JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 73/87

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	LINTON WILLIAMS	PLAINTIFF/APPELLANT
A N D	JEAN WILSON	1ST DEFENDANT
A N D	HARRIS WILLIAMS	2ND DEFENDANT
A N D	INSURANCE COMPANY OF THE WEST INDIES	RESPONDENTS

C.M.N. Daley for Appellant

Miss Majorie Rose for 1st and 2nd Defendants

Dennis Goffe for Respondents

April 26-28 and May 29, 1989

ROWE P.:

The appellant was injured in a road accident on July 15, 1983. A year later on August 31, 1984 he filed a Writ of Summons claiming damages for negligence against the two defendants and on October 22, 1984 he served a statement of claim upon Maurice Frankson, Attorney-at-Law for the defendants, who in turn entered appearance on December 3, 1984. On September 5, 1984 the Attorneys for the appellant served a Notice of Proceedings on the Respondents Company with whom the 1st defendant's motor vehicle which was involved in the accident was insured, informing the respondents that Suit C.L. 1984/W. 256 in the instant action had been filed.

No defence was filed. As a consequence the appellant entered Interlocutory Judgment against both defendants on May 6, 1985 and proceeded to assessment of damages on January 15, 1986 when the appellant was awarded the sum of $231,863.79 as damages including interest and costs to be agreed or taxed.

Other proceedings followed. An attempt was made to recover the damages from the defendants and, we were told, the writ of seizure and sale was returned nulla bona. A writ has been filed by the appellant to recover from the respondents the amount of the judgment by reason of the provisions of Section 18(1) of the Motor Vehicle Insurance (Third Party Risks) Act.

The defendants took steps to set aside the Interlocutory Judgment entered in default of Defence. They applied to the Master and put before her their affidavits setting out their reasons in support of the application. On April 7, 1986 the Master dismissed their Summons to set aside the Interlocutory Judgment. From this Order the defendants did not appeal.

One might assume that if the defendants had the means to satisfy the judgment, the appellants would not seek recourse to their insurers. As it turned out the defendants had no goods on which to levy and predictably the successful plaintiff turned to the insurers. The respondents have said they would have no defence to the action which the appellant has brought on the judgment and consequently their only course of action is to seek to set the Interlocutory Judgment aside and to defend the action on the merits. And so the respondents filed a Summons on June 3, 1986, addressed to the plaintiff, seeking to set

aside the default judgment entered on May 27, 1985 against the defendants. Although not made parties to this application, the defendants were very much aware of it and indeed filed affidavits to be used in support thereof.

The Summons to set aside the default judgment came on for hearing before Reckord J. (Ag.) on April 9, 1987. Through his Counsel, the appellant took certain preliminary objections to the hearing of the Summons. These were over-ruled and an appeal from that ruling and subsequent Order was taken to this Court as C.A. 47/87. The gravamen of the appellant's complaint at that time was that the respondents had no locus standi to make an application to set aside the default judgment as he had not previously obtained the leave of the Court to intervene. This Court considered the course of procedure adopted in the English Court of Appeal in Jacques v. Harrison (1883) 12 Q.B.D. 136 and in Windsor v. Chalcraft (1930) 2 All E.R. 751 and being in respectful agreement with the decisions in both cases, decided that an Insurance Company in the position of the respondents had a right to intervene in the action, and not just a liberty so to do. Consequently the respondents could intervene as of right to seek leave to set aside the default judgment. In other words, the Court was of the view that a person in the position of the respondents who had a contractual relationship with the defendant governed by the Motor Vehicle Insurance (Third Party Risks) Act, could on its own motion and in its own name intervene in a suit, if there was a possibility that such an Insurance Company could be liable on the judgment by virtue of Section 18(1) of the said Act. The Insurance Company did not as a first stage require leave of that Court to intervene and as a second stage, such leave having been granted, to then apply to have the judgment set aside.

There was an irregularity in the Summons in that the defendants had not been served and so made parties to the application before Reckord J. (Ag.). This Court, following the decision in Jacques v. Harrison supra, held that this omission though a serious one, was not fatal to the continued hearing of the Summons as the Court had power to adjourn and to give the defendants a chance to be heard if they so desired. The matter was sent back to Reckord J. (Ag.) for continuation of the hearing.

