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Privy Council Appeal No. 22 of 2004

Leymon Strachan *Appellant*

v.

(1) The Gleaner Company Limited and
(2) Dudley Stokes *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 25th July 2005

Present at the hearing:-

Lord Hoffmann
Lord Millett
Lord Rodger of Earlsferry
Lord Carswell
Sir Charles Mantell

*[Delivered by **Lord Millett**]*

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1. This appeal is brought by the plaintiff in the action from a judgment of the Court of Appeal of Jamaica (Panton JA and Cooke JA(Ag); Langrin JA dissenting) dismissing his appeal from the refusal of Smith J to set aside an earlier order of Walker J as being made without jurisdiction. By his order Walker J had purported to set aside a default judgment for damages to be assessed after the damages had already been assessed and a final judgment entered in the plaintiff's favour.

2. This brief summary of the background serves to indicate the nature of this appeal but it does not do justice to the welter of applications, cross-applications, appeals, orders, orders setting aside earlier orders and orders refusing to set aside earlier orders in proceedings which have got completely out of hand. More than 13 years have passed since the Writ was issued, and the question which now falls for decision is whether, subject only to an outstanding appeal on quantum, there has been a final judgment in the action or

whether, as the majority of the Court of Appeal have held, the action has not yet progressed beyond the conclusion of pleadings.

3. In January 1992 the plaintiff Mr Leyman Strachan brought an action for libel against the publishers of a national newspaper "The Gleaner" and its editor Dudley Stokes (the defendants). The action arose out of the publication of two articles in July 1991. On 9 April 1992 judgment in default of defence for damages to be assessed was entered against the Defendants. On 16 May 1995 final judgment was entered for $510,726 special damages and $22.5 million general damages. This followed a contested six day hearing before Bingham J sitting with a jury at which the defendants were represented and in which they played a full part. On the next day the defendants lodged an appeal against the size of the award, which they claimed was manifestly excessive and which Downer JA later described as "unprecedented in Jamaica". On 22 May 1995 Downer JA stayed execution on the judgment pending the appeal (Bingham J having refused to grant a stay) on terms that the defendants pay the sum of $1 million into an interest-bearing account in the joint names of attorneys for the parties. This was done.

4. Shortly after the jury's award was publicised in the press two potential witnesses came forward with evidence which, the defendants claim, would enable them to plead justification. On 4 April 1996 they applied to the Supreme Court to set aside the default judgment of 9 April 1992 and for leave to defend the action on the ground that since the date of the judgment fresh evidence had been obtained on the basis of which they had a good defence.

5. The application came before Walker J (as he then was) on 28 May 1996. At the outset of the hearing the plaintiff raised a preliminary objection to the judge's jurisdiction to set aside the default judgment on the ground that he had no power to do so once damages had been assessed and a final judgment had been entered. The judge overruled the objection and adjourned the substantive hearing of the application to the 16 September. The plaintiff could have appealed the judge's dismissal of his preliminary objection in the interim but he did not.

6. On 20 September 1996, after a contested hearing which had lasted a further five days, Walker J set aside the default judgment and gave the defendants leave to file and serve a defence within 14 days of his order on terms that they pay the costs thrown away by the abortive hearing before Bingham J and the jury, which they did. He found that on the basis of the new evidence the defendants'

proposed defence had a real prospect of success, that they could not be blamed for the delay in making the application, and that setting aside the default judgment would not unfairly prejudice the plaintiff. The plaintiff has never challenged these findings.

7. Walker J treated the viability of the proposed defence and the delay in making the application as the critical issues, much as he would have done if there had been no assessment of damages and no final judgment in the meantime. He seems to have treated these events as merely the consequences of the delay for which the defendants could not be blamed. It is possible (though he did not say so) that he regarded any particular hardship to the plaintiff which may have been caused by the fact that the assessment hearing had taken place as sufficiently dealt with by the terms as to costs which he was imposing.

8. The defendants filed their defence on 3 October 1996 and a few days later the plaintiff filed a reply. The defendants applied to the Court of Appeal to order that the money in the joint account and held to await the outcome of the now abortive appeal from the jury's award be paid out to them. The application came before a single Justice of Appeal (Downer JA) sitting in Chambers on 18 November 1996. He refused the application and set aside the order of Walker J on jurisdictional grounds, saying that the judge "had in substance ordered a retrial which he was not empowered to do". On a successful appeal by the defendants to the full court, the Court of Appeal (Rattray P, Gordon and Patterson JJA), observing that there had been no appeal from the order of Walker J and on the understanding that the defendants intended formally to withdraw their appeal from the jury's award, discharged Downer JA's order (thereby reinstating the order of Walker J) and directed that the money in the joint account be paid out to the defendants' attorneys on the termination of the appeal. In addition to finding that as a single member of the Court of Appeal Downer JA had no jurisdiction to set aside the order of Walker J (particularly when there was no application before him and no argument by either party) Rattray P observed that the plaintiff was not challenging the jurisdiction of Walker J to make the order which he did.

