TOPICAL ASPECTS OF
DEFAULT JUDGMENTS AND SUMMARY JUDGMENTS

INTRODUCTION

Both kinds of remedy enable a Plaintiff to obtain early judgment - which is very attractive. compared to the alternative of waiting 3 or more years for trial. For that reason there is no shortage of cases on the subject. This paper will consider some of the more interesting issues which have arisen more or less recently. It is not intended to be a comprehensive consideration of the entire subject. As the law stated herein is Jamaican law, and the audience includes persons from other jurisdictions, I will wherever necessary set out the relevant provisions of the Jamaican Civil Procedure Code so that such persons can if they wish compare them with the provisions in their respective jurisdictions.

DEFAULT JUDGMENTS

ENTRY OF JUDGMENTS

ISSUE NO. 1

When is a Default Judgment (for a debt or liquidated demand) regarded as having been "entered"?

1. *Default Judgments are entered in default either of appearance or defence. Section 70 of the Civil Procedure Code provides:-*

> *"Where the Writ of Summons is indorsed with a claim for a liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants (if more than one) fail, to appear thereto, the plaintiff may, on an affidavit of service of the writ, and of such non-appearance as aforesaid, and to the effect that the debt is due and payable and still subsisting and unsatisfied, enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any) or (if no rate be specified) at the rate of six per centum per annum, to the date of the judgment and costs."*

Section 245 of the Civil Procedure Code provides:-

> *"If a Plaintiff's claim be only for a debt or liquidated demand, and the Defendant does not, within the time allowed for that purpose, file a*

> *statement of defence, and deliver a copy thereof, the Plaintiff may, subject to the provisions of section 258A of this Law at the expiration of such time, enter final judgment for the amount claimed, with costs."*

It is worth noting that S. 70 prescribes the procedure for the entry of judgment but S. 245 does not.

2. *Section 453 of the Civil Procedure Code provides:-*

> *"Where, under any Law, it is provided that any judgment be entered upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular, and contain all that is by Law required, he shall enter judgment accordingly."*

If you think that any Court considering whether a judgment in default of defence had been "entered" under S. 245, would have to consider S. 453, you would be wrong. In ***Workers Savings & Loan Bank Ltd. v Macro Finance Corp. Ltd. et al*** *S.C.C.A. Nos. 102 & 103 of 1996 (decided on December 3, 1996) - the Court of Appeal made no reference to Section 453 at all and that was so despite the fact that the appellants relied on it. Let me declare interest: I was Counsel for the appellants. (In fact I have been involved in many of the cases mentioned herein). As this case, at least in my opinion, changed the law, or, to put it another way, had the effect of declaring that the existing practice of entering default judgments was wrong, I shall have to spend some time discussing it.*

3. *The Court of Appeal decided that a judgment in default of defence exists the moment a Plaintiff files the appropriate documents at the Registry, and that the Registrar has a "ministerial" duty in the matter, which is to "enter them in the decree register for their due effect" as provided for by Section 587 of the Civil Procedure Code which reads:-*

> *"Every final judgment or order of the Court,* ***and every judgment by default****, or by confession or by consent of parties, shall be filed in the*

suit or other proceeding, and recorded in a book to be kept by the Registrar for the purpose and to be called the Decree Book; and the Registrar shall keep an alphabetical index thereof."

The section, in my opinion, has nothing to do with the entry of judgments, but deals with the filing of judgments by the party who has gotten a judgment by default or after trial or by consent, and the recording of such judgments and orders in the Decree Book.

4. *The purpose of the section is obvious- it is to create a record of final judgments (and orders) after they have been entered. For that purpose, the judgments or orders have to be placed on the respective Court files and entries have to be made in the Decree Book to record their existence. I would characterise such acts as clerical which is why the section does not refer to "the officer". Before a judgment in default of appearance or defence can be filed and recorded it must be "entered". In order to "enter" a judgment in default of appearance or of defence, documents have to be filed including affidavits. Hence S. 453 applies; and under it the Registrar is required to examine the affidavits and must "enter" judgment only if the affidavits "contain all that is by law required". Thus until a default judgment is "entered" in the sense used in S.453, it does not exist at all. By contrast, a judgment/order given or made in Court or in chambers exists from that time, but "shall not be acted on or enforced unless and until such judgment or order has been (...) drawn up and entered": S. 579(4).*

5. *The question whether the default judgments existed had arisen in this way. On October 9 the Bank's attorneys-at-law had filed Summonses to extend the time for filing the Defences in both suits. The companies' attorney-at-law had taken the preliminary objection that time could not be extended because judgment in default of defence had been filed on October 8, accompanied by affidavits of debt and of search, and the Judge (Smith J) had ruled that "the proper course is to apply to set*

aside the default judgment", and dismissed the Summons.

