SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO.140 of 1999

BETWEEN:

(1) DAVIDSON FERGUSON
(2) SARAH FERGUSON

Plaintiffs

and

(1) WILLIE VOLNEY
(2) TEXACO WEST INDIES LIMITED

Defendants

Appearances:

Mr. Alberton Richelieu for the Plaintiffs.
Ms. Kimberley Roheman for the Defendants.

2000: July 13
2001 March 28

JUDGMENT

[1] HARIPRASHAD-CHARLES J: On 28th day of March 2001, I set aside the Judgment in Default filed herein on 21st day of October 1999 and I grant leave to the Second-named Defendant to file and serve their Defence within seven [7] days failing which Judgment and Costs to be taxed shall be entered in favour of the Plaintiffs. I also indicated that the reasons therefor would be reduced into a written judgment subsequently. The following represents my reasoned judgment.

[2] On 24th day of February 1999, the Plaintiffs filed a Writ of Summons indorsed with Statement of Claim claiming special damages of $452,793.80, interest and costs allegedly caused as a result of the negligence of the Defendants.

[3] The Writ of Summons was served on the Defendants on 19th day of May 1999. On 31st day of May 1999, the Second-named Defendant filed an entry of appearance. On 21st day of October 1999, the Plaintiffs entered Judgment in Default of Appearance against the First-named Defendant. On even date, the Plaintiffs also obtained Judgment in Default of Defence against the Second-named Defendant. On 26th day of November 1999, the Plaintiffs caused to be filed a Summons for Assessment of Damages. Three days later, the Second-named Defendant applied by Summons to set aside the Judgment in Default of Defence and sought leave to file and serve a Defence herein. The Summons was supported by a sworn affidavit of Christopher Anthony McNamara. No draft Defence was exhibited to the application.

[4] At paragraph 2 of his affidavit, the deponent, Christopher Anthony McNamara alleged that there have been negotiations between the former Solicitors of the Plaintiffs before the Firm of Richelieu & Associates took over the conduct of the matter.

[5] At paragraph 4, the said deponent averred that by letter of 17th day of June 1999, signed by himself and Mrs. Petra Nelson on behalf of Messrs. Richelieu & Associates, it was agreed that a meeting would be rescheduled to discuss the matter and that no Defence would be filed until seven (7) days after the conclusion of the said meeting. (Copy of letter exhibited herewith and marked Exhibit “A”)

[6] He further alleged that the meeting commenced on or about 6th day of July 1999 and it was agreed that certain documents and receipts would be sent to McNamara & Co. by Richelieu & Associates and that the meeting would continue and be finalized.

[7] At paragraph 6, he alleged that to date, McNamara & Company have not been in receipt of the aforementioned documents.

[8] In a nutshell, the Second-named Defendant's argument was that the meeting was never concluded as certain documents and receipts which were agreed on were not received and as a consequence, the agreement of 17th day of June 1999 that no defence will be due until seven (7) days after the conclusion of the meeting is still binding upon the parties.

[9] On 3rd day of February 2000, Edith Petra Jeffrey-Nelson filed an affidavit in reply to the affidavit of Christopher Anthony McNamara. In essence, she alleged that the meeting which was scheduled for 6th day of July 1999 had in fact been concluded and the Second-named Defendant failed and or neglected to file and serve their Defence within the stipulated time period.

[10] At paragraph 12, Ms. Nelson stated inter alia that the Plaintiffs denied that no documents were sent to McNamara & Company. She further stated that her Firm gave instructions to demand settlement from the said Second-named Defendant which they did by letter of 28th day of July 1999.

[11] Ms. Nelson averred at paragraph 13 that seven days had long passed after the expiration of the date of the meeting and there being no response to the letter of 28th day of July 1999, they proceeded to enter Judgment in Default.

[12] At paragraph 14 of her affidavit, Ms. Nelson alleged that the Judgment in Default of Defence obtained against the Second-named Defendant is a regular Judgment and the application to set it aside is not in order and as a consequence, ought to be dismissed.

[13] On 13th day of June 2000, the Second-named Defendant filed a Notice of Hearing seeking an Order to set aside the Default Judgment. A supplementary affidavit deposed by the said Christopher Anthony McNamara together with a Draft Defence of the Second-named Defendant were appended to the said Notice of Hearing.

THE PLAINTIFFS' SUBMISSIONS

[14] The Plaintiffs submitted that the Judgment in Default of Defence entered against the Second-named Defendant is regular. I agree.

[15] The Plaintiffs also rightly submitted that in order to set aside a Default Judgment which has been regularly obtained, one must show that there is a good Defence and there must be an affidavit of merits. In this regard, the case of Clarke v Harper (1979) 35 WIR 46 was cited in support of this submission.

