SUMMARY PROCEDURES FOR DETERMINATION OF CIVIL CLAIMS

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A SETTLEMENT:

1. The greatest potential for the speedy resolution of disputed civil claims is to be found in amicable settlements. In most situations of conflict the basic facts are known to the parties and the applicable principles, if not known by their legal representatives can be ascertained with appropriate industry. There are of course, cases in which the facts are complicated and the truth difficult to discover. There are others in which the law is obscure and the judicial decisions in conflict. These situations should not deter the efforts at settlement but should be important factors in assessing the risks involved if there is no settlement. It is my view that the attorney has a duty to his client as well as the Courts to explore all reasonable prospects of achieving an amicable settlement. Delays, costs and losses due to inflation are important considerations which are too often disregarded.

2. The conduct of negotiation is by itself an important subject deserving of its own special study. For the purposes of this paper, the value and benefits in economy and good inter-personal relationships must nevertheless be emphasized. Secondly, the need for the early consideration of this question is too often overlooked. Most settlements are only achieved on the trial day. By then considerable time has been lost and expenses incurred. It seems that at the time of the close of the pleadings or the Order on the Summons for Directions,

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the parties should have a clear knowledge of each others' cases, their strengths and weaknesses, should through discovery, interrogatories and inspection of documents have a fair knowledge of the evidential material available and therefore be in a position to assess the chances of failure and success. A practice needs to be developed of dealing specifically with the question of settlement at this time or at the latest prior to the filing of a certificate of readiness. Unfortunately, at this stage, the case for most attorneys goes into hibernation until a trial date is fixed.

3. The strategy of making an early payment into Court to induce a party who is reluctant to agree to a reasonable settlement should not be forgotten. Such a step greatly reduces your client's and increases your opponent's margin of risk since if he fails to secure more on trial, he will lose all the costs subsequent to the payment in.

B ARBITRATION:

4. This is an important avenue to consider for the speedy resolution of civil claims. Most references to arbitration result from cases, notably insurance and building contracts, where the parties themselves had initially included an arbitration clause in their agreement. Many other cases, especially in the commercial field and in cases in which technical evidence will predominate are suitable for arbitration. Arbitration has the advantage of enabling the parties to select an Adjudicator with special expertise or known competence in the relevant field, whereas in the Courts a Judge may be

required to deal with a subject with which he had no previous familiarity. Attorneys should therefore consider suggesting to clients in appropriate cases that abitration is a desirable procedure. It must be admitted that the immediate costs of arbitration may be greater than the costs of court proceeding in that, the parties have to pay the Arbitrator's fees and expenses while the Courts provide a virtually free service.

5. In many cases, arbitrations take so long to be completed that one of their chief advantages is lost. In order to ensure that arbitrations result in a speedy resolution of disputes, it is important to provide a decisive method for the selection of the Arbitrator or Arbitrators which does not involve having to go to the Court. A simple method of appointing a Single Arbitrator is for one party to propose three (3) names from which the opposing party select one and on failure within a limited time, then some third party, example, President of the Society of Architects, will nominate the Arbitrator. Where there is provision for an arbitration panel of three (3) persons, an effective method is for each party to be required to appoint one Arbitrator and the two Arbitrators so appointed should appoint the third. If one party fails to make his appointment within a given time, then the other party's appointee shall be deemed to be the sole Arbitrator with all the powers to determine the matter. If two (2) Arbitrators appointed under this system, fail to appoint the third, then a third party is empowered to do so. <u>See Appendix 1, for a sample clause</u>.

6. In order to ensure that the arbitration proceed expeditiously, it is necessary that the Arbitrator should meet early after the appointment to fix a clear time-table for the pleadings and hearings and that the parties should require the Arbitrator himself to hand down his Award within a limited period.

C. INTERLOCUTORY APPLICATIONS:

7. Apart from the fact that prompt applications for further and better particulars, discovery of documents, admissions and the administration of interrogatories will help to identiy the issues, flush out material evidence and clarify the facts, thus faciliating settlement, such procedures, if promptly taken, will enable early filing of the certificate of readiness and speed up the progress towards trial.

8. In certain types of cases, actions are brought or defended to delay the inevitable or to obtain some temporary advantages. In some cases, an interlocutory injunction will have the result of making a trial at some distant date academic. Orders to stop labour protest, breaches of restrictive covenants or copyright will sometimes terminate the proceedings for all practical purposes and gain for the client immediate protection of his right or property.

9. An order for an account is also an important interlocutory, as well as final order. Where the responsibility to account cannot be successfully denied it is nearly always useful to apply by summons for an account and where necessary that

the receipts and payments be vouched and verified. Where an account is likely to be needed, it should be remembered that the writ of summons should be endorsed with a claim for an account.. See Code, S. 16.

