JAMIACA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 16/91

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	STANLEY McKENZIE	1ST DEFENDANT/APPELLANT
AND	ANTHONY CAMPBELL	2ND DEFENDANT
AND	ERROL CUNNINGHAM	PLAINTIFF/RESPONDENT

Crafton Miller & Miss Nancy Anderson for 1st Defendant/Appellant

Clarke Cousins & Andre Earle for Plaintiff/Respondent

January 27 & April 9, 1992

GORDON, J.A.:

On 19th June, 1990 Pitter, J., gave judgment by default against the 1st defendant in the claim for negligence brought by the plaintiff. He awarded general damages in the sum of $400,000 with costs.

On 18th March, 1991 the 1st defendant succeeded in a Motion to set aside the default judgment entered herein and Pitter, J., ordered the following terms:

"1. (a) That the 1st Defendant/Applicant pay into court an amount of $200,000.00 within 60 days of the date hereof.

(b) That a further sum of $6,000.00 to be paid into court as Security for costs within 60 days of the date hereof.

2. Failure to comply with the terms of this order the original Judgment to stand.

"3. Costs of today to be the Plaintiff's to be agreed or taxed.

4. Application to enlarge time granted.

The 1st defendant appealed against the orders of Patter, J., at 1 (a) and 1 (b) and on the hearing we allowed the appeal in part by setting aside condition 1 (b) as to security for costs and ordered that the respondent should have ½ costs of this appeal. In other respects the order of Patter, J., was affirmed and we directed that the appellant should pay into court the sum of $200,000 within sixty days of the 27th January, 1992, the date of the hearing of the appeal. We now fulfil our promise to put our reasons in writing.

The aetiology of this matter is gleaned from affidavits of the 1st defendant and of Mr. Stephen Shelton, an attorney-at-law of the firm of Messrs. Myers, Fletcher & Gordon who had conduct of the case on behalf of the appellant. The appellant was served with the writ in or about October, 1985 and on 5th November, 1985 Interlocutory Judgment in default of appearance was entered against him. A summons to proceed to assessment of damages on 3rd March, 1986 was served on the appellant who then retained the services of Messrs. Myers, Fletcher & Gordon to act on his behalf. An application to set aside the Interlocutory Judgment and for leave to enter appearance and file defence out of time was made by the appellant's attorneys. The application succeeded and appearance and defence were duly filed. Directions were given on 26th May, 1986 and the case was placed on the cause list. The appellant's attorneys communicated with him through his wife, as per his instructions, at an address supplied by him.

The appellant and his wife subsequently began moving between Jamaica and the United States of America and in the result correspondence sent to him by his attorneys advising him of the progress

of the matter were returned unclaimed. The appellant failed to respond to letters or telegrams and he failed to communicate with his attorneys in any way. Lacking instructions, when the case came up for trial on the 26th March, 1990 the appellant's attorneys sought an adjournment to make an application to have their name removed from the record. This application was refused on the 27th March, 1990 and the attorneys still lacking instructions from the appellant, withdrew from the suit.

The appellant for his part "thought that the case was no longer still being pursued." It was not until "Late November, 1990 when my wife on a visit to Jamaica, called my then attorney that she was told of the judgment and she returned to Miami and told me," he deposed. He then retained attorneys to represent him.

It is against this background that Pitter, J., made the orders that are challenged.

Mr. Miller for the appellant expressed concern about the terms of 1 (b) attached to setting aside of the default judgment. Acknowledging that the learned trial judge has a discretion, recognized in **Evans v. Bartlam** [1937] 2 All E.R. 646, Mr. Miller submitted that in the terms attached the judge acted contrary to the spirit of the law which was expressed in **Naamlooze Vennootschap Beleggings Compagnie "Uranus" v. Bank of England and Others** [1948] 1 All E.R. 465. This case decided that a defendant exercising his right to defend himself ought not to be prevented from so doing, or hampered, by being ordered to give security for costs.

