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judge could scarcely have avoided wondering why it had not been put at the forefront of the submissions by Mr. Atkinson. Occurring as it did in the circumstances and in the sequence described in the note, the suggestion to disqualify bears all the marks of a move made pursuant to a determination to secure the postponement of the trial despite the fact that the application for this purpose was judged to be without merit and had been refused. This determination was manifest...

In the above case Mr. Boyd Carey was the Resident Magistrate and his refusal to withdraw from the trial was taken before the Full Court of the High Court on a Writ of Prohibition. At the hearing of this writ the Resident Magistrate was represented by counsel from the Attorney-General's Department, briefed as the practice then was by the Crown Solicitor. The writ was thrown out. Before us no one represented Ellis, J. and Mr. Goffe en passant made brief reference to it. The question that has to be addressed is, is there a "real danger of bias" on the part of Ellis, J?

Ellis, J. spoke as counsel at the bar eighteen (18) years ago, commenting on the authorship of an article in the press that disturbed those present in Court. Other counsel in Court, including one who is now a Judge, voiced their objection to the article. They dealt with what presented an attack on the judiciary.

That counsel has since served as a Resident Magistrate and for the past 16 years as a judge of the High Court. Would a reasonable and fair minded person knowing the relevant facts have come to the conclusion that there was a real danger that a fair trial of the defendant by Ellis, J. was not possible?

Ellis, as counsel, spoke eighteen (18) years ago in a flush of poetic eloquence not to be outdone by eminent counsel who had spoken before him. He uttered words not original but recorded in Edwards Law Officers of the Crown.

Rhetoric is a facility in the armoury of counsel and in all probability the incident was long forgotten by the speaker. I am not persuaded that an experienced Judge would embark on a trial knowing that he was biased. I would answer both questions posed in the negative and in so doing I dismiss the appeal and order that costs be costs in the cause.

Order

By a majority (Forte & Downer JJA)

(1) Appeal allowed.

(2) Order of Ellis, J. set aside.

(3) Trial to be heard in Supreme Court by another judge.

(4) Costs of appeal to the appellant to be agreed or taxed.

C. BRAXTON MONCURE v. DORIS CAHUSAC DELISSER

[COURT OF APPEAL (Rattray, P., Bingham and Harrison, JJ.A.) June 6, July 1, 2, 4 and July 31, 1997]

Landlord and Tenant - Recovery of possession - Question of reasonableness to be determined prior to order - Rent Restriction Act, s. 25.

Civil Procedure - Default judgment - Setting aside - Evidence of a prima facie defence necessary - Judicature (Civil Procedure Code) Act, s. 408.

Civil Procedure - Default judgment - Registrar performing administrative and not judicial function when entering judgment in default.

The respondent as the owner of a residential property in Bluefields Pen, Westmoreland which she leased to the appellant for five years, with an option to renew for successive five year terms, conditional on the appellant giving notice in writing not less than 3 months prior to the expiration of each five year term to renew the lease. The lease was duly renewed once and the Statement of Claim filed by the respondent in her action for recovery of possession maintained that thereafter the appellant failed to renew the lease and the lease had terminated. Appearance was entered by the appellant but no defence filed, judgment was entered and a writ of possession issued and execution stayed until the hearing of the appellant's summons to set aside the judgment. The application was refused and in a written judgment, the judge in chambers found the application as being without merit. The appellant appealed and challenged the finding of the lack of the existence of an arguable case and also submitted that the judgment was irregular, null and void as the Registrar entered it without making a determination that it was reasonable to give judgment for recovery of possession pursuant to section 25 of the Rent Restriction Act.

Held: (i) the court will not allow a default judgment to stand if there is a genuine desire of the defendant to contest the claim supported by the existence of some material upon which that defence can be founded; the determination of the truth of the facts is a function for the judge in the contested hearing;

(ii) the Registrar's adjudicatory functions are not being exercised when a default judgment is entered by the Registrar, it was purely an administrative act;

(iii) no judgment for recovery of possession can be made unless, in accordance with section 25 of the Rent Restriction Act, the court considers it reasonable to make such order; the need for adjudication before the making of an order for possession is manifest.

Appeal allowed, final judgment set aside, defendant given seven days to file a defence, costs to the appellant.

Cases referred to:

(1) *Evans v. Bartlam* [1937] A.C. 473; [1937] 2 All E.R. 646

(2) *Smith v. Poulter* [1947] 1 K.B. 399

Appeal from refusal of Judge in Chambers (McIntosh, J. (Ag.)) to set aside final default judgment.

Dennis Morrison, Q.C., John Vassell and *Paula Blake* for the appellant.

Dr. Lloyd Barnett and *Carol Davis* for the respondent.

