 Judgment Book.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W062 of 1991

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| BETWEEN | WINDSOR INTERNATIONAL LIMITED | PLAINTIFF |
| AND | RONALD K. PIRNIE | FIRST DEFENDANT |
| AND | PHOENIX JAMAICA LIMITED | SECOND DEFENDANT |
| AND | PHOENIX GROUP INTERNATIONAL LIMITED | THIRD DEFENDANT |

IN CHAMBERS

R.B. Manderson Jones for Plaintiff Respondent

Christopher Dunkley and Paul Beswick for third Defendant Applicant

HEARD: November 15, 18, 1991.

CORAM WOLFE J.

The summons herein filed by the third Defendant seeks the following orders:

1. That execution of the Writ of Seizure and Sale issued against the third Defendant on the 11th day of October, 1991 be stayed.
2. That Judgment in Default of Defence entered against the third Defendant herein be set aside.
3. That the third Defendant be and is hereby granted leave to file Defence and Counterclaim to the action herein by the 15th day of October, 1991, and to deliver same within 7 days of the date of the order herein;
4. Such further and other relief as to this Honourable Court may seem just.

This action was commenced, by Writ of Summons with Statement of Claim endorsed thereon, on the 11th day of March, 1991. Conditional Appearance was entered by the second Defendant "without prejudice to apply to strike out the Writ of Summons and subsequent proceedings filed therein". This Conditional Appearance was dated the 22nd day of March 1991. On the 5th day of April 1991 Ronald Brandis Manderson-Jones filed two affidavits stating:

(a) that he had served the third Defendant with a copy of Writ of Summons and Statement of Claim endorsed thereon.

(b) that he had searched the Suit Book kept in the Registry of the Supreme Court on the 5th day of April 1991 and found no Appearance, Defence or other pleadings by or on behalf of the third Defendant.

On the 5th day of April 1991 an affidavitof Debt, in respect of the third Defendant, was filed in the Registry of the Supreme Court, and on the 5th day of April Judgment in Default of Defence was entered against the third named Defendant at J Binder 686 Folio 85A. The Plaintiff on the 22nd day of April 1991 applied for a Writ of Seizure and Sale. The Writ was issued on the 26th day of April 1991. The third Defendant issued a summons dated the 13th day of May, 1991 seeking the following Orders.

(1) That service of the Writ of Summons herein upon the third Defendant be set aside and all subsequent process flowing therefrom.

(2) That the Bailiff of the Resident Magistrate's Court for the parish of Kingston be and is hereby restrained from disposing of the goods and chattels of the third Defendant.

(3) That the Bailiff of the Resident Magistrate's Court do forthwith release the goods and Chattels of the third Defendant currently in his possession by virtue of Writ of Seizure and Sale filed herein to the third Defendant or its order.

By summons dated the 27th of May 1991 the Plaintiff sought an Order (1) to serve the third Defendant out of the Jurisdiction with a copy of the Writ of Summons or with a Notice of the Writ and (2) that the time of Appearance be forty five (45) days from the date of such substituted service.

The Summons filed by the third Defendant to set aside the service of the Writ of Summons upon it and the summons for substituted service at the instance of the Plaintiff were both heard by Langrin J. on the 31st day of May 1991 when he ordered that service of the Writ of Summons upon the third Defendant be set aside and all subsequent process flowing therefrom and granted the Plaintiff's application in terms of the amended summons.

Appearance was entered on the 28th day of August 1991 by the third Defendant in response to the service of the Writ outside of the jurisdiction. Worthy of note is the fact that the date of appearance is during the long vacation.

The third Defendant moved the court by way of summons dated the 3rd day of September 1991 for an order directing the Bailiff to release the goods and chattels of the third Defendant currently in the possession of the Bailiff

by virtue of the execution of a writ of seizure and sale on the 26th day of April 1991. The Bailiff caused an Inter pleader summons to be issued of the Court and on the 4th day of October 1991 the Bailiff was ordered to release all goods in his possession, a virtute the writ of seizure and sale executed on the 26th day of April 1991, to the third Defendant. Having achieved its objective by way of the Inter pleader summons the third Defendant did not pursue the summons mentioned above.

Mr. Manderson Jones, relentless and like shylock, the Jew, insisting on his pound of flesh followed on the 4th of October with his affidavit of search stating that the third Defendant had failed to file a defence and entered Judgment in Default of Defence at J/Binder 688 Folio 118. On the same day he required a writ of seizure and sale to be sealed. The writ of seizure and sale was issued on the 11th day of October 1991.

On the 28th day of October 1991 the third Defendant issued a summons returnable on the 12th day of November 1991 seeking the following Orders.

