

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. 2952 of 2000

BETWEEN

MOOSAI'S HARDWARE COMPANY LIMITED

Plaintiff

AND

MOOSAI DEVELOPMENT COMPANY LIMITED

1st Defendant

TECHNOVISIONS INVESTMENTS INCORPORATED

2nd Defendant



Before The Hon. Madame Justice C. Pemberton

Appearances:

For the Plaintiff: Mr A. Ashraph

For the 1st Defendant: N/A

For the 2nd Defendant: Mrs. L. Maharaj S.C. leading Mr D. Rambally, Ms Isaacs and instructed by Mrs. N. Maynard-Marshall.

2005: October 4

2005: November 18

2005: December 9

DECISION

[1] **BACKGROUND**

On 22nd November 2000, Technovisions Investments Incorporated ("TII") filed proceedings against Moosai's Development Company Ltd and Moosai's Hardware Company Limited for certain reliefs.

[2] On 24th November 2000 two days later, Moosai's Hardware Company Limited ("MHL") caused a Writ to be filed on their behalf against Moosai Development Company Limited ("MDC"). That Writ was endorsed with a claim in the following terms:

The Plaintiff's claim against the Defendant is for:

1. The sum of Two Million Eight Hundred Thousand Dollars (\$2,800,000.00) being monies due and owing for building materials supplied to the Defendant Company as of 23rd day of August, 2000 which said sum the Defendant Company has failed and/or refused and/or neglected to pay to the Plaintiff Company.

[3] Suffice it to say MDC did not appear in answer to this Writ of Summons. MHL did not amplify its claim by way of Statement of Claim either but chose to proceed to judgment in default of appearance ("the Default Judgment"). This judgment was dated 9th January 2001 and entered on the same day.

[4] TII obtained a consent judgment ("the Consent Judgment") against MDC in the proceedings filed in November 2000.

[5] TII sought to obtain the fruits of their Consent Judgment but discovered the Default Judgment, the effect of which was to gain priority over the Consent Judgment by it being earlier in time.

[6] By Summons filed 4th March 2003 TII applied to the court to intervene. This application was dismissed. TII successfully appealed and by decision of Hamel-Smith JA dated 27th January 2005, the Court of Appeal ordered that TII be joined as a defendant in these proceedings "to enable it to apply to have the judgment set aside"¹. The judgment referred to by the Appeal Court was the Default Judgment.

[7] By Summons filed 24th March 2005 as amended TII sought the following reliefs:

1. *An Order that time for filing of this Summons and affidavit in support be extended to date of filing hereof.*
2. *An Order that the Judgment entered in default of Appearance on the 9th day of January 2001 be set aside on the ground of irregularity and/or nullity in that*
 - (i) *Such judgment can only be entered after the service of a Specially Indorsed Writ of Summons with accounts attached or a Generally Indorsed Writ of Summons with an accompanying Statement of Claim.*
 - (ii) *The judgment as entered is for too much.*
 - (iii) *No claim was made in the Writ for interest but judgment was entered for interest from the date of filing of the Writ.*

¹ See **TECHNOVISION INVESTMENTS INCORPORATED v. MOOSAI HARDWARE COMPANY LTD. and MOOSAI DEVELOPMENT COMPANY LTD. Civil Appeal 68 of 2003 per Hamel-Smith JA (unreported)**

3. *An order that the judgment entered herein on 9th January 2001 in default of notice of intention be set aside and that the Second Named Defendant be at liberty to defend this action by acknowledging service and giving notice of intention to defend within eight (8) days.*
4. *That the cost of this application be provided for.*
5. *Such further or other order and/or direction as to the Court may seem fit and expedient.*

[8] Neither MHL nor MDC filed responses to TII's affidavit. In fact, MDC took no part in the proceedings. I was therefore left to TII's recounting of events, which I determine are the facts.

[9] **GROUND UPON WHICH APPLICATION SHOULD BE SET ASIDE**

NULLITY OR IRREGULARITY

The issue here is: Is the endorsement on the Writ of Summons sufficient to allow the Plaintiff to enter a judgment in default without first **servicing** a Statement of Claim?

MOOSAI'S HARDWARE COMPANY LIMITED'S CASE

Mr Ashraph pointed out that MHL's filing of a generally endorsed writ does not preclude them from proceeding to take up a judgment in default of defence. He relied on dicta from Master P. Sobion in **ANSA FINANCE AND MERCHANT BANK LTD v ROXANNE ENTERPRISES LIMITED**², in particular when the

² **ANSA FINANCE AND MERCHANT BANK LTD. v. ROXANNE ENTERPRISES LTD. HCA 2701 of 2001 (unreported)**

Learned Master stated that “The Rules and in particular Order 6 Rule 2 (b) do not require that a specially endorsed writ be used in the case of a liquidated demand.”

