JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 117/2002

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN: **NEW FALMOUTH RESORTS LIMITED** **APPELLANT**

AND: **JAMES N. PHELAN** **RESPONDENT**

Carol Davis for the Appellant

Garth McBean and Tricia McNeil instructed by Dunn Cox for the Respondent

May 19, 20, 2003 and March 18, 2005

DOWNER, J.A.

Introduction

In this important procedural appeal New Falmouth Resorts Ltd. ("the Company") sought to set aside the order of D.O. McIntosh, J. who dismissed the summons of the Company to set aside a default judgment in favour of James N. Phelan the respondent. The Company also challenged the learned judge's discretion exercised in favour of the respondent James Phelan to proceed to execute the said default judgment.

The basis of the default judgment

It is helpful to set out the default judgment to appreciate the significance of the proceedings in the Court below. The amended final judgment reads at page 8 of the record:

> "The Defendant [the Company] not having filed a Defence to the Writ of Summons herein and Affidavit of Search and in proof of debt having been filed it is this day adjudged that the Plaintiff recover against the Defendant the sum of US$240,623.00 with interest thereon in the sum of US$133,520.04 from September 20, 1976 to April 18, 1984."
>
> DATED the 27th day of April 1989."

It appears from the record that there was no entry of appearance by the Company and there was no defence filed with respect to the statement of claim endorsed on the writ. The statement of claim reads as follows:

> "1. On the 20th day of September, 1976, the Plaintiff's action against the Defendant was heard before the Presiding Judge His Honour James Meyer, of the District Court of Travis County, Texas 126th Judicial District in the United States of America.
>
> 2. The said Court was duly constituted and held in accordance with the laws of the said County, and State of the United States of America that had jurisdiction in that behalf.
>
> 3. On the said 20th day of September, 1976 the said Court gave judgment in the said action in favour of the Plaintiff, and ordered the Defendant to pay the Plaintiff the sum of $240,623.00 (United States Dollars) and interest on the said sum at the rate of 6% per annum from the said date of judgment until payment.
>
> And the Plaintiff Claims:
>
> (i) $890,305.10 (Jamaican) which is the equivalent of $240,623.00 (United States)

at the rate of $3.70 (Jamaican) to United States Dollar at the date hereof.

(ii) Interest.

Dated the 17th day of April 1984

DUNN, COX & ORRETT
Attorneys-at-law for the Plaintiff."

The judgment of the District Court in Texas was exhibited at page 17 of the Record and reads as follows:

"No. 222,728

JAMES N. PHELAN	IN THE DISTRICT COURT
V.	OF TRAVIS COUNTY, TEXAS
NEW FALMOUTH RESORTS, LTD. ET AL	126TH JUDICIAL DISTRICT

JUDGMENT

The above entitled cause came before this Court on 20th of September, 1976, plaintiff James Phelan, appearing by his attorney, and defendant New Falmouth Resorts, Ltd. having filed a Confession of Judgment executed by its director David N. Phelan.

It appears from plaintiff's petition that the alleged cause of action is just, and that the defendant has confessed judgment thereto.

It is therefore adjudged:

1. That plaintiff James N. Phelan recover from defendant New Falmouth Resorts, Ltd. the sum of $218,749.00 plus attorney's fees of $21,874.00 for a total of $240,623.00 with interest at the legal rate of 6% per annum from date of judgment until paid.

2. That costs of this suit be taxed against defendant.

Signed on September 20th 1976

James Meyers
Judge Presiding."

As regards the status of this judgment at common law in our courts it is best to cite in full the case of ***Malony v. Gibbons*** 2 Camp 502 and 170 English Reports at page 1232:

"First Sittings after Term at Westminster
Thursday Nov. 29, 1810
Malony, Esquire v. Gibbons

(An action may be maintained upon a foreign judgment obtained by default, which states that the defendant appeared by attorney – without proving that the attorney mentioned had authority to appear, or that the defendant was living within the jurisdiction of the foreign Court.)
[Referred to, *Obicini v. Bligh,* 1832, 8 Bing. 335; *Guiard v. DeClermont,* [1914] 3 K.B. 145]
Action on a judgment of the Supreme Court of the island of Jamaica.
In the judgment, after the declaration, which was in assumpsit, there was the following entry:
'And the said J. Gibbons, by J. Ferrier, his attorney, comes and defends the wrong and injury when, &c, and says nothing in bar or preclusion of the said action of the said J. Molony: Wherefore," &c (in the common form).
Garrow for the defendant insisted, as this was a judgment by default, that the plaintiff was bound to prove, that Ferrier was properly constituted the defendant's attorney, or at any rate that the defendant himself, pending the original action, was living within the jurisdiction of the Supreme Court; and he referred to *Buchanan v. Rucker,* 1 Campb. 63

> Lord Ellenborough – I will look to these foreign judgments with great jealousy; but I must give them credit for the facts which they specially allege; and I must presume in the present case, that the Court saw Ferrier properly constituted attorney for the defendant.
> Verdict for the plaintiff
> Park and Reader for the plaintiff
> Garrow for the defendant."

There is of course no subsidiary legislation in this jurisdiction for the registration and enforcement of judgments of Texas or the United States of America.

The Company retained an attorney G. Irvin Terell who challenged the jurisdiction of the Texas Court and these were the three issues set down for hearing exhibited at page 123 of the Record thus:

"No. 222,728

JAMES N. PHELAN	IN THE DISTRICT COURT
V.	OF TRAVIS COUNTY, TEXAS
NEW FALMOUTH RESORTS, LTD., ET AL	126TH JUDICIAL DISTRICT

ORDER

Upon Motion of the Plaintiff, the following are ordered set for hearing before this Court on the 24th day of Oct. 1974, at 9.00 a.m.:

1. Special Appearance of Defendant New Falmouth Resorts, Ltd under Rule 120A
2. Plea of Privilege of Defendant New Falmouth Resorts, Ltd.
3. Plea of Privilege of Defendant David Phelan."

Presiding Judge
126th District Court."

