

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 of 1991

BETWEEN:

1. ASHTON AMORY SR.
2. ASHTON AMORY JR.

Appellants

and

DORA CLENDONINEN

Respondent

Before: The Honourable Chief Justice Floissac - President
The Honourable Miss Justice Joseph J.A. (Ag.)
The Honourable Mr. Justice Matthew J.A. (Ag.)

Appearances: Mr. T. Byron for the Appellants
Mr. L.L. Moore for the Respondent

1992: March 26 and 27.

JUDGMENT

MATTHEW J.A. (Ag.)

On March 28 1991, the Respondent, Dora Clendoinen, then plaintiff, filed a Suit against the Appellants Ashton Amory Sr. and Ashton Amory Jr. then defendants, claiming from them, jointly and generally, damages and costs.

No appearance to this Suit was entered within eight days after service of the Writ as is required by Order 12, Rule 4 of the Rules of the Supreme Court (Revision) 1970, and so, on April 17, 1991 the Respondent entered judgment in default of appearance purportedly under Order 13, Rule 1, of the Rules of the Supreme Court.

The Appellants by summons dated May 25, 1991 sought to set aside the judgment in default. The affidavits in support of the summons were to the effect that the Appellants had a good defence to the action. The Solicitor for the Respondent and the Solicitor's Clerk swore to affidavits in support of the summons.

Before that summons could be dealt with by the learned Judge, the Appellants filed another summons on June 27, 1991 to set aside

the same judgment in default of appearance, but on this occasion they set up another reason in support of their application, namely, that the judgment was irregular in that it did not comply with Order 13 Rule 2 of the Rules of the Supreme Court.

Singh J, after hearing arguments from both sides, on June 28, 1991, ordered that the application of the Appellants be granted and that the judgment in default be set aside. He further ordered that the Appellants be given seven (7) days to file their defence and that costs of \$1,000 thrown away by the Respondent be paid by the Appellants. He also ordered that the costs of \$1,000 was to be paid before the filing of the defence.

On July 12, 1991 the Appellants filed a summons seeking leave to appeal against the Judge's order just referred to above, and on July 19, 1991 the learned Judge refused the application for leave to appeal.

On October 9, 1991 this Court granted the necessary leave to the Appellants to prosecute the appeal.

The grounds of appeal as found at page 1 of the record are as follows:

- "1. That the defendants are entitled to the setting aside of the Judgment dated the 17th day of April, 1991 ex debito justitiae, and without any terms being imposed against them as to costs;
2. That the learned Judge erred in awarding costs of \$1,000 to the plaintiff in setting aside a Judgment irregularly entered by the plaintiff when there were no proper materials before the learned Judge upon which he could do so."

As I stated earlier the Respondent entered judgment in default of appearance pursuant to Order 13 Rule 2 of the Rules of the

Supreme Court. That rule pertains to a claim for a liquidated demand only. But the statement of claim is in respect of a claim for unliquidated damages and any judgment in default of appearance in this circumstance should have been entered pursuant to Order 13, Rule 2 of the Rules of the Supreme Court.

The judgment in default of appearance entered on April 17, 1991, states-

"(a) That the defendants Ashton Amory Sr. and Ashton Amory Jr. do pay the plaintiff the sum of \$37,418.70.

(b) That the defendants pay the costs of this action to be taxed".

That judgment in the terms stated above would have been appropriate in the case of a default of appearance when the claim is for a liquidated demand.

In his ruling found at page 40 of the record, the learned trial Judge stated -

"The Judgment entered was irregular only on the ground that it was entered for a liquidated sum when the plaintiff's claim was for unliquidated damages. The Judgment would have been perfect had it been entered for damages to be assessed".

I agree with the learned Judge that the Judgment was irregular. However, he went on to deal with the reasons for the non entry of appearance and the merits of the defence.

At the hearing learned Counsel for the Appellants advanced an argument that the judgment was irregular also because there was no compliance with Order 13 Rule 7(1) which states:-

"7(1) Judgment shall not be entered against a defendant under this Order unless -

(a) an affidavit is filed by or on behalf of the plaintiff

proving due service of the writ or notice of the writ on the defendant; or

- (b) the plaintiff produces the writ indorsed by the defendant's solicitor with a statement that he accepts service of the writ on the defendant's behalf".

