

GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.9 OF 2001

BETWEEN:

1. GREGORY BOWEN
2. THE ATTORNEY-GENERAL OF GRENADA

Appellants

and

DIPCON ENGINEERING SERVICES LIMITED

Respondent

Before:

The Hon. Sir Dennis Byron
The Hon. Mr. Satrohan Singh
The Hon. Mr. Albert Redhead

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr R.N.A. Henriques Q.C., Mr Hugh Wildman with him for the Appellants
Mrs Celia Edwards, Mrs Byer with her for the Respondent

November 21: 2001
January 14: 2002

JUDGMENT

- [1] SINGH, J.A.: On July 9th, 1996, the Respondent brought suit against the Appellants claiming a declaration that an agreement of September 30, 1994 was valid and binding, and an injunction.
- [2] On December 9, 1996, because the Appellants filed no defence, the Respondent entered judgment in default of defence and damages were to be assessed.

- [3] Negotiations then took place between the Attorneys for the Respondent and the Second named Appellant.
- [4] On December 11, 1998, with both the Respondent's Attorney and the Appellant's present, a consent judgment was entered in favour of the Respondent for \$3,000,000.00
- [5] On September 25, 1999, the Respondent instituted proceedings to set aside that consent judgment. Those proceedings were heard and dismissed by St. Paul J on October 4, 1999, who also refused the Respondent leave to appeal.
- [6] The Respondent thereafter, on October 4, 1999, instituted new proceedings in Suit No. 452 of 1999 in respect to the same cause of action. In 452 of 1999, Alleyne J, on October 5, 2000, set aside the aforementioned Consent Order, and ordered that there be an assessment of damages.
- [7] By a summons dated May 3, 2001, supported by an affidavit from the First named Appellant and a draft defence, the Appellants sought to set aside the aforementioned default judgment on grounds that the judgment offended "the Rules of the Supreme Court as well as Statute Law" and that there was a good defence disclosed in the affidavit in support and the draft defence. No affidavit was filed in response thereto.
- [8] On June 15, 2001, Alleyne J, refused the Appellants an adjournment of the hearing of the application and dismissed the application to set aside the default judgment with costs to the Respondent.
- [9] In dismissing the application, the learned Judge held that "the affidavit filed in support is without merit and would have scant chance of success." The Judge did not see the draft defence.

[10] Alleyne J then proceeded with the assessment of damages and on July 31, 2001, awarded the Respondent special damages \$3,696,304.43 and general damages \$7,506,328.00 with interest on the special damages at 10% per annum from January 8, 1996, and interest on the general damages at the statutory rate from the date of the judgment in default December 9, 1996. He also awarded costs.

[11] The Appellants have appealed against this Order of Assessment on the following grounds:-

1. The learned trial judge erred in law in refusing the Appellants' application to set aside the default judgment; in refusing the application the learned trial judge held that the Appellants' defence had a scant chance of success. It is submitted that the proper test is whether or not the Appellants can show that they have an arguable case on the merits.
2. The default judgment of the Respondent was irregularly obtained in that it did not comply with Order 54 Rule 2 (1) of the Rules of the Supreme Court (Revision) 1970, which states that where proceedings are commenced against the Crown, it shall be endorsed on the writ stating the circumstances in which the Crown's liability is alleged to have arisen and the Government Department and officers of the Crown concerned. It is submitted that the failure of the Respondent to so indicate on the writ renders the proceedings a nullity.
3. That the learned trial judge erred in law in proceeding with the assessment of damages on affidavits in that there was no order by the Court for assessment to be done by affidavit as is required by Order 38 Rule 2(1) of the Rules of the Supreme Court (Revision) 1970."

[12] This was a rather clever notice of appeal. It speaks that the appeal is from the judgment of Alleyne J wherein he assessed the damages in this matter. It does not challenge the quantum of that assessment. It challenges it on procedural grounds. Its primary ground was that the assessment was wrong because the Trial Judge erred when he dismissed the

Appellant's application to have the default judgment set aside. A decision from which there was no appeal.

- [13] However, despite this ingenuity of the Appellants, I agree with the submission of Learned Queen's Counsel Henriques, that as assessment of damages could be challenged on the ground that the judgment was improperly obtained. I therefore address that issue.

