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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

IN COMMON LAW

SUIT NO. C.L. 1173 of 1973

BETWEEN SWIM-QUIP INCORPORATED PLAINTIFF

A N D MAGNUS & ASSOCIATES LTD DEFENDANT

Mr. Bruce Barker for the plaintiff.

Mr. Lancelot Cowan for the defendant.

J U D G M E N T

The plaintiff, Swim-quip Incorporated, by a specially endorsed writ dated 31st July, 1973, claims the sum of $3,233.13 from the defendant, Magnus and Associates Limited. The particulars filed therewith show that the claim was for goods sold and delivered by the plaintiff to the defendant, who entered appearance on the 14th September, 1973.

Thereupon the plaintiff's attorneys by letter dated 11th December, 1973, requested the attorneys for the defendant to supply within seven days Further and Better Particulars of the defence. This request was in keeping with section 171 of the Judicature (Civil Procedure Code) Law, Chapter 177.

Non-compliance resulted in an application by summons on behalf of the plaintiff that the defendant supply the Further and Better Particulars within 14 days. On the 29th April, 1974, the Master (Ag) by the written consent of the parties ordered that the Further and Better Particulars be supplied within 21 days. Failure by the defendant to comply, resulted in another application by summons on behalf of the plaintiff that paragraphs 2 - 7 of the defence be struck out. When this summons came on for hearing on the 26th June, 1974, on the application of

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the attorney for the defendant, it was adjourned to the 11th July, 1974.

It should be noted at this stage that on the 20th June, 1974, the defendant had filed a summons for extension of time within which to file particulars pursuant to the order of the 29th day of April, 1974. This was supported by two affidavits one by Richard Allan Williams, Attorney-at-Law and a senior partner in the firm of Williams and Williams, Attorneys-at-Law for the plaintiff and the other by Irwin Fitz McClintock Escoffery, a director of the defendant company. These affidavits in effect purported to account for, and explain why the order made on the 29th April, 1974, had not been complied with in the time stipulated.

On the 11th July, 1974, both summonses were adjourned to the 25th July, 1974, with the costs of that day's hearing awarded to the plaintiff in any event. During this adjournment, the defendant applied by summons for leave to file an amended defence. This was set down for hearing on the 12th September, 1974, but was together with the other previously mentioned summons, eventually heard by me on the 11th December, 1974. At the conclusion of the arguments which were presented by learned attorneys for the parties, I was asked to put my judgment in writing. This judgment is as follows:

In the first place, it must be recognised that the outcome of the application to extend time will necessarily determine the other two applications. I, therefore, deal with that summons first, and take into account the argument on behalf of the plaintiff, that a consent order that the defendant do file Further and Better Particulars within 21 days cannot, upon the defendant's failure to comply, be set aside except by consent.

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Undoubtedly, the parties may consent to enlarge the time for delivering or filing any pleading answer or other document and this they can do in writing without application to the Court of Judge - see section 174 of the Judicature (Civil Procedure Code) Law, Chapter 177. This section does not say what is the effect of this consent, i.e. whether it is irrevocable, and more particularly, whether the consent is effective in the terms stated on behalf of the plaintiff. Chapter 177, however, provides by section 676:

> "The Court shall have power to enlarge or abridge the time appointed by this Law or affixed by any order enlarging time, for doing any act, or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

Notwithstanding these provisions, Mr. Barker, for the plaintiff, submitted that the authorities support very strongly his argument that time fixed by consent cannot be enlarged except by consent. He referred me, first of all, to Supreme Court Practice 1956, page 1378, which is a note on the then Order 64 r.7 and which in its first section is identically worded with section 676 of the Civil Procedure Code. This note in the relevant portion is as follows:

> "..... in interlocutory proceedings the Court or Judge has inherent jurisdiction to extend the time independently of [r.7]..... Semble, the same applies to the extension of a period of time fixed by an interlocutory order of the Court of Judge for doing some act or taking some proceeding; there is an inherent jurisdiction (apart from this rule) to extend the time (unless the order was by consent, Australasian Automatic Weighing Machine Co. v. Walter [1891] W.N. 170)."

This note is repeated in the same terms in the Supreme Court Practice 1970, Volume 1, at page 15, in the note of Prder 3 r.5(1) which now replaces Order 64 r.7. Interestingly enough, in Volume 2 of 1970 edition of the Supreme Court

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Practice, at page 5591 under the rubric 'Order by Consent", the editors state a more positive position. Thus:

> "An order made by consent cannot be extended or altered without consent (Australasian Automatic Weighing Machine Co. v. Walter /1891/W.N. 170 except in cases of mistake etc."

Needless to say, the plaintiff asked me to give due weight to the force and effect of the Australasian etc. v. Walter case. In that case a motion was made that the time limited by an order made by consent might be enlarged. North J. refused to make such an order on the motion on the ground that an order made by consent could not be altered without consent. Two things are remarkable about this case. Firstly, the case is very shortly reported and does not give the reasoning behind the judgment of the learned judge. Secondly, he adjudged thus despite the fact that it was the plaintiff company which applied for the extension of time to allow the defendant to transfer to the plaintiff company or their nominees certain shares in the company. The report does not state what was the stand of the defendant who was represented by counsel.

