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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1990 S. 268.

BETWEEN	FLORENCE SAMUELS	PLAINTIFF
AND	MICHAEL DAVIS	DEFENDANT

SUIT NO. C.L. 1990 W. 270

BETWEEN	PETER WILLIAMS JNR. (an infant by his father and next friend PETER WILLIAMS SNR.)	PLAINTIFF
AND	MICHAEL DAVIS	DEFENDANT

SUIT NO. C.L. 1990 W. 271

BETWEEN	PETER WILLIAMS	PLAINTIFF
AND	MICHAEL WILLIAMS	DEFENDANT

SUIT NO. C.L. 1990 W. 272

BETWEEN	SHEREEN WILLIAMS	PLAINTIFF
AND	MICHAEL DAVIS	DEFENDANT

Messrs Charles Piper and Christopher Samuda instructed by Piper and Samuda for the Applicant, United General Insurance Company Limited.

Messrs Clark Cousins and Benito Palomino instructed by Rattray, Patterson Rattray for the plaintiffs.

Heard June 25, July 1, July 29, October 2, 1992.

Harrison J. (Ag.)

This is a Motion in which the applicant United General Insurance Company Limited seeks to set aside default judgments on two grounds, namely:-

1. Irregularity on the grounds that:-
   (a) An order for substituted service was improperly made as the defendant was out of Jurisdiction when this order was made.
   (b) An interlocutory judgment in default of appearance was entered prematurely during the legal vacation; and
2. That in the interest of justice the defendant ought to be given leave to defend the action.

The motion came before me on the 25th day of June 1992. Submissions were made on behalf of the parties and I reserved judgment.

A brief resume' of the case and the history of the litigation is necessary. The plaintiffs were injured in a road accident on March 26, 1988 and as a consequence of this they filed Writs of Summonses and Statements of Claims on December 7, 1990, claiming damages for negligence against the defendant.

By letter dated April 11, 1988 the plaintiff's Attorney sent a Notice of Proceedings to the defendant and copied same to his Insurers, United General Insurance Company Limited.

Personal service of the Writs could not be effected on the defendant with the result that on July 16, 1991 the Master made an order for substituted service of the Writ and other documents on United General Insurance Company and one Wayne Morris.

On August 6, 1991, Interlocutory Judgment in default of appearance was entered. The plaintiff proceeded to assessment of damages and final judgment was eventually entered.

Mr. Cousins took certain preliminary objections at the very outset of the hearing of this Motion. He submitted:-

1. That the applicant had no locus standi to make an application to set aside the judgment as it had not previously obtained leave of the Court to intervene nor had it entered an appearance.

2. That this Court has no jurisdiction to hear the application since it was Reid J., who had assessed the damages.

Unchallenged evidence in the Affidavit of Andrea Evering Gordon-Martin, Claims Manager of United General INsurance Company revealed:-

(a) That the defendant Michael Davis, effected a policy of Insurance with the said Company for the period 11th March 1988 to the 10th March, 1989 inclusive.

(b) That at the time of the accident the company had insured the defendant

(c) That the company had a contingent pecuniary interest and was materially concerned with the result of the action as the same would affect its legal rights.

In light of the above evidence it was my considered view that there was a possibility that United General UInsurance Company could be liable on the judgment by virtue of section 18 (1) of the Motor Vehicle Insurance (Third Party Risks) Act. Consequently I ruled that the applicant could on its own Motion and in its own name intervene without leave and apply to set aside the default judgments. I considered it also un-necessary for the applicant to have entered an appearance. (See Linton Williams v. Jean Wilson and Ors. SCCA 73/87 delivered 29th May 1989; Jacques v. Harrison (1883) 12 QBD 136 and Windsor v. Chalcraft (1938) 2 All E.R 751.)

On the issue of lack of jurisdiction, I was of the opinion that it would have been appropriate as a matter of practice for the application to have been made before Reid J. However, since Reid J. was on Circuit and was unavailable, I ruled that the application was properly before me. (See Mason v. Desnoes & Geddes Privy Council Appeal No. 54/88 delivered 2. 4. 90.)

As a result of these rulings I proceeded to hear the Motion to set aside judgment.

Mr. Piper submitted that there was an irregularity in the Order of the Master for substituted service. He contended that this order was improperly made as the defendant was residing out of the jurisdiction at a time when the order was made. Furthermore, he argued that this was known to the plaintiffs and it was not a situation where the defendant was seeking to avoid service of the Writ. In these circumstances, he said that if personal service could not have been effected within the jurisdiction substituted service ought not to have been ordered. He referred to the cases of Fry v. Moore (1889) 23 QBD 395 and Worcester City and County Banking Company v. Fairbank Pauling & Co. (1984) QBD 784.

