

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2023/0034

BETWEEN:

[1] JESSY JAMES KHOULY
[2] SANDY-ANN KHOULY
(Administrators of the Estate of WAFAA KHOULY née HADEED aka WAFFA
KHOULY née HADID aka WAFAA KHOULY

Appellants

and

MOUNT ST. JOHN'S MEDICAL CENTRE BOARD

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Eddy D. Ventose
The Hon. Mde. Esco L. Henry

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Kendrickson Kentish for the Appellants
Mr. George Looby IV for the Respondent

2024: May 3;
June 5.

Interlocutory appeal – Default judgment – Appeal against decision to set aside judgment in default – Part 13 of the Civil Procedure Rules (Revised Edition) 2023 – Appellate interference in the judicial discretion of lower courts – Whether the decision of the learned judge exceeded the generous ambit within which reasonable disagreement was possible, such that it was blatantly wrong – Whether the learned trial judge erred in law in finding that there was a good explanation advanced by the respondent for its failure to file a defence – The effect of an application to strike out on the timeline for filing a defence under the CPR – Whether the period for the filing of the defence commenced the day after the order of the

Court of Appeal dated 8th March 2023 allowing the appeal of the learned trial judge on the application to strike out

On 10th February 2020 the appellants claimed against the respondent the following reliefs: (1) damages for medical negligence resulting in the death of Wafaa Khouly née Hadeed; (2) damages under the Fatal Accidents Act; (3) damages under the Causes of Action (Survival) Act; (4) funeral expenses in the sum of \$13,400.00; (5) interest; (6) costs; and (7) further reliefs as the court deems fit. On 11th March 2020, the respondent applied to strike out the appellants' claim, which was granted by a master on 1st December 2021.

On 14th December 2021 the appellants appealed to the Court of Appeal against the decision of the master. On 8th March 2023, the Court of Appeal in an oral decision allowing the appeal made the following orders: (1) the appeal is allowed and the orders of the master are set aside, (2) this issue is remitted for determination at the trial of the substantive claim in the court below, (3) the respondent shall pay the appellants' costs in the court below set at \$1,500.00 and costs in the appeal set at \$1,000.00. Since no defence was filed by the respondent, the appellants filed a request for judgment in default on 12th April 2023 and judgment was entered by the court office against the respondent on 26th June 2023.

On 12th July the respondent applied to set aside judgment in default. The learned trial judge delivered judgment on 11th September 2023 and was satisfied that the three conditions for setting aside default judgment in accordance with CPR 13.3(1) were met. The learned trial judge found that the respondent applied to set aside the default judgment as soon as reasonably practicable, that the respondent provided a good explanation for the failure to file a defence, i.e. the respondent was waiting for an order for the further progression of the claim and that the respondent had a real prospect of successfully defending the claim.

Dissatisfied with the decision of the learned trial judge, the appellants appealed to the Court of Appeal on 4th December 2023. The main issue for the Court of Appeal was whether the learned trial judge erred in the exercise of her discretion under CPR 13.3(1) which permits a judge to set aside a default judgment where the judge is satisfied that an appellant has met the three conditions in that rule. Consequently, two sub-issues arise: (1) Whether the respondent gave a good explanation for failure to file a defence and (2) whether the respondent had a real prospect of successfully defending the claim. There is no question that the respondent applied as soon as reasonably practicable after finding out the judgment had been entered. Further, there cannot be any real question that the learned judge correctly found that the respondent had a real prospect of successfully defending the claim by relying on the limitation point in the Public Authorities Protection Act. Therefore, the issue of whether the respondent gave a good explanation for failure to file a defence remained for determination.

Held: allowing the appeal against the decision of the learned trial judge and setting aside the orders made at paragraph 55 subparagraphs (a) to (e) in their entirety, resulting in the restoration of the judgment in default on 26th June 2023 and awarding the appellants their

costs in the appeal to be paid by the respondent, such costs to be assessed if not agreed within 21 days, that:

1. It is settled law that an appellate court will not interfere with the exercise of a judge's discretion unless it is satisfied that the learned judge erred in principle or he/she has omitted to take into account matters which should have been taken into account or took into account matters which should not have been taken into account and as a result exceeded the generous ambit within which reasonable disagreement is possible or the decision is wholly wrong. This is especially so in case management decisions as the managing judge is usually far more acquainted with the details of the case than the appellate court and is considered to be in a better position to make decisions pertaining to interlocutory issues for the progression of the case.

