JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 104/89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	LEROY MILLS	PLAINTIFF/APPELLANT
AND	ROLAND LAWSON	1ST DEFENDANT/RESPONDENT
AND	KEITH SKYERS	2ND DEFENDANT/RESPONDENT

W.K. Chin See, Q.C. & Oirin Tonsingh
for appellant

Mrs. Pamela Benka-Coker & Michael Levy
instructed by Clinton Hart & Company
for the Respondents.

30th April, 1st & 28th
May, 1990

CAREY, J.A.

Mr. Mills claimed that he was injured on 28th October, 1987 while attempting to board a bus owned by Mr. Lawson and driven at the time by Mr. Skyers. He pleaded that the accident was caused by their negligence. His writ and statement of claim against these defendants (the present respondents) was filed on 17th December, 1987. Interlocutory judgment in default of appearance or pleadings was entered on the 8th April, 1988. Mr. Mills' attorneys-at law filed a summons to proceed to assessment of damages on 2nd May, 1988. It was set down for hearing on 4th July, 1988. The order on that summons was made on 28th July, 1988. Damages were assessed on 25th January, 1989 and final judgment entered. The defendants did not appear and were not

represented at this hearing.

On 26th May, 1989, they suddenly roused themselves to action; they entered appearance to the writ against them and also applied to set aside the interlocutory judgment and for leave to file a defence. The Master refused on 28th June to set aside that judgment. The appellants were not quieted by that dismissal and filed a motion to set aside the final judgment. The matter was heard apparently on 27th July and 21st September, 1989 before Chester Orr J. who dismissed it. On the very next day, the appellants filed another motion for an order that -

> "1. The Final Judgment entered herein by his Lordship Mr. Justice Clarke on the 25th January, 1989 upon an uncontested Assessment of Damages herein and the Interlocutory Judgment entered on the 8th April, 1988 herein both against the abovenamed Defendants together with all intervening and subsequent Orders be set aside on the ground that the Defendants have a good Defence on the merits of this claim and have not had an opportunity of being heard on the merits and now desire so to be heard;
>
> 2. Leave be granted to the Defendants to file a Defence within fourteen (14) days of the making of such an Order."

That motion came on for hearing before Theobalds J, on 16th November, 1989 and 4th December, 1989 when he ordered -

> "(1) That the Final Judgment against the First Defendant Roland Lawson is hereby set aside.
>
> (2) That Leave is granted to the Defendants to file and deliver a defence within 14 days of the date hereof on condition that the amount of $54,715.01 be paid into a Commercial bank in a joint interest

> "bearing account in the joint names of the Attorneys-at-law for the Plaintiff and the Defendants within 10 days of the date hereof;
>
> (3) .....
> .....
>
> (4) On the application for leave to appeal by the Plaintiff:-
>
> (a) Leave to appeal by the Plaintiff on the issue as to whether or not this Assessment was a trial in order to invoke the provisions of section 354 instead of section 77 of the Judicature (Civil Procedure Code) Act is granted;
>
> (b) Leave to Appeal generally is refused."

On the application of the appellant, this court granted leave to appeal generally.

We are concerned therefore with two matters, firstly, a question of construction of sections 77 and 354 of the Civil Procedure Code Law in respect of which leave was granted by the learned judge and, secondly, a question of the exercise of his discretion in setting aside the default judgment. The judge gave a somewhat exiguous oral judgment after an adjournment which has occasioned no little difficulty to Mrs. Benka-Coker in her endeavours to support it. Although we were told detailed arguments were placed before him, he did not expose his thinking to us and we have unfortunately, been deprived of his analysis or comments on either of the questions with which we are faced. He was content to express himself in these terms -

> " I have noted the arguments put forward and the affidavits filed in support of and in reply to the application. The matter is not as one sided as it might have appeared at first as the Affidavits of the Defendants do disclose a lack of sincerity.

> " With that in mind and without going into the facts in detail the final judgment is set aside. I propose to grant leave to the Defendant on certain terms."

Having prescribed the condition, he continued -

> "The idea behind this is that the Plaintiff has been suffering hardships through fault not his own. The Defendants were concerned not so much with the Judgment as to liability but as to the amount awarded."

