

C.A. Summons to vacate default order made by Master that "inter alia" defence
filed be struck out for disobedience of order of the Court for
delivery of affi of documents and inspection. Summons dismissed by Master. - Asked against
order dismissing summons - whether order would result in
an injustice. - Substantial payment into Court by defendant
for costs - Order set aside.

JAMAICA

[Appeal allowed - Order set aside - Order affi of documents
etc etc [4]]

Civil Procedure I
Civil Procedure II

To Case referred to

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 45/87

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

compr

BETWEEN MANTECA WAREHOUSE LIMITED DEFENDANT/APPELLANT

AND ANTHONY CHIN-QUE
EDNA CHANNER
ALLAN LOGAN PLAINTIFFS/RESPONDENTS
OWEN NELSON
ADOLPH SILVERA

D.M. Muirhead, Q.C., and J. Kirlew, Q.C., for Appellant

Gordon Robinson for Respondents

October 3, 1988

CAREY, P. (Ag.):

This is an appeal from an order made by Master Vanderpump on
the 8th of May, 1987, whereby she dismissed a Summons filed on behalf of
the defendant to vacate an order which she herself had made by default
some time previously. In that default order she directed inter alia that
the defence filed be struck out for disobedience of the order of the Court.
There had been an order for delivery of an affidavit of documents and for
inspection made under the Summons for Directions.

It was argued before us by Mr. Muirhead that the bases on
which this Court could interfere with the order of the learned Master was,
where the Court was of the view that the order made, would result in an

injustice. Mr. Gordon Robinson did not dissent from that view of the law which I think to be right.

Mr. Gordon Robinson gave a procedural history of the matters filed in the action. What that history demonstrated was, that there was a great deal of delay in prosecuting the defence over time. It also showed that there was a failure on the part of the defendant to comply with orders of the Court made to speed up the trial and, indeed, there were occasions when the defence was required to pray for extensions of time which in the event were granted but with stringent conditions. I think I should mention one of these. It required payment of large sums of money for water rates which was the subject of the action and we understand this morning that some \$14,000.00 had been paid into Court by the defendant.

What has impressed me in this matter, in favour of interfering with the Master's order, is that no attempt has ever been made to have the defence struck out, which is proof positive that there is a serious issue to be tried. In order that a litigant should be driven from the judgment seat, some very good reasons should be shown to allow that to take place. Delay by itself, and that has been demonstrated here, is not in my judgment, enough. Speaking entirely for myself, it would be a manifest injustice if this defendant who has, albeit belatedly and under constraint, paid money into Court pursuant to the claim as costs should not be allowed to have his day in Court.

For myself, I would be disposed to order that the appeal be allowed and the order of the Master set aside. In my view, she did not, in the proper exercise of her discretion, balance against the undoubted delay, the payment of \$14,000.00 as costs into Court.

FORTE, J.A.:

I too would allow the appeal for the reasons so succinctly stated by the learned President (Acting).

I add only the opinion that where the issues raised by the defendant in his defence is a prima facie valid defence to the action, then careful scrutiny ought to be applied to the exercise of the discretion to strike out the action for some procedural wrong.

I agree that in this case an injustice would occur if the order was allowed to stand. For those reasons, as I said before, I would also allow the appeal.

DOWNER, J.A.:

The important issue to be tried in this case is who is to pay the water rates. The Master made an Order, which would result in shutting out the defendants from adducing their defence and Mr. Gordon Robinson in support of that Order by the Master gave the detailed account of the dilatory tactics of the defendant. But this is a civil case and one very important fact which was not mentioned by Mr. Gordon Robinson, for the respondents, was that the defendant had paid some \$14,000.00 into Court and this was a very good indication that the defendant took the case seriously and was interested in the outcome of the hearing on merits.

Consequently, I would interfere with the Master's discretion on the grounds that it would be a manifest injustice if the defendant were not to have his day in Court. I therefore concur that the Master's Order should be set aside.

CAREY, P. (Ag.):

It is ordered that the defendant file an affidavit of documents relating to the issues raised in defence and answer to further and better particulars within seven (7) days hereof and it is further ordered that there be inspection of documents within seven days of the delivery of the affidavit documents. It is further ordered that the case be restored to the Cause List and there will be an Order for speedy trial of the action.

The respondents are entitled to the costs of this appeal to be taxed if not agreed.