The Marina Village Limited v St. Kitts Urban Development Corporation Limited SKBHCVAP2105/0012 (delivered 19th May 2016, unreported) followed; **Yates Association Construction Co. Limited v Brian Quammie** BVIHCVAP2014/0005 (delivered 15th May 2015, unreported) followed.

2. 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 the CPR imposing pre-conditions for setting aside a default judgment. If these pre-conditions are not satisfied the court has no discretion to set aside. With reference to the pre-condition of whether there is a good explanation for the failure to file a defence, a full and detailed explanation does not make the explanation one that is good or excusable. Among others set out by this Court in various decisions, misapprehension of the law, mistake of the law by counsel, volume of work and inadvertence do not serve as an excuse for noncompliance with a rule or order.

Kenrick Thomas v RBTT Bank Caribbean Limited (formerly Caribbean Banking Limited) Civil Appeal No. 3 of 2005 (delivered 13th October 2005, unreported) followed; **Public Works Corporation v Mathew Nelson** DOMHCVAP2016 (delivered 27th May 2017, unreported) followed; **Attorney General v Universal Projects Limited** [2011] UKPC 37 applied.

3. The respondent's explanation in essence is that (1) counsel for the respondent was mistaken in his belief that time began to run from the decision of this Court in the first appeal and was therefore not aware that the defence had to be filed and (2) it was the fault of the court office in not setting a date to file a defence by the court. There is established authority of this Court that an application to strike out automatically stops time from running for the filing of a defence. It follows that when that application is finally determined either by the court below or by this court, time begins to run from the date of the judgment. The timelines in the CPR on the filing of a claim form and statement of claim are automatic. A defence must be filed 28 days after the date of service of the claim form. This timeline occurs automatically,

there is nothing required of the court office or anyone else. There is no need for any order of the court for the timeline for filing the defence to be engaged once again when the court finally determines the application. Consequently, when this Court in the first appeal gave its decision allowing the appeal and setting aside the order of the learned master on 8th March 2023, it meant that the respondent had 28 days from 9th March 2023 to file his defence. It cannot be a good explanation that the respondent was awaiting a notice of case management conference and the learned trial judge erred in accepting the respondent's explanation as a good explanation for his failure to file his defence within the 28-day period after the Court handed down its decision on 8th March 2023.

St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported) followed; **Attorney General of Saint Luca v Darrel Montrope** SLUHCVP2019/0021 (delivered 9th July 2020, unreported) followed; **Reginald Anthony Hull v Attorney General of Saint Christopher and Nevis et al** SKBHCVP2012/0029 (delivered 10th June 2013, unreported) followed; **Jenny Lindsay v Thomas Aristide Flemming** AXAHCVP2015/0002 (delivered 8th December 2016, unreported) considered.

JUDGMENT

- [1] **VENTOSE JA:** This is an appeal filed by the appellants on 4th December 2023 appealing against the decision of the learned trial judge dated 11th September 2023 in which the learned trial judge set aside a judgment in default entered on 26th June 2013 and gave directions for the respondent to file a defence within 7 days of the date of the judgment.

Background

- [2] The appellants filed their claim form and statement of claim on 10th February 2020. In that claim, the appellants claimed against the respondent the following reliefs: (1) Damages for medical negligence resulting in the death of Wafaa Khouly née Hadeed; (2) Damages under the Fatal Accidents Act;¹ (3) Damages under the Causes of Action (Survival) Act;² (4) Funeral expenses in the sum of \$13,400.00; (5) Interest; (6) Costs; and (7) Further and other reliefs as the court deems fit. The respondent

¹Cap. 166 of the Revised Laws of Antigua and Barbuda 2017.

²Cap. 78 of the Revised Laws of Antigua and Barbuda 2017.

filed an acknowledgement of service on 21st February 2020. On 11th March 2020, the respondent filed an application to strike out the appellants' statement of claim, which was granted by a Master on 1st December 2021. The appellants appealed on 14th December 2021 to the Court of Appeal against the decision of the Master. On 8th March 2023, the Court of Appeal in an oral decision allowing the appeal made the following orders:

- (1) The appeal is allowed and the orders of the master are set aside.
- (2) This issue is remitted for determination at the trial of the substantive claim in the court below
- (3) The respondent shall pay the appellant's costs in the court below set at \$1,500.00 and costs in the appeal set at \$1,000.00.

