IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R071A/1991

BETWEEN	NORD RERRIE	PLAINTIFF
AND	KEITH TENANT	DEFENDANT

Patrick Bailey instructed by Patrick Bailey & Co.
for the Defendant/Applicant

John Graham instructed by Broderick & Graham
for the Plaintiff/Respondent

November 11 and December 16, 1993

In Chambers:

CLARKE J.

By a specially endorsed writ filed on 14th June, 1991 the plaintiff claimed inter alia to recover from the defendant the sum of J$50,000.00 and US$10,950.00 and damages for breach of contract. He pleaded that in or about May 1987 the defendant having contracted with him to repair his BMW motor car, he delivered the car to the defendant and paid him at his request the aforesaid sums on account of the cost of purchasing parts and effecting the repairs. The plaintiff further pleaded that in breach of the contract the defendant failed to effect the repairs, although he had made repeated verbal and written requests for him to do so.

On 12th July, 1991 the defendant entered an appearance. However, the defendant not having filed nor delivered a defence, the plaintiff filed on 21st August, 1991 and caused to be entered interlocutory judgment in default of defence with damages to be assessed. Damages were duly assessed on 17th June, 1992 in the sum of $295,280.00 with interest. The defendant was absent and was not represented but had been duly notified of the date of assessment.

On 7th September, 1992 a writ of seizure and sale was issued for execution against the defendant. On 10th November, 1992 the defendant filed a summons to set aside the default judgment and subsequently obtained orders staying execution of the writ of seizure and sale until the determination of the summons.

It is true that when the summons was filed it was unsupported by affidavit.

I do not, however, agree with Mr. Graham that that circumstance, without more, warrants the dismissal of the summons. There is no such rule. In applications of this sort the judge's discretion must necessarily be unfettered by rigid rules. In any case, the defendant did file the affidavit on which he relies, albeit some 4 months after filing the summons.

As Lord Atkin pointed out in Evans v. Bartlam [1937] A.C. 473 at 480:

> "The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

But whilst there has been no adjudication, the interlocutory judgment obtained by the plaintiff in default of defence is a regular judgment and may only be set aside if the defendant shows grounds why the discretion to set it aside should be exercised in his favour. As Lord Wright said in Evans v. Bartlam (supra) at page 489, "the primary consideration is whether [the defendant] has merits to which the Court should pay heed." This means, as all their Lordships clearly contemplated in that case, that a defendant who asks the Court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success: see Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc (1986) 2 Lloyd's Law Reports 221 at 223 (C.A.). That is common sense, for there is no point in setting aside a judgment if the defendant has no defence and if he has shown no "merits".

The defendant in the instant case is a shareholder and the managing director of a company called Body Craft Limited. Since its incorporation over 12 years ago he has been involved in its operation. This company, he says, is the proper defendant and not he, for according to him, the said contract for repairs was entered into between the plaintiff and Body Craft Limited, he merely acting as an employee of the company. Under cross examination he admits, however, that he gave a receipt under his signature for monies received for the repairs. He also admits that there is nothing in the receipt or other documents to indicate that he signed on behalf of Body Craft Limited or of any other person. He says, however, that he received the monies as an employee of the company.

Add to those factors these: For the purpose of effecting repairs a used engine was purchased abroad. The engine was air freighted to Jamaica and was damaged in transit. The invoice confirming the purchase as also the cargo damage and short

landing certificate are made out to Keith Tenant (the defendant) as purchaser and consignee, respectively. Nowhere in those documents is any reference made to Body Craft Limited!

On 21st November, 1991, be it noted, three months after the default judgment was filed, parts for the vehicle which had not been installed thereon, were returned to the plaintiff. Evidencing the return of the parts is a requisition of even date in the name of Body Craft Limited signed by the plaintiff's agent. And that is the only document relied on by the defendant in which the name, Body Craft Limited appears.

So, in the result the documentation on which the defendant relies does not show ex facie any receipt of the monies by Body Craft Limited or that the parts for the vehicle were ever purchased by, or consigned to, the company.

The plaintiff has obtained a regular judgment against the defendant. Although it is a judgment entered without trial, for the judgment to be set aside, it is not enough that the defendant has an arguable defence, even if his defence can be put as high as that. The defence must carry some degree of conviction. In my veiw, that is clearly not the case here. On the evidence the defendant has not shown that he has a defence which has any reasonable prospect of success.

There is another and important consideration which tells against the defendant. Again, as a matter of common sense, though not making it a condition precedent, I will "take into account the explanation as to how it came about that the defendant ... found himself bound by a judgment regularly obtained to which he could have set up some serious defence": per Lord Russell of Killowen in Evans v, Bartlam (supra) at page 483.

The defendant says that the delay in filing a defence "was due in part to inadvertence and to difficulties in locating some of my records". In the circumstances of this case, is this a satisfactory explanation for the defendant's delay in filing the summons and the belated affidavit in support of it? I think not. The summons was filed 1 year and 5 months after he had been served with the writ and 1 year and 4 months after he had entered appearance. It was not until 4 months and 1 week had elapsed after filing the summons, and only the summons, that he attempted to explain the

delay in making the application and to indicate, plainly unimpressively, that after all, the wrong defendant was sued. As Mr. Graham submitted, the defendant having eventually filed the summons one would have thought that he would have prosecuted the application with dispatch.

So, the defendant's dilatory conduct is a matter I must also take into account in assessing the justice of the case.

That done, I dismiss the summons with costs to the plaintiff to be agreed or taxed.

Cases referred to

(1) Evans v Bartlam [1937] A.C. 473.
(2) Alpine Bulk Transport Co Ltd v Saudi Eagle Shipping Co. Inc (1986) 2 Lloyd's Law Rep. 221.