9. The plaintiff took this as a word to the wise. He now belatedly applied to the Court of Appeal for leave to appeal out of time from the order of Walker J, not on the merits, but on the ground that he had no jurisdiction to set aside a judgment which had become final and from which there was pending appeal to the Court of Appeal. The defendants filed an affidavit in answer opposing the application on jurisdictional grounds (which their Lordships consider to be

plainly mistaken) and the plaintiff withdrew it. Instead, on 4 March 1997, he applied to the Supreme Court to set aside the order of Walker J on the grounds foreshadowed by Downer JA, alleging that the order was made without jurisdiction and was a nullity which another judge of the Supreme Court could and should set aside.

10. The application came before Smith J on 15 May 1997. He upheld a preliminary objection by the defendants that he had no jurisdiction to set aside an order made by a judge of co-ordinate jurisdiction. The plaintiff appealed to the Court of Appeal. By a majority the Court of Appeal dismissed the appeal on 6 April 2001. It is from this judgment that the plaintiff now appeals to the Board.

11. In his judgment Panton JA stressed that the order of Walker J had never been appealed. He observed that, although the foundation of the plaintiff's case consisted of an attack on the validity of his order, no appeal from it was before the Court. He observed that there had been many cases in the Supreme Court in which default judgments had been set aside even after damages had been assessed, and said that he would be "very hesitant" to classify as a nullity an order made in the circumstances that faced Walker J. Ultimately, however, he dismissed the appeal on the short ground that, even if Walker J had no jurisdiction to make the order which he did, it was not open to a judge of co-ordinate jurisdiction to exercise an appellate jurisdiction to set it aside.

12. Cooke JA(Ag) rejected the argument that the order of Walker J was made without jurisdiction. He agreed with Panton JA that applications to set aside final judgments for liquidated damages after a default judgment for damages to be assessed were commonplace in Jamaica. He based his judgment on the fact that there had been no adjudication on the merits in relation to liability, and concluded that the judgment for damages to be assessed remained a default judgment which Walker J had jurisdiction to set aside. In a dissenting judgment Langrin JA held that by the time Walker J made his order the default judgment had "changed its character" from a default judgment to a final one. He held that, since Walker J had no jurisdiction to set aside a final judgment, it was a nullity which a judge of co-ordinate jurisdiction could properly set aside.

13. Two distinct questions have been argued before the Board: (1) whether Walker J had jurisdiction to make the order he did; and (2) if he did not, whether Smith J had jurisdiction to set it aside. In their Lordships' opinion, while both questions can be answered without difficulty by reference to principle and policy, they have both been

settled by decisions of high authority which were not cited (and in one case was not available) to the Court of Appeal.

Did Walker J. have jurisdiction to set aside the default judgment after damages had been assessed?

14. Section 258 of the Judicature (Civil Procedure Code) Law of Jamaica provides, in terms similar to those of the corresponding rule in England, that

> "Any judgment by default, whether under this title or under any other provisions of this law, may be set aside by the Court or a Judge upon such terms as to costs or otherwise as such Court or Judge may think fit."

That Title includes section 247 which provides for the entry of an interlocutory judgment for damages to be assessed. In *Mason v Desnoes and Geddes Ltd* [1990] 2 AC 729, (a case under a different section which enables the Court to set aside a judgment where a party does not appear at the trial), the Board observed that the reference to "the Court or a Judge" makes it clear that the jurisdiction is one which may be exercised by a judge in chambers and, at pp 736-737:

> "...the application to set aside a default judgment is not the invocation of an appellate jurisdiction but of a specific rule enabling the court to set aside its own orders in certain circumstances where the action *has never been heard on the merits.*" (Emphasis added.)

15. There is no doubt that section 258 gives a judge of the Supreme Court power to set aside a default judgment, whether it be a judgment for damages which remain to be assessed (which is interlocutory) or for liquidated damages (which is final). The question for decision in the present appeal, therefore, is not whether the judgment which Walker J purported to set aside was interlocutory or final, but whether it was a default judgment. That depends on whether the interlocutory judgment for damages to be assessed was spent when the damages were assessed or (to put it another way) whether it was superseded or overtaken by the final judgment for a liquidated sum; and if so whether the final judgment can be said to be a default judgment when the defendant appeared at and participated in the hearing to assess damages.

16. In their Lordships' opinion these questions are easily answered if three points are borne in mind. The first is that, once judgment has been given (whether after a contested hearing or in default) for

damages to be assessed, the defendant cannot dispute liability at the assessment hearing: see *Pugh v Cantor Fitzgerald International* [2001] EWCA Civ 307 citing *Lunnon v Singh* (unreported) 1 July 1999, EWCA. If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is *res judicata.* The second is that, whether the defendant appears at or plays any part in the hearing to assess damages, the assessment is not made by default; the claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at a further hearing at which the plaintiff could prove his loss. The third is that the claimant obtains his right to damages from the judgment on liability; thereafter it is only the amount of such damages which remains to be determined.