6. *In the case of* ***The Jamaica Record Ltd. v Western Storage Ltd.****, S.C.C.A. No. 37/89 (unreported), the Court of Appeal held, where a Summons to Proceed to Assessment to Damages came up for hearing on March 16, 1989 after a Summons to set aside the interlocutory judgment and for leave to file defence out of time had been filed (but not served) on March 15, 1989, and was set for hearing on March 30, 1989, that the Master in chambers had been wrong to hear the Summons to Proceed. Hence the question must be asked: If before the Registrar enters a judgment in default of defence it comes to her notice that a Summons for extension of time has been filed, should she proceed nevertheless to enter judgment? Perhaps that may have to be decided one day.*

7. *To return to the Workers Bank case, the Court relied on Section 70 of the Civil Procedure Code - dealing with judgment in default of appearance - when determining whether the proper documents had been filed to enable the Registrar to enter judgment in default of defence. It must be doubted whether that is correct. Section 70 relates to a different stage of the suit and requires the filing of 4 documents: an affidavit of service, an affidavit of search, an affidavit of debt and the final judgment.*

8. *The Court of Appeal also referred to S. 451, but only to comment that a judgment has retrospective effect. S. 451 provides:-*

   "In all cases not within the last preceding section, the entry of judgment shall be dated as of the day on which the application is made to the Registrar to enter the same, and the judgment shall take effect from that date."

The preceding section referred to, S. 450, deals with judgments given in Court and summary judgments. However S. 451 is significant because it is clear that in all other cases an "application" has to be made to the Registrar to enter a judgment. Then S. 453, as we have seen, imposes a duty on the Registrar to examine such "application" and to enter judgment only if it be "regular ... and contain(s) all that is by law required"

9. *Ss. 70 and 453 together support the argument that the Registrar has a discretion whether to sign and thereby "enter" a Default Judgment based on documents filed in support of the Default Judgment. For instance, an appearance does not have to be served, if it is filed in time. But it may not be on the Court file when the Plaintiff does his search and the Plaintiff may file the papers for the entry of a judgment in default of appearance. If a clerk brings the appearance to the Registrar, is she to ignore it and enter judgment nevertheless? But it is in connection with the affidavit of debt that in my experience, the Registrar is most likely to postpone or to decline to enter judgment. That is because if interest is included therein* ***at more than the 6 percent*** *allowed by S. 70, the Registrar has to be satisfied that the rate claimed is justified by contract. I have a file of correspondence concerning differences of opinion between the Registrars and attorneys-at-law over the years, over the rates of interest claimed.*

10. *After the case was decided I learned of a Trinidadian case, Lopez v Bank of Nova Scotia, S.C.C.A. No. 59 of 1987 (unreported) which decided the very same issue, but in exactly the opposite way. The judge below had held that the practice:*

> *"requires the Registrar to ensure that the papers are in order before the judgment is entered, he has a function to perform before the entry of judgment. The mere leaving of the documents therefore do not constitute a judgment until the Registrar is satisfied that the documents are in order and require him to enter judgment."*

She then granted an order extending the time for delivery of the defence and the Plaintiff appealed, contending that the judge erred in law in holding that a judgment in default of defence only became effective when the Registrar appends his signature to the judgment filed by the Plaintiff.

11. *The appellant submitted "that once the Plaintiff goes to the Registry and files the appropriate documents... and the documents are received by an officer in the Registry and duly stamped with the seal of the Registry, and copies returned to the Plaintiff so stamped, the judgment is entered and there is no requirement for the Registrar to append his signature to the form of judgment". The Court had to consider the equivalent of S. 449 of the Code and based its decision on it. S. 449 provides:*

> *"Every judgment shall be entered by the Registrar in the book to be kept for the purpose."*

12. *While I agree with the decision I respectfully disagree with the basis for it. The "book" in S. 449 must be a reference to the Decree Book mentioned in S. 587 and entry therein, as I have already argued, is required for recording purposes, not for enforcement purposes. As I have argued the relevant sections in Jamaica are S. 451 and, especially, S. 453.*