[16] Counsel for the Plaintiffs argued that the bald allegation by the deponent, Christopher Anthony McNamara at paragraph 9 of his affidavit filed on 29th day of November 1999 that there is a good Defence is not sufficient. I entirely agree with Counsel's argument. But the said deponent filed a supplementary affidavit with a Defence of the Second-named Defendant on 26th day of June 2000 and it is somewhat startling that vigilant Learned Counsel has not alluded to the draft Defence.

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[17] The Plaintiffs alleged that the conduct of the Second-named Defendant warranted serious consideration in light of the circumstances of the case. According to the Plaintiffs, there were meetings held as to settlement which were without prejudice and the only question in issue related to quantum which would be better agreed on assessment.

[18] According to the Plaintiffs, there were negotiations ongoing with the previous Solicitors of the Plaintiffs when the present Solicitors took over the conduct of the case and requested a revivor to be sent to the Defendants' Solicitors which they refused to sign.

[19] Counsel for the Plaintiffs contended that there is no Defence on the issue of Prescription which is a matter of law as the Writ of Summons was filed on the 24th day of February 1999 and the Plaintiffs' claim in nuisance is a continuing tort which continued unabated to 11th day of March 1996.

[20] The Plaintiffs submitted that in setting aside a Judgment, the Court must exercise its equitable discretion. Counsel alluded that the maxim "he who comes to equity must come with clean hands" is particularly significant in light of the Second-named Defendant's conduct in this matter.

[21] Learned Counsel contended that the Court must also be guided by the reasons for the delay; the conduct of the parties and the justice of the case.

THE DEFENDANTS' SUBMISSIONS

[22] Learned Counsel for the Second-named Defendant contended that paragraph 9 of the affidavit of Mrs. Nelson is untrue in respect of the allegation that there was no agreement that the meeting would continue thereafter and it was understood that it had in fact concluded that day. Counsel further contended that there is ample evidence to verify an arrangement for a further meeting which was signed by Ms. Nelson. It is strange that such ample evidence is omitted as an exhibit.

[23] It is also the submission of Counsel that the crux of the matter is that there was a written agreement between the Solicitors for the parties that there would be no further proceedings until after the next meeting which was to be at the Defendants' Solicitors convenience and which was never held.

[24] In addition, the Defendants submitted that the Plaintiffs have deceptively attempted to obtain Judgment without dealing with the merits of the case and that the Second-named Defendant has an arguable Defence to the claim based on the facts and the law. The Defendants further contended that the claims by the Plaintiffs may be prescribed and statute-barred.

[25] In closing arguments, Learned Counsel referred to the case of Evans v Bartlam [1937] A.C. 473 and more particularly, the dictum of Lord Atkin at page 480 where he formulated the classic statement of the basic principle of law 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 only been obtained by a failure to follow any of the rules of procedure."

[26] The Second-named Defendant asserted that in the instant matter, there was no failure to follow procedure. According to Counsel, the failure to file and serve a Defence within the time limited for so doing was due solely to the written agreement by the Plaintiffs not to proceed within a certain time.

CONCLUSION

[27] Paragraph 13/9/18 of the United Kingdom Supreme Court Practice 2000 sets out the principles which the Courts apply in setting aside Default Judgments. They are as follows:

> "DISCRETIONARY POWERS OF THE COURT – The discretionary power to set aside a default judgment which has been entered regularly is unconditional, and the Court should not lay down rigid rules which deprive it of jurisdiction. The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the Defendant has no defence, and because, if the Defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also, as a matter of common sense the court will take into account the explanation of the Defendant as to how the default occurred. The foregoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in The Saudi Eagle [1986] 2 Lloyd's Rep. 221 at page 223. From that case the following propositions may be derived:
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> (a) It is not sufficient to show a merely" arguable" defence that would justify leave to defend under Order 14; it must both have " a real prospect of

success" and "carry some degree of conviction." Thus the Court must form a probable outcome of the action.

(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the Court's discretion to set aside."

See also: Lord Wright at page 488 in Evans v Bartlam [supra].

[28] Counsel for the Plaintiffs submitted that in setting aside a default judgment, the Court must be guided by the reason for the delay and the conduct of the parties. He placed great emphasis on The Saudi Eagle case [supra]. He contended that the Second-named Defendant was estopped from setting aside the Default Judgment because for several years and negotiations between both parties, the issue was never one of liability of the Defendants but quantum of damages. He urges the Court to take that into consideration in assessing the justice of the case. I am however not persuaded by this untenable argument as there is no evidence before the Court to substantiate it.

[29] A problem with which we are confronted in this case is to apply the guidelines set out by the House of Lords in the landmark cases of Evans v Bartlam and The Saudi Eagle to an entirely different factual situation.

