IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R-09 OF 1993

BETWEEN	REGAL FOUNDATIONS (1977) LIMITED	PLAINTIFF
A N D	CUPID FOUNDATIONS (JAMAICA) LIMITED	DEFENDANT

Mr. Dennis Goffe Q.C., and with him Mr. Alexander Williams for Plaintiff.

Mr. Andrew Rattray and with him Miss Carol Sewell for the Defendant.

11, 12, 13 January and February 25, 1994

SMITH J.

This is an application to set aside a judgment obtained in default of appearance.

The parties are limited liability companies incorporated under the Laws of Jamaica.

By a lease dated the 15th April, 1988 the plaintiff demised to the defendant premises situate at 20 Old Harbour Road, in the parish of Saint Catherine together with machinery and equipment therein, for the term of five years. The lease expired on the 14th April, 1993.

By a Writ of Summons endorsed with a Statement of Claim and dated 27th day of May, 1993 the plaintiff claimed U.S.$17,292.50 as rental due for the period February 1, 1993 to 14th April, 1993.

This Writ was filed on May 28, 1993 and service was effected by sending a copy thereof by registered post to the registered office of the defendant's company pursuant to S.370 of the Company's Act.

No appearance was entered. The plaintiff accordingly applied for judgment in default and obtained same. The default judgment was entered on the 8th November, 1993. A Writ of Seizure and Sale was obtained by the plaintiff on the 30th November, 1993 and sent to the Bailiff for Kingston for execution. Unknown to the plaintiff at the time of forwarding the Writ of Seizure, the Writ of Summons and Statement of Claim were returned unclaimed. Mr. Ronald Joseph the Plant Manager of the defendant's company explained what happened. He said that for the purpose of initial incorporation the address of the defendant company's attorneys-at-law was used as the registered office. Once the defendant's company had established its own registered office the company's secretary should have changed the address of the registered office. This was not done. However it was assumed to have been done. I take this to mean that

the defendant's company had failed to comply with S.106(2) of the Company's Act, it had not sent to the Registrar of Companies a notice of change of address. Thus the Writ of Summons and Statement of Claim never came to the attention of the defendant's company. However by operation of law they were deemed to be served. The plaintiff up to the time of obtaining the Writ of Seizure and Sale knew nothing of this, they assumed that the defendant company was served.

It was only on the 14th December, 1993 after the Bailiff had gone to the defendant company's premises to execute the Writ that the defendant was made aware that it had been sued.

On 16th December, 1993 the defendant through its attorney entered a conditional appearance with a view to applying to set aside the default judgment. A Summons to set aside judgment was filed on the same date along with affidavit in support. By this Summons, as amended, the defendant is seeking an Order that the judgment be set aside on the grounds that:-

(a) the said judgment was irregularly obtained;

(b) the defendant has a good defence to the plaintiff's claim;

The Irregularity Issue

Where a judgment is irregularly obtained the defendant is entitled as of right to have it set aside. The irregularities specified in the amended Summons are:-

(i) that the defendant was never served with a sealed copy of the Writ of Summons herein; and

(ii) the Writ of Summons was dated 27th May, 1993 but was filed on May 28, 1993.

I propose to deal with them in turn.

In an affidavit, Miss Euphemia Pitt deponed that she duly registered "letter dated 31st May, 1993 to the defendant at its registered office 21 East Street, Kingston in the parish of Saint Andrew (sic), enclosing a true stamped copy of the Writ of Summons in this suit dated the 28th May, 1993." (emphasis supplied). The letter referred to was exhibited to her affidavit.

Mr. Goffe submitted that by virtue of S.35 of the Civil Procedure Code when service is required the defendant must be served with a copy of the Writ "under the seal of the court." A 'stamped' copy is not a 'sealed' copy, he contended. Default Judgment, he urged, ought not to have been entered because the Affidavit of Service stated that a stamped rather than a sealed copy had been served. The defendant, he

continued, is entitled ex debito justitiae to have such judgment set aside because at the time when the judgment was entered the Registrar relied onthe affidavit of Miss Pitt.

Mr. Rattray for the plaintiff submitted that on the evidence before me what was in fact sent for service was a true sealed copy of the Writ of Summons and Statement of Claim. This is not disputed. Mr. Rattray referred to the letter exhibited to the affidavit of service sworn to by Miss Pitt which letter was before the Registrar at the time when default judgment was entered. This letter is addressed to the defendant and reads:

> "Pursuant to Section 370 of the Companies Act, we hereby serve you with a true sealed copy of the Writ of Summons and Statement of Claim....."

