ST. VINCENT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 7 of 1977

BETWEEN: ST. VINCENT CASINO COMPANY LIMITED Defendant/Appellant

and

ALRIC C. HILLOCKS Plaintiff/Respondent

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Nedd (Acting)

Appearances: S.E. Commissiong for Appellant

C. Dougan for Respondent

1978, May 8, 9 and 12

J U D G M E N T

PETERKIN, J.A.:

This is an appeal against the judgment of Berridge J. dismissing an application to set aside a judgment obtained in default of appearance and the execution issued thereon.

The facts and circumstances are stated in the affidavit sworn to in support of the application and in the cross-examination of the deponent. There was no counter affidavit. The facts disclose that on 21/9/77 a writ was issued against the Appellant Company by the Respondent claiming the sum of $70,427.00 being the amount due and owing by the Defendant to the Plaintiff between the months of July and September, 1977. A copy of the writ was served the same day on the Secretary at its registered office. On 30/9/77 judgment in default of appearance was entered against the Appellant Company in the amount claimed with $60 costs. On 1/10/77 a writ

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of fieri facias was issued and a levy made. On 4/10/77 a summons was filed on behalf of the Appellant Company to set aside the judgment entered in default of appearance. The summons was heard on the 14th November, 1977, and on the 25th November in a written judgment the judge dismissed the application.

It should be recorded at the outset that it has been conceded that the judgment was regularly obtained. It has also been conceded that in the event of the judgment being set aside, the execution issued thereon would, without further application, also be set aside.

Counsel for the Appellant Company stated that although the endorsement on the writ did not set out the nature of the claim for the amount due and owing, it was his intention to contend, should leave be granted, that it arose out of a gaming contract and as such was illegal. He also referred the Court to that part of the judgment which reads,

> "Mr. Commissiong conceded that the Defendant Company is indebted to the Plaintiff but stated that the quantum of the debt was in issue and that the Defendant Company intended to honour its obligation when that issue was settled by the parties."

Counsel then contended that the Appellant had shown a prima facie defence. Counsel then referred the Court to the affidavit and submitted that the Appellant had shown reasonable grounds for the delay.

Counsel for the Respondent has argued that the judge in dismissing the application considered all the circumstances including the fact that the Appellant Company was virtually admitting that it was operating the Casino illegally. The Company was, he argued, estopped from raising such a defence as was proposed. This in my view would be one of the matters for the consideration of the Court trying the issue and does not arise

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at this stage.

The learning on the matter of the setting aside of judgments obtained by default is clearly set out in the judgment of Lord Atkin in the case of Evans v Bartlam, 1937 2 A.E.R. 646 at page 650. It is as follows:

> "I agree that both R.S.C., Ord. 13, r. 10, and R.S.C., Ord. 27, r. 15, give a discretionary power to the judge in chambers to set aside a default judgment. 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 the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there was a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. 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."

Unfortuantely, in the instant matter before the Court the judge has made no finding on the two relevant issues, namely, the question of a prima facie, or good arguable defence and that of the reason for the delay.

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In my opinion having failed so to do the matter remains at large, and it falls to this Court to exercise the discretion which it was the duty of the trial judge to have exercised. In my view the Appellant has not only shown good reason for the delay, but has given proof of a prima facie defence, at least as relates to part of the claim, and ought to be given the opportunity of being heard. Accordingly, I would allow the appeal and set aside the judgment on terms.

In the result, I would order as follows:-

(1) Judgment set aside and leave granted to Appellant to enter an appearance out of time within 7 days.

(2) The Appellant to pay all costs thrown away, to include the costs of the levy, and the costs of this appeal.

(3) The Appellant is to pay into Court to abide the result of the trial of the action the sum of $20,000.

(4) On payment into Court of the sum named the articles seized, estimated by Counsel for Appellant to be valued at approximately $15,000, are to be returned to the Appellant.

(N.A. Peterkin)
JUSTICE OF APPEAL

I agree.

(R. A. Nedd)
JUSTICE OF APPEAL (Acting)

I also agree.

(Sir Maurice Davis)
CHIEF JUSTICE