Mr. Clarke Cousins for the respondent submitted that the application for setting aside the judgment did not fall squarely within the ambit of section 354 of the Civil Procedure Code in that it was not made within ten days of the trial . He conceded however

that the trial judge had a discretion to disregard the lapse of time in a proper case - **Beale v. MacGregor** [1886] 2 T.L.R. 311 and the exercise of that discretion by the judge should not be interfered with unless it was shown that there had been some "error of principle or misapprehension of fact on his part," or unless he had given undue weight to a particular aspect of the facts: **Gordon v. Craddock** [1963] 2 All E.R. 121. Our attention was not drawn to any such error or misconception.

Mr. Cousins further submitted that it is trite law that security for costs is ordered in the cases where the claimant in the action is a foreign resident. As the respondent had not been relying on that principle, he submitted that the order for costs incorrectly recorded the intention of the judge which was to order the appellant to pay the costs thrown away. Accordingly he applied to amend Order 1 (b) by deleting the same and substituting therefor the following:

> "(b) That a further sum of $6,000 being the plaintiff's costs thrown away and costs of this application be paid into court."

There is no doubt that the judge is empowered by section 354 of the Civil Procedure Code to set aside a judgment entered by default. Section 77 of the Civil Procedure Code also provides for the setting aside of a judgment entered summarily. In either case the judge has a wide discretion as to the terms on which his discretion is exercised and unless it is shown that this discretion was improperly exercised the Court of Appeal will not interfere with the judge's disposition.

It is agreed between the parties that an order is usually made for the plaintiff in these proceedings to have his costs thrown away. However, Pitter, J., did not make an order for costs thrown away. What he did was to order the appellant to give security for

the respondent's costs and presumably if the appellant did not make the security within the stipulated 60 days the default judgment would stand. We declined to grant the amendment of Order 1 (b) as proposed by Mr. Cousins as to do so would be to make an arbitrary order without information as to the particulars of those costs.

Section 77 of the Civil Procedure Code is in pari materia with O. 13 r. 9 of the R.S.C. 1986. The commentary to O. 13 r. 9 in O. 13/9/14 which deals with the discretionary powers of the Court states in part:

> " 'where a judge allows an application to set aside a default judgment he is obliged to give reasons, otherwise the Court of Appeal will have to exercise its discretion afresh in the matter' **Lennard vs. International Institute for medical Studies:** Times April 29, 1955 C.A."

This case applied the principles laid down by Griffiths, L.J., in **Eagil Trust Co Ltd v. Pigott-Brown and another** [1985] 3 All E.R. page 119. The headnote to this case reads as follows:

> "In decisions involving the exercise of judicial discretion a judge should, as a general rule, give reasons for his decision, the particularity of such reasons being dependent on the circumstances of the case and the nature of the decision: thus, when dealing with an application in chambers to strike out an action for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the basic principles on which he has acted and the reasons that have led to his conclusion. In giving reasons the judge is not required to deal with every argument presented by counsel in support of his case, and where a particular argument has not been dealt with but it can be seen that there are grounds on which the judge would have been entitled to reject it the Court of Appeal will assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion. The requirement that reasons be given is subject to

> "certain well-established exceptions, such as the award of costs (unless the award is unusual) and the refusal of leave to appeal to the Court of Appeal from an arbitrator's award (see p 122 a to e and p 124 j, post). Although the exercise of a judge's discretion may be attacked if it is clearly wholly wrongly exercised, the Court of Appeal will not use this as a means of substituting its own discretion for that of the judge (see p 121 e to j and p 124 j, post)."

The two cases referred to above firmly establish the duty of a judge to articulate the reasons which impel him to exercise his discretion in a certain way. In most cases the judge will have the benefit of reasoned arguments from counsel and these will enable him to identify the important issues for determination. The judge should then perform his clear duty to inform the parties why he came to his decision and thereby lay the foundation upon which the Court of Appeal may ultimately have to build. We endorse the need for reasons to be given for the exercise of the discretion whenever a judge sets aside a judgment whether regularly or irregularly obtained.

The conduct of the appellant lacks sincerity and the order that payment into court be made of a part of the judgment is, we accept, within the competence of the learned trial judge and warranted in the circumstances. The order for payment into court by the defendant of a sum assessed as security for costs is unsupportable. As much argument turned upon the order for security for costs which issue was determined in favour of the appellant we order that the appellant pay only ½ of the costs of the respondent who was successful on the issue raised in ground 1 (a) of the Grounds of Appeal.

Having found as we have, we made the orders abovementioned.