In light of this Mr. Rattray submitted that reference in the affidavit of service to "stamped" copy instead of "sealed" copy is a mere misdescription or error and does not in any way invalidate the judgment obtained or cause same to be irregular. The maxim "falsa demonstratio non nocet" is applicable to the circumstances of this case, he urged.

In my view Mr. Rattray is right. In truth a copy of the Writ "under the seal of the Court" was sent by registered post to the registered office of the defendant. The Writ of Summons and Statement of Claim which was returned unclaimed speaks to this, and indeed Mr. Goffe is not saying otherwise. The bone of Mr. Goffe's contention is that the Registrar relied on the affidavit of service in entering default judgment and that affidavit speaks of serving a "stamped" copy of the Writ of Summons.

It is my view that one must look at the substance. To have the judgment set aside as of right, the defendant must show that it was irregularly obtained. To my mind where in fact a sealed copy of the Writ was sent but the affidavit of service erroneously refers to a stamped copy this is not the kind of "irregularity" if indeed it is that is contemplated. This error is of no substance. To succeed the defendant must show that the judgment ought not to have been signed at all. Where the plaintiff has obeyed all the rules and entered judgment accordingly, such judgment should be treated as regular. The undisputed error in the affidavit of service which did not and could not prejudice the defendant cannot, I venture to think, vitiate the judgment.

I now turn to the second alleged irregularity. Mr. Goffe submitted that there is an irregularity on the face of the Writ of Summons in that the writ bears the date 27th May, 1993 but was filed on the 28th May, 1993. Mr. Rattray conceded that Section 8 of the Civil Procedure Code was not complied with. This section provides that:

> "Every Writ of Summons ..... should bear date on the day on which the same shall be filed or issued ....."

What is the effect of such non-compliance. Section 678 of the Civil Procedure Code reads:

> "Non-compliance with any of the provisions of this law shall not render the proceedings in any action void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms, as the Court shall think fit."

The court therefore has a discretion. Mr. Goffe submitted that the court should not exercise its discretion in favour of the plaintiff for the following reasons:

(i) This is a judgment enforced by execution of a Writ of Seizure and Sale against the goods of the defendant.

(ii) We now know that the Writ of Summons was returned to the plaintiff i.e. it never came to the attention of the defendant.

He argued that to do otherwise would be to permit the plaintiff all the benefits of its execution of the judgment despite its own error.

Mr. Rattray for the plaintiff submitted that such non-compliance in no way prejudiced the defendant. He contended that the non-compliance is in fact relatively insignificant and asked the court to exercise its discretion t amend the date of the Writ of Summons to read 28th day of May, 1993. To support his contention and application he cited the cases of A.C.E. Betting Company Limited vs. Horseracing

Promotions Limited and Summit Parting Company Limited vs. Horseracing Promotions Limited (consolidated appeals) SCCA NOS. 70 and 71/90 delivered 17th December, 1990.

In these cases one of the issues which arose for consideration was:

> "As the Writs and Statements of Claim were dated 17th May, 1990, and filed 16th May, 1990 this being in breach of S.8 of the Civil Procedure Code, were the Writs void or merely irregular?"

This is precisely the issue here.

The Court of Appeal upheld the decision of Walker J. who delivered himself thus:

> "Obviously an error wa smade in the dating. I asked myself, if the Writ is amended what possible prejudice would the defendant have? I can see no prejudice whatsoever and the Writ is amended. It is my view that the Writ is not rendered void by being wrongly dated. It is an irregularity which can be cure, I do grant the application to amend the Writ to read 16th May, 1990."

In doing so the Court of Appeal adopted the words of Denham J. in Wesson Brothers v. Stalker (1882) L.T. 444 at 445 "if we set these proceedings aside we should be giving effect to a contemptible quibble." In dealing with this aspect of this case I will content myself by saying that the non-compliance with Section 8 complained of by Mr. Goffe does not render the writ void. It has no prejudicial effect on the defendant. It can be cured by amendment without prejudicing the defendant. I therefore grant the application by Mr. rattray and order that the date of the Writ be amended to read 28th day of May, 1993.

