JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 42/2002

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

BETWEEN:	**DELROY RHODEN (by Next Friend-Edgar Rhoden)**	**PLAINTIFF/ APPELLANT**
AND:	**CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED**	**1ST DEFENDANT/ RESPONDENT**
AND:	**TREVOR REID**	**2ND DEFENDANT/ RESPONDENT**

Earl Witter instructed by Gentles & Willis for the Appellant

Hilary Phillips Q.C., and Andrea Benjamin instructed by Grant, Stewart, Phillips and Co., for the 1st. Respondent

Dundeen Ferguson instructed by Ferguson Campbell & Co., for the 2nd Respondent

November 12, 14, 15, 2002; February 3, 5, 6, March 31, 2003; and March 18, 2005

DOWNER, J.A.

There are two central issues to be determined in this interlocutory appeal. The first is whether the interlocutory judgment in default of defence against the first respondent, Construction Developers Ltd. is effective, so that the appellant Delroy Rhoden may proceed to assessment of damages. The second issue is whether there being no defence served by the second respondent Trevor Reid,

on the appellant Rhoden, it is open to Rhoden to enter a judgment in default of defence and thereafter proceed to assessment of damages against the second respondent in the same proceedings. The appellant contends that he ought to succeed on both these issues. There is another issue concerning the dismissal of the appellant's statement of claim for want of prosecution by the order of Hazel Harris J. The appellant seeks to strike out that order as null and void. It was boldly contended by Mr. Earl Witter on behalf of the appellant, that even if the order in the court below was a valid one, it was wrongly decided. If this contention is correct then it has been argued that the appellant should have the costs both here and below.

How did the Judgment in Default come about?

Here is how the default judgment reads at page 32 of the record:

> "NO DEFENCE filed by or on behalf of the first Defendant CONSTRUCTION DEVELOPERS ASSOCIATION LIMITED herein
>
> IT IS THIS DAY ADJUDGED:
>
> The Plaintiff claims against the First Defendant damages to be assessed and costs to be agreed or taxed.
>
> Dated the 8th day of January 1996
> (signed)
> ERROL GENTLES PLAINTIFF's
> ATTORNEY-AT-LAW.'

A true copy of the default judgment from the registrar of the court below, supplied to this court during the course of appeal shows, that it was entered 19th February, 1996.

Judgment in default of defence was only entered against one tort-feaser. At this stage the other defendant Trevor Reid could not be found for service. The entry of appearance was not included in the record so it is necessary to advert to the affidavit of Errol Gentles, the Attorney-at-Law for the appellant for the evidence of it. It states at page 16 of the record:

> "4. That on the 18th day of July, 1995, a copy of the Writ of Summons and Statement of Claim was served on the 1st Defendant, by registered mail.
>
> 5. That on the 26th day of September, 1995 an Appearance was entered on behalf of the 1st Defendant by Messrs. Grant, Stewart, Phillips & Co. and a copy was served on the Plaintiff's Attorneys-at-Law on the 27th day of September, 1995."

Section 52 of the Judicature (Civil Procedure Code) Law (the Code) has this to say on the entry of appearance:

> "52 The time for entering an appearance to a writ of summons shall be fourteen days from the service of the writ, exclusive of the day of service, unless the Court or a Judge shall otherwise direct."

Then section 199 of the Code dealing with the filing and delivery of a copy of the defence on the plaintiff states:

> "199. Where a defendant has entered an appearance, he shall file his defence, and deliver a copy thereof, within fourteen days from the time limited for appearance or from the delivery of the statement of claim whichever is the later unless:-
>
> (a) the time is extended by consent in writing or by the Court or a Judge; or

(b) the writ of summons is specially indorsed with or accompanied by a statement of claim under section 14 of this Law and the plaintiff in the meantime serves a summons for judgment under Title 13; or
(c) the writ of summons is specially indorsed with or accompanied by a statement of claim under section 14 of this Law and contains a notice that the plaintiff intends to apply under Title 13B for a trial without pleadings."

