NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 102 & 103/96

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	**WORKERS SAVINGS AND LOAN BANK LIMITED**	**APPELLANT**
AND	**WINSTON McKENZIE** **BENROS COMPANY LIMITED** **BENTLEY ROSE**	**RESPONDENTS**
AND	**WORKERS SAVINGS AND LOAN BANK LIMITED**	**APPELLANT**
AND	**MACRO FINANCE CORPORATION LIMITED** **BENROS COMPANY LTD** **BENTLEY ROSE**	**RESPONDENTS**

Dennis Goffe, Q.C. & John Graham instructed by Patterson, Phillips & Graham for the appellant Bank

Clifton Daley for Respondents Benros Co. Ltd. & Macro Finance Corporation & Enos Grant for Bentley Rose Ltd instructed by Daley, Walker & Lee Hing

Robert Armstrong holding a watching brief for the respondent Winston McKenzie

November 25, 26, 27, 28, 29 & December 3 1996

RATTRAY, P.

I agree with the Order as pronounced by Downer J.A. for the reasons stated in the judgment.

DOWNER, J.A.

INTRODUCTION

These appeals were heard together because they raise the same issues of law. They also demonstrate unusual conduct by the Registry of the Supreme Court which ought not to be repeated. When litigants approach the Registry they ought to be treated equally for discriminatory conduct speaks the language of injustice. The respondents Bentley Rose and his two companies Benros Company Ltd and Macro Finance Corporation Ltd have every right to feel a sense of injustice in the light of the Registry's rulings in these cases. It is to be hoped that the judgment of Smith J will have restored the reputation of the Registry which was temporarily disturbed.

The issues on appeal

There are two principal issues to be resolved in this appeal. The first is whether the Registrar was right in refusing to enter the default judgment in the light of the Formal Order of the Supreme Court dated 18th October, 1996 That Formal Order was signed by her. Had entry been made by the Registry then, Bentley Rose and his two corporations would have been entitled to enforce the default judgment of $89, 958, 586.80 in favour of Benros Company Ltd and $13,984,782.51 in favour of Macro Finance Corporation Ltd. Correspondingly the Bank and the other respondent Winston McKenzie could have moved the court to set aside the default judgment.

The second issue was whether at an earlier stage the two respondent companies were entitled to have judgment of default entered by the Registrar in the light of their applications to the Registry on 8th October 1996. This has very important implications for the respondents in the light of Section 451 of the Judicature (Civil

Procedure Code) Law (The Code). This section applies to judgments in default of pleadings. It states:

> "451. Date of entry of other judgments.
>
> In all cases not within the last preceding section, the entry of judgment shall be dated as of the day on which the application is made to the Registrar to enter the same, and the judgment shall take effect from that date."

The section is characteristic of a common law judgment in that it has a retrospective effect. It means that the Registrar's refusal to carry out her duty and the prolonged submissions by Mr. Goffe in this court on behalf of the Bank has further served to frustrate the respondent companies. Men of commerce require quick and accurate decisions to their problems. The judicial system can be of assistance, but counsel must play their part.

The first issue

The initial step to note was the summons to file a defence out of time by the Appellant Bank which instituted proceedings before Smith, J in chambers. The remedy sought was as follows:

> "(1) Leave be granted to the First Defendant to file and deliver its Defence to the action within seven (7) days of the date of the Order."

It was filed in the Registry on 9th October and served on 10th October, 1996.

The Formal Order on that summons was filed on 22nd October, 1996 and the hearing was on the 18th October. The relevant sections of the order state:

> "1. The Summons be and is hereby dismissed
>
> 2. Leave to appeal granted.

> 3. Stay of execution of the Judgment in Default granted for 14 days"

The reasoning of Smith, J was short and clear. Referring to the default judgment which the respondent companies sought to enforce the learned judge said:

> "Judgment was filed on 8th October, 1996" Once these documents were filed the proper course is to apply to set aside the judgment."