- [3] Since no defence was filed by the respondent, the appellant filed on 12th April 2023 a request for judgment in default of defence and judgment was entered by the court office against the respondent on 26th June 2023.

The decision in the court below

- [4] On 12th July 2023, the respondent applied to set aside judgment in default. The learned trial judge gave judgment on 11th September 2023 and was satisfied that the three conditions for setting aside default judgment in accordance with rule 13.3(1) of the **Civil Procedure Rules (Revised Edition) 2023** ("CPR") were met. First, the respondent applied to set aside the default judgment as soon as reasonably practicable after finding out that the judgment had been entered. In this case, the application was filed 7 days after the perfected order of the court and 17 days after receiving notice. Second, the learned trial judge accepted the following explanation by the respondent as a good explanation for the failure to file a defence: 'the Court of Appeal having not given the time frame for the filing of the defence, the [respondent] was awaiting the scheduling of the matter by the Court office to facilitate an order being made for the further progression of the claim'. Third, the learned trial judge accepted that the respondent had a real prospect of successfully defending

the claim because the draft defence that was filed by the respondent sought to rely on the limitation point contained within the provisions of the **Public Authorities Protection Act**³ (the “PAPA”) and to defend the negligence as claimed as to the steps that were taken by the respondent’s employees in relation to the deceased, Wafaa Khoully. The learned trial judge accepted that the defence raised was more than arguable. Consequently, the learned trial judge concluded that the respondent had satisfied her of the conditions necessary to set aside the default judgment under CPR 13.3(1). The learned trial judge therefore granted the application and set aside the default judgment that was previously granted in favour of the appellants.

The appeal

[5] As mentioned above, the appellants appealed the decision of the learned trial judge and in their notice of appeal set out the following grounds:

- ”1. The learned judge erred in law and/or misdirected herself when having cited Sylmond Trade Inc v Inteco Beteiligungs AG, the court failed to properly consider and apply the law when she held that there was no fault on the part of the Respondent and that there was a good explanation for the failure of the Respondent to file a defence to the Claim.
2. The learned judge erred in law and/or misdirected herself when she failed to properly consider and/or hold that the Respondent’s explanation and reason for the failure to file a defence was an incorrect interpretation of CPR Part 13.3 (1) by the Respondent’s authorities.
3. The learned judge erred in law and/or misdirected herself when she held at paragraphs 48 to 49 of the judgment, that “the Applicant did not need an order of the court to file a defence” and then proceeded to hold that “it would have been quite within the Applicant’s range of decisions available to them to await the matter being reassigned to a judicial officer of the High Court for the matter to be brought back on the trial track that the Court of Appeal had placed it on.” The learned judge failed to consider that, given the nature of the Court of Appeal Order, the matter would take its normal course under the CPR and CPR Part 10 would naturally apply, especially since the Respondent failed to properly apply for an extension of time to file a defence and/or a stay of the proceedings.

³ Cap. 352 of the Revised Laws of Antigua and Barbuda 2017.

4. The learned judge erred in law and/or fact by failing to properly consider that the draft defence filed by the Respondent did not raise cogent averments to displace or overcome the allegation that the Respondent was exercising a private duty in treating the deceased to satisfy the Court that the defence had a realistic prospect of success or a more than arguable case".

[6] The first three grounds of appeal relate to the second condition that needs to be satisfied under CPR 13.3(1)(b), namely, 'gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be'. The main issue in this appeal is whether the learned trial judge erred in the exercise of her discretion under CPR 13.3(1) which permits a judge to set aside a default judgment where the judge is satisfied that an applicant has met the three conditions outlined in that rule. Two sub-issues arise. The first is whether the respondent gave a good explanation for the failure to file a defence. The second is whether the respondent had a real prospect of successfully defending the claim, in accordance with the third condition that needs to be satisfied under CPR 13.3(1)(c). There is no question that the respondent applied to the court as soon as reasonably practicable after finding out that judgment had been entered. The appellants did not appeal against that finding by the learned trial judge.

