JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 41/2001

BEFORE: THE HON. MR. JUSTICE FORTE, P .

THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (Ag.)

BETWEEN: CAROIL TRANSPORT MARINE LTD
PLAINTIFF/APPELLANT

AND: PETROJAM LTD

DEFENDANT/RESPONDENT

Gordon Robinson and Mrs. Georgia Gibson-Henlin,

instructed by Henlin Gibson Henlin for the appellant

Dennis Goffe, Q.C. and Miss Maliaca Wong,
instructed by Myers, Fletcher and Gordon for the respondent

May 21,22 and July 17. 2001

FORTE. P:

Having read in draft the judgment of Panton J.A. I entirely agree and have

nothing further to add.

PANTON, J.A

The appellant, a limited liability company incorporated under the laws of Cyprus, is and was at all material times the disponent owner of a vessel called the "M/T “Athamas" Ex Yayamaria". On the 18th September 2000, the Appellant filed a writ with a special endorsement seeking the recovery of US$5Q, 631.94 for demurrage or breach of contract rising from the detention of the vessel under a charter party between the appellant and the respondent dated the 13th December 1995. The appellant also claims interest at the rate of 18%

per annum from the 12th April 1996. No Defence having been filed, judgment was entered on the 13th November 2000, for the sum abovementioned as well as interest at the rate of 18%, and $16,000 costs.

In a judgment delivered on the 2nd March 2001, Dukharan, J. set aside the default

judgment on the ground that it had been irregularly entered. He also granted the respondent leave to file and deliver its Defence and counterclaim within fourteen days of the date of the order. Leave to appeal was refused by the learned Judge. However, on the 19th March 2001, this Court granted leave to appeal.

Two grounds of appeal were filed by the appellant. The first states that the learned trial judge erred as a matter of fact and/or law and/or wrongly exercised his discretion in making the Order as the respondent had failed to set out in its summons and affidavit in support of the summons to set aside, the irregularity complained of. The second ground was not argued as the respondent conceded the point stated therein. It is therefore unnecessary to set out that ground.

The respondent, notwithstanding its concession on ground two, sought to uphold the decision of the learned judge on different grounds in a notice filed on the 11th May 2001. The grounds advanced were:

> "1. The default judgment was irregular as it was
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> entered for too much, since it included interest but: (a) the

affidavit of debt did not; {b) interest could only have been awarded by a Judge i.e. under the Law Reform (Miscellaneous Provisions) Act.

2. The affidavit of search was defective and misleading in that it stated (at paragraph 2) that on November 13, 2000 "no Defence had been filed or steps taken by or on beha1f of the Defendant" when in fact a Summons for Stay of Proceedings (under the Arbitration Act, S. 5) with an affidavit in support had been filed on October 18,2000.

3. The defendant/respondent has a good Defence in that it has filed and served a counterclaim for a sum larger than the claim of the plaintiff/appellant which the defendant/respondent claims to be entitled to set off against the claim of the plaintiff/appellant".

Leave was granted to the respondent for the enlargement of time to allow it to rely on the respondent's notice: whereupon, the respondent abandoned ground 2 in that notice. It will be observed that ground 1 in the respondent's notice seeks to provide the particulars that the appellant's sole remaining ground is concerned with. Due to the overlap involving these two last mentioned grounds, we thought it appropriate to invite Mr. Goffe, Q.C., to make his submissions first.

GROUND l

Mr. Goffe said that the threshold for the setting aside of a default judgment was quite low, and he took comfort in the decision in **Baraboo v. Bryan** (1989} 26 J.L.R. 372 , in which this Court held that the default judgment was irregular on the face of it as it was for a sum which, due to an error in summation, was in excess of the sum of the itemized debit claims. The respondents were thus ex debito justitiae entitled to have it set aside. He pointed to the fact that the affidavit of debt filed by the appellant in the instant case did not include any reference to interest payment; and so it meant, he said, that the judgment had a fatal flaw. Mr. Robinson responded that that was not the law. He relied on section 70 of the Judicature (Civil Procedure Code) Law which reads:

> "Where the writ of summons is indorsed with a claim for a liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants (if more than one) fail, to appear thereto, the plaintiff may, on an affidavit of service of the writ, and of such non-appearance as aforesaid, and to the effect that the debt is due and payable and still subsisting and unsatisfied, **enter final Judgment for any sum not exceeding the sum indorsed on the writ, together with Interest at the rate specified (If any),** or (if no rate be specified) at the rate of six per centum per annum, to the date of the judgment and costs."