Mr. Chin See argued that the judge should not have entertained the application because the time limit for making the application had expired and there was no application made to enlarge time. Section 354 of the Civil Procedure Code Law applied specifically to the circumstances of this case, where final judgment had been entered after damages had been assessed in the absence of the defendants.

Mrs. Benka-Coker responded that the matter was governed by Section 77 of the Code which contained no time constraint. Section 354 applied to trials which meant where both liability and damages were determined by the court, and an assessment of damages was not a trial.

Section 77 provides as follows -

> "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."

One of the preceding sections is 72, which provides -

> "If the claim indorsed on the writ is, as against any defendant, for unliquidated damages only, and that defendant fails to appear, the plaintiff may enter interlocutory judgment against him for damages to be assessed and costs, and proceed with the action against the other defendants, if any."

The judgment which is entered when the pre-conditions of that provision are satisfied, is an interlocutory judgment. But other provisions deal with claims for liquidated damages and the non-appearance of the defendant when final judgment may be entered. See for example Section 71. Section 77 is not concerned therefore exclusively with final judgments; it is concerned with judgments entered in default of appearance. The "Title" referred to in Section 77, is "Title 12 - Default of Appearance." Section 72 precedes Section 77 but the judgment entered is interlocutory. It hardly needs stating that in the present case, final judgment had been entered upon the assessment of damages. The defendants desired to have that judgment set aside. That final judgment plainly is not within the ambit of Section 77.

In my judgment, Section 77 entitles a judge or the Master to set aside judgments entered in default of appearance whether the judgment entered be final or interlocutory. This observation is not entirely accurate, however. It is also important to add that the power under the section is exercisable in respect of those cases in which the defendant has <u>not entered an appearance</u>. If it is appreciated then that the term 'default of appearance' is used in this sense, then, the formulation is, I think, eminently right. For this reason as well, I am not persuaded that Section 77 is capable of being invoked as Mrs. Benka-Coker has endeavoured to maintain.

Section 354 of the Code, to which we must now turn, provides as follows -

> "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."

The question which now falls to be determined is whether an assessment of damages is a trial because it is at least plain that while Section 354 deals with judgments at a trial, the scope of Section 77 is limited to judgments entered where appearance has not been entered.

Mrs. Benka-Coker for the respondents, seemed to think that a civil trial necessarily required a determination of liability as well as damages at one and the same time. Her submission was that, when a judge determines the issue of liability alone, as is procedurally and practicably possible, that would not be a trial. And to be logical, she had to be saying as well that if liability were admitted or judgment entered with damages to be assessed, then the assessment issue was not a trial.

That argument, is, in my judgment, demonstrably unsound. On either issue, a judicial determination is called for. The party, in these circumstances the plaintiff would be required to prove his claim; he must discharge the burden of proof cast upon him. He must call evidence which the judge must hear and consider. He must then decide as a matter of law whether the claim (whether it be as to liability or as to damages) has satisfied the standard of proof necessary.

I think also, that the argument fails, because there are no words in Section 354 limiting the word "trial" to cases where liability and damages are required to be determined, as opposed to liability or damages. Both are issues which fall to be determined in civil trials but that is not inevitably so. The parties may well accept liability and require a determination as to damages. Sometimes the parties may agree damages and leave the issue

of liability to be determined by the judge. A trial then can only mean a process whereby a judicial determination is called for on some triable legal issue. Thus there may be trials of issues, references, inquiries and assessments of damages and also trials of actions. It is a term of general application and it is used in that way in Section 354. In my view, it cannot be without significance and this is consistent with what I have so far said, that Section 366B speaks of - "the Court or a Judge may ..... order that the action proceed to trial before a Judge (with or without a jury) for assessment of damages."(Emphasis supplied) Mrs. Benka-Coker did admit that if the court held, that an assessment of damages was a trial, then the time limit provided in Section 354 would have passed at the date of her application and would have entitled the judge in the absence of any application to enlarge time, (which was not made before him) to strike out her application.

I must now say something with respect to the matter of the judge's exercise of his discretion. It is the law that this Court may only interfere with the exercise of a judge's discretion where he applies the wrong principle or applies the correct principle in a contrary way or the order is plainly wrong. See the observations of Lord Diplock in Hadmor Productions v. Hamilton (1982) 1 ALL E.R. 1042 at P. 1046, on the limited function of an appellate court in an appeal against the grant or refusal of an interlocutory judgment. I cannot conceive that the approach of this court differs where the appeal is against the grant of conditional leave to defend.