RATTRAY, P.: By a Writ of Summons dated 26th of June 1996 with which was filed a Statement of Claim of the same date, the respondent/plaintiff Doris Cahusac Delisser claimed from the appellant/defendant C. Broxton Moncure possession of property situated in Bluefields Pen, Westmoreland, and registered at Volume 851 Folio 250 of the Register Book of Titles. The respondent/plaintiff is the owner of this property which she leased to the appellant/defendant on the 1st of June 1982. The property is residential. The term of the lease was for five years, renewable for successive five year terms up to a total period of forty-five years conditioned on the exercise by the lessee of an option giving notice in writing not less than three months prior to the expiration of each five year term of his desire to renew the lease. The lease was duly renewed on the 20th of February 1987. The Statement of Claim maintained that thereafter the lessee failed to renew the option and consequently the lease terminated on the 30th of May, 1992. Appearance was entered by the appellant/defendant on the 3rd of December 1996. No defence having been filed judgment was entered for the plaintiff/respondent on the 17th of January 1997 and a writ of possession issued out of the Supreme Court on the 17th of February 1997. The execution of the writ of possession was stayed for a period of seven days consequent on an ex parte application made before Walker, J. in Chambers on the 20th of February 1997.

Consequently, on the 27th of February 1997 a summons to stay execution of the writ of possession, to set aside the final judgment, and for leave to extend the time within which to file the defendants defence was filed by the appellant/defendant and came on for hearing contested before McIntosh J. (Ag.) on the 3rd of March 1997. On the 7th of March 1997 McIntosh, J. (Ag.) in a written judgment refused the application as being without merit. It is this judgment which is the subject of the appeal before us.

The crux of the judgment appears in the following paragraphs:

> A careful perusal of the affidavits and exhibits does not reveal any evidence that the Defendant did give notice of intention to renew the lease for the period 1992 to 1997 as required by the Lease Agreement.
>
> There is evidence that the Plaintiff through her Attorney as far back as September 1992 indicated that the lease was terminated.
>
> The Defendant did nothing upon receipt of this information indicating unequivocally that he accepted that to be the true position.
>
> The Affidavit of merit was not filed by any person alleging knowledge of the facts.

In this appeal the thrust of the submissions of Mr. John Vassell on behalf of the appellant is two pronged. Firstly, he challenges the assessment of the learned judge in Chambers on his finding of the lack of the existence of an arguable case on the part of the appellant. Secondly, he put forward an additional submission for which he sought leave to argue not having done so before the learned judge in Chambers and for which we now grant him leave. That submission is in the following terms:

> That the final judgment in default was irregular, null and void, and the Registrar of the Supreme Court acted without jurisdiction in entering same as there had been no determination as required by s. 25.of the Rent Restriction Act that it was reasonable to give Judgment for recovery of possession.

With respect to the first submission reliance was placed heavily on the principles laid down by Lord Atkin in *Evans v. Bartlam* [1937] 2 All ER 646 upon which a Court would exercise its discretion in setting aside the default judgment. That discretion is

unconditional in its terms. A careful reading of the case discloses that there is in fact only one rule, that is, "that the applicant must produce to the Court evidence that he has a prima facie defence." Even this rule in Lord Atkin's words, "could, in no doubt rare but appropriate cases, be departed from."

The Court will not allow a default judgment to stand if there is a genuine desire of the defendant to contest the claim supported by the existence of some material upon which that defence can be founded. The determination of the truth of the facts is a function for the judge in the contested hearing.

The point of conflict between the parties is as to whether a notice of renewal of the lease was in fact received by the landlord so as to establish the exercise by the lessee of the option to renew. Dr. Barnett's submission on behalf of the respondent/plaintiff invites us at this stage to come to a determination on this crucial issue. We are satisfied that once the issue is raised, and there is sufficient material disclosed which indicates the existence of a triable issue on the facts, the default judgment should not be allowed to stand. There is some evidence contained in the affidavit of Miss Paula Blake dated 3rd March 1997 and sworn in accordance with section 408 of the Judicature Civil Procedure Code which exhibits several letters of correspondence concerning the parties, on the issue of the renewal. This requires an interpretation and evaluation at the trial stage. It is neither necessary nor desirable to have a final assessment of the evidence at this stage.

The second point raised by Mr. Vassell may be briefly condensed as followed: -

(a) the property is one to which the Rent Restriction Act applies and in respect of which there is no exemption order under the Rent Restriction [Exempted] Premises Order 1983.

(b) section 25 of the Rent Restriction Act requires that before an order for possession can be made the Court or judge must be satisfied that it is reasonable to make the order.

(c) a default judgment is an administrative act by the Registrar of the Supreme Court, and the question of reasonableness is not therefore determined prior to the making of the order.

