1979 April 5

[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

EMMANOUEL VOLOUHAKIS,
Appellant-Defendant,

v.

CHARILAOS GEORGHIOU,
Respondent-Plaintiff.

(*Civil Appeal No.* 5116).

Civil Procedure—Judgment by default—Partial misdescription of the reason for which judgment actually was applied for—Court, which had given judgment, fully aware of the true position—No injustice to defendant in the circumstances of this case—Orders 17 *and* 26 *of the Civil Procedure Rules, and rule* 1 *of Order* 64 *of such Rules.*

Civil Procedure—Judgment by default—Exact item or items of the prayer for relief of the statement of claim to which the judgment related not specified exactly—But plaintiff obtained judgment by default for the sum to which he was entitled—Judgment not a nullity and no injustice caused to the defendant.

The respondent-plaintiff sued the appellant-defendant seeking, *inter alia*, the cancellation of four promissory notes, each one for the amount of C£1,200, which had been signed by the respondent to the order of the appellant; and the return of the sum of C£1,200 which he had paid at the time when the first of the four promissory notes had matured. When the statement of claim was filed the amount claimed in respect of the satisfaction of the promissory notes was increased to C£4,800 although at the time when the statement of claim was filed the respondent had paid off only the first two of the four promissory notes in question.

Although the appellant, who was residing abroad, had originally entered an appearance by counsel he subsequently ceased to be so represented; and, in view of this fact, the District Court gave directions as regards the delivery of the statement of claim

and of any subsequent document to him, namely that the Registrar should notify him "by prepaid registered letter" that his counsel has ceased to act for him and that it was required for him, if he intended to defend the claim against him, to furnish within thirty days from the day of the receipt of the letter an address for service within the municipal limits of Nicosia, and in default of doing so notice of any application in the action was to be given by posting it on the Court's notice-board.

When the respondent applied for judgment against the appellant for default of appearance such judgment was given after the Court was satisfied that the Registrar had sent to the appellant a letter as directed by the Court, that such letter had been received duly by him, and, that, eventually, the application for judgment by default had been duly posted on the Court's notice board.

Upon appeal by the defendant against the dismissal of his application for the setting aside of the judgment given as above counsel for the appellant contended:

(a) That the application for judgment by default wrongly stated that judgment was being applied for in default of appearance whereas an appearance had, actually, been entered on behalf of the appellant; and that the view of the trial Court that this wrong statement made no difference, because the Court which had given the judgment was fully aware of the true position and had not been misled in any way, was erroneous.

(b) That though the trial Court has found that in paragraph (e) of the prayer for relief in the statement of claim it was wrongly stated that there was claimed the repayment of the sum of C£4,800, instead of the correct sum of C£2,400 which corresponded to the total of the two, out of the four, promissory notes which had been paid off by the respondent on having matured, nevertheless the trial Court refused to vary accordingly the judgment which had been given by default against the appellant.

Held, (1) that though it is correct that the obtaining of judgment in default of appearance is governed by Order 17 of the Civil Procedure Rules, whereas the obtaining of judgment in

default of defence is governed by Order 26 the corresponding provisions of these two Orders are closely similar; and that, therefore, no injustice could have been caused to the appellant in the way in which judgment by default was applied for, and given, against him in the context of the special circumstances of this particular case.

Per curiam:

In any event, if any irregularity has occurred in this respect, it is an immaterial non-compliance with the Civil Procedure Rules, which, according to the provisions of rule 1 of Order 64 of such Rules, does not render the judgment given by default against the appellant void, unless a direction to that effect is made by the Court or a Judge, and, quite correctly, no such direction has been made by the trial Court; nor is this Court prepared to do so itself.

(2) That by the time judgment by default was obtained all the four promissory notes concerned, each one for C£1,200, and totalling all together C£4,800, had matured; that when the respondent gave evidence in support of his application for judgment by default he stated that he had paid to the Bank of Cyprus and, the appellant had collected, a total amount of 600,000 drachmas, the equivalent of which in Cyprus currency was, at the time, C£4,800, and that he was claiming this amount; that, therefore, it is clear that the respondent obtained judgment by default for the sum of C£4,800 to which he was entitled at the material time and no injustice was caused to the appellant, in any way, in this respect; that the judgment given by default cannot be regarded a nullity and it cannot be said that the respondent has obtained judgment for more than he had claimed by his writ of summons having extended his claim by means of the statement of claim without amending the indorsement of the writ; and that, accordingly, the appeal must be dismissed (*Gee* v. *Bell* [1887] 35 Ch. D. 160 distinguished).

Appeal dismissed.

Per curiam:

If it could be said that, by not specifying exactly in the judgment by default the exact item or items of the prayer for relief in the statement of claim to which such judgment related, there has occurred some irregularity, this irregula-

rity would be regarded as a mere non-compliance with the relevant Rules of Court and practice, which did not render the judgment obtained by default void and which did not call for any remedial order or direction on the part of the trial Court which has given the appealed from decision.