The first respondent, Construction Developers did not comply with Section 199 of the Code, so the appellant Rhoden entered a judgment in default. The serving of a defence by the 1st respondent Construction Developers Associates Ltd. on 22nd February 1996 when the default judgment was entered on 19th February, 1996 does not alter the position as regards compliance.

Consequence of failure to comply with section 199 of the Code

Once there is an entry for default judgment section 247 of the Code authorized the appellant Rhoden to proceed to interlocutory judgment for damages. It reads:

"Interlocutory judgment for damages. * #3

247. If the plaintiff's claim is, as against any defendant, for unliquidated damages only, and that defendant does not, within the time allowed for that purpose, deliver a defence, 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."

At this stage it is necessary to refer to the Statement of Claim. It reads as follows at pages 4-5 of the record:

"BETWEEN DELROY RHODEN (By Next Friend Edgar Rhoden) PLAINTIFF

A N D CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED 1ST DEFENDANT

AND TREVOR REID 2ND DEFENDANT

1. The Plaintiff is a schoolboy aged 13 years and is the son of his next friend Edgar Rhoden.

2. The Plaintiff at the material time was attending Excelsior High School at Mountain View Avenue in the parish of St. Andrew.

3. The first Defendant is a registered company incorporated under the Companies Act and has its registered office at 11 Dunrobin Avenue, Kingston 10 in the parish of St. Andrew and the second Defendant was employed to first Defendant as driver.

4. The first Defendant at the material time was the registered owner of motor vehicle licensed 9494AS and the second Defendant was the driver of the said motor vehicle as the servant or agent of the first Defendant.

5. On the 14th of December 1994 the Plaintiff was standing at a bus stop along Mountain View Avenue in the parish of St. Andrew awaiting the arrival of a bus when the second Defendant so negligently drove the said motor vehicle that it crashed into the bus stop and hit the Plaintiff."

Then the particulars of negligence read thus:

"PARTICULARS OF NEGLIGENCE

(1) Failing to keep any or any proper look out or to have due regard for other road users.

(2) Failing to keep a straight course.

(3) Failing to stop, slow down or in any other way so to manage or control the motor vehicle so as to avoid the impact."

The following paragraphs complete the Statement of Claim:

"PARTICULARS OF INJURIES

(a) Mild contusion to left occipital region.

(b) Cerebal concussion

(c) Abrasions to left scapula and left hip region

PARTICULARS OF SPECIAL DAMAGE

(a)	Medical Expenses	$2000.00
(b)	Cost of Transportation to doctor	500.00
(c)	Cost of medical report	350.00
	Total	$2,850.00

6. The said injuries and damage were occasioned to the Plaintiff by reason of the negligence on the part of the second Defendant

7. The Plaintiff will rely on the principle Res Ipsa Loquitur."

So far as the judgment in default is concerned "a prudent commercial lawyer ought to act promptly to set aside the default judgment". It was so stated in **Workers Savings & Loan Bank v Winston McKenzie Benros Company Limited et al.** S.C.C.A. Nos 102 and 103/96 delivered December 3, 1996. In so ruling, this court was following the classic judgment of **Evans v Bartlam** [1937] 2 All E.R. 646. Here is how Lord Atkin puts it at page 650:

> "I agree that both R.S.C., Ord. 13, r. 10, and R.S.C., Ord. 27, r. 15, give a discretionary power to the judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence. It was suggested in argument that there is another rule, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."

The corresponding section to the Rules of the Supreme Court (R.S.C.) cited above in the Code is section 258 which 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."

The default judgment in the instant case has not been set aside for over six years. So the issue of consent mentioned by Lord Atkins comes into play. It

is not out of place when considering the default judgment to point out that on 4th October, 1995, the Attorneys-at-Law for the 1st respondent Construction Developers Associates Ltd. wrote to Rhoden's attorneys seeking to effect an amicable settlement. This issue of consent was addressed by Vaughan Williams J. in **In Re. South American and Mexican Company Ex parte Bank of England** [1895] 1 Ch. 37 at 45 thus:

> "It has always been the law that a judgment by consent, or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end."

