

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 111/2002

**COR: THE HON. MR. JUSTICE HARRISON, P. (AG.)
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.**

BETWEEN	TREVOR McMILLAN	1ST DEFENDANT/ APPELLANT
	NETWORK SECURITY	4TH DEFENDANT/ APPELLANT
	ARTHUR McNEISH	5TH DEFENDANT/ APPELLANT
AND	RICHARD KHOURI	PLAINTIFF/ RESPONDENT

**Mrs. Susan Reid-Jones & Mrs. Monique Harrison-Beckford instructed by
Director of State Proceedings for appellants**

Dr. Lloyd Barnett instructed by Keith Bishop for respondent

16th, 17th 18th, June and 29th July, 2003

HARRISON, P. (AG.)

This is an appeal from the judgment of Sykes, J on 3rd June 2002 dismissing a summons to set aside interlocutory judgment entered on 25th October 2001, and for leave to file a defence out of time.

We heard the arguments in this appeal, allowed the appeal, set aside the interlocutory judgment and made the following order.

Leave granted for the Attorney-General to file, if necessary, a further amended defence to the amended Statement of Claim dated 4th August 2000, within fourteen (14) days of the date hereof. A speedy trial is ordered. There shall be no order as to costs. As promised, these are our reasons in writing.

The relevant facts are as follows. In March 1992 as a result of investigations into the importation of certain goods into the Island by certain companies, the respondent, a shareholder in the said companies was arrested and charged for offences under the Customs Act. He was tried and the charges against him were dismissed on 7th June 1994.

On 1st August 1994 the respondent issued a writ of summons against defendants Trevor McMillan, the Commissioner of Customs and Excise, Lawrence May, Network Security Ltd, Arthur McNeish and the Attorney-General of Jamaica, the first, second, third, fourth, fifth and sixth defendants, respectively. A copy of the said writ of summons was served on the first, fourth and fifth defendants/appellants on 9th June 1995, 11th August 1994 and 6th October 1994 respectively.

On 29th August 1994 the sixth defendant, the Attorney General of Jamaica entered an appearance "for the Sixth Defendant the Attorney-General of Jamaica."

The Crown Proceedings Act, under the heading "Part II Substantive Law", in section 3, inter alia, reads:

"3.-(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject –

(a) in respect of torts committed by its servants or agents; ..."

An "agent" is defined in section 2(2) of the Act. It reads:

"(2) In this Act, except in so far as the context otherwise requires or it is otherwise expressly provided, the following expressions have the meanings hereby respectively assigned to them, that is to say –

'agent', when used in relation to the Crown, includes an independent contractor employed by the Crown; ..."

The procedure required to be employed in suits against the Crown is stated in section 13(2) of the Act. It reads:

"13. (2) Civil proceedings against the Crown shall be instituted against the Attorney-General."

The endorsement to the amended writ of summons dated 4th August 2000, reads:

"The Plaintiff's claim is against the 1st and/or 2nd and/or 3rd and/or 5th Defendants is for damages for misfeasance and/or abuse of public office, further or in the alternative, the Plaintiff's claim against all the Defendants or any one or more of them is for damages for false imprisonment and/or malicious prosecution and/or conspiracy and/or defamation and or negligence whereby the 5th Defendant maliciously

or with (sic) reasonable or probable cause falsely arrested and/or imprisoned the Plaintiff and/or preferred charges against him of which he was duly acquitted.

And the Plaintiff further claims damages for detainee and/or detention of a shipment of photographic materials.

The 6th Defendant is sued pursuant to the Crown Proceedings Act." (Emphasis added)

The Statement of Claim dated and filed 24th May 1995 was served on the 1st defendant/appellant on 9th June 1995 and on the 4th and 5th defendants/appellants on 27th June 1995.

An amended Statement of Claim dated 4th August 2000 conveys, inter alia, that:

- (1) the 1st, 3rd, 4th and 5th defendants were sued as servants and/or agents of the Government of Jamaica, and in their personal capacity;
- (2) the 2nd defendant was sued as a servant and/or agent of the Government of Jamaica and
- (3) the 6th defendant was sued pursuant to the Crown Proceedings Act.

Seeing that where the agents of the Crown commit torts, the liability is also that of the Crown vicariously, the Attorney-General is a proper defendant, under the provisions of section 13 of the Act.

It is our view that the appearance entered by the 6th defendant, the Attorney General on 29th August 1994, was an appearance on behalf of the

Crown in respect of the torts committed by "...its servants or agents ...", the 1st, 2nd, 3rd, 4th and 5th defendants.

On 28th May 1996 the Director of State Proceedings representing the Attorney-General filed a defence on behalf of all the defendants. It reads in paragraph 2:

"2. Save that:

- (a) It is admitted that at all material times the First, Fourth, and Fifth Defendants were servants or agents of the Crown, acting as such, and;
- (b) It is denied that the said defendants were acting in their personal capacity,

Paragraphs 2, 3, 4, and 5 of the Statement of Claim are not admitted." (Emphasis added)

On 4th August, 2000 the said 6th defendant filed and served an amended defence again stating in paragraph 2 that the defendants were "... servants and agents of the Crown" and, continuing, stated in paragraph 7(a) that paragraph 16 of the Statement of Claim "... disclosed no reasonable cause of action by virtue of Section 33 of the Constabulary Force Act."

On the said 4th August 2000 the respondent filed an amended Statement of Claim which he served on the Director of State Proceedings on 5th August 2000. There is no evidence that this amended Statement of Claim was served on any of the other defendants.

