



be exercised in accordance with Rules, but English practice to apply where no other provision made

jurisdiction of the Court shall be exercised in accordance with any Rules made under this Law.

(2) In any matter of practice or procedure for which no provision is made by this or any other Law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case."

The argument for the Plaintiff is that this part of the English rules is of no force or effect in the Cayman Islands because provision is already made in the Grand Court (Civil Procedure) Rules - "the local Rules" for the setting aside of Judgements in default.

Examination of the local Rules discloses that no provision has been made therein for the setting aside of Judgements of this Court entered in default of pleading. Indeed there is no provision in these Rules for judgement in default of pleading to be entered in the first place. In this respect Part VI of the Rules which covers the subject matter of "Pleading" is to be contrasted with O. 19 of the R. S. C. which deals comprehensively with the practice and procedure to be followed in the English High Court where reliance is placed upon a failure of the other side to plead according to the rules. Counsel for the Defendant therefore submits that no provision is made by the local Rules for this particular matter of practice and procedure so that the English rules do indeed apply in the present case.

Counsel for the Plaintiff rests his submission on the wording of rule 20 of the Grand Court Rules which is in the following terms:

"Judgement given in default of appearance may be set aside.

20. Notwithstanding the provisions of rule 19, in any action in which judgement is entered in default of appearance by the defendant under the provisions of that rule, the Court may set aside or vary the judgement, upon such terms as may seem fit."

This rule contains an express reference to the immediately

preceding rule 19 of the Rules which deals and deals only with the procedure for entering judgement in default of appearance. It would seem logically, therefore, to be confined in its effect to making provision for the setting aside of default judgement obtained in these circumstances only. Indeed this is the plain ordinary meaning of the words used in rule 20.

In Cayman Islands News Bureau Ltd v Robert Cohen C 64 of 1987 I delivered a ruling on 25th February 1988 to the effect that O. 27 rule 3 of the R.S.C. is not in force in the Cayman Islands. After carefully reviewing the reasons which I gave for that Ruling, I can find nothing in it inconsistent with a decision that O. 19 rule 9 of the R. S. C. is in force and may be relied upon in the Cayman Islands. To hold otherwise would involve the proposition that this Court is not empowered to set aside a default judgement which is later seen to have worked an unforeseen injustice. As was pointed out by Sir Jack Jacob in The Fabric of English Justice at p. 60, cited in that ruling, a Court should be invested with power to maintain its process from being abused. This necessarily involves the assumption of jurisdiction to set aside summary judgements rendered without a trial upon the merits of the issues between the parties where it can later be shown that a miscarriage of justice has occurred in the operation of that summary process. I hold therefore that O.19 rule 9 of the English rules applies and that I have jurisdiction to entertain the present application.

It is common ground that the Court is invested under O.19 rule 9 with a wide discretion to set aside a judgement entered in default of defence where the justice of the case requires it. The onus lies upon the Defendant to show that there is some triable issue of law or fact on which to found his defence before the Court will exercise in his favour this discretion to set aside a judgement in default which has been regularly obtained against him: see *Evans v Bartlam* (1937) 2 AER 646. That is the most important element in the consideration of the exercise of this discretion by the Court: see *Vann v Awford* (1986) Times Newspaper 23 April 1986. The Defendant does not

have to show a good defence but merely one which is fairly arguable in order to demonstrate that a triable issue exists: see *Burns v Kondel* (1971) 1 Lloyd's L.R. 554.

Bearing in mind these principles I turn to examine the circumstances disclosed in the affidavit evidence. The judgement which is the subject matter of this application was entered upon a Specially Endorsed writ of Summons claiming the sum of \$14,914.85 as being the fair and reasonable remuneration payable for work performed and materials supplied by the Plaintiff at the request of the Defendant at the Cayman Diving Lodge, Grand Cayman. This was an establishment which at all material times was owned by a limited liability company in which the Defendant held 49 per centum of the shares and one D. Robert Autrey held 51 per centum. Both men were directors of the Company and, pursuant to a shareholders agreement entered into between them, the Defendant and his wife were acting as managers of the Lodge.

It is fair to say, upon a consideration of the history of the dispute between the Plaintiff and the Defendant according to the various affidavits filed and documents exhibited to them that a great deal of imprecision exists as to who were the actual contracting parties to the agreement for renovation work at the Cayman Diving Lodge which was undoubtedly concluded in January 1988 on the basis of a letter dated 21st of that month addressed by the Plaintiff, signing for Justus Islands Custom Homes as Manager, to the Manager of the Cayman Islands Diving Lodge and countersigned by the Defendant in apparent acceptance of the proposed works detailed therein. There is also evidence of interim payments tendered to and accepted by the Plaintiff in the form of company cheques. The ~~Defendant~~ <sup>Plaintiff</sup> however deposes that he was unaware of the company involvement and believed at all times that he was dealing with the Defendant personally. At the early stages he dealt only with Mr. Plain. Having reviewed this evidence it appears to me that a triable issue exists on the question whether the Defendant entered into this contract with the Plaintiff on his own account or as agent for a disclosed

principal, namely, the Company of which he was a director and minority shareholder. In the latter case, of course, he would not incur personal liability upon the contract; in the former case he would be personally liable whether or not he might have a claim over against the Company or against his fellow shareholder as a third party. This is an issue which could only be properly determined after a trial upon the merits with oral evidence including cross-examination and full discovery of relevant documents.

