7 pages.

COURT OF APPEAL.

15th February, 1994 33.

Before: **Sir Godfray Le Quesne, Q.C., President,**
Sir Charles Frossard, K.B.E., and
R.C. Southwell, Esq., Q.C.

Between:	**Strata Surveys, Limited.**	**Appellant**
And:	**Flaherty and Company, Limited.**	**Respondent**

Application for leave to appeal, under Article 13(e) of the Court of Appeal (Jersey) Law, 1961, from the Order of the Royal Court (Samedi Division) of 4th October, 1993, whereby the application of the Appellant (the Sixth Defendant in the Court below) to set aside a Judgment by default obtained against it in favour of the Respondent (the Plaintiff in the Court below) was dismissed.

Advocate A.P. Begg for the Appellant.
Advocate N.M.C. Santos Costa for the Respondent.

JUDGMENT.

SOUTHWELL, J.A.: This is a claim by the Plaintiff, Flaherty and Company, Limited, against six Defendants in connection with a building project. The Sixth Defendant is Strata Surveys, Limited, or Strata for short.

Strata instructed Mourant, du Feu and Jeune as their counsel.

On 22nd July, 1993, Advocate Costa for the Plaintiff wrote to Advocate Mourant confirming his agreement that the action could on the next day, 23rd July, be adjourned for four weeks to allow Advocate Mourant time to take detailed instructions from his clients, Strata. But it was indicated that there would be no further agreed extension of time for Strata to file an answer to the claim.

On 23rd July, 1993, the four weeks were given to Strata to plead accordingly.

Those four weeks ran out by 20th August, 1993. The case was called on that day; there was no appearance on behalf of Strata and at the request of Mr. Costa on behalf of the Plaintiff, Judgment was given in default.

Advocate Mourant's affidavit in support of the summons to set aside the default Judgment made it clear that he had forgotten that the matter was to be called again on 20th August, and had failed to arrange either to appear himself, or for someone else in his firm to appear.

A summons was taken out on behalf of Strata to set aside the Judgment. That summons was heard by the Royal Court, Samedi Division, on 4th October, 1993. The Royal Court dismissed the application by Strata so that the Judgment in default stands.

The matter comes before the Court of Appeal by way of an application for leave to appeal and an application for leave to file further evidence which was not opposed. We have treated the application for leave as the substantive appeal and heard full argument for which we are indebted to Advocate Begg and Advocate Costa.

The matter turns on the true interpretation of the Royal Court Rules, 1992, and in particular Rule 9/3 paras. (1) and (2) which read as follows:

> ***"(1) Any judgment by default may be set aside by the court on such terms as to costs or otherwise as it thinks fit. (2) An application under paragraph (1) of this Rule shall be supported by an affidavit stating the circumstances under which the default has arisen and shall be made by summons".***

Paragraph (1) provides the Royal Court with a broad power to set aside default Judgments on appropriate terms. This is a discretionary but not an unfettered power. It is a power to be exercised judicially. The essential requirement to be met in its exercise is the requirement to do justice between the parties.

In the present case, that means justice to the Plaintiff and justice to Strata. The Court has always to keep in mind that judgments obtained where there is default by a defendant have not been preceded by any trial or other consideration of the merits of the claim, nor of any arguable defence to the claim which the defendant may have.

In the well-known case in the English jurisdiction of Evans -v- Bartlam [1937] A.C. 473, the House of Lords considered the

power of the Court to set aside default judgments. In the course of his speech in that case, Lord Atkin said this, and I quote from p.480:

> ***"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 only been obtained by a failure to follow any of the rules of procedure".***

Royal Court Rule 9/3(1) is similar in terms to the R.S.C. (1993 Ed'n) O.13 r.9. In Jersey, just as much as in England, the power is to be exercised, having regard to what is fair and just, keeping always in mind the principle as stated by Lord Atkin.

Rule 9/3(2) requires the application under paragraph (1) to be supported by an affidavit. The affidavit must be one stating the circumstances under which the default has arisen.

It was argued by Advocate Costa for the Plaintiff and held by the Royal Court that such circumstances are limited to those which explain how the default arose, for example, because of a mistake by the defendant's counsel, and that such circumstances do not include other considerations such as the merits of the claim; whether the defendant has any arguable defence to the claim; or the merits of any such defence.

