

Dipcon Engineering Services Limited

Appellant

v.

**(1) Gregory Bowen and
(2) The Attorney General of Grenada**

Respondents

FROM

THE COURT OF APPEAL OF GRENADA

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 1st April 2004

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

[Delivered by Lord Brown of Eaton-under-Heywood]

1. This is an appeal by Dipcon Engineering Services Ltd (Dipcon) from the decision of the Court of Appeal of Grenada (Sir Dennis Byron CJ, Singh and Redhead JJA) dated 14 January 2002, setting aside orders made by Alleyne J respectively on 15 June 2001 refusing to set aside a regular default judgment obtained by Dipcon on 9 December 1996 for damages to be assessed, and on 31 July 2001 assessing Dipcon's damages at EC\$11,202,632 plus interest.

2. Dipcon's grounds of appeal to the Board are threefold. It contends, first, that it was not open to the Court of Appeal, on an appeal directed ostensibly only to the judge's assessment of damages, to set aside a regular default judgment previously entered in its favour; secondly, that the Court of Appeal in any event erred in concluding that the judge had misapplied the law in himself refusing to set aside the default judgment; thirdly, that the Court of

Appeal, even assuming that it was entitled to exercise a fresh discretion in the matter, itself erred in its approach.

3. It will readily be apparent that something of the history of this litigation - although fortunately very little of the underlying contractual dispute - will need to be recounted before these grounds can be examined.

4. By written agreement dated 30 September 1994 (the agreement) the Government of Grenada (“the Government”) leased to Dipcon a quarry at Mount Hartman, St George, and provided for it to be worked for an initial period of 10 years on terms as to the supply of aggregates and other materials to the Government and the payment of royalties by Dipcon.

5. The Government terminated the agreement on 1 November 1995 and on 8 January 1996 forcibly dispossessed Dipcon from the quarry.

6. Writs were issued by Dipcon first in January 1996 and then in July 1996 and a statement of claim was served dated 23 July 1996 particularising a special damage claim of over EC\$19m. On 12 November 1996 the Government was ordered by St Paul J to deliver a defence within 21 days failing which Dipcon were to be at liberty to enter judgment for damages to be assessed (“the peremptory order”).

7. On 9 December 1996, no defence having been delivered, judgment was entered for Dipcon against the Government for damages to be assessed (“the default judgment”). Quite why no defence was delivered, either within time or, indeed, until some years later, has never been explained. All that the Government has ever said with regard to the early history of this litigation, in an affidavit sworn by Mr Bowen, the first respondent Minister for Works and Communications, dated 30 May 2001, is that: “I was not properly advised and represented by my solicitor at that time, who was also the solicitor for the Attorney General” - a somewhat bland assertion considering that on the making of the peremptory order the Government was represented by the Solicitor General.

8. Following the default judgment, Dipcon and the Government entered into lengthy negotiations as to the damages payable, leading to a consent order on 11 December 1998 for payment of EC\$3m. Subsequently, however, Dipcon claimed not to have authorised this settlement in that sum and, having instructed fresh solicitors, it took steps to have the consent order set aside. Initially,

it applied within the existing action but, when that application failed before St Paul J on 4 October 1999, on the basis that only in a fresh action can a consent order be set aside for want of authority, it commenced a fresh action on that same day. A year later, on 5 October 2000, following a contested hearing before Alleyne J, the consent order was set aside and a further order made that “the matter proceed to an assessment of damages by the Court”.

9. On 25 January 2001 Dipcon duly issued a summons for the assessment of damages. A hearing date was set for 23 May 2001 but was then adjourned at the Government’s request to 1 June with an order that they pay the costs of the adjournment in the sum of EC\$3,000 by 31 May (a sum never in fact paid).

10. On 30 May 2001, just two days before the adjourned hearing date, the Government issued an application to set aside the default judgment. In the result, on 1 June, the Master adjourned both that application and the assessment of damages hearing to be heard by Alleyne J on 8 June. On 8 June Alleyne J adjourned the hearing of both matters to 15 June so that the Government’s setting aside application could be properly served on Dipcon. On 15 June counsel for the Government, Mr Alexis, sought a further adjournment of the hearing on the basis that Mr Hugh Wildman (counsel earlier appearing for the Government and junior counsel before the Board on the present appeal) had on 7 June issued proceedings against Alleyne J alleging “bias or a real danger of bias” and seeking a declaration that that judge “ought not to adjudicate in any matter in which [Mr Wildman] appears as an Attorney-at-Law”. It is convenient to note at this stage that Mr Wildman’s action was heard by Mr Othniel Sylvester QC acting as a High Court Judge on 17 July and on 31 July 2001 was roundly dismissed as “wholly misconceived” and “frivolous, vexatious and an abuse of the process of the Court”.