There were three Orders by the Texas Court exhibited at pages 134, 135 and 136 of the Record. It is appropriate to cite one of these Orders at this stage to demonstrate that the Company submitted to the jurisdiction of the Court. At page 134 the following Order appears:

"No. 222,728

JAMES N. PHELAN — IN THE DISTRICT COURT

V. — OF TRAVIS COUNTY, TEXAS

NEW FALMOUTH RESORTS, LTD. 126TH JUDICIAL DISTRICT
ET AL

ORDER OVERRULING DEFENDANT'S
MOTION OBJECTING TO PERSONAL JURISDICTION

On November 20, 1974 came on to be heard the defendant New Falmouth Resorts, Ltd's Special Appearance to Present Motion Objecting to Personal Jurisdiction. Both Parties appeared by their attorneys of record and announced ready.

The Court, having considered the pleadings, evidence introduced in support of the pleadings, and argument of counsel, is of the opinion that defendant's said motion should be overruled.

It is therefore ORDERED that the defendant New Falmouth Resorts, Ltd's Motion Objecting to Personal Jurisdiction is hereby overruled.

Signed on February 6, 1974

James R. Myers
Presiding Judge
126th Judicial District

APPROVED AS TO FORM:

James A. Burroughs
1305 San Antonio St.
Austin, Texas 78701
ATTORNEY FOR PLAINTIFF

G. Irvin Terrell
3000 One Shell Plaza
Houston, Texas 77002
ATTORNEY FOR DEFENDANT
NEW FALMOUTH
RESORTS, LTD"

Section 269 of the Judicature (Civil Procedure Code) Law reads:

> "269. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge, on motion or summons, without an appeal."

The Company gave its consent to the amendment to the Default Judgment pursuant to section 269 of the Code. To demonstrate this it is imperative to advert to the Order of the Master on 7th June 1995 at page 19 of the Record:

> "UPON THIS SUMMONS TO AMEND Judgment Pursuant to S 269 of the Judicature (Civil Procedure Code) Law dated the 16th day of March, 1995 coming on for hearing this day and upon hearing **MR. LANCELOT A. COWAN**, Attorney-at-law instructed by **MESSRS DUNN, COX, ORRETT & ASHENHEIM** Attorneys-at-Law for the Plaintiff and **MS. MICHELLE KIRTON,** Attorney-at-law instructed by **MESSRS. CLINTON, HART & COMPANY,** Attorneys-at-Law for the Defendant;
>
> **IT IS THIS DAY HEREBY ORDERED** as follows:
>
> (i) that the Final Judgment entered herein on the 27th day of April, 1989 in the sum of US$240,623.00 with interest thereon from the 18th day of April, 1984 until Judgment, be amended or corrected to read:
>
> 'The Defendant not having filed a Defence to the Writ of Summons herein and Affidavit of Search and in proof of debt having been filed it is this

> day adjudged that the Plaintiff recover against the Defendant the sum of US$240,623.00 with interest thereon in the sum of US$133,520.04 from September 20, 1976 to April 18, 1984."

Section 258 of the Judicature (Civil Procedure Code) Law is applicable and reads:

> "258. Any judgment by default, whether under this Title or under any other provisions of this Law, may be set aside by the Court or a Judge upon such terms as to costs or otherwise as such Court or Judge may think fit."

It is necessary to point out that the Record in this case was somewhat inadequate in certain respects. The Articles of Association of the Company have not been exhibited. In addition the affidavit of search and proof of debt was not incorporated in the Record.

There are orders made by Marsh J. at page 93 of the Record and Orders by Edwards J at pages 25 – 26 of the Record. With respect to the orders of Marsh J. no reasons were delivered and if they were, they do not appear in the Record . No complaint about this was made by Counsel for the respondent James Phelan. With respect to Orders of Edwards J. there are no reasons delivered but Mr. J. Henry Chisholm on behalf of the Company said in his affidavit at page 66 of the Record:

> "21. With regard to paragraph 10 of the said proceedings, I was not aware of any consent not to pursue the execution of the judgment herein. Further there is no apparent reason why the said judgment should not have been pursued if it was genuine, save that in 1996 the Defendant was controlled by the Phelan family, and now it is controlled by me. The

> judgment referred to has been Appealed, but the Appeal cannot proceed because Mr. Justice Edwards retired without making the notes of evidence available for the Record of Appeal."

The orders of Edwards J. will be adverted to later. If the Company wished to appeal, it would not be the first time that this Court had to hear and determine an appeal without the judge's notes of evidence. It is important to note that although the contest in these proceedings was procedural, the real issue is the control of the valuable real estate owned by the Company. The Company is a shell with valuable concealed assets.

The initial question which comes to mind is whether in the circumstances of this case, the Company being a party to the amendment could, after a lapse of over six years after the amendment, now seek to set aside the Default Judgment in favour of the respondent James Phelan. The Default Judgment was entered 27th April 1989. The Summons to set it aside was filed 27 October 2002 which is some 13 years later. The amendment to the Default Judgment was filed 29th April 1996.

Having regard to the principle of estoppel the answer appears to be in the negative: see **Kok Hoong v, Leong Cheong Mines Ltd** [1964] 1 All ER 300, 1964 A.C. 993.

To reiterate, there is no Affidavit of Search nor Proof of Debt with respect to the original Default Judgment nor the Amendment thereto. In any event, their absence was not raised at this stage nor it seems in the Court below. However, the initial affidavit of the respondent James Phelan supporting his

summons to execute the Default Judgment dated 13th May 2002 at page 10 of the record reads:

"1. That I am a Stage Worker with true place of abode and postal address at P.O. Box 5123 Austin, Texas 78763 in the United States of America and I am a Judgement Creditor of the Defendant Company.

2. That the facts stated herein are true to the best of my knowledge, information and belief.

3. That Final Judgement was entered in this action on the 27th April, 1989 against the defendant for the sum of US $240,623.00 with interest at 6% per annum thereon from the 18th day of April 1984, until judgment. Exhibited hereto as '**JP1**' is a true copy of the attested Copy Judgment referred to herein.

4. That the said judgement was obtained on the basis of an action filed against the Defendant in a duly constituted Court in Travis County, Texas judicial district in the United States of America and held in accordance with the laws of the said Court. Exhibited hereto as '**JP2**' is a true copy of the said judgment obtained in the United States of America.

5. That the said foreign judgement awarded me in the sum of US$240,623.00 with interest at 6% per annum from the date of judgement until payment.