After numerous objections and much argument Reckord J. (Ag.) on September 24, 1987 set aside the default judgment on condition:

> (1) that the respondents be joined in the action as a defendant;
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> (2) that the respondents file a defence within fourteen days from the date thereof;
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> (3) that the costs thrown away should be paid by the respondent to the appellant.

Against this Order the appellant has filed and argued the present appeal.

At the outset of the hearing of the appeal the Court had to dispose of preliminary objections raised by the defendants and by the respondents. It was not necessary to decide whether the defendants could be heard on the appeal, although they claimed that having been served with the Notice of Appeal they had a right to appear and to be heard, as their preliminary objection had no merit. It proceeded upon the basis that as the defendants had been given unconditional leave to defend the action, under Section 11(1)(a) of the Judicature (Appellate Jurisdiction) Act, an appeal

did not lie therefrom. The Order of Reckord J. (Ag.) from which the appeal was taken was the Order of September 24, 1987 and he expressly gave leave to appeal from that Order. No appeal is extant in relation to an Order of October 1, 1987, so far as this Court is aware.

Mr. Daley in grounds 1(i) and (ii); 3(i) and (ii) sought to raise the identical questions which were raised and decided in C.A. 47/87, and in relation to them this Court ruled that they were res judicata.

Ground 1 - commenced with general words and then descended to particulars:

> "1. The order of the Court adding the Third party (I.C.W.I.) on its own application and without the express consent of the Plaintiff, a defendant in the action as a condition for granting the order to set aside the judgment entered against the Defendants is made without jurisdiction since inter alia:
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> (i) the cause or matter as it stands between the existing parties does not relate to Third Party,
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> (ii) the Third party is a person only indirectly interested in the proceedings."

Ground 3:

> "The learned trial judge erred in law in hearing and determining an application by the Insurance Company of the West Indies Limited (a third party) to set aside the judgment entered against the Defendants herein, notwithstanding:

"(i) a failure on the part of the said Third Party to comply with the provision of Order 13 R. 9(3) of the Supreme Court Practice,

(ii) the fact that no Appearance was entered in the matter by the Attorneys-at-Law acting for the Insurance Company of the West Indies Limited on behalf of any party in the proceedings or on behalf of anyone at all coupled with the refusal of the said Attorneys-at-Law to admit service of an affidavit in the case on the ground that they had not entered Appearance in the matter."

Mr. Daley's reliance upon rule 13/9/3 of the Supreme court Practice, 1988, was in support of his submission that a third party who has or can acquire a locus standi to apply to set aside a judgment must show that he has a direct interest in so doing and must either do so in the name of the defendant, with his leave, or he must make both plaintiff and defendant parties to the application and ask for leave to intervene. Jacques v. Harrison supra, contains many similar factual situations to the instant case. These applications were by mortgagees to set aside nine default judgments for possession of mortgaged property entered against the lessee of the said mortgaged property. There was good reason for the third party to believe that the nominal defendant did not intend to defend the actions and probably because of this, the mortgagee applied in its own name to set aside the judgments without making the defendant a party of the applications. Those applications went before Field J. who dismissed them. On appeal therefrom to the Divisional Court, the default judgments were set aside. On further appeal

to the Court of Appeal, the Order of the Divisional Court was confirmed with modifications.

Bowen L.J. took the opportunity to re-state the proper practice to be adhered to in such proceedings. He said at p. 167 of the Report:

> "There are, so far as we can see, only two modes open by which a stranger to an action, who is injuriously affected through any judgment suffered by a defendant by default, can set that judgment aside; and these two modes are amply sufficient to protect any such stranger in all cases in all his rights. He may, in the first place, obtain the defendant's leave to use the defendant's name, if the defendant has not already bound himself to allow such use of his name to be made; and he may thereupon, in the defendant's name, apply to have the judgment set aside on such terms as the judge may think reasonable or just. Or he may, if he is not entitled without further proceedings to use the defendant's name, take out a summons in his own name at chambers to be served on both the defendant and the plaintiff, asking leave to have the judgment set aside, and to be at liberty either to defend the action for the defendant on such terms of indemnifying the defendant as the judge may consider right, or, at all events, to be at liberty to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24, subs. 5."

