IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

SUIT NO. C.L. 1985/J576

BETWEEN	JAMAICA CITIZENS BANK LIMITED	PLAINTIFF
AND	AUBURN LIMITED	FIRST DEFENDANT
AND	JIHEJE LIMITED	SECOND DEFENDANT
AND	DELBERT PERRIER	THIRD DEFENDANT
AND	MILLICENT HAMILTON	FOURTH DEFENDANT

Berthan Macaulay Q.C. and Rudolph Francis for Applicant.

Michael Hylton and Miss Monica Ladd instructed by Myers, Fletcher and Gordon for Plaintiff/Respondent.

HEARD: June 7, 8, 11, 12, 13 and July 30, 1990.

WALKER J.

This motion which has been brought by Auburn Court Limited (hereinafter referred to as "the applicant") is remarkable for what it seeks to achieve, namely the annulment of a judgment for a sum of money which the applicant admits owing. For this reason I must confess that, following my judicial instincts, I started to hear this case with a bias in favour of the plaintiff. However, if Mr. Macaulay is correct in his argument that the plaintiff's judgment is a nullity, I concede that, defenceless on the merits though the applicant's case may be the applicant would be entitled to succeed in this motion which is now before me.

By a specially indorsed writ dated November 20, 1985 the plaintiff claimed against Auburn Limited (as first defendant), Jiheje Limited (as second defendant), Delbert Perrier (as third defendant) and Millicent Hamilton (as fourth defendant) to recover the sum of $4,723,866.74 for principal and interest due and owing by the defendants under two loans made by the plaintiff.

On December 10, 1985 the writ was personally served on the third defendant, Delbert Perrier, for the first defendant, Auburn Limited.

On December 11, 1985 an unconditional appearance was entered on behalf of all the defendants by Trevor Levy and Company, Attorneys-at-Law.

On Janaury 15, 1986, no defence to the action having been filed by any of the defendants, the plaintiff applied for judgment in default of defence, and on January 24, 1986 final judgment was entered against all the defendants.

On September 28, 1987 by order of the court, the plaintiff's writ was amended to delete therefrom the name "Auburn Limited" as first defendant and to substitute therefor the name "Auburn Court Limited". Hereafter, the plaintiff's judgment not having been satisfied, the plaintiff resorted to sale of land proceedings pursuant to which, on December 8, 1987, the Registrar of the Supreme Court conducted an enquiry into certain real estate owned by the applicant. The records disclose that at this enquiry the applicant was represented by Mr. Gordon Robinson, Attorney-at-Law of the legal firm of Nunes, Scholefield, DeLeon and Company. Previously, on October 7, 1987 this firm had filed a document entitled "Appearance" under which it had purported to enter a second appearance to the plaintiff's action on behalf of the first, second and third defendants as originally designated therein. From here on, pursuant to an order of the court, the plaintiff sought to enforce its judgment by sale of real estate of which the applicant was proved to be the registered proprietor. In the process, copious correspondence passed between the plaintiff's Attorneys-at-Law on the one hand and those representing the applicant at different times on the other hand. The tenor of this correspondence left no room for doubt that the applicant was admitting liability on the judgment debt and attempting to settle the matter without the loss of its real estate which was subject to the court order for sale.

On May 30, 1990, no such settlement having been achieved, in a late development the applicant filed a summons to stay proceedings. On June 4, 1990, this summons was withdrawn by the applicant's Attorney-at-Law, Mr. Rudolph Francis.

In support of this motion counsel for the applicant, Mr. Macaulay, made the broad submission that the plaintiff's judgment is a nullity and should be set aside by the court in exercise of its inherent jurisdiction. He advanced several points which may be summarized as follows:

1. The plaintiff's writ is a nullity in that it named as the first defendant herein Auburn Limited, a non-existent entity.
2. The plaintiff's writ was never at any time served on the applicant, Auburn Court Limited.

3. Assuming that the plaintiff's writ was served on Auburn Limited, such service was not effected in accordance with the provisions of s. 370 of the Companies Act and was, therefore, null and void.

4. The plaintiff's writ is null and void since, although an order for amendment was made by the court, the said order was not carried into effect in accordance with the provisions of s. 265 of the Civil Procedure Code and had become, ipso facto, void and of no effect.

5. That by filing an affidavit of debt in the process of obtaining judgment in default the plaintiff impliedly rejected the Appearance entered on behalf of the defendants on December 11, 1985. This gave rise to uncertainty as to whether judgment had been obtained in default of Appearance under s. 70 of the Civil Procedure Code or in default of Defence under s. 245 of that Code.