6. That on the 7th June, 1995 an order on Summons to Amend Judgement pursuant to Section 269 of the Judicature (Civil Procedure Code) Law was granted by the (Ag.) Master McIntosh which reflected the correct figure of the judgment to be US$374,143.04.

> Exhibited hereto as **'JP3'** is a true copy of the said Order on Summons to Amend Judgment mentioned and referred to herein."

Then the respondent James Phelan explains why the judgment was not executed thus at page 11 of the Record:

> "9. That from and since the filing of the Amended Final Judgement on the 29th April 1996 I consented not to pursue the execution of this Amended Final Judgement as there were pending equitable proceedings in this Honourable Court to wind up the defendant Company – New Falmouth Resorts Limited.
>
> 10. That the equitable proceedings were held over the period October 1989 to December 1998. Exhibited hereto as **'JP6'** is a true copy of an order made by the Hon. Edwards J in the equitable proceedings mentioned and referred to herein.
>
> 11. That the said defendant company was not wound up and I do verily believe is a going concern."

The learned judge in the Court below presumably accepted these reasons as the basis of his findings which permitted the respondent James H. Phelan to execute the Default Judgment as of right. It was a surprising decision and must be carefully examined. An initial point to note is that the Default Judgment was entered on 27th April 1989 and the amendment of the later date relates back to the original entry.

In the context of the Default Judgment, the Minutes of the Directors Meetings of the Company at page 34 of the Record are of importance:

"MINUTES OF DIRECTORS MEETING
OF
NEW FALMOUTH RESORTS LTD
Held this 28th day of May 1976 at 4 Caledonia Crescent, Kingston 5 Jamaica

Present were: David Phelan, Chairman
J. Henry Chisholm, Managing Director

The meeting called to order by the Chairman

RESOLVED

1) That New Falmouth Resorts Ltd recognizes the note held by James N. Phelan for USA$125,552.00 signed by John P. Phelan III as Director of New Falmouth Resorts Ltd. on June 30, 1970 to be paid on June 30, 1971, is valid, past due and payable upon demand.

RESOLVED

2) That New Falmouth Resorts Ltd recognizes the note held by the P.N. Phelan Trust No. 1 for US$250,000.00 signed by John P. Phelan III as Director of New Falmouth Resorts Ltd on June 30, 1970 to be paid on June 30, 1971 is valid past due and payable upon demand.

There is no other business, the meeting adjourned.

Signed: David Phelan
Chairman

Signed: J. Henry Chisholm
Managing Director."

The note for $US218,675 is exhibited at page 35 of the Record and the note for US$125,522 is exhibited at page 102 of the Record.

As noted previously, the Company was represented in the proceedings in Texas and Mr. Jim Chisholm, the Managing Director of the Company, was

aware of those proceedings as he signed Court documents challenging the jurisdiction of the Texas Court. This document is exhibited at pages 111-113 of the Record.

At page 151 of the Record there is a Defendant's Confession Of Judgment by the Chairman of the Board of Directors David Phelan. This document reads as follows:

"No. 222,728

JAMES N. PHELAN	IN THE DISTRICT COURT
VII.	OF TRAVIS COUNTY, TEXAS
NEW FALMOUTH RESORTS, LTD ET AL	126TH JUDICIAL DISTRICT

DEFENDANT'S CONFESSION OF JUDGMENT

The defendant, New Falmouth Resorts, Ltd., hereby confesses judgment in favor of plaintiff, James N. Phelan, for $218,749.00 principal and interest, plus an additional $21,874.00 as attorney's fees, and authorizes the Court to render judgment accordingly.

This confession of judgment is for money justly due plaintiff arising from the following facts:

On June 30, 1970, in the City of Houston, County of Harris, State of Texas, the defendant corporation, New Falmouth Resorts, Ltd., acting through its authorized agent, executed and delivered to plaintiff a promissory note in the principal sum of $125,522, which note was due and payable on the 30th day of June, 1972, and was to bear interest at the rate of 8% per annum. The defendant corporation totally failed to make payment after due demand thereof, and it became necessary for plaintiff to place this note in the hands of Friedman & Harman, Attorneys-at-law, for collection of said note

as stipulated therein. The principal and interest now owing on said note is $218,749.00 and the attorney's fees stipulated therein amount to $21,874.00. Said note is in all respects valid, and the plaintiff is justly entitled to recovery thereon.

Dated Sept, 15 1976
NEW FALMOUTH RESORTS, LTD.

By. David Phelan
Director, New Falmouth Resorts
2119 Swift Street
Houston, Harris County, Texas."

At this stage a reference to the orders of Edwards J., at page 25 of the Record, in the equitable proceedings is appropriate. The proceedings were entitled as follows:

"BETWEEN NEW FALMOUTH RESORETS LIMITED PLAINTIFF

AND CHISHOLM & COMPANY LIMITED 1ST DEFENDANT

AND J. HENRY CHISHOLM 2ND DEFENDANT

IN COURT

BEFORE THE HONOURABLE MR. JUSTICE EDWARDS

October 18, 19, 20, 1989, July 15, 16, 19, November 18, 19, 20, 21, 22, 1991, March 30, 31, April 1, 2, 3, 1992, February 19, 20, 21, March 10, 11, 18, 20, April 7, 29, 30, May 1, July 28, 29, 31 1997 December 18, 1998

UPON THIS MATTER COMING ON FOR HEARING THIS DAY and UPON HEARING PATRICK W. FOSTER and KATHERINE P.C. FRANCIS, Attorneys-at-Law of Messrs. Clinton Hart and Co., for the Plaintiff, ENOS A. GRANT and NORMAN WRIGHT Attorneys-at-Law instructed by MESSES. WRIGHT, DUNKLEY & CO., for the Defendant IT IS HEREBY ORDERED AND DECLARED THAT:

1. All those parcels of land known as part of New Court formerly Roslin Castle in the parish of Trelawny and comprised in Certificate of Title

registered at Volume 1066 Folio 929 are legally and beneficially owned by the Plaintiff.

2. All those parcels of land known as part of New Court formerly Roselin Castle in the parish of Trelawny and comprised in Certificate of Title registered at Volume 1066 Folio 930 are legally and beneficially owned by the Plaintiff.