The learned judge was required to consider the length of the delay and whether it had been satisfactorily

accounted for. See City Printery Ltd. v. Gleaner Co. Ltd. (1968) 13 W.I.R. 126. He was obliged to do so because ex hypothesi no time constraint applied on the interpretation he must have accepted. Then he was required to consider as well, whether the defence as projected had any merit.

The learned judge stated that the affidavits "do disclose a lack of sincerity." No one was able to explain what that statement meant or what principle it was meant to embody. The sincerity of the defendants' affidavit was not, it is accepted, a factor for consideration in determining whether the explanation given was satisfactory. Nor was it relevant to determine the merit or otherwise of the defence. But it is conceivable that possibly the learned judge was saying nothing more than that he could not accept the explanation given as being satisfactory. If that be so, the order he made, plainly cannot be justified on that reasoning.

With regard to his other observation that - "the defendants were concerned not so much with the judgment as to liability but as to the amount awarded," again, counsel experienced some difficulty in appreciating its true sense. If it meant that the defendants had no belief in their case, that is, their defence, I would have thought, that must result in their application being dismissed. That reason could hardly result in the defendants being allowed to file an unmeritorious defence.

I am driven to conclude that the learned judge's discretion was exercised either on a misunderstanding of the law or that the exercise of his discretion to grant the application was so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act

judicially, could have reached it.

There remains one other matter to which I must advert. On the material before the judge, it was clear that the plaintiff had done everything that the Civil Procedure Code required him to do. There is no suggestion that there was any irregularity in the entering of final judgment. Due notice of the hearing of the assessment had been served upon the appellants. The reason for their inactivity was that they had given their insurers their writs, and were relying on the assurance that the matter would be taken care of. The insurers' reason was that the file had been mislaid. None of these reasons could be regarded as a satisfactory explanation for the delay in applying to set aside the judgment. The judge appears to have come to this view, but for reasons which are not readily appreciated, nonetheless granted the application.

Mrs. Benka-Coker did, out of prudence, apply to us to enlarge time to make the application to set aside the judgment, but for my part, I could not accede to that request seeing that no further material has been provided explanatory of the delay.

It is for these reasons that I agreed with my brethren in allowing the appeal and setting aside the order of Theobalds J with costs both here and below to the appellant.

DOWNER, J.A.

The issue of law in this appeal is whether the order made by Theobalds J in the Supreme Court, setting aside the assessment of damages for $151,670.00 against the respondent Roland Lawson was erroneous and should therefore be set aside on appeal. The assessment was made by Walker J, and the consequence of the order made by Theobalds J, has been to deprive Leroy Mills the appellant of his judgment.

Proceedings prior to the setting aside of the order of assessment on appeal

The appellant's claim was in negligence for personal injuries and his writ of summons was issued against the respondent Lawson who was the owner of the motor vehicle and one Skyers his driver. No appearance was entered and the appellant Mills then entered an interlocutory judgment in respect of liability in default of appearance on 8th April, 1988. Further on 20th July, before the Master in Chambers, the appellant received an order to proceed to assessment of damages at a hearing which it was estimated would be completed in one day. The mode of assessment was to be by judge alone in open court. Neither the respondent Lawson nor his driver Skyers appeared at the hearing of this summons.

The next step was crucial. On 25th January, 1989 Walker J assessed damages against the respondent Lawson for the sum of $151,670.00 with interest and the assessment was made without the appearance of the respondent or counsel on his behalf. No written judgment was delivered but the appellant must have satisfied the learned judge that he was entitled to the quantum of damages awarded. This aspect of

the case is so important that it is necessary to quote the section of the Civil Procedure Code (The Code) which justifies this order. Section 552 reads -

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

Be it noted that before the trial commences the appellant would have had to satisfy the court that the procedural requirements as to notice were complied with. Then once he proves his case on balance of probabilities, there is a trial within the intendment of the section. There is no indication in the record that the copy of this assessment bears a judicial stamp or that it was entered in the judgment book, but no objection to it was taken by the respondent.

