IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1999/R-048

BETWEEN	PAULETTE ROSE (On her behalf as mother dependent and near relative of the deceased DELNIELO AUTHERS)	PLAINTIFF
A N D	THE ATTORNEY GENERAL OF JAMAICA	DEFENDANT

Mr. Edward Brightley and Mr. Maurice Manning for Plaintiff instructed by Nunes Scholefield, DeLeon & Co.

Mr. Peter Wilson and Miss Stacy-Ann Bennett for Defendant instructed by the Director of State Proceedings.

Heard: June 28 and July 10, 2001

MCDONALD J. (Ag)

This application seeks an order to set aside interlocutory judgment in default of defence and for leave to file and serve a defence.

The claim is one against the defendant to recover damages under the Fatal Accidents Act for wrongful death of the deceased on or about the 22nd day of September, 1997 caused by the negligence of the servant and/or agents of the Crown.

Chronology of Events:

1. On the 29th April 1999 the Plaintiff filed a Writ of Summons and Statement of Claim.

2. Appearance was entered on 25th May, 1999: but thereafter the defendant failed and/or neglected to file any defence

3. Summons for leave to enter Judgment in default of defence was filed on 22nd June, 1999 and order granted on 20th July, 1999.

   There is no dispute that the judgment was a regular one.

4. On 15th May 2000, summons for order to proceed to Assessment of Damages was heard and granted -

5. On 31st October 2000 the hearing of the Assessment of Damages was adjourned - summons to set aside judgment pending.

6. On 27th October 2000 summons to set aside Interlocutory Judgment was filed and set for hearing on 28th June, 2001.
   Affidavit of Mrs. Foster-Pusey in support was filed on 25th June, 2001.

The Affidavit deposed inter alia that:-
paragraph 9 ..... "I am informed by the Commissioner of Police and do verily believe the following facts:-

(a) The lock-ups were being supervised at the time of the incident. The officers supervising were at their proper location in the reception area of the lock-ups.
Lock-ups are not constructed to include police personnel beyond the reception area.

(b) The officers on duty acted with dispatch on hearing noise from the cells. Upon investigation, Authers was found with injuries whereupon he was rushed to the Kingston Public Hospital for treatment.

(c) The police officers search food and clothing coming in for inmates and also search cells and inmates on a regular basis to prevent the entry of weapons into the cells. Despite the best efforts of the authorities, inmates find ingenious ways to smuggle in weapons and to also utilize ordinary things, e.g. a toothbrush, to fashion weapons.

(d) The deceased had not indicated to any police officer that he was in any special danger or had received any threats on his life.

(e) The attack on the deceased was entirely unforeseen by the police administration.

(f) Investigations were launched into the murder of the deceased and five inmates were listed on the information; however the matter is yet to be determined".

A draft defence was exhibited to this affidavit

I have advised myself as to section 258 of the Judicature (Civil Procedure Code) Law which gives the Court or Judge a discretion when it comes to the setting aside of default judgments; and of the principles governing the exercise of this discretionary

power enunciated in Evans v Bartlam (1937) 2 ALLER 646 at page 650 which reads:-

> "The discretion is in terms unconditional. The Courts however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence".

The primary consideration is whether or not the defence has merits to which the Court should pay heed. As stated by Bowen LJ in Evans v Bartlam (supra) at page 656.

> "If merits are shown, the Court will not prima facie desire to let pass a judgment on which there has been no proper adjudication".

Secondly the Court should consider whether or not the defendant is guilty of laches in making his application and whether he has offered an explanation as to why he failed to file a defence.

The dicta of Dillon LJ in Vann & Another v Awford and others - The Times 23rd April 1986 at page 4 is instructive - It reads:-

> "In applications to set aside a judgment, I entirely agree with my Lord that the primary consideration is whether there is a defence on the merits, and the judge should have considered that first before considering the question of delay".

The defendant in the instant case has strongly urged that it has an arguable case which carries some degree of conviction. In support, Mr. Wilson relied on Day v RAC Motoring Services Ltd (1999) 1 ALL ER 1007 and referred the Court to paragraph 9 of Mrs. Foster-Pusey's affidavit and paragraph 5 of the proposed defence.

Mr. Wilson contends that Mrs. Foster-Pusey's affidavit qualifies as an affidavit of merit inspite of the fact that paragraph 9 contains hearsay evidence. He submitted that hearsay evidence is admissible on interlocutory proceedings and that the said affidavit has complied with section 408 of the Judicature (CPC) Law.

Further that Mrs. Foster-Pusey has given the sources and grounds of the information which she embodied in the affidavit. Section 408 of the Judicature (CPC) Law provides -

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings or with leave under section 272A or section 367 of this Law, an affidavit may contain statements of information and belief, with the sources and grounds thereof".

Mr. Brightley on the other hand strongly argued that Mrs. Foster-Pusey's affidavit is not an affidavit of merit and contains hearsay upon hearsay.

In support of his position he relied on Ramkissoon v Olds Discount (1961) 4 WIR 73 at page 74 which reads thus:-

> "Nothing in the affidavit of the Solicitor says or suggests that the Solicitor had any personal knowledge of the facts of the case or that what appears in the statement of defence is true. This affidavit merely attempts, in our view, to excuse the defendant from not filing his defence ..... The case of Farden v Ritcher (1) is sufficient authority for holding that before a judgment which has been regularly obtained and properly signed could be set aside, an affidant of merit was required as an almost inflexible rule, and what such an application to set aside the judgment is not thus supported, it ought not to be granted except for some very sufficient reason".

