GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.12 OF 2005

BETWEEN:

[1] GREGORY BOWEN
[2] THE ATTORNEY GENERAL

Appellants

and

DIPCON ENGINEERING SERVICES LIMITED

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Hugh Wildman with Adebayo Olowu for the Appellants
Mrs. Celia Edwards for the Respondent

2006: February 21;
May 22.

JUDGMENT

[1] GORDON, J.A.: This is an appeal against a decision of the Master dated July 8, 2005 refusing an application by the appellant to be removed from the claim as a defendant in his personal capacity.

[2] The background to this appeal can be stated quite shortly. By an agreement dated 30th September 1994 between the Government of Grenada and the respondent the respondent leased from the Government a quarry for a period of 10 years. In 1995, after a change of government, the Government, through its then Minister of Works, (the appellant) terminated the agreement. The respondent filed a writ claiming damages naming the appellant, Lawrence Samuels and

Consolidated Contractors Limited as defendants. By a ruling of the High Court (St. Paul J.) it was determined that the complaint was really against the Government of Grenada. An application was made by the respondent as claimant (and granted) to remove the names of Samuel and Consolidated from the suit and to add the name of the Attorney General as defendant. The appellant's name remained as a defendant. No more need be said in this context than that a judgment in default was entered in favour of the respondent against both defendants. That judgment (hereafter called "the principal judgment") was appealed by the Attorney General and the appellant and was confirmed by the Privy Council.

[3] Prior to the hearing of the appeal against the principal judgment by this court, the appellant filed a summons on July 31st 2001 seeking to be removed as a defendant on the grounds that the claim against him was not sustainable in that any action he took was taken as a Minister of Government and hence the action against him personally was in breach of section 14 (2) of the Crown Proceedings Act (hereafter "the Act"). Whilst the matter was wending its way to Her Majesty in Council the summons of July 2001 remained in abeyance. It is that summons that the Master heard on July 8, 2005.

[4] Of importance is the fact that the summons referred to at paragraph 3 above was never drawn to the attention of either the High Court, the Court of Appeal or the Privy Council. It remained in a state of suspended animation until it was heard by the Master.

[5] The learned Master arrived at his decision to refuse the application not on the basis of a consideration of the merits of the application, but rather on the basis of a lack of jurisdiction on which topic the Master had invited submissions as a preliminary issue. In his view, as expressed in his judgment "[t]he defendant here is asking me to interfere with a decision of the Appellate Court of last instance."

[6] Section 14 of the Crown Proceedings Act to the extent relevant reads as follows:

> "14 (1) Civil proceedings by the Crown may be instituted by the Attorney-General.
>
> (2) Civil proceedings against the Crown shall be instituted against the Attorney-General…"

[7] It is the submission of Counsel for the respondent that the language of section 14 (2) of the Act is mandatory and hence any judgment obtained contrary to its terms is bad in law and a defendant adversely affected, as is the respondent in this case, is entitled to have the judgment set aside, *ex debito justitiae*, as a nullity.

[8] Unfortunately, the learned Master did not have for his assistance the Privy Council decision in Strachan v The Gleaner Company Limited et al[1] which decision was issued some few days after the Master delivered his.

[9] The circumstances in Strachan were as follows: In January 1992 the plaintiff Mr. Leyman Strachan brought an action for libel against the Gleaner newspaper and its editor. In April 1992 judgment in default of defence for damages to be assessed was entered in favour of the plaintiff. In May 1995, after a six day hearing in which the Gleaner took full part, damages were awarded to the plaintiff in the sum of some $500,000.00 special damages and $22.5 million general damages (J$). Shortly after the result was publicized in Jamaica, two persons came forward as potential witnesses with evidence which the defendants claimed would enable them to plead the defence of justification. The defendants applied to the Supreme Court to set aside the default judgment and for leave to defend the action on the grounds of fresh evidence.

[10] The judge at first instance set aside the default judgment and gave the defendants leave to defend the action ("the Walker J. Order"). The trial judge treated the viability of the proposed defence and the delay in making the application as the

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[1] 2005 [UKPC] 33

critical issues. The plaintiff applied to the Supreme Court alleging that the setting aside Order was made without jurisdiction and was a nullity which another judge of the Supreme Court could and should set aside. Upon the hearing of the application, the defendants took the point, by way of preliminary objection, that a judge of the Supreme Court could not set aside an order made by a judge of co-ordinate jurisdiction. The objection was upheld and that order upholding the preliminary objection ("the Smith J. Order") was appealed to the Court of Appeal which upheld the decision and further appealed to the Privy Council.

[11] Section 258 of the Judicature (Civil Procedure Code) Law of Jamaica provides that:

> "Any judgment by default, whether under this title or under any other provision 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"

This is substantially in pari materia with the old Rules of the Supreme Court (Revision) 1970 Order 13 rule 8 which provides that,

> "The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."

