IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 1993/G110

BETWEEN	CLYDE GRAHAM	PLAINTIFF
A N D	THE ATTORNEY GENERAL	FIRST DEFENDANT
A N D	DONOVAN MASON	SECOND DEFENDANT

Mr. David Johnson and Miss D. Ferguson for Plaintiff.

Mr. Carlton Colman and Miss L. Sloley for First Defendant.

JUDGMENT

IN CHAMBERS

Heard: January 25, and March 31, 1995

HARRISON J. (Ag.)

Setting aside judgments in default of appearance and pleadings do come before the Master on a daily basis and there are times when you are faced with problems concerning unusual modes of procedure. The present case happens to fall in this category.

I had promised to deliver my judgment in writing but due to a change of post, time did not permit me to do so before now. I do apologise for the delay and now seek to fulfil this promise.

On the 17th day of June, 1993 the plaintiff issued a Writ of Summons and served same together with Statement of Claim on the defendants claiming damages for Negligence. The first defendant entered an appearance but thereafter failed and/or neglected to file any defence within time. Leave to enter interlocutory judgment against the first defendant was granted by the Master on the 9th June, 1994 and Judgment was entered in judgment binder 699 folio 230. There is no contest that this judgment was not regularly entered.

On the 19th July, 1994 the plaintiff filed a summons to proceed to assessment of damages against the first defendant which was fixed for hearing on October 4, 1994.

Interlocutory judgment was also entered against the second defendant in judgment binder 698 folio 32 and an order granted to proceed to assessment of damages against this defendant.

Notice of assessment of damages against both defendants was filed on the 12th October, 1994 and was eventually set for hearing on the 6th February, 1995. However, the first defendant had filed a summons on the 4th November 1994 seeking an order to set aside the interlocutory judgment against itself. It had also sought leave to file a defence out of time.

The affidavit in support was sworn to by David Higgins, Crown Counsel in the Attorney General's Chambers. It deposed inter alia, that on the 3rd May, 1994 its Attorneys had written to Piper and Samuda, Attorneys-at-Law for the plaintiff requesting permission to file its defence out of time but it was denied. He also deposed:

> ".....I have been informed by Donovan Mason and do verily believe that the collision occurred without negligence on the part of the defendants. Further that the collision was caused solely by the negligence of a pedestrian, whose name and identity are unknown to the defendants and who whilst the second named defendant was driving the said vehicle registered 30 1275 with due care on the proper side of the road, the said pedestrian stepped into the road. In order to avoid hitting the pedestrian with the said motor vehicle, the second defendant in the emergency created, was forced to swerve violently, but he was unable notwithstanding the exercise of reasonable care and skill on his part to avoid the plaintiff's motor car registered 5136 AD..."

It was further deposed that the delay in filing the defence was not deliberate and finally, he stated:

> ".....I verily believe that the defence exhibited ..... is a good defence to the plaintiff's claim and is reasonably likely to succeed and has merit."

A draft defence was exhibited to this affidavit and was consistent with the Affidavit evidence.

In relation to default of pleadings section 258 of the Civil Procedure Code states:

> "Any judgment by default, whether under this Title or under any other provisions of this Law, may be set aside by the Court or Judge upon such terms as to costs or otherwise as such Court or Judge may think fit."

This section therefore gives the Court or Judge a discretion when it comes to the setting aside of default judgments. In Evans v Bartlam (1937) 2 All ER 646, Lord Atkin speaking of this discretionary power stated inter alia:

> "I agree that both RSC Ord, 13 r 10 and RSC Ord. 27 r 15 give a discretionary power to the Judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The Court have, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where 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....."

Lord Atkin futher stated:

> "....the principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have power to revoke the expression of its coervice power where that has been obtained only by a failure to follow any of the rules of procedure....."

The primary consideration therefore, is whether the defendant has merits to which the Court should pay heed. The cases show that the court should also consider whether or not he is guilty of laches in making his application and whether he has offered an explanation why he neglected to file his defence.

