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ROYAL COURT

23rd July, 1990 111

Before: The Bailiff, and
Jurats Myles and Herbert

Between: **Neville Henry Godwin** Plaintiff

And: **Jeremy Grig Harvey** Defendant

Application by the Defendant, under Rule 8/3 of the Royal Court Rules, 1982, as amended, to set aside the Judgment obtained by default against the Defendant on the 22nd June, 1990.

The Defendant on his own behalf.
Advocate N.F. Journeaux for the Plaintiff.

JUDGMENT

BAILIFF: This is an application by the defendant to set aside the judgment obtained against him by default on the 22nd June of this year.

The judgment concerns a claim by the plaintiff against the defendant for certain sums of money arising out of an agreement under which the plaintiff bought shares from the defendant in respect of a company and there was an agreement that those shares could be repurchased. Whether that was a complete agreement, whether it was varied by subsequent correspondence or orally is not for us at this

stage to determine at all. What we have to do is to examine the law which applies to an application of this sort.

We have been referred to a number of authorities by Mr. Journeaux for the plaintiff, but on the basis that we should by analogy apply English law. Our law and the rules under which we operate in matters of this sort are different from the English rules.

The power to set aside judgments by default is contained in our rule 8/3(1) and reads as follows: "Any judgment by default may be set aside by the court on such terms as to cost or otherwise as it thinks fit". The corresponding English rule is Order 13 Rule 9 of The White Book: "Without prejudice to Rules 7/3 & 4 the court may on such terms as it thinks just set aside or vary any judgment entered in pursuance of this order".

So far so good and had our rule been silent thereafter as the English rules are, we might probably have felt constrained to apply the principles very carefully argued by Mr. Journeaux that so far as England is concerned, if the judgment is regular as this one was, then it was an almost inflexible rule that there must be an affidavit on the merits, that is to say an affidavit stating the facts showing a defence to the action. We might as I say have decided that in similar cases in Jersey an affidavit of that nature is to be required.

However, our rule continues in paragraph two as follows: "An application under paragraph one of this rule shall be supported by an affidavit stating the circumstances under which the default has arisen and shall be made by summons". It says nothing there about the merits of the defence and we think that if it was required that the merits of the defence should be disclosed in the affidavit then the rule would have mentioned it. Moreover it is not customary now when cases come before the Royal Court for the first time, if an application is to be made to set the case immediately on to the pending list for the Court as it used to in the past when it was merely permissive for the Court to place an action on the pending list to go into the facts of the case. Any application to place a pending action on the pending list is to be granted by the Court without going into the merits of the case.

Therefore we think that we cannot accept Mr. Journeaux's arguments that we should apply the equivalent English rule and require in the affidavit a statement as to the facts on the defence.

Now that is not to say that in appropriate circumstances it might not assist the Court to determine its outcome if such facts were indeed included in an affidavit. The Court wishes me to say that even if that were the rule, although I have found that it is not, the Court would have some doubt, I put it no higher than that, as to whether on the affidavit submitted by Mr. Harvey he would have come sufficiently within the rule to justify the Court in setting aside the judgment. For example he suggested that although there was a written agreement for the purchase of the shares and an arrangement in the agreement for the repurchase of those shares, that agreement was itself varied in writing by the parties. As evidence of that he produced a letter of the 14th May, 1989, in which he invited the plaintiff to change his investment of £10,000 for a two to one investment in another company which at that time was not yet formed and indeed we are not at all sure this morning whether it has actually been formed even now.

He was unable to produce any written confirmation of that letter from the plaintiff and told us that the plaintiff had accepted it verbally. That is an example, perhaps the most obvious one, of some of the defects we would have found in his affidavit as to the merits of the defence, if we felt it had been necessary to consider them.

However, we have confined ourselves to the strict wording of our rule. Therefore the circumstances under which the default has arisen must be limited to the reasons why the defendant did not appear in the Royal Court - as he did not - on the 22nd June, and which resulted in the judgment being taken against him.

In order to assist us in this matter we asked Advocate Meiklejohn to tell us what he knew of the position. It was made clear to us that there are two other actions pending before this Court against the defendant in respect of which Mr. Meiklejohn's firm Ogier and Le Cornu had appeared in order to place them on the pending list. Thereafter,

by letter of the 5th June, 1990, that firm had notified the defendant that it would not be prepared to appear for the defendant when the actions were heard. It followed therefore that the defendant was going to represent himself personally or perhaps find another firm of lawyers to act.

No notice of the Order of Justice which was confirmed in the judgment on the 22nd June was given to Ogier and Le Cornu. Mr. Meiklejohn saw it for the first time on the list in Court on the afternoon of the 22nd June, 1990. He told us that Mr. Harvey had spoken with his secretary in respect of another action which is not relevant to this action, but did not mention the instant case.

Mr. Meiklejohn's understanding was that his firm would not be representing the defendant on the two other matters and indeed, as he told us, Mr. Harvey had been specifically written to to this effect.

He said that as regards the belief which Mr. Harvey told us he had that he and Mr. Meiklejohn would be appearing on the afternoon of the 22nd June, that belief could not reasonably have been held by Mr. Harvey. On the other hand he did go on to say that if Mr. Harvey had thought that no one would be there then probably he himself would have made an effort to attend.

Now in approaching this matter we have of course had regard to the fact that Mr. Harvey is representing himself and we have made allowances for litigants in person and we always do in this Court.

Nevertheless, if parties choose to represent themselves, parties who are clearly articulate and literate as Mr. Harvey undoubtedly is, they must take care to conform to the rules of the Royal Court. Those rules are there to be followed to give form and substance to our procedures and if they are not followed, unless there is very good reason for their not being followed, certain consequences must follow.

Under the circumstances, in view of the fact that Mr. Harvey was aware, in our opinion, that he would not be represented, it was up to him to ensure that he would be. After being told that he was not going

to be represented in the other two cases, it was up to him to be sure that he was either represented or be there on the 22nd June. He did neither and the loss must lie where it falls. The summons is dismissed with costs.

Authorities

Royal Court Rules, 1982, as amended: Rule 8.
R.S.C. (88 Ed'n) 0.13 r.9.