IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. K025 OF 1998

BETWEEN	MARGARET KIDD	PLAINTIFF
AND	SHENETTE ARJU	1ST DEFENDANT
AND	RICHARD GORDON	2ND DEFENDANT

Heard on 11th April 2002 and on 27th May 2002

Mr. Stephen Jeffery Mordecai, for the Plaintiff.

Ms. Gillian Mullings instructed by Patrick Bailey & Co. for 2nd Defendant.

Campbell J.

On the 27th December 2001 the 2nd Defendant filed a Relisted Notice of Motion dated 3rd July 2001, for Stay of Execution and to set aside Service of the Writ of Summons and all subsequent proceedings.

The Notice sought the following Orders:

1) There be a stay of execution of the Judgement herein.

2) That the service of the Writ of Summons and all subsequent proceedings herein be set aside.

3) In the alternative, that the time within which to apply to set aside the Final Judgement be enlarged in accordance with section 676 of the Judicature Civil Procedure Code Law.

4) That the Final Judgement herein be set aside in accordance with Section 354 of the Judicature Civil Procedure Code Law and an Order made for damages to be reassessed.

5) No Order as to Costs.

6) Further and/or other relief.

The Court was advised by Counsel for the 2nd Defendant that only paragraphs 3 and 4 were being proceeded with, and that the application to set aside the default judgement was being withdrawn.

The challenge was therefore, to the Final Judgement. The notice was supported by the affidavit of Richard Gordon sworn to and filed on the 11th July 2001, in which Mr. Gordon depones; inter alia;

1. That I reside and have my true place of abode and postal address at Apartment No. 7, 73 Shortwood Road, Kingston 8 in the parish of St. Andrew, and I am the second Defendant herein.

2. That sometime in 1998 I received a Writ of Summons naming me as a Defendant at the suit of the Plaintiff upon which I consulted an attorney-at-law for advice on how to proceed with the matter. That the said attorney-at-law, upon perusing the documents, informed me that the Writ of Summons was not sealed nor filed and a suit number was not endorsed thereon and as such, it was irregular and I should await a further document from the Plaintiff. Accordingly, I did not instruct an attorney-at-law to enter an appearance on my behalf after I received the said document.

3. That I received no further documents or correspondence pertaining to this suit until the Bailiff attended at my home on the 25th of June 2001 to execute a Writ of Seizure and sale for a judgement obtained by the Plaintiff against me therein.

4. That the cause of action herein arose from a road traffic accident in which I was involved in or around March 1998 when the vehicle I was driving collided with the Plaintiff's vehicle.

Stephen Jeffery Mordecai filed an affidavit dated 4th October, 2001 on behalf of the Plaintiff, he states inter alia;

5. That I have been served with and have perused the affidavit of Richard Gordon, the Second Defendant herein, sworn to on July 11, 2001 and filed herein.

6. That in paragraph 2 of the said affidavit, the Second Defendant alleges that he consulted an Attorney-at-law for advice on receiving the Writ of Summons herein.

7. That in October 1998, I received a "Without Prejudice" letter from Jennifer Messado and Company signed by Lanza Turner-Brown (Mrs.) which letter

   a) stated the correct suit number C.L K025/98,

   b) made no reference to or allegation that the Writ of Summons was not sealed or filed or was irregular and

   c) requested details of the Plaintiff's claim be sent to the said Attorney.

8. That since having knowledge of the Second Defendant's allegation as to the Writ of Summons served on him, I have made inquires or my then legal clerk, Rodney Bushay, who on or about the 25th July 1998 served the Second Defendant personally.

9. That I am informed by the said Rodney Bushay that the Writ of Summons served on the Second Defendant was duly sealed, filed and was issued out of the Supreme Court Registry bearing Suit No. C.L. K025/98.

10. That the Writ of summons which the Second Defendant admits receiving, stated his address as 73 Shortwood Road, Kingston 8 and, accordingly, he was aware from as early as September 1998 that there was no apartment number stated on the Writ of Summons.

11. That the Attorneys who wrote on behalf of the second defendant were informed by my letter to them dated February 21, 2000 that the Assessment of Damages herein was set for May 11, 2000 and that letter enclosed a copy of the Statement of Claim in Suit C.L. K025/98.