In considering whether the affidavit in support qualifies as one with merit, the case of Ramkinssoon v Olds Discount Co. (T. C. C.) Ltd. (1961) 4 WIR 73 is instructive. There, the respondent had obtained judgment in default of defence against the appellant on November 28, 1960. On December 15, 1960 the appellant applied to a judge in Chambers to have the judgment set aside. The application was supported by an affidavit sworn to by the appellant's solicitor and a statement of defence signed by Counsel. The application was refused. The appellant appealed contending inter alia, that the affidavit along with the Defence constituted a sufficient disclosure of merit and dispensed with the need for an affidavit from the defendant personally. In his affidavit the solicitor did not purport to testify to the facts set out in the defence nor did he claim to have personal knowledge of the matters put forward to excuse the failure to deliver the defence. It was held:

1. The solicitor's affidavit did not amount to an affidavit stating facts showing a substantial ground of defence and the facts related in the statement of defence were not sworn to by anyone there was no affidavit of merit before the judge or the Court of Appeal.
2. The judge had given consideration to the relevant factors before exercising his discretion and as there was no sufficient ground for saying that he had acted contrary to principle, his decision could not be disturbed.

McShine Ag. C. J in the course of his judgment said:

> "Nothing in the affidavit of the solicitor says or suggests that the solicitor had any personal knowledge of the facts of the case or that what appears in the statement of defence is true. The affidavit merely attempts, in our view, to excuse the defendant for not filing his defence....."

Campbell J. A in Jamaica Record and Ors. V Western Storage Ltd. SCCA 37/89 (unreported) delivered 5/3/90 stated as follows:

> ".....unlike the Ramkissoon case where the affidavit was sworn to by a solicitor who had no personal knowledge of the facts stated in the defence and the latter was signed by Counsel, in the instant case the facts relative to the delay in filing the defence, and the facts constituting the defence were within the personal knowledge of the deponent who was the "in house" Attorney and Secretary of the first appellant and he was authorised by all of the appellants to swear to the affidavit. The said affidavit was thus the affidavit of merit of the appellants....."

In Water and Sewerage Authority v Lillian Waithe (1972) 21 WIR 498, another judgment of the Trinidad Court of Appeal, an application was made to set aside a judgment in default of appearance. The allegations in the suit were that the respondent had sustained injuries as a result of falling into a unguarded excavation left by the appellant on a public highway. The appellant there relied upon an affidavit sworn to by its Secretary deposing that he had been informed by a named employee of the appellant and verily believed that proper measures had been taken to prevent injury to users of the highway. The allegations in this affidavit, if true, were such as prima facie would provide a defence to the respondent's claim.

One of the issues which fell to be determined in that case was whether the proceedings before the judge in Chambers were interlocutory or final. The Court of Appeal held that they were interlocutory and that the affidavit was in order.

It was submitted by Mr. Colman in this case that the discretion to set aside ought to be exercised in favour of the defendant. He further submitted that the affidavit was one with merit albeit that the deponent was relying upon information and belief. To this effect he relied upon the Waithe's case and asked the court to treat it as being highly persuasive. It was also his view that the Ramkissoon's case was distinguishable from the instant matter.

Mr. Johnson on the other hand submitted firstly, that the affidavit relating to merits in the defence should have been sworn to by the actual tortfeasor who was in fact the second defendant. Furthermore, he argued that since there was no affidavit from him, an explanation ought to have been given for its absence

Secondly, he submitted that for the Court to be asked to exercise its discretion in favour of the first defendant at a time when there is a judgment against the second defendant, would in fact be asking the Court to make an inconsistent order. The records do show that there is a judgment against the second defendant and there was no application before the Court to set it aside.

Mr. Johnson in an effort to strengthen his attack, pointed out that there has been no denial in the draft defence nor in the Affidavit evidence that the second defendant was agent or servant of the first defendant. He argued therefore that since the second defendant was an agent or servant of the Crown at the material time and there was no application before the Court to set aside the judgment against that defendant the Court should not exercise its discretion in favour of the first defendant. Mr. Colman's only response to this submission was that the court ought not to visit what has happened to the second defendant upon the first defendant.