[12] In commenting on section 258 of the Judicature Law of Jamaica the Privy Council said the following at paragraphs 14 and 15:

> 'That Title includes section 247 which provides for the entry of an interlocutory judgment for damages to be assessed. In *Mason v Desnoes and Geddes Ltd* [1990] 2 AC 729, (a case under a different section which enables the Court to set aside a judgment where a party does not appear at the trial), the Board observed that the reference to "the Court or a Judge" makes it clear that the jurisdiction is one which may be exercised by a judge in chambers and, at pp 736-737:
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> > "…the application to set aside a default judgment is not the invocation of an appellate jurisdiction but of a specific rule enabling the court to set aside its own orders in certain circumstances where the action *has never been heard on the merits*." (Emphasis added.)
>
> There is no doubt that section 258 gives a judge of the Supreme Court power to set aside a default judgment, whether it be a judgment for damages which remain to be assessed (which is interlocutory) or for liquidated damages (which is final). The question for decision in the

> present appeal, therefore, is not whether the judgment which Walker J purported to set aside [the Walker Order] was interlocutory or final, but whether it was a default judgment. That depends on whether the interlocutory judgment for damages to be assessed was spent when the damages were assessed or (to put it another way) whether it was superseded or overtaken by the final judgment for a liquidated sum; and if so whether the final judgment can be said to be a default judgment when the defendant appeared at and participated in the hearing to assess damages."

[13] The Privy Council continued in its judgment at paragraphs 18 and 19 in the following terms:

> "The conclusion that Walker J. had jurisdiction to make the order he did is well supported by authority. In *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.* (*The Saudi Eagle*) [1986] 2 Lloyd's Rep 221 the defendants, believing that they had no assets, deliberately allowed an interlocutory judgment for damages to be assessed to be entered against them by default, and only after damages had been assessed and final judgment entered, realising that they had given security, applied initially to the judge and then on appeal to the Court of Appeal, unsuccessfully at both hearings, to set aside the judgment and for leave to defend. The application was refused on the merits; but it was not suggested that the judge would not have had jurisdiction to set aside the judgment had it been appropriate to do so.
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> In *Dipcon Engineering Services Ltd v Bowen* [2004] UKPC 18; 64 WLR 117 (which was decided after the judgment in the Court of Appeal in the present case), Lord Brown of Eaton-Under-Heywood, writing for the Board on appeal from the Court of Appeal of the Eastern Caribbean Supreme States, said at para 24:
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> > "Whilst *Saudi Eagle* is clear authority, if authority were needed, for the proposition that an application to set aside a default judgment can be made (and, if refused, can then be appealed) notwithstanding that final judgment had been entered, it is certainly not authority for saying that on an appeal against an assessment of damages a previous default judgment can be set aside without any such application ever having been made…"

[14] As their Lordships point out, it is by no means new law that an application to set aside a default judgment can be made notwithstanding that final judgment has

been entered. The principle is of long standing. In 1937 Lord Atkin in Evans v Bartlam[2] said the following:

> "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 only been obtained by a failure to follow any of the rules of procedure".

Accordingly I would hold that the master had jurisdiction to set aside the default judgment that had been entered against the appellant and to dismiss the claim against the appellant in his personal capacity.

[15] A final issue must be dealt with, and that is whether the Rules of the Supreme Court 1970 apply, or, whether the Civil Procedure Rules 2000 (CPR) apply. CPR part 13.3 and 13.4 read as follows:

> Cases where court may set aside or vary default judgment
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> 13.3(1) If rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –
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> (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
>
> (b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and
>
> (c) has a real prospect of successfully defending the claim.
>
> (2) If this rule gives the court power to set aside a judgment, the court may instead vary it.
>
> Applications to vary or set aside judgment – procedure
>
> 13.4(1) An application may be made by any person who is directly affected by the entry of judgment.
>
> (2) The application must be supported by evidence on affidavit.
>
> (3) The affidavit must exhibit a draft of the proposed defence."

[16] It will be appreciated that CPR is more restrictive than the Rules of the Supreme Court 1970 in the criteria used for the exercise of judicial discretion. However, I am of the view that this should not be a factor in this case. Part 73 of CPR entitled

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[2] [1937] AC 473

"Transitional Provisions" at sub rule 73.3 states "These rules do not apply to proceedings commenced before the commencement date in which a trial date has been fixed unless that date is adjourned." In this case there was no trial date, but a judgment in default was obtained before the commencement date. In the circumstances I hold that the Rules of the Supreme Court 1970 are the applicable rules and in particular Order 13 rule 8 quoted at paragraph 11 above.

[17] In conclusion, I hold that the learned Master did have jurisdiction to grant the application if, in the exercise of his judicial discretion, he felt that this was the proper course in the interests of justice. However, he did not exercise his discretion and so I am of the view that this court, being in as good a position as the learned Master, can exercise its discretion and grant the application for the removal of the appellant as a defendant in suit No.1996 No. 1.

[18] In all of the circumstances of this case, and in light of further information as to the conduct of the parties which may be discovered by a reading of the Privy Council judgment in Dipcon Engineering Services Limited v Bowen and another[3], I would order that each party bear its own costs of both this appeal and that of the court below.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

[3] (2004) 64 WIR 117