JAMAICA

IN THE COURT OF APPEAL

SUPREME CIVIL APPEAL NO. 59 OF 1997

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	BOOK TRADERS CARIBBEAN LIMITED	APPELLANT
A N D	WEST INDIES PUBLISHING LIMITED	APPELLANT
A N D	JEFFREY YOUNG	RESPONDENT

Dennis Goffe, Q.C. and Patrick McDonald
instructed by Myers Fletcher and Gordon
for the Appellants

David Henry instructed by Nunes Scholefield
and DeLeon for the Respondent

July 16th & 17th and November 10, 1997

FORTE, J.A

I have read the judgment of Downer, J.A. in draft and agree with its reasons and conclusion.

DOWNER, J.A.

In these proceedings the appellants who were defendants in the court below, Book Traders Caribbean Ltd. and West Indies Publishing Ltd., seek to set aside the judgment in default of defence obtained by the respondent Jeffrey Young. He is the plaintiff in the action for damages. He suffered very serious injuries from a motor car accident which occurred on the 13th October, 1994. The endorsement on the writ of summons states his claim. It reads:

> "The Plaintiff's claim is against the Defendants jointly and/or severally to recover damages for negligence and against the Third Defendant to recover damages for Breach of Contract of Employment for that on or about the 13th day of October 1994 the Second Defendant, the servant and/or agent of the First and/or Third Defendant, so negligently drove, managed and /or controlled motor vehicle bearing Registration CC 571Z, owned by the First Defendant in which the Plaintiff was a passenger in the course of his employment along the Duncans Main Road in the Parish of Trelawny, that he caused and /or permitted same to leave the said main road and collided into the right embankment and overturned, as a consequence of which the Plaintiff has suffered injuries, loss and damage and incurred expense.
>
> Dated 20th March, 1996."

The respondent Young on 19th August, 1996, obtained an interlocutory judgment in default of defence. It was in the following terms:

> " The Defendants, BOOK TRADERS CARIBBEAN LIMITED, DERRICK HARVEY, and WEST INDIES PUBLISHING LIMITED, not having filed a Defence in this action herein IT IS THIS DAY ADJUDGED that Interlocutory Judgment be entered against the said Defendants for damages to be assessed and costs to be taxed."

Insurance companies play a dominant role in the law of torts and their dominance is amply demonstrated in personal injuries cases. The Jamaica General Insurance Co. Ltd. is the insurer in respect of employers' liability and even before the proceedings were instituted they wrote to the Attorneys-at-law for the respondent as follows:

> "4th May, 1995
>
> Nunes, Scholefield, DeLeon & Co.
> Attorneys-at-Law
> 4 Duke Street
> P.O. Box 208
> Kingston
>
> Attention: Mr. Lowell G. Morgan
>
> Dear Sirs:
>
> Re: Employers' Liability Claim: 13/10/94
> Insured: West Indies Publishing Limited
> Employee: Jeffrey Young
> Our Ref: EL 4555/94/11
> Your Ref: LGM/vom
>
> We acknowledge receipt of your letter dated 25th April, in respect of the captioned matter.
>
> Please be advised that we have already completed the majority of our investigation, and are presently clarifying a few points.
>
> We expect to complete this exercise in the very near future, and as usual will be in contact with you." (Emphasis supplied)

Any subsequent assertion that this insurer was not aware of what was done on its behalf would not be credible.

Further West Indies Publishing Ltd. the holding company of whom Book Traders Caribbean Ltd. is a subsidiary in acknowledging that the respondent Young was its employee wrote:-

> "August 31, 1995
>
> Nunes Scholefield, DeLeon & Co.
> 4 Duke Street
> Kingston
>
> Attention: Lowel G. Morgan
>
> Dear Sirs:
>
> Re: Your letter d/d August 28, 1995 - Your Ref: LGM/vom
>
> We are in receipt of your letter regarding your client Jeffery Young who was injured in a motor vehicle accident while he was employed to this company.
>
> Please be advised that the matter is being handled by our insurance Brokers, DPB Insurance Brokers.. They recently relocated and their new telephone number is 978-9886-95, please feel free to contact them on this matter.
>
> Yours sincerely,
>
> Christine Elliott
> Office Manager"

