[2011] UKPC 37
Privy Council Appeal No 0067 of 2010

JUDGMENT

The Attorney General (Appellant) *v* Universal Projects Limited (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	James Guthrie QC
David di Mambro	Mr. Neal Bisnath
(Instructed by Charles Russell LLP)	(Instructed by Bankside Commercial Solicitors)

LORD DYSON

1. The principal issue that arises on this appeal is whether an application by a defendant to set aside a judgment following non-compliance with a court order extending time for filing a defence in default of which permission is given to the claimant to enter judgment is (i) an application to set aside judgment under CPR 13.3 (as is contended by the Attorney General) or (ii) an application for relief from sanctions under CPR 26.7 (as contended by Universal Projects Limited).

The facts

2. By a claim form filed on 16 December 2008, the claimant claimed a sum a little in excess of $31million from the defendant as money due under an engineer's certificate issued under a contract for the improvement of the Churchill Roosevelt Highway. The claim form was served on the Solicitor General's Department ("the Department") on the same day. Deborah Jean-Baptiste-Samuel is the attorney who has had the conduct of these proceedings since receipt of the claimant's pre-action protocol letter on 14 November 2008. On 8 December, Ms Baptiste-Samuel obtained a bundle of papers from the Ministry and passed them on to the advocate attorneys at the Department who were assigned to the case. The attorneys were of the opinion that they could not act without formal instructions from the Ministry (which had its own in-house attorneys). Instructions were received on or about 13 January 2009. Neither of the attorneys was aware of the claim form. The document (and it seems other relevant papers) had been stored by inexperienced staff in a vacant office. They were discovered by chance on 30 January.

3. Meanwhile, on 16 January the claimant had applied for permission to enter judgment in default of an appearance and defence. Under rule 12.2(2), a claimant may not obtain a default judgment against the State without the permission of the court. The application was served on the Department on 23 January. On 2 February, the case was assigned to Ms Renessa Tang Pack, an attorney in the Department. When it was discovered within the Department that the case had previously been assigned to Ms Baptiste-Samuel, on 10 February it was reassigned to her. On the same day, the defendant entered notice of appearance.

4. By now, the time for filing a defence had expired. On a date between 10 and 20 February, Ms Baptist-Samuel received a telephone call from the Judicial Support Officer to Delzin J to the effect that the "Universal Projects Limited matter" would be listed before that judge for hearing on 11 March. She assumed that this would be for a case management conference, since she had not seen the application for permission to

enter a default judgment. By chance, on 20 February Ms Baptiste-Samuel was in court before Gobin J on a different matter. She discovered (to her surprise) that the "matter of Universal Projects Limited" was listed before Gobin J that very day for an application for judgment in default of an appearance and defence. It transpired that the case listed before Delzin J on 11 March was a different case. Ms Baptiste-Samuel made an oral application to Gobin J for an extension of time for service of the defence in the present case. The judge made an order extending the time for service of the defence by 21 days until 13 March adding "in default leave is granted to the claimant to enter judgment against the defendant." In her affidavit sworn on 1 April, Ms Baptiste-Samuel says that she did not recall the judge "having guarded the order for the delivery of the defence or having imposed an unless order that there be judgment for the claimant in default of delivery of the defence by 13 March".

5. The defendant did not file its defence by 13 March. According to the evidence of Ms Baptiste-Samuel, the advocate attorneys took the view that outside counsel should be retained and that authorisation for this course should be obtained from the Solicitor General. This took time because there was no Solicitor General and the approval of the Attorney General was required. In the result, outside counsel were not instructed until 10 March. On 13 March, Ms Baptiste-Samuel wrote a letter to Gobin J informing her that counsel were examining the documents in their briefs "feverishly" and that they required additional time to absorb their instructions and advise the Attorney General. It would not be possible to file a defence that day. The letter included this: "Senior and Junior Counsel have undertaken to complete as much of the review of their briefs as is possible over this weekend and to this end, we write respectfully to notify the Honourable Judge that it is our intention to file the necessary applications early next week."

6. On 16 March, the claimant entered judgment in the sum of $32,811,582.31 (inclusive of interest and costs). On 23 March, the defendant applied for (i) a stay of the action pending arbitration and alternatively (ii) an extension of time to file its defence and (iii) summary judgment against the claimant. On 25 March, Ms Baptiste-Samuel received a letter from the claimant's attorney enclosing a copy of the default judgment dated 16 March. On 1 April, the defendant filed a notice seeking permission to amend the application of 23 March to include an application for an order that the default judgment be set aside.