Appellate interference

[7] In **The Marina Village Limited v St. Kitts Urban Development Corporation Limited**⁴ this Court stated at paragraph [8] that it is settled law that an appellate court will not interfere with the exercise of a judge's discretion unless it is satisfied that the learned judge erred in principle or he/she has omitted to take into account matters which should have been taken into account or took into account matters which should not have been taken into account and as a result exceeded the generous ambit within which reasonable disagreement is possible or the decision is wholly wrong. In **Yates Associates Construction Co. Limited v Brian Quammie**,⁵ this Court also stated that:

⁴ SKBHCVP2105/0012 (delivered 19th May 2016, unreported).

⁵ BVIHCVAP2014/0005 (delivered 5th May 2015, unreported).

“[13] It is the law that the appellate court can only disturb the exercise of the learned master’s discretion if it were to conclude that the master erred in principle in his or her approach or has left out of account some aspect that he or she should have considered and as a result the decision exceeded the generous ambit within which reasonable disagreement is possible or the decision is wholly wrong. This principle was enunciated by Sir Vincent Floissac in the case of *Dufour and Others v Helen Air Corporation Ltd* which was quoted and followed by this Court in *Attorney General et al v Geraldine Cabey* where Gordon JA pointed out that Sir Vincent Floissac’s words have “been quoted and followed in this court on occasions too numerous to count”. He went on to recite the following:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

[8] It is also necessary to refer to the following statements of this Court in **Digital Security Services Ltd v Nevis International Bank & Trust Limited**⁶ when dealing with an appeal in respect of the exercise of the discretion by a learned judge in respect of CPR 13.3(1)(b):

“[20] In dealing with these grounds of appeal I make the preliminary observation that the challenge to the Judge’s finding that the Appellants had not provided a good explanation for the delay in filing the defence is a challenge to a finding of fact by the Judge in the exercise of his case management powers. It is trite that appellate courts are generally reluctant to interfere with findings of fact and the exercise of discretion by a trial judge, even more so when the finding that is challenged is a case management decision. The reason for the appellate courts’ reluctance to interfere in the context of case management decisions is the recognition that the managing judge is usually far more acquainted with the details of the case than the appellate court and is considered to be in a better position to make decisions dealing with interlocutory issues and generally progressing the case to trial expeditiously and in the most cost-effective

⁶ NEVHC VAP2021/0003 (delivered 7th April 2022, unreported).

way. This principle has been expressed in various ways in numerous decisions of this Court.”

Conclusions

- [9] The governing rule is CPR 13.3(1) which provides as follows:
- “13.3 Cases where the court may set aside or vary default judgment –
(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 same case may be; and
(c) Has a real prospect of successfully defending the claim.”
- [10] In respect of the finding by the learned trial judge on the third condition to be satisfied under CPR 13.3(1)(c), namely that the respondent had a real prospect of successfully defending the claim, there cannot be any real question that the learned judge correctly found that the respondent has a real prospect of successfully defending the claim by relying on the limitation point in the **PAPA**. It was therefore not surprising that this point was not pursued at all in submissions filed by the appellants in support of the notice of appeal and not mentioned at all during oral submissions at the hearing before this Court.
- [11] In considering the second condition in CPR 13.3(1)(b), the learned trial judge accepted the respondent’s explanation that, since this Court in the first appeal had not given any time frame for the filing of the defence, the respondent was awaiting the scheduling of the matter by the court office to facilitate an order being made for the further progression of the claim. The learned trial judge correctly accepted that, first, the respondent did not need an order of the court to file a defence and second, before the filing of the application to strike out, and if the application had not been successful the respondent knew that they would have had to have filed a defence to the proceedings. However, the learned trial judge at paragraph [49] of her judgment stated as follows:

“However, this court must consider that in light of the order of the Court of Appeal that it would have been quite within the Applicant’s range of decisions available to them to await the matter being reassigned to a judicial officer of the High Court for the matter to be brought back on the trial track that the Court of Appeal had placed it on. Indeed, this court does not disagree that this could also have been done by the Applicant seeking directions, but the fact that they did not, in this court’s mind does not amount to there being no good explanation on the part of the Applicant. I therefore find that the Applicant has also met this condition.”