13. *In concluding the Court observed:*

> *"The entry of a default judgment is a purely administrative act and a judgment when entered becomes a judgment of the Court. It is not a judgment of the Registrar or Assistant Registrar so as to enable him to vary the date of entry and, since it is a default judgment, it only becomes a judgment of the Court and takes effect from the date on which it is entered. That is the day of its date and the judgment should bear that date. there is much, however, to be said for treating a default judgment as entered on the date on which <u>all</u> the necessary documents(not merely the judgment as drawn up) are presented to the Registry for judgment to be entered. This of*

course is a matter for the Rules Committee by which I think the matter ought to be considered."

Thus the Trinidadian Court of Appeal applied the existing procedural law and asked the Rules Committee to consider whether to change it. The Jamaican Court of Appeal interpreted the existing procedural law as meaning that the default judgments were entered on the day they were filed.

14. *The Default Judgments in the Workers Bank cases were set aside by Paul Harrison J. (as he then was) in April 1997, both on the ground that they were irregularly entered and on the alternative ground that there were defences on the merits. In holding that they were irregularly entered the learned judge held (inter alia) that:*

> *"Entry of judgment merely entails the filing of documents, without judicial intervention but the Registrar of the Supreme Court has to be satisfied of the state of affairs at the time of such entry, e,g, whether or not the defendant has "..failed to file a defence" and what is the amount claimed and now due to the defendant. A defence may be filed, even out of time, and "a copy thereof" not yet served on the plaintiff. In such circumstances the Registrar is still obliged to accept such a defence. It is not a nullity: Gill vs Woodfin (1884) 25 Chan. Div. 787. The plaintiff would not then be entitled to enter judgment, until the said defence is set aside."*

15. *There were several other grounds on which he held that the Default Judgments had been irregularly entered. One of them was that, in one of the 2 cases, the affidavit of search was dated October 8, 1996 but referred to a search carried out on October 3, 1996, in breach of a Practice Direction issued by the Registrar of the Supreme Court which required that:*

> *"Every affidavit of search must be sworn and filed on the same day on which search is made."*

ISSUE NO. 2

16. (A) ***What is a "liquidated demand"***

a) *In Birbari Ltd. v Birbari (1976) 23 W.I.R. 98 the Jamaican Court of Appeal held:*

"that in order to be entitled to enter final judgment on a defendant's failure to file a defence to his claim on the ground that his claim is for a debt or liquidated demand, a plaintiff must: (i) show that his claim arises under a contract; (ii) state the amount demanded, or so express it that the ascertainment of the amount due is a mere matter of calculation; and (iii) render sufficient particulars of the contract so as to describe its real nature. it is the nature of the contract on which the claim is based, as well as the fact that a specific sum is claimed, which brings the claim, or fails to bring it, within the meaning of the words "debt or liquidated demand". A plaintiff does not bring his claim within s. 245 of Cap. 177 by the mere device of particularising in his statement of claim, in form of definite sums of money, what in effect are unliquidated damages.

The Court said sums claimed for repairs to the premises occasioned by the Defendant's alleged failure to observe his obligations under the lease were not liquidated amounts, whereas the sum claimed in respect of telephone services supplied to the premises could be so described. The Court set aside the default judgment as to the entire amount. (Just last week I saw a final default judgment entered on a Statement of Claim which claimed a specific amount as "damages".

(B) ***May a Plaintiff enter a judgment in default of appearance which includes interest which has not been claimed in the Statement of Claim endorsed on the Writ?***

b) *In* ***<u>Long Yong Ltd. v Forbes Manufacturing & Marketing Ltd.</u>*** *the Jamaican Court of Appeal set aside a judgment entered under S. 70 in default of appearance, which had included interest at 6% where no interest had been claimed at all. The Court held that a defendant was entitled to know what the Plaintiff was claiming so he could respond to the claim appropriately; and that although interest under the Law Reform (Miscellaneous Provisions) Act did not have to be pleaded it could only be awarded by a judge.*

ISSUE NO. 3

17. ***Is a judgment given at the trial in the absence of the Defendant, a "default judgment?"***

a) *S. 35 2 - 4 of the Civil Procedure Code provides:-*

"If, when a trial is called on, the defendant appears and the defendant does not appear, the plaintiff may prove his claim, so far as the burden of proof lies upon him.