It is at this juncture on 26th May, five months after the assessment was made that the respondent Lawson and Skyers entered the arena. They entered an appearance. Further in their summons they asked that the interlocutory judgment in respect of Skyers be set aside. There seems to have been an error here, for although the summons purports to be made on behalf of both respondents, the request to set aside the judgment was expressly made on behalf of Skyers alone. Yet the request for leave to file a defence was made by both parties. Perhaps it is helpful to quote the relevant portion of the summons to highlight the error. -

> "as soon thereafter as Counsel may be heard on the hearing of an application on behalf of the Defendants for an Order that:
>
> 1. The Interlocutory Judgment in Default of Appearance entered against the Second named Defendant in Judgment

" Binder No. 674 Folio 344 be set aside;

2. Leave be granted to the Defendants to file a Defence within fourteen (14) days;

DATED the 26th day of May, 1989."

The record on the whole has may errors but no objection was taken to them and they do not affect the merits of the case.

This summons was dismissed by the Master, pursuant to Section 354 of the Code on the 28th of June, 1989 and he had jurisdiction to hear and determine the matter on the merits. See Kenneth Mason v. Desnoes and Geddes Ltd. Privy Council Appeal No. 54 of 1988 delivered 2nd April, 1990. The Master had ruled that the matter ought to have been listed before Walker J, who had made the order for assessment. Had Walker J been available, this would have been a desirable procedure and an adjournment, so that it could have been heard before that judge would have been preferable to a dismissal. The order speaks of setting aside the interlocutory judgment in default of appearance, but the only order that could then have been set aside was the order of assessment of January 25, 1989. This must be so as the interlocutory order was then merged with the final order. It is appropriate to set out this order to demonstrate the strange course of these proceedings -

"IN CHAMBERS
THE 28TH DAY OF JUNE, 1989
CORAM: THE MASTER.

UPON THE SUMMONS TO SET ASIDE INTERLOCUTORY JUDGMENT IN DEFAULT OF APPEARANCE AND FOR LEAVE TO FILE DEFENCE coming on for hearing this day and upon hearing MR. ORRIN K. TONSINGH, Attorney-at-law for and on behalf of the Plaintiff and Mr. Michael Levy instructed by Messrs. Clinton Hart and Company, Attorney-at-law for and on behalf of

"the Defendant IT IS HEREBY ORDERED:

1. That the Summons to set aside default judgment be dismissed.

2. That the cost of this summons be the Plaintiff's to be agreed or taxed."

The other feature was that subsequently, on the 27th of July, there was filed a Notice of Motion to set aside the final judgment for assessment of damages and this was heard by Orr J on the 21st of September, 1989. For completeness here is the order that was made -

"HEARING: THE 27TH JULY & 21ST DAY OF SEPTEMBER 1989

BEFORE: MR. JUSTICE CHESTER ORR

UPON the hearing of the NOTICE OF MOTION to set aside default Judgment herein and upon hearing Mrs. Pamela Benka-Coker and Mr. Michael Levy instructed by the firm of Clinton Hart and Company for and on behalf of the First Defendant/ Applicant and upon hearing Mr. Donovan Chin See Queens Counsel and Mr. Orrin Tonsingh instructed by Mr. Orrin Tonsingh for and on behalf of the Plaintiff it is hereby Ordered and adjudged that the Motion be dismissed with costs to the Plaintiff to be agreed or taxed."

In the face of this order, this certainly ought to have been the end of proceedings in the Supreme Court. No reasons were given for this dismissal and it does not seem that the appellant raised the matter of abuse of process. It was in this state of confusion that the matter was again brought to court before Theobalds J, on another matter to set aside the assessment of damages. This new motion which made no specific reference to the previous proceedings was heard on 16th November and judgment delivered on 4th December, 1989. The motion is at p. 61 of the record

and it is set out hereunder -

> " TAKE NOTICE that this Honourable Court will be moved on Thursday the 12th day of October, 1989 at 10:00 o'clock in the forenoon at the Supreme Court, Public Buildings, East Block, King Street, Kingston or as soon thereafter as Counsel may be heard on an Application on behalf of the abovenamed Defendants for an Order that:
>
> 1. The Final Judgment entered herein by his Lordship Mr. Justice (Clarke) Walker on the 25th January, 1989 upon an uncontested Assessment of Damages herein in and the Interlocutory Judgment entered on the 8th April, 1988 herein both against the abovenamed Defendants together with all intervening and subsequent Orders be set aside on the ground that the Defendants have a good Defence on the merits of this claim and have not had an opportunity of being heard on the merits and now desire so to be heard;
>
> 2. Leave be granted to the Defendants to file a Defence within fourteen (14) days of the making of such an Order; and
>
> 3. Such further directions may be given as to this Honourable Court seems fit.
>
> DATED THE 22nd DAY OF September, 1989."

