IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO: C.L. 2000/ B-011

BETWEEN	MARK BROWN	PLAINTIFF
AND	THE ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
AND	DET. CONS. WAYNE WELLINGTON	2ND DEFENDANT

Jeffrey Daley, Esq., instructed by Rattray, Patterson, and Rattray for the Plaintiff;

Mrs. A. Ferguson-McNair instructed by the Director of State Proceedings for the 1st Defendant.

Second Defendant Not Appearing or Represented

JUDGMENT

IN CHAMBERS

This matter came on for hearing in Chambers on the 29th day of March, 2001, by way of cross summonses, one on the part of the Plaintiff for an Order to proceed to assessment of damages, and the other hand, one on the part of the 1st Defendant, to set aside the interlocutory Judgment in default of defence which had been secured by the Plaintiff. It was decided that the application to set aside and grant leave to file defence out of time should be heard first as, depending upon the outcome of that Summons, it might not be necessary for the other summons to be pursued. This course is consistent with that suggested as the appropriate one by Campbell J.A. in **Jamaica Record, Ricketts, Mayne, et al v Western Storage Limited [1990] 27 J.L.R. 55 at page 57 Para H.** After the hearing on March 29, 2000, I stated that in deference to the arguments advanced and the authorities cited by the parties, I would reserve judgment and hand down a written judgment. In furtherance of that undertaking, I now provide this decision.

This is yet another case where a citizen sues the state and for whatever reasons, a defence is not filed within the time limited for such filing and the plaintiff seeks to proceed to

assess his damages. For the purposes of the summons, the history of the matter may be briefly stated.

On January 20, 2000, the Plaintiff filed a Writ of Summons against the defendants to recover damages for assault and battery, and for negligence, in relation to an incident which had purportedly occurred in Old Harbour on the 27th day of October, 1998. The writ, together with the statement of claim, was served by the Plaintiff on the 1st defendant on the 21st day of January, 2000. Attempts to serve the second defendant appear to have been unsuccessful, and in the result, an Order had been made granting renewal of the writ, in the hope of serving the second defendant. The 1st defendant entered an appearance on the 27th day of January 2000, but thereafter failed or neglected to file a defence within the time allowed. Leave to enter interlocutory judgment against the first defendant was granted by the acting Master on October 2, 2000, and entered in the Judgment Binder at binder No: 725, Folio 453. It was pursuant to this Order that, on November 16, 2000, the Plaintiff filed a summons for order to proceed to assessment of damages. Meanwhile, on the 31st day of October 2000, the first defendant had filed a summons to set aside interlocutory judgment. After some abortive attempts to have the matter heard, it finally came on for hearing before me on March 29, 2001.

The affidavit in support of the summons to set aside the interlocutory injunction was sworn by Yolande Lloyd-Alexander, Assistant Crown Counsel in the Attorney General's Chambers. The affiant in her affidavit admitted that the Director of State Proceedings had been served with the writ, that an appearance had indeed been entered on behalf of the Director of State Proceedings, but "that a defence had not been filed within time due to administrative difficulties in obtaining instructions in this matter". In light of comments which I make later, I wish to say that I accept that it is a reasonable inference from the passage quoted, that the failure to file the appropriate defence was not deliberate. The affidavit also contained the following paragraphs, to which I will also return later.

6. That a file has now been obtained and a defence drafted upon the instructions contained therein. A copy of the proposed defence is exhibited hereto and marked "YLA1".

7. That I am informed by the second-named defendant and verily believe that the first-named defendant has a good defence to this action.

8. That I am informed by the Second-named Defendant and do verily believe that the Defendant (sic) actions were reasonable and justified in the circumstance for the following reasons:-

   a. The second-named defendant was in pursuit of the known gunmen;

   b. The gunmen opened fire in the direction of the Second-named Defendant and the Second-named Defendant returned the fire.

   c. The Plaintiff was an innocent bystander who received an injury as a result of the cross-fire.

A draft of a proposed defence was attached to the affidavit and this appeared to be consistent with the affidavit.

