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ROYAL COURT

4th June, 1990

81.

Before: The Judicial Greffier

BETWEEN	The Jersey Cheshire Home Foundation	PLAINTIFF
AND	Clifford Harrison Rothwell and others, exercising the profession of consulting engineer under the name of C.H. Rothwell and Partners	FIRST DEFENDANTS
AND	John H. Richards	SECOND DEFENDANT
AND	Peter Cameron Limited	THIRD DEFENDANT
AND	Ronez Limited	FIRST THIRD PARTY
AND	Clifford Harrison Rothwell and others, exercising the profession of consulting engineer under the name of C.H. Rothwell and Partners	SECOND THIRD PARTY
AND	Peter Cameron Limited	THIRD THIRD PARTY
AND	John H. Richards	FOURTH THIRD PARTY

Application by the Third Third Party for an extension of time in which to file an answer. The Second Defendant submits that he has a Judgment under Rule 6/10(4)(a) without an express order of the Court being required. The Second Defendant's submission is rejected and the extension of time granted.

Advocate R.G.S. Fielding for the Third Third Party
Advocate R.J. Michel for the First Defendant
Advocate J.G. White for the Second Defendant.

JUDGMENT

THE JUDICIAL GREFFIER: On the 23rd January, 1990, the Deputy Judicial Greffier made an order (inter alia) joining the first, second and third defendants to this action as second, third and fourth third parties. Paragraph (6) of that order read as follows -

"that the second, third and fourth third parties have twenty-eight days from the date hereof to file an answer;". Peter Cameron Limited, the third third party failed to file a third party answer until the 8th March, 1990, which was outside the twenty-eight day period. The present summons has been issued in order to seek an extension of the twenty-eight day period.

The main issue before me is the question as to the effect of the failure to file a third party answer within the time period. Advocate White on behalf of the second defendant, submitted that this failure has given his client a judgment against the third third party for reasons set out more fully below. The subsidiary issue has arisen as to how, if Advocate White's argument is wrong, a defendant may obtain a judgment against a third party who defaults in filing a pleading. That issue is merely a matter which has arisen in argument in passing and my opinion on that matter is therefore obiter dicta but nevertheless I will express an opinion on that matter as it may well assist members of the legal profession in future cases.

Rule 6/10(4) of the Royal Court Rules, 1982, as amended, states - "where the time limited for filing an answer by the third party has expired and no answer has been filed -

(a) he shall be deemed to admit any claim stated in the defendant's answer and shall be bound by any judgment (including judgment by consent) or decision in the action

in so far as it is relevant to any claim, question or issue stated in the defendant's answer; and

(b) the defendant by whom the third party was convened, may, if judgment by default is given against him in the action, at any time after satisfaction of that judgment and, with the leave of the Court, before satisfaction thereof, obtain judgment against the third party in respect of any contribution or indemnity claimed in his answer and, with the leave of the Court, in respect of any other relief or remedy claimed therein."

The wording of Rule 6/10(4) is very similar to that of Order 16 Rule 5 of the Rules of the Supreme Court 1965. In fact, the only differences are those which are consequential upon differences in our procedure.

Advocate White's argument may be summarised as follows:-

(a) that Rule 6/10(4)(a) states that a third party in the position of the third third party in this action shall be deemed to admit any claim stated in the defendant's answer;

(b) that although Rule 6/10(4) was very similar to Order 16 Rule 5, the Jersey procedure was materially different from the United Kingdom procedure;

(c) that in the United Kingdom in such circumstances a third party could apply ex parte for a default judgment;

(d) that the intention behind Rule 6/10(4) in the absence of a similar ex parte procedure was not to make it more difficult for such a default judgment to be obtained and therefore must be to give the defendant a judgment; and

(e) that the appropriate procedure was for the third party to apply under Rule 6/10(5) for the judgment to be set aside.

In passing Advocate White alleged that neither Rule 6/7(5) nor Rule 6/17(4) allowed a defendant to take a judgment against a third party in such circumstances and that therefore a judgment must be implied so that the words, "shall be deemed to admit any claims stated in a defendant's answer and shall be bound" were equivalent to the words "shall be deemed to have a judgment given against him". Advocate White further stated that although he was not able to quote as a precedent any other example of a judgment being presumed, the position was analogous to that of an Unless Order. That is to say, that the effect of Rule 6/10(4) was that of an Unless Order stating that Unless the third party filed an answer within the time period the defendant would have a judgment against him.