The Default Judgment

- [14] The Power given to a judge to set aside a judgment in default is discretionary exercise is the need to do justice to all parties. In *Evans –v- Bartlam* (1937) A.C. 473 Lord Atkin at p 480 explained this power with these words:

“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.”

- [15] It is settled law, that in the exercise of this discretion, the Judge does not have to be satisfied that the Appellant has a defence which is likely to succeed. It would be enough, if he found that there was, with some degree of conviction, an arguable case for the defence. [*Evans –v- Bartlam supra*: *Day –v- Royal Automobile Club Motoring Services Ltd.* (1999) 1 WLR p 2150.]

- [16] I would here adopt the approach as suggested by Ward LJ in *Day's* case at p 2157.

“Perhaps the best guidance of all is in Sir Roger Ormrod's judgment that this is not a rule of law but a matter of commonsense. Thus it is usually easy to identify the case which is hopeless and say “There is no real prospect of success.” I add the emphasis to make the point that one is

looking at the matter negatively. The approach is distorted if one uses “real prospects of success” as a positive test. That wrongly encourages a test for judging fact on affidavit and then coming to a provisional view of the probable outcome. I agree, however, that the arguable case must carry some degree of conviction but judges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set aside against the facts being advanced by the other side. Choosing between them is the function of the Trial Judge, not the judge on the interlocutory application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it. I would therefore be a little hesitant to elevate the test into, as it is advanced in *The Supreme Court Practice*, a real likelihood that a defendant will succeed.”

- [17] Applying the above principles of law to the instant matter, I am of the view that **Alleyne J** applied a wrong legal principle when he dismissed the application to set aside the default judgment because the defence in the affidavit of merits “would have scant chance of success.” As I understand that language, the Learned Judge was not saying that the Appellants’ case was “hopeless”.
- [18] In any event, looking at the affidavit of merits, it is difficult to understand how the Learned Judge came to conclusion. The case brought by Respondent alleged a breach of contract by the Appellants. The case brought by Respondent alleged a breach of contract by the Appellants. The defence as alleged in the affidavit of merits, contended that the breach was on the part of the Respondent and it identified what was that breach. The transcript before us does not disclose any inherent improbability in what was being asserted by the appellants or any extraneous evidence which was capable of contradicting that assertion. In my judgment, such a situation would necessitate an investigation into the facts of the case which would be a matter for the Judge at the trial and not **Alleyne J** on the application.

- [19] In my view, what was disclosed in the affidavit was enough to identify an arguable defence to justify the grant of the application to set aside the default judgment. I have seen in the record before us, the draft defence. What is disclosed therein fortifies my opinion that there was an arguable defence. In my judgment therefore, **Alleyne J**, erred in law when he refused to set aside the default judgment. On the authority of **Evans –v- Bartlam [Supra]**, the consent judgment which was set aside, would be an irrelevant consideration by this Court in the determination of the appeal. I therefore agree with the arguments in support of the ground of appeal that the Trial Judge erred when he dismissed the application to set aside the default judgment. Accordingly, I order that the said default judgment be set aside.
- [20] Looking at this matter as a whole, from all that is disclosed in the transcript before us, including the unhealthy and unsavory atmosphere that prevailed between the legal advisors of the Appellants and the Bench and the enormous quantum of the judgment on assessment, I am of the considered opinion that there would be justice for all, should the Appellants be given an opportunity to present their defence.
- [21] Having set aside the default judgment, the judgment on the assessment must also be set aside.
- [22] I would therefore allow this appeal. The judgments of **Alleyne J** on the default judgment and assessment of damages are set aside. The Appellants are given 14 days from the date of this judgment to file their defence after which the matter will take this normal legal course. Failure of the Appellants to file their defence within this prescribed time, the aforementioned judgments will stand without further order. It is also considered that all costs thrown away as a result of this judgment to be paid by the Appellants to the Respondent.

SATROHAN SINGH
Justice of Appeal

I concur

C.M. DENNIS BYRON
Chief Justice

I concur

ALBERT REDHEAD
Justice of Appeal

Dated this 11th Day of December, 2001