So the insurance company, the insurance brokers and the appellant company West Indies Publishing Ltd. were aware by their admissions, of the claim by the respondent Jeffrey Young. Two further letters are of importance to demonstrate the forbearance

of the respondent Jeffrey Young and the strange ways of the appellant companies. Here is the unequivocal letter from the original attorneys of the appellants:

> " May 8, 1996
>
> Messrs, Nunes, Scholefield, DeLeon & Co.
> Attorneys-at-Law
> 4 Duke Street
> Kingston
>
> Attention: Mr. Lowell Morgan
>
> Dear Sirs:
>
> Re: Suit No. C.L. Y - 003 of 1996
> Jeffrey Young vs. Book Traders
> Caribbean Limited et al
>
> We write to advise that we act on behalf of the Defendants in relation to this matter, and have entered an Appearance herein. A copy of same will be served on you shortly.
>
> We are in the process of obtaining further instructions from our client and ask that you take no steps in default without further communicating with us.
>
> Yours faithfully
> PATTERSON, PHILLIPSON & GRAHAM"

This was followed by a reminder by Nunes Scholefield DeLeon & Co. on July 8th complaining that there was no response to that letter of May 8th, 1996, and a courteous enquiry as to when a defence would be filed. It was against this background that the interlocutory judgment of 19th August 1996 was obtained.

The proceedings in Chambers

The agreed note of the reasons McIntosh. J, gave for refusing to set aside the default judgment reads:

> " I find Andrew Rousseau's affidavits most insincere in expressing the reasons for the delay of the Defendants. The delay of the defendants I find was inordinately long more so than the delay of the attorneys. If the matter came to hand as late as January, 1997, to May 1997 is a very long time to get instructions from the Defendants so there is an inordinate delay on the part of the attorneys but even greater delay on the part of the Defendants. This Court does not find that there is a reasonable defence to this action. In the premises, application refused, costs to the Plaintiff to be agreed or taxed. Leave to appeal refused."

The gist of the learned judge's reasons was that there was no reasonable affidavit of merit and that there was undue delay on the part of the appellant companies in forwarding their instructions to Myers Fletcher & Gordon their new Attorneys-at-law. It is therefore of critical importance to examine the affidavits of merit adduced in chambers to determine whether they disclosed a credible defence and further why no defence was filed within the time provided by the Civil Procedure Code. As for the time in which to file a defence see Sec. 199 Civil Procedure Code. Appearance was entered on 9th May, 1996 and the defence should have been filed fourteen days thereafter.

Two preliminary observations ought to be made on affidavits of merits. They ought to disclose facts within the personal knowledge of the deponents and secondly if reliance is based on hearsay evidence then those who supplied the

information should be asked to give affidavit evidence. Here is how the excuses given by a director of both companies began:

> 2. "Then Writ of Summons and Statement of Claim were served on the Defendant companies in or about the month of April, 1966. Shortly thereafter the motor insurers for the First Defendant, Caribbean Home NCB Insurance Limited took over the management of the matter. I was advised by the said insurers and do verily believe that they instructed attorneys-at-law, Messrs. Patterson, Phillipson & Graham to act for the First Defendant and an appearance was entered by Messrs. Patterson, Phillipson & Graham on behalf of the First and Third Defendants."

This statement ignores that even before proceedings were instituted there was correspondence between Jamaica General Insurance Co. Ltd., the employers' liability insurers for the second defendant West Indies Publishing Co. Ltd.as well as the insurance brokers for that company. There was no evidence from the motor insurers mentioned in the above paragraph nor was there any evidence that Patterson, Phillipson & Graham exceeded their instructions. Even if such a situation were true it has no bearing on the merits of the defence.