Which documents was Smith J referring to? Section 70 of the Code stipulates what the applicant for a default judgment ought to provide. That section states:

> "Procedure to judgment in cases of liquidated demands.
>
> 70. Where the writ of summons is indorsed with a claim for a liquidated demand, whether specifically or otherwise, and the defendant fails, or all the defendants (if more than one) fail, to appear thereto, the plaintiff may, on an affidavit of service of the writ, and of such non-appearance as aforesaid, and to the effect that the debt is due and payable and still subsisting and unsatisfied, enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of six per centum per annum, to the date of the judgment and costs."

The relevant affidavits were those of Search and Debt. The learned judge said of them:

> "Dealing with Suit No B-141/96 it would seem to me that Affidavit of Debt and Affidavit of Search are in order,"

Here are the relevant paragraphs from the Affidavit of Search:

> "2. That I did on the 8th day of October, 1996, carefully search the Suit Book kept in the Registry of this Honourable Court from and including the 3rd day of May, 1996 the date of the filing of the Writ of Summons to and including the date hereof for the purpose of ascertaining whether any defence has been filed by or on behalf of the 1st Defendant to this Action.

> 3. That I find from such search that no Defence has been filed by or on behalf of the 1st Defendant to the Writ of Summons and Statement of Claim herein."

The Affidavit of Debt in full reads:

> "I Bentley Rose, being duly sworn make oath and say as follows:
>
> 1. That I reside and have my true place of abode and postal address at 5 Johnson Close, Key Stone in the parish of Saint Catherine and I am a businessman, and incorporated under the laws of Jamaica and having registered offices situate at 39 Brentford Road, Shop No. 12 in the parish of Saint Andrew and I am duly authorised to make this Affidavit on behalf of the said Company as well as on my own behalf.
>
> 2. That the 1st Defendant was at the date of the issue of the Writ of Summons herein justly and truly indebted to the Plaintiffs in the sum of Eighty-Nine Million, Nine Hundred and Fifty-Eight Thousand, Five Hundred and Eighty-Six Dollars and Eighty Cents $89,958,586.80) as set out in the Statement of Claim.
>
> 3. That since the filing of the Writ of Summons nothing has been paid on account of the said amount and there is now bona fide due and owing to the Plaintiffs in the sum of Eighty-Nine Million, Nine Hundred and Fifty-Eight Thousand, Five Hundred and Eight-Six Dollars and Eighty-Cents ($89,958,586.80) which said sum is due and payable and still subsists and is unsatisfied.
>
> 4. That I depone to this Affidavit from matters within my personal knowledge and from my examination of the files and documents of the Plaintiffs."

The affidavits concerning Macro Finance Corporation are identical except that the debt is $13,984,782.51.

Continuing the learned judge said:

> "The proper course is to apply to set aside the default judgment filed on the 8th October, 1996."

The situation then is that the learned Registrar (Ag.) had both the judge's reasons and the Formal Order which in clear terms recognised the existence of the default judgment. Further by expressly stating that affidavit of Search and Debt were in order, the implication was that the learned judge in a courteous manner for which he is noted, was commanding the Registrar to carry out her ministerial duty to enter the default judgment. The learned judge's reasons for Macro Finance Corporation are similar. It is appropriate to set it out:

> "Affidavit of Debt and Affidavit of Search were filed on the 8th October, 1996.
>
> Judgment in default of pleadings filed on the 8th of October, 1996.
>
> The defendants contending the judgment filed on the 8th of October, 1996 is irregular.
>
> Summons for Leave to file Defence Out of Time filed on the 9th day of October, 1996 for hearing on the 17th of October, 1996.
>
> Court rules that the proper course is to apply to set aside the default judgment.
>
> Summonses in both cases dismissed."

Having regard to the request made by the respondent companies to enter the default judgments, what was her duty? Her job description is in statutory form. Section 12 of the Judicature (Supreme Court) Act states in part:

> "12 - (1) ... shall perform the following duties, that is to say -
> ...
> attend the sittings of the Courts and Judges, take minutes, write out and enter up judgments and orders;
> ..."

