[2011] UKPC 38
Privy Council Appeal No 0068 of 2010

JUDGMENT

The Attorney General (Appellant) *v* Keron Matthews (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Phillips
Lord Brown
Lord Kerr
Lord Dyson
Sir Patrick Coghlin

JUDGMENT DELIVERED BY
Lord Dyson
ON

20 October 2011

Heard on 7 July 2011

Appellant	*Respondent*
Peter Knox QC David di Mambro (Instructed by Charles Russell LLP)	Aiden Casey Aisha Serrette (Instructed by Bankside Commercial Solicitors)

LORD DYSON:

1. On 28 September 2009, the claimant issued proceedings against the defendant claiming damages for assault and battery. His case is that he was assaulted and beaten in prison by a prison officer called Garcia. The claim form and statement of case were served on 29 September 2009. The period for filing a defence expired on 11 November 2009 (CPR 10.3(3)). On 15 October, the defendant filed a notice of appearance indicating an intention to defend the claim. Ms Patricia Cross was assigned as the attorney for the State. She asked for Prison Officer Garcia to attend a meeting on 9 November to give her instructions. He did not attend. The last date for filing the defence was 11 November. By that date, the defendant had neither filed a defence nor sought an extension of time for doing so.

2. On 7 December Ms Cross asked for Prison Officer Garcia to attend her office on 28 December. Once again he did not attend. By a letter dated 10 December to the claimant's attorney, the defendant requested the claimant's agreement to an extension of time of 48 hours from 13 November, since Ms Cross was still having difficulties in obtaining the necessary instructions for preparing the defence. On 11 December, the claimant's attorney replied refusing to agree to an extension of time, saying that the guidance of the Court of Appeal was that (since the request for an extension of time was made after the time for filing the defence had expired) the defendant had to apply to the court for relief from sanctions under CPR 26.7.

3. On the same day, the claimant filed an application for permission to enter judgment in default of defence. This application was served on the defendant on 29 December. On 13 January 2010, the Legal Department of The Prison Administrative Offices told Ms Cross that arrangements would be made for Prison Officer Garcia to meet her on 19 January. On 14 January, the defendant filed an application under CPR 10.3(5) and 26.1(1)(d) for an extension of time for the filing and service of the defence on the grounds that additional time was needed to obtain complete instructions. This application was served on 15 January.

4. On 18 January, Gobin J heard both the claimant's application for permission to enter judgment in default of defence and the defendant's application for an extension of time. She dismissed the claimant's application and granted the defendant an extension of time until 9 February to file and serve the defence (with judgment for the claimant in default). The claimant appealed to the Court of Appeal on 22 January. Gobin J gave her written reasons on 8 February. The defendant filed a defence on 9 February. On 12 February, the Court of Appeal (Kangaloo and Stollmeyer JJA, Narine JA dissenting) allowed the appeal against both of Gobin J's decisions and gave the claimant permission to enter judgment in default of defence.

Relevant provisions of the CPR

5. Rule 1.1 defines the "overriding objective" of the rules as being to enable the court to deal with cases justly. Rule 1.1(2) provides that this includes ensuring that a case is dealt with expeditiously. Rule 1.2(2) provides that the court must seek to give effect to the overriding objective when it "interprets the meaning of any rule". Part 10 contains rules in relation to defences and provides that a defendant may apply for an order extending the time for filing a defence (rule 10.3(5)). The general rule is that the period for filing a defence is 28 days after the date of service of the claim form and statement of case (rule 10.3(1)). But in proceedings against the State, the period for filing as defence is 42 days after that date (rule 10.3(3)). Part 12 contains rules in relation to default judgments. It provides that, if requested by the claimant to do so, the court office must enter judgment if the defendant fails to enter an appearance where the time for doing so has expired (rule 12.3) and the defendant fails to file a defence where the time for doing so has expired (rule 12.4). Part 13 deals with the setting aside or varying of default judgments. Rule 13.3(1) provides:

> "The court may set aside a judgment entered under Part 12 if—
>
> (a) the defendant has a realistic prospect of success in the claim; and
>
> (b) the defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him."

6. Part 26 sets out the court's powers of case management. It has the power to extend the time for compliance with any rule, practice direction or order or direction of the court (rule 26.1(1)(d)). Rule 26.6 provides:

> "(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."

7. Rule 26.7 provides:

> "(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.
>
> …..
>
> (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.
>
> (4) In considering whether to grant relief, the court must have regard to—
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> (a) the interests of the administration of justice;
>
> (b) whether the failure to comply was due to the party or his attorney;
>
> (c) whether the failure to comply has been or can be remedied within a reasonable time; and
>
> (d) whether the trial date or any likely trial date can still be met if relief is granted."

Gobin J's reasons

8. In summary, the judge's reasoning was as follows. The court has a discretion to extend the time for compliance with any rule or practice direction (rule 26.1.1(d)) and to extend the time for serving a defence (rule 10.3(5)). In granting an extension of time pursuant to these rules, she placed significant weight on the fact that the extension would cause no prejudice to the claimant, whereas refusal of an extension

would deprive the defendant of the opportunity to defend the claim. The defendant's failure to file a defence within the 42 day period fixed by the rules (rule 10.3(3)) did not automatically attract any sanction. Rather, it left the defendant exposed to the possibility of an application for judgment in default. That is not a sanction within the contemplation of the rules. Rule 26.7 has no application where no sanction has been imposed by a court order or by a rule.