I disagree with the arguments put forward by Mr. Piper and find that the proper forum for challenging this order would be by way of an appeal.

Mr. Piper further submitted that the judgment was also irregular on the ground that the interlocutory judgment in default was entered prematurely in the legal vacation, the time therefor having not been expired.

In this instance, service of the Writ of Summons was effected by registered post. It is therefore crucial to determine the effective date of service since the time within which to enter appearance was limited to 14 days from the date of substituted service.

Sylvia Henry deposed that she registered a letter containing the Writ of Summons and other documents to United General Insurance Company on July 19, 1991.

Christopher Samuda deposes further that United General Insurance Company received the documents by registered post on September 4, 1991.

From all indications therefore, United General Insurance Company was served with the Writ of Summons at least, on September 4, 1991.

The Affidavit evidence as it relates to the delivery of the Writ and other documents has remained un-challenged by the plaintiffs.

In these circumstances, appearance would be required to be entered on or before September 18, 1991. On this premise, a judgment in default of appearance entered on August 6, 1991 would be premature.

Mr. Piper did not challenge the premature entry of judgment for the above reason. Instead, he submitted that the judgment was prematurely entered because the plaintiffs in computing time for the appearance included days within the legal vacation.

Rule 39 of the General Rules and Orders of the Supreme Court reads as follows:

> "During the vacation appointed by the said order in Privy Council, the time of such vacation shall not be reckoned in the computation of the times appointed or allowed by the Civil Procedure Code for filing amending and delivering any pleadings unless otherwise directed by the Court or a Judge."

Section 2 of the Civil Procedure Code provides:-

> "Pleadings shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff and of the defence or further defence of any defendant thereto, and of the reply or further reply of the plaintiff whether to such statement or defence or to any counterclaim of a defendant, and of the rejoinder of the defendant to any such reply as last aforesaid."

Order 12/1/2 of the English Supreme Court Practice describes an Appearance as the process by which a person against whom a suit has been commenced (a) shows his intention to defend the suit and (b) submits himself to the jurisdiction of the Court.

On a closer look at the above rules, it is obvious that the term 'pleading' does not embrace an entry of appearance. I hold therefore that the period during the legal vacation should be reckoned in the computation of time for the entry of an appearance.

It remains for me to determine the effective date of service of the Writ of Summons on United General Insurance Company. Section 52 (1) of the Interpretation Act is relevant and indeed instructive. It reads as follows:

> "Where any Act authorises or requires any document to be served by post whether the expression 'serve' 'give' or 'send' or any other expression appears, the service **shall** be deemed to be effected by properly addressing, prepaying and posting a letter containing the document and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Mr. Cousins submitted that the Court should in light of the above provision allow 7 days for the delivery of documents sent in the ordinary course of post. Mr. Piper did not find this proposal objectionable. Having established this proposition, Mr. Cousins found himself in a dilemma. It meant that the computation of time for the entry of appearance should commence July 26, 1991 since the evidence revealed that the letter was sent to United General Insurance Company on July 19, 1991. It was obvious therefore that the time, that is 14 days, limited for appearance, had not expired on August 6, 1991 when the judgment in default of appearance was entered. Mr. Cousins conceded at this point and quite rightly, that the judgment was prematurely entered and was therefore irregular.

One would have thought that Mr. Cousins would have yielded but he urged the Court nevertheless to exercise its discretion and waive the irregularity having regard to the prior conduct of the applicant and the delay of 10 months which

have elapsed before steps were taken to set aside the judgment.

Is this a proper case for the exercise of judicial discretion?

Section 678 of the Civil Procedure Code states as follows:

> "678. 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 amend or otherwise dealt with in such manner, and upon such terms as the Court shall think fit."

Mr. Cousins sought to rely on the above provision and on the case of MacFoy v. United Africa Co. Ltd. [1961] 3 All E.R. 1169. At page 1172 Lord Denning delivering the judgment of the Board and dealing with an Order in identical terms as section 678 above explained it thus:

> "This rule would appear at first sight to give the Court a complete discretion in the matter. But it has been held that it only applies to proceedings which are voidable, not to proceedings which are a nullity; for these are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the Court without going under the rule; see Anaiby v. Praetorious [1888) 20 QBD 764 and Craig v. Kanseen [1943] 1 All E.R. 180."

In this case the error lies in the premature entry of a judgment. Indeed, it is a judgment entered before actual default is made by the defendant. It is irregular and amounts to a nullity. The defendant is therefore entitled to have it set aside ex debito justitiae.

The Court therefore orders as follows:-

Default judgment entered on August 6, 1991 set aside on the following conditions:

1. The defendant be at liberty to file a defence within fourteen days hereof.
2. Costs of this application to the Applicant to be taxed if not agreed.