8 pages.

ROYAL COURT
(Samedi Division) 45

28th February, 1994

Before: F.C. Hamon, Esq., Commissioners, and Jurats Blampied and Hamon

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Between:	Bene Limited	**Plaintiff**
And:	V.A.R. Hanson and Irene Shelton t/a V.A.R. Hanson & Partners	**First Defendants**
And:	J. Smith	**Second Defendant**
And:	Public Services Committee of The States of Jersey	**Third Defendant**
And:	The Public of the Island of Jersey	**Fourth Defendant**

Application by Fourth Defendant to set aside default Judgement.

Advocate P.S. Landick for the Fourth Defendant.
Advocate P.C. Sinel for the Plaintiff.

JUDGMENT

THE COMMISSIONER: This is an application by the Public of the Island (the Fourth Defendant in this action) to set aside a Judgment in default made on 10th December, 1993.

The Plaintiff has made a claim for loss of profits suffered as a result of the erection of "raking shores", which are angled supports to a building and the carrying out of certain repair works to 16 Queen Street. The Plaintiff has a sub-lease of the ground floor of the property. Put very simply the property and the adjoining property are leased by the Public from H.A. Gaudin and Company. Both head lease and sub-lease expire in 1998. The Public has a duty under its lease to keep the property in a good state of repair and to avoid danger.

Substantial structural problems were discovered in October, 1991, and (it is alleged with the consent of the Plaintiff's then lawyer and agent) the raking shores were erected. Thereafter many problems arose - which we need not itemise here - and the fault is alleged to have been caused by the Defendants.

The First Defendants are the Chartered Structural Engineers to the Third Defendant (the Public Services Committee); the Second Defendant is the Architect employed by the Third Defendant; the Fourth Defendant (the Public) is of course the head tenant. It will be readily seen that the actions of the first three Defendants are linked to the actions of the Fourth Defendant. They all travel in the same carriage.

Their liability, if proved, would be difficult to separate. We were told that it was always intended by the Public to defend the Plaintiff's claim. That is borne out by two letters, one of which was written by the Attorney General to the Plaintiff's lawyers on 26th November, 1993, and it says in essence:

> *"Would you please agree that on Friday 3rd December, 1993, you will have the matter placed on the pending list without any need for a representative of this Department to appear?"*

The reply on 1st December was, to put no finer point upon it, a statement that the Attorney General should (and I quote): *"employ the stratagem used by the rest of the profession, namely of telephoning a colleague who will be attending Court and asking that he appear on that occasion on your behalf"*.

The Attorney General replied on 2nd December, to say that he understood and noted the contents of the letter.

We have two affidavits, one from Matthew John Thompson, an English Solicitor in the employ of Ogier & Le Cornu, the other from Advocate Marc Yates. Advocate Yates was the Advocate representing Ogier & Le Cornu, in Court, on 10th December, 1993. He had been instructed to appear on behalf of the Second but not the Fourth Defendants. He was not instructed because Mr. Thompson had misunderstood a conversation between himself and H.M. Attorney General. That conversation had dealt with the question of why the Public was made a party to the action at all.

On 9th December, 1993, Mr. Thompson had written, with a copy of further and better particulars that he intended to serve, which questioned why the Public of the Island had been made a proper party to the proceedings.

On 10th December, 1993, Advocate Yates was duty Advocate for Ogier & Le Cornu in relation to the Friday afternoon Court List. He had been instructed to appear on behalf of the Second Defendant

and placed the claim against him on the Pending List. When he raised the matter of the non-representation of the Fourth Defendant, the Advocate appearing for the Plaintiff applied for judgment against the Fourth Defendant. He attempted to intervene and suggested that any such application against the Fourth Defendant should be adjourned since it seemed to him wrong that no one was representing the States of Jersey. The Plaintiff's Advocate disagreed, and said that the intervention was improper because there were no instructions to back it.

As it happened the Court decided to allow judgment to be taken and judgment of the Court was entered against the Fourth Defendant.

A very similar matter came before the Court of Appeal recently: Strata Surveys, Ltd -v- Flaherty and Company, Ltd (15th February, 1994) Jersey Unreported C.of.A. In that case, the President of the Appeal Court said this:

> ***"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".***
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> ***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.***
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> ***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.***
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> ***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:***
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> > ***"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"."

Then the Court of Appeal went on at p.3 to say this:

"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".

Then the Court went on to say this:

"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".