The following paragraph makes the situation worse. It reads:

> "3. In the interim, the First and Third Defendants commenced dialogue with their insurance brokers with a view to ascertaining whether the employer's liability insurers for both companies would indemnify them against the Plaintiffs claim, in the event a judgment was awarded against them"

The necessary implication was that the insurers on this aspect were aware of the litigation and we know that even before proceedings were instituted, the Jamaica

General Insurance Co. Ltd. was in correspondence with the respondent's Attorney-at-Law.

It is now appropriate to set out the status of Andrew Roussseau. He states:

> "1. That I reside and have my true place of abode and postal address at 9 Dewsbury Avenue, Kingston 6 in the parish to St. Andrew. I am a businessman, and the Managing Director of Book Traders Caribbean Limited and West Indies Publishing Limited, the First and Third Defendants herein. I am duly authorized to make this affidavit on behalf of both Defendants."

Against this background the following paragraph is important. It reads:

> "4 I was later advised by the said attorneys that interlocutory judgment in default of defence was entered by the Plaintiff against all the Defendants herein on the 19th day of August, as they had chosen not to file a defence to the claim."

This was the critical evidence the learned judge had before him for the failure to file a defence in time. In so far as the learned judge's order reflected that the appellants were bound by the default judgment, because the attorneys-at-law on the record for the appellants elected not to file a defence the order cannot be disturbed. It should also be noted that, the deponent did not state the date Patterson, Phillipson & Graham informed him that default judgment had been entered in support of both companies. Moreover,it would be extraordinary if Patterson, Phillips & Graham did not inform the insurers of their election not to file a defence. In two extensive affidavits by Andrew Rousseau it is difficult to discuss the merits of the defence being adumbrated. However the circumstances were outlined as to how Myers Fletcher & Gordon came to represent the appellants. They were as follows:

> "5. To the best of my knowledge, at no time prior to this were instructions sought from either the First or the Third Defendants with a view to filing a defence on our behalf.
>
> 6. Messrs. Patterson, Phillipson & Graham continued to have conduct of the matter on behalf of both Defendants until December 30, 1996, when an appearance was entered by Messrs. Myers, Fletcher & Gordon on behalf of the Third Defendant. This was as a result of the Third Defendant being advised by Messrs Patterson, Phillipson & Graham that although they had entered an appearance on behalf of both the First and Third Defendants in the matter, they had actually received instructions to act on behalf of the First Defendant only, since they had been retained by the motor insurers for the First Defendant. They advised the Third Defendant that the Appearance had been entered for the Third Defendant only due to the urgency of the matter. They advised the Third Defendant to retain separate counsel, failing which they would be applying to remove their names from the record as acting for the Third Defendant."

These are grave charges against Patterson, Phillipson & Graham. It would have been appropriate to have them make this admission in affidavits rather than rely on this roundabout way of stating the matter.

There is a clause in the Employers' Liability Policy which reads:

> " No admission offer promise or payment shall be made by or on behalf of the Insured without the written consent of the Company which shall be entitled if it so desires to take over and conduct in his name the defence or settlement of any claim or to prosecute in his name for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Insured shall give all such information and assistance as the Company may require."

One can take judicial notice that such a clause appears as a matter of course in motor vehicle insurance policies also; yet that policy was not exhibited and the assertions under paragraph 5 and 6 of the affidavit above look odd . **Vann and another v Awford**. The Times 23rd April, 1986 cited with approval in **The Gleaner Co. Ltd. and Dudley Stokes v Eric Anthony Abrahams** S.C.C.A. 80/80 delivered 11th December, 1991 was relied on. There the default judgment was set aside although lies were told because there were triable issues which is always the overiding consideration.. So in respect of Book Traders Ltd. the first appellant, there is a clear admission that Patterson, Phillips & Graham was instructed by the insurers of the motor vehicle policy. In that regard since no explanation was forthcoming as to why a defence was not filed the learned judge cannot be faulted on finding no ground in the affidavit of Andrew Rousseau for setting aside the default judgment. The election not to file a defence made the default judgment akin to a consent judgment.