10. The application may be made in Chambers for all necessary inquiries or accounts to be taken. This may be done at any stage of the proceedings. The Court may give special directions as to the mode of taking the accounts. See Code, SS. 312-18. The Judge also has the power to call on the party having the conduct of the proceedings to explain any undue delay in the prosecution of the accounts or inquiries. The accounts and inquiries may produce the materials which enable summary judgment to be entered or compel a settlement. See Code, SS. 87-88; R.S.C. Order 43. For an Outline of the Main Steps in the Accounting Procedure, See Appendix II.

D SUMMARY JUDGMENTS:

11. Apart from the more straightforward and regular applications for judgment in default of pleadings or appearance which are always susceptible to late applications for leave to enter appearance or file defence out of time, there are important summary procedures for obtaining speedy judgment. As far as pleadings are concerned, a stern warning to an opponent that default judgment will be entered sometimes produces the necessary reaction. It is now becoming frequent for attorneys to seek their opponents' consent for an extension of time for additional periods which exceed the length of time originally permitted by the rules. This is hardly ever justified. See Appenx.III

12. The most well known of the summary judgment procedure is that which is known after the English Rule as the Order 14 procedure. For this procedure to apply, the Defendant must have entered appearance, the statement of claim must have been endorsed on the writ or served on the Defendant and the affidavit in support must verify the facts on which the claim is based and state that in the deponent's belief there is no defence to that claim or part or no defence except as to the amount of any damages claimed. See Code SS. 79-84. See Appenx. IV.

13. It is important to bear in mind that this procedure may be applied to part of the applicant's claim. The entry of judgment on an incontestable and substantive part of a claim often results in a quick settlement of the entire claim.

14. Where the Judge is satisfied that there is no defence or no fairly arguable point to be advanced on the part of the Defendant, it is his duty to give the judgment for the Plaintiff. Anglo-Italian Bank v. Wells 38 LT. of p. 201. The procedure is designed to prevent a person who is clearly entitled to money from being delayed where there is no arguable ground of defence to the claim. If the Defendant shows an arguable defence to only part of the claim or the claim is partly admitted, the Judge should order judgment for the sum due and give leave to defend the residue, but he cannot make his leave to defend the residue conditional on payment of the amount found to be due. Lazarus v. Smith [1908] 2 K.B. 266.

15. The Defendant can only resist the application by a preliminary objection that the case is not within the Rule /7

or the statement of claim or affidavit is defective or alternatively, by showing that he has a good defence on the merits or a difficult point of law is involved or a dispute as to the facts which ought to be tried, or some grounds showing reasonable grounds for a bona fide defence. It may, for instance, be necessary for an account to be taken to determine if any amount is due. A sham defence will not avail. "A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgment for the Plaintiff. You do not get leave to defend by putting forward a case that is all surprise and Micawberism" per Megarry, V-C in The Lady Anne Tennant v. Associated Newspapers Group Ltd . (1979) F.S.R. 298.

16. Where an application is made under these provisions and the Defendant contends that there is an issue fit for trial, the Judge may with the consent of the parties dispose of the action finally and without appeal in a summary manner on such terms as to costs as he may think fit. See Code S. 86. This exceptional procedure allows a virtually instant arbitration of the suit.

E TRIAL BY EXTRAORDINARY PROCEDURE:

17. ISSUES OF FACT: Where the parties are agreed as to the questions of fact to be decided between them, they may after the issue of the writ by consent and Order of the Court or a Judge, proceed to the trial of any such questions as may be stated for trial without any formal pleadings. See Code S. 329.

The questions of fact to be determined should be set out clearly and concisely. See Code Sch. VI, Form 16. The parties may also consent that from the findings of fact in the affirmative or negative as the case may be, a fixed sum of money or a sum to be ascertained by one of the issues posed should be paid by one of the parties to the other, either with or without costs. On the findings being so made, judgment may be entered for the sum so fixed or ascertained and execution may issue on such judgment forthwith. See Code SS. 330-332.

18. The Court or a Judge may also at any stage of the proceedings order that different questions of fact be tried by different modes of trial or that one or more than one question of fact be tried before others. See Code, Section 340. By this means, a critical question may be determined at an early stage so as to make it unnecessary to conduct a protracted trial over other factual issues which thereby become academic.