1. That Execution of the writ of seizure and sale issued against the third Defendant on the 11th day of October, 1991, be stayed.
2. That Judgment in Default of Defence entered against the third Defendant herein be set aside.
3. That the third Defendant be and is hereby granted leave to file Defence and Counterclaim to the action herein by the 15th day of October 1991, and to deliver same within 7 days of the date of the order herein.

The summons was supported by an affidavit sworn to by Mr. Paul Beswick Attorney-at-Law and three affidavits filed by Sandy Oleson. I shall deal with the contents of the affidavit anon, but for completeness I must mention that the third Defendant leaving no stone unturned to protect himself against the relentless savagery of the Plaintiff's Attorney-at-Law sought of the Court an Exparte Injunction by summons dated the 7th day of November, 1991 and on the 8th day of November 1991 Panton J. granted the Exparte injunction in terms of the summons before him for a period of five (5) days.

Having set out the history of the matter I shall now proceed to address the task at hand. The affidavit sworn to by Mr. Beswick states at paragraphs 3,

4 and 5.

(3) "That when the Order was made giving leave to the Plaintiff to serve the writ of summons by substituted service on the third Defendant out of the jurisdiction on the 31st day of May, 1991. I calculated the time for Entry of Appearance as 45 days from the date of service of same.

(4) The Attorney-at-Law for the Plaintiff sent my legal firm a copy of his letter covering service of the Notice of Writ dated the 27th day of June 1991, and I therefore calculated time for the Appearance on the basis of 45 days commencing on the 30th day of June, 1991 and ceasing on the 31st day of July 1991, and recommencing on the 16th day of September 1991. That I did this because I believed that the rule excluding the long vacation from the computation of time applied to Appearances.

(5) That by my calculations, the time for entry of Defence expired on the 14th day of October, 1991. The Defence and Counterclaim were in fact filed on the 15th day of October, 1991 one day late on the basis of my calculations."

I accept as true the contents of paragraphs 3, 4 and 5 of Mr. Beswick's Affidavit.

Order 3 r 3 of the Rules of the Supreme Court states:

"Unless the Court otherwise directs, the period of the long vacation shall be excluded in reckoning any period prescribed by these rules or by any order or direction for serving, filing or amending any pleading."

"PLEADING" as defined -

"includes any petition or summons, and also includes the statements in writing of the claim or demand of any Plaintiff, and of the defence of any Defendant thereto and of the reply of Plaintiff to any counterclaim of a Defendant."

In Murray v Stephenson 19 Q.B.D. 60 it was held that the word "summons" in the definition of pleading did not mean writ of summons. An Appearance is only an answer to the summons. Pleading really begins after the party has answered the summons. An Appearance is therefore not a pleading and so in the instant case Mr. Beswick erred in his computation when he relied on the provisions of Order 3 r 3.

It is clear from the quoted sections of the affidavit that the fault in failing to file the defence in the required time rests squarely and heavily upon the shoulders of the third Defendant's Attorney-at-Law. I appreciate that the Attorney-at-Law is the agent of the third Defendant but I make the point to emphasize that the delay was in no way due to the litigant who the Court will always assist to ensure that he has his day in Court and that he is not driven

away from the judgment seat on the ground of mere form or technicality once he has a good defence.

Paragraph 11 of Mr. Beswick's affidavit avers that the third Defendant "has a good defence to the action herein and has additionally filed a Counterclaim etc." Although these documents have been mentioned they have not been formally exhibited and the question therefore arises as to whether or not the Court can look at them. The reference to them in the affidavit of Mr. Beswick is clearly an indication that it was intended to rely on them in support of the application. I hold that the Defence and Counterclaim notwithstanding they are not exhibited in the accustomed way can be looked at. Paragraph 1 of the Defence denies the claim by the Plaintiff. Paragraph 3 denies the allegations made in the statement of claim. It is true that the rules have laid down time frames in which the business of the Court must be conducted. However the said rules permit a Court in certain circumstances to extend the prescribed time where it is just so to do.

Mr. Manderson Jones for the Plaintiff submitted that where it is sought to set aside a judgment regularly obtained, as in the instant case, the cardinal rule is that the application must be supported by an affidavit of merit. Reliance for this proposition was place upon the following cases.