It is reasonable to infer that the matter came up for hearing on 12th October and was then adjourned to 16th November. There is a reference "to intervening and subsequent orders to be set aside" in the motion, but they were never adverted to again either in the reasons or order made by Theobalds J.

Was the order of Theobalds J wrong in law?

The appropriate place to begin is with the order of Theobalds J in the Supreme Court - The relevant section reads -

> "(1) That the Final Judgment against the First Defendant Roland Lawson is hereby set aside.

> "(2) That Leave is granted to the Defendants to file and deliver a defence within 14 days of the date hereof on condition that the amount of $54,715.01 be paid into a Commercial Bank in a joint interest bearing account in the joint names of the Attorneys-at-law for the Plaintiff and the Defendants within 10 days of the date hereof."

As the learned judge gave leave to appeal on a specific point, it is helpful to quote another section of the order as it reveals how he approached the problems before him. Paragraph (4) of the order reads -

> "(4) On the application for leave to appeal by the Plaintiff:-
>
> (a) Leave to appeal by the Plaintiff on the issue as to whether or not this Assessment was a trial in order to invoke the provisions of section 354 instead of section 77 of the Judicature (Civil Procedure Code) Act is granted;
>
> (b) Leave to Appeal generally is refused."

This court gave the appellant leave to appeal generally.

The learned judge also gave his reason for making the order of the court, so his mind was clearly revealed. As his analysis of the affidavit of the respondent and those who supported him as well as his application of law was crucial to the making of his order, these must be examined to determine whether his order can be affirmed. The first essential to be considered is, if there were good reasons for the respondent's delay in seeking to set aside a judgment regularly obtained after a delay of some five months in the first instance after judgment was entered, six months in the second instance and eight months in respect of the order on appeal. Further whether there was an arguable defence. The primary affidavit therefore must be

that of the respondent Lawson and this is what he says about these matters in paragraphs 9, 10 and 11 of his affidavit -

> "(9) That sometime in or about February, 1988 I was served with the Writ of Summons and Statement of Claim in Suit No.C.L.M. 497 of 1987 which I immediately proceeded to take into the offices of my aforesaid insurers where I spoke with the same officer of the Company to whom I had made my earlier report and delivered to him copies of the documents which had been served on me. That I was assured by this gentleman that everything would be taken care of.
>
> (10) That in reliance on the assurances which I received I made no further inquiries in respect of the macter and heard nothing further in respect of same until sometime in late May, 1989 when my aforesaid insurers contacted me to advise that judgment had been entered against myself and my driver and that I was required to attend upon their Attorneys-at-law, Messrs. Clinton Hart & Co., in respect of proceedings which had now been commenced against my insurers themselves arising out of the original claim against myself and my driver.
>
> (11) That I am advised by my aforesaid insurers and do verily believe that their file in respect of this matter had been misplaced in their offices in consequence of which the matter had not been handled as it would otherwise have been and that the proper persons had not become aware of the matter until the commencement of proceedings against the Insurance Company itself in Suit No. C.L.M 038 of 1989 whereupon an Appearance was immediately filed on its behalf and steps taken to ascertain the particulars of their insured who had been involved in this action. That I am further advised and do verily believe that my insurers were severely handicapped in their search by the unwillingness of the Plaintiff's Attorney-at-law to divulge any details of the Defendants in the original action, that is, in Suit No. C.L.M 497 of 1987."