Advocate Fielding for the third third party argued that no judgment had been obtained, that there was no other example in Jersey Law in which a judgment could be given by implication of law without the need for an actual verdict to be pronounced by a Court and that it was open to a defendant to apply under Rule 6/17(4) for judgment on admissions. Advocate Fielding took the view that it would not be appropriate for a defendant to apply under Rule 6/7(5).

Advocate Michel for the first defendant agreed that there was no judgment in existence and argued that under the United Kingdom procedure it was still necessary for a judgment to be pronounced. He took the view that a defendant could apply either under Rule 6/17(4) or under Rule 6/7(5).

Advocate Fielding referred to section 16/5/2 on page 245 of the Supreme Court Practice 1988. And I now quote the section in full:-

> "Effect of default by third party - where the third party is in default of giving notice of intention to defend or, when ordered to serve a defence, in default of defence, he is deemed to admit the claim stated in the third party notice and is bound by any judgment or decision in the action in so far as it is relevant to any claim, question or issue stated in the notice. Whether the effect of such admission and of being so bound entitles the defendant to apply for judgment, Order 27, Rule 3 has not been decided; but, especially when the third party is in default of defence, there seems no reason why that rule should not apply to such a case."

Order 27, Rule 3 is the English Rule on judgment on admissions and corresponds very closely to our Rule 6/17(4). Advocate Fielding also referred to section 16/5/3 and the fact that it states, "there appear to be two modes by which the defendant may enter judgment against a third party in default". Those two modes are in fact those which are set out in Order 16, Rule 5(1)(a) & (b) and are in circumstances which are analogous to those set out in Rule 6/10(4)(a) & (b). Advocate Fielding's argument was that in each case a judgment had to be entered and that under Order 16, Rule 5(1)(a) this had to be with leave unless the defendant had already satisfied any judgment given against him by the plaintiff.

I do not find any part of Advocate White's argument attractive. It is clear to me that even in England a judgment is not presumed but

that some procedure has to be followed in order to obtain the same. It is clear, as a matter of general principle, that it is more difficult to obtain a judgment in Jersey than it is in England and that a judgment can only be obtained in Jersey by a specific Order of a Court. An Unless Order is in itself a specific Order of a Court. I therefore find it impossible to agree with him that Rule 6/10(4)(a) gives rise to an implied judgment. Indeed, I do not believe that any Rule of Court or Principle of Law in the Island of Jersey gives rise to a judgment without the decision of a Court. However, there is a fundamental flaw in Advocate White's argument on account of the terms of Rule 6/10(4)(b). This sub-Rule deals with a particular example of default under Rule 6/10(4), namely that in which the defendant allows a default judgment to be taken against him. In those circumstances it is clear that the defendant still has to apply under Rule 6/10(4)(b) in order to obtain a judgment against the third party. That clearly presumes that he does not already have a judgment against the third party but on Advocate White's argument he would already have such a judgment under Rule 6/10(4)(a).

Therefore for the reasons stated above I reject the second defendant's arguments and find that the second defendant has no judgment against the third third party. Similarly, the first defendants have no judgment against the third third party, although the first defendants have never argued along those lines.

Counsel for both the first defendants and the second defendant having accepted that if I found that there was no judgment in existence then there remained no satisfactory arguments against extending the time period, I have so ordered. All three counsel were aware of the

fact that it is often the practice of advocates to file pleadings outside of the strict time periods and that no objection is usually raised to these. A most obvious example of this would be the filing of an answer. Answers are often filed out of time and the Court will normally only grant a judgment under Rule 6/7(5) when the default has continued up to the time on the Friday afternoon at which the application under that rule is heard. It has not been the practice of the Judicial Greffe to refuse to accept pleadings which are filed out of time. Indeed, the Court of Appeal in the case of Ernest Farley & Son Limited -v- Takilla Limited (1984) JJ at p.123, which related to the appeal procedure in the Court of Appeal, indicated that the Judicial Greffe should not reject a document for some procedural irregularity but that the document should be filed and then subsequently attacked by the other party. The same principle would appear to apply to Royal Court pleadings, although it is unusual for another party to oppose a document which has been filed out of time. Other parties have effective remedies to force the filing of an answer or a third party answer or Further and Better Particulars of an existing pleading and the Court has effective powers under Rule 6/21(2) to give directions in relation to the filing of further pleadings on an application for setting down on the hearing list.

