JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 37/89

BEFORE: THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN THE JAMAICA RECORD LIMITED
MARK RICKETTS
CAROL MAYNE
WINSTON WITTER
DESMOND RICHARDS — APPELLANTS/DEFENDANTS

A N D WESTERN STORAGE LIMITED — RESPONDENT/PLAINTIFF

W.B. Frankson Q.C., & Dr. Bernard Marshall for Appellants

D. Goffe for the Respondent

December 11, 1989 & March 5, 1990

CAMPBELL, J.A.:

On October 20, 1988 the respondent issued a writ and served the same together with a statement of claim on the appellants claiming damages for Libel.

The appellants entered appearance on November 2, 1988 but thereafter failed and/or neglected to file any defence within time or prior to interlocutory judgment being entered against them. This interlocutory judgment was entered on March 1, 1989 and an attested copy thereof with a Summons for an order to proceed to assessment of damages were served on the appellants on March 6, 1989. The Summons was fixed for hearing on March 16, 1989.

On March 15, 1989 the appellants filed a Summons to set aside the interlocutory judgment and by the selfsame Summons sought leave to file a defence to the action out of time. The affidavit in support of this Summons deposed to facts explanatory of the delay in filing the defence and also that the defence was ready for filing and that the defence was based on justification and fair comment. A draft of the proposed defence was exhibited to the affidavit and prima facie showed, consistently with the affidavit, that the defences were justification and/or fair comment on a matter of public interest namely the public health. The affidavit was sworn to by one Earle Wright the "in house" attorney-at-law and Secretary of the first appellant. He deposed that he was authorised to "make this affidavit" on behalf of all the appellants.

On the 16th of March, 1989 when the Summons for the order to proceed to assessment of damages came on for hearing, the Summons to set aside the interlocutory judgment and for leave to file a defence out of time had been filed, though it appeared that it had not yet been served on the respondent's attorneys-at-law. Counsel for the appellants brought to the attention of the learned Master that a Summons to set aside the interlocutory judgment and seeking an order for leave to file a defence out of time had been filed and a date had been fixed by the Registrar for the hearing of this Summons. He accordingly requested an adjournment, subject to cost, of the hearing of the Summons for the Order to proceed to assessment of damages to abide the outcome of his Summons. This request was resisted by the respondent and the learned Master refused the appellants' request and granted the Order to proceed to assessment of damages. On March 30, 1989 the learned Master heard the appellants' Summons, he dismissed the same and refused them leave to appeal.

The appellants having been granted leave to appeal on an earlier occasion filed their appeal against the order of the Master dismissing their Summons. Their grounds of appeal in substance were that:

1. There was sufficient material before the learned Master on which he could properly have exercised his discretion in favour of the appellants to allow the action to proceed to trial for a hearing on the merits.

2. The learned Master erred in law in holding that -

   (a) the merit projected in the appellants' affidavit was not based on an allegation of fact;

   (b) he could find no sufficient reason to set aside the aforesaid judgment.

We were struck at the outset by the unusual procedure adopted by the Master in granting the order authorising further proceedings on the default judgment notwithstanding that his attention had been drawn to the fact that a Summons had been filed to set aside the default judgment which latter Summons had been fixed for hearing on a subsequent date.

We invited Mr. Goffe for the respondent to justify the propriety of this procedure. In summary his justification is that it was a matter of practical consideration which was a matter for the judge and cannot be elevated to a rule of procedural law. He conceded however that where two Summonses are before the court for hearing, namely one to proceed to assessment of damage and the other to set aside the judgment then as a practical consideration the judge usually first hears the Summons to set aside the judgment. He however justifies the action of the learned Master in the instant case on the

ground that only one Summons namely the Summons to proceed to assessment was before him, hence no question arose as to which Summons he ought to have heard first. We think Mr. Goffe has over-simplified the matter and in doing so has overlooked the important fact that the Summons by the appellants was either on the file before the Master or ought to have been on the file and on being apprised of its existence the Master ought to have considered whether it is more desirable, and for practical reasons, to hear the latter Summons first. In considering whether or not to refuse the adjournment, the learned Master should have considered whether his refusal could not arguably, albeit erroneously, be said to have been predicated on a view that the appellants' Summons of which he was made aware was without merit and that its subsequent dismissal would be a mere formality.

Mr. Goffe further submits that there is no rule of law requiring Summons to set aside default judgments to be heard before Summons to proceed. While this may be so, commonsense, economy in the use of judicial time, and the avoidance of any suggestion that a matter has been predetermined without a hearing justify the continued use of the procedure generally adopted by judges which as far as is practicable ensures that a Summons to set aside a default judgment of which they are aware at the time an Order to proceed to assessment of damages is sought, is heard and determined before consideration of the latter. We think the learned Master ought to have followed this procedure.

