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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL H 142 OF 1995

BETWEEN OSWALD HENRY PLAINTIFF/RESPONDENT

AND CORRINA PERRY DEFENDANT/APPLICANT

Mr Sean Kinghorne for the Defendant/Applicant, instructed by Gaynair & Fraser.

Mr Richard Reitzin instructed by C.J. Mitchell & Co. for the Plaintiff/Respondent.

Heard on the 15th, 16th and 29th days of December 1999, and the 13th day of January 2000, and the 2nd day of March, 2000.

Coram: Orr J.

Introduction

On 13th January I delivered an oral judgment in this matter and promised to provide a written transcript of my reasons I now fulfil that promise.

On 23rd July 1998, the defendant not having filed a defence, the plaintiff obtained judgment in pursuance of a motion before Theobalds J. (the formal order incorrectly states that the motion was heard by Reckord J.)

The notice of motion sought the following orders and/or declarations:

> "1. At all material times the Plaintiff and the defendant are joint registered owners as joint tenants in respect of all those premises situated at 59, Young Street, Spanish Town, in the Parish of Saint Catherine and registered at Volume 1100 Folio 393 of the Register Book of Titles and of all those premises situated at Lot 12, Wellington Drive Hopedale, Spanish Town in the Parish of St. Catherine registered at Volume 1074 Folio 543 of the Register Book of Titles.
>
> 2. That both properties be valued by a reputable valuator.

3. That the properties be sold and the net proceeds of sale be divided between the parties.

4. In the alternative that the property at Lot 12 Wellington Drive, Spanish Town, in the Parish of St. Catherine be awarded to the Defendant and the property at 59, Young Street, in the Parish of St. Catherine be awarded to the Plaintiff.

5. That the Defendant be ordered to pay the cost of the valuation.

6. That the Defendant be condemned in costs.

6. Such further and other relief as may be just.

The order by Theobolds J. was as follows:

> "1. That the property at Lot 12 Wellington Drive, Spanish Town, in the parish of Saint Catherine be awarded to the defendant and the property at 59, Young Street in the Parish of Saint Catherine be awarded to the Plaintiff.
>
> 2. That the Defendant be condemned in costs."

This is an application by way of Summons to set aside the judgment so obtained, and for leave to file a defence "within fourteen (14) days of the date of the Order herein."

By paragraph 3 of the summons the defendant also seeks an order that:

> "The Plaintiff whether by himself, his servants and/or agents or otherwise be restrained by injunction from selling, transferring and/or otherwise disposing of."
>
> (i) All That Parcel of land known as 59 Young Street, Spanish Town,

in the parish of Saint Catherine
containing by estimation One
Thousand One Hundred Square
Feet and being All That Parcel
of land registered at Volume
1100 Folio 393.

(ii) All that Parcel of land part of
Ballinware part of Hopedale
in the parish of Saint Catherine
being All That Parcel of land
registered at Volume 1074
Folio 543 of the Register Book
of Titles.

Until the determination of the
Instant suit."

A PRELIMINARY OBJECTION

Mr Reitzen took a preliminary objection that the judgment obtained could not be categorized as a default judgment and therefore could not be set aside. The defendants only recourse was to appeal.

He developed his argument in this way:

Judgment upon motion for judgment arises out of court proceedings; Judgment by default is ministerial. Even if a judgment upon motion for judgment could be regarded in law as a default judgment, nevertheless in this particular case, it did not amount to a default judgment.

On a motion one party must appear whereas a true default judgment is obtained without appearance before a judge.

Substantial evidence on the merits is adduced on motion whereas in a default judgment no such evidence is required.

On a motion the relevance, and admisibility of evidence is tested by the court before it is received.

On a motion the evidence is weighed. None is admitted in a default judgment.

Argument is heard by the Court on substantive issues on motion. The contrary applies to a default judgment.

In the instant case, as in all motions for judgment, the judgment is formulated by the judge on due consideration of the evidence. The relief granted was an alternative in the prayer.

Section 258 of the Civil Procedure Code (CPC) does not permit judgment by default on motion to be set aside.

If section 258 of the Civil Procedure Code can apply to motions or trials then there would be no need for section 354.

Section 442 contemplated two (2) broad categories of judgments. (a) On motion for judgment, and (b) in any other manner. Category (b) is designed to distinguish judgment by default from, for example, judgment upon motion, and shows that they are mutually exclusive.

The applicant has not shown that the judgment was a default judgment, for example that the judge did not use his intellect.

Mr. Kinghorne in reply, pointed out that section 307 of the Civil Procedure Code provided for judgment on admissions. Section 442 compels a plaintiff to proceed by motion unless he is allowed to file a summons. Had a defence been filed the plaintiff could not have proceeded by motion but would have had to go to trial. Hence the defendant/applicant is correct in maintaining that the judgment is a judgment in default.