Further her duties pursuant to section 12 were to :

> "transact all such ministerial business of the Supreme Court, and perform such other duties of a like kind, as are assigned to him by rules of court:"

One ministerial duty contemplated both by the learned judge's reasons and the Formal Order of the Court was that the Default Judgment of both companies be entered. Whatever doubts she may have had previously they could no longer exist. At this stage it is appropriate to refer to the default judgment in issue. That for Civil Appeal 102 of 1996 in so far as relevant reads:

> "DATED THE 8TH DAY OF OCTOBER, 1996
>
> The 1st Defendant, WORKERS SAVINGS & LOAN BANK LIMITED, not having delivered any Defence, IT IS THIS DAY ADJUDGED that the Plaintiffs recover against the said Defendant:
>
> (a) Final Judgment for the sum of Eighty-Nine Million, Nine Hundred and Fifty-Eight Thousand, Five Hundred and Eighty-Six Dollars and Eighty Cents ($89,958.80) and costs to be agreed or taxed.
> ..."

Counsel for the respondent companies pleaded with the Registrar but to no avail. She preferred to act on the persuasive words of Mr. Graham, counsel for the appellant, Workers Bank. Here is Mr. Daley's letter to her dated 25th October after the hearing before Smith J and the Formal Order.

> "We received a copy of a letter written to you by Messrs. Patterson, Phillipson & Graham.
>
> The Formal Order of the Court on the hearing of the Summons brought by the defendants for extension of time to file defence has been served on the

> defendants. All parties must be guided thereby.
>
> Mr. Graham's contention is not only erroneous, it is irrelevant.
>
> The learned Judge has ruled that the Judgment in Default of Defence has been duly filed and leave cannot be sought for extension of time to file defence. The learned Judge in his equitable jurisdiction has deemed to be done what ought to have been done, and the plaintiff's application was dismissed on the preliminary point that leave to file defence could not be granted when Judgment in Default of Defence was already duly filed. In any event section 249 of The Judicature (Civil Procedure Code) Law makes it clear that it is the plaintiff who enters judgment by filing the requisite documents.
>
> The proper course for the defendant to follow would be to apply for leave to set aside the default judgment.
>
> No stay of execution in relation to the recording of the judgment has been granted. The function of the Registrar was and remains an administrative act, and no suit has yet been brought in relation to the failure to carry out the said act. We certainly hope that you will not be misguided by Messrs. Patterson Phillipson and Graham as we do not wish to be constrained to apply for an order of mandamus directing you to carry out your statutory duty of recording the judgment pursuant to section 587 of The Judicature (Civil Procedure Code) Law."

In fairness I should also advert to the persuasive letter of Mr. Graham dated October 23, 1996. Here is the remarkable letter. It had disastrous effect on the respondent's case:

> "Attention: Mrs. Carol Beswick
>
> Dear Madam:

Re: Suit No. C.L. M-150 of 1996 -
Macro Finance Corporation Limited
et al vs Workers Savings & Loan
Bank Ltd et al

On the 18th day of October 1996, Mr. Justice Smith made an order in the captioned matter, a copy of which is enclosed.

The Summons for Leave to File Defence Out of Time was not heard on the merits and was dismissed on the preliminary point that once the papers were filed for judgment in default of defence notwithstanding the fact that the Registrar had not formally entered the judgment the application being brought by a defendant who is in default of defence should be an application to set aside judgment and that an application for leave to file the defence out of time would not be entertained.

We have filed an appeal against the Judge's Order, a copy of which we attach. The Notice and Grounds of Appeal is enclosed.

You will note that the Court granted leave to appeal and granted a stay of execution for fourteen (14) days. It is our contention that while the appeal is pending and the Order for Stay of Execution is in place your taking any steps in relation to the entry of a judgment would be premature.

We also note that a requisition is on the court file which has not been complied with.

We ask that you be guided accordingly.

Per: JOHN G. GRAHAM"

The result of the Registrar's conduct was that inspite of the reasons of Smith J, the Formal Order and the representation of Mr. Daley, the default judgment which ought to have been entered from at least 18th October has still not been entered. It

was an unusual conduct by the learned Registrar and she should now enter the default judgment forthwith. This peremptory order is in compliance with Section 587 of the Civil Procedure Code which reads:

> " Decree Book.
>
> Record of final judgments and orders.
>
> 587. Every final judgment or order of the Court, and every judgment by default, or by confession or by consent of 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 index thereof."