In the circumstances I find that the judgment is regular. I must therefore go on to consider whether the defendant has shown merits.

The Merit Issue

Where a judgment has been regularly obtained in order to have it set aside the defendant must show merits.

It is not disputed that rent is due from the defendant to the plaintiff. However the defendant is claiming that it has a right of legal set-off.

Pursuant to Clause 5(31) of the Lease Agreement between the parties the defendant paid to the plaintiff the sum of U.S. $23,800 as a security deposit. I will

set out the said clause.

> "5(31) To pay Regal as security deposit at the same time as the first of the monthly rent hereunder becomes payable (without obligation by Regal to pay any interest or other payment whatever therefor) the sum of U.S.$23,834 which sum shall be retained by Regal until the termination of this agreement or any extension thereof, PROVIDED however that without prejudice to the exercise of any of its rights hereunder Regal may apply the whole or any part thereof as may be required for that purpose in payment for the whole or any part of any damage or destruction to the factory or the equipment which pursuant to this agreement Cupid is under obligation at its own cost and expense to make good PROVIDED also that at the termination of such agreement or extension thereof any balance of the security deposit no so applied shall be repaid by Regal to Cupid."

In its draft Defence the defendant claims that "the plaintiff has failed to return the said security deposit or any balance thereof and has failed to account to the defendant as to how the said security deposit has been applied." The defendant thus claims to be entitled to set-off from the amount of the plaintiff's claim the amount of the said security deposit.

On the other hand the plaintiff through Mr. Yvon Desulme its Executive Chairman states that prior to the termination of the lease by letter dated 8th April, 1993 its attorneys-at-law informed the defendant that the plaintiff and its agents would inspect the factory on the termination of the lease. Mr. Evan Spiro's evidence which is not disputed, in this regard, is that on the 14th of April, 1993 (on the termination of the lease) he along with representatives of the plaintiff and defendant inspected the said premises. Mr. Spiro said the premises were in a deplorable condition and in a general state of disrepair. He estimated that the value of repairs and replacement as of 15th April, 1993 for the factory would not exceed $750,000. By letter dated 23rd April, 1993 the plaintiff's attorney-at-law informed the defendant's attorneys-at-law that the security deposit is now being held pending the outcome of the assessment of the condition of the factory machinery and equipment.

Accordingly the plaintiff contends that "the security deposit being held by the plaintiff is to be applied towards any damages or destruction to the plaintiff's premises caused by the defendant, its servants and/or agents as well as to replace missing equipment belonging to the plaintiff as provided for by Clause 5(31) of the lease agreement."

Mr. Goffe submitted that Clause 5(31) contemplates that any claim by the plaintiff to be entitled to deduct a sum from the security deposit was to be made in good time before the expiration of the lease on 14th April, 1993 and any remaining balance was to be repaid to the defendant on or about the 15th April, 1993. He argued that the plaintiff had the right to inspect the premises during the life of the lease, and that the time when Mr. Spiro did the inspection, was not the time for the plaintiff to be making such inspection - he should have done so before.

I am afraid I do not agree with this contention. I am inclined to accept Mr. Rattray's submission that the time at which the plaintiff would ascertain whether or not there was any damage to its property or equipment would be at the termination of the lease or within a reasonable time thereafter. This must be so bearing in mind that the reason for the security deposit is to cover damage to the plaintiff's factory or equipment and such damage would have to be ascertained at the end of the lease.

Mr. Goffe submitted that inspite of Clause 5(1) the defendant has a right to set-off. Clause 5(1) reads:

> "Cupid to the intent that the obligation shall continue throughout the term of this agreement and any renewal thereof hereby covenants and agrees with Regal as follows:
>
> (1) to pay to Regal during the first five (5) year period of this agreement the rent of U.S.$6,917.00 per month and should the option to renew herein provided for be exercised the sum payable as rent during the renewed term of the agreement shall be U.S.$9,300.00 per month such payments to be made to Regal at the address set out at page one of this agreement or at such other place in Jamaica as Regal shall from time to time designate in writing <u>without any prior demand therefor and without any deduction or set-off whatever</u> on the days and times and in the manner herein specified. If the term of this agreement shall commence on a day other than the first day of a calendar month, then Cupid shall pay to Regal, upon the commencement date of the term of this agreement a pro rata portion of the first fixed montly rent pro rated on a daily basis with respect to the fracitonal calendar month in which the date of commencement of this agreement falls, and thereafter the monthly sums shall be paid in advance on the first day of each calendar month." (emphasis mine)