- [12] This Court in **Kenrick Thomas v RBTT Bank Caribbean Limited (formerly Caribbean Banking Limited)**⁷ at paragraph [10] stated that, first, 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; second, if the pre-conditions are not satisfied the court has no discretion to set aside; and third, the rule makers ordained a policy regarding default judgments - it is as simple as that. This Court in **Public Works Corporation v Matthew Nelson**⁸ stated at paragraph [19] that the giving of a full and detailed explanation does not thereby make the explanation one that is good or, put differently, excusable. While the Privy Council in **Attorney General v Universal Projects Limited**⁹ did not define the term ‘good explanation’ it referred nonetheless to explanations which it would not consider to be good explanations, stating that:

“[23] ... 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.”

- [13] In **Michael Laudat et al v Danny Ambo**¹⁰ this Court stated that:

⁷ Saint Vincent and the Grenadines Civil Appeal No.3 of 2005 (delivered 13th October 2005, unreported).

⁸ DOMHCVAP2016/0007 (delivered 27th May 2017, unreported).

⁹ [2011] UKPC 37.

¹⁰ DOMHCVAP2010/0016 (delivered 15th December 2010, unreported).

“[14]. ... Finally, we wish to remind legal practitioners, particularly junior counsel, of the numerous decisions of this court which clearly establish that counsel do not have a good explanation which will excuse non-compliance with a rule or order, or practice direction where the explanation given for the delay is misapprehension of the law, mistake of the law by counsel; lack of diligence, volume of work, difficulty in communicating with client, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence or inadvertence. (internal citations omitted)”

- [14] In the court below, the respondent argued that, since this Court in the first appeal did not set a deadline for the filing of the defence, the court office ought to have given notice of a case management hearing and set a date for the filing of the defence. The respondent cited no authority for that proposition. The respondent’s submission was that in the absence of a date for the filing of the defence, the appellants did not satisfy the requirements of CPR 12.5, and the judgment in default was wrongly entered. The respondent’s alternative argument was based on CPR 13.3(1). The arguments in relation to CPR 13.3(1)(b) were as follows:

“29. The explanation provided for the failure to file a Defence is that there was no deadline given for filing same, so Counsel for the Defendant was not of the mind that the Defendant would be exposed to the possibility of Judgment in Default being entered against the Defendant.

30. Following the Court of Appeal’s decision and the absence of an order regarding the Defence, Counsel for the Defendant was awaiting a notice for a case management conference to receive an order from the Court as to the filing of the Defence.

31. After receiving notice of the Judgment in Default, it would have appeared that setting a case management simply slipped the Court Office.

32. The Judgment in Default, therefore, came as a surprise to Counsel.

33. This explanation is not an instance of indifference as to whether judgment could be entered. Counsel strongly thought that judgment could not be entered and that there must have been some reason, perhaps inundation, why the Court Office had not yet issued notice of the case management.

34. If the Court disagrees with Counsel’s interpretation and applicability of the Caribbean 6/49 Limited case and must determine whether to exercise its discretion, we invite the Court to view the explanation for the failure to file the Defence as Counsel’s honestly held, though mistaken, belief that there was no deadline regarding its filing.

35. We respectfully submit that, a mistaken belief (if Counsel’s interpretation of the Caribbean 6/49 Limited case is wrong), is something other than indifference as to whether judgment could be entered against the Defendant/Applicant.”

- [15] The essence of the submission was that counsel for the respondent was mistaken in his belief that time began to run from the decision of this Court in the first appeal and was therefore not aware that the defence had to be filed. The second aspect of the submission is that it was the fault of the court office in not setting a date for a case management conference at which the respondent would be given a date to file a defence by the court. The first submission requires an understanding of the effect of the application to strike out on the timeline for filing a defence under the CPR.
- [16] CPR 10.2(1) states that a defendant who wishes to defend all or part of a claim must file a defence (which may be in Form 5). CPR 10.3(1) states that the general rule is that the period for filing a defence is the period of 28 days after the date of service of the claim form. Unless displaced by the court or any other rule, a defence must be served 28 days after the date of service of the claim form. What therefore happens when a claimant within the 28 days makes an application to strike out the claim form but has not yet filed his defence? Some guidance is provided by this Court in **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**.¹¹ The respondent in that case instituted proceedings by writ of summons against the appellant for a sum due and owing. One of the issues the court had to consider was whether the mere fact of filing an application to strike out stopped time from running in relation to the period within which a defence should have been filed. An application for default judgment was sought and obtained for the failure to file a defence. One of the grounds for setting aside the default judgment was that the judgment in default had been entered before the time period for entering a defence had expired.
- [17] At first instance, the trial judge accepted that: (1) the appellants' application to strike out did not operate as a stay of the requirement to file a defence; (2) the time limited for filing a defence had expired; (3) the judgment obtained by the bank was a regular judgment; and (4) the judgment in default ought not to be set aside. On appeal, this Court reversed the finding by the trial judge that the filing of the strike out application

