

JERSEY / JUDGMENT

Watson v Ronez [2004]

JRC 130 (20 July 2004)

[2004] JRC 130

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judgment

the deputy bailiff: 1. The application before us this afternoon is one made by the Defendant to set aside judgment in default which was obtained on 25 th June 2004. The background is as follows. The Plaintiff was employed by the Defendant in 1991. In 1994 he was diagnosed as having 'vibration white finger' or ' Raynauld's syndrome'. He contends that this was caused by the use of a vibrating tool, known as a ' Scabbler Gun', whilst employed by the Defendant. He contends that the Defendant acted in breach of its duty as an employer to provide a safe system of work and the Defendant is therefore liable for the injuries. 2. The Plaintiff issued an Order of Justice on 8 th November 2001. This came before the Court on 16 th November 2001 when, by agreement, it was adjourned sine die. Nothing appears to have happened after that until 27 th June 2003 when Voisin and Co, the Defendant's advocates, wrote to Bedell Cristin, the Plaintiff's advocates, notifying them that the Defendant intended to issue a summons to strike out the Plaintiff's claim for want of prosecution. Now that, in fact, did not proceed but it was resuscitated on 9 th June 2004 when Voisin and Co gave a similar notice to the Plaintiff's advocates that they were going to issue a summons to strike out, this time, as disclosing no reasonable cause of action, as well as for want of prosecution. 3. The response to that was a letter from Bedell Cristin giving notice that the Plaintiff intended to bring the proceedings back before the Royal Court on Friday 18 th June and seek judgment in default. That was not proceeded with because the necessary four clear days notice had not been given, but on 16 th June the Plaintiff's advocates gave notice by fax to the Defendant's advocates that they would be bringing the matter back before the Royal Court on Friday 25 th June. 4. The Court has been provided with an affidavit from Mr Lee Ingram, a legal assistant of Voisin and Co. He explained in that affidavit what happened next. His responsibilities apparently include checking the Friday afternoon list of cases before the Royal Court. He thought that he had instructed an advocate from another firm to represent Voisin and Co on the afternoon of 25 th June in order to place this matter on the pending list. Unfortunately it seems that he forgot to inform the other advocate about this particular case. That advocate did appear for Voisin and Co on another matter which was on the list but did not appear when the present case was called, with the result that, in the absence of anyone representing the Defendant, judgment in default on liability was given that afternoon. 5. We are quite satisfied that this arose from an administrative error in the office of Voisin and Co. There was no intention on the part of the

Defendant to submit to judgment. Indeed, in the meantime on 17th June a date had been fixed before the Master for the hearing of the Defendant's summons to strike out the Order of Justice. That date was fixed for 21st September. On 1st July Voisin and Co realised their error when they received the Act of the Court giving judgment on liability in default and the next day they issued a summons to set aside the judgment. 6. The principles upon which the Court will act when considering whether to set aside a judgment in default were authoritatively considered by the Court of Appeal in the case of *Strata Survey Ltd -v- Flaherty and Co. Ltd*

[1994] JLR 69 . In particular, Southwell JA said at page 71: "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* (3), 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 ([1937] A. C. at 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.'" 7. Later, at page 72, Southwell JA said this (at line 26): "...when an application is made under r.9 to set aside a default judgment, (a) the affidavit in support should deal with any defences on which the defendant wishes to rely if the judgment is set aside; (b) the affidavit in support should deal with the error or other reasons which led to the default; (c) 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; and (d) 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*." 8. It is clear, therefore, that any affidavit in support of an application to set aside a judgment in default must deal with any defence. In this case, Mr Ingram's first affidavit failed to do so. It really did not touch on the matter at all, other than asserting the existence of a defence and went on to refer to the fact that the injuries may have been caused by the Plaintiff's abuse of controlled drugs. That was picked up by the Plaintiff in correspondence and in due course a second affidavit was filed by Mr Ingram. That exhibits a draft answer which had been supplied in correspondence on 14th July 2004 and would presumably be filed if the judgment is set aside. 9. The draft answer admits that the Plaintiff worked for the Defendant and used the Scabbler gun. However, it denies that the extent and length of the use of the gun was as much as the Plaintiff contends, or that the use of the gun caused the Plaintiff's injuries. Furthermore, it denies that it breached its duties as an employer to provide a safe system of work, particularly according to the state of knowledge at the relevant time. 10. Advocate

Steenson, on behalf of the Defendant, says that that is sufficient. He refers to page 74, lines 27-30 of the judgment in *Strata* which seems to suggest that the only material before the Court of Appeal as to the nature of the proposed defence in that case was an affidavit from Advocate Maurant

