IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO: C L TO32 OF 1997

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| BETWEEN | TOUCHE ROSS MANAGEMENT CONSULTANTS | PLAINTIFF |
| A N D | THE ATTORNEY GENERAL FOR JAMAICA | DEFENDANT |

Miss Cheryl Lewis instructed by the Director of State Proceedings for the Defendant/Applicant.

David Henry & Christopher Cheddar instructed by Nunes Scholefield, DeLeon & Company for the Plaintiff/Respondent

IN CHAMBERS

Heard on the 3rd, 6th & 18th days of May, 1999

**CORAM : Courtenay Orr J.**

This is an application by the defendant to set aside judgment entered in default of defence.

In the endorsement to its writ filed and served on the 18th day of March 1997, the plaintiff claims the sum of Three Hundred & Thirty-Three Thousand Four Hundred & Twenty-Five Dollars & Sixteen Cents in United States currency ($333,425.16) and the sum of Seventy Thousand Five Hundred and Fifty-Six Dollars & Ten Cents ($70,556.10) in Jamaica currency, for breach of contract and unjust enrichment. The plaintiff also claims interest on these sums.

This matter has a curious history.

The defendant filed an appearance on April 4, 1997. On May 1, 1997, the Plaintiff filed a "summons for leave to enter interlocutory judgment in default of appearance."

This was fixed for hearing on 14th October, 1997. On that day the matter came before the Master and the minute of order reads "Adjourned to 13th November, 1997. File to be located."

The appearances noted are: Mr. Cheddar for the Plaintiff, Miss Gallimore for the Defendant.

The affidavits in support of the summons were sworn by Christopher Cheddar and Artnell Kelly. The latter's affidavit was irregular on two counts.

> (1) It was headed "Affidavit of Search For Appearance" and spoke only to a search for an appearance not a defence.
>
> (2) Contrary to a Practice Direction issued by the Registrar of the Supreme Court it was not sworn and filed on the same day on which the search was made. It was sworn on May 1, 1997, but search was made on April 9, 1997.

Christopher Cheddar's affidavit so far as is material states in paragraph 5:

> 'That I am informed by our client, Artnell Kelly, and do verily believe that to date, the Defendant has not entered an Appearance to this action and I crave leave of this Honourable Court to refer to the Affidavit of Artnell Kelly filed herein. (Emphasis mine)

This affidavit was sworn and filed on the same day - May 1, 1997.

On 31st October, 1997, the plaintiff filed an amended summons which was headed thus:

"Amended

Summons for Leave to Enter Interlocutory Judgment in Default of Defence."

But no new supporting affidavit was filed then.

On November 13, 1997, when the matter came back before the Master the only affidavits filed were the two mentioned earlier which spoke to the absence of an appearance.

The Master made an order granting Leave to Enter Interlocutory Judgment in Default of Defence and leave to proceed to assessment of damages. On that occasion only Mr. Cheddar for the plaintiff was in attendance.

On November 21, 1997, the plaintiff filed an affidavit sworn on the same day by Artnell Kelly, indicating that he had searched to see if a defence had been filed but he had found none. On that same day the plaintiff filed an interlocutory judgment in default of defence. This was signed by the Registrar on 13th January 1998.

On June 8, 1998 the Acting Master heard a summons for an order to proceed to assessment of damages. Then Mr. Cheddar and a Mr. Jennings appeared for the plaintiff and Ms. A. Johnson for the defendant. An order was made in terms of the summons.

On 29th October, 1998, the plaintiff filed a notice of Assessment of Damages.

That was adjourned sine die on 22nd January, 1999.

On March 11, 1999, the defendant filed this summons to set aside the judgment in default of defence.

THE SUBMISSIONS ON BEHALF OF THE DEFENDANT/APPLICANT

At the application for leave to file judgment in default of defence there was no affidavit of search which said that no defence had been filed. This was a fundamental error which entitled the defendant to have the judgment set aside as of right.

The delay though very long should not be a barrier to this application.

The problem was the content of the affidavit, not the failure to follow a rule of the Civil Procedure Code.

If the Court did not agree with the above submission the Court should hold that the defendant has shown that there was a meritorious defence.

She cited the following cases in support of her submissions:

Lane Investment Ltd. V United Grocery Co.26 JLR 212

Bruce Golding v Pearnel Charles 28 JLR 247

Analby v Preatorions (1888) 20 QBD 764

THE SUBMISSIONS ON BEHALF OF THE PLAINTIFF/RESPONDENT

The Master had jurisdiction to hear the summons for leave to enter default judgment, as at the time of the hearing of the summons no defence had been filed and the time for doing so had expired.

The purpose of the affidavit (of search) is to place the matter in a cogent form before the Court.