There was evidence from Derrick Hanley who was the driver of the motor vehicle involved in the accident. He did not enter an appearance nor did he seek to set aside the default judgment entered against him. His evidence will be analysed later.

Exhibits presented on behalf of West Indies Publishing Ltd. the third appellant sought to show that although the requisition forms for the respondent Young's salary were made on that company, the accounting system elected to make the drawer of

the cheque Book Traders Caribbean Ltd. This was how it was explained by Andrew Rousseau.

> "14. Neither the Plaintiff nor the Second Defendant was employed to the Third Defendant at the material time, nor were they acting for or on behalf of the Third Defendant. The Plaintiff was at all material times employed to the First Defendant as a temporary warehouse clerk, while the Second Defendant was employed to the First Defendant as a driver.
>
> 15. The Third Defendant has never carried on any trading activity. At all material times it has functioned only as a 'holding' company for various other companies. The First Defendant operates and at all material times operated as wholesale purchasers, importers and distributors of books, and sells books to the Book Shop Limited, which at all material times operated a store in Montego Bay from which the Plaintiff and Second Defendant were returning at the time of the accident. At the material time I was the managing director of the Book Shop Limited."

Nothing in this explanation goes to the merit of the case. As for the affidavit of Derrick Harvey dated 8th April, 1997 it reads:

> " I reside and have my true place of abode and postal address at 115 1/4 Barbican Road, Acadia South, Kingston 8 in the parish of Saint Andrew. I am the Second Defendant herein.
>
> 2 I was driving motor vehicle No. CC 571Z on the 13th of October, 1994 in which the Plaintiff, Mr. Jeffrey Young, was a passenger when the accident giving rise to this action occurred. At the time of the accident, the Plaintiff was not wearing a seatbelt in the vehicle. This vehicle was fitted with seatbelts for both the driver and the passenger"

He gives no evidence of the manner of his driving to rebut the particulars of negligence alleged against him, so as to bring into consideration **Hunter v Wright**

(1938) 2 All E.R. 621 which was cited in this context. He merely states that the respondent Young was not wearing a seat belt. This aspect of the affidavit clearly was of no assistance to the appellants in establishing a credible affidavit of merit. For an instance where the Privy Council found there was no credible affidavit of merit see **Kenneth Mason v Desnoes and Geddes Ltd.** (1990) 2 W.L.R. 1273.

Furthermore no explanation was adduced as to why that evidence was not filed in the Supreme Court until 5th May, 1997, three years since the accident and one year after proceedings were instituted. It should be borne in mind that the Employers' Liability Insurers had stated as far back as 4th May, 1995 that they had completed most of their investigations. The tenor of their letter suggests that they corresponded frequently with the respondent's Attorneys-at-Law.

What was the response on behalf of the respondent Jeffrey Young

Maurice Manning the attorney-at-law for the respondent, stated the extent of the injuries thus:

> "3. That the motor vehicle accident giving rise to the suit herein occurred on or about the 13th day of October,1994. The said accident resulted in the Plaintiff suffering significant injuries leaving him about eighty percent (80%) impairment of the whole person. And I exhibit as "M.M.M. 1" copies medical report of Professor John Golding dated May 2, 1995 and Dr. Grantel G. Dundas dated April 14, 1997 detailing the Plaintiff's injuries."

Because of the binding nature of the default judgment until set aside the following paragraphs demonstrate the strength of the respondent's case.

> "10. That no response being received from the Defendants Attorneys-at-Law, the Plaintiff filed Interlocutory Judgment in default of Defence on the 19th August, 1996.
>
> 11. That thereafter Summons to Proceed to Assessment of Damages was filed, a date obtained and the Summons served on the Defendants' Attorneys-at-Law on 11th September, 1996.
>
> 12. That the said Summons was heard on the 29th day of October, 1996 and appropriate orders made. The Defendants did not appear by themselves or their Attorneys-at-Law.
>
> 13. That on the 30th Day of December, 1996 the 3rd Defendant changed its Attorneys-at-Law from Patterson, Phillipson & Graham to Myers, Fletcher & Gordon. Up to that time no steps were taken to set aside the default judgment.
>
> 14. That on April 4, 1997 the 1st Defendant gave notice of Change of Attorneys-at-Law from Patterson, Phillipson & Graham to Myers, Fletcher & Gordon. Again no steps were taken in the suit herein to set aside the judgments."