It is Mr. Goffe's contention that where there is a right to set-off Clause 5(1) does not require the defendant (the tenant) to pay the rent in full notwithstanding

the set-off. He refers to the following cases: Elinor Inglis v. Verne Granburg SCCA No. 84/89 delivered 19th February, 1990; British Anzani (Felixstowe) (U.K.) Ltd., (1979) 2 A.E.R. 1063; Kenneth Morris v. Owen Taylor SCCA No. 39/1983 delivered 22nd November, 1984.

Mr. Goffe submitted that in the Inglis case the language was clear, it said: "without any deductions" and yet the Court of Appeal per Carey J.A. held that Mrs. Inglis had not contracted out from the right to deduct from the rent. He argued that the Inglis decision made no distinction between deductions and set-off; it treated them as being interchangeable, he contended.

Mr. Rattray on the other hand argued that the parties by virtue of Clause 5(1) have by clear and unequivocal words agreed to contract away the right to make any deduction or set-off from rental. In such a case, he submitted, a claim by the defendant to a right of set-off cannot be entertained as a valid defence or an arguable defence to have a regular judgment set aside.

He referred to Halsbury's Laws of England 4th Edition Volume 42 paragraphs 406, 417, 428 and 462. At paragraph 462 it is stated that an equitable set-off is available against a claim for rent in circumstances where there is a close connection between the cross-claim and the lease. It seems to me therefore that the crucial question at this stage of this exercise is whether or not parties may contract out of the right to decut or set-off. If yes then the next question is, have the parties in the instant case covenanted to exclude the lessee's right of set-off.

In Inglis v. Granburg supra the appellant (tenant) was obliged to incur considerable expenditure to put the premises in a rentable condition. She did not pay the rent claiming she had the right of set-off. The respondent (landlord) acknowledged that he was indebted to the appellant.

Clause 2(a) of that lease agreement reads: "To pay the rent due without any deductions." The Court of Appeal per Carey J.A. accepted the principle stated in the British Anzani case "that whether at common law or in equity, a tenant could claim a right to set-off advances made to put the premises in a rentable condition Carey J.A. at page 3 went on to say:

> "That case it seems to me answered as well Mr. Grant's submission that the words in the clause requiring the payment of rent without deduction could not be defeated by the principle of set-off. Indeed, one of the arguments in that case by the landlord was that in the very nature of rent, there could be no set-off against it."

Mr. Goffe sought to rely on this dictum in support of his contention that Clause 5(1) of the lease in the instant case does not affect the defendant's right to set-off. I do not think that the Inglis v. Granburg case supports such a contention.

In that case the tenant had paid money on repairs which the land lord had failed in breach of covenant, to carry out. The landlord acknowledge his indebtedness to the tenant. Such payment would thus be regarded as a payment pro tanto of tent. The circumstances in the instant case are completely different. The defendant is not claiming that the plaintiff is in breach of any covenant and there is no acknowledged debt on the part of the plaintiff. Thus it cannot, in my view, be right to say that the dictum of Carey J.A. supports the contention that in the circumstances of this case Clause 5(1) does not exclude the right of set-off. Also the British Anzani case does not I think, support the view contended for by Counsel for the defendant.

In the first place it does not seem that there was a clause similar to Clause 5(1) in the agreements between the parties in that case. In any event the Court was not in that case required to construe the provision of such a clause. What the court held in the Anzani case was that at common law there could be a set-off against a claim for rent if the tenant is obliged to expend money for repairs and "if the tenant has given notice of want of repairs and in any event such a defence only applied if the amount claimed to be set-off was certain and could not be disputed or challenged as to quantum."

It is clear that this case is not authority for the view that parties cannot contract away the right to set-off.

Paragraph 418 of Halsbury's Laws of England (supra) reads:

> "Parties may contract out of the right to deduct or abate, but this can only be done by clear and unequivocal words."