As mentioned earlier, the appellant's writ is specially indorsed and the claim is for a

liquidated amount and the rate of interest is also specified. We are therefore of the view that section 70 of the Judicature (Civil Procedure Code) Law has been complied with. Whereas in the **Badaloo** case, the judgment was entered for an amount above that which had been claimed, that \is not the situation in the present case as the interest that was included in the judgment had in fact been pleaded. Accordingly, it was in order for final judgment to be entered as indeed it was, and for the amounts claimed.

Mr. Goffe, Q.C., further submitted that interest may only be awarded by a judge, and that, in any event, there was no basis in contract or tort for the claim of interest. So far as the award of interest is concerned, he was relying on section 3 of the Law Reform (Miscellaneous Provisions) Act which reads:

> "In any proceedings tried in any Court of Record
>
> > for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: "

It is clear that this section is dealing with proceedings that are being tried. There was no trial in the matter, and the rate of interest was already clearly claimed in the special endorsement to the writ. The writ is dealing with a matter of a commercial nature which in the normal course of events would be expected to attract interest at a commercial rate. To state the rate of interest being claimed should not therefore be something to be held against the appellant in order to deny it of its claim.

GROUND 3

The respondent claims that it has a good Defence to the claim. Furthermore, according to the respondent, it has counterclaimed for a sum greater than the appellant's claim, and is thereby entitled to a set-off. The counterclaim is on the basis that the appellant owes the respondent in respect of losses sustained by the respondent “due inter alia to contamination of the unleaded gasoline and diesel fuel which was carried on the M/T .'Athamas" owned by the plaintiff" **(appellant).**

Mr. Robinson has challenged the assertion by the respondent that it has a good Defence.

Firstly, he said that no affidavit of merit was filed. Secondly, he said, the affidavit filed by Miss Maliaca Wong contains a serious Inaccuracy as it ascribes ownership of the vessel to the appellant. That being so, the counterclaim, he said, is unsustainable as the respondent's claim is against a third party.

In **Farden** v. **Richter** (1889) 23 Q.B.D. 124, Huddleston, B. at page 129 had this to say in respect of the failure of a defendant to file an affidavit indicating that he had a Defence on the merits:

> "... the present Master of the Rolls appears to have stated that is was an inflexible rule that a regular judgment properly signed could not be set aside without such an affidavit, and there are statements in the manuals of practice to much the same effect. The expression is perhaps strong, but, where there is no such affidavit, it is only natural that the Court should suspect that the object of the applicant is to set up some mere technical case. At any rate, when such an application is not thus supported, it ought not to be granted except for some very sufficient reason."

Miss Maliaca Wong, attorney-at-law, filed an affidavit in support of the summons to set aside the judgment. We see no good reason for not regarding it as satisfying the requirement for the filing of an affidavit of merits. The appellant's claim was

particularized in the special endorsement. The claim covered “lay days" and “demurrage", setting out the number of days and hours as well as the rate per day. Miss Wong's affidavit has not denied the debt. However, it alleges that "some of the fuel was contaminated on board, some lost due to leakage and because of the defects in the ship discharge of the cargo of fuel at Kingston took longer than it should have done." From this, it may be seen that the condition of the ship is to form the basis of the respondent's counterclaim, but such a claim would have to be against those persons who have responsibility for maintaining the vessel in good condition, that is, the owners. The appellant is the disponent owner. This distinction is important and the respondent has acknowledged it by submitting its invoice with its claim to the true owners (see exhibit "MW2" attached to the affidavit of Maliaca Wong dated 14th February, 2001). The intended Defence is therefore no Defence at all.

In the circumstances, both grounds in the respondent's notice are devoid of merit. We find that the learned judge was in error when he set aside the judgment on the basis of

irregularity. The appellant was entitled to judgment as entered, including the interest stated. The appeal is allowed. The order of Dukharan, J. made on the 2nd March, 2001, is set aside. Costs to the appellant are to be agreed or taxed.

SMITH J.A. (Ag.)

I also agree.