Since there was no defence the Master was obliged to make the order souht.

Section 678 of the Civil Procedure Code need not be invoked because there was no irregularity.

Alternatively, if there was, Section 679 makes it clear that an application such as the instant one should not be allowed unless made within a reasonable time. Miss Lewis had conceded that the time - 1 year and 3 months - was unreasonable.

Indeed it was inordinate and inexcusable.

If there was in irregularity, by appearing at the hearing of the summon to proceed to assessment of damages, counsel for the defendant had taken a fresh step after knowledge of the irregularity and was therefore barred from succeeding.

There was no proper affidavit of merits, merely a draft defence. The defence does not state how much of the claim is now owed - merely that the bills were adjusted. The affidavit of counsel for the defence is inadequate to support the alleged defence.

Delay by itself can be a bar.

He agreed that this was not an instance of non-compliance with the Civil Procedure Code.

Miss Lewis, in reply, submitted that the case of Ramkissoon v Olds Discount 4 WIR 73 cited by Mr. Henry did not apply to her affidavit, as she represented the Crown and this is an interlocutory application. The case revolved around the interpretation of the contract, the terms of which are set out in the Statement of Claim.

## THE COURT'S ANALYSIS AND CONCLUSION

Section 258 B provides that in any proceedings against the Crown, no judgment for the plaintiff shall be entered in default of pleadings without the leave of the Court or a Judge.

Section 245 of the Civil Procedure Code states:

> "If the plaintiff's claim is only for a debt or liquidated demand and the defendant does not within the time allowed for that purpose, file a statement of defence and deliver a copy thereof, the plaintiff may subject to the provisions of Section 258A of the Law at the expiration of such time, enter final judgment for the amount claimed with costs."

In the instant case the claim is for a liquidated demand.

Section 453 provides:

> "Where under any Law, it is provided that any judgment may be entered upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced and if the same be regular, and contain all that is by Law required he shall enter judgment accordingly."

Section 587 states:

> "Every final judgment or order of the Court, and every judgment by default or by confession or by consent of the parties, shall be filed in the suit or other proceeding and recorded in a book to be kept by the Registrar for the purpose and to be called the Decree Book and the Registrar shall keep an alphabetical order thereof"

In Worker's Savings and Loan Bank Ltd. v Macro Finance Corporation Ltd. & Others SCCA No: 102 & 103 of 1996, delivered on December 3, 1996, the Court of Appeal held that a judgment in default of defence is entered when the Registrar performs a ministerial function when she enters the judgment in the register for its effect pursuant to Section 587 of the Civil Procedure Code.

In the instant case when the Registrar entered judgment she had before her a proper affidavit and there had been an order granting leave by the Master. So the irregularity here was at the stage of the application for leave to enter judgment. It is agreed on all sides that at that time the defendant had not entered a defence, and still has not yet done so. Applying the test of nullity adumbrated by the Privy Council in Marsh v Marsh [1945] AC 271 at 884 - whether the irregularity was contrary to natural justice - I hold that in the instant case it is a mere irregularity which does not make the proceedings before the Master null and void, and in view of the fact that a correct affidavit was before the Registrar when she entered judgment, I hold that the judgment entered is not null and void.

I am fortified in this view by the dictum of Carey JA in Bruce Golding v Pearnel Charles 28 JLR 247 at 253 I to 253 C.

He said:

> "The effect of this rule (Order 2 r 1) in general is that the distinction between nullity and mere irregularity disappears. The Court in *Eldemire v Eldemire* C.A. 79/89 (unreported) dated March 22, held that certain proceedings begun by originating summons instead of a writ were a nullity. In so ruling, we had followed the floss on the original Order 70 which appears in the White Book 1962 but we were overruled when that case went on appeal to the Privy Council. See cit. P.C. 33/89 dated 23rd July, 1990 at page 5 where their Lordships spoke of the 'modern practice.'"

> '....In general the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification...'
>
> I understand their Lordships to be saying that the distinction between nullity and a mere irregularity has been removed. The dissenting judgment of Lord Denning M.R. in re P*ritchard (dec'd)* (supra) should prevail in these matters. We were being told that that case should not be followed. We have achieved the same procedural position as it exists in the United Kingdom. Not only have we been saved the trouble of amending section 678 of the Civil Procedure Code, we are not obliged to invoke section 686. I think however, there may well be some failures to comply with the Code which a court would be constrained to hold, were so serious as to render the proceedings a nullity. In my view, where the omission was deliberate or, for the purpose of causing delay, evasion, deception or otherwise not in good faith, or contrary to natural justice, these I would venture to suggest, justify a court in declaring proceedings void. But I hasten to add that this is not intended as exhaustive but illustrative of the situations I have in mind."