The Court's Analysis and Conclusion

(a) The Procedure on a Motion for Judgment

In giving judgment on motion the judge may look at the statement of claim and nothing else - Young v Thomas [1892] 2 Ch 135. Bowen L.J. explained the rationale for this rule at 137: He said

> "There is no doubt that, in determining the rights of the parties in the action, the statement of claim alone is to be looked to, and the reason for this rule is obvious, namely that the facts stated therein are taken to be admitted by the defendant and as, has been decided by Lord Justice Kay in Smith v Buchan, no evidence can be admitted as to those facts.

Where the plaintiff sought to use affidavits filed in support of his motion for judgment, the court refused to read them and ordered that the cost of their preparation should be disallowed - Jones v Harris (1887) 55LT884. That disposes of the points regarding evidence as submitted by Mr Reitzin.

(b) The Nature of the Judgment in the Instant Case

This rule which restricts the judge's consideration to the pleadings only, points to a very important fact in relation to the motion for judgment. It is not a judgment on the merits. It is gained because the process has been accelerated by the defendant's failure to file a defence; in other words it is a judgment in default of defence. It is an inescapable and central fact, is that it is this default which makes the judgment possible. It is crucial to the motion.

The court's approach to judgments in default is enshrined in the oft quoted dictum of Lord Atkin in Evans v Bartlam (1937) AC 473 at 480, where he said:

> "The principle obviously is that unless and until the court has pronounced 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." (emphasis added)

But Mr Reitzin argues that there is no provision for setting aside a judgment such as that in the instant case.

(c) The Statutory Provisions Governing Judgment by Default

The sections of the Judicature (Civil Procedure Code) Law, as set out hereunder are important to a consideration of the issues. They are as follows:

"Setting aside or varying judgment"

77 Where judgement is entered pursuant to any of the preceding sections of this Title, it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may be just."

This section applies only to matters under Title 12 – Default of Appearance and therefore does not apply to this case.

Under "Title 26 – Default of Pleading."

Defendant In default

254. In all actions, other than actions against the Crown and those mentioned in the preceding sections of this Title,the plaintiff may, if the defendant does not within the time allowed for that purpose deliver a defence, apply for judgment by motiton or summons, and on the hearing of the application the Court or a Judge shall give judgment as the plaintiff appears entitled to on the statement of claim.

Setting Aside Judgment by Default

258. 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. (emphasis supplied)

Under "Title 33 – Trial"

"iv **Proceedings at Trial**

352 ....
353............

Application to set aside verdict or judgment by default

354. Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon application made within ten days after the trial."

Section 354 does not apply to the instant case, as what took place does not amount to a trial in that no evidence could be heard and no affidavits considered.

There now remains only section 258. Mr Reitzin as noted earlier, argues that if Section 258 applies to judgment obtained on motions or trials then there would be no need for Section 354; and that Section 258 does not apply to the instant case.

I am of opinion that the marginal note "setting aside judgment by default" may be used to assist in the interpretation of this section.

It may be objected that one should not have regard to the side notes in interpreting the sections of the law. I do not agree. It is true that, that was the view held in time past and by distinguished judges such as Willes J at that: but the modern view is different.

In R v Schildkamp [1971] AC 1 at page 10 Lord Reid observed:

> "The question which has arisen in this case is whether and to what extent it is permissible to give weight to punctuation, cross-headings and side-notes to sections in the Act. Taking a strict view, one can say that these should be disregarded because they are not the product of anything done in Parliament. I have never heard of an attempt to move that any of them should be altered or amended, and between the introduction of a Bill and the Royal Assent they can be and often are altered by officials of Parliament acting in conjunction with the draftsman.
>
> But it may be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act. I say more realistic because in very many cases the provision before the court was never even mentioned in debate in either House, and it may be that its wording was never closely scrutinised by any member of either House. In such a case it is not very meaningful to say that the words of the Act represent the intention of Parliament but that punctuation, cross-headings and side-notes do not.
>
> So, if the authorities are equivocal and one is free to deal with the whole matter, I would not object to taking all these matters into account, provided that we realise

> that they cannot have equal weight with the words of the Act. Punctuation can be of some assistance in construction. A cross-heading ought to indicate the scope of the sections which follow it but there is always a possibility that the scope of one of these sections may have been widened by amendment. But a side-note is a poor guide to the scope of a section, for it can do no more than indicate the main subject with which the section deals.

Lord Upjohn in his speech said at page 27.

> It must always be remembered that cross-headings, punctuations [sic] and marginal notes are not part of the Bill passing through Parliament in this sense that they cannot be debated and amended as the Bill passes its various stages, in marked contrast to the preamble and long title. These cross-headings and marginal notes are put there in the first place by the Parliamentary draftsman but as the Bill proceeds may be altered (probably in consultation with the draftsman) by the officials of Parliament to accord with amendment made to the body of the Bill as it progresses."

It must also be noted that the whole Act is produced by Parliament as its Act, and by law a reference to an Act is a reference to the Act as published.