Firstly, I must decide whether or not the plaintiff's writ is a nullity. If it is, then the plaintiff's judgment is also a nullity and that is an end of the matter. There can be no doubt that a judgment which is a nullity is something which a person aggrieved by it is entitled to have set aside ex debito justitiae. As Lord Denning so aptly observed in the case of Macfoy v United Africa Company Limited (1961) 3 All E.R. 1169 at p. 1172:

> "If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void."

As support for his submissions in this regard Mr. Macaulay relied mainly on two cases, the first of which was Daimler Company Limited v Continental Tyre and Rubber Company (Great Britain) Limited (1916) 2 A.C. 307. In that case an action was commenced without authority, the fact of the matter being that the directors of the plaintiff company were all alien enemies who could not give a retainer. It was held that in the circumstances the action should be struck out as irregular. Lord Parker (at p. 337) stated the principle thus:

> "But when the court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed. It clearly would not do so in the case of an infant plaintiff, and I can see no difference in principle between the case of an infant and the case of a company which has no directors or other officers capable of giving instructions for the institution of legal proceedings."

This principle was later applied in the case of Lazard Brothers and Company v Midland Bank Limited (1932) All E.R. Rep. 571, the second case relied on by Mr. Macaulay. Here the question was whether by Soviet Law the judgment debtor was at the date of issue of the writ an existing juristic person. It was held that it was not and that, accordingly, the entire proceedings had to be treated as a nullity.

In my view the decisions of the House of Lords in these two cases are clearly distinguishable from the present case. In the case of Daimler Company Limited v Continental Tyre and Rubber Company (Great Britain) Limited their Lordships were concerned with an incompetent plaintiff, and in Lazard Brothers and Company v Midland Bank Limited with a judgment debtor who was a non-existent juristic person. In the present case it is not in dispute that at the date of issue of the plaintiff's writ, and at all times subsequently, the applicant whom it was intended to sue was, and has been, an existing juristic person.

In my judgment the true test to be applied in cases such as the present one is that enunciated by Devlin L.J. in Davies v Elsby Brothers Limited (1960) 3 All E.R. 672. In that case the facts were that prior to the accident, the subject matter of the plaintiff's action, the plaintiff had been employed to a partnership firm called "Elsby Brothers". Subsequently that firm became a limited company which also employed the plaintiff. The

plaintiff issued a writ and, the date of the accident not having been stated therein, there was room for reasonable doubt when the limited company got the writ whether the plaintiff intended to sue the company or the partnership firm which had ceased to exist shortly before. In the view of the court (Pearce and Devlin L. JJ.) that was fatal to the power to amend the writ. Delvin L.J. expressed the opinion that whether a writ was addressed to a non-existent person or whether it was a case of mere misnomer should be determined on the basis of what a reasonable reader in the position of the defendant would conclude upon receiving the writ. In prescribing the test to be applied Devlin J.J. said at page 676:

> "The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: Of course it must mean me, but they have got my name wrong, then there is a case of mere misnomer. If, on the other hand, he would say: I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries, then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer."

It was held on the facts of that case that the amendment which was granted by the lower court involved the addition of a new defendant, the limited company. It was not merely the correction of a misnomer or misdesription since there had been two separate entities involved, namely the firm and the company. The writ correctly described the firm, but, the date of the accident not having been stated, the writ did not show that the company must have been intended.

This test prescribed by Delvin L.J. was applied by the Court of Appeal (Donovan and Danckwerts L. JJ.) in the later case of Whittam v W.J. Daniel and Company Limited (1961) 3ALL E.R. 796. Here the facts were that a limited company was sued within the limitation period but without adding the word "limited" and, therefore, appeared to have been sued in the name of a firm. The court allowed an amendment whereby the word "limited" was added after the limitation period had expired. It was held on appeal distinguishing Davies v Elsby Brothers Limited (supra) that the amendment was a correction of a mere misnomer since, in all the circumstances of the case, there could have been no doubt who it was that the plaintiff

intended to sue. The mere omission of the word "limited" did not mean that no person was sued and that, until that was corrected, there was no defendant to the proceedings. Applying the test of Devlin L.J. to the matter at hand Donovan L.J. said at page 799:

> "Applying that test, there could have been no doubt in the mind of the defendants when they got the writ that it was they whom the plaintiff intended to sue and that she had simply got the name wrong."

And for his part Danckwerts L.J. in concurring with the judgment of Donovan L.J. said at p. 802:

> "The present case is plainly distinguishable from the decision of this court in Davies v Elsby Brothers, Ltd., because, in the present case, there is no other entity to which the description in the writ could be taken to refer. On the other hand, counsel for the defendants' argument is that it is a description which describes nothing and, therefore, is an action against nobody, and, therefore, it would be improper and against the rules to put in the defendants in place of a person which did not exist. I cannot accept that argument. It seems to me that this is a case in which the description could only refer to the defendants and would not be taken by any reasonable person to refer to anybody but the defendants."