The decision of the Court of Appeal

9. It was common ground before the Court of Appeal that this was a rule 26.7 case. There was binding authority in the Court of Appeal of Trinidad and Tobago which supported that view. Kangaloo and Stollmeyer JJA said that this was by implication a relief from sanctions case which fell to be determined in accordance with rule 26.7 and that the conditions of rule 26.7(1) and (2) had not been satisfied. Accordingly, the judge had erred. The time for serving the defence should not have been extended and the claimant's application for permission to enter judgment should have succeeded. Narine JA, dissenting, said that rule 26.7 did not apply. The matter fell to be dealt with under rule 10.3(5) and he saw no reason for interfering with the judge's exercise of discretion. He was aware of the other decisions of the court which held that rule 26.7 applies in these circumstances. But he considered that they had been decided per incuriam.

Discussion

10. The majority of the Court of Appeal in the present case applied the reasoning of its earlier decisions of *Trincan Oil Ltd v Schnake* (Civ App No 91 of 2009) and *Khanhai v Cyrus* (Civ App 158 of 2009). In *Trincan,* P Jamadar JA explained the correct interpretation and application of rule 26.7 where the time specified by the rules for taking some procedural step has passed and no prior application for an extension of time has been made. He said that the consequence of the non-compliance with the rule was the imposition of an "implied sanction": in *Trincan*, the implied sanction was that, since the time specified by the rules for filing an appeal had passed, no appeal could be pursued. In *Khanhai,* the defendant failed to file a defence within the period specified by the rules for doing so and no application had been made for an extension of time before the expiry of that period. The Court of Appeal held at para 20 of *Khanhai* that the sanction imposed by the CPR for non-compliance with the rules was that, without the permission of the court, no defence could be served after the time for filing a defence had elapsed. It followed that rule 26.6(2) required an application for relief from sanctions pursuant to rule 26.7.

11. More recently, the implied sanction doctrine has been reasserted by the Court of Appeal in *The Attorney General of Trinidad and Tobago v Regis* (Civ App No 79

of 2011) (unreported) 13 June 2011. In a comprehensive judgment, the court considered and rejected the objections to the court's previous interpretation of rule 26.7. The court said at para 29 that the consequence of the court's earlier decisions and its approach "has resulted in an observable shift away from a cancerous *laissez-faire* approach to civil litigation to a more responsible and diligent one". It noted that, as recently as 25 May 2011 and conscious of the court's jurisprudence, the Rules Committee had nevertheless agreed to retain rule 26.7 without amendments. At para 32, the court said:

> "The aforesaid decisions of the Court of Appeal on Part 26.7 reflect the exercise of the indigenous court's interpretative function as it develops a local jurisprudence relevant to existing needs and circumstances. While it is acknowledged that other jurisdictions and other cultures may adopt different approaches to similar problems, it is hoped that regard will be paid to the experiences and insights of local judges to know what best suits the needs of local society as they seek, in the exercise of their independent sovereignty and constitutional mandate, to interpret and apply the laws of Trinidad and Tobago in ways that are purposeful for their people."

12. The claimant seeks to uphold the reasoning of the majority in the present case and in particular the notion of the implied sanction. The argument runs as follows. In any case where (a) a party needs or wishes to take procedural steps, (b) a mandatory time limit is prescribed by the rules for the taking of this step, (c) the time limit has expired without the party making an application for an extension of time for the taking of the step, then (d) unless a rule expressly otherwise states, the party is disabled from taking the relevant step, (e) being placed under that disability is an adverse consequence for that party which flows from that failure to observe the rule which prescribes the time limit, and (f) the adverse consequence is a sanction within the meaning of rule 26.7. As regards (d), rule 9.3(3) is an example of a rule which expressly otherwise states. Rule 9.3(1) provides for a general rule that the period for entering an appearance is 8 days after the date of service of the claim form. But rule 9.3(3) provides that a defendant may enter an appearance "at any time before a default judgment is entered."

13. It is central to the claimant's argument that a defendant cannot file and serve a defence once the time for doing so has passed. Rule 10 does not say so in terms, but it is submitted that it is to be interpreted as if it had done so. If the position were otherwise, the defendant would have an unlimited right to file a defence at any time before judgment is entered. If that were the case, what purpose would be served by having rules which impose a time limit for the filing of a defence? Furthermore, it is significant that there is no provision corresponding with rule 9.3(3) in relation to the filing of a defence. Thus an application to file a defence out of time where the agreement of the claimant has not been obtained is not merely an application under

rule 10.5. It is in reality an application for relief from the automatic sanction imposed by the rules. In short, it is submitted on behalf of the claimant that rule 26.6 and 26.7 are designed to ensure compliance with all the time limits provided by the rules of court, court orders and practice directions.