There is a footnote reference to the decision of the House of Lords in Gilbert Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd., (1974) AC 689. At paragraph 248 (ibid) a similar statement appears in respect of the equitable right to set-off. It is stated in the footnote to the latter paragraph that ".....in principle a clear contractual exemption would override equities, leaving the defendant to a later action." It should be stated that in the instant case the defendant could only seek to rely on an equitable right to set-off. The Anzani case is the authority for the statement at paragraph 462 of Halsbury's laws of England (supra) that equitable set-off is available against a claim for rent in circumstances where there is a close connection between cross-claim and the lease.

The next question to be considered is whether the words in the lease at Clause 5(1) amount to a contractual exclusion of the defendant's right of set-off. As said before, Mr. Goffe argued that in the Inglis case the language was clear, it said without any deductions and yet the Court of Appeal held that Mrs. Inglis had not contracted out the right to deduct. The Inglis decision, he claimed, made no distinction between 'deductions' and 'set-off.'

In the Inglis case the operative words were 'without deductions.' In the instant case the words are 'without any deductions or set-off whatever.' Interestingly in a recent case the Court of Appeal (U.K.) had to decide whether a covenant in a lease that the rent is to be paid without any deduction was sufficiently clear to exclude the tenant's equitable right of set-off. The case is Connaught Restaurants Ltd., v. Indoor Leisure Ltd., New Law Journal August 13, 1993 at p. 1188. The Court held that the words used were insufficiently clear to carry the implication of an intention to exclude the tenant's equitable right of set-off. This decision is instructive.

In delivering the judgment Waite L.J. held that the consideration that should be followed in construing such a provision are:

> (1) Clear words are needed to exclude a tenant's remedy of an equitable right of set-off.
>
> (2) The word "deduction" has never achieved the status of a term of art, but is an expression employed (both in everyday speech and in the language of the courts) at one moment in its strict sense to describe the ordinary process of subtraction with which it is grammatically associated, and at other moments in a broader sense to describe the result which follows when one claim is set against another and a balance is struck. It is thus a useful and a flexible word, but heavily dependent upon the context in which it is used for an accurate understanding of the sense in which it is being employed. If the context happens to be one that affords no guidance as to its intended meaning, it becomes an expression that necessarily suffers from ambiguity. It cannot, in short, be accurately described as a "clear" word.
>
> (3) It follows that the simple expression "without any deduction" is insufficient by itself, in the absence of any context suggesting the contrary, to operate by implication as an exclusion of the lessee's equitable right of set-off.
>
> (4) Added words of exception or qualification are relevant to the construction of such a phrase, but they too are subject to the general requirement of clarity and will only be effective to displace the lessee's right of equitable set-off if their effect is to create a clear context for exclusion .....

He concluded by saying "Draftsmen who are concerned to exclude the tenant's equitable right of set-off would therefore be well advised to do so explicitly ...."

In the instant case the draftsman did so explicitly by stating without <u>any deduction or set-off whatever.</u> For the reasons which I have attempted to give I hold that on the undisputed facts the obligation of the defendant under Clause 5(1) of the lease agreement is to pay the rent "without deductions or set-off." There is therefore no arguable defence. The respective claims of the parties under Clause 5(31) - the clause dealing with the security deposit are another matter.

The application to set aside the default judgment is accordingly refused. Costs to the plaintiff to be taxed if not agreed. Certificate for one Counsel granted. Leave to appeal granted. Stay of execution granted pending hearing of an appeal on condition that the amount of U.S.$18,400.66 be paid into an interest bearing foreign exchange account at Citizens Bank, King Street in the joint names of the attorneys-at-law for the respective parties to await the outcome of the appeal or prior determination of the matter.

[illegible] ... with law - S 67B [illegible] Effect [illegible] ... to amounts - whether defendant has [illegible] Application to set aside judgment refused. Leave to appeal granted.

Cases referred to

1. A.C.E. Bottling Company Limited v Stonemacing Plantations Limited and Summit Bottling Company Limited v Stonemacing Plantations Limited (Consolidated appeals) SCCA No 70 and 71/90 - 17/12/90
2. Wesson Brothers v Stalker (1882) L.T. 444.
3. Elinor Inglis v. Verne Granburg SCCA No 84/89 - 19/12/90
4. British Anzani (Felixstowe) (U.K.) Ltd (1979) 2 A.E.R 1063
5. Kenneth Morris v Owen Taylor SCCA No 39/83 - 20/11/84
6. Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd (1974) A.C. 689
7. Connaught Restaurants Ltd v. Indoor Leisure Ltd New Law Journal - August 13, 1993 at p 1188.