Then next stage, the Assessment of damages was recorded thus:

> "15. That on April 4, 1997 Messrs Myers, Fletcher & Gordon were served with Notice of Assessment of Damages herein set for Friday, May 6, 1997.
>
> 16. That one month later, on the 5th day of May, 1997 the 1st and 3rd Defendants filed Summons to set aside Default judgment."

The relevant authorities applied to the circumstance of this case

Evans v Bartlam (1937) A.C. 473 is the leading authority on this aspect of the law. There at p. 480 **Lord Atkin** said:

> " The Courts, however, have laid down for themselves rules to guide them in the normal exercise

> of their discretion. One is that when the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence."

The issue of the merit was also adverted to by **Lord Wright** thus at p. 489:

> " Here the appellant shows merit, in that the debt was primarily a gaming debt; he denies that he made any new contract within **Hyams v. Stuart King** (1908) 2 K.B. 696 an authority which has not yet been considered by this House.

In this case the attempt to demonstrate that there was an arguable case was the evidence that the respondent did not wear a seat belt and **Froom v Butcher** (1975) 3 All E.R. 520 was prayed in aid to support the case, for the appellant companies. In that case Lord Denning, M.R. said at p. 525:

> "Seeing that it is compulsory to fit seat belts, Parliament must have thought it sensible to wear them. But it did not make it compulsory for anyone to wear a seat belt. Everyone is free to wear it or not, as he pleases. Free in this sense, that if he does not wear it, he is free from any penalty by the magistrates. Free in the sense that everyone is free to run his head against a brick wall, if he pleased. He can do it if he likes without being punished by the law. But it is not a sensible thing to do. If he does it, it is his own fault; and he has only himself to thank for the consequences."

His Lordship continued thus on p. 526:

> " The Road Traffic 1972 says that a failure to observe that provision does not render a person liable to criminal proceedings of any kind, but it can be relied on in civil proceedings as tending to establish or negative liability: see section 37 (5)"

There are no such statutory provisions in Jamaica. Further there has been no preparatory work done as in England so that Lord Denning could say:

> " The government's view is also plain. During the years 1972 to 1974 they spent £2 1/2 million in advertisements telling people to wear seat belts. Very recently a bill was introduced into Parliament seeking to make it compulsory. In this respect England is following the example of Australia, where it has been compulsory for the last three or four years. The bill here has been delayed. So it will not be compulsory yet awhile. But, meanwhile, I think the judges should say plainly that it is the sensible practice for all drivers and passengers in front seats to wear seat belts whenever and wherever going by car. It is a wise precaution which everyone should take."

Even if there was an issue of contributory negligence on the merits of the case, it was raised for the first time on 5th May, 1997, over a year after proceedings were instituted and judgment in default was obtained. In these circumstances the following passage in **Evans v Bartlam** must be considered. Lord Wright said at p. 489:

> " He has been guilty of no laches in making the application to set aside the default judgment, though as **Atwood v. Stuart King** 3 Q.B.D.722 and other cases show, the Court, while considering delay, have been lenient in excluding applicants on that ground."

See also **New Brunswick Ry. Co. v British & French Trust Corporation** (1939) A.C. 1 at p.35 per Lord Wright.

