

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 6 of 1992

BETWEEN:

WAYNE BROWN

Appellant

and

MALCOLM CHARLES

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice  
The Honourable Dr. Nicholas J.O. Liverpool - Justice of Appeal  
The Honourable Mr. Satrohan Singh - Justice of Appeal

Appearances: Mr. H.D.A. Deterville for the Appellant  
Mr. M.B.G. Gordon for the Respondent

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1993: October 26, 27;  
November 08.  
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JUDGMENT

SIR VINCENT FLOISSAC, C.J.

By a peremptory ("unless" or conditional) order dated 19th December 1990 and entered on 3rd January 1991, d'Auvergne J. ordered (*inter alia*):

" (1) That the defendant (respondent) do within fourteen (14) days of the date hereof serve on the plaintiff (appellant) the further and better particulars of the defence as requested in the Request for Particulars filed herein on the 26th day of November 1990.

(2) That in the event that the defendant (respondent) fails to comply with this order paragraphs 2 and 4 of the defence be struck out....."

The particulars ordered were filed in the High Court on 9th January 1991 and according to paragraph 4 of the appellant's Affidavit in support of the summons hereinafter referred to, the particulars were served on the appellant's solicitors on the following day (10th January 1991). This means that the particulars were served seven days later than the date prescribed therefor by the peremptory order.

On 18th October 1991 or more than nine months after the service of the particulars, the appellant filed a Request for Hearing and on 3rd February 1992, the action was fixed for hearing

on 12th May 1992. Meanwhile, by summons filed in the High Court on 30th April 1992, the appellant applied for an order:

" (1) Declaring that the defence of the defendant (respondent) herein to have been struck out as provided for in the order of the Court herein dated 19th day of December 1990 and entered on the 3rd of January 1990.

(2) That the plaintiff (appellant) be at liberty to enter judgment against the defendant (respondent) in the terms of the prayer in the statement of claim....."

By judgment delivered on 27th May 1992, *d'Auvergne J* dismissed the appellant's summons or application. The appellant is dissatisfied with the judgment and has appealed against it. The two issues in the appeal are (1) whether the learned judge should have declared that paragraphs 2 and 4 of the defence had been struck out and (2) whether the learned judge should have granted leave to enter judgment in default of defence.

#### **(1) The declaration**

Technically, there was no need for a judicial declaration that paragraphs 2 and 4 of the defence had been struck out. The fate of these paragraphs had already been ordained by the peremptory order which clearly stipulated the consequence of disobedience thereof. The peremptory order was an order of the High Court and as such was and remained valid and effective until it was reversed, revoked, set aside, varied or performed.

There was no appeal against the peremptory order. Nor was there any application to revoke, set aside or vary that order. Nor was there any application for an extension of the time prescribed by that order for the service of the particulars ordered. When that prescribed time elapsed, paragraphs 2 and 4 of the defence were struck out as an automatic result of the peremptory order and the disobedience thereof and without the need for any further judicial declaration to that effect.

#### **(2) Judgment in default**

The second and principal issue in this appeal is whether the learned judge should have granted the appellant leave to enter judgment in default of defence. Indisputably, the grant of such

leave was entirely within the judicial discretion of the learned judge who was required to exercise that discretion by the application of relevant principles and by having due regard to all relevant factors, circumstances and considerations and to the relative weights thereof.

In her judgment, the learned judge outlined the antecedents of the summons and considered the submissions of counsel for the appellant and counsel for the respondent. The learned judge was particularly impressed with the submission of counsel for the respondent that "after a request for hearing has been granted and a date set there should not be any further application". That submission was based on Order 34 rule 3(2) which provides that "If there are any interlocutory proceedings pending, a cause or matter shall not become ripe for hearing until the determination of such proceedings."

The learned judge concluded her judgment as follows:

" It is my view that the submission falls under Order 34 Rule 3(2). It is also significant to note that the Request for Hearing was filed nine (9) months after the order of 19th December 1990 and therefore the plaintiff should have made the application under review then."

The learned judge therefore seemed to have been content to dismiss the application solely on the ground of its lateness. However, there were at least four factors which were relevant to this case and which the learned judge could have taken into account.

Firstly, the Court will not normally grant leave to enter a judgment which it would afterwards set aside on proper grounds. In *Wallersteiner v Moir* (1974) 3 AER 217 at 232, Lord Denning M.R. said:

"The Court will not enter a judgment which it would afterwards set aside on proper grounds being shown: see *Graves v Terry*; *Gibbins v Strong*. A judge in chambers has a discretion which he will exercise on the same lines as he will set aside a judgment in default. He will require the party to show that he has a good defence on the merits. This is a time-hallowed phrase going back for a hundred years: see *Watt v Barnett*; *Farden v Richter*. It has been explained by Lord Atkin as meaning that the applicant would produce to the court evidence

that he has a prima facie defence (see *Evans v Bartlam*). The applicant must produce evidence by affidavit showing that he has such a defence. The judge will also himself require the party in default to pay the costs occasioned by his default. But ultimately it is for the discretion of the judge - a discretion, be it noted, which will be reviewed in this court, if need be."

Had the learned judge granted the appellant leave to enter judgment in default of defence, she would have done so in the face of the likelihood of that judgment being subsequently set aside under the rule laid down by the House of Lords in *Evans v Bartlam* (1937) 2 AER 646. There it was decided that normally the dominant or overriding factor which governs the exercise of the judicial discretion to revoke or set aside a regular judgment in default of defence is the fact that the defendant has a prima facie defence on the merits to the Statement of Claim. In the present case, that dominant or overriding factor may be said to have been in danger of being neutralised by the existence of the peremptory order, but the degree of the likelihood of the continuance of that danger had to be measured in the light of the second factor to which I shall now refer.