If, when a trial is called on, the defendant appears and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action, but if he has a counterclaim, then he may prove such counter-claim, so far as the burden of proof lies upon him.

Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after the trial."

Thus if the Plaintiff proves his claim; he will obtain judgment, but such judgment may be set aside.

b) *In **Mills v Lawson et al** interlocutory judgment in default of appearance was entered on 8th April 1988, in a motor vehicle accident case. Damages were assessed on 25th January 1988 and final judgment entered. The Defendants did not appear at the assessment. The Defendants unsuccessfully applied to the Master to set aside the **interlocutory** judgment. They then applied by motion to set aside the **final** judgment , again without success. They then applied on September 22, 1989 by motion to set aside both the interlocutory and the final judgments on the ground that they had a good defence and had not had an opportunity to be heard. This time they succeeded, and the matter went to the Court of Appeal. The issue was whether S. 354 applied i.e. whether the assessment of damages was a trial, in which case the 10 day time limit for applications to set aside applied; or whether it was a default judgment under S. 77 which had no time limit S. 77 provides:*

"Where judgment is entered pursuant to any of the preceding

sections of this Title, it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may be just."

c) *In* ***Shocked v Goldschmidt*** *(1998) 1 All E.R. 372 the English Court of Appeal said (at p. 382 c-d)*

> *"To equate judgments by default with judgments given after a trial is heretical. If it were correct, a party who chose not to be present at trial could afterwards change his mind, and provided he was prepared to pay the costs thrown away could always procure a hearing of the matter, however much the time of the court had been wasted by his decision, whatever the inconvenience to his opponent, and however little his own conduct merited indulgence."*

d) *In* ***Morris v Taylor*** *the Jamaican Court of Appeal considered Ss. 352 and 354. Trial of the case had commenced. The Defendant's Counsel had cross-examined the Plaintiff and his witnesses. The Plaintiff had closed his case (for assault and damages for personal injury) and the case was adjourned. The Defendant himself had not been present in Court. When it resumed neither the Defendant nor his attorney was present. The Judge treated the Defence as "abandoned", and the proceedings as an assessment of damages and gave judgment for the Plaintiff. The Defendant changed lawyers, applied for leave to apply out of time to set aside the judgment on the basis that he had not known of the trial date and that it was a default judgment. The Plaintiff argued it was a trial. The judge refused the application, and the Defendant appealed. The Court of Appeal set aside the judgment, and ordered a new trial.*

Campbell J.A. (Ag.) said:

> *"In the circumstances which presented itself to the learned trial judge on 7th December 1979, he had only two alternatives open to him. One was to treat the appellant as having closed his case without adducing evidence or alternatively, treating the matter as coming within sections 352 and 354 of the Judicature (Civil Procedure Code) Law....*

ERRATUM

Insert the following below the third line on page 10:-

The Court of Appeal held that S. 77 applies only to a judgment entered where an appearance has not been entered, and not to a judgment entered after an assessment of damages in the absence of the defendant. The assessment of damages was a trial of the issue of damages and the resulting judgment was not a default judgment.

On either alternative it was incumbent on the learned trial judge either to give judgment for the respondent on the basis of the facts adduced by him in evidence with a right of recourse by the appellant to section 354 above, or to dismiss his claim as not established on the evidence. it was not open to him to treat the appellant's defence as abandoned except where the same has been voluntarily withdrawn. A ***fortiori*** *there was no power or authority in the learned trial judge to treat the defence of the appellant as having been abandoned merely because of his absence from court on December 7, 1979...*

What section 354 contemplates is a case in which the defendant has had a judgment of the court given at a trial against him at which trial he was not heard wholly or partially in his defence, had not participated fully in the trial and had not waived his right to do so."

e) In ***McKenzie v Campbell*** (1982) 29 J.L.R. 125 the Court said:-

"There is no doubt, that the judge is empowered by Section 354 of the Civil Procedure Code to set aside a judgment entered by default" (at 127 F-G).

In that case the Defendant did not appear at the trial. If would appear that greater care needs to be taken in using the term "default judgment".

