Privy Council Appeal No. 54 of 1988

Kenneth Mason *Appellant*

v.

Desnoes and Geddes Limited *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND APRIL 1990

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Oliver of Aylmerton**]*

This appeal from the Court of Appeal of Jamaica raises a not unimportant point of law with regard to the jurisdiction of a Master of the Supreme Court of Jamaica to set aside a default judgment.

The appellant alleges that on 17th April 1980 he drank part of the contents of a bottle of beer which had been manufactured and marketed by the respondents. It contained, so it is alleged, plastic bristles which, by the negligence of the respondents, had somehow got into the bottle in the process of brewing or bottling. On 5th April 1982 Messrs. R.M. Millingen and Co. issued proceedings on his behalf claiming that the ingestion of this unexpected and unsolicited additive had caused him injury both physical and mental resulting in a loss of weekly earnings at the rate of $300 per week which had then endured for eighteen weeks and was still continuing. A defence was filed on behalf of the respondents on 21st May 1982.

The Consolidated Judicature (Civil Procedure Code) Law of Jamaica (Cap. 177) provides in section 344(1) for the keeping by the Registrar of the Supreme Court of lists of actions set down for trial. As actions are set down the Registrar is required to enter them in one or other of two cause lists, according to their estimated

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length. It is the duty of solicitors, (subsection 4) once an action has been set down, to watch the cause lists so that preparations for trial are made in good time. Before each term, (subsection 5) the Registrar prepares a term's list of actions likely to be reached during the term and he is required to notify the solicitors concerned of actions appearing in the term's list. The solicitors are then to arrange a trial date and when this has been done a trial list is prepared showing the actions fixed for trial and the date fixed. It is, so it seems, also the practice for a week's list to be prepared and posted showing the cases due for hearing in the forthcoming week.

The events leading up to this appeal have never been fully explained. So far as they can be deduced from the only evidence available, which consists of two affidavits of Mr. Millingen, the appellant's solicitor, sworn respectively on 6th August 1986 and 12th May 1988, the sequence of events was as follows:-

The action appears to have been set down at some date in 1982. On 6th March 1985 the solicitors on both sides were notified that it had been placed in the cause list. For some reason which has never been explained it did not appear in the term's list, although it seems to have appeared in the week's list. The respondents' solicitors appear to have been aware of this but Mr. Millingen omitted to notice it. On 27th June 1985 the action came on for hearing before Alexander J. The respondents' solicitor was there. Mr. Millingen was not. Section 353 of the Civil Procedure Code of Jamaica provides that:-

> "If, when a trial is called on, the defendant appears and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action ..."

So the judge, quite properly, made an order striking out the action with costs.

There the matter rested until 24th October 1985 when Mr. Millingen wrote to the Registrar complaining that the action had not been placed on the trial list. This letter shows that he had then become aware, in some manner which has never been explained; that it had been placed in the week's list prior to the hearing before Alexander J. although his evidence is that he did not become aware of the order of Alexander J., which had not been served upon him, until very much later. In his letter he asked for the action to be placed in the list for the next return day. The Registrar seems to have been equally unaware that the action had been already struck out because on 17th March 1986 he told Mr. Millingen that he had fixed the trial for 10th April 1986. On the following day Mr. Millingen was served with the default judgment, presumably as a result of the respondents' attorneys having been told of the new trial date. Section 354 of the Civil Procedure Code

prescribes a period of ten days from the date of trial as the period during which application may be made to set aside a default judgment. Thus the time for setting aside had long since expired at the date when the default judgment was served. Nevertheless, it might be supposed that the appellant's solicitors, even if they could not apply to set it aside within ten days of the trial, would at least have hastened to do so within the prescribed period after they had become aware of it. They did not do so and a period of unbroken calm ensued which lasted until 6th August 1986 when they issued a summons before the Master in Chambers. In the meantime, on 16th April 1986, Alexander J., who had made the original order, died.

