IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS: 70 & 71/90

COR: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	A.C.E. BETTING CO LTD	DEFENDANT/APPELLANT
	V.	
	HORSERACING PROMOTIONS LTD	PLAINTIFF/RESPONDENT
AND	SUMMIT BETTING CO LTD	DEFENDANT/APPELLANT
	V.	
	HORSERACING PROMOTIONS LTD	PLAINTIFF/RESPONDENT

B.J. Scott, Q.C. with Norman Harris for Appellants

Gordon Robinson instructed by Scholefield Nunes & DeLeon for Respondents

October 22, 23 & December 17, 1990

FORTE, J.A.

By the consent of the parties, these appeals were heard together.

These are appeals from orders of Walker J, made in Chambers on the 12th July, 1990, where on the hearing of Summonses to set aside judgments made in default of appearances, he ordered in each case thus:

(a) Summons to set aside Judgment and to strike out Writ of Seizure and Sale dismissed.

(b) Application for stay of execution refused.

(c) Leave to appeal granted.

(d) Costs to the Plaintiff.

The judgments sought to be set aside were entered on the 11th of June, 1990 on Writs of Summons with specially indorsed Statements of Claim filed on the 16th of May, 1990. No appearances had been entered as of that date and indeed none was entered until the 15th of June, 1990.

As these appeals proceeded on issues of procedure, no reference will be made to the substantive claims.

Before us three issues arose for consideration:

1. As the writs and Statements of Claim were dated 17th May, 1990, and filed on the 16th May, 1990, this being in breach of section 8 of the Civil Procedure Code, were the writs void or merely irregular.

2. If the writs were not void, but irregular, did the appellants' entering of appearance subsequent to the default judgment cure the irregularities.

3. Were the writs of summons properly served on the appellants, and if so, does proof subsequent to judgment being entered, that they were not received by the appellants entitle the appellants to have the judgments set aside ex debito justitiae.

1. WRITS - VOID OR IRREGULAR

It was conceded by the respondents that the writs of summons having been dated the 17th May, 1990 and filed on the 16th May, 1990 this amounted to a failure to comply with section 8 of the Judicature (Civil Procedure Code) Act which reads as follows:

> "8. Every writ of summons, and also (unless by any Law or by the provisions of this Law it is otherwise provided) every other writ, shall bear date on the day on which the same shall be filed or issued, and shall be tested in the name of the Chief Justice, or, if the office of Chief Justice shall be vacant, in the name of one of the High Court Judges."

As the writs of summons, did not bear the date on which they were filed, they were clearly in breach of section 8.

Counsel for the appellant in urging on us that the writ was void as it did not comply with section 8, argued the following ground of appeal:

> "The learned Judge erred in law when he found that the Writ of Summons with the Statement of Claim dated 17th day of May, 1990 endorsed thereon, was not void and that the irregularity was one that could be cured by application of the provisions of Section 678 of the Judicature (Civil Procedure Code) Act.

He contended, in advancing this ground, that the writs being in breach of section 8, were not writs of summons i.e. they were void and therefore the provisions of the Civil Procedure Code did not apply to them. For this proposition he relied on the case of **Wesson Brothers v. Stalker** [1882] L.T. 444. The headnote set out hereunder is sufficient to understand the issues that arose for discussion:

> "The plaintiffs in an action for goods supplied, issued a specially indorsed writ against the defendant. The goods were supplied during and after the month of July 1882. The copy of the writ served upon the defendant was accurate in all respects except that in the 'teste' the year was thus given, 'one thousand eight hundred and eighty,' instead of 'eighty-two.' In default of appearance the plaintiff's signed final judgment under Order XV., r. 1. The defendant afterwards applied to set the judgment aside on the ground that the 'teste' of a writ was a material part of it, and any error in it would be fatal to its validity; and that the affidavit of service by the solicitor's clerk who served it was false. The registrar and the judge at chambers before whom the application was made both refused to set the judgment aside. The defendant appealed.

> "**Held**, on appeal, that the affidavit of service by the Clerk was not a false one, and that the mistake in the teste of the writ was a mere imperfection, and not a fatal error prejudicing the defendant, who therefore was not entitled to have the judgment against him set aside."

Mr. Scott, however, argued that the error in that case was made on a copy of the original writ which was itself without error, and that had the error been on the original, the court would have felt compelled to find that the error was 'fatal to its validity'. In the instant case, he submitted, the error was on the original document and therefore made it void.

The learned judge, in dealing with this issue preferred the contention of the respondent, which was also urged upon us, that the error was not fatal to the writs, but amounted to an irregularity which could be cured by amendment. He dealt with it in these words:

> "Obviously an error was made in the dating. I asked myself, if the Writ is amended what possible prejudice would the Defendant have? I can see no prejudice whatsoever if the Writ is amended. It is my view that the Writ is not rendered void by being wrongly dated. It is an irregularity which can be cured. I do grant the application to amend the Writ to read 16th May, 1990."

