[2015] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 9/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**LEEMAN VINCENT**	**APPELLANT**
AND	**FITZROY BAILEY**	**RESPONDENT**

Michael D Thomas for the appellant

Respondent appearing in person

18 March 2015

ORAL JUDGMENT

McDONALD-BISHOP JA (AG)

[1] This is an appeal brought by Mr Leeman Vincent, the appellant, against the order of Her Honour Miss Calys Wiltshire, Resident Magistrate for the parish of St. Ann, made on 4 October 2012. By that order the learned Resident Magistrate had set aside an order for recovery of possession made on 14 August 2012 in favour of the appellant by Her Honour Miss Andrea Thomas, Senior Resident Magistrate for the parish. The plaint note was endorsed that the order was made by consent and it was signed by both the appellant and the respondent as well as by the learned Senior Resident Magistrate.

(This order will conveniently and interchangeably, be referred to, from time to time, as "the consent judgment").

The factual background

[2] The background leading up to the order of the learned Resident Magistrate setting aside the consent judgment may be summarized as follows: The appellant filed a plaint, in person, against the respondent in the Resident Magistrate's Court for the parish of St Ann for recovery of possession of a dwelling house which was said to be occupied by the respondent as a tenant and situate at Pimento Walk in the parish. Prior to the filing of the plaint, the respondent was duly served with a notice to quit on 8 June 2012, which was to expire on 9 July 2012.

[3] The summons was issued and served on the respondent for him to appear on the return day scheduled for 14 August 2012 at the courthouse in St Ann's Bay. On that date, the respondent duly appeared before the learned Senior Resident Magistrate. The appellant was also present. It seems, from all indication, that they were both unrepresented. The endorsement made by the Senior Resident Magistrate over her signature on that day, reveals the following order:

> "By consent Order made for recovery of possession on or before 14/9/2012 Costs $2016.00."

[4] The formal order in the same terms was subsequently drawn up and signed by the learned Senior Resident Magistrate on 17 September 2012.

[5] The learned Senior Resident Magistrate, in compliance with earlier directions from this court (differently constituted), had also filed an affidavit in which she attested to the accuracy of the records thereby confirming that both parties had appeared before her on 14 August 2012, and that both consented to the order and affixed their signatures to the plaint note in her presence. There is no challenge to these assertions of the learned Senior Resident Magistrate.

[6] Following the drawing up of the formal order, the respondent, through his attorney-at-law made an application entitled, "Application to Set Aside Default Judgment". On the wording of the application, it was made "for the default judgment entered herein on the 14th day of August 2012 to be set aside and for a trial date to be set." He also made an application for stay of execution of the 'default judgment'. The affidavit of the respondent sworn to on 17 September 2012 was relied on in support of the application to set aside the judgment. The application was scheduled for hearing on 4 October 2012.

[7] On that date, the application to set aside the 'default judgment' came before the learned Resident Magistrate who proceeded to set aside the consent judgment. Apparently, in keeping with the title of the application before her, she proceeded to treat it as one for setting aside a judgment in default, which is specifically governed by section 186 of the Judicature (Resident Magistrates) Act.

The reasons for judgment

[8] She set out in her brief reasons for judgment the basis on which she had granted the order setting aside the judgment as follows:

> "On hearing application, [sic] from Counsel for the Appellant [sic], Vincent Leeman [sic] supported by affidavit revealing that said Appellant [sic] had a good defence, I ordered that default judgment be set aside.
>
> On the occasion of the application, the Court was however not seized [sic] properly of the nature of the judgment originally entered. Consequently on the basis that the judgment was entered in default, the matter was heard and the same set aside."

It is evident that the learned Resident Magistrate had made an error by referring to the "Appellant, Vincent Leeman", when she ought to have said the respondent.

The grounds of appeal

[9] The appellant is aggrieved by the order of the learned Resident Magistrate and has filed and argued before us through his counsel, Mr Thomas, two grounds of appeal. They are as follows:

> "(a) The application to set aside judgment related to a consent judgment, which was not in law capable of being set aside by the said application.
>
> (b) The learned Resident Magistrate erred in law when she granted the application and made the order to set aside default judgment."

