JAMAICA

IN THE COURT OF APPEAL
MOTION: NO: 9/2000

BEFORE: THE HON. JUSTICE FORTE, PRESIDENT
THE HON. MR. JUSTICE HARRISON, J.A
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**BRUCE GOLDING**	**APPELLANT**
AND	**THE JAMAICA OBSERVER LTD. AND ITS PROPRIETORS**	**1st RESPONDENT**
AND	**THE EDITOR OF THE SAID JAMAICA OBSERVER LTD.**	**2nd RESPONDENT**
AND	**AUDRE FRANKLYN PRESIDENT,YOUNG JAMAICA**	**3rd RESPONDENT**

Berthan Macaulay Q.C. and **Wentworth Charles** instructed by **Wentworth S. Charles** for the Appellant

Christopher Malcolm instructed by Patterson, Phillipson and Graham for the respondents.

March 22 and July 12, 2000

FORTE, P.:

Having read in draft the judgment of Langrin J.A., I agree with his reasoning and conclusion and there is nothing more I could usefully add.

HARRISON, J.A.:

I also agree.

LANGRIN, J.A.:

We have before us an application for leave to appeal against a ruling made by Harrison J, sitting in Chambers on 14th February, 2000. The impugned order is set out as under:

> "Preliminary objection overruled. Summons to proceed. Leave to appeal refused. Court recommends that matter be set down for continuation during the week of 13th March, 2000. Reasons for ruling can be obtained on application to the Registrar".

On the 12th October, 1999 a writ of summons was served on the first respondent and an appearance was entered the following day. The Statement of Claim was filed on the 15th November, 1999 and served on the first respondent the following day. The allegation is that the Statement of Claim was filed out of time and no extension of time was sought by the appellant neither was any consent sought for the Statement of Claim to be filed and served out of time. On the 1st December, 1999 an interlocutory judgment was entered against the first respondent.

A summons dated 14th December, 1999 was brought by the first respondent seeking to set aside the service of the Statement of Claim on the basis that it was filed out of time and therefore irregular. This summons was dismissed on 1st February, 2000.

The minute of order noted that the Summons for leave to proceed to Assessment of Damages was adjourned to 8th February, 2000 to be heard together with two other Summonses filed by the defendants. The first respondent had filed a summons to set aside interlocutory judgment entered on 1st December, 1999 on the

ground of irregularity because the Statement of Claim was served on the respondent out of time.

This summons was heard by Karl Harrison J. in Chambers on 14th February, 2000. There was also another summons by the third respondent to set aside a Default judgment set down for hearing on the same date.

Mr. Macaulay Q.C. on behalf of the appellant objected to the hearing of the summons. He raised certain preliminary objections and argued that by virtue of Section 678 of the Judicature (Civil Procedure Code) Law, the procedure for setting aside on the ground of irregularity was by motion and not by summons.

Harrison J in his reasons for ruling noted however that Mr. Macaulay Q.C. had conceded that the matter was properly before him and that he had jurisdiction to hear the application to set aside since it was brought under Section 258 of the Code. In both of the summonses the learned judge ruled that they should proceed. Leave to appeal against the ruling was sought but refused.

By letter dated 14th March, 2000, Mr. Macaulay, Q.C. wrote to Harrison, J pointing out that in his ruling he had attributed a submission to him that he did not in fact make. According to Mr. Macaulay ,Q.C. what he had submitted was that if the judgment was a <u>regular</u> judgment then the proper procedure would have been under section 258, but since the judgment was being attacked on the ground of irregularity then the judge would have no jurisdiction to hear it in Chambers on summons.

The grounds of appeal are stated as follows:

> "(1)The Learned Judge in Chambers exceeded his jurisdictional powers and usurped the powers of the Court under Section 678 of the Judicature (Civil Procedure Code) Law. The Learned Judge's

> powers to hear an objection for non-compliance of the Sections of the Judicature (Civil Procedure Code) Law would only have been heard by the Judge sitting in Open Court (see Section 484 of the Judicature (Civil Procedure Code) Law.
>
> (2) Assuming, but not conceding, that the Learned Judge could have heard such an application on a Summons in Chambers, the Learned Judge was wrong in Law in holding that the requirement for 2 clear days notice as required by Section 523 Judicature (Civil Procedure Code) Law was waived by the Appellant, because the Appellant's Counsel was present on another occasion in Chambers, when Counsel for the Respondent had indicated that he intended to serve a Summons on the Appellant, which Summons was later served less than 2 clear days as required by the said Section 523 Judicature (Civil Procedure Code) Law."