17. Accordingly it cannot be said that a judgment (whether after a contested hearing or by default) for damages to be assessed is spent once damages are assessed; it remains the source of the plaintiff's right to damages. Nor can it be said that in such a case the interlocutory judgment is overtaken or superseded by the final judgment for a liquidated sum; it would be more accurate to say that it is completed and made effective by the assessment. By entering final judgment for the amount of the damages awarded by the jury, the Bingham J gave combined effect to the default judgment on liability and the quantification of damages by the jury.

18. The conclusion that Walker J. had jurisdiction to make the order he did is well supported by authority. In *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc. (The Saudi Eagle)* [1986] 2 Lloyd's Rep 221 the defendants, believing that they had no assets, deliberately allowed an interlocutory judgment for damages to be assessed to be entered against them by default, and only after damages had been assessed and final judgment entered, realising that they had given security, applied initially to the judge and then on appeal to the Court of Appeal, unsuccessfully at both hearings, to set aside the judgment and for leave to defend. The application was refused on the merits; but it was not suggested that the judge would not have had jurisdiction to set aside the judgment had it been appropriate to do so.

19. In *Dipcon Engineering Services Ltd v Bowen* [2004] UKPC 18; 64 WIR 117 (which was decided after the judgment in the Court of Appeal in the present case), Lord Brown of Eaton-Under-Heywood, writing for the Board on appeal from the Court of Appeal of the Eastern Caribbean States, said at para 24

> "Whilst *Saudi Eagle* is clear authority, if authority were needed, for the proposition that an application to set aside a default judgment can be made (and, if refused, can then be appealed) notwithstanding that final judgment has been entered, it is certainly not authority for saying that on an appeal against an assessment of damages a previous default judgment can be set aside without any such application ever having been made ..."

20. It was sought to distinguish these cases (and others in Jamaica) on the ground that there the defendants did not contest the assessment; in most of them (including *Saudi Eagle*) the defendants did not appear at the assessment hearing. Both liability and quantum were determined by default; and it was not surprising to find that a final judgment entered in such circumstances could be set aside as a default judgment. Their Lordships cannot accept this distinction; as they have already observed, whether or not the defendant chooses to appear at and contest the assessment of damages, the assessment is not made by default.

21. Policy considerations dictate the same conclusion. A default judgment is one which has not been decided on the merits. The Courts have jealously guarded their power to set aside judgments where there has been no determination on the merits, even to the extent of refusing to lay down any rigid rules to govern the exercise of their discretion: see *Evans v Bartlam* [1937] AC 473 where Lord Atkin (discussing the provisions of English rules in substantially the same terms as Section 258) said at p 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".

22. Accordingly, and for reasons which are substantially the same as those of Cooke JA, their Lordships are satisfied that, there having been no determination on the merits in relation to liability, Walker J had jurisdiction to set aside the judgment for damages to be assessed.

23. Their Lordships would add this. Although the fact that damages have been assessed and a final judgment entered does not deprive the court of jurisdiction to set aside a default judgment, it is highly relevant to the exercise of discretion. It is an aspect of, but separate from, the question of delay. It cannot be safely assumed in every case that any prejudice to the plaintiff can be met by putting

the defendant on terms to pay the costs thrown away by the assessment hearing. There can be no rigid rule either way; it depends on the facts of the particular case.

If Walker J had no jurisdiction to set aside the judgment for damages to be assessed, was his order a nullity which Smith J had jurisdiction to set aside?

24. Since their Lordships are of opinion that Walker J did have jurisdiction to make the order he did, it is not strictly necessary to discuss the question whether Smith J would have had jurisdiction to set it aside as a nullity if he did not. But the question is an important one and, since the Court of Appeal were led astray by the confusing terminology in which such questions are discussed in the cases, in particular by the distinction between "irregularities" and "nullities", and their attention was not drawn to the leading English authority, their Lordships consider it right to state the true position.

25. The distinction between orders which are often (though in their Lordships' view somewhat inaccurately) described as nullities and those which are merely irregular is usually made to distinguish between those defects in procedure which the parties can waive and which the Court has a discretion to correct and those defects which the parties cannot waive and which give rise to proceedings which the defendant is entitled to have set aside *ex debito justitiae.* The leading example is *Craig v Kanssen* [1943] 1 KB 256, where the proceedings were not served on the defendant at all. The Court of Appeal held that the proceedings were a nullity which the defendant was entitled as of right to have set aside. Unfortunately Lord Greene MR expressed the view that the court of first instance had an inherent jurisdiction to set aside an order made in such proceedings and that it was not necessary to appeal from it. But this was expressed in cautious terms, was *obiter,* and has since been doubted. Moreover, Lord Greene left open the question, on which there was clear authority and which would seem to be highly relevant, whether the order had sufficient existence to found an appeal. Their Lordships respectfully think that he was mistaken.