On 16th October 2001 the suit came on for trial in the Supreme Court in respect of all the defendants. Counsel for the respondent sought summary

judgment against the defendants who, in the words of counsel, "... had not entered an appearance..." This request was made in spite of the fact that the Attorney General had entered an appearance and had filed a defence on behalf of all the defendants in the suit.

It is not in dispute that the defendants were servants and or agents of the Crown and by virtue of Section 13 of the Crown Proceedings Act it is required that "... civil proceedings against the Crown shall be instituted against the Attorney General." Despite this, on the unfortunate invitation of the trial judge, the respondent entered interlocutory judgment on 25th October 2001 against the 1st, 4th and 5th defendants.

By a curious sequence, on 6th November 2001 the Director of State Proceedings entered an appearance on behalf of each of the 1st, 4th and 5th defendants. In our view it was desirable that when on 29th August 1994, the Director of State Proceedings entered an appearance on behalf of the 6th defendant he should then have specifically indicated that he was doing so on behalf of all the defendants. It is prudent to do so, in order to remove all doubt.

On 29th November 2001 the Director of State Proceedings filed a summons to set aside the interlocutory judgment entered on 25th October 2001, claiming, inter alia, that the said interlocutory judgment had been irregularly obtained. The summons was supported by John Francis' affidavit dated 9th November 2001. This summons was served on 6th December 2001 and heard on 7th January 2002 when it was dismissed.

A second application to set aside the said interlocutory judgment was made by summons dated 18th January 2002 and supported by a second affidavit of the said attorney-at-law John Francis. This affidavit was dated and filed on 18th January 2002.

This summons was heard by Sykes, J (Ag.) on 3rd June 2002 when it was dismissed on the ground that a second application was the wrong procedure and that an appeal against the earlier dismissal of the summons dated 29th November 2001 should have been pursued. As a consequence this appeal was filed.

The grounds of appeal are:

- "1. That the learned judge erred in law and or wrongfully exercised his discretion by failing to find that the Second Affidavit of John Francis was one of merit which disclosed a prima facie defence.
2. That the Learned Judge erred in law in holding that a second Application to set aside an Interlocutory Judgment was a wrong procedure, and that an appeal of the first decision should have been pursued."

By the provisions of Section 258 of the Judicature (Civil Procedure Code) Law now repealed an interlocutory judgment entered by default may be set aside.

A second and subsequent application may be made to the same or another judge of the Supreme Court to set aside such a judgment as long as the applicant can put forward new relevant material for consideration (*Gordon et al v. Vickers et al* (1990) 27 J.L.R. 60). Facts may be regarded as new material,

although through inadvertence or lack of knowledge such facts were not placed before the court on the first occasion provided they are relevant (See also ***Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies et al*** [1971] 1 W.L.R. 550.)

The second affidavit of John Francis in paragraphs 12, 13, and 14 does disclose information additional to that which was contained in the earlier affidavit grounding the first application to set aside the said judgment, namely:

- "12. The First Defendant has advised me, and I do verily believe that at all material times he was acting as an agent of the Crown and not in his personal capacity. He has further advised me, and I do verily believe, that he examined reports submitted to him by members of the Revenue Protection Division, the contents of which showed that the Plaintiff knowingly and intentionally undervalued imported goods in order to reduce the amount of duty he was obliged to pay the Government, thereby committing a fraudulent evasion of customs duty in breach of the Customs Act.
- 13. I have been advised by the fifth Defendant, and I do verily believe the following:
 - a. At all material times he was acting as a servant of the first Defendant and ultimately the Crown, and not in his personal capacity.
 - b. He was involved in investigations concerning the Plaintiff's participation in under-valuations and fraudulent valuations of imported goods, in breach of the Customs Act.
 - c. In the course of these investigations, he received reports from, and inspected documents seized (pursuant to search warrants) by members of the Revenue

Protection Division. From an examination of these documents and reports he discovered that the Plaintiff was knowingly and intentionally undervaluing imported goods in order to reduce the amount of duty he was obliged to pay to the government, thereby committing a fraudulent evasion of customs duty for which he was subsequently arrested and charged.

- d. The fraudulent under-valuation of the goods led to their seizure

- 14. I am informed by Mr. Lawrence May and do verily believe that the seizure of the under-valued goods was never appealed against."

In this regard we disagree with the submissions of Dr. Barnett that the second affidavit did not disclose any new relevant material.

The latter affidavit in so far as it contains hearsay evidence based on information and belief, is in conformity with the provisions of Section 408 of the Judicature (Civil Procedure Code) Law (old law) now replaced by Rule 30.3(2) of the Civil Procedure Rules 2002, in that it is filed in Interlocutory proceedings (**D. & L.H. Services Ltd et al v. The Attorney General** SCCA No 53/98 delivered 26th March 1999, **Water & Sewage Authority v. Waithe** (1972) 21 WIR 498).

We are of the view that Sykes J erred in holding that the second application was the utilization of the wrong procedure.

Assuming that he did exercise his discretion in finding that the affidavit of John Francis was without merit he was also in error.

In these circumstances this Court has the power to exercise its own discretion in respect of this application to set aside the said interlocutory judgment.

This Court is guided by rule 13.3 of the Civil Procedure Rules 2002 which reads:

"13.3 - (1) Where rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –

- (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
- (b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and
- (c) has a real prospect of successfully defending the claim."

On the evidence before us, we find that there was no delay on the part of the appellants in seeking to set aside the judgment and that the appellants have a good defence to the claim. In respect of rule 13.3(1)(b), given our earlier stated view of the operation of the Crown Proceedings Act, this provision does not apply.

Consequently, for the above reasons, we made the order stated earlier.

PANTON, J.A.

I agree.

SMITH, J.A.

I agree.