But the matter is put beyond doubt by the decision of the Court of Appeal in the recent case of Singh (Santosh Kumari) v Atombrook Limited (Trading as Sterling Travel) (1989) 1 W.L.R. 810. The facts are summarized in the headnote to that case which reads as follows:

> "The plaintiff's husband bought from travel agents carrying on business under the name Sterling Travel at a London address, three airline tickets for the plaintiff and their children to travel to the United States on 25 July 1984. But on 27 June the husband died and the family could not travel. The unused tickets were returned to the travel agents and a refund on them was promised. In spite of repeated inquiries by letters and telephone calls no refund came through. On 4 June 1987 the plaintiff, as administratrix of her deceased husband's estate, issued a writ addressed to "Sterling Travel (a firm)." Nothing was heard from them and on 21 July judgment in default was entered. When the plaintiff tried to execute the judgment it appeared that the travel agents were no longer at the London address. On 24 August another travel agent advised the plaintiff's solicitors that they had received the writ, that there was no firm called Sterling Travel but their associate company, Atombrook Limited, was the proprietor of Sterling Travel. The plaintiff's solicitors invited them to apply for the judgment to be set aside. After a delay of some months Atombrook Limited applied on 25 November 1987 to have the judgment set aside

> on the ground that it had been irregularly obtained. Hutchinson J., confirming the order of the district registrar, decided that although the judgment had been obtained irregularly the defendants were not entitled to have the judgment set aside under R.S.C., Ord. 2, as a matter of right and that he would set aside the judgment under Ord. 13 r. 9 provided the defendants brought the full amount claimed into court. The judge also gave the plaintiff leave to amend the writ by substituting for the defendants' name "Atombrook Limited trading as Sterling Travel."

In dismissing the appeal by the defendants the court (Kerr L.J. and Sir John Megaw) held, inter alia, that although the defendants would be entitled to have the proceedings set aside if there were a real doubt as to the party being sued, since the defendants had been aware that they were the party the plaintiff intended to sue, the proceedings were to be treated as a case in which there was a misnomer of the defendants and one to which Ord. 2 r. 1 (1) and (2) and Ord. 20 r. 5 applied so that the irregularities did not invalidate the proceedings. In the course of his judgment at p. 820 Kerr L. J. said:

> "Of course, in the present case there was never the slightest doubt in the minds of the defendants that the plaintiff intended to sue them and that they were the persons with whom this case was concerned. From start to finish they knew that perfectly well, and in my judgment they were taking steps throughout to avoid the pursuit of this claim against them. Undaunted, however, Mr. Weitzman said that this still left it open for an objective person to have construed the writ in a different way. He was suggesting - though I find it impossible to follow the argument in full or to accept it - that an objective person, although knowing all the facts which the defendants knew, might still have thought that these plaintiffs intended to sue a firm called Sterling Travel which might be an existing entity, or something of that kind. That is fanciful and I reject it."

My first comment with regard to these authorities is that, differing from counsel for the applicant, I do not find any of them to be in conflict with any other. The issue here is simply whether or not the description of the first defendant on the plaintiff's writ can be regarded as a mere misnomer. The question is: "Is it a mere misnomer or is it not?" As I have said before it is not in dispute that at the date of issue of the writ the applicant was an existing juristic person. There was no such entity as fitted the description of Auburn Limited at that time. I have no doubt that at the time of personal service of the writ upon the third

defendant, the third defendant, who was then a director of the applicant, knew perfectly well that it was the applicant that the plaintiff intended to sue, and that it had merely got the name wrong. Furthermore, the third defendant must then have been well aware of the applicant's indebtedness to the plaintiff. Significantly, that indebtedness has never been denied. Indeed, it has been affirmed by payments on account made by the applicant since the plaintiff's judgment was obtained. Significantly, too, appearance was entered on behalf of all the defendants named in the plaintiff's writ on the day after personal service of the writ upon the third defendant. From all of this the inference is irresistible, and I am prepared to draw it, that, having been served with the writ, the third defendant passed the writ immediately to the attorneys-at-law with instructions to enter appearance as was done. In the result, I have concluded that the present case is one of mere misdescription or misnomer which does not invalidate the writ.

Mr. Macaulay's second and third points may, I think, be conveniently taken together. He contended that the plaintiff's writ was never at any time served on the applicant, and further that, assuming that the writ was served on Auburn Limited, such service was null and void not having been effected in compliance with the provisions of s. 370 of the Companies Act which he argued were mandatory. S.370 reads as follows:

> "A document may be served on a company by leaving it at or sending it by post to the registered office of the company."

