

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1991/DO83

BETWEEN	FRANKLYN DOUGLAS ALVIN DOUGLAS	PLAINTIFFS
AND	NATIONAL COMMERCIAL BANK JAMAICA LTD	DEFENDANT

Burchell Brown for the Plaintiffs.

Dave Garcia and Nigel Jones instructed by Messrs Myers

Fletcher and Gordon for the Defendant.

Heard 2ND. 5th, December 2002

IN CHAMBERS

Cole-Smith J. (Ag.)

This is an amended Summons to strike out Statement of Claim and a Summons to amend Writ.

I have examined the file with particularity and since Fraud unravels all then the Limitation Period would run from the time the Fraud was discovered.

Consequently so important a matter I think it appropriate to refer the matter pursuant to Section 41 of the Judicature (Supreme Court) Act to the Court of Appeal.

If the Court of Appeal decides that the allegations of Fraud should not have been struck out then it will be appropriate to consider the status of the pleas for Negligence and Breach of Trust which may well involve concealed Fraud.

As for the complaint that Breach of Trust was not pleaded specifically the averments of Negligence can be used to sustain pleas for Breach of Trust see Nocton v. Ashburton 1914 A.C. 932.

Moreover the beneficiaries were infants at the time of death and the question is; at what time did they discover Fraud after their twenty-first birthday?

Additionally, Mr. Burchell Brown pointed out Section 49 (b) of the Judicature (Supreme Court) Act which reads as follows:

"No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of any such trust, shall be held to be barred by any Statute of Limitations".

The rules of Equity prevails; see Sections 49(i) and (j) of the Judicature (Supreme Court) Act.

The failure to take into account Section 49 (b) of the Judicature (Supreme Court) Act would make subsequent proceedings a nullity.

Consequently as stated previously the matter is referred to the Court of Appeal pursuant to Section 41 of the Judicature (Supreme Court) Act and the trial is to be stayed pending the outcome of the reference.

Costs to be costs in the cause.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 48/2004

BETWEEN CARIBBEAN DEPOT LTD. APPELLANT
AND INTERNATIONAL SEASONING & SPICE LTD. RESPONDENT

PROCEDURAL APPEAL

IN CHAMBERS

Nigel Jones instructed by Myers, Fletcher & Gordon
for the appellant
Gayle Nelson & Co. for respondent

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.

7th June, 2004

1. This is an appeal pursuant to Rule 2.4(3) of the Court of Appeal Rules which provides for the hearing of a procedural appeal on paper by a single judge.
2. The appeal is from an order of D. McIntosh J, made on the 6th day of May, 2004 whereby he set aside a Judgment in Default of Acknowledgement of Service filed on the 10th day of October, 2003 and served on the 22nd December, 2003.
3. The grounds of appeal are:

- (a) The order of the learned judge in Chambers was unreasonable in light of the affidavit evidence presented by the Appellant and the Respondent in the court below.
 - (b) The decision of the Learned Judge in Chambers that the Default judgment should be set aside was erroneous in law.
 - (c) It was not sufficient for the learned judge to state that he was setting aside the judgment on humanitarian grounds.
4. In his written submissions in support of the procedural appeal counsel for the appellant stated at para. 7 page 4:
- " The Learned Judge in Chambers expressed his view that the Defendant's Affidavits were totally without basis and after hearing the submissions from counsel for the Defendant he indicated there was (a) no appropriate explanation for the delay and (b) that there was no merit shown. Even before hearing submissions from counsel for the Claimant the Learned Judge indicated that he would nevertheless be granting the order on humanitarian grounds."
5. The Notice of Appeal with written submissions in support thereof was filed and served on the 17th May, 2004 pursuant to Rule 2.4(1).
6. The respondent may within 7 days of the receipt of notice of appeal, file and serve on the appellant any written submissions in opposition to the appeal or in support of any cross appeal – See Rule 2.4(2).

7. The respondent has not exercised the right conferred by Rule 2.4(2). Consequently, the statement attributed to the learned trial judge and repeated at (4) above remains unchallenged.
8. In the absence of any written judgment by the learned trial judge, I am disposed to accept that the learned judge below set aside the judgment in Default of Acknowledgment of Service solely on humanitarian grounds.
9. Rule 12.4 of the Civil Procedure Rules provides for Default Judgment for failure to file Acknowledgment of Service.
10. Rule 13 provides for the setting aside of Default Judgment. Rule 13.2 sets out the cases where the court must set aside default judgment.

Rule 13.3 which is the relevant sub-rule sets out the cases where the court may set aside Default Judgment. It states:

- (1) Where rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant -
 - (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
 - (b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and
 - (c) has a real prospect of successfully defending the claim.

- (2) Where this rule gives the court power to set aside a judgment the court may instead vary it.
11. Before D. McIntosh J, the claimant did not challenge the defendant's contention that the application to set aside was made as soon as reasonably practicable after finding out that the default judgment had been entered.
12. Thus the issues before the trial judge were:
- (i) Did the defendant give any good explanation for the failure to file an Acknowledgment of Service?
 - (ii) Has the defendant a real prospect of successfully defending the claim?
13. If the answer to either of these is in the negative, the judge would be obliged to dismiss the application to set aside. Only if the answers to both are in the affirmative, would the court have a discretion to exercise any power under Rule 13.3.
14. The learned judge having found that there was :
- (a) No appropriate explanation for the delay; and
 - (b) No merit shown;
- had no power to set aside the judgment on humanitarian grounds.
15. Accordingly, the appeal is allowed and the order made on the 6th May, 2004 set aside.