Further section 679 of Civil Procedure Code provides that:

> "No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

The time which has elapsed since the irregularity is a very long time- one year and three months. I would not grant this application on the basis of an irregularity at this late stage. So I shall proceed to deal with this application as one to set aside a regular judgment.

What of the defendant's delay in terms of a bar to the grant of this application? The court has a discretion to grant an application such as this as long as the court is satisfied that no one is prejudiced by the defendant's tardiness, or that such prejudice as is occasioned can be cured by an appropriate order for costs; or that to allow the judgment to stand would be oppressive. *Attwood* v *Chichester* (1878)3 QBD 772; *Harley* v *Samson* (1914) 30 T.L.R. 430.

How is the delay explained? In the further affidavit of Cheryl Lewis she states in paragraphs 3, 4 and 5 as follows:

> "...that at the time the said Order to enter Default Judgment was made the said file was misplaced.
>
> 4. That the (sic) due to administrative lapse it was

> sometime in January 1999 that it was realized that the judgment was irregularly obtained and hence the application to set aside.
>
> 5. That the delay was not deliberate."

The records also indicate that various attorneys in the defendant's department appeared in this matter at different times. No doubt this contributed to the "Administrative lapse." In my view junior counsel in that department could bebefit greatly from more close supervision.

In *Beale v McGregor* (1886) 2TLR it was held that the court has an inherent power to prevent an abuse of its own proceedings and a judgment will be set aside even though the application is out of time if the circumstances of the case require this.

Notwithstanding the long delay I will not dismiss this application on the ground of delay but will go on to consider the merits.

Since there is no nullity, to succeed in this application, the defendant must show merit. Mr. Henry submits that the affidavit in support of this application and which was sworn by counsel for the defendant is invalid. I do not agree. She has conduct of the case and may give evidence of information provided the source is stated.

Mr. Henry also says that the affidavit and proposed defence do not disclose a proper defence or an arguable case. I will now assess the accuracy of this statement.

The nature of the contract between the parties is set out in paragraph 3 of the statement of claim. This is admitted by the defendant. It reads thus:

> "By a contract in writing (herein-after referred to as 'the contract') dated the 11th day of September 1991 and made between the Consultant and the Defendant's servant and/or agent, the Ministry of Health, the Consultant agreed to provide consulting services for the benefit of the Ministry of Health and its Health Services Rationalization Project, and the Ministry of Health agreed to pay to the Consultant the amounts due and owning by it from time to time for the services performed by the Consultant."

In paragraph 6 which is also admitted by the defendant, the plaintiff states that "between October 1991 to October 1993 the Defendant honoured its obligations by paying the Plaintiff in full."

Then comes the gravamen of the plaintiff's claim, in paragraph 7.

> "Wrongfully and in breach of the Contract, the Defendant has since November 1993, willfully failed and/or refused to pay to the plaintiff its fees for consulting services performed by the Plaintiff on behalf of the Defendant and expenses incurred in the sum of US$333,425.16 and in the sum of J$70,556.10"

In the particulars of special damages the plaintiff sets out details of allegedly unpaid sums incurred for consulting services rendered at various locations - Kingston, London and Boston. In each case the plaintiff sets out the invoice number for each month and the total for the location.

Then there is a heading "Short payments unexplained by the Ministry." Again the month, year and invoice number are stated, and then a total sum claimed under that heading.

What is the defendant's response to all this? In paragraph 3 of the proposed defence, the defendant admits certain terms of the contract dealing with matters such as the manner of payment, the contract period, how the terms may be modified, how remuneration shall be determined, what are reimbursable expenses, the rate of interest payable on unpaid sums, and so on. The paragraph then states:

> "The Defendant further states that it was also an express term of the Consultancy Agreement that any payment to the plaintiffs under the contract is subject to the Approval of the Inter-America Development Bank."

But significantly, nowhere is it stated what are the implications of this alleged term in respect of the claim, the very detailed claim, made by the plaintiff!

In response to paragraph 7 of the statement of claim quoted above, in which the plaintiff avers that since November 1993 the defendant has "willfully failed and/or refused to pay" its bills, the defendant denies this and avers:

> "The Defendant will contend that certain adjustments made to the invoices submitted by the plaintiffs were done pursuant to Clause 9.3 (c) (1) of the consultancy agreement, and the provision of the Agreement that payment by the Bank will be made only at the request of the client and upon approval of the bank."

Again, no averment is made regarding the effect of these adjustments vis a vis the claim of the plaintiff, nor is it alleged how the provision regarding "Request of the client" and "approval by the Bank" affect the plaintiff's claim. The defendant ought to be far more forthcoming.