In my judgment that is not the correct interpretation of paragraph (2). The circumstances under which the default has arisen are wide enough to include and do include the merits of the claim in respect of which judgment has been obtained in default and the merits of any defence. It is inconceivable that Rule 9 could have been intended to exclude the need for the affidavit of the defendant to deal with any defence and its merits, or to exclude consideration by the Court of any such defence and its merits. Often the defences available to the defendant will be the most important factor for the Court to consider when hearing an application to set aside a judgment in default. If the defendant cannot show that he has a defence which is reasonably arguable, there may be no injustice whatever to the defendant in allowing the judgment to stand.

The position for which Advocate Costa argued successfully before the Royal Court would mean that, even if the Defendant had an obvious and complete defence to the claim so that if the claim were to be tried the claim would inevitably fail, the Defendant's affidavit would have to omit reference to such a defence and the Court would have to ignore it.

In my judgment Rule 9 cannot be interpreted in this way. On the contrary when an application is made under Rule 9 to set aside a default judgment, (1) the affidavit in support should deal with

any defences on which the defendant wishes to rely if the judgment is set aside; (2) the affidavit in support should deal with the error or other reasons which led to the default; (3) the Court should weigh all relevant factors including the merits of the defences put forward by the defendant, and the error or other cause of the default; (4) in deciding whether or not to set aside the judgment, the Court should keep in mind the fundamental principle stated by Lord Atkin in the words I have already quoted from Evans -v- Bartlam.

This does not mean that advocates need not trouble about the time limits by which steps must be taken on behalf of their clients. If advocates fail to adhere to such limits, whether laid down in the Rules, or ordered by the Court, or agreed between the parties, they might find themselves having to pay personally the costs thrown away by reason of their failure.

A number of cases decided in the Courts of Jersey were cited to us and I refer to them in the order in which they were cited. Cutner -v- Green (1980) J.J. 269 C.of.A., was a decision of the Court of Appeal on an application to set aside a judgment in default. The principal features of the case were that (1) the defendant deliberately allowed Judgment to be entered by default on the basis of erroneous legal advice that the Judgment would be unenforceable against him in England where he was resident; (2) he had no defence at all and the Court was satisfied that no injustice could be shown to result from allowing the Judgment to stand. There is nothing in the Judgment of the Court of Appeal in Cutner -v- Green which is inconsistent with the Law of Jersey as I have now stated it.

In the case of Re Barker (1985-86) J.L.R. 186, C. of A., the Court of Appeal had to consider a different question: whether the Applicant after *renonciation* had been pronounced and after *dégrèvement* and *réalization* had been ordered against his property, could nevertheless still obtain from the Court an Order allowing him to make a *remise de biens*.

The Court of Appeal at p.193 of that Judgment referred to the predecessor of Rule 9/3, Rule 8/3 of the Royal Court Rules, 1982, by way of analogy and had regard to the fundamental principle as stated by Lord Atkin in Evans -v- Bartlam. The Court of Appeal upheld the decision of the Royal Court that the Applicant still had a sufficient interest in his property which could be offered *entre les mains de la justice* and which could be the subject of a hearing on the merits. The analogy with the Rule relating to the setting aside of default judgments was referred to by the Court of Appeal in recognition that, under that Rule, the merits of the Defendant's defences, if any, and whether they were reasonably arguable, were a factor to be considered by the Court.

In Godwin -v- Harvey (23rd July, 1990) Jersey Unreported; (1990) JLR. N.3, the Royal Court appeared, at p.3 of the unreported Judgment, to conclude that under what was then Rule 8/3 the Court could have regard only to how the default had arisen and not to the merits of any defence. However the Royal Court also indicated, perhaps somewhat inconsistently, that it might assist the Court in deciding on an application to set aside a default Judgment if the facts relating to any defence were included in an affidavit of the Defendant. The Royal Court went on to give some consideration to the merits of suggested defences in that case. In my judgment, the approach of the Royal Court in Godwin -v- Harvey, as in the present case, was not consistent with the true interpretation of Royal Court Rule 9/3 which governs this kind of application in the Courts of Jersey.

In the case of Takilla Limited and Others -v- Green and Others (9th June, 1992) Jersey Unreported, a Judgment in default was set aside by the Royal Court primarily on the ground that the Defendant had been led by the Plaintiff to believe that no Judgment in default would be entered and that he need not take any step in the case until the Plaintiff had given him further notice. The Court noted, in addition, that counsel for the Plaintiff conceded that there was an arguable defence.

