14/98

COURT OF APPEAL (ENGLAND) — CIVIL DIVISION

SHOCKED and ANOR v GOLDSCHMIDT and ORS

Leggatt, Roch and Morritt LJJ

7 October, 1 November 1994 — [1998] 1 All ER 372

CIVIL PROCEEDINGS – APPLICATION TO SET ASIDE AND REHEAR – TWO DIFFERENT CATEGORIES OF APPLICATIONS – JUDGMENT IN DEFAULT OF DEFENCE OR APPEARANCE – CONSIDERATIONS RELEVANT TO SUCH APPLICATIONS.

1. In hearing an application to set aside a judgment in default of defence, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default in filing the defence and for any delay, as well as against the prejudice to the other party.

2. In hearing an application to set aside a judgment after a trial where a party does not appear, each case will depend on its own facts and the weight to be accorded to the relevant factors will alter accordingly. The predominant consideration is not whether there is a defence on the merits but the reason why the applicant failed to appear at the hearing. If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other factors include delay in applying to set aside, the applicant's conduct, whether the successful party will be prejudiced by the judgment being set aside and the public interest in there being an end to litigation.

LEGGATT LJ: [With whom Roch and Morritt LLJ agreed] *[After setting out the facts and the reasons given in granting the application to set aside and rehear, his Lordship continued]*... **[377]** The cases about setting aside judgments fall into two main categories: (a) those in which judgment is given in default of appearance or pleadings or discovery, and (b) those in which judgment is given after a trial, albeit in the absence of the party who later applies to set it aside. Different considerations apply to these two **[378]** categories because in the second, unless deprived of the opportunity by mistake or accident or without fault on his part, the absent party has deliberately elected not to appear, and an adjudication on the merits has thereupon followed. It is therefore no surprise to find that in none of the four cases cited to us in the first category was any of the five cases in the second category cited; and in only one of the second category cases was a case cited from the first category.

It is convenient to consider default judgments first. The leading case is *Evans v Bartlam* [1937] 2 All ER 646, [1937] AC 473; (1937) 53 TLR 689. The defendant had suffered judgment to be entered against him in default of appearance. The Court of Appeal ([1936] 1 KB 202) allowed an appeal from the judge's order setting aside the judgment. But the House of Lords reversed the decision of the Court of Appeal and restored the Judge's order. Lord Atkin referred to the rules laid down by the courts to guide the exercise of discretion to set aside a default judgment, saying ([1937] 2 All ER 646 at 650, [1937] AC 473 at 480; (1937) 53 TLR 689):

> 'One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he had a *prima facie* defence ... The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.'

Lord Russell of Killowen ([1937] 2 All ER 646 at 651, [1937] AC 473 at 482) remarked:

> '... from the nature of the case, no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action; and (b) how it came about that the applicant found himself bound by a judgment, regularly obtained, to which he could have set up some serious defence.'

Lord Wright ([1937] 2 All ER 646 at 656, [1937] AC 473 at 489) expressed the conclusion:

> 'In a case like the present, there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown, the court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication ... The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms, as to costs, or otherwise, which the court, in its discretion, is empowered by the rule to impose.'

The next case cited to us on default judgments was *Vann v Awford* (1986) 130 SJ 682; (1986) 83 LS Gaz 1725. The judge declined to set aside a judgment given against the second defendant in default of appearance, and also a judgment given against him when damages were assessed in his absence. He had lied when he said on oath that he had no knowledge of the proceedings. On appeal Dillon LJ considered that, despite the prejudice to the plaintiffs, as there were ample arguable defences the **[379]** award should be set aside and there should be a fresh hearing. He added: 'Even for lying and attempting to deceive the court, a judgment for £53,000 plus is an excessive penalty if there are arguable defences on the merits.' Nicholls LJ, agreeing, observed that the judge was plainly right to treat the appellant's misconduct as a very serious matter, but held that the judge fell into error in not also considering and giving proper weight to the respects in which, and the extent to which, the plaintiffs would suffer prejudice if the judgment was set aside. He concluded that, balancing these considerations and taking into account the appellant's misconduct in the face of the court, the balance came down firmly in favour of the appellant having the opportunity to present to the court his defence on the claims made against him. The judgment was accordingly set aside on terms. That case was followed two weeks later by *The Saudi Eagle* [1986] 2 Lloyd's Rep 221. After reviewing *Evans v Bartlam* and *Vann v Awford,* Sir Roger Ormrod came to the conclusion that the defendants in the case before the court had failed to show that their defence enjoyed a real prospect of success. He added (at 225):

> 'The conduct of the defendants ... in deliberately deciding not to give notice of intention to defend because it suited the interests of the group to let the plaintiffs proceed against these defendants is a matter to be taken into account in assessing the justice of the case.'

The court accordingly dismissed the appeal against the judge's refusal to set aside judgment. In the more recent case of *Allen v Taylor* [1992] 1 PIQR P255 this court followed *Vann v Awford* and *The Saudi Eagle,* and, balancing the defendant's assertion of merits against his conduct, against prejudice to the plaintiff, and against absence of proper adjudication, decided that on an appropriate condition the judgment should be set aside. These cases relating to default judgments are authority for the proposition that when considering whether to set aside a default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and for any delay, as well as against prejudice to the other party.