There is nothing on the record to indicate that the Respondent complied with Rule 7(1) of the Rules of the Supreme Court.

Learned Counsel for the Respondent in his usual forthright manner conceded that the authorities were clear in this matter. He did not advance any counter arguments.

My finding that the order was irregular has certain consequences. At Volume 26 of the Fourth Edition of Halsbury's Laws of England, the learned authors state *inter alia*:-

"When a judgment in default of appearance or defence has been entered before the proper time, or there has been no service, or no sufficient service, or it has been entered for a greater amount than is due, or there has been a breach of good faith, it will be set aside *ex debito justitiae*, apart from any consideration as to whether there is a good defence on the merits, and the plaintiff is usually ordered to pay the costs occasioned by the judgment or order."

The Appellants, in my view, obtained the setting aside of the Order *ex debito justitiae* and yet were visited with costs in the sum of \$1,000.

In *White v. Weston* 1968 2 A.E.R. 842, the Court of Appeal held that because the summons to the defendant was posted to an address which at the relevant time was not the defendant's residence or place of business and did not reach him, the defect was so fundamental as to entitle him *ex debito justitiae* to have the judgment set aside without terms being imposed; and accordingly the order that costs of the original hearing should be costs in the

cause should be set aside.

At page 846, Lord Justice Russel stated:-

"In cases where a defendant has applied to set aside a judgment and is entitled to such an order as of right, the court has exercised its discretion in respect of the defendant's costs of the application if the defendant declines to agree to terms suggested by the court, recognising that the court cannot impose terms on a defendant who does not agree. But here the court, by making an order that the plaintiff's costs of the November 1966 hearing should be costs in the cause, has in effect imposed a term on the defendant, and has qualified or subtracted from his absolute right to have the judgment set aside. In my view the county court judge misdirected himself in considering that he had any power to visit, even contingently, on the defendant the plaintiff's costs of a hearing that, as against this defendant, should never have taken place at all, and to which he was a stranger. Accordingly, in my judgment, that part of the order below that ordered the costs of the November 1966 hearing be costs in the cause should be set aside."

And Lord Justice Sacks at page 848, had this to say -

"Once the county court judge had disabused himself of his suspicions, and had come to the conclusion (which seems to have surprised him) that the summons had been sent by post to the wrong address and had not been received by the defendant, it followed that he was dealing with a case in which the plaintiff had obtained judgment despite the fact that there had been no service of process on the defendant. I agree, for the reasons given by my Lord, that the latter was then quite plainly entitled to have the judgment set aside *ex debito justitiae*; and to my mind also it is in the present case (where no execution was levied) academic to discuss whether technically it is set aside as being a nullity, or on account of irregularity".

In my judgment the Appellants in this case were entitled to have the irregular default judgment entered against them on April 17, 1991, set aside *ex debito justitiae* and without any order as to costs to be paid by them to the Respondent.

I notice that from an exhibit on the record the solicitor for the Appellants on June 28, 1991 enclosed a cheque of \$1,000 to the Solicitor for the Respondent pursuant to the Order of Singh J. At the hearing learned Counsel for the Appellants asked this Court to bear in mind that the money has been paid.

The Court hereby orders that the part of the order below dated June 28, 1991, which relates to the award of costs of \$1,000 to be paid by the appellants to the Respondent, be set aside.

The Court further orders that the Respondent do repay to the Appellants forthwith the said sum of \$1,000 paid by the Appellants to the solicitor for the Respondent on or about June 28, 1991.

To the extent indicated herein the appeal is allowed.

The Respondent is ordered to pay the Appellants their costs of this appeal to be taxed, if not agreed.

(Sgd.) A.N.J.MATTHEW
Justice of Appeal (Ag.)

(Sgd.) V.F.FLOISSAC
Chief Justice

(Sgd.) M. JOSEPH
Justice of Appeal (Ag.)