The affidavit of Cheryl Lewis in support of this application throws no more

light on the subject.

Is this sufficient to show merit? In Burns v Kendal [1971] 1 *Lloyd's Rep.* 554, the English Court of Appeal ruled that in a claim based on negligence, the defendant should still be deemed to have an arguable case even though he only wishes to argue the plaintiff's contributory negligence. Here the defendant at least is saying in effect "I do not owe all that you say I owe. There are adjustments to be made in keeping with certain clauses in the contract."

The defendant in the proposed defence does not spell out the implications of clauses in the agreement on which it seeks to rely. This should be done.

Nevertheless, I am of opinion that at the very least the proposed defence plays in the instant case - a breach of contract - a role akin to that of a defence of contributory negligence in an action for negligence. It goes to reduce liability. Hence I rule that though the proposed defence is rather thin, there is a triable issue.

I therefore set aside the judgment in default of defence. But having regard to my view of the quality of the proposed defence. I order that the defendant file an amended defence within thirty days hereof setting out its contention with greater particularity in the areas I have indicated. Unless the defendant complies with this order the judgment shall stand.

As regards costs the defendant shall pay costs thrown away to the plaintiff including the costs of and incidental to this application. These costs shall be taxed if not agreed and unless they are paid to the plaintiff within thirty days of taxation or agreement, the defendant shall not be allowed to proceed further.

One final aspect of this order. I bear in mind the dictum of Carey J.A. in Bruce Golding v Pearnell Charles (supra) at 254 I to 255 B where he said:

> "In my view, nothing is to be gained by considering whether the judge is exercising an inherent jurisdiction to control proceedings in his court or pursuant to Section 344 (2) where he makes an order for speedy trial. It is plain the Registrar on such an order will always act pursuant to this provision. But I must express my opinion with respect to the making of this order. The judge should in making this decision be provided with material justifying such an order. The judge must consider the nature of the case, the reasons for urgency in its disposal over other cases, bearing in mind that few aggrieved parties do not desire an early trial. The fact that a great deal of money is at stake, is not in my view, a relevant consideration. The fact that the parties are important or national figures, should not by itself justify an order. Where the postponement of having an early decision in the case might have serious financial or other

> repercussions to the economy or a segment of the society or if irreparable harm might result to a party, all these constitute the sort of factors which should predispose a Judge to granting such an order."

I regard an order for a speedy trial as most appropriate in this matter, having regard to the nature of the case, the fact that it involves foreign consultants, and the great harm which would be done to this country's reputation in trade and dealing with foreign entities if it were thought that delays in commercial transactions and the resolution of disputes in the courts with foreign entities were inordinate.

In fine the order of the Court is as follows:

Unless the defendant pays to the plaintiff costs thrown away and the costs of and incidental to this application within thirty days of such costs being agreed or taxed, and further unless the defendant files an amended defence within thirty days hereof, the judgment in default entered by the plaintiff shall stand.

A few comments on the form of the proposed defence.

It is a cardinal rule of pleading that all material facts must be pleaded. Jacob and Goldrein in their book, Pleadings, Principles and Practice, state at page 48:

> "Each party must plead all the material facts on which he relies for his claim or defence, as the case may be. In other words, he must plead all the facts which he must prove to establish a legally complete or viable cause of action or ground of defence, and no averment must be omitted which is essential to success." (Emphasis mine)

I am well aware that pleadings must contain facts and not the evidence by which those facts are to be proved, but I still regard the defendant's pleadings as inadequate in light of the particulars in the statement of claim and the nature of the cause of action. "... the defendant must deal specifically with every material allegation contained in the statement of claim traversing it, or admitting it with some stated qualification." (Jacob and Goldrein op. cit p. 111).

One further comment which goes to the style of the proposed defence. The defendant pleads as follows:

> "Paragraphs 9 and 10 of the Statement of Claim are not admitted."

As regards paragraph 9 of the Statement of Claim I regard this response as lacking in proper style. Paragraph 9 of the Statement of Claim alleges that the plaintiff's wrote letters on some seven occasions to the Permanent Secretary and the Director of Projects of the Ministry of Health and the Minister of Health, requesting

payment of fees and expenses, and that the Ministry has failed to respond.

Now, the defendant acts on behalf of these bodies and persons. The truth or otherwise of the alleged facts must be within their knowledge. Although there is no difference in effect between denying and not admitting an allegation, the better practice is to observe a distinction between them in pleading. A party denies any matter which, if it had occurred would be within his knowledge, such as the receipt of correspondence from his opponent; while he refuses to admit matters which are not within his own knowledge. If the Ministry and other addressees did not receive the alleged letters they should say so. If they are unsure, they should ascertain the position and enter the appropriate response.