Cases referred to:

Craig v. *Kanseen* [1943] 1 All E.R. 108;

Fleet Mortgage and Investment Co. Ltd. v. *Lower Maisonette 46 Eaton Place Ltd. and Another* [1972] 2 All E.R. 737 at p. 744;

Gee v. *Bell* [1887] 35 Ch. D. 160.

Appeal.

Appeal by defendant 1 against the judgment of the District Court of Nicosia (Stavrinakis P.D.C. and Evangelides, Ag. D.J.) dated the 18th September, 1972, (Action No. 1697/67) whereby his application for the setting aside of the judgment given against him, by default, in the above action for the amount of C£4,800.— was dismissed.

L. Papaphilippou, for the appellant.

E. Efstathiou with *M. Vassiliou*, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant challenges the decision of the District Court of Nicosia by means of which there was dismissed his application for the setting aside of the judgment which was given against him in action No. 1697/67, in the District Court of Nicosia, for the amount of C£4,800, with legal interest and costs.

When the said action was instituted the appellant was residing abroad, namely in Athens, and leave was granted for the service of notice of the writ of summons on him out of the jurisdiction.

He entered an appearance through counsel other than the one who has appeared for him in this appeal.

Subsequently, an application by summons was made for the addition of a second defendant and for the amendment of the claim which was indorsed on the writ of summons. When the bailiff went to serve the said application on counsel who had

entered an appearance on behalf of the appellant, counsel refused to accept service and wrote to the Registrar of the District Court of Nicosia stating that he had ceased to represent the appellant.

Eventually, a second defendant, namely the Bank of Cyprus Limited, was added by order of the Court, and leave was, also, granted to amend the writ of summons in a manner which we need not describe in detail, as it did not, in any way, alter the substance of the claim of the respondent, as the plaintiff in the action, against the appellant, as a defendant.

By his claim as originally indorsed on the writ of summons, as well as after such claim had been amended, the respondent sought, *inter alia*,the cancellation of four promissory notes, each one for the amount of £1,200, which had been signed by the respondent to the order of the appellant; a declaration that certain machinery which the appellant had supplied to the respondent was unfit; damages for misrepresentations; the amount of C£2,400 as an admitted debt, due by the appellant to the respondent as his share in a partnership between them; also, the return of the sum of C£1,200, which the respondent had paid at the time when the first of the four promissory notes had matured; and it was, actually, this sum which was increased, by the aforementioned amendment of the writ of summons, to C£2,400, since in the meantime the respondent had paid off the second promissory note which had, also, matured.

When the statement of claim was filed the amount claimed in respect of the satisfaction of the promissory notes was increased to C£4,800, although at the time when the statement of claim was filed the respondent had paid off only the first two of the four promissory notes in question.

In view of the fact that the appellant had ceased to be represented by counsel, the District Court gave directions as regards the delivery of the statement of claim and of any subsequent document to the appellant, namely that the Registrar should notify him "by prepaid registered letter" that his counsel has ceased to act for him and that it was required of him, if he intended to defend the claim against him, to furnish within thirty days from the day of the receipt of the letter an address for service within the municipal limits of Nicosia, and in default of doing so notice of any application in the action was to be given by posting it on the Court's notice-board.

Then the respondent applied for judgment against the appellant for default of appearance and such judgment was given on February 19, 1968, after the Court was satisfied that the Registrar had sent to the appellant a letter as directed by the Court, that such letter had been received duly by him, and that, eventually, the application for judgment by default had been duly posted on the Court's notice-board.

In an effort to execute the judgment against the appellant the respondent applied to the Athens Court of First Instance, which declared, on November 12, 1969, that the judgment against the appellant could be executed in Greece and a copy of the decision of the said Court, No. 7330/1969, as well as a certificate that the appellant had not appealed against such decision and that he had been served with such decision on March 5, 1971, in Athens, form part of the record of the proceedings now before us.

Then on April 26, 1971, the appellant applied to the District Court of Nicosia to set aside the judgment, which had been given against him by default, as aforesaid, on February 19, 1968.

The first ground on which the appellant sought this relief was that the application for judgment by default wrongly stated that judgment was being applied for in default of appearance whereas an appearance had, actually, been entered on behalf of the appellant. As a matter of fact when the respondent filed his application for judgment in default of appearance there was stated therein the sequence of events which have already been referred to in the present judgment, namely how it came about that counsel originally entered an appearance on behalf of the appellant and then he ceased to appear for him any longer, and directions were given by the Court as regards the service of any further documents on the appellant. It was expressly stated in that application that though the appellant had received the letter sent to him pursuant to the said directions he had failed to furnish a new address for service.