It is true that the issue in that case was a consent judgment, and in affirming the judgment, the Court of Appeal made no mention of judgment by default. However, the statement of principle by Vaughan Williams .J. has never been in doubt. It was affirmed by Viscount Radcliffe in **Kok Hoong v Leong Cheong Kweng Mines Ltd.** 1964 A.C. 993 or [1964] 2 W.L.R. 150 at 156 thus:

> "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 judicatam. 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 upon as only another form of a judgment by consent (see **In re South American & Mexican. Co.** [1895] 1 Ch. 37) 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."

New Brunswick Railway Co. v. British & France Trust Corportion [1939] A.C. 1, speaks of the same principle. Here is how Viscount Radcliffe speaks of **New Brunswick** in **Kok Hoong** (supra) at page 158:

> "In their Lordships' opinion the **New Brunswick Railway Co.** case 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 specialised terms. This reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinised 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., ([1939] A.C. 1, 21) they can estop only for what must "necessarily and with complete precision" have been thereby determined."

On this analysis the default judgment raises an estoppel per rem judicatum on the issue of liability. It was therefore not open to the 1st

respondent, Construction Developers, to institute proceedings to dismiss the statement of claim for want of prosecution on the issue of liability when the default judgment has concluded that issue. Further, no application has been made to set it aside.

Could the Appellant Rhoden and 1st Respondent Construction Developers Associates Ltd. waive the default judgment?

The parties cannot waive the existence of the default judgment regularly entered. If they could so do, then by contract, parties could overrule the law between the parties as reflected in judgments of the Courts. Even a Court of Appeal cannot substitute its own finding for that of the Court below when there is a concluded judgment on an issue. An apt statement of this principle is to be found in **Westminister Bank Ltd. v. Edwards** [1942] 1 All E.R. 470. Here the Court of Appeal purported to ignore the findings of the County Court Judge and substitute its own finding on the issue of a multiple lease. Here is how Lord Simon L.C. dealt with the matter and how he treated a jurisdictional issue at pages 472-473:

> "The judgment of GODDARD, L.J., includes the statement that after the premises were demised to the present respondents they were used by them as a warehouse. No statement to this effect can be found in the county court judge's notes or in his judgment, and both counsel affirmed to us that no such statement or admission was made. Even if the fact were so, this would not prove that this was not a multiple lease. I am forced to the conclusion that there were no sufficient materials before the Court of Appeal to support the ruling that this lease was not a multiple lease.

> Moreover, the question was not in issue. There are, of course, cases in which a court should itself take an objection of its own motion, even though the point is not raised by any of the parties before it. A court is not required to entertain a case which is brought before it only by collusion or other abuse of process. To give an absurd instance, a court cannot be required to decide what are necessaries for an infant if the parties collusively agree to treat the purchaser of the goods as under age when he is not under age at all. In the present case, however, there is no collusion or pretence of any kind. Again, a court not only may, but should, take objection where the absence of jurisdiction is apparent on the face of the proceedings. Thus, an appellate court not only may, but must, take the objection that it has no jurisdiction to hear an appeal if it is apparent that no right of appeal exists. In **Norwich Corpn. V. Norwich Electric Tramways Co., Ltd** ([1906] 2 K.B. 119; 38 Digest 57, 337; 75 L.J.K.B. 637; 95 L.T. 12). VAUGHAAN WILLIAMS, L.J. formulated the proposition thus, at p. 125..."

Then continuing on the same page Lord Simon said:

> "Here not only did the parties agree that the lease was a multiple lease, but the county court judge, after inspecting the premises, included among his findings an express decision to this effect."

Lord Diplock stated this jurisdictional principle in a later judgment of **Isaacs v Robertson** (1984) 43 W.I.R. 126 at 128-129 which will be citied in full later. Both Lord Simon and Lord Diplock in dealing with jurisdictional issues, recognized that it is necessarily related to the concept of nullity rather than irregular orders which can also be set aside ex debito justitiae. The distinction between orders which are nullities and irregular orders where there

is no waiver is of importance in this case and will be addressed in full in due course.

