

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

COMMONWEALTH OF DOMINICA

DOMHCVAP2013/0025A

In the matter of an Interlocutory Appeal

BETWEEN:

GLENFORD ROLLE

Appellant

and

STEPHEN LANDER

Respondent

Before:

The Hon. Dame Janice M. Pereira

Chief Justice

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

On Written Submissions:

Ms. Gina I. Dyer Munro for the Appellant

Ms. Ernette C.J. Kangal for the Respondent

2014: October 20.

Interlocutory appeal – Default judgment – Failure to file acknowledgement of service or defence on time – Wrong ‘notes for defendant’ attached to claim form served on appellant/defendant in court below – ‘Notes for defendant’ pertained to fixed date claim rather than general claim – Whether claim ought to have been treated as fixed date claim as a result – Whether appellant/defendant prejudiced by inclusion of wrong notes

The appellant (who was the defendant in the court below) was served with a general claim form and statement of claim on 15th March 2013. Attached to the claim form were notes to the defendant. However, these notes were not the ones which should have been attached to that claim form as they pertained to a fixed date claim, and not a general claim. The claim form did however, contain a notice to the defendant informing him of the claimant's entitlement to apply to have judgment entered against him in default of acknowledgment of service. The appellant not having acknowledged service of the claim or filed a defence within the time specified by the Civil Procedure Rules 2000, the respondent (the claimant in the court below) filed a request for judgment to be entered in default on 13th November 2013. A few days after, the appellant filed a defence, and then subsequently, an

acknowledgment of service. The matter came up for status hearing on 22nd November 2013 before the learned master, who held that the respondent was entitled to his judgment. The master accordingly ordered that the matter be remitted to the Registrar for entry of judgment provided that the conditions of CPR 12.4 were satisfied.¹

The appellant appealed, arguing inter alia that: (1) the claim was a fixed date claim since it was one for debt recovery, and as a result, default judgment could not be entered at the request of the Registrar, or in any event when a defence had been filed and served before the learned master had made her order; and (2) the learned master erred in law by failing to consider that the 'notes' for the defendant (which pertained to a fixed date claim) notified the defendant, among other things, that 'the claimant will not be entitled to enter judgment against the [defendant] without a hearing'.

Held: dismissing the appeal and ordering that the appellant pay the respondent's costs of \$2,000.00, that:

1. The claim being for the recovery of a specified sum of money, it did not fall within the class of matters which ought to commence by fixed date claim form. The general claim form (Form 1 in the **Civil Procedure Rules 2000**) was the correct form to initiate the proceedings.
2. Notwithstanding that the 'notes' for the defendant which were attached to the general claim form served on the appellant/defendant in the court below pertained to a fixed date claim rather than a general claim, the defendant ought to have proceeded as though the claim was a general claim. The inclusion of the wrong notes for the defendant did not change the true nature of the claim. This error went to form rather than substance, and cannot be used by the appellant/defendant as a basis for arguing that the claim ought to have been treated as a fixed date claim, to which different rules would apply in relation to the entry of default judgment.
3. The trigger for resorting to CPR 12.5 (which deals with the conditions to be satisfied for the entry of judgment for failure to defend a claim) is the failure to file a defence within the period for filing a defence, and in the case of CPR 12.4 (which deals with the conditions to be satisfied for the entry of judgment for failure to file an acknowledgment of service) it would be the failure to file an acknowledgement of service. In relation to rule 12.5, the critical question is whether at the time the request for judgment in default was made, a defence had been filed. Similarly, under rule 12.4, the critical question would be whether at the time when the request for default judgment was made, an acknowledgment of service had been filed.
4. The filing of a defence subsequent to the filing of a claimant's request for judgment to be entered for failure to defend will not avail a defendant. Upon receipt of the

¹ Although the order of the learned master refers to rule 12.4, the grounds of appeal and the arguments of counsel essentially make reference to rule 12.5.

claimant's request, the court must enter judgment for failure to defend if the conditions set out in CPR 12.5 are satisfied. The learned master's order was not in breach of the Rules.

The Attorney General v Keron Matthews [2011] UKPC 38 applied.