Section 354 of The Judicature (Civil Procedure Code) Law. Provides that;

> "Any verdict or Judgement obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, ***upon an application made within ten days after the trial.***"

It was common ground that the assessment of damages constituted a trial for the purposes of S354. This is supported by the decision of the Court of Appeal in ***Mills v Lawson and Skyers*** (1990), 27 J.L.R. at page, 196 Carey J.A., said;

> "Mrs. Benka-Coker for the respondents, seemed to think that a civil trial necessarily required a determination of liability as well as damages at one and the same time....The argument, is demonstrably unsound. On either issue, a judicial determination is called for. The party, in these circumstances the plaintiff would be

> required to prove his claim, he must discharge the burden of proof cast upon him. He must call evidence which the Judge must hear and consider. He must then decide as a matter of law whether the claim (whether it be as to liability or as to damages) has satisfied the standard of proof necessary.
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> I think also, that the argument fails, because there are not words in Section 354 limiting the word "trial" to cases where liability and damages are required to be determined, as opposed to liability or damages. Both are issues which fall to be determined in civil trials but that is not inevitably so. The parties may well accept liability and require a determination as to damages. Sometimes the parties may agree damages and leave the issue of liability to be determined by a judge. A trial then can only means a process whereby a judicial determination is called for on some triable issues. Thus, there may be a trial of issues, references, inquires and assessments of damages and also trial of actions. It is a term of general application and it is used in that way in Section 354."

The Order being sought to be set aside was made on the 3rd July 2000, before N. McIntosh J. (ag). Counsel for the Defendant, has submitted that there was no need for a substantive application and relied on The Supreme Court Practice-1997- O35r.2, which is similar to Section 354, save for the period within which the application must be made. The notes to that rule states that the Court has a discretion under O.3r.5, to extend the period of 7 days. See (Schafer v Blyth) 1920 3K.B. 141, where the Court of Appeal thought it was not necessary to make a substantive application for such enlargement.

The affidavit in support the application does not deal directly with the question of delay, Richard Gordon's affidavit of 11th July 2001 states at paragraph 10;

> "That I only found out about the Judgement and the proceedings herein when the bailiff attended at my home at Apartment 7, 73 Shortwood Road, Kingston 8 to execute the Writ of Seizure and Sale on the 25th of June 2001. That had I known about the proceedings herein, I would have taken the appropriate steps sooner."

And at paragraph

7 That I am surprised at the quantum of damages, and I wish to challenge the Plaintiff's claim for damages as in the event the Plaintiff suffered loss and damage as a result of the accident. I believe that the Plaintiff has failed to keep her losses at a minimum.

8 That I have perused the documents filed herein by the Plaintiff and I have noted that the Plaintiff received treatment in San Francisco, California in the United States of America for the injuries that she alleges that she sustained in the accident. That the Plaintiff is a resident in Jamaica and to the best of my knowledge, information and belief, the treatment that the Plaintiff is alleged to have received was available in Jamaica.

9 That I did not receive a Notice of Assessment herein and, had I received same, I would have attended at the hearing. My postal address is Apartment 7, 73 Shortwood Road, Kingston 8 in the parish of St. Andrew.

Was there service of the notice of assessment on the Defendant?

The defendant states in his further affidavit dated 1st October 2001 that he never received registered letter 009259. He further contends that it was

misdirected, in that it did not have Apt. 7 on the envelope. As a result of this misdirection, it was returned to the sender endorsed "removed".

The affidavit of Jeffery S. Mordecai dated 4th October 2001, states that the Defendant admits receiving the Writ of Summons at 73, Shortwood Road ***he should therefore be aware*** that there was no apartment number stated on the Writ.

In Kenneth Morris v Owen Taylor SCCA no. 39 of 1983. Campbell, J.A. (A.G) said;

> "What section 352 and 354 contemplate is a case in which the defendant has had a judgement of the court given at a trial against him at which trial he was not heard wholly or partially in his defence, had not participated fully in the trial **and *had not waived his right so to do.*** In this regard the right of a party to full participation in his trial before condemnation is succinctly expressed thus by Jenkins, L.J., in Grimshaw v Dunbar (1953) 1 All E.R. 350 at p. 355 (emphasis mine).
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> > 'A party to an action is prima facie entitled to have it heard in his presence .He is entitled to dispute his opponents case and cross-examine his opponents witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. If ***by some mischance or accident*** a party is shut out from that right and an order is made in his absence, common justice demands, so far as it can be given effect to, without injustice to other parties, ***that the litigant who is accidentally absent*** should be allowed to come to the court and present his case, no

> doubt on suitable terms as to costs (emphasis mine).'
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> The above cited dicta in my view, supports a liberal interpretation of section 352 and section 354 so to effect the purpose thereof namely to facilitate review by the same trial judge of a judgement given by him where a defendant had not fully participated, in consequence of which, the judgement was not one wholly on the merits."