[10] He seeks the following orders:

> "(a) that the order of the learned Resident Magistrate be set aside and the consent judgment stand (b) such order as to costs as may be deemed just."

[11] Mr Thomas has urged on the appellant's behalf that the order appealed against should be set aside by this court because based on the learned Resident Magistrate's reasons for judgment, she had implicitly admitted that she had erred in law in setting aside the judgment. He contended that on that implicit admission alone, the order ought to be set aside because she had recognized that she was wrong to have set aside the consent judgment in the mistaken belief that it was a default judgment. He said that based on the admission made, he saw no need to cite any authority in support of his argument that the learned Resident Magistrate erred in setting aside the judgment. In his view, it is trite that the learned Resident Magistrate could not have done so as a matter of law.

The respondent's position

[12] The respondent has filed no response to the appeal. He has also attended the hearing in person but was unable to advance any argument in defence of the impugned order of the learned Resident Magistrate. He sought to advance before us the argument that although he had signed the plaint in court which contained the order giving him one month to leave the premises, he did not understand what was given to him to sign. He said he did not quite understand the proceedings.

[13] The problem with the respondent's case, however, is that the explanation he is now advancing was never included in the affidavit filed in support of the application before the learned Resident Magistrate and no evidence was presented before this court by him to rebut the affidavit of the learned Senior Resident Magistrate who attested to what transpired at the time the order was made and the plaint was signed. There is thus nothing before this court that could avail the respondent in warding off the challenge to the order that was made setting aside the consent judgment.

Reasoning and findings

[14] It is recognized that the two grounds of appeal are closely related and so they have been treated simultaneously as a matter of convenience in an effort to determine the central question as to whether the learned Resident Magistrate erred in law in setting aside the consent judgment.

[15] Unfortunately, we cannot share counsel's view that simply because the learned Resident Magistrate implicitly said that she had erroneously dealt with the judgment as a default judgment that that could be taken as being conclusive of the matter that she had erred in law in setting it aside. There must be an objective evaluation of what she did within the context of the applicable law in order to say that she had, in fact, erred and that her order ought to be set aside.

Setting aside judgment by default under section 186 of the Judicature (Resident Magistrates) Act

[16] The Judicature (Resident Magistrates) Act in section 186 makes provision for the entry of judgment by default and the setting aside of such judgment. It reads:

> "If on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Magistrate, upon due proof of the service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only; and the judgment thereupon shall be as valid as if both parties had attended:
>
> **Provided always, that the Magistrate in any such cause, at the same or any subsequent Court, may set aside any judgment so given in the absence of the defendant and the execution thereupon, and may grant a new trial of the cause, upon such terms as to costs or otherwise as he may think fit, on sufficient cause shown to him for that purpose.**" (Emphasis added)

[17] It is clear from a reading of the section that the fundamental pre-requisite for the grant of a judgment by default in the Resident Magistrate's Court is the absence of the defendant. So, where the defendant is present in person judgment by default cannot properly be entered against him.

[18] In this case, there is clear and unchallenged evidence that the respondent, being the defendant in the matter, was present on the return day when the learned Senior Resident Magistrate proceeded to make the order for recovery of possession by consent. The parties themselves signed to the plaint bearing the order. Furthermore,

the formal order that was filed also bore reference to the type of judgment that was entered on 14 August 2012 as being one entered by consent.

[19] All these matters would have formed the record of the court and would have indicated at the time the application was being heard by the learned Resident Magistrate that the respondent was present at the time the order was made and that the order was made by consent. If she had simply checked the plaint note, which she could have legitimately done, she would have seen that no default judgment was entered in the matter and that would have sufficed to, at least, put her on notice that the wrong application was before her. This fact would have brought home to her that the powers conferred on her by section 186 to set aside a default judgment could not have been invoked in the circumstances to dispose of the application before her.