Laches is closely connected to estoppel. There is a passage in the opinion of Lord Radcliffe which is useful in this connection. It appears in **Kok Hoong v. Leong Cheong Kweng Mines Ltd.** 1964 A.C. 993 at 1010 which reads:

> " Their Lordships turn to the first ground. In their view there is no doubt that by the laws of England, which is the law applicable for this purpose, a default judgment is capable of giving rise to an estoppel per rem judicatam. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand. For, while from one point of view a default judgment can be looked upon as only another form of a judgment by consent (See **In re South American & Mexican Co.'**) (1895) 1 Ch.37, 45; 11 T.L.R.21 and, as such, capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, from another a judgment by default speaks for nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious, and indeed, grave danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default." [Emphasis supplied]

This passage must be considered against the background that Andrew Rousseau expressly stated that Patterson, Phillipson and Graham the Attorneys-at-Law for both companies 'had chosen not to file a defence to the claim.' This suggests that there was consent on the issue of liability in favour of Jeffrey Young the respondent . Be it noted that the affidavit states:

> "Messrs. Patterson, Phillipson & Graham continued to have conduct of the matter on behalf of both Defendants until December 30, 1996, when an appearance was entered by Messrs. Myers, Fletcher & Gordon on behalf of the Third Defendant."

Yet those affidavits suppporting the summons to set aside the default judgment are dated May 1997. It does not seem that there was any urgency to set aside the judgment in default which was in the nature of a consent judgment.

In **Atwood v. Chichester** (1877-8) 3 Q.B.D 722 at p. 723 Bramwelll, L.J, stated that principle relating to laches thus:

> " When sitting at chambers I often heard it argued that when irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but that in other cases the objection of lateness ought not to be listened to, and any injury caused by the delay may be compensated for by the payment of costs. This I think a correct view."

The medical reports exhibited detail the very serious injuries suffered by the respondent Young. Here is a conclusion from the medical report of the late Sir John Golding dated May 2, 1995:

> " Mr. Young co-operated with Physical Therapy but due to the flexion spasms his progress has been limited. He became depressed when he saw that his progress was slower than had been anticipated.
>
> Mr. Young can be considered as having reached Maximum Medical Improvement with a 80% whole person impairment. He will remain doubly incontinent and impotent."

The conclusion of Mr. G.G. Dundas, F.R.C.S. dated April 14, 1997 is similar:

> " Using medical Association's Guides for the evaluation of permanent, this assigns a permanent disability of eighty-four percent (84%) of the whole person."

To my mind having regard to the extent of the injuries and length of time which has elapsed the respondent would suffer irreparable injury if there was any further delay in having the assessment for damages. This is not a situation where costs are an adequate compensation.

It is true that the misconduct of the attorneys-at-law for the appellant ought not by itself to debar them from having the default judgment being set aside. **Kenneth Morris v. Owen Taylor** (unreported) S.C.C.A. 39 of 1983 delivered November 22, 1984, and **McPhee v McPhee** (1965 - 70) 1 L.R.B. 334 were cited in support of the appellants because although there were delays the default judgment was set aside. The appellants in this case are limited liability companies one being the subsidiary and the other a holding company and they were joint defendants. The affidavits on their behalf were adduced by a director of both companies. Liability was joint and several. There were also two insurance companies involved who had the right, it appears, to take over the conduct of the litigation. The nature of the affidavits disclose that corporate capacity is being used to avoid the fact that the election by Patterson, Phillipson & Graham not to file a defence was in the nature of a consent judgment which bound both companies on the issue of liability and that the only escape route would have been an affidavit of merit as in **Evans v Bertlam & Midland Bank Trust Co. Ltd and another v Green and others No. 3** (1979) 2 All E.R 193. The affidavits in this case lacked merit.

Conclusion

The hearing of the application for leave to appeal and the hearing of the merits of the appeal took place shortly before the date set for the assessment of damages. There was no defence on the merits disclosed in the affidavits in support of the summons to set aside the default judgment. There was also inexcusable delay in seeking to set aside the default judgment especially as this was a case where the appellant had suffered grave personal injuries . Having regard to the medical report further delay in assessment would cause him irreparable damage. Consequently at the close of the hearing there was a unanimous decision that the appeal be dismissed, that the order of the court below be affirmed and that the agreed or taxed costs of the appeal would go to the respondent.

GORDON, J.A.

I concur.