- the advocate for the defendant - exhibiting a draft answer and stating his belief that it disclosed a defence. Advocate Steenson says, therefore, that that is all a defendant needs to do. 11. Advocate Cadin, on the other hand, says that more is required. He refers in particular to the case of *Alpine Bulk Transport Co., Inc -v- Saudi Eagle Shipping, Co., Ltd* (1 st July 1986) Unreported Judgment of the Court of Appeal of England (Civil Division). He relies in particular on a passage of the judgment of Sir Roger Ormrod at page 6 of the report, which reads as follows: "In the course of his argument, Mr Clarke Q. C used the phrase "an arguable case" and it, or an equivalent, occurs in some of the reported cases (e.g. *Burns v Kendel* (1977) 1 Ll. L. R.554 and *Vann v Awford*). This phrase is commonly used in relation to Order 14 to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default judgment, it does not accord, in our judgment, with the standard indicated by each of their Lordships in *Evans -v- Bartlam*. All of them clearly contemplated that a defendant who is asking the court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success..... Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The "arguable" defence must carry some degree of conviction." 12. We find it impossible to lay down any guidelines as to exactly what is required in any particular case. Much will depend on the circumstances. For example, one cannot tell how detailed the draft answer was in *Strata* . It may have been an extremely detailed document. It was clearly sufficient to convince the Court of Appeal that, as Southwell JA put it, it "plainly demonstrates that *Strata* has a reasonably arguable defence to the claim against them" . 13. As against that, the onus undoubtedly lies on a defendant. He has allowed a judgment to be taken against him. He must satisfy the court that his defence is sufficiently meritorious that the court should exercise a discretion in his favour to set aside the judgment against him. In most cases we think a defendant would be well advised to go beyond merely exhibiting a draft answer. He should swear an affidavit, setting out and explaining, in simple terms, the essential nature of the defendant's case in language which is easily understood, rather than relying upon a pleading with its technical but sometimes rather uninformative language of non admissions and denials. 14. We must determine whether, in this particular case, the Defendant has satisfied us that it has an arguable defence which carries some degree of conviction. We think that the Defendant could and indeed should have been rather more forthcoming about the nature of its

defence. But, on balance, we conclude that sufficient emerges from the draft answer to enable us to say that there is a defence which justifies being heard. The answer does make it clear that the Defendant denies some of the key factual assertions relied upon in the Order of Justice in relation to the use of the gun. It also denies causation, in other words that the use of the gun caused the injuries, and it also denies that whatever it did amounted to a failure to provide a safe system of work, or otherwise breached its duties as an employer. Now these are clearly matters which require full investigation of what happened and in our judgment the Defendant has, as we have said, just done enough to satisfy us that it should be allowed to take these matters to trial and have them heard by a court, given that the judgment arose out of the administrative error that we have described. 15. So to summarise: in our discretion we will set aside this judgment for the following reasons: (i) There is an arguable defence which reaches the required threshold; (ii) The default arose solely out of an administrative error on the part of the Defendant's advocate but not through any action of the Defendant personally; (iii) There has been no delay in applying to set aside the judgment in default; (iv) There would be an injustice if, solely because of the error, the Defendant was not allowed to put its defence at trial; (v) There will be no real prejudice to the Plaintiff; he is merely put back in the position in which he would have been if the administrative error had not been made. We will of course hear argument shortly but any prejudice in terms of costs can be met by the appropriate Order. (Discussion on costs followed) 16. In this case the Plaintiff applies for costs. In *Strata* the Court of Appeal said this: (at page 72) "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, 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." 17. This whole matter arose only because of an administrative error in the office of Voisin and Co. Had that not occurred, none of the costs in this case would have been incurred. One starts, therefore, with the proposition that the costs have been thrown away by a failure in the office of Voisin and Co. It is true, of course, that the Defendant has been successful today. Had this been a case where it was obvious that the judgment should have been set aside and the Plaintiff acted unwisely in opposing it, then one might well say that the costs incurred by the Plaintiff were of its own choosing. 18. But, given what we have said in the judgment, we do not think that that is the case here. We think that the Plaintiff was entitled to make the Defendant argue and prove its case because of the less than wholly adequate manner in which the Defendant outlined the merits of its defence. In the circumstances, having concluded that the Plaintiff acted reasonably throughout in opposing this application, I rule that these costs have been incurred because of the administrative error by Voisin and Co. It clearly would not be right to order the Defendant itself to pay the costs and I therefore order that Voisin and Co. pay the Plaintiff's costs on the standard basis.

Authorities *Strata Survey Limited -v- Flaherty and Co., Ltd*

[1994] JLR 69 . *Jersey Agencies Ltd -v- Allenby and Anor*

- [1999] JLR N.13; (11 th October 1999) Jersey Unreported; [1999/171]. Berry Trade Ltd and Vitol Energy (Bermuda) Ltd -v- Moussavi and Ors
- [2003] JRC193. Royal Court Rules 1992, as amended: Rules 7/7; 9/3. R. S. C. [1999] Vol 1: 0. 13, r. 9; 0.14. Alpine Bulk Transport Co., Inc -v- Saudi Eagle Shipping, Co., Ltd (1 st July 1986) Unreported Judgment of the Court of Appeal of England (Civil Division). Page Last Updated: 24 Jun 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 26 October 2026 · Esheria