Huddersfield Banking Co. Limited v. Henry Lister & Son Limited /1895/ 2 Ch. 273 shows that a consent order can be set aside only on certain grounds. In that case the Court of Appeal was unanimous in its decision that on the ground of common mistake the consent order could be set aside. The opinion of Lindley L.J., at page 280 was that:

> "A consent order so long as it stands is as good an estoppel as any other order .....a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual."

To the same effect is the opinion of Byrne J., in

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Wilding v. Sanderson [1897] 2 Ch. 534 at pages 543 - 544 when he said:

> "A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the Court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is, of course, enforceable while it stands, and a party affected by it cannot if he conceives he is entitled to relief, simply wait until it is sought to be enforced against him, and then raise by way of defence the matters in respect of which he desires to be relieved. He must, when it has been completed obey it, unless and until he can get it set aside in proceedings duly constituted for this purpose."

A reading of the cases on the point shows that they were all cases arising out of judgments or orders made by consent and resulting in final judgments. Because of this the Courts were reluctant to set aside the consent judgment or order unless the compromise was arrived at by mistake, misrepresentation, fraud etc.

It must be noted here that none of these grounds were put forward by the defendant in this case. It has been sought to explain the failure to supply the Further and Better Particulars by the fact of the debilitating illness of the responsible person from whom those particulars could be obtained. On the other hand, it does not appear to me, that it can be argued that in the instant case final judgment was entered for the plaintiff. This is shown clearly by the necessity for the plaintiff to apply to the Court to enforce the sanction for non-compliance which is the striking out of the relevant parts of the defence: of Supreme Court Practice, 1956, page 349 - a note to the Rule corresponding to Section 171 of the Civil Procedure Code. But it seems to me, this prima facie right does not crystallise until application is made to the Court and granted by the Court.

However, that may be, I have to consider two other authorities brought to my attention by Mr. Barker, who sought to distinguish them. He urged that I should be guided to my decision by the case of Seeriram v. Trade Winds Limited, Civil Appeal No. 3/1971, which he said is directly in point. In that case a default judgment had been entered by Seeriram against the Trade Winds Limited on 29th July, 1970. On 30th November, 1970, the learned Chief Justice

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ordered that the judgment be set aside, and that the defendant company file its defence within 21 days. This was not done, and on the defendant's application, Robinson J, as he then was, granted an extension of time for 24 hours. This was set aside by the Court of Appeal, on the ground that Robinson J., had no jurisdiction to set aside a consent order. Mr. Barker was not able to quote from the judgment but he gave me the terms of the endorsement of counsel who appeared for the defendant-respondent. This in effect was that counsel had to concede that he could not proceed with the appeal because of the cases of Australasian Automatic etc. v. Walter and Huddersfield Banking Company Limited v. Lister.

The submission, therefore, developed that Seeriram is binding on me despite the other case which Mr. Barker cited. This is Baldeosingh v. Sankerlall (1974) 18 W.I.R. 375. The Court of Appeal of Trinidad and Tobago was there dealing with an appeal against an interlocutory order by a judge varying the terms of an interlocutory order made by consent of parties. Ultimately, the question which faced the Court of Appeal was the one with which I now have to deal: Can a consent order in interlocutory proceedings be varied by the Court or a judge on the application of either of the parties to the proceedings?

In delivering the judgment of the Court of Appeal, McShine, C.J., adverted to the effect of cases already referred to, where the proceedings are to define substantive rights, and continued (page 377 E - F):

> "It appears, however, that the situation as to interlocutory orders is different, for it has been held in Mullins v. Howell (1879) 11 Ch. D. 763, 48 L.J. Ch 679) that the Court had an inherent jurisdiction to vary interlocutory orders made by consent. The question was dealt with by Jessel, M.R. in Mullins v. Howell in the following terms:
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> > "I do not think that the rules which have been laid down as the rules under which the Courts will enforce agreements will apply to enforcing orders of the Court because the Court had jurisdiction over its own orders, and there is a larger discretion as to its orders made on interlocutory applications than as to those which are final judgments."

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The learned Chief Justice further opined that the Court could derive no assistance from the Australasian Automatic case (supra). His impression was that:

> "It is only necessary to state that the order sought therein was one which involved a substantive right of the parties to the transfer of certain shares and was not merely one relating to procedure."

Mr. Barker submitted that the reliance on Mullins v. Howell was misconceived and that that case is not authority for the proposition formulated by the learned Chief Justice.

My researches have, however, discovered judicial approval of the views of Sir George Jessel, M.R. For example, Ormrod J. in B(GC) v. B(BA) [1970] 1 A.E.R. 973, cited it as "authority for the proposition that the Court can vary interlocutory orders". This was a case where Ormrod J. was asked to review a consent order for maintenance of a wife which it was contended had been under a mistake. In such a case one basis for the Court's jurisdiction to review such an order was that the Court is exercising its inherent power to vary interlocutory consent orders, referred to by Sir George Jessel, M.R., in the case which I have already cited ('p.917b').