The appellant's application was supported by a single affidavit of Mr. Millingen which set out that he had been informed of the placing of the action in the cause list, exhibited his letter to the Registrar of 24th October 1985 and deposed to the fixing of the new trial date and the service of the default judgment. No explanation was tendered as to how the deponent had become aware of the inclusion of the action in the week's list nor was any reason advanced why he had failed to attend the hearing before Alexander J., save such as could be deduced from the terms of his letter to the Registrar. No explanation or excuse was advanced for the failure to apply back to the trial judge as soon as the default order was served nor for the delay between 18th March 1986 and 6th August 1986 when the affidavit was sworn.

The summons was heard before Master Vanderpump on 2nd December 1986 when she granted an extension of time for making the application and made an order setting aside the default judgment and ordering the costs thrown away and the costs of the application to be taxed and paid by the appellant. It is not in dispute that if the Master had jurisdiction to make the order at all, she had equally jurisdiction under section 676 of the Civil Procedure Code to enlarge the time for making the application.

Under section 10(1) of the Judicature (Supreme Court) Act 1880, an appeal from a decision of the Master lies direct to the Court of Appeal. Accordingly, on 23rd March 1987, the respondent, pursuant to leave granted on 9th March 1987, appealed to the Court of Appeal of Jamaica. That court (Campbell, Wright and Forte JJ.A.) allowed the appeal and set aside the Master's order, with costs. The ground upon which the appeal was allowed was that the Master's order was made without jurisdiction and was, therefore, a nullity. The court also indicated, however, that they would, in any event, have had no hesitation in allowing the appeal on the merits.

In their Lordships' opinion, the Court of Appeal were wrong in holding that the order was made without jurisdiction. The office of the Master of the Supreme Court of Jamaica was created by the Act of 1880 which, as amended in the Judicature (Miscellaneous Provisions) Act 1966, now provides in section 8A-(1):-

> "There shall be attached to the Supreme Court a Master who shall exercise such authority and jurisdiction of a Judge in Chambers as shall be assigned to him by rules of Court."

Section 27 of the same Act established the Supreme Court and conferred upon it the jurisdiction previously vested in specified courts existing at the commencement of the Act. Section 28 provides as follows:-

> "Such jurisdiction shall be exercised so far as regards procedure and practice, in manner provided by this Act, and the Civil Procedure Code and the law regulating criminal procedure, and by such rules and orders of court as may be made under this Act; and where no special provision is contained in this Act, or in such Code or law, or in such rules or orders of court, with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been exercised by the respective Courts from which it is transferred or by any such Courts or Judges, or by the Governor as Chancellor or Ordinary."

Section 39 of the Act is in the following terms:-

> "A single Judge of the Supreme Court may exercise, in Court or in Chambers, any part of the jurisdiction of the Court which before the passing of this Act might have been exercised in the like manner, or which may be directed or authorized to be so exercised by rules of court to be made under this Act.
>
> In such cases a Judge sitting in Court shall be deemed to constitute a Court."

So much for the jurisdiction of the judge. The powers of the Master are conferred by section 8B-(1) of the 1966 Act which provides:-

> "Where under this Law the Master has jurisdiction in relation to any matter, then, subject to this Law, he shall have and may exercise in relation to the matter all the powers of the Court or a Judge, including the power of making an order in such matter, which order may include provision for costs, certificate for counsel or other consequential matters; and any such order so made by the Master shall, subject to this Law, have the same effect as if it had been made by the Court or a Judge."

The words "under this Law" and "subject to this Law" throw one back to the rules of court referred to in section 8A-(1).

Section 43 of the Act of 1880 conferred on the Chief Justice power to make rules governing procedure and practice and went on to provide that:-

> "The provisions of the Civil Procedure Code shall by such Rules be extended and adopted, insofar as they may be conveniently applicable, to regulate the practice and procedure of the Court in its several civil jurisdictions."

By the Judicature (Rules of Court) Act 1961 the power to make Rules of Court was vested in a Rules Committee established by the Act including rules "(d) for prescribing what part of the business which may be transacted and of the jurisdiction which may be exercised by judges of the Supreme Court in Chambers may be transacted or exercised by officers of the Supreme Court".