11. Mr Alexis’s application on 15 June was that the Government’s setting aside application should be adjourned until after Mr Wildman’s action had been disposed of or alternatively should be heard by a different judge. Mr Alexis stated that his instructions were limited to applying for an adjournment. Alleyne J refused the application but then stood over the hearing for an hour to enable the Government to consider their position further. When the Court reconvened, Mr Alexis reiterated his client’s contention that the hearing should be adjourned, an application which was then resisted by Dipcon’s counsel on a number of grounds. She pointed out that Mr Wildman was not the only counsel with knowledge of the case. He had appeared together with another counsel on 1 June

and she submitted in particular that Dipcon was suffering prejudice through the repeated adjournments of the various hearings and the undue delay in concluding them. Mr Alexis in reply asked yet again that the matter be adjourned, making no submissions in support of the substantive setting aside application. In the result Alleyne J refused the Government's application for an adjournment and dismissed their application to set aside the default judgment. It is sufficient for present purposes to quote just two paragraphs from his brief ruling:

“1. That an attorney is not minded to appear before a particular court before which he or she has business is not a ground for an adjournment. Indeed, to put that forward as a ground for an application comes close to discourtesy to the court. There is no merit in that ground.

3. It seems to me further that the application itself [described in the previous paragraph as ‘an application to set aside an order’] on the affidavit filed in support is without merit and would have scant chance of success.”

12. On 21 June 2001 Alleyne J refused the Government's application for leave to appeal against his ruling. On 11 July 2001 the Government purported to appeal against that ruling to the Court of Appeal notwithstanding that leave to appeal had been refused and that no fresh application for leave had been made to the Court of Appeal itself. In the event the purported appeal was not pursued.

13. Meanwhile, on 9 July 2001 Dipcon had served the Government with a summons fixing a new date for the assessment of damages on 20 July 2001. At the hearing on 20 July the Government once again appeared by Mr Alexis who once again sought an adjournment of the proceedings, this time applying for a stay upon the assessment of damages on the basis of the outstanding appeal against the judge's dismissal of the setting aside application. Alleyne J refused the application for a stay and proceeded to the assessment of damages. Mr Alexis stated that he would be exceeding his instructions if he cross-examined Dipcon's witnesses (who had attended, as previously ordered, for cross-examination upon their affidavits) and substantially confined himself to putting Dipcon to proof of its alleged losses. At the end of the hearing, Alleyne J reserved judgment until 31 July 2001 when, as already stated, he entered final judgment for Dipcon in the total sum of EC\$11.2m odd plus interest.

14. The Government then appealed to the Court of Appeal by notice dated 31 August 2001. Although ostensibly challenging Alleyne J's judgment dated 31 July 2001, the notice complained also of the judge's earlier refusal to set aside the default judgment, including amongst the grounds of appeal:

“3(a) the learned trial judge erred in law in refusing the Appellants' application to set aside the default judgment; in refusing the application the learned trial judge held that the Appellants' defence had a scant chance of success. It is submitted that the proper test is whether or not the Appellants can show that they had an arguable case on the merits.”

15. The Court of Appeal's judgment was given on 14 January 2002 by Singh JA, the other two members of the Court concurring. Having set out the grounds of appeal Singh JA continued:

“12. This was a rather clever notice of appeal. It speaks that the appeal is from the judgment of Alleyne J wherein he assessed the damages in this matter. It does not challenge the quantum of that assessment. It challenges it on procedural grounds. Its primary ground was that the assessment was wrong because the Trial Judge erred when he dismissed the Appellants' application to have the default judgment set aside. A decision from which there was no appeal.

13. However, despite the ingenuity of the Appellants, I agree with the submission of [Mr Henriques QC for the Government] that an assessment of damages could be challenged on the ground that the judgment was improperly obtained. I therefore now address that issue.”