Similar circumstances, though not identical, were faced and considered by Karl Harrison J. (Acting, as he then was), in the case, **Clyde Graham v The Attorney General and Donovan Mason, Suit No. C.L 1993/G110**. As was stated by Harrison J. (Ag), in that case: "In relation to default of pleadings, section 258 of the Civil Procedure Code states:

> "Any judgment by default, whether under this Title or under any other provisions of this law, may be set aside by the Court or Judge upon such terms as to costs or otherwise as such Court or Judge may think fit."

This section therefore gives the Court or Judge a discretion when it comes to setting aside of default judgments".

The learned judge referred to the leading case on this question, **Evans v Bartlam (1937) 2 AER 646**, and in particular, the judgment of Lord Atkin, the relevant and often-quoted portion of which is set out below.

> "I agree that both RSC Order 13 r 10 and RSC Order 27 r 15 give a discretionary power to a judge in Chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts have, however, 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....."

He further stated that:

> "The principle obviously is that, unless and until, the court has pronounced a judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure..."

The principles to be drawn from Lord Atkin's statement above, may be stated as follows: firstly, that a pre-requisite of an application asking the court to exercise its discretion to set aside a default judgment is that the applicant should show that its defence "has merit" which a court should consider; and secondly, that the court has an unconditional discretion in deciding whether to grant such an application, subject only to the rules which it has laid down for such exercise. In order to determine whether the default

judgment should be set aside, therefore, the applicant must show that the prospective defence "has merit", and that the discretion of the court may, within the rules the courts have laid down over the years, be exercised in its favour.

In support of its application, the attorney for the first defendant has submitted that in order to satisfy the pre-requisite of a show of merit, the applicant must show that it has an "arguable case". It purports to base this submission on the authority of **Day v RAC Motoring Services Limited, [1999] 1 AER p. 1007**. The relevant section of the headnote of this case is set out below.

> When considering whether to set aside a judgment obtained in default of defence, the court did not need to be satisfied that there was a real likelihood that the defendant would succeed, *but merely that the defendant had an arguable case* which carried some degree of conviction. The court should, however, be very wary of trying issues of fact on affidavit evidence where the facts were apparently credible and were to be set against the facts being advanced by the other side, since choosing between them was the function of the trial judge, not the judge on the interlocutory application, unless there was some inherent improbability in what was being asserted, or some extraneous evidence which would contradict it. It followed, in the instant case, that the judge had applied the wrong test. Moreover, he had also erred in the application of that test in that his evaluation of the defendant's case was plainly wrong. Accordingly, the appeal would be allowed and the judgment in default set aside (see p 1013 *e* to p 1014 *a*, p 1015 *b* to *d* and p 1016 *b c*, post).

Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle [1986] 2 Lloyd's Rep 221 and *Allen v Taylor* [1992] PIQR P255 considered. (Emphasis mine)

The applicant proceeded to argue that paragraph 8 of the affidavit of merit sworn by the assistant crown counsel sets out an arguable defence. It was further submitted that since delay in filing its defence was not *per se*, a bar to the setting aside and grant of time to file the defence, the application should be granted.

Mr. Daley in his submissions made on behalf of the Plaintiff, pointed to section 408 of the Judicature (Civil Procedure Code) Law, which provides in relevant part that:-

> "affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings or with leave under section 272A or section 376 of this law, *an affidavit may contain statements of information and belief, with the sources and grounds thereof".* (Emphasis mine)

He argued that since Mrs. Lloyd-Alexander, as counsel, "does not have personal knowledge to swear this affidavit", there is no proper affidavit of merit, within the meaning of section 408 of the Code, before the court for consideration. In order to be a proper affidavit for the purposes of the Code, so the argument runs, it must either be within the knowledge of the affiant or "contain statements of information and belief with the sources and grounds thereof". He further submits that since the affidavit in paragraph 6 only stated that the purported defence was drafted "upon instructions contained in a file" the origin or authors of which are unknown, it amounts to no more than hearsay. In such circumstances, at best the assertions are of "information and belief", and in the absence of "source and grounds" for such information and belief as required by section 408, the affidavit is inadequate. In support of this proposition he cites **Ramkissoon v Olds Discount (T.C.C.) Limited (1961) 4 W.I.R. 73.** The judgment in this Trinidadian

case was also extensively considered by Harrison J. (Ag.) in the Clyde Graham case referred to above.