The first of the cases cited about setting aside judgment after a trial was *Grimshaw v Dunbar* [1953] 1 All ER 350, [1953] 1 QB 408. In it Jenkins LJ referred directly to *Evans v Bartlam* [1937] 2 All ER 646, [1937] AC 473; (1937) 53 TLR 689 only for Lord Atkin's comment that it must be material for the judge to know why it was that the defendant failed to appear on the proper day when the case came into the list and was heard. Jenkins LJ referred also to delay prejudicing the other party and the question whether the other party would be prejudiced by an order for a new trial, before concluding ([1953] 1 All ER 350 at 355, [1953] 1 QB 408 at 416):

> '... a party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. If by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the court and present his case, no doubt on suitable terms as to costs ...'

[380] In *Re Barraclough (decd)* [1965] 2 All ER 311 at 316, [1967] P 1 at 10-11 Payne J

relied on a quotation from Sir Cresswell Cresswell in *Ratcliffe v Barnes* (1862) 2 Sw & Tr 486 at 487, 164 ER 1085 at 1086:

> '"The general principle, as I collect it, is this, that where a party has had full notice, and has had the opportunity of availing himself of the contest, he will be bound by the decision" ... It would lead to a grave injustice if a decision ... could not be put right although by mistake or by accident it had been given in the absence of somebody who genuinely wished to come to court and oppose it.'

There followed in 1978 *Midland Bank Trust v Green (No* 3*)* [1979] 2 All ER 193, [1979] Ch 496, in which judgment was entered as a result of a trial which the defendant deliberately elected not to attend. Oliver J ([1979] 2 All ER 193 at 200-201, [1979] Ch 496 at 505) after citing extensively from *Re Barraclough* said:

> 'Whilst obviously it is always important that there should be finality in litigation, it does seem to me that the degree of importance of this as a conclusive factor must depend to some extent, first, on what has occurred as a result of the order which it is sought to set aside and, secondly, on the effect which the exercise of the court's discretion is likely to have. If, as in *Re Barraclough,* the successful parties in the litigation (and, of course, in a probate case those entitled under the will) have acted on and regulated their affairs on the basis of the decree, and if the reopening of the matter will involve, as it did there, a complete retrial on matters of fact which have already once been investigated by the court, then an applicant would, I think, have to present some overwhelmingly strong reasons before the court could be persuaded to reopen the matter and put the successful party once more in peril in a way which could scarcely be compensated in costs.'

In *Craddock v Barber* [1986] CA Transcript 159 the defendant had indicated that he had no intention of attending the trial at which judgment was given against him. The judge declined to set aside the judgment. In this court Browne-Wilkinson V-C said:

> 'For myself, I think in a case such as this, where a party has been clearly notified of a date for trial and has deliberately chosen to absent himself, it is a most real consideration to be taken into account in assessing where the interests of justice lie. Certainly the interests of justice require that a man should at least have the opportunity of a trial; but if he chooses to ignore the opportunity given him I see no manifest injustice in not offering him a second opportunity. I am not in any way seeking to lay down any rule but I would say it was entirely open to the judge in this case to say that this gentleman had his opportunity, he had contumaciously decided not to take advantage of it, the defendant has an order in his favour and to reopen that would be detrimental to him, and balancing those factors reach the conclusion that the interests of justice did not require the order of [the judge] to be set aside.'

Similarly, after considering the submission that, once contumacious conduct has been dealt with, it is to be regarded as wiped out, Sir David Cairns said:

> 'In my judgment there are two answers to that proposition. First, it is not only the interests of the parties which have to be considered, the public interest has to be considered also, the interest that litigation should not be **[381]** prolonged, and that a decision which has been given and which on the face of it appears to be a final decision should not be set aside where the reason for the decision having been given in absence of one of the parties was wholly because of the failure of that party to attend the trial and his misbehaviour in relation to the trial. Secondly, in considering justice between the parties, the conduct of the person applying for an order for a rehearing has to be taken into consideration as well as the matters arising in the litigation itself.'

Consonant with this decision was *Packer v Denny* [1986] CA Transcript 310, in which the defendant had applied on medical grounds, which the judge did not accept, for an adjournment. It was refused, and judgment was given against her. This court declined to interfere with that exercise of the judge's discretion. Ralph Gibson LJ remarked:

> 'If a reasonable explanation is provided for the absence of the party at the hearing, and if the application is made in due time, justice normally requires that the judgment be set aside for the obvious reason that a trial is unjust if only one side is heard and the other side wishes to be heard ... Where a defendant has had ample indulgence and opportunity to present her case, and the explanation proffered for her absence is rejected as not put forward in good faith, then, in my judgment, the judge is entitled in the exercise of his discretion to reject the application.'

These authorities about setting aside judgment after a trial indicate that each case

depends on its own facts and that the weight to be accorded to the relevant factors will alter accordingly. But from them I derive the following propositions or 'general indications' as Lord Wright might have called them.

(1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.

(2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.

(3) Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so.

(4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.

(5) Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it.

(6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour.

(7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.

(8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.

Contrasting the cases in the two categories it seems to me that whereas in the first the court is primarily concerned to see whether there is a defence on the merits, in the second the predominant consideration is the reason why the party against whom judgment was given absented himself. *[His Lordship then considered the order made and the reasons for it, allowed the appeal and restored the original order.]*
