JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 61/88

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	ROSE DUNSCOMBE	PLAINTIFF/APPELLANT
A N D	YORK PAGE SEATON	DEFENDANT/RESPONDENT

Dr. Bernard Marshall instructed by
B.E. Frankson and Co. for Appellant

Andrew Rattray and Miss Andrea Rattray instructed by
Rattray, Patterson, Rattray and Co. for Respondent

May 16; June 16, 1989

ROWE P.:

By Writ of December 8, 1987, the appellant commenced an action against the respondent seeking a declaration that she is the fee simple owner of No. 11 Kings Way, St. Andrew, registered at Vol. 1109 Folio 384 of the Registered Book of Titles free from all encumbrances. Ancillary reliefs seeking the Cancellation of the Certificate of Title at Vol. 1109 Folio 384 and the issue of a new Certificate to the appellant as also an injunction restraining the respondent from dealing with or entering upon the property were added.

Paragraph 3 of the Statement of Claim filed in support of the Writ alleged fraud in the defendant/respondent. The plaintiff/appellant pleaded that on February 18, 1982 the defendant fraudulently and falsely transferred to himself premises No. 11 Kings Way, which was at all material times owned by the plaintiff in fee simple. Particulars of fraud were given.

In Paragraph 4 of the Statement of Claim, the allegation of false representations was repeated and particulars were given. A third head of claim was added, that is to say, negligence and some particulars were provided. And finally an alternative claim was made based upon the provisions of the Registration of Titles Act.

The defendant wishing to have Further and Better Particulars of the alleged fraudulent representation as also of the provisions of the Registration of Titles Act upon which the plaintiff was relying, applied by Summons to Morgan J. and obtained an Order on April 14, 1988. Paragraph 2 of that Order provided:

> "That if the Plaintiff fails to supply the Defendant with the said Further and Better Particulars within the time specified by this Honourable Court (within 14 days of the date of the Order herein) the Statement of Claim filed by the Plaintiff be struck out with costs awarded in favour of the Defendant."

No particulars were delivered by the plaintiff. Consequently on May 5, 1988 the defendant's Attorneys prepared a "Judgment" which "Judgment" was entered in the Judgment Binder of the Supreme Court. It recited the Order of Morgan J. that the Further and Better Particulars

should be filed within fourteen days of April 14, 1988; told of the failure of the plaintiff to file such Further and Better Particulars; referred to the consequences of that failure, and on those premises, the "Judgment" concluded with these words:

> "IT IS THIS DAY ADJUDGED that there be Judgment in favour of the Defendant against the Plaintiff with costs to be Agreed or taxed."

The Attorneys for the plaintiff filed two Summonses on May 17, 1988, one seeking leave to file Further and Better Particulars out of time, and the other requesting Further and Better Particulars from the defendant. Langrin J. refused both Summonses but granted leave to appeal from his refusal to extend time.

Another route was preferred to the appellate process. On June 30, 1988 the plaintiff filed a Summons seeking an Order to set aside the "Judgment" entered on May 5, 1988 and renewed his application for leave to file Further and Better Particulars out of time. On this occasion the Summons went before the Master who refused to grant the reliefs sought but granted leave to appeal. That leave has been pursued.

There was obvious negligence on the part of the plaintiff's Attorneys in complying with the Order of Morgan J. as the plaintiff was legally represented before her and he must have been aware of the Order of the Court. All this costly litigation, however enlightening to the profession, could have been avoided simply by a timely compliance with the Judge's Order. Be that as it may, I turn to consider the Grounds of Appeal proferred by

Dr. Bernard Marshall. His first point was that the "Judgment" was void and a nullity in three respects:

(a) there was no Order from the Court to the Registrar to enter judgment for the defendant;

(b) the defendant failed to apply to the Court for leave to enter judgment;

(c) there was no provision in the Civil Procedure Code or otherwise sanctioning the procedure adopted by the defendant in entering the judgment.

Section 79 of the Civil Procedure Code enables a plaintiff to apply to a Court for leave to enter judgment against a defendant in certain types of cases when the plaintiff swears that the defendant has no defence to the action. Section 244 of the Code enables a defendant to obtain judgment in default of a Statement of Claim but only upon application to the Court to dismiss the case for want of prosecution.