16. Singh JA then considered *Evans v Bartlam* [1937] AC 473 and *Day v Royal Automobile Club Motoring Services Ltd* [1999] 1 WLR 2150 and continued:

“17. Applying the above principles of law to the instant matter, I am of the view that Alleyne J applied a wrong legal principle when he dismissed the application to set aside the default judgment because the defence disclosed in the affidavit of merits 'would have scant chance of success'. As I understand that language, the Learned Judge was not saying that the Appellants' case was 'hopeless'.”

17. Singh JA then referred further to Mr Bowen's affidavit of 30 May 2001 (the “affidavit of merits” as he had described it) and to

three of its exhibits - respectively a letter dated 18 September 1995 from the Government's expert to the project manager working on the road scheme which Dipcon was supplying with quarry products, a letter dated 3 May 1996 from the Ministry's Chief Technical Officer to a firm of contractors undertaking government work, and the Government's draft defence to Dipcon's statement of claim - and concluded that these documents disclosed "an arguable defence", namely the allegation of an "identified" breach of contract with nothing in the case to suggest "any inherent improbability of what was being asserted".

18. Paragraph 20 of the judgment reads:

"20. Looking at this matter as a whole, from all that is disclosed in the [record] before us including the unhealthy and unsavory atmosphere that prevailed between the legal advisers of the Appellants and the Bench and the enormous quantum of the judgment on assessment I am of the considered opinion that there would be justice for all should the Appellants be given an opportunity to present their defence."

19. It is against that background, then, that their Lordships must now consider Dipcon's grounds of appeal.

Ground 1 - it was not open to the Court of Appeal to set aside the default judgment on an appeal against the assessment of damages

20. Singh JA held in para 13 of his judgment (see para 15 above) that "an assessment of damages [can] be challenged on the ground that the judgment was improperly obtained". The default judgment entered here on 9 December 1996 was not, of course, "improperly obtained". It was a regular judgment following upon the Government's non-compliance with the peremptory order. But put that thought aside: Singh JA was, it seems clear, in fact reviewing the judge's earlier refusal to set aside what all recognised to have been a regular default judgment. So the question is: was that ground of appeal open to the Court on the particular appeal before it?

21. Dipcon submit not and in this regard refer to two decisions of the English Court of Appeal - *Lunnun v Singh* (unreported, 1 July 1999) and *Pugh v Cantor Fitzgerald International* [2001] EWCA Civ 307 - which established, in the words of Jonathan Parker LJ in *Lunnun*, "the underlying principle ... that on an assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of

liability, whether such determination takes the form of a judgment following a full hearing on the facts or a default judgment". As Peter Gibson LJ said in the same case:

"It is not in dispute that when judgment in default is entered for damages to be assessed the question of liability is thereby determined and cannot be challenged while the unappealed judgment still stands."

22. It necessarily follows, submits Ms Rogers for Dipcon, that an unappealed judgment refusing to set aside a regular default judgment cannot be challenged on an appeal against an assessment of damages.

23. Mr Henriques QC for the Government submits to the contrary. He argues that once the final judgment is entered, as here it was on 31 July 2001 when damages had been assessed, an appeal to the Court of Appeal lies as of right and it is open to the appellant on such an appeal to call into question any previous interlocutory ruling or order which it wishes to dispute, including, therefore, in the present case, the judge's ruling on 15 June 2001 refusing to set aside the default judgment. It was, submits Mr Henriques, unnecessary at that stage to bring a specific appeal against the ruling of 15 June which is why, he suggests, the Government had abandoned their attempt to mount that earlier appeal. In support of this argument Mr Henriques seeks to rely on *Alpine Bulk Transport Company Inc v Saudi Eagle Shipping Company Inc* [1986] 2 LLR 221 (*Saudi Eagle*) in which (a) the defendants had deliberately allowed an interlocutory default judgment to be entered against them, (b) some six months later damages had been assessed and final judgment given, and (c) only then had the defendants (realising at last that, although they had no assets, they had earlier given security) applied - initially to the judge and then on appeal to the Court of Appeal, in the event unsuccessfully at both hearings - to set aside the judgment and for leave to defend.

24. This is not an argument that their Lordships can accept. Whilst *Saudi Eagle* is clear authority, if authority were needed, for the proposition that an application to set aside a default judgment can be made (and, if refused, can then be appealed) notwithstanding that final judgment has subsequently been entered, it is certainly not authority for saying that on an appeal against an assessment of damages a previous default judgment can be set aside without any such application ever having been made or, as here, that a previous refusal to set aside the default judgment can be challenged without that refusal itself being appealed.

