THE PREMIER	APPELLANTS
AND	
ROVIKA INC. MANISH VALECHHA DENNISON DALEY	RESPONDENTS

FURTHER SUBMISSIONS FOR INTERLOCUTORY APPEAL