Reference was made to Section 258 of the Civil Procedure Code which reads:

> "Any judgment by default, whether under this Title or under any other provisions of this Law, may be set aside by the Court or a Judge upon such terms as to costs or otherwise as such Court or Judge may think fit".

Mr. Macaulay, Q.C. submitted that Section 258 speaks only to regular judgments and therefore all irregularities must be dealt with under Section 678. It would therefore mean that even though there is a default judgment if it were irregularly obtained then one must proceed under Section 678 to have it set aside.

Section 678 states:

> "Non-Compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner, and upon such terms, as the Court shall think fit".

Section 678 refers only to "the Court" and this would not include a judge in Chambers.

Reliance was placed on ***Baker v Oakes*** [1877] 2QBD 171. In this case, no application as to costs was made at the trial but subsequently the same judge who had tried the action while sitting in Chambers made an order as to costs. It was decided that Order LV only gives the power to "the Court" without the alternative "or a judge". It was clearly therefore, not a case in which it was intended to give jurisdiction to "a judge at chambers" (per Cockburn, C.J). Brett, J.A. observed at p. 176, "I am of the opinion that 'Court' does not include a Judge at Chambers."

It is instructive to note also the Jamaican case of ***Kenneth Mason v Desnoes and Geddes Ltd.*** PC Appeal # 54 of 1988 delivered 2nd April, 1990. At page 5 of the judgment, in referring to section 354 of the Civil Procedure Code, their Lordships relied on the case of ***Baker v Oakes*** and stated that:

> "The reference to the 'Court or Judge' makes it clear that this jurisdiction is one which may be exercised by the Judge in Chambers".

Their Lordships even noted that it also included a Master in Chambers.

Reference was also made to **In Re Davidson** (1899) 2 Q.B.D. 103. The case involved an application made by a solicitor for the costs of an inquiry. The report of the Committee which heard the inquiry had entirely exonerated the solicitor from the charge made against him. Darling, J. was of the view that this application for costs must be made to the Court and not to a Judge in Chambers. Channell, J noted that the power is given to the Court, and not to the Court or Judge and therefore it was the Court only, that could deal with the matter.

The case of ***Gordon v Vickers*** S.C.C.A # 59/88 delivered March 8, 1990 is also worthy of mention. The appellants, as in the instant case, sought to have a default judgment set aside on the ground of irregularity. When the matter came before Langrin, J, he dismissed the application, holding that the appellants, had not satisfied him of the irregularity of the judgment. However, the appellants by a motion, renewed their application to strike out the default judgment. When the matter came before Harrison, J, he dismissed it on the ground that Langrin, J, in a court of co-ordinate jurisdiction had adjudicated on the issues raised and had dismissed the application on the merits. On appeal, one issue was whether repeated applications could be made to set aside a default judgment. Rowe, P in delivering the judgment was of the view that it was open to a defendant against whom a default judgment has been entered to make more than one application to have it set aside. He noted at page 6 ,"This does not mean that the Court is powerless to curb an abuse of its process, nor does it mear that the Court is powerless to curb an abuse of its powers, nor does it mean that a defendant against whom a default judgment has been regularly entered can make repeated applications to have it set aside without adducing new relevant facts". The judgment also referred to and considered Section 258 of the Civil Procedure Code which enables a Court or Judge to set aside any judgment obtained by default. It was noted that the discretion given by the section is wide and unfettered.

The case of ***Gordon v Vickers*** shows that our Court of Appeal, when faced with an application to set aside a default judgment on the ground of irregularity (as in the instant case) referred to and relied on Section 258 of the Civil Procedure Code.

Before this Court, Mr. Malcolm, Counsel for the Respondent, pointed out that Sections 254-258 of the Civil Procedure Code deal with default judgments. He noted that the only section which speaks to the setting aside of default judgment is section 258. According to Counsel for the Respondent, if the intention of the legislature was to allow setting aside to be brought under other sections, the Code would have expressly said so. On the other hand, Section 678 speaks to non-compliance generally. He also noted that whereas section 678 speaks to irregularity, on the clear wording of section 258 one can proceed under that Section either if the judgment is regular or irregular.

It is interesting to look at similar provisions in the Supreme Court Practice (hereinafter called the "White Book"), and to view how they are treated.