Where the plaintiff's claim is for a debt or liquidated demand and the defendant does not file a defence within the time limited for that purpose the plaintiff may enter final judgment - Section 245. But where the claim is for unliquidated damages upon failure by the defendant to file a defence, the plaintiff cannot enter final judgment, but only interlocutory judgment - Sections 247-249.

Section 442 in Title 37 of the Code makes general provision for the manner in which judgments may be obtained. It provides:

> "Except where by any Law it is expressly provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment."

It was strongly submitted on behalf of the appellant and the point was conceded by Counsel for the Respondent, that there was no express provision in the Code which permitted the respondent to enter judgment where there was a failure to comply with an Order such as the one made by Morgan J. Prima facie, the respondent should therefore have applied to Morgan J. or if she were unavailable, to another Judge, by motion, to enter judgment when fourteen days had gone by and the plaintiff had not filed the Further and Better Particulars as she was ordered to do. I will return to this ground after considering the other main ground argued on the appellant's behalf.

Ground 3 complained that the learned Master erred in law in holding that the Plaintiff was unable to proceed with the action as the Statement of Claim was struck out as the time for filing the Further and Better Particulars had expired. This Court did not have the benefit of anything that the Master said in giving judgment and it is becoming more and more noticeable that in appeals from the Master there are never any reasons for judgment. The Master could have been persuaded by Counsel for the respondent that once the time for filing Further and Better Particulars had expired, the Order of Morgan J. that the Statement of Claim should be struck out on failure to comply, would automatically take effect and did in fact take effect in the factual circumstances of this case. There is a line of cases relied on before us by Mr. Rattray which lent support to that view.

All the relevant cases were reviewed by Roskill L.J. in Samuels v. Linzi Dresses Ltd. (1980) 1 All E.R. 803. The old Law can be fully expressed in the headnote

from Script Phonography Co. Ltd. v. Gregg (1890) 59 L.J. Ch. 406:

> "When an order has been made in chambers dismissing an action unless the next step is taken by the plaintiff within a specified time, and the plaintiff does not take that step within the specified time nor appeal against the order, the order takes effect, and the time for taking the step cannot subsequently be extended, the action having become dead, notwithstanding that the order has not been drawn up or served upon the plaintiff before it became operative."

Two earlier cases Whistler v. Hancock (1878) 3 Q.B.D. 83 and King v. Davenport (1879) 4 Q.B.D. 402 had, in the view of North J., settled the law, when he came to decide the Script Phonography v. Gregg case, supra. Cockburn C.J. had so expressed himself in Whistler v. Hancock:

> "This is a very plain case. The defendant obtained an order that unless the statement of claim were delivered within a week the action should be at an end. The plaintiff took out a summons to set aside the appearance, and if he could have obtained an order to take that effect before the week was out, he would have been the victor, but before his summons could be heard he fell under the operation of the order dismissing the action, and the action was at an end. It cannot be contended that the taking out of a summons to set aside the appearance in the meantime could keep the action alive after the period when by the operation of the

> "master's order it was defunct. For these reasons, I think the master had no jurisdiction, and the order of Fry, J., was right."

This decision and those which followed it were criticized by Lord Denning M.R. in R.v. Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd. (1976) 1 All E.R. 897 when he said at p. 900:

> "I have one further observation to make. It is about Whistler v. Hancock. It seems there to be suggested that if a condition is not fulfilled the action ceases to exist, as though no extension of time can be granted. I do not agree with that line of reasoning. Even though the action may be said to cease to exist, the court always has power to bring it to life again by extending the time."

This observation of Lord Denning M.R. has been expressly approved by the Court of Appeal in Samuels v. Linzi Dresses Ltd., supra, and appears to be consonant with the provisions of Section 676 of the Civil Procedure Code, where it is provided that:

> "The Court shall have power to enlarge ..... time ..... fixed by any order enlarging time for doing any act or taking any proceeding ..... and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

It is always necessary to construe the terms of the actual Order made by the Court to determine whether upon default there is a penalty and how the penalty ought to be exacted. The clear policy of the law as evidenced by Section 676 quoted above, is that a litigant should be afforded every reasonable opportunity to come in to file

documents and to be heard in any pending action. That it seems to me is why the Code does not contain a provision for the automatic effect of a default to file Interrogatories or Further and Better Particulars. The headnote to Samuels v. Linzi Dresses Ltd. reads:

> "The defendants to an action failed to comply with an order dated 4th October 1978 for delivery of particulars of their defence and counter-claim within 21 days. On 15th December the Judge in chambers made a further order that 'unless' the particulars were served by 2nd January 1979 the defence and counter-claim would be struck out leaving the plaintiff at liberty to sign judgment for damages to be assessed. The defendants failed to serve the particulars by 2nd January and on that date issued a summons asking for an extension of time. By an order dated 5th March the judge granted an extension of time until 9th March 1979. The plaintiff appealed contending that, by virtue of RSC Ord. 3, r 5(1) where an 'unless' order was made i.e. one striking out the claim or defence unless some act was done within a specified time, there was no jurisdiction to grant an extension of time."

The provisions in RSC. Ord. 3 r. 5(1) are less extensive than Section 676 of the Civil Procedure Code. Under the English Rule:

> "The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings."

The Court of Appeal expressed the view that the principle is now firmly established that a Court will not

generally speaking, strike out a claim for want of prosecution where the plaintiff is free to issue a fresh writ. If the twelve year limitation period in respect of land provided in Section 3 of the Limitation of Actions Act applies to the instant suit, then the plaintiff/appellant would have the undoubted right to bring a fresh action against the respondent, were this action to be struck out for non-compliance with the Order of Morgan J.

The more important point decided by the Court of Appeal in the Samuels v. Linzi Dresses Ltd. case relates to the power in the Court to extend an "unless" Order after its expiry. Roskill L.J. said at p. 812(c):

> "In my judgment, therefore, the law today is that a court has power to extend the time where an 'unless' order has been made but not been complied with; but that it is a power which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. Primarily it is a question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not."

Lawton L.J. said at pp. 812-3 of Whistler v. Hancock:

> "It was wrong in the first place. In my judgment it was contrary to the wording of RSC Ord 57 as set out in the schedule to the Supreme Court of Judicature Acts 1873 and 1875. Roskill LJ has sounded a note of warning about these earlier decisions on procedure made before this court as a division of the Supreme Court of Judicature had had an opportunity of seeing how the new rules were working. The decisions in 1878 and 1879 were probably coloured by the old practice."

All the Officers in the Court below contributed in some measure to the rather unusual course which this case has taken. Particulars were requested in relation to paragraphs 3(a), 3(b) and 6 of the Statement of Claim. Paragraph 4 of the Statement of Claim which made allegations about false and untrue representations could stand by itself. Paragraph 5 sounded in negligence and was expressly pleaded as a claim in the alternative. The Further and Better Particulars requested had nothing whatsoever to do with the claims in paragraphs 4 and 5 of the Statement of Claim, yet the Summons asked for and Morgan J. made an Order striking out the entire Statement of Claim. The need for viligance when considering the penalty for failure to comply with an Order for Further and Better Particulars is clearly indicated.

There was no precedent for the respondent to enter a final judgment in the action and the Registrar ought to have rejected the document tendered by the Attorneys for the respondent and to have directed them to the provisions of Section 442 of the Civil Procedure Code.

Neither Langrin J. nor the Master appreciated that they had a discretion to extend the time for filing the Further and Better Particulars and therefore erred in treating themselves as without jurisdiction. The document placed on the files as the "Judgment" is clearly a nullity, as it is unsupported by any Order of the Court or by any provision in Law or the rules of Court. The Master ought to have set it aside.

Had the Master applied the appropriate Law, the Master would in all probability have extended the time within which the appellant should file the Further and Better Particulars especially as those particulars had been prepared and were

then available for immediate service upon the respondent. The lapse of time between the expiry of the "unless" Order and the application for an extension of time to file the Further and Better Particulars was by no means inordinate. This is exactly the kind of case where, the claim being of a substantial nature, a Court would exercise its discretion in favour of the appellant.

I have said that the "Judgment" entered was and is a nullity. It ought to be set aside. I would allow the appeal and set aside the order of the Master. I would order that the appellant be at liberty to file and serve Further and Better Particulars ordered by Morgan J, within ten days of the date hereof. The appellant is entitled to her Costs of the appeal to be agreed or taxed. Costs before the Master to be Costs in the Cause.