19. QUESTIONS OF LAW: The parties may also agree to state questions of law arising in their suit in the form of a special case for the opinion of the Court. The special case must state the facts and identify the documents necessary to enable the Court to decide the questions raised thereby. On the argument of the special case, the Court and parties are at liberty to refer to the documents and stated facts and the Court may draw such inferences of fact or law which might have been drawn from them as if they had been proved at a trial. This provision gives litigants an exceptional opportunity to secure

the speedy determination of their civil disputes. Either party may enter a special case for argument by delivering to the Registrar a memorandum of entry in the prescribed form. It is only where the party is an infant or under disability that leave of a Judge is necessary. See Code, SS. 325-6.

20. If it appears to the Court or a Judge that in any case or matter, there is a question of law which it would be convenient to have decided before any evidence is given or question of fact tried or reference made to an Arbitrator, the Court or Judge may so order and all such proceedings as the decision or the question of law may render unnecessary, may be stayed. See Code, S. 323.

21. The parties may as in the case of trial of issues of fact agree that on the determination of the questions of law, a sum of money fixed by the parties or ascertained by the Court shall be paid by one party to the other and such amount will be recoverable forthwith. See Code, S. 327; R.S.C. Order 33.

22. These procedures may also be used where the issue can be dealt with as a preliminary point and will have a specific bearing on the action or part of the trial. Only such questions as must necessarily arise in the action should be stated and the Court should not be asked to decide fictitious or hypothetical questions, or issues which relate to persons who are not parties. Sumner v. William Henderson & Sons [1963] 1 W.L.R. 823. It is also highly undesirable for preliminary questions of law to be determined on assumed

facts. The facts should either be agreed or found as otherwise the decision or the law may be premature or irrelevant. If therefore facts other than those appearing in the pleadings or agreed statement are necessary or desirable to be established preliminary questions of law should not be decided. Tilling v. Whiteman [1979] 2 W.L.R. 401. If the legal principles are obscure, this procedure is undesirable as the formulation of the ratio may have to be limited to or influenced by the special factual circumstances. Where the issue involves dealing with the whole subject-matter of the action without evidence, it is not a preliminary point, and should be dealt with as a final trial. Roddstock Corp. and Industrial Soy. v. Norton-Roddstock [1968] 2 W.L.R. 1214.

23. A case may be brought to a speedy conclusion by having a determination on the validity of the pleadings. The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or defence or that it is frivolous or vexatious. See Code, S. 238; R.S.C. Order 18, or 19. It is only in plain and obvious cases that the summary process may be employed under this provision. If there is a point of law which requires serious argument, an objection may be taken on the pleadings and the point set down for argument as indicated above. This application should be made promptly and before the close of the pleadings. The application should state precisely what part of the pleadings is being attacked, and what order is being sought, eg. judgment, dismissal of action or stay. If evidence has to assessed, this

Rule should not be resorted to. Eg. of application, action against public authority for breach of statutory duty, brought after one (1) year.

F ORIGINATING SUMMONS:

23. There are many cases in which the relatively expeditious originating summons procedure may be used. Under SS. 531 &531A of the Code, -

> "Any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested".
>
> "Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a Law or an instrument made under a Law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed".

24. Where there are disputed questions of fact on which the cross-examination of witnesses is desirable, it is usual to convert the proceedings to the writ procedure. If the matter is of public importance and interest, either the argument may be ordered to be heard in open Court or the decision given in open Court.

25. This method of initiating the proceedings conduces to an expeditious hearing. Except possibly in the case of an action based on fraud if the Court determines that the proceedings should have been begun by writ, it may order the proceedings to be continued as if it had so begun and in

particular, order that the affidavits shall stand as the pleadings. Even if there is an order for pleadings to be served, such an order should require the pleadings to be served very quickly since the parties would have had notice of the issues and filed affidavits on the matter. As a result, no time is usually lost and an order for speedy trial will be granted in appropriate circumstances.

26. On the Originating Summons procedure, the usual interlocutory orders may be obtained and counter-claims filed.

G SPEEDY TRIAL ORDERS:

27. In the sense that an order for a speedy trial assists in avoiding the normal delay attendant on a case being dealt with by the ordinary motion of the Court's lists, it provides an effective method for the expeditious dispatch of the matter. Under S. 344 (2) of the Code, actions set down for trial take their place in the Cause List as they are set down but a Judge or the Registrar may order otherwise. On the Summons for Directions, the Judge or Master may give such directions as to the future course of the action as appears best adopted to secure its just, expeditious and economical disposal. The parties have a duty at this stage to make all appropriate interlocutory applications and the Judge or Master has a duty to consider all matters which it is possible and convenient to deal with at that stage. See Code, S. 272A, 272F.

