JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 53/98

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

BETWEEN:	D & L H SERVICES LIMITED	1st PLAINTIFF/ APPELLANT
	ISADRA INTERNATIONAL LIMITED	2nd PLAINTIFF/APPELLANT
	DALEY, WALKER & LEE HING (a firm) by its partner CLIFTON DALEY	3rd PLAINTIFF/ APPELLANT
	CLIFTON DALEY	4th PLAINTIFF/APPELLANT
AND	THE ATTORNEY-GENERAL	1st DEFENDANT/ RESPONDENT
AND	THE COMMISSIONER OF THE JAMAICA FIRE BRIGADE	2nd DEFENDANT

Clifton Daley and Miss Yvonne Ridguard for the 1st, 2nd and 3rd appellants

Yvonne Ridguard for 4th appellant

Lennox Campbell, Senior Assistant Attorney-General and Cordel Green for respondent

23, 24, 25 September; 8th October 1998
1st February and 26th March, 1999

HARRISON, J.A.

This is an appeal against the order of Mrs. Z. McCalla, J. of 21st. May, 1998 setting aside the interlocutory judgment against the first defendant/respondent on the ground that there was a good defence and granting leave to file and deliver the said

defence within five days thereof. We heard the arguments on both sides dismissed the appeal and promised to put our reasons in writing. We now do so.

The history of this matter is that the writ and statement of claim were filed and served on 24th November 1997 on the 1st defendant/respondent and on 26th November 1997 on the 2nd defendant. The plaintiffs allege negligence and breach of statutory duty on the part of the 2nd defendant resulting in damage and loss to them due to a fire on their premises in November 1997. Appearance was entered on behalf of the 1st defendant/respondent but no defence was filed. On 21st January 1998 the appellants by way of summons sought leave to enter judgment in default of defence against the first defendant/respondent. At the hearing of the summons on 10th March 1998 by the Master both the appellants and the respondent were represented, and it was ordered that the appellants be at liberty to enter judgment in default of defence but execution be stayed for fourteen (14) days during which period the 1st defendant/respondent had leave to file and serve a defence failing which the order should stand.

The respondent failed to file a defence within the said time, consequently on 27th March 1998 the appellants filed and entered its said judgment pursuant to the order of the court on 10th March 1998 and issued a summons to proceed to the assessment of damages to be heard on 16th April 1998.

On 9th April 1998 the respondent filed a summons to set aside the judgment and sought an extension of time in which to file a defence. The defence was in fact filed on 30th March 1998, six days after the time limited by the said Master for filing, and served on the appellants on 31st March 1998.

On 21st May 1998, the respondent succeeded in having the said judgment set aside, by Mrs. McCalla, J. on the ground that despite being a mandatory order of the court she had the jurisdiction to do so. An affidavit of information and belief of an officer of the 1st defendant/respondent was valid and admissible and although there was delay, the fact that there was merit shown by the defence in the affidavits was the factor of primary consideration. As a consequence the instant appeal is before us.

Mr. Daley for the appellants argued that the said judgment entered and perfected was a mandatory order of the court and therefore cannot be set aside. He said that it was entered in accordance with section 258B of the Judicature (Civil Procedure Code) Law and therefore was not a default judgment. The judgment was regularly obtained and perfected and cannot be set aside. It was a final and not an interlocutory judgment and accordingly the affidavit of Cordel Green was hearsay and inadmissible and was not an affidavit showing merit. There was no defence showing merit.

Mr. Campbell for the respondent submitted that the learned trial judge had jurisdiction to set aside the said judgment filed on 27th March 1998 even though it had been entered pursuant to an "unless" order and had the power to exercise her discretion to extend time in which to file the defence (section 676 of the Code). There was no necessity for reasons for delay. If merit is shown in the defence, the exercise of the discretion will not be disturbed. The judgment was interlocutory and there is no rule making a distinction that such a judgment when perfected cannot be set aside. The affidavit of Cordel Green is admissible and shows a defence on the merits, refuting the plaintiffs' claim. The respondent always displayed an intention to defend and there was no principle that a judgment by default by order of the court cannot be set aside.