7. On 16 April, Gobin J granted the defendant permission to amend its application, but said that the application to set aside the judgment was misconceived and that what was required was an application for relief from sanctions under CPR 26.7. She then treated the application as if it had been made under that rule and dismissed it for reasons which it will be necessary to consider. On 26 February, the Court of Appeal (Archie CJ, Kangaloo JA and Jamadar JA) dismissed the defendant's appeal. The defendant now appeals to the Board with the permission of the Board.

The Civil Procedure Rules

8. Part 1 deals with the "overriding objective". It is defined in rule 1.1. Rule 1.2(2) provides that the court must seek to give effect to the overriding objective when it interprets any rule. Rule 12 deals with defaults judgments. It provides that, if requested to do so by the claimant, the court must enter judgment if the defendant fails to enter a defence within the period prescribed by the rules.

9. Part 13 deals with setting aside and varying default judgments. Rule 13.3 provides:

> "13.3 (1) 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 the judgment had been entered against him.".

10. Rule 26 is headed "Case Management—the Court's Powers". It is necessary to set out Parts 26.6 and 26.7 in full:

> "**Court's powers in cases of failure to comply with rules, orders or directions**
> (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**
> (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.

(4) In considering whether to grant relief, the court must have regard to—

(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.

(5) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

Was the application to set aside the default judgment an application under Part 13 or an application for relief from sanctions under Part 26.7?

11. In a detailed and skilful argument, Mr Knox QC submits that the application was made under Part 13.3. This is not a point that was taken in the Court of Appeal. The following is a summary of his principal submissions. First, Part 13 is a complete code for setting aside default judgments. This is clear from the language of Part 13.1. But if rule 26.7 can be pressed into service in relation to the setting aside of default judgments, Part 13 is not a complete code at all. Secondly, rules 13.3 and 26.7 do not fit together. If they are read together, rule 13.3 is misleading. It suggests that there are only two preconditions before the discretionary power to set aside a default judgment may be exercised, whereas rule 26.7 specifies different preconditions before the discretionary power to grant relief from sanctions may be exercised.

12. Thirdly, the requirement in rule 26.7(3)(c) for general compliance in the past makes little sense in the context of default judgments, where usually there will have been only a brief history against which to assess this. Fourthly, if rule 26.7 applies in relation to default judgments, it has the potential to produce disproportionate and unjust results. The most obvious example is a default judgment entered for a substantial sum where the claim is wholly lacking in merit and (even worse) if the default is a simple error which is modest in gravity, but for which there is no good explanation. Such an interpretation of the CPR does not promote the overriding objective and does not satisfy the mandate of rule 1.2 that the court must seek to give effect to the overriding objective when it interprets the meaning of any rule. It is this

aspect of the matter which is of particular concern to the interveners, the Law Association of Trinidad and Tobago.

13. The Board is unable to accept these submissions. The short answer to them is that on 20 February 2009, Gobin J granted the defendant an extension of time for service of a defence until 13 March but imposed a term that in default the claimant had leave to enter judgment. That term was a "sanction" within the meaning of rule 26.7. The word "sanction" is an ordinary word. It has no special or technical meaning in rule 26.7. Dictionary definitions of "sanction" include "the specific penalty enacted in order to enforce obedience to a law". That is precisely what the term attached to the grant of an extension of time was. It was a penalty that would be imposed if the defence was not served by 13 March. In the language of rule 26.6(1), it was the consequence of the failure to comply with the court order. It is artificial to say that the sanction was the permission to enter judgment. The permission of itself would not affect the defendant. The sanction was the judgment entered pursuant to the permission. Mr Knox rightly concedes that if the order made on 20 February had provided that the time for defence was extended until 13 March and in default the defendant was debarred from defending the claim, the debarring would have been a sanction. In substance, such an order would have been little different from the order that was in fact made. It is true that the claimant would still have had to prove its case, but the defendant would not have been permitted to resist it.

14. Rule 13.3 and rule 26.7 are dealing with different situations. Rule 13.3 is dealing with the setting aside of a default judgment where it has been entered in the circumstances specified in Part 12 ie where there has been a failure to enter an appearance or file a defence as required by the rules. Rule 26.7 is dealing with applications for relief from any sanction, including any sanction for non-compliance with a rule, direction or court order where the sanction has been imposed by the rule or court order. The distinction is important: see the judgment of the Board in *The Attorney General v Keron Matthews* [2011] UKPC 38.

15. It is true that usually there will be little scope for the application of the requirement in rule 26.7(3)(c) of general compliance in the past in the context of default judgments. But the Board does not regard this is a significant indicator of the scope of rule 26.7. Judgments in default are not always entered at a very early stage of the proceedings. Default can occur at any stage.