[30] In Evans v Bartlam, the Defendant, Evans owed the Plaintiff a substantial sum of money for unsuccessful betting transactions. The Defendant did not enter an appearance and the Plaintiff entered Judgment in Default. Thereafter, the Defendant asked for time to pay and the Plaintiff's solicitors gave him a further seven days. Before the expiry of the seven days, the Defendant applied to the Master to set aside the Default Judgment. The Master dismissed the application but the Judge in Chambers allowed the appeal on terms as to costs. The Court of Appeal (by a majority) allowed the appeal on the ground that the Judge had, as a matter of law, no discretion in the matter because the Defendant, in asking for and receiving an extension of time, had elected to accept the validity of the Default Judgment or alternatively had approbated it and was bound in law to submit to it. The House of Lords held that there was no such rule of law and consequently the Court of

Appeal's order could not be supported. The appeal was therefore allowed and the Judge's order restored.

[31] In the Saudi Eagle case, the Plaintiffs claimed damages for breach of contract by the defendants who refused to load certain cargo. A year later the Plaintiffs issued with leave a writ for service out of the jurisdiction and served it 10 months later. No notice of intention to defend was given and interlocutory judgment was signed. An order for assessment of damages was made and damages were assessed. Final Judgment was given.

[32] The Defendants applied to set aside the Judgment and for leave to defend contending that the Plaintiffs had sued the wrong Defendants. Straughton J. dismissed the application holding that while there was an arguable point that the Plaintiffs should have sued Saudi Ambassador Shipping Co. and not Saudi Eagle Shipping Co. Ltd., the Defendants had deliberately allowed the Plaintiffs' claim to go by default and were not deserving of the Court's exercise of its discretion in their favour. The Defendants appealed.

[33] The Court of Appeal held that there was no substance in the suggested defences that it was the wrong Plaintiff and the wrong contract. They also held that on the evidence the Defendants had not shown that they had a defence which had any reasonable prospect of success; the conduct of the Defendants in deliberately deciding not to give notice of intention to defend because it suited their interests not to do so was a matter to be taken into account in assessing the justice of the case. The appeal was dismissed.

[34] The present case arises out of a negligence action. The Plaintiffs alleged that from or about 14th day of January 1996 to the 11th day of March 1996, the Defendants had wrongfully caused to issue, proceed and arise from the First-named Defendant's gas station in their possession, quantities of offensive, noxious and unwholesome fumes, vapours and gases and noxious filthy matter which have spread and diffused themselves into, over and upon the Plaintiffs' property and polluted the air. The nuisance steadily continued ever since that date but abated.

[35] The Second-named Defendant has set up Defences which are expressly set out at paragraphs 9 and 10 of the Defence filed on 26th day of June 2000. In my view, the defences show a real prospect of success and carry some degree of conviction if the evidence is forthcoming to support the pleadings.

[36] Further, there is material discrepancy of the most vital factual evidence in this matter which evidently led to the delay in the filing and service of the defence within the time specified by law. It relates to the affidavits of two solicitors, Christopher Anthony McNamara and Petra Jeffrey-Nelson. No viva voce evidence was taken to resolve the issue as to whether or not the meeting which commenced on 6th day of July 1999 was ever concluded. In the absence of such viva voce evidence, I am more inclined to accept the allegation of Christopher Anthony McNamara in his supplementary affidavit of 26th day of June 2000 as it remained uncontroverted. I therefore find that the meeting of 6th day of July 1999 was never concluded.

[37] It is my considered opinion that there could hardly be any condemnation of the conduct of the Second-named Defendant as was patently apparent in The Saudi Eagle case. Indeed, Christopher Anthony McNamara deponed that he was astounded when he learnt that Judgment in default was served on their client, the Second-named Defendant and not on them as negotiations had not yet concluded.

[38] As I have reiterated, I am of the provisional view that the Second-named Defendant has a real prospect of success in this suit. I am also of the view that the conduct of the Second-named Defendant in not filing their Defence in time was not deliberate but arose out of a misunderstanding as to whether or not the meeting was ever concluded.

[39] In Bank of Nova Scotia v Emile Elias & Co. Ltd. (1992) 46 WIR 33, it was held that in order to set aside a Default Judgment a defendant must show not merely that it had an arguable case but that its defence had merits to which a Court must pay heed. I opined that it would be a grave injustice not to allow the Second-named Defendant to have a proper adjudication on the merits.

[40] In the exercise of my discretion, I set aside the Judgment in Default of Defence filed herein on 21st day of October 1999. I grant leave to the Second-named Defendant to file and serve their Defence within seven [7] days failing which judgment and costs to be taxed shall be entered in favour of the Plaintiffs. I further order that the Second-named Defendant do pay the Costs in any event occasioned by the setting aside of the Judgment in Default.

INDRA HARIPRASHAD-CHARLES

High Court Judge

4th day of April 2001