JUDGMENT

- [1] **BAPTISTE JA:** Glenford Rolle, the appellant, appeals against an interlocutory order of a master remitting a matter to the Registrar for judgment to be entered once the conditions set out in rule 12.4 of the **Civil Procedure Rules 2000** ("CPR 2000") are satisfied. Although the order refers to rule 12.4, the grounds of appeal and the arguments essentially relate to rule 12.5. This judgment will follow that pattern.
- [2] The background facts are that the appellant (who was the defendant in the court below) was served with a claim form and statement of claim on 15th March 2013. The respondent (who was the claimant in the court below) claimed a sum of money as being due and owing to him by the appellant as a result of a breach of a lender/borrower contractual agreement entered into between them. Attached to the claim form were notes to the appellant. These notes were not the correct notes to be attached as they were notes that are attached to a fixed date claim form. Notwithstanding, this error, the claim form initiating the claim contained a notice to the appellant informing him of the respondent's entitlement to apply to have judgment entered against him in default of acknowledgment of service. I note here that counsel for the respondent stated that the request for default judgment was predicated on a failure to file an acknowledgement of service or defence within the time prescribed by the Rules.
- [3] The appellant/defendant having failed to enter an acknowledgement of service and or a defence within the time specified by the CPR 2000, the respondent/claimant filed a request for judgment in default on 13th November 2013. A defence was filed on 18th November 2013 and on 21st November 2013 an amended defence was filed. An acknowledgement of service was filed on 22nd

November 2013. The matter came up for status hearing on the same day. The master noted that counsel for the appellant indicated that the time for filing the defence expired on 13th April 2013 and that a request for judgment in default was filed on 13th November 2013. The master also stated that based on the case of **The Attorney General v Keron Matthews**,² the court was of the opinion that the claimant was entitled to his judgment. The master accordingly ordered that the matter be remitted to the Registrar for entry of judgment provided that the conditions of CPR 12.4 are satisfied.

[4] The appellant advances five grounds of appeal:

1. The claim (debt recovery) being a fixed date claim, default judgment could not be entered at the request of the Registrar or in any event when a defence / amended defence was already filed and served before the master's order.
2. The master erred and was wrong in law by failing to consider that the claimant, in the "Notes for Defendant" notified the defendant, among other things, that:

"The Claimant will not be entitled to enter judgment against you without a hearing"

in accordance with the statutory form, fixed date form set out in CPR 2000 Form 2.
3. The master erred in law when she found that an amended defence filed and served before status hearing was not to be considered by the court and that the claimant was entitled to default judgment being entered at a request to the Registrar.
4. The master failed to observe rule 12.5 of the CPR 2000, which speaks to the conditions to be satisfied before entering judgment for failure to defend.

² [2011] UKPC 38.

5. The master misapplied the case of *The Attorney General v Keron Matthews* ([2011] UKPC 38).

[5] In respect of the first two grounds of appeal, Ms. Dyer-Munro, counsel for the appellant, contends that the claim was not susceptible to the entry of default judgment by the Registrar as it was a fixed date claim. Ms. Dyer-Munro cites rule 12.2(b) of CPR 2000 which states that a claimant may not obtain default judgment if the claim is a fixed date claim. In addition, Ms. Dyer-Munro relies on various 'notes for defendant' on the claim form filed by the respondent/claimant. These include: (i) 'The Claimant will not be entitled to enter judgment against you without a hearing', in accordance with the statutory Form 2 – fixed date claim form; (ii) 'You should also attend the first hearing. If you do not the Judge may deal with the claim in your absence.' Relying on these notes, Ms. Dyer-Munro submits that judgment should not have been entered by the Registrar, but by the judge and the master was wrong when she ordered the Registrar to enter judgment.

[6] A convenient starting point in respect of the first two grounds of appeal is to determine the nature of the claim. Rule 8.1(1) states that a claimant starts proceedings by filing the original and one copy of the claim form. A claim form must be in Form 1 except in circumstances set out in paragraph 5.³ Paragraph 5 deals with Form 2 (fixed date claim form). Form 2 – fixed date claim form – must be used in a claim arising out of hire-purchase or credit sale agreements; in proceedings for possession of land; where its use is required by a rule or practice direction; where by any enactment proceedings are required to be commenced by originating summons or motion.

[7] The claim form used to initiate the proceeding is clearly headed 'Form 1: Claim Form'. Furthermore, and importantly, the claim was simply for the recovery of a specified sum of money; to which a fixed date claim form (Form 2) is inapplicable. As Ms. Kangal, counsel for the respondent, correctly points out, the claim does not

³ CPR 8.1(4).

fall within the class of matters which ought to commence by fixed date claim form. Does the inclusion of the 'notes to defendant' change the true nature or quality of the claim? The answer must be in the negative. As has been indicated, Ms. Dyer-Munro, in propounding in favour of a fixed date claim form, relies on the 'notes to defendant' to buttress her argument. Ms. Kangal concedes that the wrong notes for the defendant were attached; but submitted that the insertion of these notes went to form rather than substance and cannot be used by the appellant as a shield. I agree. In my judgment, the appellant cannot seriously advance the view that he suffered any prejudice by the inclusion of the notes in question. The appellant was served with the Claim Form and Statement of Claim and would be cognizant of the steps to be taken and cannot pray in aid the attachment of the wrong notes. The appellant was not absolved from filing his defence within the time specified by the Rules. In a nutshell, the appellant's complaints are misconceived, being erroneously predicated on the claim being a fixed date claim. Accordingly, there is no merit in grounds 1 and 2.