3. The mortgage(s) dated 1st July 1976 and July 1982 purportedly made between the Plaintiff and the First Defendant as being null and void.

4. All monies paid by the Plaintiff under the alleged mortgage(s) be refunded to the Plaintiff.

5. All injunction restraining both Defendants or either of them, their servants and/or agents or otherwise from in any way selling, transferring, or otherwise disposing of any of the parcels of land registered at Volume 1066 Folios 929 and 930 of the Register Book of Titles.

6. The First Defendant's claim for damages for breach of contract is dismissed.

7. ...

8. ...

9. The First Defendant's claim for a declaration that it is entitled to 51% of the Plaintiff's shares is disallowed.

10. .. .

11. The Second Defendant's claim for damages for wrongful termination of his services s (sic) Managing Director of the Plaintiff is dismissed.

12. The Second Defendant's claim for a declaration that the purported termination of his services as the Plaintiff's Managing Director is illegal is refused."

This is an Order from which there was no appeal by the Defendants.

A later order by Marsh J. dated 20th July 2001 at page 93 of the Record declared that James Chisholm was entitled to 500 Ordinary Shares. It seems there was no appeal from this Order by the Company. As indicated previously there are no reasons exhibited for the important findings in the Order although it was ordered that some members with substantial shareholdings be struck off the Register of Shareholders. They were not represented at the hearing and it does not seem that they were ever informed of this motion. The Order may be struck out as it seems to be open to challenge either in this Court or the Supreme Court by way of the Court's inherent jurisdiction. This jurisdictional point can be taken at any time by the shareholders affected. The relevant cases are **Craig v. Kanseen** [1943] 1 All E.R. 108, **Kwame Asante v. Chief Kwame** [1949] Weekly Notes at page 49, **Kofi Forfi v. Sufah** [1958] A.C. 59 **Patterson v. Solomon** [1960] A.C. 579. **Norwich Corporation v. Norwich Electrical Tramways Company Ltd** [1906] 2 K.B. 129 shows that the Court ought to raise the point even if the parties to the litigation do not.

The Company appears to be the registered holder of over 1000 acres of prime land in a resort area (see page 46 of the Record). This is the substance of the numerous proceedings being fought out in these courts.

It is clear that the Order of Edwards J. was substantially in favour of the Company and that the attempt by James Chisholm to wind up the Company failed (see page 51 of the Record for the Summons to Stay

Proceedings). It was against this background that the judgment in the Court below must be considered.

Proceedings before McIntosh J.

To reiterate, there were two summonses before McIntosh J. in the Court below. The summons by the Company dated 24th October 2002, reads as follows at page 61 of the Record:

> "1 That the judgment dated 29th April 1989 be set aside.
>
> 2. That the Defendant be given leave to file and serve Defence within 7 days of the date hereof.
>
> 3. Further or other relief."

The summons by the respondent James Phelan reads in part as follows at page 9 of the Record:

> ". . . as soon thereafter as Counsel may be heard on an application on behalf of the Plaintiff for an Order that:
>
> 1. Leave be granted to execute Amended Final Judgment entered in this action in Judgment binder No. 684 Folio 147 on the 27th day of April, 1989 with interest thereon from the 18th of April, 1984 until Judgment.
>
> 2. The costs of this application be costs in the cause."

It was against this background that McIntosh J. ruled as follows at 154A-154B of the Record:

> "Before the court were two summonses brought by the parties to the action:

1. Plaintiffs summons for leave to execute judgment and

2. Defendants summons to set aside judgment.

Both parties agreed that it was after plaintiff had filed summons for leave to execute judgment that the defendant sought leave of the court to apply to set aside the plaintiff's judgment.

This court acceded to the request of the defendant that the 'summons to set aside' be heard first as the decisions in respect to that summons would ultimately decide the fate of plaintiff's summons.

After hearing submissions by Miss Carol Davis for defendant and Mr. Gammon for the plaintiff, this court dismissed the defendants summons.

In respect to the plaintiffs summons, leave was granted to execute amended final judgment with interest thereon from the 18/4/84 until judgment. Costs were awarded to the plaintiff."

At this point the error in the thinking by all concerned in the Court below, can be detected. It was assumed that once the Default Judgment was not set aside, its enforcement was assured. The truth was that for the first six years after entry there was an entitlement to enforce the judgment. Any time thereafter the enforcement of the judgment required the exercise of judicial discretion.

Then the judgment continued thus:

"A stay was granted pending appeal unless the defendant did not actively pursue the said appeal within the next ensuing three (3) months.

The defendants application was based on an allegation of fraud in the obtaining of a foreign judgment.

To substantiate this reliance was placed on the affidavit evidence of James Chisholm. This was supported by a letter from one Marjorie Fitz-Henley [formerly Marjorie Brown-Young] dated the 3/6/85.

This evidence relates to acts which they say were done before 1985 by person or persons who are now dead and cannot speak to the issues contained therein.

What they did in fact state quite clearly is that if the judgment in the foreign court had been obtained fraudulently, James Chisholm acquiesced in that judgment being so obtained and was a party to it. No doubt it suited him so to do at that time.

He cannot now that he is in a different position seek to set it aside because it is now in his interest to do so.

He allowed that judgment to stand from 1989. It was enforced in the Jamaican Courts. He is estopped from denying it was regularly obtained.

Further as a shareholder of the company he could have taken steps to have any illegal act done by the company or its directors or managers set aside by the court.

The defendant is now guilty of the most extreme laches in his application to set aside the judgment.

To now ask this court to act as a Court of Appeal on a judgment obtained in a foreign court when the parties or principals at the time the judgment was obtained are dead, is to put it mildly-suspect."

Then in conclusion McIntosh J. ruled:

> "This court is of the view that the defendant seeks to set aside the judgment because of his own personal agenda now that he is managing director of the defendant company.
>
> It is certainly the right of the plaintiff to enforce his judgment which was properly obtained as far back as 1989 if he so chooses."

This finding that the respondent Phelan had a right to enforce the 1989 Default Judgment is crucial to the determination of this case. It runs counter to the discretion accorded to the Courts pursuant to section 594 of the Code and the matter will be dealt with later in this judgment.