In exercising discretion upon this application I also have to consider how the default judgement came to be signed. The Specially Endorsed Writ was issued on 1st July, 1988 and served on the Defendant personally by the Bailiff on the 14th July, 1988. Strangely enough there is on record an appearance entered on his behalf two days earlier, on 12th July 1988, by W.S.Walker & Co. They had been acting as attorneys for the Company in correspondence with the Plaintiff and his attorneys Ritch and Conolly over the dispute. It would appear that they must have accepted service on behalf of the Defendant prior to 14th July 1988.

A rift had meanwhile developed in the relationship of Mr. Autrey and the Defendant in regard to the running of the company which caused Mr. Autrey to bring pressure to bear on W. S. Walker & Co. to withdraw as attorneys on record for the Defendant. They in fact wrote to Mr. Plain on 20th July 1988 saying that they could not represent him further in the matter and recommending him to consult Bruce Campbell & Co. instead. Mr. Plain deposed that when he received this letter he had already made travel arrangements to go to the U.S.A. on business and did not in fact consult Mr. Jenkins <sup>11/20/88</sup> ~~at that time~~ until 2nd or 3rd August on his return. In the meantime on 28th July 1988 the Plaintiff had taken out a summons for judgement in default of defence which was returnable on 8th August, 1988. At that hearing Mr. Polack appeared for the Plaintiff and Mr. Jr the Defendant. Mr. Jenkins sought an adjournment or occasion but indicated to the Court that essential.

Defendant would be seeking an indemnity against a third party. There was no suggestion that the Defendant would seek to defend himself by pleading that he had not contracted personally with the Plaintiff. This omission can only be ascribed to the shortness of time since Mr. Jenkins had been consulted by Mr. Plain in regard to this quite complicated situation. In the circumstances the Court gave leave to sign judgement in default on the ground that no defence to the Plaintiff's claim had been foreshadowed.

It seems to me quite clear that the speed of the Plaintiff's advisers in taking steps to obtain a default judgement at the earliest opportunity afforded by the Rules, coupled with the untimely withdrawal of W. S. Walker & Co. as a result of the unrelated dispute between Mr. Autrey and Mr. Plain, had the unfortunate result of obscuring the existence of a triable issue which the Defendant, if he had been properly and timely advised, could have advanced at the hearing on 8th August 1988. Having now reviewed my notes of that hearing I conclude that, had he done so it is most unlikely that leave would have been given to the Plaintiff to sign judgement in default of defence that day. Therefore, irrespective of the eventual outcome of the triable issue which has now been identified, it follows that a miscarriage of justice has occurred which it is the Court's duty to correct if it can fairly do so without causing further injustice.

The difficulty which arises in this connection stems from the 'consent' order which was entered by Schofield J at the hearing of a commitment summons issued by the Plaintiff on 18th August, 1988 returnable on 9th September 1988. From his affidavit, it would appear that the Defendant allowed himself to be panicked by the implicit threat of imprisonment into agreeing to pay \$7,500 of the judgement debt within 14 days and the balance by monthly instalments of \$1000 thereafter. As a result the greater part of the judgement has already been satisfied, although at the conclusion of the hearing of the present summons I suspended the further operation of this

'consent' order and the obligation to pay further instalments. It is in these circumstances submitted on behalf of the Plaintiff that it is too late for the Defendant now to seek relief by way of setting aside the default judgement.

Having considered dicta of Lord Russell of Killoren in *Evans v Bartlam* at p. 651 and *Siebe Gorman & Co. Ltd. v Preupac* (1982) 1 AER 377 I am satisfied that the 'consent' order does not constitute any kind of estoppel to preclude the Defendant from seeking this relief. However, it would in my view, work injustice to the Plaintiff to require him to repay to the Defendant monies which have been paid under the terms of the consent order to date and which, if the issue is finally determined in his favour at the trial, the Plaintiff will be entitled to recover again at the end of the day.

In the result the judgement in default entered pursuant to the order of 8th August 1988 is set aside, together with the 'consent' order of 9th September, 1988 upon the terms that the Plaintiff shall be under no obligation to repay the monies already paid thereunder pending the hearing and final determination of this action.

I will hear argument from counsel as to costs.

Dated the 9th January, 1989.



Chief Justice.