[20] It is, indeed, unfortunate that the learned Resident Magistrate proceeded to entertain the application to set aside the judgment and to actually dispose of it without having first verified the official record of the court to ensure not only that a judgment was, in fact, entered but also to ascertain the terms of that judgment.

[21] This verification of the record was even more necessary because of the deficiency in the affidavit concerning the judgment that was entered or the order that was made. It should be noted that although the application, itself, was entitled an 'application to set aside default judgment' and did disclose in the body of it that it was being made for the learned Resident Magistrate to set aside the default judgment entered on 14 August 2012, the respondent in his affidavit evidence filed in support of

the application made no mention at all to the judgment entered. So, there was nothing on the affidavit that could have alerted the learned Resident Magistrate to the type of judgment that was, in fact, entered on 14 August 2012.

[22] The affidavit concentrated purely on issues pertaining to the dwelling house and alleged that the appellant had no right to it. It was, evidently, on that basis that the learned Resident Magistrate concluded that the respondent had a good defence and then proceeded to set aside the judgment on that sole basis. That is, of course, the primary consideration in setting aside a regularly obtained default judgment: see **Evans v Bartlam** [1937] 2 All ER 646. That, however, would not have been the only material consideration for the learned Resident Magistrate in determining whether to set aside what she thought was a default judgment. She would have had to demonstrate in her reasons that she had given thought, in exercising her discretion, to the considerations laid down in **Grimshaw v Dunbar** [1953] 1 All ER 350 that were approved by this court in **Boucher v Gayle** (1960) 2 WIR 457.

[23] If the learned Resident Magistrate had given consideration to the principles enunciated in **Grimshaw v Dunbar** and **Boucher v Gayle** in exercising her discretion to set aside what she thought was a default judgment, she would have recognized that this was not an appropriate case in which to exercise her jurisdiction to set aside the judgment on the basis that it was one granted by default. This observation is noted for the following reasons.

[24] The first consideration should have been the reason for the failure of the respondent, as the defendant in the action, to appear when the case was listed to be heard. In **Grimshaw v Dunbar**, it was stated in relation to this consideration at page 354:

> "First, although there is no hard and fast rule about it, as Lord Atkin pointed out in ***Evans v. Bartlam*** [1937] 2 All E.R. 650, it must be material for the learned judge to know why it was that the defendant failed to appear on the proper day when the case came into the list and was heard. How does this case stand as regards that matter?"

[25] In this case, the respondent was not absent and so if the learned Resident Magistrate had embarked on an enquiry along this line to seek to ascertain the reason for the respondent's absence, given that that is the first pre-requisite for the entering of a default judgment, she would have recognized that he was, indeed, present at the time the judgment in issue was entered. In such circumstances, she would have realized that a default judgment could not have been properly entered. This would have put her on enquiry as to how to treat with the application that was before her.

[26] Another relevant consideration for present purposes, and a material one identified by the authorities, is the question of prejudice to the appellant if the judgment were set aside and a new trial ordered. There ought to be a consideration whether any potential prejudice to the innocent party may be adequately compensated by a suitable award of costs. In this regard, evidence and/or submissions from the appellant would have been relevant. There are, however, no notes of the proceedings to inform this court as to what transpired at the time the application was dealt with.

There is also no indication on the record that the appellant was served with the application before the date fixed for hearing and that he was present at the time the order setting aside the judgment was made. There is no indication that he was afforded an opportunity by the learned Resident Magistrate to be heard on the application before the order was made. In fact, in her reasons for judgment, the learned Resident Magistrate only stated that it was after having heard the respondent's attorney-at-law and after considering the affidavit of the respondent (although she wrongly said appellant) that she set aside the judgment.

[27] In such circumstances, it is hard to conclude that the learned Resident Magistrate had at the forefront of her mind, the issue of prejudice to the appellant as a party who had secured a regularly obtained judgment, *prima facie*, with the agreement of the respondent and whose interest was likely to have been affected by the order.

[28] The third consideration would, of course, be the prospects of success of the respondent who was applying for a new trial. That would be to say whether the respondent had raised on his affidavit a, *prima facie,* defence on the merits or, in other words, at least, an arguable one or one supportable by evidence. This seemed to have been the only consideration that operated on the mind of the learned Resident Magistrate.