The submission on behalf of the appellant Rhoden in this case, is that once there was a default judgment regularly entered, the learned judge below had no power to embark on proceedings which resulted in her findings that the statement of claim could be dismissed for want of prosecution. She had no power because the proceedings subsequent to the entry of the default judgment were nullities. This is how Lord Denning stated it in **McFoy v United Africa Co., Ltd.** [1961] 3 All E.R. 1169 at 1172:

> "Rule 1 says that:
>
> > "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings 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."
>
> This rule would appear at first sight to give the court a complete discretion in the matter. But it has been held that it only applies to proceedings which are voidable, not to proceedings which are a nullity: for those are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the court without going under the rule; see **Anlaby v. Praetorius** ((1888), 20 Q.B.D. 764), and **Craig v. Kanssen** ([1943] 1 All E.R. 108; [1943] K.B. 256)."

Then Lord Denning continues thus on the effect of nullity on the same page:

> "It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is

> founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity."

All that Lord Denning was stating here is that in some instances when an order or resolution is alleged to be a nullity then a party may wait until proceedings are instituted against it and rely on nullity as a defence. See **Wandsworth London Borough Council v. Winder** [1985] A.C. 461 or [1984] 3 All E.R. 976:

The judicial basis for declaring proceedings a nullity in relation to procedural rules was elegantly stated by Fry L.J. in **Anlaby v. Praetorius** (1888) 20 Q.B.D. 764 at 769 thus:

> "But in the present case we are not concerned with an instance of non-compliance with a rule, nor with an irregularity in acting under any rule. The irregular entry of judgment was made independently of any of the rules; the plaintiff had no right to obtain any judgment at all."

The distinction is easy to state but difficult to apply. Later cases reiterate this distinction between nullity and irregular judgments where a claimant has not waived the irregularity he has a right to have the order set aside ex debito justitiae. The distinction is brought out in **Re Pritchard** [1963] 1 All E.R. 873, but Lord Greene was also aware of the distinction in the earlier case of **Craig v Kanseen** [1943] 1 All E.R. 108. Here is how he recognizes it at pages 112-113:

> "The difficulty of defining the precise line which separates an irregularity from a defect which makes

> the order a nullity is referred to in **Fry v. Moore** ((1889), 23 Q.B.D. 395; Digest, Practice, 969, 5047; 58 L.J.Q.B. 382; 61 L.T. 545). There LINDLEY, L.J., said, at p. 398:
>
> But then arises the question, whether the order for substituted service was a nullity, rendering all that was done afterwards void, or whether it was only an irregularity. If it was the latter, it could be waived by the defendant. I shall not attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served, and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could be waived.
>
> It was a case of substituted service. LOPES, L.J. says, at p. 399:
>
> It is said that the proceeding was a nullity, and no doubt the distinction between a nullity and a mere irregularity in procedure is often a very nice one. But in the present case I think there was only an irregularity."

Craig v. Kanseen is a case of importance. At page 111 Lord Greene M.R. cites Lord Russell in **Smurthwaite v Hannay** [1894] A.C. 494, the earliest of the decisions on this issue from the House of Lords to demonstrate that if the point is a nullity it is never too late to raise it. Here is the passage in full.

> "In referring to this point, LORD RUSSELL OF KILLOWEN said, at p. 506:
>
> This objection is not, in my judgment, well founded. In my judgment, such joinder of plaintiffs is more

> than an irregularity; it is the constitution of a suit as to parties in a way not authorised by the law and the rules applicable to procedure; and apart altogether from any express power given by the rules, it is fully within the competence of the court to restrain and to prevent an abuse of its process."

Earlier Lord Herschell L.C. was cited on the same page thus:

> "I cannot accede to the argument urged for the respondents, that even if the joinder of the plaintiffs in one action was not warranted by the rule relied on, this was a mere irregularity of which the plaintiffs, by virtue of Ord. 70, could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity."