1. Evans v Bartlam 1937 A.C. p.473 at p.480. This was a case in which it was sought to set aside a judgment in default of appearance. The House of Lords in dealing with the exercise of the Court's discretion to set aside a judgment said per Lord Atkin:

> "I agree with both rules Order XIII r 10 and Order XXVII r 15 give a discretionary power to the judge in chambers to set aside a default Judgment. The discretion is in terms unconditional. The Courts however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the Judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why Judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing Judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default Judgment set aside who knew at the time and intended that there should be a Judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced Judgment upon the merits or by consent, it is to have 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. But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not in my opinion exists. (emphasis mine)

2. Watt v Barnett 1878 3 QBD p.363 at p366 Jessel M.R. said:

"I agree however, with both the learned judges that, though the service may have been regular according to the Order, still the Court has power to set aside the judgment where that is necessary for the purpose of doing substantial justice."

"The mere fact that the Defendant has not had notice of the proceedings is not of itself sufficient, to hold it to be so would in fact be setting aside the order for substituted service. But if he shews that he had no notice, and that he has a good ground of defence, it is reasonable that he should be let in to defend. The first question then is whether the Court is satisfied that there is a good defence on the merits, if not, leave to come in ought to be refused."

3. Farden and Another v Richter 1889 23 QBD 124 at p.129. Huddleston B said:

"The application to set it aside must be taken to have been met on the threshold by the objection that the Defendant had not made any affidavit suggesting that he had a defence on the merits. During the arguments I was inclined to doubt whether such an affidavit could always be necessary. But in Smith v Dobbins the present Master of the Rolls appears to have stated that it was "an inflexible rule" that a regular judgment properly signed could not be set aside without such an affidavit, and there are statements in the manuals of practice to much the same effect. The expression is perhaps strong, but, where there is no such affidavit, it is only natural that the Court should suspect that the object of the applicant is to set up some mere technical case. At any rate, when such an application is not thus supported, it ought not to be granted except for some very sufficient reason (emphasis mine).

4. Ramkissoon v Olds Discount Co (T.C.C.) Limited 1961 W.I.R. p.73.

Head Note

"The respondent's obtained judgment in default of defence against the appellant on November 28, 1960. On December 15, 1960 the appellant applied to a judge in chambers to have the judgment set aside. The application was supported by an affidavit sworn to by the appellants solicitor and a statement of defence signed by Counsel. The application was refused. The appellant appealed, contending, inter alia, that the affidavit along with the defence constituted a sufficient disclosure of merit and dispensed with the need for an affidavit from the defendant personally. In his affidavit the solicitor did not purport to testify to the facts set out in the defence nor did he claim to

have personal knowledge of the matters put forward to excuse the failure to deliver the defence. (emphasis mine)

Held: (1) the solicitors' affidavit did not amount to an affidavit stating facts showing a substantial ground of defence; and as the facts related in the statement of defence were not sworn to by anyone, there was no affidavit ofmerit before the judge or the Court of Appeal.

(2) the judge having given consideration to the relevant factors before exercising his discretion and as there was no sufficient ground for saying that he had acted contrary to principle, his decision could not be disturbed. Evans v Bartlam followed Appeal Dismissed."

All the cases cited make it clear that an application to set aside must be supported by an affidavit of merits, and that in the absence of such an affidavit an order to set aside ought not to be made but in Farden and Another v Richter supra. Huddleston B went on to add the words "except for some very sufficient reason". I take the view that these words if they are to have any meaning must refer to reasons which are apparent from the circumstances notwithstanding the absence of the affidavit of merits or the failure of the affidavits of merits to disclose such reasons.

In Ramkissoon's case the solicitor swearing to the affidavit was unable to depose as to the reason for the failure to file the defence in time. In the instant case the affidavit sworn to by Mr. Paul Beswick does show that Mr. Beswick "has personal knowledge of the matters put forward to excuse the failure to deliver the defence". In my view his reference in his affidavit to the Defence, which is on the records, notwithstanding that it has not been properly exhibited empowers the Court to view it and consider it in arriving at its decision.

Mr. Manderson Jones admitted that the proposed Defence was served upon him but that he refused to accept it as it was being served out of time. Mr. Beswick in his affidavit has said that the Defendant has a good defence in law and paragraph 1 of Defence denies that the amount claimed is owing and claim a sum by way of counterclaim.

In the event that I am wrong in looking at the defence and holding that the affidavit of Mr. Beswick is a sufficient affidavit of merits. I am prepared to say that the circumstances of this case satisfy "the except for some very sufficient reason" of which Huddleston B spoke and which McShine Ag. C.J. cited

with approval in Ramkissoon v Olds Discount Co. (TCC) Limited supra at p. 75

For the reasons aforesaid the Order is granted in terms of paragraphs 1, 2 and 3 of the summons dated October 28, 1991.

Certificate for one Counsel granted.

Costs to be costs in the cause.

Leave to Appeal granted.