[8] Grounds 3 and 4 will be considered together. Did the master err in law by not considering the amended defence filed and served before the Status Hearing? Was the claimant entitled to default judgment upon a request to the Registrar? Ms. Dyer-Munro submits that a defence filed late and before judgment is granted is not void and must be considered by the court. In the circumstances, default judgment should not be entered. In support of this proposition Mrs. Dyer-Munroe cites **The Attorney General v Keron Matthews** where Lord Dyson said at paragraph 16 :

"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."

I must point out that, critically, immediately following the above, Lord Dyson said:

"The rules do, however, make provision for what the parties may do if the defendant fails to file a defence with [sic] the prescribed period ... 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. ... [I]f 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.”

This is precisely what happened in the present case. Therefore, Ms. Dyer-Munro cannot derive any support from **The Attorney General v Keron Matthews**.

[9] With respect to ground 4, Mrs. Dyer-Munro points out that one of the conditions for the engagement of rule 12.5 is that ‘the defendant has not filed a defence to the claim or any part of it ...’, rule 12.5(c). Counsel basically submits that rule 12.5 could not have been engaged in so far as the defendant had filed a defence to the claim before the order for the Registrar to enter judgment in default of defence.

[10] It would be instructive to consider the provisions of rule 12.5. Rule 12.5 deals with the conditions to be satisfied for entry of judgment for failure to file a defence. The court office, at the request of the claimant must enter judgment for failure to defend if: (a) (i) the claimant proves service of the claim form and statement of claim; or (ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought; (b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired; (c) the defendant has not – (i) filed a defence to a claim or any part of it; or (ii) (if the only claim is for a specified sum of money) filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or (iii) satisfied the claim on which the claimant seeks judgment; and (d) (if necessary) the claimant has the permission of the court to enter judgment.

[11] Ms. Kangal argues that the claimant satisfied all the conditions for default judgment to be entered upon his request. Further, the claim being one rightly brought by general claim form under rule 8.1(4), default judgment could be entered. Ms. Kangal submits that at the time of filing the request for default judgment on 13th November 2013, the default had already occurred in that the defendant had not filed an acknowledgement of service or a defence. Ms. Kangal correctly points out that the default lies in a failure to file a defence before the request and not in just filing a late defence.

- [12] I am more in sync with the submissions of Ms. Kangal than those of Mrs. Dyer-Munro. Counsel for the appellant appears to miss the very basis on which CPR 12.5 is predicated, which is the request for entry of judgment and the conditions to be satisfied for making the request.
- [13] The trigger for resorting to rule 12.5 is the failure to file a defence within the period for filing a defence and in the case of rule 12.4 it would be the failure to file an acknowledgement of service within the period prescribed by the rules. If the period for filing a defence has passed and a claimant utilises rule 12.5, as he is entitled to do, it certainly would be at variance with logic and contrary to the plain meaning of CPR 12.5 to then complain that the rule cannot be invoked because a defence has been filed. The same would also apply to the non-filing of an acknowledgement of service. In relation to rule 12.5, the critical question has to be whether at the time the request for judgment in default was made, a defence had been filed. Under rule 12.4 the critical question would also be whether at the time when the request for default judgment was made, an acknowledgement of service had been filed. Any other interpretation would deprive the Rules of efficacy. In my judgment, the master properly considered rule 12.5. Grounds 4 and 5 are unmeritorious.
- [14] I now consider the fifth ground of appeal. The effect of the defence being filed after the request for entry of judgment was filed and before the master made her order. In **The Attorney General v Keron Matthews**, the Board⁴ pointed out that there is no rule which states that if a defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rules, however, makes provision for what the parties may do if the defendant fails to file a defence within the prescribed period. In the present matter, the claim, not being a fixed date claim, the defendant faced the risk of a request by the claimant that judgment in default should be entered in his favour. That risk materialised when the claimant made the request. Upon receipt of such a request the court office must enter judgment for failure to defend if the conditions set out in

⁴ At para. 16.

rule 12.5 are satisfied. Accordingly, the filing of a defence or amended defence, after the filing of a request by the claimant for judgment to be entered for failure to defend will not avail a defendant. The master's order is not inharmonious with the rules, nor is it in disaccord with **The Attorney General v Keron Matthews**. The master did not misapply the law set out by the Board. This ground of appeal also fails.

[15] The learned master's order, that the matter be remitted for the attention of the Registrar for the signing of the judgment once the conditions under 12.4 are satisfied, accords with the rules and there is no basis upon which this court could upset that order. The same result would follow if the order were made in relation to rule 12.5. It is accordingly ordered that the appeal stands dismissed and the appellant is to pay the respondent costs of \$2,000.00.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur

Louise Esther Blenman
Justice of Appeal