Hence I regard the marginal note to section 258 as capable of giving assistance as to the scope of the section. This marginal note "setting aside judgment in default" taken together with the Title "Default of Pleading" would suggest that the section was intended to deal with judgment in default of pleading only, that it indicated, in the words of Lord Reid, "the main subject with which the section deals." But there can be no denying that the words of the body of the section are very wide – much wider than mere default of pleadings. How does one solve this dilemna?. For the words are wide enough to cover every provision for setting aside a judgment in default already mentioned. I think the answer is to admit the draftsman has indulged in tautology, and has inserted an all embracing provision akin to the usual sweeping general denial which appears at the end of each defence.

In the end I am of opinion that the best one can say of this section is that it is tautologous and echo the words of Brett M. R. in Hough v Windus (1884) 12 QBD 224 at 232. Where he remarked of the Bankruptcy Act (1883):

> "The more ..... I have considered this case the more difficult it appears to me to be, but I have come to the conclusion, though with great doubt that the legislature intended this Act to be verbose and tautologous, and intended to express itself twice over."

I hold therefore that Section 258 applies to a judgment in default of pleadings and therefore to the instant case and hence this application is in order, in other words the judgment obtained is a judgment in default of pleadings.

I wish to state that if Mr Reitzin were correct and Section 258 is inapplicable, I would still be prepared to grant this application. This could be done by invoking the provisions of section 686, or under the inherent jurisdiction of the court.

Section 686 is couched in these terms:

General

> **686.** Where no other provision is expressly made by law or by Rules of Court the procedure and practice for the time being of the Supreme Court of Judicature in England shall, so far as applicable be followed, and the forms prescribed shall, with such variations as circumstances may require, be used."

In Lopez v Geddes Refrigeration Limited (1968) 10 JLR 558 Fox JA delivering the judgment of the Court of Appeal and explaining the significance of this provision said at page 559 line I.

> "This section supplies the machinery whereby any gap in the code may be filled by making reference to the procedure and practice in England. If there is no gap in the code, the section does not apply."

In Neville Williams v Jamaica Pump & Valve Ltd and others, 20 JLR 1 Chester Orr J had before him a case in which the plaintiffs had begun an action by originating summons instead of by writ as required by the Code. But the Code made no provision for such an eventuality. The learned judge invoked section 686 and adopted the English

Order 28 r 8 which empowers the Court in such circumstances to order the proceedings to be continued as if begun by writ.

Similarly, I would be prepared to invoke the provisions of the English Order 19 r 9, which allows a defendant against whom judgment has been entered in default of defence to set it aside. It is noteworthy that such applications are brought by motion – Cooke v Gilbert [1882] WN 111 at 128, National & Provincial Bank v Evans (1881) WR 177 cited in Commercial Litigation: Preemptive Remedies Third Edition page 478.

As regards the inherent jurisdiction of the court, it is appropriate to quote from the article "The Inherent Jurisdiction of the Court" by I. H. Jacob Vol. 23 Current Legal Problems 1970 p. 23. At pages 50-51 He writes:

Relation Between Inherent Jurisdiction and Rules of Court

> It has been observed more than once that the court can exercise its inherent jurisdiction by summary process, even where there are Rules of Court under which it can exercise an equally effective jurisdiction. It may be useful at this stage therefore to define more precisely the relation, as well as the differences, between the inherent jurisdiction and the Rules of Court.
>
> The powers of the court under its inherent jurisdiction are complementary to its powers under Rules of Court; one set of powers supplements and reinforces the other. The inherent jurisdiction of the court is a most valuable adjunct to the powers conferred on the court by the Rules. The usefulness of the Rules of Court is that they regulate with some precision the circumstances in which the court can apply coercive measures for disobedience of or non-compliance with the requirements of the rules or orders of the court. These measures are simply convenient and effective to uphold the authority of the court in cases in which there are no aggravating circumstances accompanying such disobedience or non-compliance.
> On the other hand, where the usefulness of the powers under the Rules ends, the usefulness of the powers under inherent jurisdiction begins. This is shown in three important respects in which the powers arising out of the inherent jurisdiction differ from those conferred by Rules of Court. First, perhaps by their very nature, they are wider and more extensive powers, permeating all proceedings at all stages and filling any gaps left by the Rules and they can be exercised on a wider basis,

> for example, by enabling the court to admit evidence by affidavit or otherwise in order to examine all the circumstances appertaining to the merits of the case. (emphasis mine)

I am of opinion that the court could in its inherent jurisdiction in the absence of any appropriate rule of court set aside any judgment such as this which had not been obtained on the merits, in keeping with the dictum of Lord Atkin in Evans v Bartlam quoted above. As Jacob points out at page 51 op. cit.

> In this light, the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. A definition somewhat to this effect may be found in the Indian Code of Civil Procedure, which provides:
>
> "Nothing in this code shall be deemed to limit or otherwise Affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."
>
> It may be objected that this view of the nature of the inherent jurisdiction of the court postulates the existence of an amplitude of amorphous powers, which may be arbitrary in operation and which are without limit in extent. The answer is that a jurisdiction of this kind and character is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers, and free from the restraint of their jurisdiction in contempt and the Rules of Court, it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice.

In the result the objection is overruled with costs to the applicant to be taxed if not agreed.