Was the ruling in the Court below correct with respect to both Summonses?

The learned judge ruled correctly in refusing to set aside the Default Judgment. There was no Entry of Appearance nor was there any Defence filed within the time frame laid down by the Judicature (Civil Procedure Code) Law.

The basis on which the Company seeks to set aside the Default Judgment is the Affidavit of Merits sworn to by James Chisholm. The order of Edwards J. dated December 19, 1998 confirmed his dismissal as Managing Director of the Company.

In substance, the claim is based on the belief that the judgment obtained from the Texas Court on 20th September 1976 was obtained by fraud. Here is how it was stated in Mr. Chisholm's affidavit at pages 63 to 64 of the record:

"8. That I verily believe that the Plaintiff obtained the judgment in the United States by fraud. As indicated above, proceedings were not served on the Defendant company, and although I was Managing Director at the time I was unaware of same. From the record it appears that the judgment was entered pursuant to a "confession of judgment" by Mr. David Phelan, the brother of the Plaintiff.

9. At the material time David Phelan was a director of the Defendant company, but he was not authorized to make any confession of judgment on behalf of the company, which was in fact unaware of the proceedings in the United States.

10. Further from the record it appears as aforesaid that the actual loan was to the P.N. Phelan Trust No. 1, of which David, John and Francis Phelan were all directors. By signing the so called "confession of judgment", the said David Phelan had a direct interest, in that he relieved himself and his brothers of liability of money that they had borrowed, and sought instead to make the Defendant company responsible for the said debt. As such although the Defendant company and 3 of the Phelan brothers were Defendants in the suit, Judgment was entered only against the Defendant company.

11. In the premises I verily believe that the Judgment against the Defendant company was fraudulently obtained."

It is essential to advert to two issues which the learned judge adverted to, but which need some expansion. Firstly, the judgment was obtained in a foreign jurisdiction and the issue of whether the company submitted to the jurisdiction of the Texas Court was to be determined.

The Managing Director of the Company Mr. Chisholm did challenge the jurisdiction of the Court. The ruling of the Court on that issue at page 134 of the Record was cited previously. The other ruling at page 135 of the Record reads thus:

"No. 222.728

JAMES N. PHELAN	IN THE DISTRICT COURT OF
V.	TRAVIS COUNTY, TEXAS
NEW FALMOUTH RESORTS, LTD.	126TH JUDICIAL DISTRICT
ET AL	

ORDER OVERULING DEFENDANT
NEW FALMOUTH RESORTS, LTD.'S PLEA OF PRIVILEGE

On November 20, 1974 came on to be heard the defendant New Falmouth Resorts, Ltd.'s Plea of Privilege. Both Parties appeared by their attorneys of record and announced ready.

The Court, after hearing and considering such plea of privilege and controverting plea, and the evidence and argument of counsel thereon, is of the opinion that the plea of privilege should be overruled.

It is therefore ORDERED that such plea of privilege is overruled and venue of the cause against this defendant is retained in the County of Travis, Texas, the county in which the suit was originally filed.

Signed on February 6 1974."

This then, must be conclusive evidence that the Company submitted to the jurisdiction. Buckley L.J. in **Emanuel v Symon** [1908] 1 KB 302 at 309 said:

> "In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) L.R. 9 Ex. 345;1 Ex.D. 17. Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) 1 Ex. D. 17 where he was resident in the foreign country when the action began; (3) 14 Ch. D. 351, at p. 371 where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) 2 B. & Ad. 951 where he has voluntarily appeared; and (5) L.R. 6 Q.B. 155 at p. 159 where he has contracted to submit himself to the forum in which the judgment was obtained."

In this context it must be recalled that David Phelan was the Chairman of the Board of Directors and J. Henry Chisholm was the Managing Director who signed the minutes acknowledging the two Promissory Notes in issue. It is to be noted that both promissory notes were signed by John Phelan as Director and Mr. Chisholm acknowledged that the company was owned by the Phelan family. **Grant v Easton** (1833-1844)13 Q.B. 302 is relevant. Brett MR said at p. 303:

> "An action on a judgment has been treated as an action of debt. It has been suggested, however, that a difference exists between English and foreign judgments, but in the present case the question is, whether the defendant can shew any defence to the claim made against him. Upon principle what difference can there be between an English and a foreign judgment in this respect? An action upon a foreign judgment may be treated as an action in either debt or assumpsit: the liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment."

In this case the action was instituted by James Phelan and enforceable as a default judgment in this jurisdiction.

So as far as this Court is concerned the Minutes of the Board of Directors (supra) dated 28th May 1976, are relevant. It was referred to in the affidavit of the Respondent James Phelan thus at page 31 of the record:

> "4. That pursuant to a Director's meeting having in attendance David Phelan, the Chairman and J. Henry Chisholm the Managing Director held on the 28th May, 1976 at 4 Caledonia Crescent, Kingston 5, Jamaica, minutes were recorded evidencing a resolution that the defendant company recognized the note held by P.N. Phelan Trust No. 1 for US$250,000.00 signed by John Phelan 111 as director of New Falmouth Resorts Ltd. on June 30, 1970 to be paid on June 30, 1971 is still valid, past due and payable upon demand.
>
> Exhibited hereto as **"JP9"** is a true copy of the said defendant company minutes of directors meeting mentioned and referred to herein.
>
> 5. That the promissory note mentioned and referred to at paragraph 4 herein was effected June 30, 1970 and due June 30, 1971 in the amount of US$218,675.00 with 8% per interest per annum from June 30, 1970 until paid.
>
> Exhibited hereto as **"JP10"** is a true copy of the said promissory note mentioned and referred to herein."

Incidentally, the Promissory note exhibited at page 35 of the Record is in favour to the order of P.N. Phelan Trust 1 and, since the Texas Court gave judgment in favour of James Phelan, then Phelan Trust 1 must have endorsed it over to the respondent James Phelan.

The two Promissory Notes, the minutes of the Company and the Default Judgment have recognized the debt. So there is no merit in the Affidavit of

Merits which suggests there was no debt so as to set aside the Default Judgment.

