IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S 109 OF 1999

IN CHAMBERS

BETWEEN	SPEEDWAYS JAMAICA LTD	PLAINTIFF
AND	JONATHAN OUTAR	DEFENDANT

Miss Marina Sakhno instructed by Cowan, Dunkley and Cowan for plaintiff.

Miss Marsha Smith instructed by Ernest Smith & Company for defendants.

Heard on April 9, 2002

JONES, J. (Ag)

On July 21, 1999, the plaintiff obtained judgment in default of appearance for the amount of $2,030,000.00. The defendant has applied to have the judgment set aside. This application has some curious features, not the least of which is that an assistant bailiff for the parish of St. Catherine served a specially endorsed writ of summons against the defendant, on the Superintendent of the St. Catherine District prison where the defendant was imprisoned. The defendant denied receiving the writ of summons; the plaintiff insisted that the service on the Superintendent of Prisons was regular.

The evidence from the defendant was altogether persuasive. The relevant portion of his affidavit was as follows:

"(3)That on the 8th August 2000 I received a registered letter from Cowan, Dunkley and Cowan dated the 19th July 2000 enclosing a re-listed summons for the order for the sale of land and an affidavit in support which was to be heard by this honourable court on the 31st day of July 2000.

(4)That when I received the documents referred to above I became aware for the first time that the plaintiff had commenced an action against me.

(5)That I contacted Mr Cowan of the legal firm Cowan, Dunkley, and Cowan and for the first time learnt that a writ was issued and a judgment was issued against me.

(6)That I contacted Attorneys at Law, Messrs Balentyne Beswick and Company and instructed them that I had never been served with the writ and or statement of claim and I had no knowledge that an action had been commenced against me in the court."

The relevant portion of the affidavit of Marina Sakhno for the plaintiff reads as follows:

"(7)That on or about 6th day of May 1999, the assistant bailiff served the defendant a duly sealed copy of the writ of summons and statement of claim pursuant to Order VII rule 18 of the Resident Magistrate Court Rules by personally delivering same to Superintendent Jones of the said St. Catherine District Prison...

(8)That subsequently a default judgment was obtained and it together with the summons for the Order for Sale of land and other documents was posted by registered post to the defendant at his residence at 1-2 Jackson Crescent, Mandeville in the parish of Manchester...

(14)That I am advised by the plaintiff and do verily believe that the defence outlined in the affidavit of Johnathan Outar is a complete sham and is put forward by him at this time merely to delay the payment of money rightfully due and owing to the plaintiff for a period upwards of five and a half years."

It will be convenient first to consider whether or not the defendant provided a satisfactory explanation for his failure to enter an appearance. The defendant's attorney Miss Smith referred me to the leading case of ***Evans vs.***

Bartlam [1937] 2 AllER 646. Lord Aitkin made the following observation at pg. 649:

> *"...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 been obtained only by a failure to follow any of the rules of procedure."*

She then contended that the default judgment was irregularly obtained, as it was not served in accordance with the rules. Section 35 of the Civil Procedure Code provides as follows:

> *"When service is required the writ shall wherever itis practicable be served by delivering to the defendant a copy of such writ under the seal of the Court; but if it be made to appear to the Court or a Judge that the plaintiff is from any cause unable promptly to effect service in manner aforesaid, the Court or Judge may make such order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise as may be just."*

She argued that the plaintiff himself conceded lack of personal service in his affidavit of service dated July 20, 1999. On the other hand, the plaintiff relied on Order VII Rule 18 of the Resident Magistrate's Court Rules to effect service. It provides that:

> *"Where the defendant is a prisoner in a gaol, it shall be sufficient service to deliver a copy of the summons at the gaol to the Superintendent or any person appearing to be the head Officer in charge thereof."*

Miss Smith for the defendant then submitted that Order VII Rule 18 is not applicable to actions in the Supreme Court. She said that parliament would never intend that the rules of an inferior court should apply to a higher court.

She further submitted that service for the defendant on the Superintendent of Prisons could not be valid in the absence of an order for substituted service. There was no evidence that such an order was ever obtained.

Miss Smith cited two other authorities; ***Birbari vs. Birbari [1976] JLR 187*** and ***Anlaby vs. Pretorious 20 QBD 764.*** The court did not derive much assistance from ***Birbari's case,*** but in ***Anlaby's case*** (supra) it was held that:

> *"...Where a plaintiff has obtained judgment irregularly, the defendant is entitled ex debito justitiae to have such judgment set aside; and the court has only power to impose terms upon him as a condition of giving him his cost."*

On the other hand, Miss Sackhno asserted that the plaintiff did everything possible to serve the defendant personally. He delivered the writ of summons with the requisite fees to the bailiff of the Spanish Town court together with instructions to effect service. She maintained that the bailiff of the Resident Magistrate's court has a duty under section 17 of the Judicature (Supreme Court) Act to serve all writs documents or process out of the Supreme Court. The bailiff is deemed to be *"an officer of the Supreme Court"* when serving any writ or other document given to him in connection with proceedings in the Supreme Court. She urged this court to accept that the bailiff conformed to the only existing law for the service of prisoners' viz. Order VII Rule 18 of the Resident Magistrate Court Rules. Miss Sackhno charged that by section 17 of the Corrections Act, an inmate confined to any adult correctional centre *"shall be deemed to be in the legal custody of the Superintendent of such centre".* She referred the court to section 5 of

the Correctional Institution (Adult Correctional Centre) Rules 1991 which provides that:

> *"The Superintendent shall be the medium of communication between any superior authority or any person outside of the adult correctional centre and the members of the adult correctional centre staff or the inmates within the adult correctional centre."*

For completeness, I would make reference to Section 9 (1) of the above mentioned rules which provides that:

> *"...the Superintendent shall not allow any letter or other document to pass from or to any inmate until it has been read and initialled by himself or an officer deputed by him, and either he or such officer deputed by him may use his discretion in communicating to or withholding from an inmate the contents of any letter or other communication addressed to such inmate."*

There can be no doubt from the forgoing section, that there is no requirement for the Superintendent of Prisons to give to an inmate of a correctional institution, any document addressed to the inmate.

This court is satisfied that the defendant Jonathan Outar was not aware that the plaintiff filed suit against him until August 8, 2000. On that date he received a letter from Cowan, Dunkley and Cowan dated July 19, 2000, enclosing a summons for the sale of land to be heard by the Supreme Court on July 31, 2000. The court also finds as a fact that the writ was never served on the defendant personally, and there was no evidence that it was ever brought to his attention. This court is satisfied that the defendant Jonathan Outar has provided an adequate explanation for his failure to enter an appearance to the summons.

The second issue is this: on these facts, did the plaintiff obtain an irregular judgment? It is well established that an irregular judgment is a judgment that is entered otherwise than in strict compliance with the rules, or a statute. It is a proposition of law that where the judgment is irregular the defendant is entitled to have it set aside.

In ***White vs. Weston [1968] 2 WLR 1459*** it was held that failure to serve the summons on the defendant entitled him to have it set aside. The facts are taken from the head note:

> *"A summons giving notice of county court proceedings was sent to the defendant, in accordance with Ord. 8, r. 8 (3) of the County Court Rules, on October 28, 1966, at an address in Ilford which he had left some five months earlier. Accordingly, he had no knowledge of proceedings in respect of a car accident, which the plaintiff alleged was due to the defendant's negligence and in which the county court judge on November 25, 1966, awarded the plaintiff ú134 damages and costs which, when taxed, amounted to ú86. When the defendant learned of the proceedings he applied to set aside the judgment. During the course of the hearing the summons was found in the court file; it was stamped "Unable to meet deft. He resides at address given and would get summons by post" and signed by the Ilford county court bailiff; that was followed by "Send summons by post" and the form on the summons was filled in showing that the summons was served by posting it on October 28, 1966...*
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> *On the question whether the defendant was properly served: -*
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> *Held, ... the summons was never served and the defendant had a right ex debito justitiae to have the judgment set aside without the imposition of any term whether as to costs or otherwise...Reg. v. London County Quarter Sessions Appeals Committee, Ex parte Rossi [1956] 1 Q.B. 682; [1956] 2 W.L.R. 800; [1956] 1 All E.R. 670, C.A. considered.*
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> *Per Russell L.J... The function of service is primarily to bring to the attention of the person to be served the fact that he is being sued and particular language is required if something short of that is to constitute service (post, p. 1464B)."*

In ***Kenneth Allison Ltd vs. A.E. & Co. [1991] 3 WLR 671*** there Lordships expressly dealt with the question of what constituted personal service. The facts in the head note were that:

> *"The plaintiffs having issued a writ against the defendant partnership sought to serve it at their principal place of business immediately prior to its expiry. A personal assistant, acting on the instruction of one of the partners who was in another part of the premises, agreed to accept service and signed the appropriate form in acknowledgement. The defendants applied to set aside such service for failure to comply with R.S.C., Ord. 10, r. 1 and Ord. 81, r. 31. The application was dismissed by the district registrar but granted on appeal by the judge. The Court of Appeal by a majority dismissed an appeal by the plaintiffs.*
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> *On appeal by the plaintiffs: -*
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> *Held, (1) that personal service required the handing of the document to the person to be served or telling him what it contained and leaving it with or near him; and that, therefore, the plaintiffs' writ had not been served personally on the defendants' partner in accordance with the provisions of R.S.C., Ord. 10, r. 1(1), Ord. 65, r. 2 and Ord. 81, r. 3(1)(a)*
> *...Per Lord Goff of Chieveley. The Rules of the Supreme Court provide a comprehensive code, with a mandatory rule of personal service subject to certain specified exceptions. The suggestion in earlier authority that a different form of service, for example such service in accordance with an agreement between the parties (otherwise than as permitted by the rules), can constitute good and effective service is unacceptable..."*

In this case, it is plain beyond argument that the service of the summons was irregular. Accordingly, the defendant is entitled to have the judgment set aside with cost, ***ex debito justitiae,*** without consideration of the merits. Court orders that the default judgment entered on July 21, 1999, be set aside with cost to the defendant, to be taxed if not agreed.