In ***Shocked v Goldschmidt*** (1998) 1 All ER 372, the Court of Appeal, after examining those cases of setting aside judgements where judgements were given in default of appearance or pleadings or discovery, and (b) those in which judgement is given after trial, albeit in the absence of the applicant for setting it aside. Leggat L.J said; at pg. 381

> "Contrasting the cases in the two categories it seems to me that whereas in the first the court is primarily concerned to see whether there is a defence on the merits, in the second the ***predominant consideration is the reason why the party against whom judgement was given absented himself***." (Emphasis mine)

Mr. Mordecai, on behalf of the Plaintiff has urged, that the Defendants' delay is inexcusable, and is wholly the fault of the defendant. That the Plaintiff has done everything that he could have done, by serving the notice at the same address where he had served the Writ of Summons. That the Defendant was aware from as early as September 1998 that there was no apartment number stated on the Writ of Summons. He further contended that if the Defendant succeeds all any party subject to adverse

proceedings would need to do would be to refuse to accept registered mail, in order to avoid service. He argues that there is no complaint that there was anything wrong with the assessment of damages that the Plaintiff seeks to set aside. There was no legal challenge raised to that assessment. He referred the Court to S52 of The Interpretation Act, which provides;

> "Where any Act authorises or requires any document to be served by post, whether the expression "serve", "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to been effected by properly addressing, prepaying and posting a letter containing the document, and unless the contrary is proved to have been affected at the time at which the letter would be delivered in the ordinary course of post."

Mr Mordecai further submitted that the Defendant needs to prove that the Assessment was irregular.

Relying on the headnote of ***Shocked v Goldschmidt*** (1998) 1 ALL ER 372. He said the Defendant had demonstrated no prospects of success (b) had delayed in setting aside the writ in 1998. (c) That the Defendant had not participated in the suit for a period of four years. (d) The Defendant has made no effort to acknowledge liability (e) that the successful Plaintiff has been prejudiced by the delay, as he would have to prove twice his damages to the court. He said that the case of ***Kenneth Morris*** is distinguishable

because in the exercise of its discretion, the Court at first instance had treated the Defence has having been abandoned.

Should the Courts discretion be exercised on behalf of the Defendant, and allow him to set aside the assessment of damages in these circumstances. In ***Shockeel & Goldschimdt (Supra) Leggatt***, L.J. at page 381, quoted with approval Ralph Gibson L.J remarks in ***Packer v Denny*** [1986] CA Transcript 310 where he said;

> "If a **reasonable explanation** is provided for the absence of the party at the hearing, and if the application is **made in due time**, justice normally requires that the Judgment be set aside for the obvious reason that a trial is unjust if only on side is heard...**where a defendant has had ample indulgence** and **opportunity** to present her case and the explanation proffered for her absence is rejected as not put forward in good faith, then, in my judgment, the judge is entitled in the exercise of his discretion to reject the application." (Emphasis mine)

The defendant had been involved in an accident in March 1998. It was unchallenged that he had run into the rear of the vehicle the Plaintiff had been driving. He was served personally with the Writ of Summons on the 11th July 1998. The evidence which has not been traversed is that the address of service, was that given by the Defendant to another party involved in the accident. It was also unchallenged that the Defendants conduct from the outset has been to avoid liability, and that he was uncooperative and abusive. The Defendant alleges that he was advised that the Writ was defective by an

Attorney who has remained unnamed. No affidavit was forthcoming from this attorney. However, the Plaintiff had received a communication from Attorneys purporting to act on behalf of the Defendant.

Paragraph 10 of the affidavit of Jeffery Mordecai, states;

> "That the Attorneys who wrote on behalf of the Second Defendant in October 1998 stating that they acted for and on behalf of the Second Defendant were informed by my letter to them dated February 21, 2000 that the Assessment of Damages herein was set for May 11, 2000 and that letter enclosed a copy of the Statement of Claim in Suit No. C.L. K025/98."