WRIGHT, J.A.:

I have read the judgments of Rowe, P., and Downer, J.A., and agree with them and wish only to make a brief comment.

It is a well known fact that in this country the affinity for land is very strong. A court should, therefore, be very wary about adopting a course which would have the effect of driving a litigant from the judgment seat and thus confirming in the hands of his opponent the title to disputed land without a hearing on the merits. And the need for caution is greatly emphasised when, as in the instant case, the contestants are so unevenly matched and there are allegations of fraud made against the opponent who, without having to answer these charges, nevertheless, secures a judgment in his favour.

On the question of costs I fully endorse the Order of Rowe, P.

DOWNER, J.A.:

This is an interlocutory appeal from Master Vanderpump in which, on the 21st September, 1988, she refused the plaintiff's summons for Further and Better Particulars and a summons to set aside the judgment of Langrin, J., which was made on 16th June, 1988. Rosa Dunscombe, the plaintiff, was aggrieved by the Master's order and she secured leave to appeal to this Court.

To appreciate the basis of the appellant's complaint, the proceedings below must be examined. The appellant alleges in her Statement of Claim that the respondent York Page Seaton, fraudulently deprived her of her fee simple ownership of No. 11, Kings Way, Kingston 10 registered at Volume 1109 Folio 384 in the Register Book in the office of the Registrar of Titles. In addition to the particulars of fraud which has been pleaded, the appellant also alleges negligence on the part of the respondent and because she alleges that there was no consideration in respect of the fraudulent transfer, she claims a declaration that she is entitled to 11 Kings Way. She also claims cancellation of Duplicate Certificate of Title allegedly obtained by fraud and an injunction and damages.

In response to this Statement of Claim, the respondent sought by way of summons, before Morgan, J., Further and Better Particulars within 14 days. The particulars sought relate to the alleged fraudulent representations and the alleged trick by which the Certificate of Title was obtained. These particulars were sought after an entry of appearance of the defendant and by the customary procedure of seeking the particulars by letters before resorting to a summons.

The next step in these proceedings pertinent to this appeal was that the respondent, pursuant to the order of Morgan, J. -

> "that the Plaintiff supply the Defendant Further and Better Particulars of the Statement of Claim filed herein by the Plaintiff within fourteen (14) days of the date thereof failing which the Statement of Claim filed by the Plaintiff be struck out."

secured a "judgment" on 5th May of which the appellant complains saying that it was obtained irregularly. This issue will be of great importance in this appeal.

On 16th June, the appellant appeared before Langrin, J., and his two Orders of that day tell a story. Firstly, the appellant sought an order for Further and Better Particulars. It appears that Langrin, J., had before him the "judgment" dated 5th May, 1988 based on the Order of Morgan, J., and he on that basis, refused the summons for Further and Better Particulars. He, however, granted leave to appeal but it does not appear that this was pursued. The other summons on the same day sought leave to file Further and Better Particulars out of time. This was also refused although leave to appeal was also granted.

What was the appellant attempting in Court at that stage? She wished to pursue her Statement of Claim. To do this, it was necessary to file Further and Better Particulars as ordered by the Court although the time had elapsed for so doing. An explanation was given by counsel on her behalf to the effect that the order was not brought to his attention until after the time had elapsed. Moreover, it was stressed that the Further and Better Particulars were filed. It ought to be added that the appellant also at that stage sought Further and Better Particulars from the defendant. The impression is that the appellant had a serious issue to be tried.

Again the appellant did not resort to the appellate proceedings. Instead, she went before Master Vanderpump and

it is important to grasp what was being sought before that learned Master. Firstly, there was a prayer that the "judgment herein be set aside" and it appears that the "judgment" referred to is that purported to be made on the basis of the order of Morgan, J., of 5th May. Secondly, "that the Plaintiff be granted leave to file the Further and Better Particulars out of time."

The Master in her rulings of 21st September, 1988 ordered that "the application for an Order that Judgment be set aside and leave to file Further and Better Particulars out of time was refused." This appeal is to determine whether that order was correct.