Secondly, the respondent was at liberty at any time before the trial of the action to invoke the discretion of the Court to extend the time prescribed by the peremptory order for the service of the particulars ordered thereby. In *Samuels v Linzi Dresses* (1980) 1 AER 803, the English Court of Appeal unanimously affirmed the grant of an extension of the time prescribed by a peremptory order for the delivery of particulars of a defence and counterclaim. Delivering the leading judgment for the Court, Roskill L.J. said (at p.812):

" Orders as to time, and in particular as to the time for delivery of pleadings and particulars, are made not to be ignored but to be complied with. In the present case, long before the problem caused by the 1978 Christmas holidays arose, there had been serious delay in complying with various orders, and the defendants were at mercy when they came before Judge Hawser. They had not done that which they ought to have done. They were not, save perhaps at the very last moment, deserving of any sympathy. But at the last moment they had made a real effort to comply with the order and they were perhaps unlucky that their efforts did not meet with success.

In my judgment, therefore, the law today is that a court has power to extend the time where an 'unless' order has been made but not been complied with; but that it is a power which should be exercised cautiously and with due regard to the necessity for maintaining the

principle that orders are made to be complied with and not to be ignored. Primarily it is a question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not.

I think that Judge Hawser was in law entitled to grant the relief sought and to exercise his discretion in the way he did."

Thirdly, in the *Supreme Court Practice* (the White Book) 1993 at page 471 (25/1/5), it is stated that:

" The exclusion from any further part in the proceedings of a party who deliberately disobeys a peremptory order of the Court is appropriate where there is a real risk that the default will render the fair trial of the action impossible and any judgments in favour of the defaulter unsafe. Once the order has been complied with, even if compliance is after the time stipulated in the order, the defaulter will not be excluded from the proceedings unless the circumstances are exceptional and there remains a real risk that justice cannot be done (*Logicrose Ltd. v Southend United Football Club Ltd.*, The Times, March 5, 1988)."

Fourthly, although paragraphs 2 and 4 of the Defence had effectively been struck out, there still remained paragraph 3 of the Defence which was a denial of the contractual obligations and indebtedness alleged in paragraphs 3, 4 & 5 of the Statement of Claim. There was no application to strike out paragraph 3 of the Defence and there was no certainty that upon such application, paragraph 3 would be struck out on the ground that it was general and not specific. This was a matter yet to be determined after hearing counsel on both sides.

The learned judge may have contemplated these four factors when she refused the appellant leave to enter judgment in default of defence. She may have anticipated that the respondent would inevitably take steps to extricate himself from the consequences of the peremptory order. She may have thought that the degree of the contempt or contumely inherent in the disobedience of the peremptory order was minimal and that the contempt or contumely was forgivable by a simple explanation. She may have concluded that in these circumstances a judgment in default of defence was a futility which could only have the effect of delaying a trial the date for which had already been fixed and was imminent. Since the learned judge did not allude to these factors and considerations, I will assume that she was not influenced by them and that she exercised

her judicial discretion solely on the basis of the lateness of the application.

In *Bellenden (formerly Satterthwaite) v Satterthwaite* (1948)

1 AER 343, *Asquith L.J.* said (at p345):

" We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

This dictum of *Asquith L.J.* was cited with approval by the House of Lords in *G v G* (1985) 2 AER 225. There, *Lord Fraser* (delivering the leading judgment of the House) said (at pp 228 & 229):

" Nevertheless, there will be some cases in which the Court of Appeal decides that the judge of first instance has come to the wrong conclusion. In such cases it is the duty of the Court of appeal to substitute its own decision for that of the judge. The circumstances in which the Court of appeal should substitute its own decision have been described in a number of reported cases, to some of which our attention was drawn. We were told by counsel that practitioners are finding difficulty in ascertaining the correct principles to apply because of the various ways in which judges have expressed themselves in these cases. I do not think it would be useful for me to go through the cases and to analyse the various expressions used by different judges and attempt to reconcile them exactly. Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as 'blatant error' used by Sir John Arnold P in the present case, and words such as 'clearly wrong', 'plainly wrong' or simply 'wrong' used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

Although I may not be satisfied with the sole reason for the learned judge's decision, I am certainly not in disagreement with the decision or the outcome of the exercise of her judicial discretion. Had I been required to exercise my own appellate judicial discretion and to do so on the ground that the learned judge erred in principle, I would have arrived at the same decision to dismiss the appellant's application for leave to enter judgment in default of defence. I would have arrived at that decision on

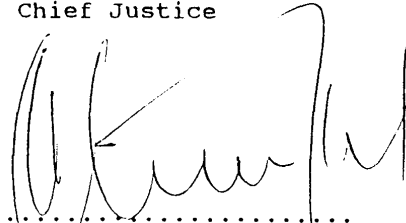
the basis of the four factors and the other considerations to which I have alluded. It is therefore academic to determine whether the learned judge erred in principle by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being unduly influenced by irrelevant factors and considerations. In my judgment, the original and appellate decisions would be the same.

For these reasons, I would dismiss the appeal but with no order as to costs.



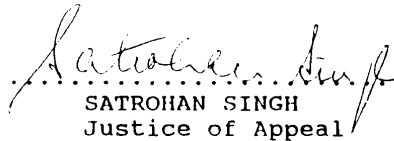
.....  
SIR VINCENT FLOISSAC  
Chief Justice

I concur.



.....  
NICHOLAS J.O. LIVERPOOL  
Justice of Appeal

I concur.



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SATROHAN SINGH  
Justice of Appeal