28. Frequently, such applications are made on the hearing of Summonses for interlocutory injunctions when the justice

of the matter required that whether the application is granted or refused, the trial should be held early, and the Judge makes the directions one of the conditions of the Order on the Summons. In England, the practice is more developed and there are several Practice Directions on the matter. The system remains flexible however, particularly, in the Chancery Division where the application may be made orally to the Judge in charge of the particular list on which the case falls.

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APPENDIX I

MODEL ARBITRATION CLAUSE

8. If any question or difference shall arise touching the meaning of this Policy or its conditions or the rights obligations or liabilities of either party hereunder the same shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two disinterested persons as arbitrators of whom one shall be appointed by each of the parties within two calendar months after having been required to do so in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after the receipt of notice in writing requiring an appointment the other party shall be at liberty to appoint a sole arbitrator. In case of disagreement between the arbitrators the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrators or umpire respectively, and in the event of the death of any arbitrator or umpire another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrators or umpire so dying was appointed. The costs of the reference and of the award shall be in the discretion of the arbitrator, arbitrators or umpire making the award. And it is hereby expressly stipulated and declared that the obtaining of an award by such arbitrator, arbitrators or umpire shall be a condition precedent to any liability or right of action or suit against the Company.

If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

APPENDIX II

APPLICATIONS FOR ORDER TO ACCOUNT
MAIN PROCEDURAL STEPS

1. Issue and serve Writ of Summons endorsed with claim for an account.

2. Defendant enters appearance if wishes to contest Claim.

3. Plaintiff issues Summons applying for Order.

4. Supporting Affidavit establishing Accounting Relationship specifying status, office and duties of Defendant and alleging failure to account after request.

5. Plaintiff serves Summons and Supporting Affidavit on Defendant.

6. At hearing of Summons, Plaintiff seeks directions as to -

   (a) manner in which account is to be presented;

   (b) evidence to be addressed in support of the accounts;

   (c) the parties who are to attend all or part of the proceedings; and

   (d) the time within which such proceeding is to be taken.

7. Plaintiff bespeaks Order at Supreme Court Registry and serve copy on Defendant.

APPENDIX II contd....

8. Accounting party prepares accounts, swears and lodges affidavit verifying accounts and gives written notice to the Plaintiff.

APPENDIX III

MAIN PROCEDURAL STEPS IN OBTAINING JUDGMENT IN DEFAULT

1. Plaintiff issues and serves on Defendant Writ endorsed with or accompanied by Statement of Claim.

2. Plaintiff searches for appearance and, if none file, affidavit of service. If claim is against Crown obtain leave to enter judgment in default.

3. If claim is for a liquidated amount, Plaintiff files affidavit of non-appearance, that the debt is due and payable and is still subsisting and unsatisfied, or if for recovery of lands, proceed to enter judgment.

4. If claim is for unliquidated damages only and for detention of goods or recovery of lands, enter interlocutory judgment for damages to be assessed.

5. If the claim is for unliquidated damages and/or for detention of goods, as well as for a debt or liquidated sum, enter judgment for the liquidated sum, interlocutory judgment as to the rest with damages to be assessed.

6. In probate and all other cases, the action proceeds as if appearance had been entered. See Code, SS. 68-78.

7. If Defendant appears but fails to file and serve a Defence, Plaintiff serves courtesy notice on Defendant's Attorneys.

8. Plaintiff issues and serves summons for leave to sign final or interlocutory judgment in default of defence, stating grounds of application.

APPENDIX III contd.....

9. In all actions, Plaintiff applys by Motion or Summons with affidavit in support; and the Court or Judge on hearing application gives judgment on the Statement of Claim. Except for simple cases, Notice of Motion should have minutes of the proposed judgment annexed. See Code, SS. 244-57.

APPENDIX IV

MAIN STEPS UNDER 'ORDER 14' PROCEEDINGS

1. Plaintiff issues and serves Writ of Summons with Statement of Claim endorsed therein or accompanying Writ.

2. If Defendant enters appearance, Plaintiff prepares Summons for summary judgment stating -

   (i) whether application relates to whole claim following the terms thereof, or to one or more of several claims specifying which;

   (ii) which of the Defendants, if more than one it is brought against.

3. Plaintiff prepares affidavit in support which must -

   (i) verify the fact on which the claim or relevant part is based; and

   (ii) that in the deponent's belief there is no defence to that claim or part or no defence except as to damages.

4. Plaintiff files and serves Summons and affidavit.

5. Plaintiff attends on hearing of Summons by the Master or Judge and asks for liberty to enter judgment for such remedy or relief as upon the Statement of Claim the Plaintiff may be entitled.