The trial Court held that it did not make any difference whether the application for judgment by default was described as judgment in default of appearance or in default of defence, and that the Court which had given such judgment was fully aware of the true position and had not been misled in any way.

By his notice of appeal counsel for the appellant has complained that the above view of the trial Court is erroneous.

It is correct that the obtaining of judgment in default of appearance is governed by Order 17 of our Civil Procedure Rules, whereas the obtaining of judgment in default of defence is governed by Order 26 of the said Rules. But the corresponding provisions of the aforementioned two Orders are closely similar and we cannot see how any injustice could have been caused to the appellant in the way in which judgment by default was applied for, and given, against him in the context of the special circumstances of this particular case.

In any event, if any irregularity has occurred in this respect, it is an immaterial non-compliance with the Civil Procedure Rules, which, according to the provisions of rule 1 of Order 64 of such Rules, does not render the judgment given by default against the appellant void, unless a direction to that effect is made by the Court or a Judge, and, quite correctly, no such direction has been made by the trial Court; nor are we prepared to do so ourselves.

The trial Court by not agreeing to set aside the judgment obtained against the appellant by default as being irregular, merely because there occurred an innocuous partial misdescription of the reason for which judgment actually was applied for, has, in our opinion, adopted, indeed, the right course in not being allowed to be influenced by mere technicalities and in choosing to look at the essence of the matter.

The next ground on which the appellant has sought before the trial Court the setting aside of the judgment in question, and which has, also, been raised before us by the present appeal, is that, though the trial Court has found that in paragraph (e) of the prayer for relief in the statement of claim it was wrongly stated that there was claimed the repayment by the appellant to the respondent of the sum of C£4,800, instead of the correct sum of C£2,400 which corresponded to the total amount of two, out of the four, promissory notes which had been paid off by the respondent on having matured, nevertheless the trial Court refused to vary accordingly the judgment which had been given by default against the appellant.

In taking the above view the trial Court pointed out that by paragraph (d) of the prayer for relief in the statement of claim there was being claimed another amount of C£2,400 and that

the trial Court was not in a position to state whether the judgment had been given in respect of the amount of C£4,800 claimed by the aforementioned paragraph (e) or whether it was the total of the two amounts of C£2,400 claimed by paragraphs (d) and (e), respectively.

Thus, the trial Court took the view that the Judge who gave judgment by default was entitled to give judgment for C£4,800 and it stated that it had no power to sit as a court of appeal in order to vary the judgment given by another Judge by default; also, that even if it had any discretion it would have not exercised it, in the light of the circumstances of this particular case, in favour of the appellant.

It is to be noted that the judgment by default was obtained on February 19, 1968, and that by then all the four promissory notes concerned, each one for C£1,200, and totalling all together C£4,800, had matured. It is to be noted further that when the respondent gave evidence on February 19, 1968, in support of his application for judgment by default against the appellant, he stated that he had paid to the Bank of Cyprus and, the appellant had collected, a total amount of 600,000 drachmas, the equivalent of which in Cyprus currency was, at that time, C£4.800, and that he was claiming this amount.

It is, therefore, clear to us that the respondent obtained judgment by default for the sum of C£4,800 to which he was entitled, at the material time, and that no injustice was caused to the appellant, in any way, in this respect.

If it could be said that, by not specifying exactly in the judgment by default the exact item or items of the prayer for relief in the statement of claim to which such judgment related, there has occurred some irregularity, we would regard this irregularity as a mere non-compliance with the relevant Rules of Court and practice, which did not render the judgment obtained by default void and which did not call for any remedial order or direction on the part of the trial Court which has given the appealed from decision.

We are not prepared to regard the judgment given by default against the appellant as a nullity, in which case we would have had to proceed to set it aside due to "a fundamental vice" (see *Craig* v. *Kanseen*, [1943] 1 All E.R. 108, which was referred to

with approval in *Fleet Mortgage and Investment Co. Ltd.* v. *Lower Maisonette* 46 *Eaton Place Ltd. and Another*, [1972] 2 All E.R. 737, 744).

Nor is this a case in which it can be said that the respondent, as plaintiff, has obtained judgment in default of appearance for more than he had claimed by his writ of summons, having extended his claim by means of the statement of claim without amending the indorsement of the writ; the present case, on the basis of its particular circumstances, is distinguishable from the case of *Gee* v. *Bell*, [1887] 35 Ch. D. 160, in that the appellant, unlike the defendant mortgagor in the *Gee* case, *supra*, did enter an appearance in the action as a defendant and was given due notice of the further proceedings against him in the manner directed by the Court, after counsel who had originally appeared for him ceased to represent him; furthermore, the judgment given by default is not, in fact, in excess of what has been claimed by the indorsement in the writ of summons.

For all the foregoing reasons this appeal is dismissed, but we are not, in view of the rather special circumstances of this case, prepared to make an order as to costs against the appellant.

Appeal dismissed. No order as to costs.