Finally, it was submitted by Mr. Johnson that the draft defence exhibited to the Affidavit was not sufficient to indicate or to support an affidavit or merit. He contended that the present case fell within the Ramkissoon principle and ought to be distinguished from Waithe and Jamaica Record cases where the deponents were stating facts within their knowledge.

Now, it is evident that the first defendant has sought to rely solely upon the affidavit evidence of David Higgins which has revealed that he is relying upon statements of information from Donovan Mason, the second defendant and his belief that the collision occurred without negligence on the part of the defendants. Section 408 of the Civil Procedure Code permits this type of affidavit evidence but upon certain conditions. The section provides as follows:

> "Affidavit shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings... an affidavit may contain statements of information and belief, with the sources and grounds thereof."

I hold the view that it is permissible in proceedings against the Crown for the proper officer to depose in an affidavit based upon information and belief facts showing the merits of the defence. On these particular facts David Higgins is Crown Counsel in the first defendant's chambers and through the Director of State Proceedings he receives instructions. The Waithe's case although not binding is highly persuasive.

In light of the view I hold above, can I disassociate from my mind the second defendant's present position in this action? Indeed, he was the agent or servant of the crown at the material time of the accident and also the actual

tortfeasor. A judgment in default of defence has been entered against him but no steps have been taken to set it aside. Can it then be argued that the affidavit evidence of David Higgins shows that there is merit and that the first defendant has a good defence to the action? I am not persuaded by this argument. I am in agreement with Mr. Johnson's submission that if I were to exercise my discretion to set aside the judgment this could be considered an inconsistent order. Counsel for the first defendant ought to have applied to have both judgments set aside.

But, there is one further aspect of this application which must be considered. Has the first defendant been guilty of laches in making this application? The Writ of Summons and Statement of Claim were served on this defendant on the the 23rd June, 1993 and appearance was duly entered on the 5th July, 1993.

Summons for leave to enter judgment was filed on the 12th January, 1994. The records on the file indicate that on the 1st day of June when the summons to enter judgment came before the Master it was adjourned to the 9th June. The first defendant's Attorney who was present on the 1st June did not return on the 9th. The Master then made the order to enter judgment against the first defendant which was duly entered on the 30th August, 1994 in binder No. 699 folio 230.

The records also show that the first defendant filed a defence even though no leave was given for this to be done. Of course, the plaintiff's Attorneys say that they have totally disregarded this defence served on them. It might have been an "administrative error" as Mr. Higgins sought to explain in his affidavit but certainly, an explanation would have been necessary for Crown Counsel's absence on the 9th June when leave was granted to enter judgment.

On the 4th October 1994 an order was made by the Master for the plaintiff to proceed to assessment of damages against the first defendant. On that occasion Mrs. S. Alcott appeared on behalf of the first defendant. No steps

were taken then to have this summons adjourned and neither is there anything to suggest that at that time the first defendant had any intention to set aside the default judgment.

The plaintiff next proceeded to file Notice of Assessment of Damages on the 12th October, 1994 against both defendants and the 6th February, 1995 was set for damages to be assessed. From all appearances the first defendant "sprung to life", as a summons was filed on its behalf on the 4th November, 1994 to set aside the interlocutory judgment in default of defence.

The affidavit evidence fails to explain the lack of interest by the first defendant after it received the negative response from Piper and Samuda. The first defendant had an opportunity to act on the 1st June, 9th June and finally on the 4th October, but chose to remain inactive. To say, "the delay was not deliberate", without explaining the reason or reasons for the delay is unacceptable. It does seem therefore, that it would be extremely difficult for my part, in view of the absence of explanations to properly exercise my discretion in the matter.

It is therefore my considered view that the summons to set aside judgment should be dismissed with costs of the application to the plaintiff to be taxed if not agreed.