With regard to the actual grounds of appeal filed, Dr. Marshall submitted that a delay of 4 months was not an inordinate delay in the filing of the defence and the defence as stated in the affidavit was good. It constituted a good affidavit of merit. He relied in explanation for the delay, inter

alia on a statement in the affidavit that a vital witness whom counsel for the appellants desired to interview prior to settling the defence could not be easily located. As regards the defence showing merit he submitted that the affidavit clearly disclosed this and the facts therein were deposed to by a person who was cognizant of them. The merit projected in the affidavit was thus contrary to the conclusion of the learned Master, based on allegations of facts which were deposed to, on behalf of the appellants, by a person with knowledge thereof. He relied on Evans v. Bartlam (1937) 3 All E.R. 646.

The response of Mr. Goffe was that a delay of 4 months in the circumstance was inordinate because the facts supporting a defence of justification and/or fair comment on a matter of public interest must be assumed to have been within the knowledge of the appellants when they published the allegedly defamatory matter. Secondly with regard to showing a defence of merit, paragraph 7 of the affidavit of Earle Wright was insufficient and the draft defence itself could not be used as evidence of merit. On this second limb of his submission Mr. Goffe relied on Ramkissoon v. Olds Discount Co., (T.C.C.)Ltd (1961) 4 W.I.R. 73.

Dealing with this second limb, the substratum of Mr. Goffe's submission is destroyed by the fact that unlike the Ramkissoon case where the affidavit was sworn to by a solicitor who had no personal knowledge of the facts stated in the defence and the latter was signed by counsel, in the instant case the facts relative to the delay in filing the defence and the facts constituting the defence were within the personal knowledge of the deponent who was the "in house" attorney and secretary of the first appellant and he was authorised by all the appellants

to swear the affidavit. The said affidavit was thus the affidavit of merit of the appellants. That affidavit explained the delay in filing the defence as due to difficulty in locating a vital witness whom the secretary had earlier taken to the appellants' counsel. This witness was later required in the process of settling the defence. Also there was difficulty in accessing vital information and documents from relevant government departments. The appellants may well have had knowledge of the contents of the documents without copies of them at the time of publishing, but were now seeking to gather and present to counsel the documentary evidence for the latter to settle the defence.

The affidavit in relation to the actual defence stated in paragraph 7 as follows:

> "7. That the Defendants have a good Defence to the action in that in so far as the said words complained of consist of allegations of fact they are true in substance and in fact, in so far as they consist of expressions of opinion, they are fair comment made in good faith and without malice upon the said facts which are matters of public interest."

Thus in our view there was sufficient evidence in the affidavit of Earle Wright explanatory of the delay which we do not consider in any case inordinate, and showing a prima facie defence on the merit. While we appreciate that the setting aside of a default judgment is a matter of discretion and ought not lightly to be disturbed by an appellate court, if the discretion is exercised on a wrong finding of facts and/or conclusion of law we are entitled to interfere. In this case ground 2 of the grounds of appeal complains that the learned Master erred in law in holding that -

(a) the merit projected in the appellants' affidavit was not based on an allegation of fact

(b) he could find no sufficient reason to set aside the aforesaid judgment.

There is no counter complaint by the respondent that the learned Master did not use words which in substance are as stated in the above ground of appeal. On this basis then, it is clear that the learned Master was saying that the affidavit of Earle Wright did not constitute an affidavit of merit and therefore there was no sufficient reason advanced to set aside the default judgment. But the said affidavit satisfied the requirements of an affidavit of merit - see Evans v. Bartlam (supra). It is also distinguishable from Ramkissoon v. Olds Discount Co., (T.C.C.) Ltd (supra) on which the learned Master must have in error relied. Had he not in error relied on this latter case, we feel he inevitably would have concluded that a defence on the merit had been disclosed in the affidavit of the appellants through Earle Wright and that since the delay in filing the defence was not inordinate he ought to exercise his discretion in favour of the appellants by setting aside the default judgment and granting the Order for the defence to be filed out of time.

As we feel the learned Master erred in law in exercising his discretion on a patently wrong conclusion from the affidavit evidence we must remedy the injustice caused thereby by setting aside the order dismissing the Summons to set aside the default judgment and substituting therefor an order setting aside the default judgment and granting leave to file defence within

10 days from the date hereof. Cost thrown away and cost of Summons below to be the respondent's in any event. The Order to proceed to assessment of damages is set aside.

The appellants will have their costs of the appeal the same to be taxed if not agreed.