[10] Mr Ashraph opined that the endorsement in the Case at bar sets out the amount due and owing and a concise statement of the nature of the Claim and therefore complies with the Rules. His contention in short is that so long as this particular defendant knows the case he has to meet the Rule is satisfied. There is no need to particularize the claim so that it is understood by the world at large.

[11] Further, the pleading conforms to the Rules and not to precedent. It is important that the pleading does this. Precedent is secondary. If the Defendant upon receiving this Writ intended to defend he would have done so. By choosing not to defend, under the **RULES OF THE SUPREME COURT 1975** he is taken to have admitted the claim. If he has therefore impliedly admitted the claim, he did not say that he does not know the nature of the claim or that he has not been supplied with sufficient particulars. The answer to the question therefore is yes and the default judgment must stand.

[12] **TECHNOVISIONS INVESTMENTS INCORPORATED CASE**

Mrs Maharaj S.C’s contention is that the indorsement in this case is insufficient to allow the Plaintiff to enter a default judgment. The default judgment should therefore be set aside. Counsel relied on the cumulative effect of **RULES OF SUPREME COURT (1975) Order 6 Rule 2³ SUPREME COURT PRACTICE (UK) Order 6 and Order 20 (RSC 1975)**.

³ **INDORSEMENT OF CLAIM**

(1) Before a writ issued it must be indorsed.

- (a) with a statement of claim, or if the statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby;
- (b) where the claim made by the plaintiff is for a debt or liquidated demand only, with a statement of the amount claimed in respect of the debt or demand and for costs and also with a statement that further proceedings will be stayed if, within the time limited for appearing, the defendant

[13] An examination of the indorsement in this case raises the following issues – can a defendant look at this Writ and know the claim he has to meet without asking further questions? If he has to ask further questions, Counsel opined that a Statement of Claim ought to be served with it.

[14] Further if the judgment is set aside, it would allow the Plaintiff to amend the indorsement on the Writ pursuant to Order 20 and so set out his case in accordance with the Rules.

[15] Going further, when one examines this indorsement it appears to be a claim in debt for building materials supplied. No particulars have been disclosed on the face of the Writ. An account needed to be supplied to show the culmination of the debt in the amount stated.

[16] **ANALYSIS**

I shall examine the indorsement first. The claim is for the sum of \$2,800,000.00 “being monies due and owing for building materials supplied as of 23rd August 2000⁴. No dates have been provided as to the supply of these materials. Was this a one-off transaction or was the debt created as a result of non-payment on a series of invoices? It is noted as well that this is the only endorsement on the Writ.

[17] Even though these questions have come to my mind, are these sufficient to order that the default judgment be set aside?

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- (i) except in either of the cases mentioned in paragraph (2), pays the amount so claimed to the plaintiff, his solicitor or agent;
 - (ii) in either of the said cases, pays that amount into court.

⁴ See page 2 *infra*

[18] **RULES OF PROCEDURE**

Order 6 Rule 2 states that a Writ must be endorsed with a statement of claim or if not so endorsed with a concise statement of the nature of the claim made and the relief or remedy required. Should the claim be for a stipulated amount only as in this case, with a statement of the amount so claimed, costs **and** also with a statement that further proceedings will be stayed if the amount claimed is paid to the Plaintiff; his agent or into court within the time limited for the defendant to enter an appearance⁵.

[19] Even though neither party addressed the requirements of Order 6 Rule 2 (1) (b) it is necessary that I do so. This is a claim in debt and it is patent that there was non-compliance with Order 6 Rule 2 (1) (b).

[20] In this case MHL's Attorney-at-Law at that time sought to go the route of what is now commonly referred to as a general endorsement giving what was regarded as the essentials of the claim. Supreme Court Rules at page 39 has this to say:

There is, however, a practice which allows a statement of claim, provided it does properly plead a cause of action, to be in a somewhat attenuated form. But all the essentials must be set out. The cause of action. e.g. "goods sold and delivered", must be stated; the dates may be given in outline, e.g. 1983, January 1 to May 1; the particulars may be given by reference to "full particulars which have been delivered and exceed 3 folios" (O. 18, r. 12 (2)), but it is essential that those particulars should have been in writing and be identified, e.g. by giving the numbers and dates of invoices.

⁵ Order 6 R. 2 *infra*.