Both counsel relied on authorities in support of his submission.

Where the plaintiff's claim is one of unliquidated damages and the defendant does not file a defence, judgment may be entered in default of defence, under the provisions of section 247 of the Judicature (Civil Procedure Code) Law (the Code). It reads:

> "247. If the plaintiff's claim is, as against any defendant, for unliquidated damages only, and that defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may enter interlocutory judgment against him for damages to be assessed and costs, ..."

However, if the proceedings are against the Crown, such judgment may only be entered with leave of the Court or a judge. Section 258B of the Code provides:

> "258B. In any proceedings against the Crown no judgment for the plaintiff shall be entered in default of pleading without the leave of the Court or a Judge, and any application for such leave shall be made by notice of motion or summons served not less than seven days before the return day." (Emphasis added)

The requirement of leave by "the Court or a Judge" prior to entry of judgment in proceedings against the Crown is not peculiar to section 258B. The restriction also exists under section 78A (judgment in default of appearance) and under section 79 (summary judgment). The purpose and rationale are that the Crown consists of so many various arms and agencies that the Court takes the precaution to make it certain that knowledge of and service of the correct government agency has been effected. Such a judgment thereafter entered by leave of the Court or Judge remains a default judgment against the Crown. The matter would not have been heard on its merits. There has been no trial. Consequently, such a judgment may be set aside under the

provisions of section 258, which, alike section 247, appears under the heading, "Title 26. Default of Pleading." Section 258 reads:

> "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."

Section 247 which concerns the entry of judgment in default of defence makes no reference or distinction in respect of a "perfected" judgment; neither do sections 451 and 453 which deal with filing and entry of judgment. I do not therefore find any assistance from the reference to **Order 32/1-6/10 of the Supreme Court Practice 1982 (UK)** relied on by Mr. Daley for the appellants. That Order specifically contemplates a restriction to setting aside when there is a hearing. It reads:

> "The Jurisdiction to re-hear Summons. There is no power to re-hear an application after any order made or the hearing has been perfected ..." (Emphasis added).

Reference was made to the case of **Rackham vs Tabrum** (1923) 129 L.J. 24 in which it was held that where there has been a hearing on the merits and the judgment has been perfected it cannot be set aside. In any event, in the circumstances of this case, the provisions of section 686 of the Code may not be invoked to permit a reference to the Supreme Court Practice in England.

It is our view that Mrs. McCalla, J. correctly found that she had the jurisdiction to set aside the said judgment.

The form of the judgment was in the nature of a specific order that the respondent perform an act, i.e. to file its defence, failing which the judgment would stand. This is referred to as an "unless order." The Court expects its orders to be respected and obeyed. But the Court will, in some instances, entertain the application

of the very party who has not obeyed the order of the Court. There is both the authority of court decisions and statutory endorsement of this. Section 676 reads:

> "676. 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." (Emphasis added)

In **Samuels v Linzi Dresses Ltd.** [1980] 1 All ER 803 following the decision in **R v Bloomsbury and Marylebone County** [1976] 1 All ER 897, the Court of Appeal endorsed the grant of an extension of time to deliver particulars in compliance with an "unless" order, although the said defendant had failed to comply with two previous orders. Roskill, L.J. said, at page 812:

> "...the law today is that a court has power to extend the time where an 'unless' order has been made but not been complied with; but that it is a power which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. Primarily it is a question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not."

In **Dunscombe v Seaton** (1989) 26 JLR 224, a decision of this Court following **Samuels v Linzi Dresses** (supra), Rowe, P. referred to section 676 of the Code, and said, at page 227:

> "It is always necessary to construe the terms of the actual Order made by the Court to determine whether upon default there is a penalty and how the penalty ought to be exacted. The clear policy of the law as evidenced by Section 676 quoted above, is that a litigant should be afforded every reasonable opportunity to come in to file documents and to be heard in any pending action."