The Code referred to in section 43 is now contained in the Consolidated Judicature (Civil Procedure Code) Law under section 354 of which the application to the Master was made. That section provides:-

> "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."

The reference to "the Court or a Judge" makes it clear that this jurisdiction is one which may be exercised by the judge in Chambers (see *Baker v. Oakes* (1877) 2 Q.B.D. 171).

In exercise of the power conferred by the Act of 1961 there were made and published rules prescribing the duties of the Master in Chambers, rule 2 of which (as amended in 1967) provides that, with certain defined exceptions which are immaterial for present purposes:-

> "The Master in Chambers may transact all such business and exercise all such authority and jurisdiction in respect of the same as may be transacted or exercised by a Judge in Chambers."

The argument of the respondents before the Court of Appeal which was accepted by that court was that the expression "a Court or a Judge" in section 354 did not embrace a Master. On any ordinary construction of the section and of the provisions of section 8B(1) of the Act of 1880 it clearly does. The argument to the contrary appears to their Lordships to be based upon a misunderstanding of certain English authorities regarding applications under what is now order 35 rule

2 of the Rules of the Supreme Court, which refers merely to a judgment being set aside by "the Court". In *Vint v. Hudspith* [1885] 29 Ch.D. 322, a plaintiff who had failed to appear and had thus had his action dismissed appealed against the judgment to the Court of Appeal. That court, whilst accepting that it had jurisdiction to hear the appeal, expressed the view that the proper course in the first instance was to apply to the judge to have the judgment set aside and the action restored. In remarking that the plaintiff ought first "to apply to the judge who gave the judgment to restore the action" Cotton L.J. was merely stating the normal practice, not construing the rule (then order 36 rule 33 which, unlike the present order 35 rule 2, contained the same reference to "the Court or a Judge" as appears in section 354 of the Civil Procedure Code). Again in *Schafer v. Blyth* [1920] 3 K.B. 140, Lush J. observed that applications under the rule ought to be made to the judge who tried the case. This again was merely a reflection of the ordinary practice and does not bear on the question of jurisdiction.

It is undoubtedly the case that, in the ordinary way, where a default order has been made by a judge, application to discharge the order would normally be made to the same judge if he is available to hear it. There is, however, certainly no immutable rule to this effect as the Court of Appeal seems to have thought. It was that court's view that the procedure "is 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". That may well be a correct principle, but the application to set aside a default judgment is not the invocation of an appellate jurisdiction but of a specific rule enabling the court to set aside its own orders in certain circumstances where the action has never been heard on the merits. *Freason v. Loe* [1877] 26 W.R. 138 was a case of an application by motion under what was then order 36 for the dismissal of an action for want of prosecution, an order which, again, could be made by "the Court or a Judge". Objection was taken that the application should have been made to the Judge in Chambers and not by motion in open court. Jessel M.R., however, observed that the application was more properly brought in Chambers but that the alternative procedure was a permissible one. Whilst, therefore, it would, in their Lordships' opinion, have been more appropriate as a matter of practice for the appellant's application in the instant case to have been made to Alexander J. either in court or in Chambers during his lifetime, it was nevertheless within the Master's jurisdiction and, the judge being dead, the summons was quite properly heard by her. If, therefore, this were the only point on the appeal their Lordships would feel obliged to advise Her Majesty that the appeal ought to be allowed.

As previously mentioned, however, the Court of Appeal expressed an unequivocal view that, in any event, the respondents' appeal to that court ought to be allowed on the merits and the respondents' written case seeks to uphold the decision on this additional ground. As already observed, the affidavit in support of the summons before the Master provided no material at all upon which the Master could properly exercise her discretion either to extend the time for application or to set aside the judgment. The Master's notes of the argument before her equally disclose no such material. Nor does the further affidavit sworn by the appellant's solicitor in support of the application for leave to appeal to the Board.

In these circumstances, their Lordships entirely agree with the Court of Appeal's view that the Master's order, even if made within jurisdiction, was made without any supporting material and was plainly wrong. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs before the Board.