25. Strictly, therefore, *Dipcon* is correct in its argument. But it does not follow that its appeal should be allowed on this ground. Their Lordships have no doubt that it would have been open to the Court of Appeal to have invited and acceded to a late application by the Government for leave to appeal against Alleyne J's order of 15 June 2001 and that such a course would have regularised the proceedings before it and properly enabled the Court to examine and, if appropriate, to overturn that previous order. Certainly *Dipcon* would have been entitled to an adjournment to prepare itself more specifically for an appeal on this basis but it seems improbable that it would have sought one. Their Lordships are accordingly not disposed to allow the appeal on this ground.

Ground 2 - the Court of Appeal erred in finding that Alleyne J had misdirected himself in law

26. The Court of Appeal's crucial finding in this regard appears in para 17 of Singh JA's judgment (see para 16 above), namely "that Alleyne J applied a wrong legal principle when he dismissed the application to set aside the default judgment because the defence disclosed in the affidavit of merits 'would have scant chance of success'".

27. *Dipcon* dispute this finding on two grounds. First, and most fundamentally, Ms Rogers submits that it reveals an important misunderstanding of the judge's reasoning: what Alleyne J was saying in para 3 of his judgment (see para 11 above) was not that the *defence*, but rather that the *application*, was "without merit and would have scant chance of success". Secondly, Ms Rogers submits that, even if the judge had indeed been referring there to the defence, the test adopted of "scant chance of success" accorded with the authorities (which use a variety of expressions for the purpose) and the judge's conclusion upon it was justified on the facts.

28. The first of these two arguments appears to their Lordships irresistible. The judge was in terms referring to "the application itself" and, indeed, he was clearly right to have been doing so. Of course, the merits of the proposed defence are of importance, often perhaps of decisive importance, upon any application to set aside a default judgment. But it should not be thought that it is *only* the merits of the proposed defence which are important. The defendants' explanation as to how a regular default judgment came to be entered against them, in particular where, as here, it followed their failure to comply with the peremptory order, will also be

material. That is not to say that there must necessarily be a reasonable explanation for this: as Lord Atkin said in *Evans v Bartlam* [1937] AC 473,480, there is no rule that the Court must be satisfied that a reasonable explanation exists, adding:

“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 only been obtained by a failure to follow any of the rules of procedure.”

29. But it should be noted that Lord Atkin had earlier observed:

“... obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion.”

30. Important too will be any delay in applying to set aside the default judgment and any explanation for this also. Although it is not applicable in Grenada, it is worth noting the English Civil Procedure Rules (“Part 13 rule 13.3 (2)”):

“In considering whether to set aside ... a judgment ... the matters to which the Court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.”

31. Those particular considerations were clearly of real importance in the present case. The default judgment, as already stated, followed the Government’s breach of a peremptory order which to this day is unexplained except by reference to the Government “not [being] properly advised and represented”. As for the delay in applying to set it aside, this totalled four and a half years, from 9 December 1996 until 30 May 2001 when the application was issued. Insofar as Mr Henriques sought to explain this delay by reference to the substantial periods of time elapsing (a) whilst the parties were in negotiation leading to the initial consent judgment for EC\$3m (2 years, from 9 December 1996 until 11 December 1998), and (b) whilst *Dipcon* was litigating to have that consent order set aside (22 months, from 11 December 1998 to 5 October 2000), the inference being that the Government were content with the default judgment when they thought that they could settle the claim for no more than EC\$3m, three important points fall to be made. First, the Government cannot have known for much of that initial two year period that settlement was available for as comparatively little as EC\$3m: *Dipcon’s* claim was

for some time advanced in a much larger sum than this. Secondly, the fact that the Government were prepared to pay EC\$3m - and must have appreciated that the settlement figure could well be substantially more than this - suggests little confidence in the merits of their substantive defence. Thirdly, there was a final eight month delay between 5 October 2000 and 30 May 2001, during the second part of which, moreover, proceedings were already progressing towards the Court's final assessment of damages.

32. Mr Bowen's affidavit of 30 May 2001 in support of the setting aside application said not a word about any of these matters. In those circumstances it seems to their Lordships hardly surprising that Alleyne J should have described the application itself, whatever view might be taken of the three exhibited documents relied upon to suggest a good defence to the action on the merits, as being "without merit" and as having only a "scant chance of success".

