IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L 1998/M154

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| BETWEEN | ROY McGILL | PLAINTIFF |
| AND | O'NEIL DUNN | DEFENDANT |

John Graham and Miss Georgette Scott instructed by John G. Graham & Co. for the Plaintiff.

Wentworth Charles instructed by Wentworth Charles & Co. for the Defendant.

SUMMONS TO SET ASIDE DEFAULT JUDGMENT

Heard: December 12, 18 2002; January 7, 2003

**HARRISON J**

The defendant has filed this summons seeking an order to set aside a default judgment that was made by me at the trial of this action on the 10th day of October 2002. He also seeks an order that all subsequent proceedings be set aside and that the action be restored on the Cause List and a date set for the re-trial.

The factual background

The plaintiff's claim against the defendant is for an order that the defendant do deliver up a compressor that was loaned to the defendant as well as damages for Detinue. The Writ and Statement of Claim were served on the defendant in and around the month of June 1998. He thereafter contacted the firm of Givans, Brown & Co. and had discussions with Mr. Ivor Peynado, one of the firm's Associates. He subsequently retained them to represent him.

Appearance was entered on his behalf on the 4th day of August 1998 and a Defence filed on the 31st day of August 1998. A further Defence was filed on the 29th day of September 1998 which denied liability and the particulars of claim contained in the Plaintiff's Statement of Claim.

After the pleadings were closed the plaintiff's Attorneys applied by letter dated the 4th March 1999 for the matter to be placed on the Cause List. This was done and the Registrar by letter dated the 3rd day of September 1999 advised the plaintiff's Attorneys. Copies of this letter were also sent to Messrs. Pollard, Lee Clarke and Campbell and Givans, Brown & Co., Attorneys at Law.

When the action came up for trial on the 7th October 2002 the defendant and his Attorneys at Law were absent. Miss G. Scott who appeared on behalf of the plaintiff advised the Court that the matter had been placed on the date fixing list for November 22, 2001 and that the 7th December 2002, was fixed as the date of trial. She further informed the Court that the defendant's Attorneys who were now Pollard, Lee Clarke and Campbell made no contact with her firm. Since the defendant and his Attorneys were absent, Counsel for the Plaintiff applied to the Court for the matter to proceed pursuant to section 352 of the Judicature (Civil Procedure Code) Law ("The Code"). This request was granted; the plaintiff proved his case and judgment was granted in his favour. Final judgment was entered on the 14th day of October 2002 at Binder 731 Folio 126 in the Judgment Binder.

On the 18th day of October 2002 the plaintiff initiated Garnishee proceedings and a Writ of Attachment was issued out of the Registry of the Supreme Court. That summons was set for hearing on the 11th November 2002 but was adjourned to the 12th December 2002. It was adjourned on the 12th December pending the outcome of the summons to set aside the judgment in default.

Wentworth Charles & Co. Attorneys at Law now appear for and on behalf of the defendant. A Notice of Change of Attorneys is dated 6th November 2002 and forms part of the Judge's bundle.

The Affidavit evidence in support of the summons to set aside

The defendant deposed to an affidavit sworn to on the 6th day November 2002. At paragraphs 2 – 5 inclusive he states inter alia:

> "2. ...I crave leave of this Honourable Court to refer to the pleadings filed in this Cause and in particular to the Final Judgment entered herein and the praecipe of Writ of Attachment copies of which were recently produced and shown to me in conference with Brown-Hamilton & Associates, Attorneys at Law whom I contacted for advice.
>
> 3. That on perusal of the copy Final Judgment produced and shown to me as aforesaid I observed that one Campbell & Campbell, Attorneys at Law, received a copy of the said Judgment.....
>
> 4. That I am not acquainted with the firm of Campbell & Campbell, Attorneys at Law, I never retained them to represent me herein and they never contacted me on receipt of the Final Judgment or at all.
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> 5. That I am advised by the said Brown-Hamilton & Associates, Attorneys at Law and do verily believe that the said Campbell & Campbell, Attorneys at Law were never on the record as my Attorneys and therefore had no authority to receive the final judgment on my behalf".

Paragraphs 6 – 9 inclusive refer to the service of the writ and statement of claim, the defendant's contact with Mr. Peynado of the firm Givans, Brown & Co. Attorneys at Law, the retaining of the firm, entry of appearance on his behalf and the filing of his Defence to the Statement of Claim. He further deposed at paragraphs 10 – 24 as follows:

> "10. That I had given Mr. Peynado all information relating to my whereabouts including telephone numbers and address together with any information needed to enable him to communicate with me as he sees fit.
>
> 11. That I expected and anticipated that Mr. Peynado would contact me for the trial so I made no contact with any other Attorney but awaited word from Mr. Peynado as to the trial date in this matter.
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> 12. That neither Mr. Peynado, Givans, Brown & Co. nor any other Attorney at Law ever contacted me with regard to the trial of this matter and I was never served with any notice advising me of the trial date.
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> 13. That on or about the 25th day of October 2002 I received a call from my Bank Manager at Scotia Bank, Liguanea Branch advising that Attachment Proceedings had been taken out against me in respect of this matter and that the current and deposit accounts which are held jointly at the said institution, would be frozen until further notice.
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> 14. That I became frantic and immediately contacted Mr. Peynado and told him what the situation was. Mr. Peynado's comment was that he thought the case had been completed, but that he would make efforts to locate the case file and get back to me.
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> 15. That Mr. Peynado did not contact me and later when I communicated with his office, the secretary informed me that he was off the Island.
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> 16. That I immediately contacted Brown-Hamilton & Associates, Attorneys at Law who advised me of the immediate legal steps I would need to take.
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> 17. That I was advised by the said Brown-Hamilton & Associates, Attorneys at Law and do verily believe that the firm Givans, Brown & Co. of which Mr. Peynado was an Associate, was dissolved as one of the partners was admitted to the bench.
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> 18. That I was further advised by the said Brown-Hamilton & Associates, Attorneys at Law and do verily believe that some of the matters, which were being dealt with by Givans, Brown & Co were forwarded to Pollard, Lee, Clarke, Campbell & Co. for attention.
>
> 19. That I was not aware that my matter had been sent to Pollard, Lee, Clarke, Campbell & Co prior to my being notified of the Attachment Proceedings by my

Bank Manager as aforesaid neither did the said Attorneys contact me albeit my address and telephone numbers were given to Givans, Brown & Co the Attorneys I retained to represent me...

20. That I was not aware that a trial date had been set for this matter, nor was I aware that a default judgment had been entered against me.

21...

22. That I am advised by my Attorneys and verily believe that the Defence filed herein enjoys a real prospect of success.

23. That the Plaintiff in whose favour judgment has been granted would not be prejudiced by the judgment being set aside.

24. That the delay in applying to set aside this judgment was due to my absence of knowledge of the trial of the action and my Attorneys' neglect in advising me thereof".

The Court's jurisdiction to deal with the summons

This application is governed by section 354 of the Code and it provides as follows:

> "354 – 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." (Emphasis supplied)

The date of judgment in the instant matter is October 10, 2002 and the summons to set aside was filed on the 6th day of November 2002. This meant that the period of ten (10) days provided for in section 354 (supra) had expired before the date of filing the summons to set aside. In order therefore, for the Court to have the necessary jurisdiction application was made to extend time to hear the summons. This was done before the substantive application was heard and the Court in exercising its discretion made an order pursuant to section 676 of the Code.

Was the matter properly set down for trial?

One of the issues raised by the defendant related to the setting down of the action for trial. It was contended that there was no evidence substantiating the filing of a Certificate of Readiness before the trial date was fixed. Carol Nelson, a legal secretary employed to Wentworth Charles & Co. deposed that having searched the records of the Registry she had not seen a Notice of Trial or Certificate of Readiness on the file. She further deposed that on the 5th day of November 2002 she attended upon the Court Administrator to confirm whether or not a Certificate of Readiness had been filed. The Court Administrator conducted a search and she was advised that none had been filed. In light of what Nelson said the Court Administrator told her, the Court decided to investigate the matter. Checks in the Registry revealed that a Certificate of Readiness was in fact filed on

the 9th March 2001. The Register was produced and an entry was seen verifying its filing. The Court was also advised by the plaintiff's Attorneys that the Certificate was served on Pollard Lee Clarke and Campbell, Attorneys at Law on the record for the Defendant. Service was admitted on the 13th day of March 2001. In the circumstances, Mr. Charles did not pursue this line of argument any further.

Miss Nelson had also mentioned that she had not observed a Notice of trial on the Judge's Bundle so I need to deal with this now. A Practice Direction issued by the Supreme Court has provided that once the Certificate of Readiness is filed and served the Attorneys at Law would thereafter attend the date fixing session in order to be advised of the trial date. A list of cases indicating the trial dates would next be published and circulated to all Attorneys with matters on that list. The Weekly List also lists the cases for trial for the forthcoming week and this list is also circulated and published. It is therefore incumbent upon Attorneys to ensure that trial dates are recorded once they have attended the date fixing session or when the Registrar of the Supreme Court publishes the trial list after the date fixing session.

In this particular case, the defendant's Attorneys failed to appear on the 12th December 2002 and they did not ask someone to hold on their behalf. In the circumstances, the Court felt obliged to proceed with the trial.

The absence of the defendant at trial

Mr. Charles submitted that a critical matter for consideration was the reason for the absence of the defendant at the trial. Was it deliberate or was it due to accident or mistake or was it due to no fault of the defendant? He referred to and relied upon the cases of **Shocked v Goldschmidt** (1998) 1 All E.R 372, **Burgoine v Taylor** (1878) LR 1 and **Mills v Lawson** 27 JLR 196. He argued however that the facts of Shocked case can be distinguished from the instant matter for the following reasons:

1. The defendant had knowledge of the trial but did not attend.
2. She had delayed in applying to set aside the judgment.
3. Her conduct before and after judgment was undeserving.
4. The length of time the Court had spent in hearing the proceedings was some 10 days.