Jersey Demolition Contractors -v- Resources Recovery Board (1985-86) J.L.R. 77, concerned the question whether an Appellant should be given a long extension of time (about 2½ years) after trial for appealing against a decision of the Royal Court (Inferior Number) - and I emphasise after trial. Not surprisingly the Court took the view that the delay was far too long. The issues of fact and law having been fully ventilated at trial, no extension of time should be granted. At p.84 the Court stated its understanding that in England the Court of Appeal would not, on a similar application, take into account the merits or the importance of the issues which were the subject of the appeal. That understanding was not, in fact, correct. For the purposes of the present case, my view is that the Jersey Demolition case dealt with a different question which arose only after a full trial and long after the Appellant had had ample opportunity to launch an appeal if it had chosen to do so.

Mr. Costa also referred us to the Act of the Royal Court of 8th May, 1992, in Wrigglesworth -v- La Pouclée Farm Developments Limited. We were not referred to any reasoned judgment. Mr. Costa told us that he acted in that case for the Plaintiff and that it was on all fours with the present case. It therefore appears, in my judgment, to have proceeded on the same incorrect interpretation of Rule 9/3.

Mr. Costa put forward an alternative argument to the effect that even if the Royal Court under Rule 9/3 could look into the merits, it was entirely in the Court's discretion whether it did

so or not and apparently if it decided not to consider the merits, its decision in that respect would perhaps not be reviewable by the Court of Appeal. In my view this argument is not a tenable one. The Royal Court would have to look into the merits in any event in order to decide whether or not to have regard to the merits. The correct approach is, as I have already stated, that the Defendant's affidavit should deal with any defences and the Court should consider whether or not any arguable defence has been shown.

Turning to the facts of the present case, the position is that: (1) the absence of any legal representative of Strata on 20th August, 1993, was due solely to the failure of Advocate Mourant to make arrangements for Strata to be represented; and (2) Advocate Mourant has exhibited to his affidavit a draft answer which in his belief discloses a defence and which, in my judgment, plainly demonstrates that Strata has a reasonably arguable defence to the claim against them.

Since in my judgment the Royal Court approached this application on the basis of an incorrect interpretation of Rule 9/3, we have, I consider, to review the exercise of the discretion under paragraph (1) of that Rule afresh. My conclusion is that the discretion should be exercised in favour of setting aside the default Judgment because, amongst other reasons: (1) Strata has a reasonably arguable defence to the claim; (2) the default arose through no fault of Strata but solely through the error of their lawyer; (3) there was no delay by Strata before applying to set aside the default Judgment; (4) serious injustice would be done to Strata if they were not to be allowed to defend the action and to have the claim and their defences heard at trial; and (5) the Plaintiff will suffer no injustice if the default Judgment is set aside and their claim against Strata proceeds to trial.

Accordingly, in my judgment, we should give leave to appeal and to file further evidence on the appeal, and on the substantive appeal, the Judgment in default dated 20th August, 1993, should be set aside.

There are two final points which I wish to mention. The first is that I have no doubt that if the Royal Court had approached this matter on the basis of the interpretation of Rule 9/3 which I have held to be the correct interpretation, the Royal Court would have reached the same conclusions on the facts as I have.

The second point is to note that in this case, as indeed in many other cases, the Plaintiff gains nothing from taking a default Judgment in August, 1993, which has had to be set aside in February, 1994, and has simply been delayed in the prosecution of its claim against all of the six Defendants.

Authorities.

Takilla Limited and Others -v- Green and Others (9th June, 1992) Jersey Unreported.

Godwin -v- Harvey (23rd July, 1990) Jersey Unreported; (1990) J.L.R. N.3.

Cutner -v- Green (1980) J.J. 269 C.of.A.

Wrigglesworth -v- La Pouclée Farm Developments Limited. Act of Royal Court of 8th May, 1992.

Re Barker (1985-86) J.L.R. 186.

Evans -v- Bartlam [1937] A.C. 473.

Alpine Bulk Transport Co. Inc. -v- Saudi Eagle Shipping Co. Inc. ("The Saudi Eagle") (1986) 2 Lloyds R. 221 C.A.

Royal Court Rules 1968: Rule 6/7; Rule 8/3.

Royal Court Rules 1982: Rule 6/7; Rule 8/3.

Royal Court Rules 1992: Rule 6/8; Rule 9/3.

R.S.C. (1993 Ed'n): s.13/9: "Setting aside judgment"
s.13/9/5: "Regular judgment"
s.13/9/5: "Irregular judgment"
s.13/9/9: "Judgment entered prematurely"
s.13/9/14: "Discretionary powers of the court"

4 Halsbury 37: paras. 393-405.

C.M. Van Stillevoldt B.V. -v- E.L. Carriers Inc. [1983] 1 W.L.R. 207.

Jersey Demolition Contractors Limited -v- Resources Recovery Board (1985-86) J.L.R. 77 C.of.A.