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ISSUE NO. 4

18. ***Can a judgment in default of appearance or defence be properly entered after an appearance or defence has been (a) filed, OR (b) filed AND served, out of time?***

a) *This issue was recently considered in* ***Lady Anson v Trump*** *(1998) 2 All E.R. 332 (C.A.). It was held by the English Court of Appeal that where a defence was served after expiry of the time limit for service, such service was not valid for the purposes of Ord. 19 R 2(1), and a judgment in default*

entered after such service was regular, although liable to be set aside by the court as a matter of discretion, not as of right. The defence was not a regular defence, and the rule applied to a regular defence. However if when he entered the default judgment the Plaintiff knew that a defence had been filed, that would be a factor when the Defendant applied to set aside the Default judgment.

*With minor differences Ord. 19 R 2(i) is the equivalent of S. 245 of the Code. Hitherto the law in England had been that if before judgment was entered the defendant served a defence out of time, a default judgment could not be entered based on the authority of **Gill v Woodfin** (1884) 25 Ch. D 707; and **Gibbings v Strong** (1884) 26 Ch. D 66, both cases from the English Court of Appeal which have been applied in Jamaica e.g. in the Workers' Bank case when Paul Harrison J, as we have seen, set aside the default judgments on that and other grounds. As far as I know this case has not yet been considered in Jamaica. Of course it is not binding on a Jamaican judge.*

b) *Would the same reasoning apply to a judgment entered in default of appearance after a late appearance had been filed? I would argue that it would not, if a Defendant has served Notice of Appearance in keeping with*

S. 54 of the Civil Procedure Code which reads:

> *"When a defendant shall appear after the day limited for his appearance, he shall, on the day on which he enters an appearance to a writ of summons, give notice of his appearance by delivering to the plaintiff's solicitor, or (if the plaintiff sues in person) to the plaintiff himself, a copy of the memorandum of appearance.*
>
> *Such notice may be given either by being delivered in the ordinary way at the address for service, or by prepaid letter directed to that address, and posted on the day of entering appearance in due course of post."*

The difference is that S. 54 provides for late entry of an appearance, and provides a way of curing the lateness, so that if the Defendant complies with it the appearance is made regular; whereas S. 245 provides no such remedy.

<u>SETTING ASIDE DEFAULT JUDGMENTS</u>

<u>ISSUE NO. 5</u>

What is the merit threshold for the setting aside of a <u>regularly</u> entered default judgment?

19. *The leading case is still* **<u>Evans v Bartlam</u>** *(1937) 2 All E.R. 646. The most relevant passages are the following:-*

> *"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 Atkin p. 650).*

> *"... 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 Russell, p. 651)*

> *"...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." (Lord Wright p. 656).

a) *What is involved in the exercise of the Court's discretion is the balancing of the merits of the Defendant's case against the reasons why judgment was allowed to go by default. Of course the onus is on the Defendant. The decided cases merely illustrate the range of the variables which may have to be taken into account. Thus in __Vann v Awford__ (1986) 130 S.J. 682 the English Court of Appeal set aside a judgment in default of appearance which had resulted in a final judgment after damages were assessed, although the Defendant had lied when, on oath, he said that the had no knowledge of the proceedings, and despite the prejudice to the Plaintiffs, as there were ample arguable defences. One of the judges observed:*

> *"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."*

20. ***__ISSUE NO. 6__***

What are the main considerations for the setting aside of a judgment given at the trial in the absence of the Defendant?

a) *In __Shocked v Goldschmidt__ the English Court of Appeal held that different considerations apply than on an application to set aside a default judgment. The main consideration was not whether there was a defendant on the merits but the reason for the absence of the defence. If the absence was deliberate the court would be unlikely to allow a rehearing. Other relevant considerations included the prospects of success of the Defendant at a re-trial, any delay in applying to set aside, the conduct of the Defendant, whether the Plaintiff would be prejudiced by the judgment being set aside, and the public interest in there being an end to litigation. The Court*

compared the principles applicable to default judgments and judgments given at a trial in the Defendant's absence.

b) *The Court held that each case depends on its own facts, but certain propositions could be derived from the decided cases namely:*

> *"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 an accident or mistake, the court will be unlikely to allow a rehearing. (3) Where the setting aside of a 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 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."*

c) *In **<u>Morris v Taylor</u>** the Court of Appeal found that although the Defendant's attorney-at-law had participated in the trial, the Defendant had not known the trial was proceeding, and that he only learned of the judgment much later, and, as we have seen, set aside the judgment.*

SUMMARY JUDGMENTS

ISSUE NO. 1

What is the nature of the jurisdiction to order Summary Judgment?