33. Para 17 of Singh JA's judgment (see para 16 above) infers that Alleyne J could only properly have dismissed the setting aside application had he concluded that the Government's proposed defence on the merits was "hopeless". If that was, indeed, the Court of Appeal's view, their Lordships think it wrong. As already indicated, Alleyne J had properly to consider other factors besides the merits of the defence and, on the facts of the present case, it would not have been right to set aside this judgment after four and a half years unless the proposed defence were substantially more convincing than merely not "hopeless".

34. Their Lordships would repeat, however, that what Alleyne J was characterising as being without merit was the Government's application rather than their defence and they consider that he was amply justified in that conclusion.

35. In these circumstances it is unnecessary and would be inappropriate for their Lordships to express any view on the merits of the proposed defence. No doubt, had such a defence been advanced pursuant to the peremptory order of 8 November 1996, it would not have been sought to strike it out or have it summarily rejected on grounds akin to those provided for by CPR Parts 3.4 and 24.2 on the basis that it had no reasonable prospect of success. That, however, as already explained, was not the determinative question arising by the time this application to set aside the default judgment came before Alleyne J, still less by the time the appeal came before the Court of Appeal.

Ground 3 - The Court of Appeal erred in the exercise of its own discretion (assuming it had one)

36. Having already concluded that the Court of Appeal was wrong to find that Alleyne J had misdirected himself as to the proper test to apply on a setting aside application of this kind, it follows that strictly speaking the Court of Appeal had no fresh discretion of its own to exercise in the matter. Even if it had, however, their Lordships would find it impossible to support the approach in fact taken.

37. It is apparent that the Court of Appeal decided to set aside the default judgment essentially for three reasons: first, because there was shown to be an arguable and not inherently improbable defence on the merits; secondly, because of “the unhealthy and unsavory atmosphere that prevailed between the [Government’s legal advisers] and the Bench”; and, thirdly, because of “the enormous quantum of the judgment on assessment” (these last two reasons being found in para 20 of Singh JA’s judgment - see para 18 above).

38. Their Lordships are prepared to assume that the first reason may be sustainable, although one might have expected Mr Bowen to be in a position to exhibit contemporaneous letters of complaint to Dipcon itself rather than to others and, as already observed, it is perhaps surprising that, if in truth the Government had a good defence, they were prepared to negotiate on a full-liability basis to pay what was on any view a very substantial sum.

39. The second of the Court of Appeal’s reasons seems to their Lordships clearly unsound. We have already indicated enough of the history of this litigation to show that in truth the Government were playing fast and loose with the Court and its procedures. It was not the Bench which was responsible for the “atmosphere”, still less Dipcon. Time and again the Government sought to frustrate the progress of these proceedings. The fact is that, having refused the Government an adjournment on 15 June 2001, as he was not merely entitled but in their Lordships’ opinion plainly right to do, Alleyne J could then simply have dismissed the setting aside application on the ground of want of prosecution without even troubling to consider its substantive merits. He need never have reached para 3 of his ruling (see para 11 above) in which he came to express his “further” view on the application’s prospects of success. In these circumstances the Court of Appeal ought properly to have regarded the Government’s position, not as stronger than it was before the judge, but as weaker: the

Government had for no good reason declined to advance its application at first instance and strictly, therefore, needed to challenge the judge's refusal to adjourn, something they could never have done.

40. As for the Court of Appeal's third reason, the size of the judgment, the Court ought properly to have had regard not merely to the Government's interest in this but also to Dipcon's. Could it really be right, five years after a regular judgment was entered following the Government's unexplained breach of a peremptory order, to deprive Dipcon of its benefit and at that stage require them to litigate a claim which for four and a half years they had no reason to suppose would be contested? It seems unlikely that it could, and certainly to have done so would have required a process of reasoning beyond that to be found in the Court of Appeal's judgment. Even, therefore, had Alleyne J's judgment itself been properly appealable, so too would have been the Court of Appeal's. This ground of appeal too, therefore, is made out.

41. For these reasons their Lordships will humbly advise Her Majesty that Dipcon's appeal should be allowed with costs and the judge's order below reinstated. The Board notes that it is unnecessary to provide for the costs in the lower courts: the Court of Appeal itself ordered that all the costs thrown away as a result of its judgment should be paid by the Government to Dipcon.