Now the plaintiff's writ was effectively amended by order of the court on October 30, 1987 and the unconditional appearance entered on behalf of the first defendant as originally named in the writ (i.e. Auburn Limited) stood good as appearance entered on behalf of the same defendant in its amended name (i.e. Auburn Court Limited). Such entry of appearance - and this is trite law - had the legal effect of waiving any irregularity in service of the writ. Mr. Macaulay's contention cannot, therefore, be sustained, nor is it necessary for me to decide whether the provisions of s. 370 are mandatory. As to the true meaning and effect of these provisions, I am content to say for the time being that I, like Kerr L.J. as he expressed himself in Singh's case (supra at p. 819), entertain doubt as

to why the word "may" should be construed as "must" in this legal context.

Addressing the fourth point advanced by Mr. Macaulay, I think that it is misconceived inasmuch as it is based on the premise that the plaintiff's writ was amended under provisions of the Judicature (Civil Procedure Code) Act (hereinafter referred to as "the Code") to which s. 265 applies. Before me Counsel on both sides agreed that power to amend a writ of summons is given to the court by s. 677 of the Code. But Mr. Macaulay pointed out that previously, when appearing at the Registrar's Enquiry in these proceedings, Mr. Hylton had contended that the writ had been amended in accordance with the provisions of s.270 of the Code. However that may be, and whatever Mr. Hylton might have said on that occasion, I think the question for me to determine is a simple one and it is this: Did the court have power to order the amendment sought to the writ? Clearly, as both counsel have conceded, it did have such power under s. 677 of the Code. The fact of the matter is, of course, that the validity of the amendment is in no way dependent on the personal view of counsel, or anyone else, as to the enabling provision of the Code.

As regards what I might call the second limb of Mr. Macaulay's argument, it is true to say that although the order for amendment was made by the court, the writ has not in fact been amended to date. I know of no provision of the law, and none was cited to me, which requires that an order for amendment of a writ (as distinct from an order for amendment of pleadings) should be carried into effect within a specified time. In my judgment, therefore, an order for amendment of a writ which is made without more, as in the present case, may be implemented at any time after such order is made. However, while I adhere to this view, I would at the same time venture to suggest that for the sake of completeness such an order should be carried into effect as soon as is practicable after it is made. This will serve to put the proceedings in proper perspective and avoid confusion.

I come now to consider Mr. Macaulay's fifth point and do not hesitate to say that I find no merit in it. As I have already observed elsewhere in this judgment the appearance entered on behalf of the applicant

on December 11, 1985 stood good to the amended writ. It could not be withdrawn except by leave of the court and was not so withdrawn. In the circumstances the plaintiff was perfectly entitled to proceed to take a judgment in default of defence and to file an affidavit of debt in the process of doing so. It cannot be said that the plaintiff's action demonstrated uncertainty of procedure, nor did it admit of the inference contended for by Mr. Macaulay.

In the result, I find that the plaintiff's judgment was regularly obtained and is valid and enforceable.

However, if I am wrong in the conclusion to which I have come and the plaintiff's judgment is voidable (as opposed to being void), I will go on to consider the provisions of section 679 of the Code.

That section provides as follows:

S.679 "No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

Accordingly, the first question is: Has the applicant taken any fresh step after knowledge of the irregularity? I would answer this question in the affirmative, such fresh steps being:

1. The "Appearance" entered by Nunes, Scholefield, DeLeon and Company, Attorneys-at-Law on October 7, 1987.
2. The attendance at, and active participation in, the Registrar's enquiry undertaken on behalf of the applicant by Mr. Gordon Robinson of the legal firm referred to above.
3. Each payment on account of the judgment debt made by the applicant.
4. Summons to stay proceedings filed by the applicant on May 30, 1990.

Secondly, the question is: Has the applicant brought this application within a reasonable time? The plaintiff obtained its judgment on January 24, 1986. Since that time the records show that a great deal of correspondence has passed between the parties' legal representatives in an

effort to settle the judgment debt in an amicable manner. In addition to this, several payments on account have been made by the applicant but to date the debt has not been fully paid. Now, over four years later, the applicant seeks to set aside the plaintiff's judgment with no intention to contest the matter on its merits. In my opinion this application has not been made within a reasonable time. It is too late and is, in reality, no more than a last ditch effort on the part of the applicant to avoid liability on a genuine debt. Accordingly, had I found it necessary to do so, I should unhesitatingly have applied the provisions of s. 679 in favour of the plaintiff and against the interest of the applicant.

This motion is dismissed with costs to the plaintiff/respondent to be agreed or taxed.