Mr. Daley for the appellants, after the hearing in this Court forwarded to us the case of **Hytec Ltd vs Coventry City Council [1997] 1 WLR 1666.** In the latter case **Ward, L.J.,** referred to **Sir Nicolas Browne-Wilkinson V.-C.'s** comment in the **Jokai case** [1992] 1 W.L.R. 1196 commenting that the court in **Samuels v Linzi Dresses** (supra) "opened the door to defaulters no more than a chink... " in "unless" order cases, and summarized his view of the approach of the court to "unless" orders. He said, at page 1674:

> "(1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order. (2) Because that was his last chance,a failure to comply will ordinarily result in the sanction being imposed. (3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compellling reason is advanced to exempt his failure. (4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy. (5) A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order. (6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice. (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two."

"Unless" orders are peremptory orders of the court and must not be deliberately flouted. Unlike an application to set aside an order or judgment, simpliciter, where the merits of the defence is paramount, in respect of an application to set aside an "unless" order, the reason for the disobedience of the order of the court must be shown by the applicant to have been beyond his control. Mrs. McCalla, J. found that:

> "No good excuse has been given by the second defendant for the tardiness in filing a defence. Whilst I agree with Counsel for Plaintiffs that 'administrative lapse' is not a good excuse nevertheless I am constrained to have regard to the authorities cited which demonstrate that the question of merit transcends the question of delay."

In so far as Mrs. McCalla, J. in exercising her discretion to set aside the said judgment, expressed the view that "the question of merit transcends the question of delay" she was in error. She correctly recited and considered the correct principles but applied them in a contrary way. Such an approach permits this Court to examine and determine what should have been the proper exercise of the discretion **(Hadmor Productions vs Hamilton** [1982] 1 All ER 1042, and to make the appropriate order that should have been made in the Court below.

In the instant case there is no "history of failure to comply with other orders." The conduct of the 1st defendant should therefore have been viewed as less than an obstinate and persistent disobedience of rules of procedure or orders amounting to an abuse of the process of the court. Appearance to the writ was entered on 26th November, 1997 by the first defendant. No defence was filed. No order was subsequently made or disobeyed. On 21st January 1998, the plaintiffs filed their summons to enter interlocutory judgment. The "unless" order of 10th March 1998 was

therefore made in the context of the absence of any failure to comply with previous orders.

The affidavit of Cordel Green dated 4th May 1998 reveals that he was prompt in seeking to obey the order of 10th March 1998. He said:

> "4. That I settled a Draft Defence on the 10th day of March 1998 which was sent to the Office of the Director of Litigation in the Attorney General's Department who has oversight responsibility for such matters. I know that Mr. Lennox Campbell, the Director of Litigation was arguing two matters in the Court of Appeal at about the time I sent the draft defence to his office.
>
> 5. That the Draft Defence was approved by the Director of Litigation on or about March 30, 1998 and it was filed on the said date. I do verily believe that the delay in approving the draft defence was due to administrative lapse.
>
> 6. That on March 31, 1998 the Defence was served on the Plaintiff who accepted the said services. A copy of the said Defence is exhibited hereto marked 'COG 1'. The said Defence was filed six (6) days later than the period prescribed by the order made on March 10, 1998 and was served seven (7) days later than the time allowed by the said order."

In the circumstances of this case, I am of the view that the tardiness in returning the approval of the draft defence prepared from 10th March 1998 is a sufficient explanation of the delay in obeying the "unless" order of 10th March 1998. There was the demonstration of a continuing intention to obey the order and to defend the action. One cannot fail to note that the affidavit of Clifton Daley dated 6th May 1998 reveals that there was a continuing dialogue with the Solicitor General of the Attorney-General's Department on behalf of the first defendant and Clifton Daley on behalf of the appellants.

In paragraph 6 of the latter affidavit, Clifton Daley said:

> "6. That before the hearing of the Summons for leave to enter Judgment against the Crown I attended on law officers of the Crown and entered into discussions and correspondence with them in order to obviate the grave injustice to Plaintiffs and injury to the integrity of the Crown, that would or could arise by the Crown putting forward a false Defence. This step was taken in the light of the conduct of the Fire Brigade which was manifested before several reputable persons."