It is important to note that Bowen L.J. thought that a stranger could be fully protected "in all cases in all his rights" by recourse to one or other of the modes set out above. Where the stranger wishes to make the application in his own name to set aside the judgment Bowen L.J. explains the reasons why the stranger must make

the defendant a party to the application. These reasons concern the protection of the defendant and do not relate to the rights of the plaintiff. The setting aside of a default judgment does not by itself deprive the plaintiff of his remedy, because when the case is tried and decided on the merits the plaintiff might very well obtain the same or more advantageous remedies. Justice sits more securely for plaintiff and defendant when both have had their day in Court and the issues litigated are decided on their merits.

Bowen L.J. in continuation of his judgment said:

> "By one or other of these two modes all that justice requires in any case can be done. But it is of the essence of the intervention of the third person, if he adopts the latter course, that the defendant should be made a party to the application. This is not a mere form, but an essential requirement of justice. The defendant has thought it more consistent with his own interest to submit at once to the plaintiff's claim instead of contesting it further. If at the instance of a stranger to the action the litigation is sought to be revived, the defendant has a right, in the first place, to dispute the title of the applicant to interfere. He has no opportunity of doing so unless he is made a party to the summons. In the second place, he has a right to be heard upon the question whether, if a litigation is to be prolonged against himself in invitum which he desired to have closed by his submission, he should not be indemnified against any risks or costs to which he may be otherwise exposed by its prolongation. Until the applicant has made the defendant a party to the application by service upon him of the summons, the applicant remains a mere stranger to the action."

These explicit words of Bowen L.J. would prima facie mean that the respondents not having made the defendant a party to the Summons to set aside the default judgment, the application should be dismissed. But it is instructive to see how the Court of Appeal resolved the matter in Jacques v. Harrison. At page 170 of the Report Bowen L.J. having reflected upon the facts of that case said:

> "..... as a matter of practice, it is difficult in technical strictness to justify an order made at the instance of a stranger that affects the possible rights of a defendant on the record who has not been made a party to the application, and whose rights are not protected by the order.
>
> When comes the appeal to this Court. The blot in the proceedings of the respondent still remains uncured. What is to be done? It would be a grave pity if all these proceedings were to be rendered abortive for the sake of protecting the interests of an absent person who may not after all care to be protected. It seems to us that the proper course to pursue is, while recognising the error in practice that has occurred, to mould the order of the Court below in such a way as will prevent the possibility of injustice, and preserve to the defendant an opportunity even now of being heard if he desires to claim it."

In C.A. 47/87, this Court in reliance upon the decision and the reasons proferred therefor by Bowen L.J. quoted above, held that non-service of the Summons upon the defendants did not make the Summons bad for all purposes and returned the action to the trial judge to do substantial justice between the parties as on the affidavits the defendants knew of the proceedings and filed affidavits in support thereof.

In the instant appeal this Court did not think that it was open to the appellant to re-open the argument that the Court had no jurisdiction to make the respondents a party to the action without the consent of the plaintiff.

Mr. Daley summarised his grounds of appeal into two propositions:

> 1. Whether a decision or order regularly obtained or made by the Court may be set aside or nullified otherwise than with the consent of the parties or by due process of appeal; and
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> 2. Whether a party who has brought an action in the Court against one party may be subject to the joinder of another party as defendant whom he does not sue and could have sued in those proceedings.