It is Order 2 Rule 1 which like our section 678 that deals with non-compliance. Order 2 r.(1) states that if there is a failure to comply with the requirements of these rules..."then the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein".

Order 2 r(1) (2) notes that upon any such failure the Court may on such terms as to costs or otherwise as it thinks just set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings, or any document or judgment or order therein, or exercise its powers under these rules to allow such amendments. The Notes to that Order state in the 1995 White Book:

> " 'Proceedings' for the purpose of this rule includes any application to the Court however informal."

The Notes also point out that certain irregularities cannot be cured under this Order – e.g. entering judgment in default of defence before expiry of the period prescribed for

service of a defence is an irregularity of such a fundamental nature as to be incurable under Order 2 r.(1) and accordingly the defendant is entitled to have the judgment set aside **ex debito justitiae.** It is also noted in the White Book that the power given to the Court by Order 2 (1) is a power to cure irregularities consisting of failures to comply with the rules. There is no power to remedy failures of a more fundamental kind. Also under Order 2 r.2 any application to set aside for irregularity may be made by summons or motion. However our section 678 makes reference to the Court only indicating therefore an application by motion.

Comparison between Order 2 and Section 678

In essence, they are similar as they both deal with the effect of non-compliance. It is to be noted that Order 2, as it presently stands in both the 1970 and 1995 White Book is far more detailed than our section 678. While section 678 speaks only to the setting aside of "proceedings", Order 2 goes even further to make reference to proceedings and any judgment, document or order therein. A brief look at the history of Order 2, shows that up until 1964 it was really then, Order 70 r (1), which provided:

> "Non-compliance with any of these rules... shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit."

It is virtually on all fours with our section 678 of the Civil Procedure Code except our draftsmen for some reason saw it fit to use "Court" rather than Court or Judge.

Setting Aside Judgment by Default

Order 27 Rule 15 in the 1961 White Book states as under:

> "Any judgment by default whether under this Order or under any other of these Rules, may be set aside by the Court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit".

The notes to this Order are summarised as follows:

> "The application may be by motion or summons. The discretionary power of a judge in Chambers is unconditional and unless and until the Court has pronounced a judgment on the merits or by consent, it has the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure (***Evans v Bartlam*** [1937] A.C 473).
>
> This order deals with both regular and irregular judgments. If the judgment is regular, then there is an inflexible rule that there must be an affidavit of merits which is an affidavit stating facts showing a defence on the merits. If it is desired to set aside the judgment for irregularity, the irregularity must be specified in the summons or notice of motion.
>
> Apart from these express rules there is an inherent power in the court to prevent an abuse of its proceedings."

It is abundantly clear that Section 258 of the Civil Procedure Code which is similar to Order 27 Rule 15 of the 1961 White Book deals both with regular and irregular judgments. Section 678 of the Code on the other hand deals with proceedings which does not include default judgments. Accordingly the respondents have a choice to proceed via Motion or Summons. The fact that they proceeded by summonses cannot invalidate the proceedings.

Mr. Macaulay then argued the special ground that the learned judge was wrong in law in holding that the requirement for two clear days notice (to serve the summons to set aside Interlocutory Judgment) was waived by the appellant. This waiver allegedly

exists because the appellant was present on another occasion in Chambers when Counsel for the respondent indicated that he intended to serve the summons.

It is stated in the 1995 White Book in Order 2/1/1 that:

> "Defective service of proceedings, however gross the defect, and even a total failure to serve where the existence of the proceedings is nevertheless known to the Defendant is an irregularity which can be cured by the exercise of discretion under Order 2 r(1)."

Authority for this proposition is The **Goldean Mariner** (1990) Vol. 2 Lloyds Law Reports 215. At page 225 Sir John Megaw noted:

> "But it is accepted that the mistakes caused none of them any prejudice; they knew that concurrent writs had been issued and were in existence in respect of each of them, and that it was the intention that the appropriate document should be served".(emphasis supplied).

In the instant case, Harrison, J in his ruling had noted that the summons was indeed short served and this amounted to an irregularity but he accepted the explanation for late service. The judge had also considered the fact that all parties were in fact present on 1st February, 2000 before Mrs. M. McIntosh J, when the matter was set for hearing on 8th February. That ground therefore fails.

The application for leave to appeal is treated as the hearing of the appeal. In the result the appeal is dismissed. The order made by the judge below is affirmed.

The respondents will have the costs of the appeal both here and in the court below to be taxed if not agreed.