The substance of the first ground of appeal argued by Dr. Marshall was that there was no provision in the Civil Procedure Code for a judgment to be entered in the manner and procedure adopted by the respondent. It is necessary, therefore, to enquire as to the manner of the entry of the judgment to see whether it was in accordance with the Code. The judgment reads as follows:

> "PURSUANT to the Order of THE HONOURABLE MISS JUSTICE MORGAN dated the 14th day of April, 1988 whereby it was ordered that the Plaintiff supply to the Defendant Further and Better Particulars of the Statement of Claim filed herein by the Plaintiff within fourteen (14) days of the date thereof failing which the Statement of Claim filed by the Plaintiff be struck out with costs awarded in favour of the Defendant and default having been made, IT IS THIS DAY ADJUDGED that there be Judgment in favour of the Defendant against the Plaintiff with costs to be agreed or taxed.
>
> DATED THE 5TH DAY OF MAY 1988
>
> RATTRAY, PATTERSON, RATTRAY"

It is evident that the attorneys-at-law for the respondent resorted to the Order of Morgan, J., and relied on it as a

"judgment" of the Court. Counsel for the appellant cited Section 442 of the Judicature (Civil Procedure Code) which reads:

> "442. Except where by any Law it is expressly provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment."

As there was no indication that the terms of Order 442 was complied with, it is clear that the judgment was irregularly obtained. Moreover, another irregularity was that Section 449 of the Code was ignored. That section reads:

> "Every judgment shall be entered by the Registrar in the Book kept for that purpose."

By virtue of Section 10 of the Judicature (Supreme Court) Act, it is the Registrar who has the duty to "write out and enter up judgments and orders." Yet what purports to be a judgment is written out by the attorneys-at-law. The Master, therefore, ought to have set aside the orders of Langrin, J.

It is true that the respondent may have applied to dismiss the action for want of prosecution in which case the Master would have had to exercise her discretion in accordance with the principles laid down in Birkett v. James [1978] A.C. 297. Since the limitation period had not yet run, it was most unlikely that her decision could have gone against the appellant. At page 322 Lord Diplock stressed this. Here is how he puts it:

> "For my part, for reasons that I have already stated, I am of opinion that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution where no question of contumelious default on the part of the plaintiff is involved; and in cases where it is likely that if the action were dismissed the plaintiff would avail himself of his legal right to issue a fresh writ the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending."

Lord Simon and Lord Russell concurred with him while Lord Salmon at page 328 and Lord Edmund-Davies at p. 334 expressly agreed. The Master by ignoring this principle, erred in refusing to extend the time for filing Further and Better Particulars.

Should the "unless" or peremptory order of Morgan, J., be interpreted so that if it was not complied with within fourteen (14) days, the Statement of Claim would be struck out and the action would die; or is there jurisdiction in the Court to extend the time? If there is this jurisdiction, this Court, on an examination of the record, is empowered to set aside the Master's Order and permit the appellant to file the Further and Better Particulars as prayed.

The modern attitude to procedural rules is to adopt a realistic approach and not drive the plaintiff from a hearing on the merits of the case if the rules when fairly interpreted, would enable the plaintiff to have her day in court. In Victorian times, the judges adopted a stricter approach consonant with the stricter rules of pleading which then obtained. Even when the new rules were introduced, the judges interpreted them restrictively. To appreciate how the old attitudes dominated interpretation, it is apt to cite the case of Whistler v. Hancock [1878] 3 Q.B.D. 83 decided by the Divisional Court of Cockburn, C.J., and Manisty, J. The narrative of events is recorded in Samuels v. Linzi Dresses [1980] 1 All E.R. 803 by Roskill, L.J. Here is his account at page 806:

> "An order had been made under the then RSC Ord 29, r 1 dismissing an action for want of prosecution unless a statement of claim should be delivered within a week. The week expired; no statement of claim had been delivered. A summons was then taken out to extend the time, and Fry J, reversing the decision of the master, held that the master had no

> "jurisdiction to make such an order. The plaintiff appealed to the Divisional Court: in those days appeals from the judge in chambers went not, as at the present time, to this court, but to the Divisional Court.
>
> Cockburn, C.J, in giving judgment, said:
>
> > 'This is a very plain case. The defendant obtained an order that unless the statement of claim were delivered within a week the action should be at an end. The plaintiff took out a summons to set aside the appearance, and if he could have obtained an order to that effect before the week was out, he would have been the victor; but before his summons could be heard he fell under the operation of the order dismissing the action, and the action was at an end. It cannot be contended that the taking out of a summons to set aside the appearance in the meantime could keep the action alive after the period when by the operation of the master's order it was defunct. For these reasons, I think the master had no jurisdiction, and the order of Fry, J., was right'."