*21. A summary judgment unlike a default judgment does not depend on default by the Defendant. In **Symon & Co. v Palmer's Stores** (1912) 1 K.B. 259, Buckley L.J. said:*

> *"Trial, as a rule, must precede judgment. Order xiv provides an extraordinary procedure in certain cases. It is a procedure in which, instead of trial first and then judgment, there is a judgment at once and never any trial. Such a procedure must be strictly confined to the specific cases for which it is provided."*

The jurisdiction depends on:

i) the Plaintiff filing and serving a writ "specially endorsed with or accompanied by s Statement of Claim under S. 14 of the Civil Procedure Code. Under S. 14 any writ may be so endorsed except where the suit includes a claim for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or a claim based on an allegation of fraud; or a probate action.

ii) there must be an affidavit by the Plaintiff "or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed, if any, and stating that in his belief there is no defence to the action".

iii) the Defendant must have entered an appearance. (If he has not, of course, the Plaintiff can enter a default judgment but as that is not a judgment on the merits it is liable to be set aside).

*a) As regards (i) note that it has been held that proceedings resulting in a summary judgment are proceedings "tried" in a Court hence interest under the L.R. (M.P.) Act may be amended: **Gardner Steel Ltd. v Sheffield Brothers** (1978) 3 All E.R. 399 - followed in the **Long Yong** case.*

b) *It appears that it is condition (ii) which has been most often discussed. In <u>Lagos v. Grunwaldt</u> (1910) 1KB41 the affidavit was held to be irregular as being made only on information and belief, and the Court held it had no jurisdiction to make the order. It had been made by an English solicitor on behalf of the Plaintiff who was a lawyer in Argentina, suing for fees, and stated that the deponent's "knowledge" was obtained from correspondence received from the Plaintiff and from correspondence and conversations with the Defendant's solicitors. That case was followed in the* ***Symon & Co.*** *case. Of course similar considerations apply to an affidavit of merits filed in support of an application to set aside a default judgment, the classic case being* ***<u>Ramkissoon</u>***. *In the* ***<u>Jamaica Record</u>*** *case the affidavit of merits was sworn to by an attorney-at-law, but he was an in-house attorney.*

c) *S. 84(2) provides that "if the Plaintiff makes an application under this Title where the case is not within the Title, the application shall be dismissed with costs to be paid forthwith by the Plaintiff". The provision applies also where in the judge's opinion the Plaintiff "knew that the defendant relied on a contention which would entitle him to unconditional leave to defend" - a clear indication that this "extraordinary procedure" is not to be abused.*

In a case from the Cayman Islands, ***<u>News Bureau v Cohen</u>*** *(1988-89) C.I. L.R. 56, the Plaintiff had filed an Originating Summons and the Defendant had made admissions. The Plaintiff applied for summary judgment and the Court held that it was only available in actions begun by writ.*

<u>ISSUE NO. 2</u>

Does it affect jurisdiction if the Defendant files and serves a Defence before the Summons is heard?

22. *On principle it should not, because the jurisdiction exists not because a Defence has not been filed - which would be a default situation - but because the Plaintiff*

asserts that there is no defence - with a common 'd'. However the issue does arise from time to time. In fact it arose in the Court of Appeal 2 weeks ago, where the Court itself raised it. And there are summary judgment cases in which the Court refers to the Defendant's failure to file a Defence e.g. ***Webster v Alfonfo*** *(1980) 34 WIR 204, at 205, where Hassanali J.A. stated that "the Defendant* ***failed to deliver a defence*** *and, on 15th March 1978, the Plaintiff made application under Order 14 of the Rules of the Supreme Court 1975 for leave to enter final judgment." In a first instance case from the Cayman Islands,* ***Bank of Butterfield v Crang*** *(1992-93) C.I. L.R. 409, at 423-4, Smellie J. said, obiter, that where a Defence is filed before a Summons for summary judgment is heard the "strict requirements of Rule 23 (the equivalent of S. 79(i) were not met". In fact there are several reported cases where applications for summary judgment were heard after Defences were filed. See e.g.* ***Reynolds Jamaica Mines Ltd. v Ocho Rios Hotels Ltd.*** *(1962) 4 W.I.R. 541,* ***North Eastern Distributors Ltd. v Desnoes & Geddes Ltd.*** *S.C.C.A. 60/96 where a Defence and Counterclaim claiming a set-off was filed. In* ***Gilbert Ash Ltd. v Modern Engineering*** *(1973) 3 All E.R. 195 (H.L.) the Defence was delivered on October 28, 1969, yet the Summons for summary judgment was taken out in May 1972 and heard in July 1972. The issue should really be in no doubt.*

ISSUE NO. 3

What is the merit threshold for the grant of leave to defend?