There is no doubt that the application to set aside was made speedily. On 15th December letters were passing between the lawyers concerned and on that day a draft summons was enclosed. Early in January, 1994, a proposed Answer was sent to the Plaintiff's Advocate. The explanation of 15th December which was given by Advocate Yates said: *"....I did not have any express instructions although I have since discovered that I should have been instructed. I was not so instructed for reasons set out in an affidavit of Matthew Thompson filed in support of the Fourth Defendant's application".*

The default clearly did not arise through the fault of the Public, if fault there was. Advocate Sinel accepted this but said that there was no reasonably arguable defence.

It seems to us wrong that we should have been shown in the course of this application letters where discovery has not yet been made or heard facts adduced without proof. It seems to us that we need to consider the affidavit of Mr. Thompson which in essence says that because the Fourth Defendants (the principal) and the Third Defendant and its professional advisers (the agent) are dealing in the same matter and are in fact almost the same parties, the action is inextricably mixed. The Plaintiff alleges that the raking shores were not necessary and caused the tort of nuisance and negligence with an unspecified amount of loss and damage.

The Second, Third and Fourth Defendants defence to that claim is summarised in Mr. Thompson's affidavit in this way:

> *"(a) the erection of the raking shores was consented to by the Plaintiff's agents;*
>
> *(b) in any event the erection of such shores was part of the Fourth Defendant's duty (if any) to keep the property in a good state of repair and to avoid danger to the public;*
>
> *(c) the plaintiff, the sub tenant, was aware of the Fourth Defendant's duty of repair and impliedly consented to the Fourth Defendant carrying out all repairs as part of that duty and therefore cannot now complain of any inconvenience caused by the Fourth Defendant lawfully discharging its contractual duties to the landlord;*
>
> *(d) in any event the Second, Third and Fourth Defendants all deny that the erection of raking shores or the extent of the repairs carried out caused the Plaintiff to suffer loss and damage and the Plaintiff is put to strict proof of this allegation as well as the amount of any losses."*

We have carefully considered the Order of Justice, the two affidavits filed by the Plaintiff, and the Answer that it is sought to file. It seems to us that much of the arguments of the Fourth Defendant sounds in contract.

There is, on reading the terms of the lease and the sub-lease set out in paragraphs 3-8 of the Answer, something of the contractual relationship between the Plaintiff and the Fourth Defendant and that relationship is complex. There is also a counterclaim in the Answer for a contribution of two-fifths of the costs of the repair work which arises out of that complex relationship. There is estoppel and waiver pleaded in paragraph 12 of the proposed Answer. There is a denial of a duty of care to the Plaintiff at all. It is even denied that the Plaintiff's trade was adversely affected by the erection and maintenance of

the raking shores or even that they obstructed the view of customers.

Advocate Sinel says that while liability may remain in issue, it is risible to argue that the Defendants have not caused a nuisance or have not derogated from the terms of the lease. Those allegations are expressly denied (and in some detail by the Fourth Defendant). We can see that a landlord owes a duty of care to its tenant, but if the Fourth Defendant has argued that not only did it not breach that duty of care but that the Plaintiff acquiesced in the emergency steps taken that is a matter which in our view has to be properly adjudicated.

Looking at it in any sense we cannot see that a serious injustice will follow if the Fourth Defendant is allowed to defend the action; nor can we see that the Plaintiff will suffer a serious injustice other than time if the defences are heard at trial. Indeed what has concerned us is that the action could very well be withdrawn against the first three Defendants if the Fourth Defendant were found now to be liable and could only then argue quantum before the Judicial Greffier.

Viewing all these matters very carefully and having listened, as I say with some anxious consideration, to all the points made by Advocate Sinel, we have no doubt whatsoever that the judgment in default must be set aside. In view of that we place the case on the Pending List.

We would say this in passing: the letter of Mr. Sinel to a colleague dated 25th February, 1994, demeans the profession and it really does not do much for one colleague, in what is supposed to be a fraternal profession, to threaten another in correspondence.

The second point that we would make is this: At the end of its Judgment the Court of Appeal, in Strata Surveys, Ltd -v- Flaherty and Company, Ltd said:

> ***"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."***

We have to say that that Judgment was written in the light of what was, I suppose, *communis error* because counsel at the time had understood the situation to be different to what it was. Those remarks of Mr. Southwell can be stressed in the light of the decision to continue with this action today which was made when the Court of Appeal Judgment was readily available.

We have thought about this very carefully but in the circumstances we are only minded to give costs of and incidental to this day's hearing to the Plaintiff.

Authorities

Strata Surveys, Ltd -v- Flaherty and Company, Ltd (15th February, 1994) Jersey Unreported C.of.A.

Searley -v- Dawson (1971) J.J. 1687.