[29] She formed the view that it was a good defence, which seems arguable, however, in the light of the fact that the affidavit was comprised predominantly of hearsay assertions and the person who seems to have had personal knowledge of the

matters being asserted by him (his baby mother) did not provide a supporting affidavit to speak to the matters that were being relied on by the respondent and she was not a party to the proceedings. While the respondent could rely on matters of information and belief, those, in any event, would have had to be properly set out in the affidavit with source and grounds disclosed, which was not done.

[30] It would appear then, from all this analysis, that even if the learned Resident Magistrate was not in error in treating the judgment as a default judgment, she would have still failed to employ the correct approach in determining whether the judgment ought to have been set aside. It means that she would have failed, in any event, to exercise her discretion judicially.

Setting aside judgment under section 201 of the Judicature (Resident Magistrates) Act

[31] The fact is that it was not a default judgment but rather one made by consent. It follows then that section 186 would not have been applicable and so the only other avenue available to the learned Resident Magistrate, in law, to treat with that application would have been section 201 of the Judicature (Resident Magistrates) Act. The section provides:

> "The Judge of a Court shall, in every civil proceeding, have power to set aside ***any*** verdict or judgment, and order a new trial, upon such terms as he shall think reasonable." (Emphasis added)

[32] On the basis of this section, it does appear that a Resident Magistrate does have the statutory power, by the use of the words, 'any verdict or judgment' to set

aside a consent judgment and to order a new trial. The interplay between sections 186 and 201, albeit not in the context of a consent judgment, was usefully discussed in **Boucher v Gayle** at page 462 as follows:

> "In the instant case, the proviso to s. 186 of the Judicature (Resident Magistrates) Law enables the magistrate who entered the default judgment to set aside such judgment at the same or any subsequent court and to grant a new trial of the cause.
>
> Section 201 enables a "judge of a court", *i.e.* the resident magistrate assigned to the particular court, to set aside *any* verdict or judgment in every civil proceeding, and to order a new trial upon such terms as he shall think reasonable.
>
> In our view s. 201 does not cover the same territory as s. 186 and the provisions of s. 201 do not derogate from the provisions of s. 186 but provide an extension of the jurisdiction granted by s. 186."

[33] The learned Resident Magistrate did not indicate, explicitly, what section of the Act she had invoked to treat with the application. It seems safe to conclude, however, from her reasons for judgment, that she mistakenly accepted the application as one to set aside a default judgment. It follows then that she would have purported to exercise the power conferred on her by section 186. However, section 201, would have also been an applicable section for consideration by her.

[34] Following the lead of the court in **Adrian Barrett v Milton Samuels** (1968) 11 JLR 89, it is open to this court to examine the application that was before the learned Resident Magistrate, within the ambit of section 201 and, in the words of Fox JA, "to

exercise its own discretion by way of review by making those considerations which the learned magistrate should have made of the material before her".

[35] In treating with the application under that section, the first thing noted of material importance is the nature of the judgment in question. The special considerations that are applicable to consent judgments would now be of relevance. Therefore, some different considerations from those applicable to default judgments would arise even though there are some considerations that may be common in dealing with the setting aside of both types of judgments. Fox JA in **Adrian Barrett v Milton Samuels** in speaking of sections 186 and 201, noted:

> "The chink in counsel's logic is the failure to recognise that, because the two sections contemplate two different situations, the consideration of the grounds and of the terms upon which the discretion may be exercised will not be the same in each situation."

[36] In **Evans v Bartlam**, the distinction between treating with a default judgment and a consent judgment was also alluded to by Lord Atkins at page 650, when he stated:

> "The principle obviously is that, unless and until the court has pronounced a judgment **upon the merits or by consent**, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure." (Emphasis added).

[37] The judgment in issue in this case, was not one that resulted from the exercise of the coercive powers of the court for failure to follow procedural rules but, instead, is

one that *prima facie*, was arrived at by agreement between the parties. In this regard, the principles of law governing the setting aside of a consent judgment, and not a judgment by default, would become the relevant ones for consideration.