23. Obviously the threshold is higher for unconditional than for conditional leave to defend. If the judge regards the proposed defence as suspicious - for example because of deliberate and undue delay in raising it or filing it as well as its contents, he/she may impose conditions which reflect that e.g. a payment into Court of the whole or part of the amount claimed. See e.g. ***Bank of Butterfield v Crang****, already cited. However the judge should not order the Defendant to pay a sum which he is incapable of paying. The Defendant cannot complain if the financial condition is difficult for him to meet, only if it is impossible; and he must put sufficient evidence before the Court, and make full and frank disclosure:* ***M.V. Yorke Motors***

<u>v Edwards</u> (H.L. (1982) 1 All E.R. 1024.

*For unconditional leave the test has been stated to be that the Defendant must satisfy the judge, as regards conflicting affidavits, that there is a fair or reasonable probability of his having a credible defence, and not merely that there is a faint possibility. See **<u>National Westminister Bank v Daniel</u>** (1994) 1 All E.R. 156 (C.A.).*

*But if the facts are not in dispute and only a question of law is involved should the judge (or the Court in an action for Specific Performance) decide the question of law, or leave it for the trial? The cases are not consistent; some say that even if the question of law is difficult the judge should decide it while others say that if a prolonged hearing is necessary leave to defend should be given. See: **<u>European Asian Bank v Punjab & Sind Bank</u>** (1983) 2 All E.R. 508 (C.A.) and <u>Home & Overseas Insurance Co. Ltd. v Mentor Insurance</u> (1989) 3 All E.R. 74. If it will take a long time to decide **whether** the issue of law arises leave to defend should be granted: **<u>R.G. Carter Ltd. v Clarke</u>** (1990) 2 All E.R. 209 (C.A.).*

*The practical solution may be for the judge to give unconditional leave to defend but to arrange an early trial (before him, preferably, as he will already know the issues) of the issue as a preliminary issue. That was done in the **<u>Gilbert Ash Ltd. v Modern Engineering</u>** case.*

*a) There is a West Indian case which puts the threshold rather low, and would not appear to be good law. It is **<u>Williams v Williams</u>** (1982) 30 WIR 77, a case from the Court of Appeal of the Eastern Caribbean States. The relevant rule contained the reference to "some other reason" why the case should be tried. The Court held that:-*

> *"The procedure for summary judgment requires that leave to defend ought to be given whenever there is an issue to be tried, even though the judge or master may think the defendant will fail, provided of course, that there is no good ground for believing that the so-called defence is a sham. In short, the defendant is not bound to show a good defence on the merits.*

> *He must, however, satisfy the judge or the master that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim".*

In his reasons for judgment the trial judge had said:

> *"My conclusion from a consideration of the pleadings and affidavits is that there is little if any substance in the defence. However, I shall grant conditional leave to defend, and unless the defendant pays into court the amount of the claim i.e. $60,838.85 within fourteen days the plaintiff shall have leave to enter final judgment.."*

The Court of Appeal said that the order for payment would deprive the Defendant of the right to defend which the order granted to him, and gave the Defendant unconditional leave to defend. So a Defendant whose defence had "little if any substance" - a view the Court of Appeal did not depart from - was given unconditional leave to defend.

*b) In the recent local case ease of **Chin v Money Traders & Investment Ltd.** S.C.C.A. No. 113/97 the Court of Appeal considered the threshold. It referred with approval to **Jones v Stone** (1984) A.C. 122 and **Jacobs v Booth's Distillery Co.** (1901) 85 L.T. 262 (H.L.) From the first it quoted inter alia the following passage:-*

> *"The proceeding established by that order is a peculiar proceeding intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay."*

From the second it quoted inter alia the following passage:-

> *"My Lords: I only wish to make it very clear that in giving judgment in accordance with that which has been proposed by the Lord Chancellor, there is no expression of opinion upon the merits of this case. The view which I think ought to be taken of Order XIV is that the tribunal to which the application is made should simply determine, is there a triable issue to go before a jury or a court? It is not for that tribunal to tender into the merits of the case at all. It ought to make the order only*

when it can say to the person who opposes the order, 'You have no defense. You could not by general demurrer, if it were a point of law, raise a defence here. We think it impossible for you to go before any tribunal to determine the question of fact.' We are not expressing any opinion whatever upon the merits of the case."