The judgment further adverts to the then relevant rule. Order 57, r 6, which reads:

> " 'A Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.'
>
> As Lawton LJ said during the argument, if one reads the then Ord 57, r 6 and then applies its language to the facts of the two cases to which I have referred, it is not readily apparent why each of those two cases did not fall within the express language of the rule."

Whistler v. Hancock was followed by another Divisional Court in Wallis v. Hepburn [1878] 3 Q.B.D. 84, but many attempts have been made to distinguish it and critical comments have been made on it. In R. v. Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd. [1976] 1 All E.R. 897, Lord Denning, M.R., said at page 900g:

> "I have one further observation to make. It is about Whistler v. Hancock [1878] 3 Q.B.D. 83. It seems there to be suggested that if a condition is not fulfilled the action ceases to exist, as though no extension of a time can be granted. I do not agree with that line of reasoning. Even though the action may be said to cease to exist, the court always has power to bring it to life again by extending the time."

The time was right for overruling Whistler v. Hancock and the opportunity was taken in Samuels v. Linzi Dresses Ltd. (supra) The headnote adequately expresses the principles which ought to guide judges at first instance. At page 803 it reads:

> "A court had jurisdiction to extend the time where an 'unless' order had been made and not complied with, but the power was to be exercised cautiously and with due regard to maintaining the principle that orders were made to be complied with. Whether an extension of time should be granted was in the discretion of the master or judge in chambers. It followed that the judge had jurisdiction to extend the time; ....."

What were the judgments and orders and summons when the appellant sought to have the Master extend the time for filing Further and Better Particulars ordered by Morgan, J.? There was the irregular judgment on 5th May, 1988 which assumed that since the time had elapsed the respondent could enter judgment against the appellant. Then there were two irregular orders by Langrin, J., on 16th June, 1988 one of which refused leave to the appellant to file Further and Better Particulars out of time and the other refused an order for Further and Better Particulars of the respondent. Also there was the summons to set aside the irregular judgment based on the order of Morgan, J.

As for the facts, reliance was placed on the affidavit of Barrington Earl Frankson. Paragraph 3 is important. It stated that when the matter came up for hearing

on 31st May, 1988 the file could not be found in the Registry and it was adjourned sine die. Since the learned judge gave no reasons for his order, we have to resort to paragraph 6 which gives the clue to the decision in the case before him. It reads "that I am reliably informed and verily believe that the Learned Judge (Langrin, J.) refused the Application for leave to file the Further and Better Particulars out of time in view of the Judgment (supra) entered herein and that the proper Application would be by way of Summons to set aside the Judgment herein."

On that basis, it appears that Langrin, J., acknowledged that he had jurisdiction to extend the time, but that he was precluded from so doing because of the irregular judgment. So far as the application for extension of time to file the Further and Better Particulars was concerned, the Writ of Summons was issued on 8th December, 1987 and the averments in the Statement of Claim alleging fraud took place in February, 1982. There has been no pleading by the respondent that the limitation period of twelve years had elapsed. Consequently, the power of the Court to enlarge time came into play. Section 676 of the Civil Procedure Code reads:

> "The court shall have power to enlarge or abridge time appointed by this Law, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

These are plain words corresponding to Ord 57 U.K. (supra) and they ought to be given the same interpretation as was adumbrated in Samuels v. Linzi Dresses Ltd., previously adverted to.

CONCLUSION

The appellant has succeeded on both grounds of appeal to have the Master's orders set aside. It has been established that the irregular judgment was a nullity and ought to have been set aside either by Langrin, J., or by Master Vanderpump. Moreover, the Master should not have refused to exercise her discretion to enlarge the time for filing Further and Better Particulars as sought by the appellant, as the Statement of Claim was not struck out but was alive.

The appeal is, therefore, allowed and the orders of the Master are set aside. I concur with the order proposed by Rowe, P.