

ROYAL COURT
(Samedi Division)

129.

4th October, 1993

Before: The Bailiff, and Jurats
Herbert and Orchard

Between: Flaherty & Company Limited Plaintiff

And: Olcott Investments Limited First Defendant

And: Mr. Peter Brian Rendle
Mr. Ian Barry Dallas Chapman
Mr. W.H. Davies
(exercising the profession of Architects
under the name of
Breakwell & Davies) Second Defendant

And: Desmond O'Neill Third Defendant

And: Beaumont Structural
Consultants Limited Fourth Defendant

And: Geo Engineering Limited Fifth Defendant

And: Strata Surveys Limited Sixth Defendant

Application by the Sixth Defendant for an Order under Rule 9/3(1) of the Royal Court Rules 1992, setting aside the Judgment by default obtained by the Plaintiff on 20th August, 1992.

Advocate D.E. Le Cornu for the Sixth Defendant.
Advocate N.M.C. Costa for the Plaintiff.

JUDGMENT

THE BAILIFF: This is a summons brought before this Court by the Sixth Defendant, Strata Surveys Limited, in an action started by the Plaintiff, Flaherty & Company Limited, against a number of defendants of which Strata Surveys Limited is one.

The action concerns a building dispute, but we are not concerned with the details today.

The matter was first due to come before this Court on 23rd July, 1993. On 22nd July, Advocate Costa for the Plaintiff wrote to Advocate Mourant for the Sixth Defendant a letter. It was in the following terms:

"Dear Advocate Mourant,

Re: Flaherty & Company Limited and Olcott Investments Limited & Others.

I write to confirm my agreement that this action can be adjourned for four weeks on Friday, 23rd July, in respect of your client, Strata Surveys Limited, to allow you sufficient time to take detailed instructions from your client company.

I must advise you however that as this matter is merely to be adjourned on Friday then the delay, in practice, amounts to approximately 8 weeks before you have to file an Answer and this, in my respectful opinion, is more than sufficient. I must therefore advise you that my client company will not entertain any further delays outside the normal litigation timetable.

Yours sincerely".

Mr. Le Cornu, appeared today on behalf of Advocate Mourant, to present a summons to set aside a Judgment by default later obtained on 20th August, and argued that that letter indicated that the Plaintiff's adviser, Mr. Costa, knew that the action was to be defended. In our opinion it does nothing of the sort, it merely gives the defendant an opportunity to defend the action within a stated time if it so wishes. It extends the normal period to a total of 8 weeks. That letter merely means, in our opinion, that the matter would be called on Friday, 23rd July, and if placed on the pending list on that day, a further four weeks would be given to the Sixth Defendant to plead.

As a result of Mr. Costa's letter of 22nd July, the matter was put off for four weeks on 23rd July.

On 20th August, the case was called and no person appearing for the defendant, Judgment was given in default. The summons now seeks to set that Judgment aside.

In his affidavit in support of the application to set aside the Judgment, Advocate Mourant indicates that he was exceptionally busy on other matters, as Bâtonnier, and that it did not come to his notice that the action was tabled for the Royal Court on Friday, 20th August. In our opinion, it was not necessary for it to be further tabled; it was due to be re-called as agreed between him and Advocate Costa. It is the duty of an advocate and his firm to make sure that the arrangements arrived at with their opponents are understood by him, or another member of the firm, and to make the proper arrangements to be represented in Court. It has been suggested to us today that Advocate Costa was in some way guilty of wrong behaviour in not telling the Court of these arrangements, or in not alerting Advocate Binnington (who is a partner of Advocate Mourant), who was in Court on 20th August that the matter was coming up.

We do not think it is incumbent upon an advocate to alert a member of the Bar in Court, who is a partner in his opponent's firm, unless there had been some special arrangements. It is not part of an advocate's duty to alert his opponent that that opponent has not been paying attention - to put it no higher - or to alert him that he is going to take judgment unless something is said.

Advocate Costa had warned Advocate Mourant that the matter was coming up, for reasons which Mr. Mourant has put in his affidavit; unfortunately for the Sixth Defendant he was not able to be here, nor did he alert or notify any other member of his firm to represent the Sixth Defendant.

It might have been possible for us, had Mr. Mourant been a sole practitioner, to say that the circumstances were exceptional but that is not the case. It is a large firm and it ought to have been possible for someone to have been here and to have been instructed.

We note that Mr. Speck, who works in that firm, appears to have been conducting some of the arrangements, looking at the initials on the correspondence, and if not Mr. Mourant then indeed Mr. Speck should have been aware of what was going on. But that is not the end of the matter, we have to look at the law.

We have a completely unfettered discretion; that is quite clear from the case of Godwin -v- Harvey (23rd July, 1990) Jersey Unreported. In that case Mr. Harvey appeared on his own behalf and it was for that reason that the Court decided to look at the merits of the defence, not because it was required to do so, but because Mr. Harvey - being undefended, and not having filed an

affidavit setting out the merits of the defence - might have felt that he was in some way prejudiced if the Court had ruled that it was not obliged to look at the merits. The Court would then have shut its mind to the merits; but it did not do that; it looked at them though not because it felt it was obliged to do so. It is clear that that Judgment, which has not been appealed, is binding on subsequent sittings of the Inferior Number unless the Court feels that it was wrong. There has been no indication in any other Judgment that any other division of this Court has felt it wrong. In Takilla Limited and Others -v- Green and Others (9th June, 1992) Jersey Unreported, it is quite true, there was a suggestion that the merits of the defence did not appear to have been considered very fully. But as I have explained, Godwin was a special case where the defendant was appearing on his own behalf. In the case of Takilla, the circumstances were totally different from the instant case.

In Cutner -v- Green (1980) J.J. 269 C.of.A., an English lawyer made a mistake in believing that a Judgment obtained in Jersey could not be enforced against him. The Judgment was in fact upheld. In Wrigglesworth -v- La Pouclée Farm Developments Limited (8th May, 1992) Jersey Unreported, a default Judgment obtained at the first appearance was upheld. Therefore, it is quite clear that this Court normally allows judgments obtained by default to remain as they are, unless there are exceptional circumstances which led to the default's being obtained.

We do not think that this is a case in which we have to look at the merits in order to decide whether they outweigh the ordinary rule applied in Godwin -v- Harvey, from which we see no reason to depart.

We are not satisfied that the matters disclosed in Mr. Mourant's affidavit are such that we should set aside the Judgment. We note from the circumstances that English counsel was being asked to settle the pleadings, that Mr. Costa has told us that he was not aware that that was so, and that had it been so he would not have consented to the delay. Clearly if local practitioners wish to use English counsel for that purpose, the consequences must fall where they lie, if our rules of procedure are thereby not strictly followed.

The application is dismissed, with costs.

Authorities

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

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

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

R.S.C. (1991 Ed'n): O.13/9.

Wrigglesworth -v- La Pouclée Farm Developments Limited (8th May,
1992) Jersey Unreported.