It is clear that, the respondent Lawson left matters in the hands of his insurers and the substance of his charge was that his insurers were negligent in arranging for his defence. Further, he has expressly stated that it was only when he was required to attend on the insurers attorneys-at-law in respect of proceedings brought against the insurers, that they the insurers sought particulars from him. The inference must be that it was only because the appellant Mills resorted to the provision of the Road Traffic Act, and sued the insurers because he failed to get satisfaction for his judgment, that the respondent Lawson acted. As Mr. Chin See for the appellant aptly points out, the respondent Lawson may well have a good cause of action against his insurers, but that in itself would not be a ground for setting aside a judgment regularly obtained. The law does contemplate that in instances of an unavoidable mistake or accident, relief ought to be given to an absent party at a trial but this must be balanced against the principle that a litigant ought not to be deprived of the fruit of his judgment regularly obtained without good cause and also that there must be an end to litigation. Here is how the issue was stated in. In re Barraclough (1965) 3 W.L.R. 1023 at P. 1030 by Payne J -

> "The general principle, whether one is considering a party to the proceedings or interested third parties, is to be found in Young v. Holloway (1985) P. 87, 90; 11 T.L.R. 128. I propose only to read a quotation from Sir Cresswell Cresswell in Ratcliffe v. Barnes (1062) 2 Sw & Tr. 486, 487.
>
> The general principle as I collect it, is this, that where a party has had full notice and has had the opportunity of availing himself of the contest, he

> " will be bound by the decision. That was not a mere dictum, but the express decision of a very learned judge, Sir John Nicholl. The fundamental principle therefore is that a party should be bound by the decision if he has had an opportunity to appear and oppose the porceedings. But if by some unavoidable accident - the kind of thing for which R.S.C., Ord. 36, r. 33, provides - a defendant has been prevented from coming to the court and opposing the proceedings, it does seem to me that the court would in the interests of justice (and under R.S.C., Ord. 36, r. (33) put the matter right. It would lead to a grave injustice if a decision - such as the decision which I gave in this case at the first hearing - could not be put right although by mistake or by accident it had been given in the absence of somebody who genuinely wished to come to court and oppose it. For my part I would hold, and do hold, that R.S.C., Ord. 36, r. 33, is available in appropriate circumstances to a defendant who is in the real sense of the word absent or who, in the terms of the rule, does not appear at the trial. On that general principle, therefore, I find myself in favour of the defendant; but that, of course is not by any means the end of this matter."

Since R.S.C. Ord. 36 r. 33 is similar to Section 354 of our Code it is appropriate to refer to it. It reads -

(Section 354) "Any verdict or judgment obtained where one 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."

This section which appears under the heading <u>Proceedings at Trial</u> of the Code is more generous as regards time than R.S.C. Order 36 r. 33 which stipulates for six days after trial". It is true that time could have been enlarged by virtue of Section 676 of the Code which reads -

> "The Court shall have power to enlarge or abridge the time appointed by this Law, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

Mrs. Benka-Coker sought to make such an application in this court. Such an application was permissible as this court has all the powers on appeal that the Supreme Court is empowered to exercise, but how could it be just, to grant an enlargement in this case after such a long delay? In this regard, the words of Lord Denning M.R. in Revici v. Prentice Hall Incorporated And Others (1969) 1 ALL E.R. 772 - at 774 were instructive as to the approach of the courts. -

> "Counsel for the Plaintiff referred us to the old cases in the last century of Eaton v. Storer (1882) 22 Ch. 91 and Atwood v. Chichester (1878) 3 Q.B.D. 722 and urged that time does not matter as long as the costs are paid. Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough."

Nor could there be any assertion to rely on Section 678 of the Code which reads -

> "Non-compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or

> "otherwise dealt with in such manner and upon such terms, as the Court shall think fit."

The non-compliance in this case was so serious that setting aside on terms as Theobalds J, did was not an appropriate remedy. It is clear therefore that on the face of it, the order of Theobalds J was wrong in law and that his order would have prejudiced the appellant if there were to be a new trial at this late stage. The affidavit of his Attorney-at-Law states that the only eye witness cannot now be traced and the probability is that he has left the island. On appeal, once it has been decided that it was wrong in law to set aside the final judgment for assessment, there is no need to examine in detail the conditions which he incorporated in his order as regards the filing of a defence. It is sufficient to say that while such conditions may be appropriate when it is correct to make an order, good conditions can never turn an erroneous order into a good one. I should add that the Attorneys-at-Law on the record for the respondent have a duty to advise him of his right of action against his insurers.

Did the reasons for judgment disclose a wrong exercise of discretion by Theobalds J.

The alternative approach which is to examine the reasons for judgment leads to the same result. The crux of the matter may be found in the following passage -

> " I have noted the arguments put forward and the affidavits filed in support of and in reply to the application. The matter is not as one sided as it might have appeared at first as the Affidavits of the Defendants do disclose a lack of sincerity.