I think that the first question is misconceived. If a third party has a right to intervene or to apply for leave to intervene to protect a direct interest of its own and to apply to set aside a default judgment entered against a defendant, that right cannot be dependent upon whether or not the defendant had any similar right. The mere fact that the third party has an interest of his own would destroy any argument that he stands in the shoes of the defendant and is thereby adversely affected by any impediment which affects the defendant. I think however, that this question has been authoritatively decided by the Court of Appeal in England in Windsor v. Chalcraft (1938) 2 All E.R. 751. I begin with a quotation from the judgment of Slesser, L.J. which to my mind sums up admirably the submissions made by Mr. Daley. Slesser L.J. said at pp. 754-755. He said:

> "Certain conditions are laid down which I read to be for the protection of the insurance company,
> .....

> "In the present case those conditions were complied with. Notice dated October 26, 1937, was served upon the insurance company by the solicitor for the plaintiff. ..... In those circumstances, I think that the position is this. It may well be that the insured person may be liable on breach of contract with the insurance company in not allowing them to have that conduct and control of the proceedings which he had undertaken by his insurance policy to give. That liability, of course, would apply equally at common law. Apart from that, it seems to me that, if he suffers judgment, either by default or by electing to suffer judgment by compromise during the proceedings, a judgment has been obtained against him within the meaning of the section, and provided that due notice is given to the insurance company at the time of the issuing of the writ, in order that they may take over the proceedings from the defendant, or do whatever they think necessary in the protection of their own interests, a complete liability is thereby established, unless the case is one where the insured person himself could, had there been no question of insurance, have set aside the judgment obtained by default. If the insured person could have set aside the judgment so obtained by default, then there would not have been a judgment within the meaning of sect. 10(1), and, if the insurance company, who were entitled to take proceedings in his name, could have set aside the judgment obtained by default on grounds which would have entitled the insured himself to have done so, equally there would have been no judgment obtained, and sect. 10(1) would not have justified judgment being obtained against the defendant, and would not have justified the insurance company being liable under the judgment which had been obtained against the defendant."

Slesser L.J. was of the clear view that the defendants had no grounds upon which they could have questioned the judgment made against them by default and consequently the Insurance Company had none other than their contention that

they had not themselves been heard. He distinguished the binding authority of Jacques v. Harrison and concluded that the only procedural remedy open to the Insurance Company was the one provided under the statute. He said:

> "As I have indicated, I think that the liability which, for reasons of public policy, is imposed by the statute upon the insurance company is one which is statutorily imposed subject to the specified statutory protection of the obligation to give the insurance company notice. If the insurance company fails to avail themselves of that statutory protection, then they cannot say, within the language of Bowen L.J., that there is any injustice which they can seek to have corrected by a further hearing. If there be such an injustice, it seems to me to be one which is imposed upon them by the legislature."

Greer L.J. and MacKinnon L.J. did not agree with the approach, the reasoning or the decision of Slesser L.J. The more explicit passage setting out the reasons of the majority of the Court of Appeal is to be found in the judgment of MacKinnon L.J. at pp. 757-758 of the All E.R. He said:

> "In this case, by virtue of the provisions of the Road Traffic Act, the underwriters, the strangers to the litigation, have much more than a contractual right with the nominal defendant. They have an actual interest by reason of the liability imposed upon them by statute to make good the amount of the judgment to the plaintiff, and for that reason it seems to me that they, of all people, are the sort of strangers interested in the judgment as being injuriously affected by it, who have a right, within the principle laid down by Bowen, L.J. to intervene, and to ask to have the judgment by default set aside.

> "I cannot agree with the suggestion that they can have it set aside only if the nominal defendant has a similar right. The truth is that only in very rare cases can the nominal defendant, who has himself consented to judgment, or allowed it to go by default, ask to have it set aside, unless he can make out that it was due to some inadvertence on his part, or that he had no notice of, or that he made a mistake about, the time of the action, or something of that sort. It is by reason of the fact that he has no pecuniary interest in his liability, and that the strangers to the proceedings really have the whole interest, that they have a right to set aside the judgment. The rule would have very little effect given to it in such a case as this if it were to be held that the strangers to the litigation could exercise their right under this rule only in a case where the nominal defendant himself had similar rights."

On the crystally clear authority of Windsor v. Chalcraft, the insurers are exercising a right independent of the defendants and when the Court exercises a discretion to set aside a default judgment in those circumstances it is in no way attempting or endeavouring to exercise an appellate jurisdiction. It is my opinion therefore that Reckord J. (Ag.) had jurisdiction to set aside the default judgment herein at the suit of the respondents.