[21] Master Sobion in the **ROXANNE CASE** had this to say:

1. *The endorsement to the writ meets the requirements of Order 6 Rule 2 (1) (a) and (b) of the Orders and Rules of the Supreme Court ("the Rules") in that it contains a concise statement of the nature of the claim made, being a claim for arrears of rental due on specified vehicles pursuant to two lease agreements. It also sets out the amount claimed.*
2. *The Rules and in particular Order 6 Rule 2 (b) do not require that a specially endorsed writ be used in the case of a liquidated demand.*
3. *The Rules and in particular Order 13 Rule 1 do not require that a claim be specially endorsed or that a Statement of Claim be filed before judgment in default is taken up against a defendant for a liquidated demand.*

[22] Mr Ashraph laid great store on this decision. Ground 3 in particular was attractive to him. Is this the situation here? Has the endorsement satisfied ground 1; for it is only if this is so can ground 3 be of any assistance to Mr Ashraph's argument.

[23] To my mind it is clear that the indorsement in this case satisfies neither Order 6 Rule 2 (1) (a) and (b) nor ground 1 of Master Sobion's reasons. The claim is vague and uncertain. Further I do not agree with Mr Ashraph that we must only concern ourselves with the particular Plaintiff and the particular Defendant and what is their understanding of a particular situation. The Rules of Procedure are made for all parties who wish to litigate before our Courts. All are bound by them.

[24] I therefore find that the judgment is irregular and should be set aside. However, should TII be allowed to defend its position?

[25] **DOES TECHNOVISIONS INVESTMENTS INCORPORATED HAVE A GOOD DEFENCE?**

MOOSAI'S HARDWARE COMPANY LIMITED'S CASE

Mr Ashraph's case is that the judgment ought not to be set aside on the ground that TII has a good defence. Further TII ought only to be allowed to defend this case if it can show that it has a good defence to the claim. There is no claim being made against TII but TII at best may have a claim against both MHL and MDC. The evidence as contained in TII's affidavit in support of this application revolves around fraud and collusion which is not a defence but a cause of action. In addition, no common issues arise. If TII were to file a separate action, Mr Ashraph advises that one of the remedies that may be sought is the setting aside of the default judgment obtained in these proceedings.

[26] Further this application is premature since Counsel argues allegations of fraud must be supported by particulars and that it would be grossly improper for me to set aside this default judgment on the basis of these allegations.

[27] **TECHNOVISION INVESTMENTS INCORPORATED CASE**

Mrs Maharaj's main thrust was that as Judgment Creditor with respect to MDC, TII was entitled to defend this case on the basis of fraud and collusion between MHL and MDC.

[28] **ANALYSIS**

Order 15 Rule 6 (2) (b) (ii) gives the Court power to enable a person to be joined as a Defendant and to defend a matter in certain circumstances⁶.

⁶ **Misjoinder and Nonjoinder of Parties**

6. (1)

What I understand TII to be saying is that MDC has a complete defence to this action since there never was a debt due and owing to MHL so that there can be no remedy claimed against them. Further TII is saying that this entire action is a sham. TII is alleging that MDC has colluded with MHL to file this action and enter this judgment as a ruse to deprive TII of the fruits of its judgment in another matter.

[29] There has been no denial of this by MHL. To my mind this silence is resounding. It would be just, equitable and convenient to allow TII to join this matter to determine whether in fact:

1. MDC had intentionally not defended this matter so as to stymie TII's ability to enforce the Consent Judgment against it; and
2. MHL and MDC had colluded to defraud TII of the fruits of its judgment as alleged.

[30] **CONCLUSION**

I therefore conclude that the Default Judgment entered in the case at bar is a nullity on the ground that the indorsement on the Writ had fallen short of Order 6 Rule 2 (1) (a) and (b) and should be set aside. Further I think that the TII has made a case for its joinder for the purpose of defending this action.

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –

- (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
- (b) order any of the following persons to be added as a party namely –
 - (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that **all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or**
 - (ii) **any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well between the parties to the cause or matter.**

[31] The Applicant herein was granted leave by the Court of Appeal to be joined as a Defendant in this action to enable it to apply to have the judgment set aside. This application was successful. The Court of Appeal's direction and order as to costs will therefore apply.

[32] Pursuant to my conclusions I now make the following Orders:

- That the judgment entered in Default of Appearance on 9th January 2001 be set aside.
- That Technovisions Investments Incorporated be joined as a Defendant herein to defend this matter.
- That the matter be converted to CPR.
- That the Plaintiff be given leave to file a Statement of Claim within 14 days of the date of this Order, failing which the entire action do stand dismissed.
- That should the Plaintiff file a Statement of Claim then the Defendant be at liberty to file an appearance and or enter its defence within twenty-eight days thereafter.
- Thereafter matter to take its course under CPR
- That MHL and MDC pay TII's costs of this Application certified fit for Counsel to be taxed in default of agreement.

CHARMAINE PEMBERTON
HIGH COURT JUDGE