The headnote is as follows:

> The respondent 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 appellant's 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.
>
> Held: (i) the solicitor's 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 of merit before the judge or the Court of Appeal; (ii)The judge had 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.

While I admire the adroitness of Mr. Daley's submission in relation to the effect of section 408 of the Code on the affidavit, I must respectfully disagree with his conclusion as to that effect. It would be singularly unrealistic if this interpretation of section 408 were to prevail, for it would seriously curtail the "unconditional discretion" referred to by Lord Atkin above, in these matters. I have little difficulty in agreeing that there is a certain sloppiness in the technical preparation of the affidavit of merit, and unworthy of the law office which is the State's premier legal advisor. However, I believe that there is sufficient in the affidavit which is consistent with the proposed defence to allow it to be considered as a proper affidavit of merit. I find support for this proposition even in the Ramkissoon[1] case above referenced.

In weighing the value of the affidavit in that case, **McShine, C.J. (Ag)**. Stated:- "Nothing in the affidavit of the solicitor says or suggests that the solicitor had any personal knowledge of the facts of the case or that what appears in the statement of defence is true. This affidavit merely attempts, in our view, to excuse the defendant for not filing his defence. The appellant seeks to have this court hold that the statement of defence exhibited is a sufficient substitute for an affidavit of merit by the defendant". It should also be noted that in any event, in the Ramkissoon case, there was one defendant and the affiant was his solicitor, while in this case, there are two, one of whom is a necessary defendant, the Attorney General for the Crown, and the second defendant as its servant or agent. This is not a case of an affidavit by one's solicitor, but of a defendant, in relation to an application to set aside a default judgment against him.

I am also fortified in my view as to the adequacy of the affidavit to be used for the purposes of showing merit, notwithstanding it being hearsay, by the following passage from the Day v RAC Motoring Case[2]. "The affidavit is therefore hearsay. It may well be double hearsay, but, this being interlocutory, it was acceptable for the purposes for which it was tendered……". The same view was expressed by Rattray, P. in **D & LH Services Limited et al v The Attorney General, and The Commissioner of the Jamaica Fire Brigade, SCCA NO. 53/98**. He stated that:- "Hearsay evidence is admissible in

[1] See page 6 above for reference
[2] Day v RAC Motoring Services Ltd, [1999] 1AER 1007

interlocutory proceedings". I need hardly add that I hold that these are interlocutory proceedings. There is in the same judgment of Rattray P.[3], a couple of throwaway sentences which have given me pause in relation to my conclusion as to the proper status to be accorded to the affidavit of Yolande Lloyd-Alexander, and its need to state "source and grounds". He states:-

> "The said affidavit of Cordel Green denies negligence and the breaches complained of, in the second defendant/respondent. *A further affidavit dated 21st May 1998 properly identifies the "sources and grounds" of the information* reciting that the informants Senior Deputy Superintendent Denroy Lewis, Superintendent Roy Williams and Deputy Commissioner F.R. Whyte stated that they 'attended the scene of the fire...and supervised the operations until the fire was extinguished.....'". (Emphasis mine)

It is not at all clear that the Learned President was advancing a principle that the "further affidavit" of the affiant in that case, which identified sources and grounds was necessary to cure a defect in the earlier affidavit, which would have been inadequate without it. In the event that such was his intention, I would hold that the court may take judicial notice of the way files with information and instructions are passed to the responsible officers in the office of the Director of State Proceedings. I would further hold that the affidavit by referring in paragraph 6,[4] to the "obtaining of a file" in which instructions are contained, when taken together with the statements of the second-named defendant incorporated in paragraph 8 thereof, constitute a sufficient "source and grounds" for the purposes of section 408 of the Code. I should also note, *en passant*, Lord Atkin's obiter dictum in the Evans case, as respects the affidavit of merits. "Even the first rule as to the affidavits of merits could, in no doubt rare but appropriate cases, be departed from".