I turn now to deal with Mr. Daley's second proposition. Here he complains that the appellant does not desire to sue the respondents, does not have an original cause of action against the respondents, cannot frame a statement of claim against the respondents in respect of the original suit, and that if he attempted to make the respondents a defendant in the first instance, the respondents would apply to have

itself struck out of the action. He said further that the respondents are not a necessary party to any of the issues which lie for the determination of the Court in the action, and he referred to the powers of the Court under Section 100 of the Judicature (Civil Procedure) Code which mandates the Court to order that the names of parties improperly joined be struck out.

The Court which sets aside a default judgment regularly obtained is required to do justice between the parties. Here the defendants are now anxious to prosecute their challenge to the appellant's claim. At the time of the accident the first defendant had insured her 1983 motor truck licensed NB-2023 with the Respondents Company, covering "Third Party and Theft" risks. Had the first defendant conformed with Condition No. 4 of that policy and had forwarded "Every letter, claim, writ, summons and process" to the Respondents Company on receipt thereof, the right which the respondents would then have had would include taking over the conduct of the case in the name of the first defendant.

Whether or not the first defendant complied with this contractual obligation is a matter upon which the Court has yet to make any determination. What is beyond doubt, however, is that the respondents had notice of the commencement of the suit and could, had they been so minded, have called for the relevant documents and instructed Attorneys-at-law to appear and to conduct the defence.

It seems to me that an Insurance Company in the position of the respondents can only have a single interest at and during the trial of the original action and that single interest is, and can only be, to show that the defendant is not liable to the plaintiff or if liable to ensure that the damages awarded are appropriate and not excessive.

It could never be right for the Insurance Company to wage its own war with its client, the first defendant, as part of and during the course of the trial of issues joined on the pleadings between the plaintiff and the defendant.

The stranger, such as the respondents, who obtains an interest by virtue of obligations prescribed by Section 18 of the Motor Vehicle (Third Party Risks) Act can apply in the name of the defendant for leave to set aside the default judgment, or can apply in his own name for a similar Order but thereafter can only defend the action in the name of the defendant on the record. But I do not think that the respondents can be permitted to raise a defence peculiar to itself which has absolutely nothing to do with the original action, which is not available to the defendants in the suit, and therefore cannot be raised by such defendants. It is one thing to have a judgment set aside so that the questions in issue between the parties can be fairly tried but quite another thing to contend that collateral issues irrelevant to the plaintiff's claim against the defendants can be litigated as part of the original action. I do not think that a person who has a right to intervene to set aside a default judgment necessarily has the further right to be added as a party to the action, e.g. as a defendant, and in the instant case I can see no basis on which the addition of the respondents as a defendant can be justified. I would therefore think that the Order of Reckord J. (Ag.) ordering that the respondents be joined as a defendant cannot stand.

It is certainly time that this action, which has had so many jack-rabbit starts, should proceed along a predictable path. Once it is accepted that the respondent can only defend the action in the name of the defendants, its private disputes with the first defendant must fail for determination

outside the issues to be joined in this action. The defendants should be given an opportunity to file a defence which of course the respondents could conduct or direct. If of course the respondents are unprepared to abide by the decision of the Court at the trial, then it would be unjust to set the judgment aside in the given circumstances.

I would therefore modify the Order made by Reckord J. (Ag.) as follows:

> Default judgment entered on May 6, 1985 set aside on following Conditions:
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> 1. Defendants be at liberty to file defence within fourteen days hereof.
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> 2. Respondents to be bound by the decision of the Court upon the trial of the Action.
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> 3. Costs thrown away in the Court below and the Costs of this appeal to be paid to the appellant by the respondents to be agreed or taxed.

WRIGHT J.A.:

I agree.

GORDON J.A.:

I agree.

Cases referred to
(1) Jacques v Harrison (1883) 12 Q B 136
(2) Wunder v Chadwick (1938) 2 All ER 75