He thereafter exhibited letters dated 9th March 1998 and 10th March 1998 to the Solicitor-General in relation to the said Suit, the first of which indicated an intention to forward to him the affidavit of an eye-witness to the fire, to administer interrogatories, and stated:

> "We will also be asking for a speedy trial ...
>
> ... We hope that there will be full agreement in obtaining an order for speedy trial."

The appellants however, on the date of the latter letter whilst anticipating a trial proceeded to apply to the Court for a judgment in default.

I am quite unable to discern a deliberate flouting of the order of the court by the first defendant/respondent and find the latter's action excusable.

The further question that arises was whether or not the affidavit of Cordel Green disclosed a defence on the merits. Mr. Daley for the appellants argued that the order being a final order, the affidavit of Cordel Green is hearsay and inadmissible and therefore the respondent has not shown any defence on its merits.

The principle is that 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. The foundation of that principle lies in Lord Atkin's pronouncement in **Evans v Bartlam** [1937] 2 All ER 646, at p. 650:

> "The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the 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."
>
> 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 discretionary power of a judge to set aside a judgment by default is therefore exercisable in certain accepted circumstances, and rules have evolved as a guide.

Where the default judgment is regularly entered, an application to set it aside must be accompanied by an affidavit revealing a defence on its merits sworn to by someone who can swear to the facts. **(Farden et al v Richter** (1889) 23 QBD 124), **Ramkissoon v Olds Discount Co.** (1961) 4 WIR 73). Again Lord Atkin in **Evans v Bartlam** (supra), said of the discretion, at page 650:

> "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."

The content of the affidavit evidence is governed by the nature of the proceedings. Hearsay evidence is admissible in interlocutory proceedings. Section 408 of the Code provides:

> "408. 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 367 of this Law, an afffidavit may contain statements of information and belief, with the sources and grounds thereof."

In order to determine whether proceedings are interlocutory or final one needs to look at the nature of the application as a result of which the order is subsequently made. Proceedings are final where for whichever side the decision is made it will finally determine the rights of the parties **(Salaman v Warner** [1891] 1 Q B 734.) In **Rossage v Rossage** [1960] 1 All ER 600, hearsay evidence was not allowed in the affidavit filed, because the proceedings were final in that it would determine in those very proceedings, which of the parties, whether mother or father, should have access to the child. In **White v Brunton** [1948] 2 All ER 606, Sir John Donaldson, M.R., propounded the application approach as the correct test to determine whether proceedings were final or interlocutory. He referred to the case of **Salter Rex & Co.** v **Ghosh** [1971] 2 All ER 865, wwhere Lord Denning, in dealing with the said issue said, at page 866:

> "I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory..."

In **Steinway & Sons vs Broadhurst-Clegg** (1983) Times - 25th February 1983 the Court of Appeal following the **Salter Rex** case (supra), held that a judgment in default of defence was an interlocutory judgment.

In the instant case in applying the application test, one cannot say that whichever way the application to set aside the default judgment went, it would finally determine the litigation between the parties. Accordingly, we areof the view that the

application to set aside the default judgment are interlocutory proceedings and the affidavit of Cordel Green, although in part based on evidence of information and belief is admissible, on the authorities and the provisions of section 408 of the Code.

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 extingished... (and)... were not derelicit in their duties and did not observe unprofessional conduct by the firemen at the scene."

Mrs. McCalla, J. correctly said:

> "I turn now to the question as to whether the affidavit of Mr. Cordell Green is an affidavit of merit and as to whether the Court should exercise its discretion in setting aside the Judgment.
>
> The affidavit of Mr. Cordel Green read as a whole is to the effect that the Second Defendant based on information and belief is disputing the allegations of negligence and pursuant thereto a draft defence has been exhibited."

We are in agreement with the findings of the learned judge that a defence on its merits was shown and see no reason to disturb them. It is true that the appellants' counsel has challenged the veracity of the allegations of the respondent's witnesses, but conflicts of evidence cannot be resolved at an interlocutory stage. Such matters are best suited to be aired and resolved at a trial.

For the above reasons we dismissed the appeal with costs to the respondent to be agreed or taxed.