The Second Issue:

Whether Smith J was correct or not about the default judgments, it was for this court to decide. Once His Lordship recognized their existence and adverted to them, it was the ministerial duty of the Registrar to enter them in the decree register for their due effect.

It is now necessary to determine whether the learned judge was right. That involves an examination of whether the respondent companies had complied with the provisions of the Code relating to the entry of default judgments. The affidavits of Search and Debt being in proper form as well as the default judgment, the learned judge's ruling was correct. How could a defence be filed while the judgment existed and ought to have been entered?

The respondent companies took a preliminary point of law on the basis that once there was a default judgment in existence, it was inappropriate to grant leave to file defence out of time as counsel for the Bank had requested. Smith J upheld the objection and dismissed the summons. Since the contention in this court was that

there is a good defence to the respondent companies' claim then a prudent commercial lawyer ought to have acted promptly and sought to set aside the default judgments. It was in the interest of the Bank so to do.

It is difficult to understand why counsel for the Bank fears to go before a judge of the Supreme Court to set aside the default judgment. Among other considerations any judge will heed the words of Lord Russell in ***Evans v Bartlam*** [1937] 2 All ER 646 where His Lordship said at p. 651:

> "... The contention no doubt contains this element of truth, that, from the nature of the case, no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action; and (b) how it came about that the applicant found himself bound by a judgment regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance."

Earlier Lord Atkin at p. 651 had said:

> "... 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."...

Further in the same case Lord Wright said at p. 654:

> "... Thus in *Gardner v Jay* [1885] 29 Ch.D. 50 at p. 58, Bowen, L.J., in discussing the discretion of the judge as regards mode of trial, says:
>
> *That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed."*

Instead of instituting proceedings to set aside the default proceedings, the appellant went before my brother Bingham in chambers. By consent, there was a further stay of execution of the default judgment. Then there was this appeal against the order of Smith J.

What did the respondent companies do?

Since the respondent companies are interested in enforcing the default judgments, it was convenient to concentrate on those provisions pursuant to Title 20 Default of Pleading which pertain to a final judgment. Section 245 of the Code reads:

> "245. If the plaintiff's claim be 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 this Law at the expiration of such time, enter final judgment for the amount claimed, with costs."

Since the Bank sought an extension of time to file a defence, when there was in existence a default judgment, it is clear that they have admitted that they were out of time. So the learned judge, as a matter of law, dismissed the summons on a preliminary point of law and he was correct.

The proceedings in chambers before Bingham JA

These were proceedings pursuant to paragraph 33 of the Court of Appeal Rules 1962 which terminated with a consent judgment:

> (1) That the proceedings be stayed herein pending the hearing of the appeal.

It was agreed by all that there was a contest on the issue of costs. The order for costs was costs to the respondents to be agreed or taxed. The Bank appealed against the order. I would not disturb my brother Bingham's proper exercise of his discretion. So I affirm his order as to costs.

Conclusion

This appeal is dismissed and the order of Smith J is affirmed. He had granted a stay of execution of the default judgment for fourteen days. That was on 18th October 1996. The formal order was filed on 22nd October 1996. The Bank has had over a month to put its house in order since then. I would grant seven days hereof to stay execution of the default judgments. The agreed or taxed costs of this appeal are to go to the respondents.

Before parting, I think I should say that it would be in the interests of justice for the parties to seek an audience with Wolfe CJ for an early date if counsel for the Bank still wishes to follow the sage advice of Smith J, to move the Supreme Court to set aside the judgments in default.

Order

1. The appeal is dismissed and the order below affirmed.
2. The Registrar of the Supreme Court is directed to enter the default judgments forthwith.
3. The Order for costs pronounced by Bingham J.A. in chambers is affirmed.

4. Stay of execution of Judgments in Default granted for seven days hereof.

5. The agreed or taxed costs of the appeal is to go to the respondents.

BINGHAM J.A.

I have read in draft the judgment prepared in this matter by Downer J.A. I am in agreement with his reasons set out therein and there is nothing further that I can usefully add.