It is instructive that the Defendants have abandoned the application to set aside the default judgement. After attending on his Attorney and being advised that the Writ is irregular, there is no evidence that he has done anything further until the arrival of the Bailiff on the 25th June 2001. The Attorney-at-Law who advised the 2nd Defendant of the irregularity of the Writ, did so based on the copy that the 2nd Defendant had been served with it appears that no effort was made to examine the original.

The rules of the Supreme Court Annual Practice 1967 at page 145, dealing with application to set aside Writ, explains that the effect of the rule is to require the defendant, who has an objection to the issue or service of the writ, the service or notice of the writ or the service on him to raise an objection. **The burden is on the defendant to make his objection in due**

time, or otherwise his appearance, if conditional, will become unconditional, or if he has not entered an appearance, he will be in default of appearance.

Is the conduct of the Defendant reasonable in the circumstances, so as to move the Court to exercise its discretion in the Defendants' favour? Did he return to his attorneys after obtaining the advice he alleges he has been given? There is no evidence that he did anything until the Bailiff arrived.

In ***Pontin v Wood*** (1962) 1 Q.B. 594. Holyrod Pearce L.J in allowing the Plaintiff's appeal from an Order of Edmund Davies, who allowed an appeal from the decision of the District Registrar refusing an application on summons to set aside service of a writ on the ground that the writ was a nullity, said at page 612 of the judgement.

> "Finally, the defendants delay is fatal to his summons. It was taken out on August 4, over four months after the defective writ was served. On July 6 the courtesy of the plaintiffs solicitors had informed the insurance company that they wished to take no advantage of the defendants failure to enter an appearance. Further, the defendant had had served on him, albeit irregularly, the statement of claim, which if regularly served would have cured the writ. Even on the most indulgent view, the defendant did not make his application within reasonable time, which is a mandatory requirement under Order 70,r.2. And in a case where the defendant is invoking the most austere rigour of the rules against genuine though dilatory plaintiffs, I see no reason for importing any indulgent view of the defendants own delay."

In ***Mills v Lawson (1990), 27 JlR196.*** Carey J., in commenting on the matter of the exercise of the judges discretion opined at page 200, letter G;

> "The learned judge was required to consider the length of the delay and whether it had properly been accounted for see City Printery Ltd v Gleaner Co. Ltd. (1968) 13 W.I.R. 126.....Then he was required to consider as well, whether the defence as projected had any merit."

Downer J.A. dealt with the application by Counsel to invoke the Court's power to enlarge the time appointed by the Code, in this way; at page 205 letter F

> "Such an application was permissible as this court has all the powers on appeal that the Supreme Court is empowered to exercise, but how could it be just to grant an enlargement in this case after such a long delay? In this regard, the words of Lord Denning M.R., in Revici v Prentice Hall Incorporated and Others (1969) 1 All E.R.772 – at 774 were instructive as to the approach of the courts.
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> "Counsel for the Plaintiff referred us to the old cases in the last century of Eaton v Storer (1882) 22 Ch.91 and Attwood v Chichester (1878) 3 QBD.722 and urged that time does not matter as long as the costs are paid. Nowadays we regard time very differently from what they did in the nineteen century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough."

In City Printery case (supra) Luckhoo J.A. quoted with approval, the observation of the Judicial Committee of the Privy Council in ***Ratnam v Cumaraasamy*** (1965) W.L.R at page 12;

> "The rules of court must, prima facie, be obeyed and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

The Defendant has failed to make his objection of irregularity in due time. The objection was taken some four years after the filing of the Writ and was only abandoned at this hearing. Final Judgement was ordered on the 3rd July 2000. The Notice of Motion was filed on the 3rd July 2001. The period of delay was one year. Conditional appearance was entered on 28th June 2001. The Bailiff found the Defendant at 73 Shortwood Road, the same address where the Writ was served on the Defendant personally.

The Defendant was required by S. 3 of the Road Traffic Act to provide the Plaintiff with his proper address; by omitting to advise him that apartment 7 was an important item of that address, he has breached the said Act.

The delay of one year has not been satisfactorily accounted for by the Defendant. Additionally, he has failed to produce medical expertise to

traverse the expert evidence of the Plaintiff to demonstrate that the medical procedures employed by the Plaintiff in the USA was available locally. The application to set aside Judgement is dismissed, and the application to enlarge time to set aside final Judgement is dismissed. Cost to the Plaintiff to be agreed or taxed.