The learned judge purported to act within the provisions of section 678 of the Judicature (Civil Procedure Code) Act which is set out hereunder:

> "678. Non-compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner, and upon such terms, as the Court shall think fit."

This section is clear in its terms, giving the Court the power to determine whether non-compliance of any of the provisions of the Code which is voidable should render the proceedings void.

If the non-compliance renders the proceedings a nullity (i.e. void) then the Court would be compelled to set it aside ex debito justitiae without calling in aid the section; but if voidable the Court can exercise its discretion to deal with it in the terms of the section.

In **Macfoy v. United Africa Co., Ltd** [1961] 3 All E.R. 1169 at page 1172 **Lord Denning** delivering the judgment of their Lordships Board and dealing with Order 50 rule 1 of the Rules of the Supreme Court of Sierra Leone, which is in identical terms as section 678 of the Judicature (Civil Procedure Code) Act, explained it thus:

> "This rule would appear at first sight to give the court a complete discretion in the matter. But it has been held that it only applies to proceedings which are voidable, not to proceedings which are a nullity; for those are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the court without going under the rule; see **Anlaby v. Praetorious** [1888] 20 Q.B.D. 764 and **Craig v. Kanseen** [1943] 1 All E.R. 108."

In this case, the learned judge was correct. The obvious error made in recording the date, was one, which though amounting to a non-compliance with section 8, would have no prejudicial effect on the respondents. Indeed, had the respondents entered an appearance within time, and the proceedings progressed in the normal way, it seems unlikely that the importance now given to the error, would have arisen.

The case of **Wesson Bros** (supra) is in my opinion, of no assistance to the Appellants as the conclusion in that case was not as a result of the document being a copy, but because the error was of no substance and in any event not prejudicial to the defendant against whom a default judgment had been entered. The words of Denman J, at page 445 explains:

> "..... The clerk's error was not of such a kind as to deceive the defendant; nor can his affidavit be said to be a false one. Putting a strict construction upon it, it may be held to be inaccurate; but I even doubt that. If we set these proceedings aside we should be giving effect to a contemptible quibble. .....".

In **Macfoy v. United Africa Co., Ltd** (supra) the plaintiffs had served a Statement of Claim during the legal vacation, which amounted to a breach of [the English] R.S.C. Ord. 64 r 4 and r 5 which were applied by the rules of court in Sierra Leone. The defendants having failed to deliver a defence within the time allowed, such time being reckoned from the end of the vacation, the plaintiff signed judgment against him in default of defence. The defendant subsequently applied for the judgment to be set aside. Having failed on other grounds, at the hearing, he appealed to the Court of Appeal on the ground that the delivery of the Statement of Claim during the legal vacation was a nullity and

that all subsequent proceedings were therefore void. On appeal to Her Majesty in Council it was held that whether the judgment in default of defence should be set aside was a matter for the discretion of the Court, the delivering of the Statement of Claim in the legal vacation being a voidable act not a nullity and that in the circumstances of the case the West African Court of Appeal had rightly exercised its discretion.

The discretion exercised in that case was under the provisions of Order 50 r 1 of the Supreme Court of Sierra Leone which are in identical terms to section 678 of the Judicature (Civil Procedure Code) Act. In delivering the judgment of the Board, Lord Denning, after considering the applicability of the specific order to proceedings which are nullity, (already referred to above), went on to deal with cases where the proceedings are irregular i.e. voidable (page 1173):

> "..... But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void.
> No court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw? .....".

In dealing with the irregularity **Walker** J, granted an amendment of the dates on the writs and Statements of Claim on the basis that it would not prejudice the appellants. In any event, he clearly exercised his discretion under section 678 of the Judicature (Civil Procedure Code) Act not to set aside the proceedings as irregular, and consequently the writs and Statements of Claim remained "good and a support for the judgment in default of appearance."

I would therefore agree with the learned judge that non-compliance with section 8, in the circumstances of this case, did not void the writs, and offer the view that the matter of error raised by the appellants is in the words of Denman J, no more than "a contemptible quibble" and amounted to no more than an irregularity.

This was therefore a proper exercise of judicial discretion, having regard to the circumstances, and the relatively insignificance of the irregularity.

2. **DOES UNCONDITIONAL APPEARANCE WAIVE IRREGULARITY?**

It was conceded on both sides that the appellants entered appearances to the writs on the 15th June, 1990 supposedly the day after the writ in respect of the case against the **A.C.E. Betting Company** was received by that Company. At this time Judgment in Default had already been entered, that being on the 11th June, 1990. Mr. Gordon Robinson for the Respondents, though conceding that there was an irregularity in respect of the dates of the Writs of Summons and Statements of Claim, contended that though the learned judge had a good basis for granting the amendment of the dates on the writs, this was unnecessary, because the appellants having entered unconditional appearance, had by that act waived the irregularity.