¹¹ Saint Christopher and Nevis Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported).

by the defendant stopped time from running for the filing of the defence and that the court office was obliged to set a date for the hearing of the strike out application before dealing with the request for default judgment. Barrow JA stated that:

“[39] The absence of an equivalent provision, addressed to undisposed of strike out applications, is not determinative in my view. The effect of filing a strike out application must be the same even in the absence of such a provision. That effect must be to prevent the entering of judgment in default. It does not matter whether expression is given to the effect of filing a strike out application by saying that time has stopped running or that a new timetable operates pursuant to the court’s case management powers under Part 26 or otherwise. That is not of importance for the present. The overriding objective of CPR 2000, to enable the court to deal with cases justly, dictates that the effect of filing an application to strike out a claim as an abuse of the court’s process is to oblige the court office to refuse to enter default judgment. Because the default judgment ought never to have been entered in these circumstances the learned judge ought to have set aside the default judgment.”

[18] In **Attorney General of Saint Lucia v Darrel Montrope**,¹² this Court accepted that it seems to be settled by **Caribbean 6/49** that the effect of the filing of an application to strike under CPR 9.7 is to stay the proceedings pending its determination. This Court did not pronounce upon the wider statement made by Barrow JA in **Caribbean 6/49** that this is the effect of any application to strike out irrespective of whether it is grounded in CPR 9.7 or not. The Court did not also consider what happens on the final determination of an application to strike out the claim when a defence has not yet been filed. The wider approach of Barrow JA in **Caribbean 6/49** was expressly endorsed by this Court in **Reginald Anthony Hull v Attorney General of Saint Christopher and Nevis et al**¹³ as follows:

“[14] As Barrow JA has previously stated in the *St. Kitts Nevis Anguilla National Bank Ltd. v Caribbean 6/49 Limited* case, the effect of filing a strike-out application must be to prevent the entering of judgment in default. I see no reason why this consequence should be limited to an application under CPR 9.7, which deals with a dispute as to the court’s jurisdiction. The effect of filing an application to strike out a claim as an abuse of the process of the court must be to oblige the court office to refuse to deal with a

¹² SLUHCVP2019/0021 (delivered 9th July 2020, unreported).

¹³ SKBHCVP2012/0029 (delivered 10th June 2013, unreported).

subsequently filed application to enter default judgment. It is proper procedure for applications to be dealt with in the order that they are filed. Besides, a litigant who makes a genuine application to strike out a claim, regardless of the rule under which he applies, ought not to be required, purely to stop time from running, to incur the expense of filing a defence to the very claim that he is asking the court to strike out. I see no merit in this ground of appeal and I accordingly dismiss it.”

[19] There is no direct authority of this Court explaining when time begins to run for filing a defence following an unsuccessful application to strike out the claim form. In **Jenny Lindsay v Thomas Aristide Flemming**,¹⁴ when dealing with a similar issue, I stated as follows:

“22. There is some merit in the argument that an application to strike out has the effect of stopping time from running in respect of the period for filing a defence: *St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited* (Civil Appeal No.6 OF 2002 dated 31 March 2003). Although the decision in the Court of Appeal in *Caribbean 6/49* involved a consideration of CPR 9.7, which states specifically that the period for filing a defence is extended when an application is made under that rule, Barrow JA [A.G.] articulated a principle of general application (at [39]) as follows:

The effect of filing a strike out application must be the same even in the absence of such a provision. **That effect must be to prevent the entering of judgment in default. It does not matter whether expression is given to the effect of filing a strike out application by saying that time has stopped running or that a new timetable operates pursuant to the court’s case management powers under Part 26 or otherwise.** That is not of importance for the present. The overriding objective of CPR 2000, to enable the court to deal with cases justly, dictates that the effect of filing an application to strike out a claim as an abuse of the court’s process is to oblige the court office to refuse to enter default judgment. (emphasis added)