Can a counterclaim be taken into account?
In **Axel Johnson Petroleum v MG Mineral Group** (1992) 2 All E.R. 163 (C.A.) The court held that where the amount of a counterclaim was ascertainable it was for a liquidated claim and as such was capable of being set off against the Plaintiff's claim; that the question whether the defendants were entitled to recover on their counterclaim constituted a triable issue of liability; that the amount due to the defendants if they succeeded on that issue, being ascertainable, was capable of being set off; and, therefore, that the counterclaim constituted a prospective defence which entitled the defendants to unconditional leave to defend.

ISSUE NO. 4

In granting or refusing leave to defend is a judge exercising discretion?

24. Goff L.J. said, in **European Asian Bank v Punjab & Sind Bank**, at p.515 e - h.
"Now it is true that the words used in the rule are 'the Court may give such judgment for the plaintiff...' and at first sight the word 'may' could be read as indicating that the court has a discretion. But it is to be observed that the court can only give such judgment if (1) the court has not dismissed the plaintiff's application (presumably) for some defect in the application itself, e.g. that there is no due verification of the claim, and (2) the defendant has not satisfied the court either (a) that there is an issue or question in dispute which ought to be tried or (b)

> *that there ought for some other reason to be a trial. Once these three possibilities are eliminated, it is very difficult indeed to conceive of circumstances where the court should not give judgment for the plaintiff, especially when it is borne in mind that the policy underlying Ord 14 has always been that, on a proper application, if the judge is satisfied that there is no triable issue, he should give judgment for the plaintiff (see The Supreme Court Practice 1982 vol 1, p 165, para 14/3-4/2, and the cases there cited). The use of the word 'may' in this context is, well strongly suspect, a survival from the days when Ord 14 did not contain the words 'or the defendant satisfies the Court... that there ought for some other reason to be a trial...' If, having regard to those words, there remains any discretion in the court, once the three possibilities well have referred to are eliminated, to decline to give judgment, it can only be a discretion of the most residual kind."*

It should be noted that the words "that there might for some other reason to be a trial" do not appear in S. 79(i) or S. 86A of the Civil Procedure Code. Since it is those words which arguably make the difference, it is very doubtful whether this case could be relied on in Jamaica. If the order for summary judgment in favour of the Plaintiff is not an exercise of discretion an appeal against the order will be by way of a rehearing, and will not be limited to a mere review of the judge's exercise of his discretion.

<u>ISSUE NO. 5</u>

Default and Summary Judgments and the Right of Appeal

S. 83 of the Civil Procedure Code dealing with summary judgments provides:

> *"Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise, as the Judge may think fit."*

S. 11 (1)(b) of the Judicature (Appellate Jurisdiction) Act provides that no appeal shall lie from an order of a judge giving unconditional leave to defend an action. In a case called **<u>Manderson-Jones v S.I.T.A.</u>** *a default judgment was set aside on the*

ground of irregularity, and the Defendant was given time to file its Defence. The Plaintiff appealed. Before the Court of Appeal the Defendant successfully took a preliminary objection that the Court of Appeal had no jurisdiction to hear the appeal by virtue of S. 11(1) (b). The Privy Council allowed the appeal (P.C.A. No. 69 of 1997) holding that:-

> *"Section 11 (1)(b) as to the granting of "unconditional leave to defend" applies only to a case where leave to defend has been given under section 83 of the consolidated Judicature (Civil Procedure Code) Law.*
>
> *Section 83 deals, and deals only, with cases which have been brought before the court for summary judgment under the procedure which is set out in title 13 of the Code, which is derived from R.S.C. Ord. 14."*

The Defendant had confused default judgments and summary judgments, and equated the giving of time to file a defence, after a Default Judgement is set aside, with the granting of unconditional leave to defend when an application for summary Judgement has failed. I can only hope that I have not confused you.

Dated the 20th day of February, 1999

DENNIS GOFFE Q.C.