In reference to Mrs. Foster-Pusey's affidavit, Mr. Brightley contends that there is no avernment (save and except she states that she is an Assistant Attorney-General in the said Chambers and instructed by the Director of State Proceedings) as to her having any personal knowledge of the facts deponed to in the defence. He further argued that if it is that the person who makes the statement has personal knowledge of the facts averred to he or she might be allowed to state certain other facts obtained from another party whilst or so long as that other person is properly identified.

Mr. Brightley states that his difficulty in reference to

paragraph 9 of the affidavit (which states that Mrs. Foster-Pusey was informed by the Commissioner of Police and do verily believe) is that neither Mrs Foster-Pusey nor the Commissioner of Police is able to say that they have personal knowledge of what transpired to to this particular person on this particular day at this particular lock-up. He submitted that if the Commissioner of Police had this information, the affidavit ought properly to have come from him or an officer who would have been at the police station on that particular day.

Mr. Brightley contends that not only must the source of the information be identified, but there must be some information as to why it is that that person is able to speak to that matter.

In the instant case the Commissioner of Police is the source, but the grounds on which he is able to give this information has not been included in the affidavit. Mr. Brightley averred that the Court would be hardpressed to come to an inescapable inference that the Commissioner of Police had personal knowledge of every incident and in particular/this incident which occured at the Central lock-up; and if he did, that affidavit ought to come from the Commissioner of Police himself; Mr. Brightley referred the Court to Book Traders Caribbean Limited & West Indies Publishing Ltd v Jeffrey Young SCCA 59/1997 where Downer JA said at page 6.

> "Two preliminary observations ought to be made on affidavits of merits. They sought to disclose facts within the personal knowledge of the deponents and secondly if reliance is based on hearsay evidence then

those who supplied the information should be asked to give affidavit evidence".

I adopt the words of Harrison J in the case of Clyde Graham V The Attorney General and Donovan Mason CL 1993/G110 when he said at page 5 :-

> "It is permissible in proceedings against the Crown for the proper officer to depose in an affidavit based upon information and belief facts showing the merits of the defence. On these particular facts David Higgins is Crown Counsel in the first defendants chambers and through the Director of State Proceedings he receives instructions".

Earlier in the judgment Harrison J said:-

> "Now it is evident that the first defendant has sought to rely solely upon the affidavit evidence of David Higgins which has revealed that he is relying upon statements of information from Donovan Mason, the second defendant and his belief that the collision occured without negligence on the part of the defendants".

In the instant case I find that Mrs. Foster-Pusey can properly depose to the affidavit. However I find the affidavit deficient in so far as the source and grounds of information are concerned.

I agree with Mr. Brightley's submission that the affidavit does not speak to the Commissioner of Police having personal knowledge of the incident and the grounds on which he is able to give this information have not been included in the affidavit.

I am not unmindful of the fact that the particulars of negligence pleaded in the Statement of Claim are somewhat wide and general in nature. Mrs. Foster-Pusey's affidavit has sought to answer these allegations as pleaded but in more specific fashion the maxim res ipsa loquitur having been pleaded.

I would agree that the Commissioner of Police having overall responsibility for the operations of the police stations and lock-ups could depose as to "the system" in relation to lock-ups as governed by the Prison Regulations and could supply information as to paragraph (a) of the affidavit where Mrs. Foster-Pusey refers to "lock-ups are not constructed to include police personnel beyond the reception area" and as to paragraph (c); but in respect of part of paragraph (a) paragraph (b) (d) (e) and (f) the Commissioner of Police is now dealing with specifics and not generalizations and I find that in the circumstances without more he cannot properly be used as the source. Paragraph (d) (e) (f) of the affidavit are not included in the proposed defence, but portions of paragraph 5 (a) of the proposed defence are specific in nature.

It is well established that the proposed defence is not a defence until it has been sworn to and is subject to amendment. The affidavit has not adopted the defence nor expressly stated that what is in the defence is adopted and that is infact the defence.

It is the affidavit which the Court must examine to see if it is an affidavit of merit and as stated by Lord McShine Ag CJ in Ramkissoon v Olds Discount (supra) at page 74 I

> "In the absence of an affidavit showing that he has a good defence on the merits, the judgment against him ought not to be set aside.
>
> (Emphasis supplied)

On the question of delay, Mr. Wilson quite forthrightly admitted that:-

> "it was very late in the day for us to come and set aside the judgment; date for assessment of the matter had been set and it was just before the date of assessment that we filed summons to set aside".

However, he referred the Court to paragraphs 4,5, 6 and 7 of Mrs. Foster-Pusey's affidavit where he said the delay was explained and asked the Court to accept that the delay was excusable under the circumstances, and to overlook the delay as costs could suffice for such delay.

Mr. Brightley asked the Court to find that the delay is inordinate and inexcusable.

He submitted that the summons to set aside was filed in October 2000, yet Mrs. Foster-Pusey's instructions were not completed until March 2001, and further that the affidavit in support was not filed until 25th June, 2001.

He said that no explanation has been offered for the delay between March 2001 and 25th June, 2001. This I accept as correct.

I do not find the explanation given for the delay in paragraph 7 of Mrs. Foster-Pusey's affidavit satisfactory and excusable.

In conclusion I find that the affidavit is deficient and that I cannot properly act upon it as being an affidavit of merit. In the circumstances it is my considered view that the summons to set aside interlocutory judgment in default of defence should be dismissed with costs of the application to the Plantiff to be taxed if not agreed.

Leave to appeal granted.