He argued that there was approximately one month delay on the part of the defendant applying to set aside the judgment and in the circumstances the delay was not inordinate. Furthermore, he submitted that the plaintiff would not suffer any prejudice should there be re-trial. The trial he said was a short one; no third party's rights had been affected and if there were to be a re-trial any inconvenience would be very minimal. In the circumstances, he submitted that the instant case falls squarely within the principles enunciated in Shocked case. He further submitted that the defendant ought to have his day in Court since he has a good defence and wishes to present his case supported by his witness.

Mr. Graham submitted on the other hand, that in considering the approach to be adopted the Court ought to look at the pleadings as well as the conduct of the defendant before

and after the entry of judgment. He also placed reliance upon the principles enunciated in the Shocked case (supra). He argued that the Court should look at the Defence to see whether the defendant enjoys a real prospect of success. He submitted that the Defence filed did not come up to the threshold of having a real prospect of success.

Mr. Graham further submitted that in dealing with the explanation for the defendant's absence the Court should consider whether the explanation given without any evidence whatsoever from any of the Attorneys such as Givans, Brown & Co. and Pollard, Lee, Clarke, Campbell & Co can be viewed with any sympathy. He argued that the court could have benefited from an affidavit from any one of these Attorneys since he or she could explain what had really occurred.

He submitted that the defendant's summons ought to be dismissed.

Assessment of the law and the submissions

Langrin J.A has stated at page 6 of **Thelma Edwards v Robinson's Car Mart Ltd and Anor**. SCCA 81/00 (unreported) delivered on the 19th March 2001, that:

> "The predominant consideration for the court in setting aside a judgment given after a trial in the absence of the applicant is not whether there is a defence on the merits but the reason why the applicant had absented himself at the trial. If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations include the prospects of success of the applicant in a retrial; the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation (emphasis supplied).

These principles are clearly stated in the case of Shocked (supra) and according to Langrin J.A "this Court has approved these principles and apply them from time to time".

How then should this court exercise its discretion? The pleadings were very brief. The plaintiff alleged inter alia, that a compressor was loaned to the defendant and having failed to return it the plaintiff has sustained loss and damages. The defendant on the other hand, although admitting that it was loaned to him averred that there was an agreement between the parties that it was the plaintiff who should have returned to collect it. It is further alleged inter alia that the defendant had requested the plaintiff to take delivery of the said compressor but he had failed to do so.

It seems to me that from a perusal of the pleadings that credibility of the parties is very crucial and that it goes to the core of the matter. In the circumstances, it is my considered view that these issues should be resolved at a trial. If I were to accede to the submissions made by Mr. Graham with regards to the prospect of success of the defence by a mere examination of the pleadings I do believe that I could be faulted.

Upon examining the affidavit evidence it is my considered view that this is not a case of a party who has been notified of a date for trial and has deliberately chosen to absent himself. He had retained the firm of Givans, Brown & Co. to act on his behalf and it was that firm that had settled and filed the defence. He stated that he had given Mr. Peynado all information relating to his whereabouts including telephone numbers and address together with any information needed to enable him to communicate with him as he sees fit. He also stated that he had expected and had anticipated that Mr. Peynado would have contacted him for the trial so he made no contact with any other Attorney but awaited word from Mr. Peynado as to the trial date in this matter. Neither Mr. Peynado, Givans, Brown & Co. nor any other Attorney at Law ever contacted him with regard to the trial of this matter and he was never served with any notice advising him of the trial date. These allegations have remained unchallenged at the end of the day.

What was the defendant's conduct after he was advised by his Bankers that Attachment proceedings were served on the bank? He stated that he became frantic and immediately contacted Mr. Peynado who had promised that he would investigate the matter. Not hearing from Mr. Peynado he said he immediately contacted Brown-Hamilton & Associates, Attorneys at Law who advised him of the immediate legal steps he would need to take. It was also then and there that he discovered about the dissolution of the firm Givans, Brown & Co of which Mr. Peynado was an Associate. He had also discovered through Brown-Hamilton & Associates, that some of the matters, which were being dealt with by Givans, Brown & Co were forwarded to Pollard, Lee, Clarke, Campbell & Co. for attention. To further compound matters a copy of the final judgment was served on Campbell & Campbell, Attorneys at Law who the defendant said he was not acquainted with. He had never retained that firm to represent him and neither was he contacted by them after they received the judgment.

The foregoing clearly demonstrates that there was a major problem concerning the defendant's legal representation. Attorneys were changed but it seems as if the defendant was never informed. It is my considered view that although it might have been useful if one of the Attorneys had explained the problems to the Court I do not believe that the absence of such an affidavit is fatal so far as the defendant's application is concerned.

It is further my considered view that the defendant acted with dispatch the moment he was made aware of the judgment. I do believe that he has satisfactorily explained the delay and the reason why he was not at Court for the trial. I hold that there is good reason for his absence at the trial.

I have also considered the implications of the plaintiff having to prepare for a re-trial should the defendant's application succeed. Due regard is also given to the public interest that there should be finality to litigation but, it is also my considered view having regard to the history of the matter that the defendant ought to have his day in court.

The Order

The default judgment is hereby set aside and it is further ordered that the action be restored to the trial list. There shall be costs of the application and costs thrown away to the plaintiff to be taxed if not agreed.