However, there are averments of Fraud in the Draft Defence at page 90 of the Record which must be addressed. The relevant paragraphs are as follows:

> **"Particulars of Fraud**
>
> i. The Plaintiff well knew that no loan in the sum of $125,552 had been made by the Plaintiff to the Defendant.
>
> ii. The Plaintiff obtained judgment by causing and/or conspiring with his brother David Phelan to enter a "Confession of Judgment" against the Defendant, when as the Plaintiff well knew the said David Phelan had no authority from the Defendant company to enter into the said "confession of judgment."
>
> iii. The Plaintiff sued the Defendant company, and also individually and as Trustees of the PN Phelan Trust No. 1, his brothers Francis Phelan, John Phelan and David Phelan. The Plaintiff then caused his brothers David Phelan to enter the alleged "confession of judgment" aforesaid, and released his brothers from liability, in circumstances where as the Plaintiff well knew the loan had been to the said PN Phelan Trust No. 1 and not to the Defendant who derived no benefit from same.
>
> iv To the knowledge of the Plaintiff, the false claim in Texas related to a matter which was statute barred. The Plaintiff's claim in the United States was filed on or about September 1976, and related to a loan and/or promissory note given in June 1970. As such the said action was statute barred in accordance with the Laws of the State of Texas."

The standard affidavit evidence ought to reach for serious considerations in these circumstances was explained by Lord Buckmaster in **Jonesco v. Beard** 1930 A.C. 298 at 300. The relevant passage reads thus:

> "It has long been the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires."

Then his Lordship continues:

> "That, however, there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial may be accepted. *Hip Foong Hong v. H. Neotia & Co* [1918] A.C. 888 is such a case; but it should be remembered that this case had come up to the Privy Council on this procedure and the Board would naturally be unwilling to defeat a case at its last stage on such a ground. ...
>
> If, however, for any special reason departure from the established practice is permitted, the necessity for stating the particulars of the fraud and the burden of proof are no whit abated and all the strict rules of evidence apply. The affidavits used must, therefore, be examined as on final trial; every particle of hearsay evidence and reference to documents, not produced, must be excluded, and it must be kept constantly in mind that the rules which permit, on interlocutory proceedings, hearsay evidence, where the exact source of the information is afforded, have no more application than they would possess were the deponent a witness in the box speaking at the trial."

Some dates and documentary evidence are important at this point . The Company speaks through the minutes of the Board of Directors and resolutions

passed at meetings of its members. The unchallenged minutes of the Board of Directors signed by David Phelan and J. Henry Chisholm on 28th May 1976 recognizes the two promissory notes in issue in this case. The "confession of judgment" signed by David Phelan, the Chairman of the Board of Directors of the Company, was signed on September 15th 1976 in Texas some four months after the resolutions of the Board of Directors recognizing the debt.

Further, with respect to the proceedings in the Texas court, there was an Entry of Appearance by the company at the instance of the Managing Director Jim Chisholm. At pages 113-115 of the Record there is evidence in the records of the Texas court that there was entry of appearance objecting to the jurisdiction of the Texas Court.

Paragraphs 14 and 15 of James Chisholm's affidavit in support of the Summons to set aside the Default judgment are a diversion. They read at page 65 of the record:

> "14. In or about October 1981, I was informed by David Phelan in the presence of Mrs. Marjorie Brown-Young that he intended to file suit against the Defendant company with regard to the note for $250,000. He instructed me that when the suit was filed I was not to enter Defence, but to allow the suit to go through so that he could take the US $250,000 out of Jamaica without having to obtain approval from the Bank of Jamaica which was a requirement at the time. I immediately told him that I would be doing no such thing, and that if he filed suit I would defend it. He then told me that if I did, he would ensure that I was removed as Managing Director of the Defendant company.

> 15. That in December 1981 Mr. David Phelan did file suit with regard to the $250,000, and I caused Defence to be entered by the Defendant company. Once this occurred, nothing further was done to prosecute the suit against the Defendant company, although Mr. Phelan did keep his word and had me removed as Managing Director of the Company for a period. I exhibit marked "JC4" for identity copy Writ of Summons and Statement of Claim, and Defence filed by the Company, and letter from Mrs. Marjorie Brown Young confirming the conversation as aforesaid."

These were proceedings between David N. Phelan in his capacity of Trustee of the P.N. Phelan Trust No. 1 and New Falmouth Resorts Ltd. The relevant Notes and Pleadings are at pages 82-85 of the record.

With respect to the Statement of Claim and the Default Judgment in the instant case here is how Mr. James Chisholm raises a defence in paragraph 16 at page 65 of the record:

> "16. That in 1984 when the Suit herein was filed I was no longer the Managing Director of the Defendant company, but I was a Director. The suit was never brought to the attention of the Board of Directors of the Company, but I subsequently discovered in 1995 that Appearance had been entered by Messrs. Clinton Hart and Company. I do not know who if anyone instructed Messrs. Clinton Hart to act on behalf of the Company, but no resolution appointing them as Attorneys for the Company was brought before the Board of Directors. Further I verily believe that Messrs. Clinton Hart were acting in a situation of conflict of interest, since at the time they entered appearance they were also Attorneys-at-Law for the Phelan family and for the Plaintiff herein. Copy letter from Clinton Hart to the General Legal Council dated 19th February 1992, in which they confirmed that they acted for the Phelan family is also attached to "JC4."

It is true that if the judgment in the Texas Court was obtained by fraud there would have been an entitlement to set it aside. The authority of **Aboulott v Oppenheimer & Co** (1883) 10 QB 295 is relevant to that issue. However, the Resolution by the Board of Directors with David Phelan as Chairman and J. Henry Chisholm as Managing Director negate any allegation of fraud with respect to the two Promissory Notes in issue. Additionally, to reiterate, the affidavit evidence of J. Henry Chisholm was insufficient to raise the issue of fraud.

It is now appropriate to address the original Grounds of Appeal. There were minor amendments which do not alter the substance of the original grounds. The original grounds at page 2 of the Record read:

> "1. That the learned trial judge erred in law and in fact in refusing to set aside the judgment entered in this action in Judgment binder No. 684 Folio 147 on the 27th day of April 1989.
>
> 2. That the Learned Judge in Chambers erred in finding that the Court . . . could not adjudicate in the matter which had been before a foreign court, since the allegation before the Jamaican Court is an allegation of fraud.
>
> 3. The Learned Judge in Chambers erred in finding that the defence that the matter was statute barred was not applicable to a foreign judgment.
>
> 4. That the Learned Trial Judge erred in that fraud as alleged in the proposed Defence of the Appellant was a good Defence to the claim of the Respondent.