26. *In re Pritchard* [1963] 1 Ch 502, 520 Upjohn LJ observed that

> "part of the difficulty is that the phrase 'ex debito justiciae' had been taken as equivalent to a nullity, but, with all respect to Lord Greene's judgment in *Craig v Kanssen,* it is not. The phrase means that the [defendant] is entitled as a matter of right to have it set aside."

Upjohn LJ distinguished between defects in proceedings which could and should be rectified by the Court and those which were so fundamental that they made the whole proceedings a nullity. These included (i) proceedings which ought to have been served but which have never come to the notice of the defendant at all; (ii) proceedings which have never started at all owing to some fundamental defect in issuing them; and (iii) proceedings which appear to be duly issued but fail to comply with a statutory requirement. These are all examples of orders of the court made in proceedings which are nullities because they have not been properly begun or served. None of them is an example of a case where an order has been made in proceedings which have been properly begun and continued. *In re Pritchard* itself was an example of the second class; the proceedings had never been started at all. According to Danckwerts LJ, the originating process had no more effect to commence proceedings than a dog licence.

27. In the present case the validity of the proceedings themselves is beyond challenge. The only question is whether an order of a judge of the Supreme Court made without jurisdiction is a nullity, not in the sense that the party affected by it is entitled to have it set aside as a matter of right and not of discretion (of course he is) nor in the sense that the excess of jurisdiction can be waived (of course it cannot) but in the sense that it is has no more effect than if it had been made by a traffic warden and can be set aside by a judge of co-ordinate jurisdiction.

28. An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess.

29. The effect of such an order was authoritatively stated by a powerful English Court of Appeal (Sir George Jessel MR Brett and Lindley LJJ in *In re Padstow Total Loss and Collision Assurance Association* (1882) 20 Ch D 137. The High Court made a winding up order against an insolvent association under a section of the Companies Act 1862 which applied to unregistered companies. The Act prohibited the formation of an unregistered company with more than twenty members. The association, which was not registered under the Act, consisted of more than twenty members. The Court of Appeal held that the statutory provision under which (if at all) the association could be wound up applied only to companies which

could be lawfully formed and not to companies like the association the formation of which was forbidden. Accordingly the winding up order was made without jurisdiction.

30. The next question concerned the effect of the order. Sir George Jessel MR said, at p.142:

> "The first point to be considered is whether, assuming that the association was an unlawful one, and that the Court had no jurisdiction to make the order, an appeal is the proper method of getting rid of it. I think it is. I think that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision b y the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous."

At p. 145 Brett LJ said:

> "In this case an order has been made to wind up an association or company as such. That order was made by a superior Court, which superior Court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court had not. I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that the only way of getting rid of it was by appeal."

31. A similar situation arose recently in Hong Kong. In *Hip Hing Timber Company v Tang Man Kit and Foo Tak Ching* [2004] 7 HKCFAR 212; [2005] 1 HKLRD 572 a two man Court of Appeal, being assured by counsel for both parties that the order under appeal was an interlocutory order, heard and allowed an appeal. On further appeal to the Court of Final Appeal, that Court expressed concern that the judge's order may have been a final order, in which case, in the absence of the prior written consent of both parties, a two man Court of Appeal would have had no jurisdiction to determine the appeal. Before the Court of Final Appeal counsel for both parties sought to waive the defect and argue the appeal on its merits without going into the difficult question whether the judge's order was interlocutory or final. The Court refused to take this course. I said:

> "An order of the Court of Appeal, if not properly constituted, is a nullity. It is, of course, a proper ground of appeal that the court from which the appeal is brought had no jurisdiction to make the order in question; but if that is found to be the case

> the court hearing the appeal has no jurisdiction to determine the appeal on its merits but is bound to confirm the position by setting aside the order below as a nullity.
>
> 35. The parties cannot confer on us by consent a jurisdiction which we do not possess, and since the issue goes to our own jurisdiction then, contrary to the advice given to the parties by the Court of Appeal ... we are bound to enquire into it whether the parties raise it or not."

In the event the Court of Final Appeal held that the original order was a final order from which a two man Court of Appeal had no jurisdiction to hear an appeal, and set aside its order.

32. The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the *Padstow case*) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; not does a judge of co-ordinate jurisdiction have power to correct it.

33. In the present case Walker J held that he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. As between the parties, however, and unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was *res judicata.* As a judge of co-ordinate jurisdiction Smith J had no power to set it aside.

34. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed with costs.