> " With that in mind and without going into the facts in detail the final judgment is set aside."

Why did the learned judge find a lack of sincerity in the respondent Lawson's affidavit, bearing in mind he was the applicant to set aside in the court below? It is to be found in paragraph 5 of his affidavit which is repeated in part for emphasis. He says -

> "I would be greatly prejudiced if I were not to be permitted to defend this claim on the merits thereof in that I would become liable personally to contribute to the damages awarded against me which are in excess of the limit of the liability of my insurers, the United General Insurance Company Limited, to indemnify me herein, namely in the sum of Fifty-Four Thousand Seven Hundred and Sixteen Dollars One Cent ($54,716.01)."

The learned judge was right to infer that it was because he, the respondent found out that he would be personally liable, that he then puts up an insincere affidavit. But the error in his reasoning is that "with that in mind" that is the insincere affidavits, he then set aside the judgment. Had he considered the long delay and the reasons given for it, coupled with the insincerity, he would have found that the only discretion he had was to dismiss the motion to set aside the assessment, and to point out that there were two previous dismissals.

Further, the conditions imposed, emphasises the learned judge's thinking. He considered that the appellant had suffered and thought that a payment into court would cure or mitigate the suffering.

In explaining why the conditions were imposed,

the learned judge said -

> "I make it a condition that the amount of $54,715.01 be paid into court in the joint names of the Attorneys-at-law. The idea behind this is that the Plaintiff has been suffering hardships through fault not his own. The Defendants were concerned not so much with the Judgment as to Liability but as to the amount awarded. Consequently the amount of $54,715.01 is to be paid into an interest bearing account in the joint names of the Attorneys-at-law for the parties within 10 days. In addition leave is granted to the Defendant to file and deliver defence within 14 days of the date hereof."

But there were aspects of suffering disclosed in the affidavits which the learned judge failed to take into account. What if the sole witness for the appellant was no longer available? Certainly the appellant would be prejudiced in such a case, as once the final judgment was set aside, both liability and damages would be in issue at a trial.

There is yet a further aspect embodied in his reasons which must be adverted to. It is clear that the judge considered and applied Section 77 of the Code rather than Section 354. Section 354 has already been dealt with and to reiterate, the assessment was a trial although the respondent was absent. Section 77, on the other hand, contemplates a situation where there is Default in Appearance and judgment is entered without any trial. That Section reads -

Title 12 Default of Appearance

(Section 77) "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."

As it must be repeated that an assessment of damages is governed by Section 354 of the Code and it is appropriate to cite Section 72 of the Code to illustrate this. It reads -

Title 12 Default of Appearance

(Section 72) "If the claim indorsed on the writ is, as against any defendant, for unliquidated damages only, and that defendant fails to appear, the plaintiff may enter interlocutory judgment against him for damages to be assessed and costs, and proceed with the action against the other defendants, if any."

The critical words are "<u>may enter interlocutory judgment against him to be assessed</u>." The assessment therefore is the trial and results in the verdict or judgment of Section 354 of the Code. The interlocutory judgment was in respect of liability. The stance of the learned trial judge suggested that he thought the matter in issue was governed by Section 77 (Supra). Further, he envisaged that he had a discretion to make the order that he did make with conditions which he reckoned were just. However, as the matter was governed by Section 354 of the Code, there was no discretion to set aside the judgment in this case. On the true construction of Section 354, having regard to the circumstances of this case, he was bound to dismiss the motion so as to uphold the order of assessment in favour of the appellant.

At the conclusion of the hearing, we allowed this appeal, set aside the order of Theobalds J, and awarded costs to the appellant, both here and below. The assessment therefore is restored. These are reasons for making that order.

MORGAN, J.A.

I have read the judgments of Carey and Downer, J.J.A. and agree that the appellant succeeds both on the law and on the facts, for the reasons set forth in the judgments.

In particular, I agree that a hearing for an Assessment of Damages is a trial of an action and that the proper section of the Civil Procedure Code to be considered in determining whether this matter should be set aside is Section 354 and not Section 77 - that on an interpretation of the learned trial judge's findings, he apparently found that there was lack of truth as to the cause of the inordinate delay and/or the defence as disclosed in the affidavits, and that on those findings the result should have been to deny the applicant the relief sought.