> 5. That the Learned Trial Judge erred in that the Defence that the Appellant had not submitted to the jurisdiction of the foreign court is a good Defence in the matter herein."

It is not necessary to advert to the sixth ground as it is just an alternative way of stating ground 1. What is significant is that none of these grounds challenge the learned judge's discretion to grant the respondent James Phelan leave to enforce the Default Judgment. However, at page 1 of the Record, the Company sought an order "that leave to execute the Judgment be refused." These Grounds of Appeal reflected the consensus in the Court below that the decision on the Default Judgment would ultimately decide the fate of the summons to enforce it. The truth is that they were two distinct issues. It may be correct to affirm the Default Judgment yet refuse leave to enforce it.

An issue adverted to by the learned judge was estoppel. Lord Radcliffe in the case of **Kok Hoong v. Leong Cheong Kweng Mines, Ltd** [1964] 1 All E.R. 300 stated some important principles in relation to default judgments and estoppel which are relevant to this case. At page 305 His Lordship said:

> Their Lordships turn to the first ground. In their view there is no doubt that by the law of England, which is the law applicable for this purpose, a default judgment is capable of giving rise to an estoppel per rem judicatum. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand. For, while from one point of view a default judgment can be looked on as only another form of a judgment by consent (see *Re South American & Mexican Co., Ltd., Ex p. Bank of England* [1985] 1 Ch. 37 at p. 45

> and as such, capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, from another a judgment by default speaks for nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious and, indeed, grave danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default."

Then at page 306 Lord Radcliffe said:

> "The other case is the House of Lords decision in *New Brunswick Ry. Co. v. British and French Trust Corpn., Ltd.* [1938] 4 All E.R. 747; [1939] A.C. 1 in which full consideration was given to the authority of *Howlett v. Tarte* [1861 10 C.B.N.S. 813 and an attempt was made to decide to what extent it represented a principle of general application for the purposes of modern litigation. In their Lordships' opinion the *New Brunswick Ry. Co.* case [1938] 4 All E. R. 747; [1939] A.C. 1 can be taken as containing an authoritative reinterpretation of the principle of *Howlett v. Tarte* [1861] 10 C.B.N.S. 813 in simpler and less specialized terms. This reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinized with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of LORD MAUGHAM, L.C. [1938] 4 All E.R. at p. 756, they can estop only for what must 'necessarily, and with complete precision' have been thereby determined."

Here is how James Chisholm, director of the Company at the relevant time, states at pages 62-63 of the Record why there was no Entry of Appearance to the Writ and Statement of Claim dated 17th April, 1984 with respect to the two summonses before McIntosh J:

> "6. That the Defendant company was previously owned by the Phelan family, including James Phelan and John Phelan. Although I was not aware of the proceedings in the United States to which the matter herein relates until on or about 1995. At the time I attended the Court, but was informed that since I was not a party to the suit but only a director of the Company, I could not intervene in the Suit. When I became Managing Director again in 2001, I did not proceed to set aside judgment because since the Plaintiff had done nothing since 1996 I verily believed that they were no longer interested in pursuing the matter herein."

This is the kernel of Mr. Chisholm's case that through "negligence, ignorance or indifference" judgment has been entered against the company in this jurisdiction. But Mr. Chisholm was not the Company, he was a director and no more by his own admission. The Record contains evidence which shows the Company had a Secretary and that its Attorneys-at-Law were Clinton Hart and Co. A further point to note is that there was no evidence that the respondent James Phelan owned any shares in the Company so as to make him a direct owner of the Company.

The fact that the minutes of the Company (supra) recognized the debt, then the Default Judgment is akin to a consent judgment and **Re South American v Mexican Co. Ltd.** referred to in **Kook Hoong,** governs the instant case. McIntosh J. was therefore correct in dismissing the Company's summons to set aside the default judgment. On this aspect of the case the respondent James Phelan has been successful.

Was McIntosh J. also correct to grant leave to execute the Amended Final Judgment?

This is the crucial area as regards the outcome of this case and no case was cited from this jurisdiction pertinent to this issue.

Section 594 of the Judicature (Civil Procedure Code) Law states:

> "Where six years have elapsed since judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be so entitled to execution may apply to the Court for leave to issue execution accordingly.
>
> And the Court may, if satisfied that the party so applying is entitled to issue execution make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried. And in either case the Court may impose such terms, as to costs or otherwise, as seems fit."

Was it appropriate for the respondent James Phelan to await the orders of Edwards J. and Marsh J. in the Supreme Court before seeking leave to pray in aid section 594 of the Code? Some dates are of importance in this context. The Amended Default judgment was obtained 27th April 1989. This is the judgment sought to be enforced. The summons to enforce the judgment was filed in the Supreme Court 17th May 2002. It was served on the Attorney-at-Law Ms. Carol Davis for the Company on 11th June 2002. This was some 13 years after the Default Judgment was entered. Once six years had elapsed leave had to be granted by the Court to enforce the Default Judgment. It was not enforced as of right as McIntosh found. The litigation between the

Company and Chisholm & Co. and J. Henry Chisholm, which concerns the ownership of over 1,000 acres of resort property, commenced in October 1989. The Order made by Edwards J. cited previously tells the story. The dispute did not pertain to any change that had taken place or any death or otherwise in the parties.

The proceedings before Marsh J. on 19th and 20th July 2001 resulted in an Order which reads at page 93 of the Record in part:

"ORDER OF MOTION
SUIT NO. E. 254 OF 2001

> UPON THE MOTION coming on for hearing on the above dates and UPON HEARING MR. NORMAN E. WRIGHT, Q.C. instructed by NORMAN WRIGHT & Co., Attorney-at-Law for the Applicant herein and MR.PATRICK FOSTER and MS. KAMINA E. JOHNSON, Attorney-at-Law instructed by the firm CLINTON HART & co., Attorneys-at-Law for the Respondent herein AND UPON READING the Affidavit of JAMES HENRY CHISHOLM sworn to on the 7th day of June, 2001, IT IS HEREBY ORDERED that the reliefs sought in the Motion dated the 7th day of June, 2001 (as amended) be granted as follows.
> ..."