[3] See page 13 of the judgment
[4] See page 3 above

I turn briefly to deal with the question of the delay. While delay is not itself a bar to the exercise of the discretion to set aside a default judgment, it certainly is one of the elements to be looked at in that exercise. There was a time gap of five (5) months from the filing of the appearance to the date of the issue of the summons seeking leave to enter judgment in default of defence, and a further three (3) months to the actual hearing of the summons on October 2, 2000. Judgment was entered in the Judgment Binder on February 6, 2001. It was only on October 31, 2000, that the first-named defendant filed its summons to set aside the judgment so obtained and sought leave to file a defence within fourteen (14) days of the setting aside. Shortly thereafter, on November 16, 2000, the Plaintiff's attorneys filed a summons for an Order to proceed to assessment of damages.

I am deeply concerned that the first-named defendant, in the affidavit sworn on its behalf, only speaks of "administrative difficulties" as the basis for the delay in filing the defence. I find it difficult to accept that a more fulsome explanation was not forthcoming. Further, there is no explanation as to why no attempt was made to have the Plaintiff's attorneys agree to a late filing of the defence. By way of some clarification, it is noted from the documents filed, that the Plaintiff had had to apply for a renewal of the Writ of Summons as against the second-named defendant, as it was about to expire. They had been unable to locate him to serve him with the writ as he was away from his place of work, but he has apparently now returned thereto. There is no evidence that he has, as yet, been served.

In spite of the mitigating effects of the foregoing, I wish to record my concern that the attorneys for the government should give the appearance of being cavalier in the approach to dealing with the complaints of citizens who allege that they have suffered loss and damage at the hands of servants of the state. For myself, I do not believe that we should accept that one arm of the state, the Director of State Proceedings, is unable, in a timely manner, to get in touch with and take instructions from an agent of another arm of the state, the police constable, *unless* the incident itself, has been so traumatizing, that it is impossible or unwise to vigourously pursue a timely statement by the individual. I

recognize that possibility, but if that is the case, common courtesy as well as professional courtesy would demand that the other side be advised early of such difficulties. It is trite but still true that "Justice delayed, is justice denied".

Notwithstanding the delay, having held that there has been a demonstration that the defence has merits, I have come to the view that my discretion should be exercised to order the setting aside of the interlocutory judgment in default of defence and leave given to the first defendant to file his defence within fourteen (14) days. The heavy preponderance of the cases makes it clear that as far as possible, "the court will not generally allow judgment by default to stand where the defendant has merely failed to follow the rules of procedure and there was no hearing on the merits". **(Per Rattray, P. in D & L.H Services Limited et al v The A.G.** et al referred to above[5]). As was seen in that case, even where the defendant has disobeyed an "unless" order, or where the defendant has breached an agreement to file his defence within a certain time, (as in Day v RAC Motoring Services Ltd.), the court still maintains authority to hear and grant applications to set aside the default judgment. See also **J.H Rayner (Mincing Lane) Ltd and others v Cafenorte SA Importadora and others [1999] 2 A.E.R. 577.** In this case it was held that:- "Where the court had concluded that there was a defence on the merits which carried some degree of conviction, it was strongly inclined to allow a default judgment to be set aside even if the defendant's conduct could be strongly criticized". Section 676 of the Code also provides statutory authority for this proposition as it states:-

> "The court shall have power to enlarge or abridge the time appointed by this law, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed".

[5] SCCA No. 53/98

The problem is also supported by Lord Atkin's statement, already referred to above that "The principle obviously is that, unless and until, the court has pronounced a judgement upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure....."

The order of the court is therefore that Interlocutory Judgement in default of defence be set aside. Leave granted for first-named Defendant to file defence within fourteen days of the date hereof. Speedy trial to e ordered. Costs to be set for the Plaintiff in any event.

ROY A. ANDERSON
April 2001