16. There are several answers to the argument that, if rule 26.7 applies to default judgments, it produces disproportionate and unjust results. First, as explained by the Court of Appeal in *Attorney General of Trinidad and Tobago v Regis* (Civ App No 79 of 2011) (unreported) 13 June 2011, there is an element of judgment inherent in an assessment of whether the conditions set out in rule 26.7(3) have been satisfied. Secondly, in so far as the conditions are regarded as draconian, they serve the purpose

of improving the efficiency of litigation. Thirdly, as already pointed out, Gobin J could unquestionably have imposed the sanction of debarring the defendant from defending in default of serving the defence by 13 March. If she had taken that course, there can be no doubt that the defendant would have been obliged to apply for relief under rule 26.7. In effect, there is no difference between an order which debars a defendant from defending if he does not serve a defence by a certain date and an order giving the claimant permission to apply for judgment if the defendant does not serve a defence by that date. Fourthly, there are ways in which a defaulting party can escape from the draconian consequences of his default. In the present case, for example, the defendant could have applied for a further short extension of time for service of the defence before 16 March. For these reasons, the Board has concluded that the application to set aside the default judgment was an application for relief from sanctions within the meaning of rule 26.7.

Did the defendant satisfy the conditions stated in rule 26.7(1) and (3)(a), (b) and (c)?

17. Both Gobin J and the Court of Appeal held that the defendant had not acted promptly (in breach of rule 26(7)(1)) and that it had not satisfied the pre-conditions stated in rule 26.7(3)(b) and (c). Additionally, Gobin J held that its failure to comply with her order of 20 February 2009 was intentional, but the Court of Appeal disagreed with her on that and there has been no appeal from that part of the Court of Appeal's decision.

18. The Board has reached the clear conclusion that there is no proper basis for challenging the decision of the courts below that there was no "good explanation" within the meaning of rule 26.7(3)(b) for the failure to serve a defence by 13 March. That is fatal to the defendant's case in relation to rule 26.7 and it is not necessary to consider the challenge to the other grounds on which the defendant's appeal was dismissed by the Court of Appeal.

19. Mr Knox submits that the Court of Appeal applied too harsh a test both on the facts and the law in relation to rule 26.7(3)(b). Gobin J dealt with the issue at para 9(k) to (n) of her judgment. She rehearsed the procedural history which has been described above and said that what happened pointed to a failure on the part of the State "to put in place adequate systems and proper administrative procedures and staffing arrangements to meet the demands for increased resources as well as efficiency under the CPR." There had been "an appalling degree of laxity and inefficiency" although this was not the fault of the attorneys within the Department. By inference she was saying that there was no good explanation for not serving the defence by 13 March.

20. The only substantive judgment in the Court of Appeal was delivered by Jamadar JA. At paras 28 and 29 he said that Ms Baptiste-Samuel must have been aware of the default provision attached to the order of 20 February. She had a responsibility to pay attention when the judge was making the order and to obtain an office copy of it as soon as possible. He considered the history of events from the date when it was apparent to the defendant that it would not be able to serve a defence by 13 March. He concluded that there was no good explanation for not serving a defence by 13 March. He dealt with the issue in the following way:

> "54. The explanations offered by the Appellant for the breach – the failure to file a defence by the 13th March, 2009 (compounded by the default order of the 20th February, 2009), arose in the context of a suggestion from one of the two State advocates assigned to the case to retain outside counsel. It appears that to retain outside counsel required some input from the Solicitor General. However, there was no substantive office holder at the time, and in these circumstances it was alleged that: "Owing to the absence of a substantive Solicitor General, this did not prove easy and further delay was occasioned in making arrangements to retain outside counsel…". I have already discussed this explanation earlier in this judgment. In addition to what I have already said there is no suggestion that there were no other officers in the department who could discharge the duties of the Solicitor General or even that there was not someone acting in that post, and it was not contended that without a substantive office holder outside counsel could not be retained. Thus, apart from this vague suggestion, no evidence was given as to why specifically the absence of a substantive Solicitor General caused a delay in retaining outside counsel in this case.
>
> 55. In my opinion a bald allegation of the absence of a substantive Solicitor General without more cannot be a good explanation for any delay in retaining outside counsel and consequently for the breach of the court's order in this case.
>
> 56. On the very day that the default order was made the suggestion was also made to retain outside counsel. If it was known that such a decision was likely to take undue time, which it seems was known, then that occurrence could not have been unexpected and should have been considered in any decision to be made by the Appellant with respect to retaining outside counsel. This especially in light of the order to have a defence prepared and filed by the 13th March, 2009. A party cannot in the face of a court order pursue a course that it knows or reasonably anticipates will lead it afoul of that order and then pray in aid of relief from the sanctions of the order the circumstances that it was aware could lead to default. In such circumstances a party must act promptly to either

comply with the court order or to secure further directions so as to avoid default. Thus the explanation given for failing to file a defence by the 13th March, 2009 is not, in my opinion, a good explanation for the breach."

