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Appeal to Privy Council

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JAMAICA

See Privy Council No 54/1988
Mason v D & G Ltd
Judgment 2/4/90 — P.C holds Master has power to extend time but affirmed and not provide sufficient grounds upon which Master can exercise her jurisdiction

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 25/87

BEFORE: The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Forte, J.A.

BETWEEN	DESNOES & GEDDES LTD	DEFENDANT/APPELLANT
AND	KENNETH MASON	PLAINTIFF/RESPONDENT

Patrick Brooks for Appellant instructed by Nunes, Scholefield DeLeon & Co.

Richard Millingen for Respondent instructed by R.M. Millingen & Co.

April 25, 26, 27 & May 30, 1988

CAMPBELL, J.A.

The respondent issued a writ with statement of claim in negligence against the appellant on April 5, 1982. Defence to the claim was filed and served on the respondent on June 15, 1982.

The action was placed on the cause list and the parties were so informed by letter from the Registrar of the Supreme Court dated March 6, 1985. It was subsequently put on the week's list for trial and actually came on for trial before Alexander J., now deceased, on June 27, 1985.

The respondent was absent, so also was his attorney-at-law. The learned judge accordingly struck out the action with costs to the appellant.

The attorney-at-law for the respondent became aware since at least October 24, 1985 that the action had been put on the week's list for trial. Whether an enquiry was then mounted to ascertain the fate of the action is not evident on the record before us, but certainly from the affidavit of Mr. Millingen, he had knowledge from March 18, 1986 that the action had been struck out on June 27, 1985.

The respondent through his attorney Mr. Millingen who had remained such from the commencement of the action, issued a Summons dated October 16, 1986 seeking to set aside the judgment and order of Alexander J.

The Summons came before the Master who on December 2, 1986 made an order setting aside the aforesaid judgment and Order.

The learned Master's findings are stated thus:

> "Section 354 of the Civil Procedure Code provides that:
>
> 'Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after the trial.'
>
> Section 676 gives the court power to enlarge time. I do so now:
>
> In accordance with the provision of section 354 order in terms of summons dated 16.10.86 costs thrown away and costs of and incidental to the summons to the defendant to be agreed or taxed."

The appellant with leave appeals against the decision of the Master.

Mr. Brooks for the appellant submits firstly, that the Master had no jurisdiction to entertain the Summons, as she did not come within the meaning of "Court or a Judge" who alone are competent under Section 354 of the Judicature (Civil Procedure Code) Law to set aside a judgment or order made under Section 353 of the aforesaid law. Secondly, on the assumption that the Master had jurisdiction, she wrongly exercised her discretion to enlarge time purportedly in exercise of powers conferred under Section 676 of the Judicature (Civil Procedure Code) Law, because no explanation for the inordinate delay in taking out the Summons had been advanced in the affidavit or otherwise. Thirdly, on the merit, the respondent had not shown why the discretion of the master should be exercised in his favour by setting aside the judgment of Alexander J., because no reason whatsoever for his non-attendance at the trial on June 27, 1985 had been advanced.

Mr. Millingen to the contrary submitted that as a matter of construction, "judge" in the expression "Court or a judge" mentioned in Section 354 of the Judicature (Civil Procedure Code) Law includes a Master in Chambers. Secondly, he submits that decisions in the United Kingdom which impliedly establish the rule that applications to set aside judgments given under Section 353, can only be made to a judge in open court, are of no persuasive authority here, because such decisions are based on the wording of Order 35/2 of the United Kingdom Supreme Court Practice 1970 which provides that only a court can set aside such orders. The order reads as follows:

> "35/2 2 (1) Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party on such terms as it thinks just."

Thus, Mr. Millingen submits that as Section 354 of our Judicature (Civil Procedure Code) Law mentions "Court or a judge" whereas the U.K. Order 35/2 mentions only "Court", our statutory provision is wider than the U.K. provision. Our provision he says is wide enough to cover jurisdiction of a Master to hear applications.

Mr. Millingen's submission in this regard is without merit because 'Court' as mentioned in Order 35/2 supra is defined to cover judge in chambers and a Master. Court is defined thus:

> "In these rules unless the context otherwise requires 'the court' means the High Court or any one or more judges thereof whether sitting in court or in chambers, or any master ....., but the foregoing provision shall not be taken as affecting any provision of these rules ..... by virtue of which the authority and jurisdiction of a master is defined and regulated."

The U.K. decisions despite the wide definition of "Court" all demonstrate that applications are to be made in open court to a judge and preferably to the judge who had dismissed the action. In Schafer v. Blyth (1920) 3 K.B. at p. 143 Lush J., in giving reasons for extending time within which to make the application said:

> "Moreover, I think that these applications ought to be made to the judge who tried the case and it so happened that I was not sitting on the sixth day after trial."

In Vint v. Hudspith (1885) 29 Ch. D. p. 322, an action came on for trial before Pollack B on 27th April, 1883. The plaintiff did not appear and the action was dismissed with costs. The plaintiff was not aware that the action had come on for trial until about September 1883. As the period had expired within which the plaintiff could have applied to set aside the order of dismissal he appealed to the Court of Appeal. Cotton, L.J., took the opportunity to lay down the procedure which should be followed before appealing to the Court of Appeal. At page 323 he said:

> "We are of the opinion that the Plaintiff's proper course was to apply to the Judge to restore the cause on the ground that the plaintiff was absent 'per incuriam'. I am far from saying that this court cannot entertain an appeal from a judgment made by default but in a case like the present it is important to prevent the Court of Appeal being flooded by having to hear cases in the first instance. It is therefore right that the Plaintiff should first apply to the judge who gave the judgment to restore the action..... The appeal must stand over a fortnight, to give time for the Plaintiff to make such application to the judge as he may be advised." (emphasis mine)

The procedure is well founded on the principle that courts of co-ordinate jurisdiction cannot exercise appellate jurisdiction in respect of matters adjudicated upon by a co-ordinate, within the latter's jurisdiction and competence. A fortiori a master can exercise no such appellate jurisdiction. We would accordingly adopt the established procedure as being the necessary and appropriate one for applications under

Section 354 of our abovementioned law. We accordingly agreed with Mr. Brooks that the learned Master had no jurisdiction to entertain the application and her order was, in consequence, a nullity. It is unnecessary for us to consider in depth the other grounds argued by Mr. Brooks. It is sufficient to say that there is considerable merit in his submissions on each of these grounds and that we would have had no hesitation in allowing the appeal on these grounds.

It was for the above reasons that we allowed the appeal on April 26, 1988 and set aside the order of the Master with costs to the appellant against the respondent.