He referred to section 679 of the Judicature (Civil Procedure Code) Act which reads as follows:

> "No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

Mr. Scott maintained that the entry of appearances was irrelevant because it was effected after judgment and at a time when the appellants had no knowledge of the irregularities which only came to light after it was discovered that Judgment in Default had been entered against them.

He contended that the appellants could not have known of the irregularities until they had examined the Records of the Supreme Court. This was apparently not done at the time of the entering of appearances. It is my view that as the Records were there and available to the appellants, they cannot now complain that they did not have knowledge of the irregularity at the time of entering appearance. One cannot shut one's eyes to the existence of facts and afterwards complain of ignorance. Consequently, I would conclude that the entering of unconditional appearance by both appellants, amounted to a fresh step in the proceedings which would result in a waiver of the irregularity that existed in respect of the dates of the Writs of Summons and Statement of Claim.

Mr. Scott also contended that an entry of appearance after Judgment is of no effect and relied for that proposition on the case of **Sommerville v. Coke & Coke** S.C.C.A. 73 & 89/89 delivered on 18th December, 1989 (unreported).

In that case, however, this Court said that appearance may be entered after judgment either for the purpose of an application to set aside the judgment or for submitting to it.

That case dealt with an application to set aside the Judgment on the merits and not with the question of irregularities and is therefore distinguishable.

3. **SERVICE OF WRITS**

As the circumstances in respect of the service of the writs in each case are somewhat different, it is necessary to treat with the facts of each separately.

A.C.E. BETTING COMPANY

In this instance, service of the Writ of Summons was effected by Registered Mail by virtue of section 370 of the Companies Act which reads as follows:

> "A document may be served on a company by leaving it at, or sending it by post to the registered office of the company."

The effect of such a service is explained by section 52 (1) of the Interpretation Act as follows:

> "52 (1) Where any Act authorises or requires any document to be served by post, whether the expression 'serve', 'give' or 'send' or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

The writ was sent by Registered Mail, on the 17th May, 1990 and there being no appearance on the 11th June, 1990 Judgment in Default of appearance was on that day entered. The letter containing the writ was correctly addressed to the Registered office of the appellant.

In support of its application to set aside the Default Judgment, the appellant exhibited an affidavit of Mr. Kenneth Fung the Secretary of the company averring that the letter containing

the writ was received on the 14th of June, 1990 i.e. three days after Judgment had been entered. Appearance was thereafter entered on the 15th June, 1990.

On these facts the learned judge concluded that service was properly effected on the appellant. Against this finding, the appellant filed and argued the following ground of appeal:

> "Although the law provides that service may be effected on a Limited liability company by post, and that accordingly service by post was proper service, Section 52 (1) of the Interpretation Act states that, 'unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.' The affidavit of Kenneth Fung at paragraph 3 states that the Writ of Summons was received on the 14th day of June, 1990 and this is not disputed. The Entry of appearance and the filing and delivery of Defence on the 15th day of June, 1990 was in order."

In support of this contention, Mr. Scott for the appellant relied heavily on the case of **Thomas Bishop Ltd v. Helmville Ltd** [1972] 2 W.L.R. 149. In that case on the 3rd June, 1971 the plaintiffs posted a writ, claiming a sum of money, by first class mail to the defendant company's registered office. On June 18, the plaintiffs entered judgment against the defendant's company in default of appearance. The defendant company applied to have the judgment set aside. Their managing director swore by affidavit that no copy of the writ had been received. He was not cross-examined and the plaintiffs did not challenge the facts deposed to but contended that the writ having been duly posted on June 3 and not having been returned undelivered, service was "deemed to have been effected" on June 4 by reason of section 26 of the Interpretation Act 1889 (similar in terms to section 52 (1)). The Master refused to set aside the judgment but varied it for a reduced sum. The Commissioner dismissed the defendant company's appeal. On an appeal to the Court of Appeal it was held allowing the appeal (per **Salmon L.J.** and **Buckley L.J.**, **(Orr L.J.** dissenting)) that service of the writ on the defendant

company could not be "deemed ..... to have been effected" on the 4th June, 1971, or at all, in the ordinary course of post, since by reason of the unchallenged facts deposed to by the defendant company's managing director, the contrary had been proved; accordingly the whole judgment in default of appearance was defective and should be set aside.