21. Mr Knox submits that the Court of Appeal did not make sufficient allowance for the difficulties which caused the delay in preparing the defence. There was no evidence that it was known as at 20 February that getting approval to instructing outside counsel would take as long as it did. But more importantly, Mr Knox submits that the court's reasoning proceeded on the mistaken premise that in law a "good explanation" requires the party in default to show that he was not at fault, with the result that he cannot rely on such things as administrative inefficiency, oversight or errors made in good faith. To interpret "good explanation" as requiring absence of fault would impose an unreasonably high test, because in practice virtually all breaches are the result of some fault. Rather, he submits, a "good explanation" is one which "properly explains how his breach came about, which may or may not involve an element of fault such as inefficiency or error in good faith" (para 26 of the defendant's written case in the present appeal). Any other interpretation would be inconsistent with the overriding objective of dealing with cases justly and should therefore be avoided under rule 1.1(2).

22. Applying that test, Mr Knox submits that the State did have a good explanation for its failure to serve a defence by 13 March. It needed to instruct outside counsel (given the size of the claim), but this took some time with the result that they were not instructed until 10 March because the matter had to be passed to the Attorney General.

23. The Board cannot accept these submissions. First, if the explanation for the breach ie the failure to serve a defence by 13 March connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency.

24. The Board cannot find any fault in the reasoning of Jamadar JA. It wishes particularly to emphasise the points made in the last part of para 56 of his judgment. The proceedings were served on the defendant on 16 December 2008. On 20 February the defendant was granted an extension of time of three weeks (until 13 March) for the service of the defence. In these circumstances, it was incumbent on the defendant to do everything that it reasonably could to meet the extended timetable. The Court of Appeal was entitled to regard the delay in instructing outside counsel as inexcusable. Even more perplexing was Ms Baptiste-Samuel's failure to seek a

further short extension of time for service of the defence. She knew that the defence would not be served in time. Instead of applying for an extension of time, she wrote the letter of 13 March 2009 referred to at para 5 above. There is no reason to suppose that, having regard to the size of the claim, Gobin J would not have granted a further short extension of time. In that event, there would have been no breach of the order of 20 February at all.

25. It follows that the appeal against the refusal to grant relief from sanctions under rule 26.7 must be dismissed.

Does the court have a residual jurisdiction to set aside the judgment to prevent an abuse of process?

26. Mr Knox submits that the defendant has a strong defence to the claim and would be bound to succeed at trial. The Board is content to assume in the defendant's favour that this is the case. It is not, therefore, necessary to examine the details of the defence. Mr Knox submits that, even if the application under rule 26.7 is rejected, the court retains an inherent jurisdiction to set aside the judgment in order to prevent its own process from being abused where the claim is shown to be misconceived and to be bound to fail.

27. Rule 26.2(1) provides that the court may strike out a statement of case or part of a statement of case if it appears "(b) that the statement of case or part to be struck out is an abuse of the process of the court; or (c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim". The rules contemplate that an application under rule 26.2(1) will be made while the proceedings are on foot, ie before judgment is entered. If a default judgment is entered, the rules provide that the defendant can apply to have it set aside, but only if the conditions set out in rule 13.3(1) or rule 26.7 (whichever is applicable) are satisfied. There is no scope for recourse to the inherent jurisdiction of the court. The territory is occupied by the rules. The court's inherent jurisdiction cannot be invoked to circumvent the express provisions of the rules. As the Board said in *Texan Management v Pacific Electric Wire and Cable Co Ltd* [2009] UKPC 46 at para 57:

> "The modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules."

The argument that Mr Knox seeks to advance is an attempt to circumvent the stringent conditions to which rule 26.7 is subject. It cannot be accepted.

Conclusion

28. For these reasons, the Board dismisses the appeal. It should record that Mr Knox sought to raise an argument that, if rule 26.7(3) on its true construction does not permit the default judgment from being set aside, then the rule infringes the defendant's rights under sections 4(a) and 5(2)(e) of the Constitution. This argument was not raised in the courts below. For this reason, the Board decided not to permit Mr Knox to develop it.

29. The parties have 28 days in which to make submissions on costs.