[38] Stuart Syme in his text "A Practical Approach to Civil Procedure", 4th edition, at paragraph 40.3.3, usefully, explained the approach to the setting aside or varying of consent judgments. He noted:

> "Many orders are made 'by consent'. A true consent order is based on a contract between the parties. As such, the contract is arrived at by bargaining between the parties, perhaps in correspondence, and the consent order is simply evidence of that contract (*Wentworth v Bullen* (1840) 9 B & C 840). To be a true consent order there must be consideration passing from each side. If this is the case, then, unlike other orders, it will only be set aside on grounds, such as fraud or mistake, which would justify the setting side of a contract (*Purcell v F.C. Trigell Ltd* [1971] 1 QB 385).
>
> However, there is a distinction between a real contract and a simple submission to an order."

[39] The learned author then cited the dictum of Lord Denning MR, in **Siebe Gorman and Co. Ltd v Pneupac Ltd** [1982] 1 WLR 185 at page 189, in illustrating the principle. Lord Denning stated:

> "It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous… one meaning is this: the words "by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real

> contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties."

[40] The foregoing excerpts do show that the setting aside of a consent judgment is a totally different matter from the setting aside of a default judgment. It is taken to mean too that a judgment expressed to be by consent could, in appropriate circumstances, be set aside like any other judgment or order made without consent while in another situation, a judgment expressed by consent cannot be set aside and fresh action would have to be brought in relation to it- see Halsbury's Laws of England, 3rd edition, Vol 22 at paragraph 1672.

[41] The whole circumstances attendant on the entry of the judgment by consent in this case would have had to have been explored to see whether if, indeed, it had resulted from a contract or compromise between the parties or whether there was no more than a simple submission by them to the order. This enquiry would be necessary since different considerations would apply to each situation. For, if it were to be found that the judgment arose from a bargain or contract between the parties, then it could only be set aside on the ground of fraud, mistake, illegality, misrepresentation, duress or any other ground on which a contract or compromise may be set aside. However, the respondent would have to provide evidence of the existence of such vitiating factors. If on the other hand, the judgment was a mere submission by the parties to an order, then it may be set aside like any other judgment entered without consent but, again, the respondent would have to provide evidence of that fact. The appellant

would also have the right to bring evidence to rebut any disputed assertions made by the respondent in relation to those matters. The consideration of the application had not advanced along those lines.

[42] In the final analysis, there was no evidence presented by the respondent in his affidavit that was before the learned Resident Magistrate as to the surrounding circumstances in which the judgment was entered or the order made. In other words, the respondent, in seeking to have the judgment set aside had given no explanation for having signed his name to the consent judgment and had given no evidence as to the circumstances attendant on the entry of such a judgment in the appellant's favour.

[43] There is no factual or legal basis disclosed on the respondent's affidavit that could justify the exercise of the learned Resident Magistrate's powers to set aside a consent judgment on the basis of section 201 on the particular application that was before her. So, by erroneously treating the consent judgment as a default judgment and setting it aside on the sole basis that there was a good defence, the learned Resident Magistrate would have failed to take into account all the relevant considerations in setting aside the consent judgment on the application that was before her.

Conclusion

[44] It seems reasonable to conclude, therefore, that there was no proper basis for the exercise of the learned Resident Magistrate's discretion under the Judicature (Resident Magistrates) Act in setting aside the consent judgment entered on 14 August

2012. Therefore, she, regrettably, fell into error in setting aside the judgment on the basis of the application before her. There is thus merit in the appellant's grounds of appeal and the court, therefore, makes the following orders:

(1) The appeal is allowed.

(2) The order of the learned Resident Magistrate, Her Honour Miss Calys Wiltshire, setting aside default judgment on 4 October 2012, is set aside.

(3) The consent judgment entered on 14 August 2014 by Her Honour Miss Andrea Thomas is affirmed.

(4) Costs of the appeal to the appellant in the sum of $15,000.00.