After listing the names of the shareholders that were struck out from the Register of Shareholders the following sentence appears at page 94 of the Record:

> "... and by inserting in lieu thereof the name of the Applicant, James Henry Chisholm, as the holder of 500 Ordinary Shares numbered 1053 to 1052 and a Director of New Falmouth Resorts Limited."

I reiterate that there is no evidence that the parties struck off the Register of Members were summoned or represented at the hearing. The parties are listed in the motion at page 93 of the Record. They are John H. Phelan 111, Frank D. Phelan, Charles H. Swann and the B.B & B partnership. They must have put up substantial contributions to the purchase of the broad acres that the company owns. The Order may be struck out at any time on the basis that there was no jurisdiction to make such an order in the absence of the shareholders directly concerned. There is some evidence at page 96 of the Record that there is a pending suit in this matter. The basis of striking out these names on the Share Register was stated in the order at page 94 thus:

> "ON THE GROUNDS THAT the persons and/or entities of (a) through (d) above, were non-residents and did not satisfy the requirements and conditions of the Exchange Control Act at the time of the purported issue of the shares in their names and accordingly, do not qualify to be shareholders of the Company."

The Exchange Control Act was repealed and replaced by the Bank of Jamaica Act Part IVA. Even when the Act was in force, breaches could be cured by subsequent permission of the Bank of Jamaica since the Bank's permission could be granted after the breach was detected. It should be noted that subject to the exceptions which do not apply in this case, a foreign judgment in personam cannot be examined for facts or law by the Courts in this jurisdiction. It is regarded as final and conclusive (see Halsbury Laws 4th Edition Vol. 8, paragraph 725). It is necessary to make this point as there is a

complaint that the debt represented by the Promissory note was statute barred by the Texan laws.

W.J. Lamb and Sons v Rider [1948] 2 KB 331 at 337 contains a passage which demonstrates that a discretion ought to have been exercised pursuant to section 594 of the Code since six years had elapsed since entry of the Default Judgment. The passage reads at page 337:

> "It follows from the above brief survey that the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it and that the two conceptions have been the subject of different treatment. Execution is essentially a matter of procedure – machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders."

Then Scott L.J. continued the Court's judgment thus on page 339:

> "The Common Law Procedure Act, 1852, and OR. 42 of the Rules of the Supreme Court were concerned, and concerned alone, with procedural machinery for enforcing a judgment when obtained. The two subjects were formerly quite independent and distinct, the one from the other, and we are quite unable to attribute to the definition of "action" in the Limitation Act, 1939, the effect of merging the two together."

These principles are applicable in this jurisdiction as the Limitation Act is distinct from the Judicature (Civil Procedure Code) Law. Further, the Code defines "action" as proceedings commenced by Writ and the proceedings to enforce a judgment in the initial case were commenced by Summons.

Then in **National Westminster Bank plc. v. Powney and others** [1990] 2 All ER 416 at 431 Slade L.J. said:

> "It is our judgment a cardinal principle of procedural law that no party should suffer unnecessarily from delay which is not his fault but rather a fault in the administration of justice. It is an unfortunate but unavoidable fact that courts cannot hear and determine every application on the day when it is first made. Indeed if they could there would probably be many more litigants seeking justice than there are at present, and a corresponding increase in demand for judges and courtrooms would be exponential. Various measures are taken to alleviate the consequences of delay of this type. For example, an action is commenced for limitation purposes when the writ is issued, even though the trial occurs many years later; interest can be awarded from the date of the writ (or earlier) to the date of judgment; an application to dismiss a claim for want of prosecution is judged on the facts as they were when the application was made, and not when it is heard months afterwards."

If the respondent Phelan had filed his summons to enforce the default judgment within six years after entry and the Court adjourned the hearing of the summons until the proceedings before Edwards J and Marsh J. were heard and determined, the principle expressed in the above passage would have been applicable.

As it is there was no fault in the administration of justice in the instant case. Yet there was this long delay after six years in filing the summons to enforce the judgment by the respondent James Phelan. The proceedings before Marsh J. and Edwards J. were not barriers to enforcing the Default Judgment as the respondent James Phelan alleged. The delay of some 13

years after entry of the Default Judgment was inordinate and inexcusable. He further compounded these errors by finding that the respondent Phelan had a right to enforce the Default Judgment after six years had elapsed since entry.

Prejudice to the Company may be inferred. The Accountants for the Company were entitled to write off the debt. The learned judge gave no weight to these issues. Consequently he exercised his discretion wrongly, and McIntosh J. ought to have refused leave to enforce the Default Judgment. So the Order below granting leave to enforce the Default Judgment must be set aside. In these circumstances the appeal by the Company succeeds. The default judgment can only be enforced if the Company once more acknowledges the debt as embodied in the judgment. The Company is entitled to its costs both here and below. The Default Judgment can only be enforced if the Company once more acknowledges the debt. The delay in delivering is regretted. The delay has been due to a heavy work load.

CONCLUSION

It is in the light of the foregoing reasons that I had agreed with my brothers Panton and Smith JJA that the Appeal should be allowed and the following Order was made at the end of the hearing:

"Appeal allowed. Order of the Court below set aside. Action struck out as being statute-barred. Costs to the appellant both here and below to be taxed if not agreed."

On second thought the sentence "Action struck out as being statute-barred" is ambiguous. The order granting leave to enforce the Default judgment ought to be set aside as the learned judge below failed to exercise the discretion accorded him by the Code. This was the basis for allowing the appeal. This Court has substituted the correct discretion by refusing leave to enforce the Default judgment. The Order should be amended so as to show that this was a procedural appeal. The amendment should read:

(1) Appeal allowed in part.

(2) Order with respect to default judgment affirmed.

(3) Order with respect to Leave granted to execute Default judgment set aside.

(4) Leave to enforce Default judgment refused.

(5) Taxed or agreed costs to the Appellant Company both here and below.

PANTON, J.A.

I agree.

SMITH, J.A.

I agree.