In these circumstances Mr. Vassell maintains that the order for possession was irregularly obtained not-having been subject to any enquiry to determine the reasonableness of the-order. He relies upon the case of *Smith v. Poulter* [1947] 1 KB 339 to support the position for which he contends.

Dr. Barnett on the other hand submits:

(1) that the Registrar has judicial powers;

(2) that the issue had never been raised before, and is raised now only at the last moment.

(3) that the English cases should not be followed because they rested upon the legislative policy of the English Parliament in this regard.

We hold that the Registrar's adjudicatory functions, are not being exercised when a default judgment is entered by the Registrar as was done in this case. It was purely an administrative act.

The issue raised, however late, is of sufficient importance to merit a determination by the Court. Furthermore, section 25 of the Rent Restriction Act makes it abundantly

clear that no judgment for recovery of possession can be made or given unless for specified reasons:

> ... and unless in addition, in any such case as aforesaid, the court asked to make the order or give the judgment considers it reasonable to make such order or give such judgment:...

Furthermore the statement of claim gives *inter alia* as one of the reasons for the landlord requiring possession that:

> (a) the said premises are required by the landlord for occupation as a residence for herself.
>
> (b) the said premises are required by the landlord for use by her for business and/or trade.

The Act provides that in these circumstances:

> ... an order or judgment shall not be made ... unless the court is also satisfied that, having regard to all the circumstances of the case, less hardship would be caused by granting the order or judgment than by refusing to grant it; ...

The need for adjudication before the making of the order for possession is manifest, and the legislative purpose is likewise transparent - the protection of the tenant in these circumstances.

There were many authorities and references cited to us by counsel on both sides and we are indebted to them for their industry and their lucid presentations. Our failure to refer to them in this judgment is no reflection on the assistance we have received from their perusal.

The appeal is allowed and it is hereby ordered as follows:

1. That the final judgment entered herein on the 17th of January 1997, and recorded in Judgment Book Binder 709 Folio 458 against the appellant/defendant is set aside.
2. The defendant is given leave to file his defence to the action out of time within seven days of the date hereof.
3. Costs of the appeal and of the proceedings before the judge in Chambers to be the appellant/defendant.

BINGHAM, J.A.: I agree.

HARRISON, J.A.: I agree.

BERTHAN MACAULAY *v.* THE ATTORNEY GENERAL AND MARGARETTE MACAULAY

[SUPREME COURT - FULL COURT (Wolfe, C.J., Ellis and Clarke, JJ.) May 12, 13 and July 31, 1997]

Constitutional Law - Redress, private law remedies - Preliminary point - Abuse of process of Court.

The applicant, a practising attorney, sought redress under section 25 of the Jamaica Constitution *via* a motion in which he alleged that his fundamental rights had and were being contravened contrary to sections 18(1), 1 8(2)(e), 19(1) and 20(2) of the Constitution. He contended that ex parte orders obtained without full disclosures to single Judges of the Supreme Court by the second respondent and also her removal of his professional files from his former office and classifying same after inspection as old files were contrary to section 19(1) of the Jamaica Constitution. Counsel for the second respondent submitted that the motion was unfounded. misconceived and baseless in law in that the conduct complained of was not properly the subject of constitutional law but ordinary civil remedies.

Held: (i) the constitutional provisions protecting breaches of fundamental rights and freedoms are primarily concerned with contraventions by the state or agents of the state endowed with coercive powers. The Constitution is premised on the provision by the common law of private law remedies in respect of contraventions of individual rights inter se: it is only where such private law remedies are deficient that resort may be had to the public law remedies enshrined in the Constitution;

(ii) the making of ex parte orders without full disclosure were errors of procedure by the second respondent and not improper judicial acts so as to be the subject of the protective constitutional provisions; the applicant's remedy was by way of appeal or application to set aside the impugned orders;

(iii) the alleged removal of the applicant's files by the second respondent were acts committed by a private individual for which the common law of contract or tort provided adequate redress.

Motion dismissed.

Cases referred to:

(1) *Maharaj v. Attorney General of Trinidad & Tobago (No. 2)* (1978)30 W.I.R. 310; [1979] A.C. 385; [1978] 2 W.L.R. 902

(2) *Chokolingo v. Law Society of Trinidad & Tobago* (1978)30 W.I.R. 372; [1981] 1 W.L.R. 106; [1981] 1 All E.R. 244

Motion for constitutional redress.

Applicant in person.

Lennox Campbell and *Aylana Johnson* for first respondent.

Pamela Benka-Coker, Q.C. and *Aisha Mulendwe* for second defendant.

WOLFE, C.J.: The applicant and the second respondent are lawfully married to each other. The marriage has fallen upon rocky ground and the applicant has taken steps to have the marriage dissolved. There have been a number of interlocutory proceedings since the filing of the petition.