I turn finally to the question as to whether a defendant can obtain a judgment against a third party prior to judgment being given against the defendant in the main action. It is clear that the procedures referred to in sub-paragraphs (a) & (b) of Rule 6/10(4) only come into effect upon judgment being given in the main action. Section 16/5/3 on page 245 of the Supreme Court Practice 1988 explains the way in which a defendant obtains a judgment against a third party after

judgment in the main action. In my view, in Jersey, it will be necessary for a defendant to apply for such a judgment and this could most conveniently be done at the hearing of the trial under sub-paragraph (a) or on the giving of the default judgment under sub-paragraph (b).

However there remains a very real practical problem from the point of view of a defendant. If the defendant has to wait until the actual trial of the action or until some interim judgment is taken against him and if the third party is in a position to be able to file a third party answer at any time subject to it's being opposed as mentioned above, then the defendant has difficulty in knowing whether or not he can safely assume that the third party is admitting liability to the defendant as set out in the third party claim. There should, therefore, be some method by which the defendant can obtain a judgment from the Court against the third party to the effect that the third party is bound to indemnify the defendant in relation to such sums as may be found due by the defendant to the plaintiff and in relation to the costs of the action incurred by the defendant.

Advocate White argued that Rule 6/17(4) was not applicable because the deemed admissions under Rule 6/10(4)(a) were not admissions of fact. I do not agree with this argument as I cannot see that the deemed admissions of any claim stated in the defendant's answer can be anything other than admissions of fact as well as admissions of law. Accordingly, I agree with the commentator in section 16/5/2 quoted above that there seems no reason why Order 27 Rule 3 in England and Rule 6/17(4) in Jersey should not apply to such a case.

I come finally to the question as to whether Rule 6/7(5) also applies. Advocate Michel argued that it applied and that the defendant therefore had two ways of proceeding. He said that an application under Rule 6/17(4) would be preferable as a judgment on admissions was a better judgment than a judgment in default of an answer. The matter turns upon the interpretation of Rule 6/10(3) which states:-

"Where a third party has been so convened, he shall from the time of service be a party to the action as if he had been made a defendant in an original action either by the defendant on whose application he was convened or by the plaintiff". The question is whether or not this sub-Rule brings the third party within the terms of Rule 6/7(5). I am not able to obtain any assistance from the Supreme Court Practice 1988 as neither Rule 6/10(3) nor Rule 6/7(5) have parallels therein. It is clear that rule 6/10(3) has an effect in relation to the question of prescription periods and this was demonstrated in the Jones Lang Wootton -v- States of Jersey & Ors. (3rd February, 1989) Jersey Unreported. However, does this Rule 6/10(3) mean that for all purposes a third party shall be treated as if he were a defendant. This is an important point as a number of Rules including 6/9 relating to counterclaims, 6/15 in relation to interrogatories and 6/26(1) in relation to payment into Court refer to defendants but not to third parties. It would appear to be logical in relation to those Rules that third parties ought to have the same rights and privileges as against defendants as defendants have against plaintiffs. The question in relation to Rule 6/7(5) is whether defendants ought to have the same rights as against third parties as plaintiffs have against defendants. There is a difficulty inasmuch as Rule 6/7(5) refers specifically to the plaintiff's having the right to apply whereas 6/17(4) refers to

admissions of fact by a party to an action in an application by any other party to the action. I am of the opinion that a defendant must have a satisfactory means of obtaining judgment against a third party who is in default of an answer and that the combination of Rule 6/10(3) and Rule 6/7(5) would appear to provide a second method to that provided by Rule 6/17(4). However, if that view is wrong, then it appears to me that a defendant has the right to bring to the Court's attention the failure of the third party to comply with the rules and to seek an appropriate order to compel performance therewith. If that is not strictly under the terms of Rule 6/7(5) then it appears to me that such an order could be obtained by summons before the Royal Court under the Court's inherent jurisdiction.

Authorities referred to:

Royal Court Rules, 1982: Rule 6/10(3), (4), & 5.
6/7(5)
6/15(1)
6/26(1)
6/9(1).

The Supreme Court Rules (1965 Ed'n): 0.16, r.5
0.27, r.3.

The Supreme Court Rules (1988 Ed'n): Vol.1: pp. 244-5.

Jones Lang Wootton -v- The States of Jersey & Ors. (3rd February, 1989) Jersey Unreported.

Ernest Farley & Son, Ltd -v- Takilla, Ltd (1984) JJ 123.