Again, Lord Denning, M.R., in Purcell v. F.C. Trigell Limited [1970] 3 A.E.R. 671 (C.A.) page 675b, recited from the judgment of Sir George Jessel, M.R., that:

> "There is a larger discretion as to orders made on interlocutory applications than as to those which are final judgments."

In the same case, Buckley, L.J., commented on Mullings v. Howell as follows:

> "In that case the parties entered into an agreement on defendant giving a certain undertaking on motion all further proceedings in action should be stayed, so that although the matter came before the Court on motion the relief which was granted was in fact relief which put an end to the action in its entirety, and perhaps, it is not, therefore, really right to regard the case as one of an interlocutory nature. But, however, that may be, it is clear that, in my judgment, from the terms of Sir George Jessel, M.R's observations in that case that he was not in any way disregarding the contractual arrangement arrived at between the parties. On the contrary he was saying that there was an arrangement but that it was an agreement which in the circumstances the Court would not enforce

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> against the defendant, that is to say, he was saying that on equitable grounds, though there was a contract it was one which ought not to be enforced in its specific terms. In my judgment nothing in that conflicts with the view that I have expressed that a consent order must be given its full contractual effect even if it relates to an interlocutory step in the action."

Winn, L.J., in agreeing with Lord Denning, M.R., said:

> "There is no fundamental distinction in law between a consent order made in interlocutory proceedings and a consent order made on a final judgment. However, there is this to be said, that apparently the Court would prefer to keep closer control over its interlocutory proceedings than it would, over its final orders if satisfied that they had been agreed to by fully advised and competent parties."

The foregoing observations were made in a case where the parties had agreed "subject to the due delivery of answers to interrogatories, that that there should be a striking out order in respect of the defence of both defendants which would have left them immediately vulnerable ..... to the quasi-automatic entry of judgment" per Winn, L.J. All the judges of the Court of Appeal saw no grounds upon which the discretion of the Court should be exercised in favour of the defendants. In the final analysis, to use the words of Lord Denning, M.R., at page 675c:

> "The Court has always a control over interlocutory orders. It may in its discretion vary or alter them even though made originally by consent."

And further:

> "even though it cannot be set aside there is still a question whether it should be enforced."

I must perforce state that the foregoing quotations were not brought to my attention by learned attorney for either side. But I have interpolated them to give some idea of the modern views of the Court on the question before me for decision. They have the effect of supporting the approach that this matter in the long-run is a matter of the exercise of the discretion of the Court.

Indeed, it was on the exercise of my discretion that Mr. Cowan seemed mainly to depend. Of course, he stressed the validity and applicability of Baldeosingh's case, which he submitted was a thorough enquiry into the point. On this aspect of discretion I quote from Baldeosingh's case:

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> "Apart from its inherent jurisdiction, extremely wide powers have been conferred by Rules of the Supreme Court permitting the Court or a Judge to enlarge or abridge the time fixed for taking procedural steps appointed by the Rules for the purpose of ensuring the due administration of Justice." (p.377 G = H)

I have already quoted the relevant section of the Law in Jamaica, which gives this jurisdiction, and I respectfully adopt the further views of the Court of Appeal of Trinidad and Tobago at page 378:

> "This rule, as will be observed, is extremely comprehensive in nature ..... The fact that the order was made by consent does not in our view preclude the judge from dealing with the application in accordance with the general tenor of the rules of the orders and rules in this regard is to ensure that there be a determination of the matter on the merits, and that justice is done between the parties."

The attainment of doing justice between the parties in the instant case must take into account two balancing factors. The first is expressed in another quotation from Lord Denning, M.R. This is reported in Revici v. Prentice Hall Incorporated [1969] 1 A.E.R. 772 at page 774:

> "Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed."

But if a ground of excuse is put forward to explain the delay it seems to me that I must consider whether in all the circumstances the prima facie rule should be strictly enforced. See, in addition to Revici v. Prentice Hall Incorporated (supra), Ratnam v. Cumarasanny and another [1964] 3 A.E.R. 83 P.C.

Is there then in the instant case any material upon which I can exercise my discretion? I am statisfied that the affidavits already mentioned provide such grounds. Accordingly, I order that the defendant be granted an extension of time within which to file the Further and Better Particulars, even although the application for extension of time was filed after the summons to strike out parts of the defence was filed. The summons to strike out paragraphs 2 - 7 of the defence is consequentially dismissed. It follows too, that leave is granted on the summons to file an amended defence.

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My initial ruling as to costs was not to make any order for costs for the actual day of hearing. But after hearing attorneys for the parties it was agreed that costs be costs in the cause. Of course, the previous orders as to costs in favour of the plaintiff are not disturbed.

Ordered that there be extension of time to file Further and Better Particulars within 10 days from the date hereof.

Ordered that there be leave to file the amended defence within 10 days hereof.

R. O. C. White
Puisne Judge
March 21, 1975