This decision ran contrary to that in the case of **Saga of Bond Street Ltd v. Avalon Promotions Ltd** (1972) 2 All E.R. 545 also a decision of the Court of Appeal in which **Salmon L.J.** also presided and which had been heard in the previous year. The facts as are relevant to this issue are concisely stated in the judgment of **Salmon L.J.** at page 546:

> "..... the plaintiffs issued a writ for the amount of the bill on 17th December 1969, and they sent this writ through the post in a prepaid envelope addressed to the registered office of the defendants at 73-75 Mortimer Street, in the West End of London. No appearance having been entered by the defendants, judgment was signed by the plaintiffs in default of appearance on 30th December 1969. On 5th January 1970 the envelope containing the writ was returned through the dead letter office, marked 'Not known'."

In concluding that in those circumstances, the service was 'undoubtedly regular' **Salmon L.J.** relied on a passage of the judgment of **Denning L.J.** on **R. v. Appeal Committee of County of London Quarter Sessions ex parte Rossi** [1956] 1 All E.R. 670 at 676. This passage reads:

> "To sum up, when service of process is allowed by registered post, without more being said on the matter, then if the letter is not returned, it is assumed to have been delivered in the ordinary course of post and any judgment or order by default obtained on the faith of that assumption is perfectly regular. It will not as a rule be set aside except on payment of costs and showing of merits: see **T.O. Supplies (London). Ltd v. Jerry Creighton, Ltd** [1951] 2 All E.R. 992 [1952] 1 K.B. 42; 2nd Digest Supp. If, however, the letter is returned

> "undelivered and nevertheless, notwithstanding its return, a judgment or order by default should afterwards be obtained, it is irregular and will be set aside ex debito justitiae". [emphasis mine]

These two conflicting views were however considered and resolved in the case of **A/S Cathrineholm v. Norequipment Trading Ltd** [1972] 2 W.L.R. 1242 at 1247. After reviewing both cases **Lord Denning M.R.** stated:

> "Returning now to the two decisions, I prefer **Saga of Bond Street Ltd v. Avalon Promotions Ltd to Thomas Bishop Ltd v. Helmville Ltd** [1972] 2 W.L.R. 149. Accordingly when the plaintiff sends a copy of the writ by prepaid post to the registered office of the company, and it is not returned and he has no intimation that it has not been delivered it is deemed to have been served on the company and to have been served on the day on which it would ordinarily be delivered. If no appearance is entered in due time, the plaintiff is acting quite regularly in signing judgment. If the defendant should seek to set it aside, he ought to explain the circumstances and go on to show that he has merits, that is, that there is a triable issue."

In my view, the conclusions, in the **Cathrineholm case**, and in the **Saga Bond Street case**, are correct and are applicable to the case under review. I am therefore of the opinion that the learned judge was correct in finding that the writ was regularly served there having been no intimation at the time of judgment that the writ had not been effectively served through Registered Mail. In the event, I would conclude that the writ having been regularly served, the appellant is not entitled to have the judgment set aside ex debito justitiae, and therefore would be compelled to show it has merit.

SUMMIT BETTING CO LTD

In this case service of the writ was also effected through Registered Mail. However the Registered Slip tendered

in proof of service referred to the address of the appellant company as "Northside Street" instead of Northside Drive which was the correct address of the Appellant Company. On this fact, the learned judge concluded that since he could not draw an inference that the postal clerk made an error in preparing the Registered Slip, the service of the writ was irregular.

He, however found that the entry of unconditional appearance by the appellant on the 15th June, 1990 "had the legal effect of waiving the irregularity in the service of the writ".

Mr. Scott, for the appellant contended before us, that the service being irregular, the appellant was entitled to have the judgment set aside ex debito justitiae.

This matter, however resolved itself, when during the course of arguments, counsel on both sides consented to the production of the addressed envelope containing the writ, which had been sent by Registered Mail to the appellant but which had been returned, subsequent to the Judgment, to the Respondent's Attorneys marked "unclaimed". It was then established that the letter had been correctly addressed to the address of the appellant company's registered office.

Had this evidence been available to the learned judge, it is fair to say that he would not have come to the conclusion that the service of the writ was irregular. In my opinion the respondent company acted in accordance with the provisions of section 370 of the Companies Act in effecting service of the writ, and accordingly the service was regular. Consequently, not having received any intimation that the writ remained "unclaimed" prior to the entering of judgment, and no appearance having been entered, the Judgment in Default was regularly

entered and therefore cannot be set aside ex debito justitiae. The appellants would therefore have to show merit i.e. that there is a triable issue.

As no leave was sought nor granted to appeal in respect of the merits, and having regard to the manner in which we resolved the issues argued before us, the appeals were dismissed, with costs to the respondent to be agreed or taxed.

ROWE, P:

I concur. The insincerity of Mr. Lloyd Hoo Mook, the company's Managing Director who denied a conversation with Mr. Sherriah the respondent's process server is abundantly demonstrated by the failure of Summit Betting Company Limited to claim registered mail properly addressed to its registered office. The appeal was devoid of all merit.

DOWNER, J.A.

I concur.