23. The principle that an application to strike out stops time from running for the period for filing a defence only partially assists the Second and Third Defendants. If time stopped running when the application to strike out was filed on 18 December 2015, then it restarted on 19 May 2016 when the Master handed down her ruling

¹⁴ AXAHCv2015/0002 (delivered 8th December 2016, unreported).

on the application to strike out. Judgment in default was not entered until 7 July 2016, a full seven (7) weeks later. (emphasis in original)”

[20] It seems to me that there is established authority of this Court that an application to strike out automatically stops time from running for the filing of a defence. In my view, it follows that when that application is finally determined either by the court below or this Court, time begins to run from the date of the judgment of the court below or this Court. The timelines in the CPR on the filing of a claim form and statement of claim are automatic. A defence must be filed 28 days after the date of service of the claim form. This timeline occurs automatically after the date of service of the claim form. Nothing is required of the court office or anyone else. The filing of an application to strike out, in accordance with the learning in **Caribbean 6/49**, stops the 28 days from running. Time therefore begins to run again from the final determination of the application. There is no need for any order of the court for the timeline for filing the defence to be engaged once again when the court finally determines the application.

[21] Consequently, applying the reasoning in **Flemming**, when this Court in the first appeal gave its decision allowing the appeal and setting aside the order of the learned master on 8th March 2023, it meant that the respondent had 28 days from 9th March 2023 to file his defence. It cannot be a good explanation that the respondent ‘was awaiting a notice for a case management conference to receive an order from the Court as to the filing of the Defence’. Once a claim form is filed, the next action is for the claim form and statement of claim to be served on the defendant within 6 months. Once that is done, the 28 days for the defendant to file the defence is thereby engaged. The service of a defence then triggers the time period for the filing of a reply which must be filed and served 14 days after the date of service of the defence.

[22] CPR 27.3(1) states that the general rule is that the court office must fix a case management conference immediately upon the filing of a defence to a claim other than a fixed date claim. The case management conference must take place not less than 4 weeks nor more than 8 weeks after the defence is filed (or notice is given under rule 14.7(3)) unless any rule or practice direction prescribes a shorter or longer

period or the case is urgent (CPR 27.3(3)). Importantly, CPR 27.3(4) states that, notwithstanding paragraph (3) a party may apply to the court to fix a case management conference before a defence is filed and CPR 27.3(5) states that the application may be without notice but must state the reasons for the application.

[23] The respondent's reason for not filing the defence is not a good explanation for the following reasons. First, time began to run from the date of the decision of the Court of Appeal in allowing the appeal against the decision of the learned master in striking out the statement of claim. Second, the respondent had 28 days from that date to file and serve the defence. Third, this Court has consistently made clear that a misapprehension or misunderstanding of the law, rules or other procedural requirements by counsel is not a good explanation that will excuse noncompliance with any requirement in the CPR 2000. Fourth, even if the excuse provided by the respondent was explicable, it would still not explain why the respondent had to await 'a notice for a case management conference to receive an order from the Court as to the filing of the defence' when CPR 27.3(4) permits any party to apply, with reasons, to the court to fix a case management conference before a defence is filed. Since the alleged misapprehension was that of the respondent, it was incumbent upon him to apply for the case management conference to get whatever directions he felt were needed to progress the matter. The respondent failed to do this with the result that the request for default judgment was made and subsequently granted. In all the circumstances the reason given by the respondent for failing to file the defence connotes real or substantial fault on the part of the respondent, which means that the respondent does not have a 'good' explanation for the breach.

[24] The learned trial judge erred in principle in accepting the respondent's explanation as a good explanation for his failure to file a defence within the 28-day period after this Court handed down its decision in the first appeal on 9th March 2023. Consequently, the decision of the learned trial judge exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Disposition

- [25] Based on the forgoing, I would allow the appeal against the decision of the learned trial judge and set aside the orders made by the learned trial judge at paragraph 55 and subparagraphs (a) to (e) in their entirety and with the result that the judgment in default entered on 26th June 2013 is restored. The appellants shall have their costs in the appeal to be paid by the respondent, such costs to be assessed if not agreed within 21 days of today's date.

I concur.

Vicki Ann Ellis
Justice of Appeal

I concur.

Esco Henry
Justice of Appeal

By the Court

Chief Registrar