14. I would reject these arguments largely for the reasons given by Mr Knox QC. First, a defence can be filed without the permission of the court after the time for filing has expired. If the claimant does nothing or waives late service, the defence stands and no question of sanction arises. If, as in the present case, judgment has not been entered when the defendant applies out of time for an extension of time, there is no question of any sanction having yet been imposed on him. No distinction is drawn in rule 10.3(5) between applications for an extension of time before and after the period for filing a defence.

15. Secondly, rules 26.6 and 26.7 must be read together. Rule 26.7 provides for applications for relief from any sanction *imposed* for a failure to comply inter alia with any rule. Rule 26.6(2) provides that where a party has failed inter alia to comply with any rule, "any sanction for non-compliance *imposed* by the rule….has effect unless the party in default applied for and obtains relief from the sanction"(emphasis added). In the view of the Board, this is aiming at rules which themselves impose or specify the consequences of a failure to comply. Examples of such rules are to be found in rule 29.13(1) (which provides that if a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits); rule 28.13(1) (consequence of failure to disclose documents under an order for disclosure); and rule 33.12(1) (consequence of failure to comply with a direction to disclose an expert's report).

16. It is striking that there is no similar provision in relation to a failure to file a defence within the time prescribed by the rules. There is no rule which states that, if the defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rules do, however, make provision for what the parties may do if the defendant fails to file a defence with the prescribed period: rule 10.3(5) provides that the defendant may apply for an extension of time; and rule 12.4 provides that, if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the claimant. It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour. That is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose.

17. Thirdly, if the Court of Appeal's approach is correct, it has consequences which cannot have been intended by the draftsman. If the claimant's argument is correct, where a judgment in default of defence is obtained by the claimant and the defendant wishes to have it set aside, he must apply to have the judgment set aside under rule 13.3 and apply under rule 26.7 for relief from a sanction imposed by the rule for failure to comply with the rule. The conditions necessary for the exercise of the court's discretion to set aside a default judgment under rule 13.3 are that (i) the defendant has a realistic prospect of success in the claim and (ii) the defendant acted as soon as reasonably practicable when he found that judgment had been entered against him. The criteria for a successful application under rule 26.7 for relief from a sanction imposed for a failure to comply with a rule are quite different. Here, the question of whether the defendant has a realistic prospect of success in the claim is not a relevant condition for the exercise of the court's discretion. Moreover, an application for relief from a sanction must fail unless all three of the conditions precedent specified in rule 26.7(3) are satisfied. These are that (i) the failure to comply was not intentional; (ii) there is a good explanation for the breach and (iii) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

18. But it cannot have been intended that, where a defendant wishes to set aside a default judgment, it must satisfy the conditions of both rule 13.3 and 26.7. Part 13 is concerned with setting aside a default judgment. That is clear from the content of the Part and is spelt out in rule 13.1 ("the rules in this Part set out the procedure for setting aside or varying a default judgment entered under Part 12 (default judgments)"). Part 26 is concerned with the court's general powers of management. It cannot have been intended that a defendant who wishes to set aside a default judgment must satisfy the requirements of both rules. If a defendant satisfies the two conditions specified in rule 13.3, his application to set aside the judgment should succeed. The court cannot refuse the application on the grounds that, although the rule 13.3 conditions have been satisfied, the further conditions specified in rule 26.7(3) have not been. If it had been intended that, unless a defendant satisfies these further conditions, the court may not set aside a default judgment, this would have been stated in rule 13.3. The fact that it is not stated in rule 13.3 indicates that the rule 26.7(3) conditions have no part to play when the court decides whether to set aside a default judgment. It follows that an application to set aside a default judgment is not an application for relief from a sanction imposed by the rule.

19. The Board is conscious of the overriding objective and the court's obligation to give effect to it when it interprets the meaning of any rule. The jurisprudence developed by the Court of Appeal emphasises the fact that the overriding objective of dealing with cases justly includes dealing with cases in ways which are proportionate and dealing with cases expeditiously. It also makes the point that an element of discretion is inherent in the preconditions specified in rule 26.7(3). The Board is alive to these considerations and fully respects the views of the Court of Appeal which have been expressed most clearly and cogently in the cases to which reference has

earlier been made. The Board certainly has no wish to impede the court's commendable desire to encourage a new litigation culture or to undermine the steps that it is taking to rid Trinidad and Tobago of the "cancerous *laisser-faire* approach to civil litigation".

20. Nevertheless, if the language of the rules admits of only one interpretation, it must be given effect. For the reasons set out above, the Board cannot accept that, where a defendant fails to file a defence within the period prescribed by the rule, it is subject to an implied sanction imposed by the rules. Rule 13.3 sets out the conditions that a defendant must satisfy if he wishes to have a default judgment set aside. If the Rules Committee wishes to impose the rule 26.7(3) conditions as additional requirements for the setting aside of a default judgment, then this should be done expressly by an appropriate amendment of rule 13.3.

21. For the reasons that we have given, this appeal is allowed. The parties have 28 days in which to make submissions on costs.