It will be seen that UpJohn L.J. for the majority approved of this approach in **Re Pritchard.** It is the correct approach, as one of the tests for a nullity, is that it cannot be waived**.** Implicit in the speeches of both Law Lords is that it is never too late to raise the issue.

Lord Greene also demonstrated that proceedings independent of the rules renders subsequent proceedings a nullity. The application in the instant case is that when there is an interlocutory judgment entered as regards liability, then the rules provide for proceedings for assessment of damages and any proceedings apart from setting aside the interlocutory default judgment, or proceeding to assessment are null and void. So proceedings to dismiss the statement of claim for want of prosecution would be a nullity. Here is how Lord Green put it at page 112 citing Vaughan Williams L.J. in **Hamp- Adams v Hall** [1911] 2 K.B. 942, Vaughan Williams L.J. said at 943-944:

> "It is contended for the plaintiff that the non-compliance with the rule has been waived by the defendant. In my opinion, it was impossible for the defendant to waive the defect, for the result of the non-compliance with the rule was that there was no writ on which the plaintiff was entitled to proceed. Then it was said that at the most the case should be regarded as one in which there has been a mere irregularity, and Ord. 70, r. 2, was called to our attention as showing how the right of a party to take advantage of a defect in the nature of an irregularity may be limited or taken away. In my opinion, that rule has no application to the circumstances of the present case. It is said that it is a very severe penalty to put on a mistake of this kind that all the subsequent proceedings should be set aside. I am not at all impressed by that argument. Where proceedings are taken by a plaintiff in the absence of the defendant, it is most important that there should be at every stage a strict compliance with the rules, and therefore it is a reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule as Ord. 9, r. 15, not as a mere irregularity which can be waived, but as a matter which prevents any further proceedings from being taken on the writ."

Be it noted that in the above case the rules provided for service of the writ to be indorsed within 3 days. The writ was served, but not within 3 days. Then the plaintiff signed a judgment in default of appearance and there was uncontested proceedings for a verdict for damages. The proceedings was set aside as a nullity. The principle expressed in **Hamp-Adams** (supra) is also applicable to the respondent Trevor Reid and will be adverted to later.

Although agreeing with the result in this case Upjohn L.J. in **Re Pritchard** (supra) at 882 suggests that this was a case of non- compliance with the rules rather than proceedings independent of the rules. He further

contended that as there was no waiver, it was rightly set aside ex debito justitiae. Upjohn L.J. also suggested that Buckley L.J. set aside the judgment on this basis.

There is a very important passage in Lord Greene's judgment at page 113 which judges at first instance in this jurisdiction should note:

> "Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order, is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent."

An appeal is permissible if taken within the proper time. If there is a need for extension of time it should be granted once there is an allegation that the order being challenged is a nullity. However, if the claim is that the order is a nullity an application can be made to the Court which made the order. Here time does not run because the point is that the order is not a valid one. This correct course was taken by the hapless Leymon Strachan with apparently unfortunate results. See **Leymon Strachan v The Gleaner Co. Ltd. and Stokes** S.C.C.A. 133/99 (unreported) delivered April 6, 2001. He had entered a default judgment on liability and proceeded to a contested assessment before Bingham J. as he then was, and a jury. That verdict was set aside by a judge at first instance who purported to set aside the default judgment and further

ordered a new trial despite the mandatory provisions of section 42 of the Judicature (Supreme Court) Act which reads:

> "Motions for new trials of causes or matters upon which a verdict has been found by a jury, or by a Judge without a jury, and motions in arrest of judgment, or to enter judgment non obstante veredicto, or to enter a verdict for plaintiff or defendant, or to enter a non-suit or to reduce damages and special cases and special verdicts, shall be heard before the Court of Appeal."

In addition section 10 of the Judicature (Appellate Jurisdiction) Act gives the right of appeal from orders made in the Supreme Court.

There can be no doubt that **Strachan** (supra) was a classic case of nullity. The contention that Strachan was out of time at any stage of the proceedings was untenable since he had invoked the inherent jurisdiction of the Court at every stage to set aside the irregular judgment of the Supreme Court. That irregular judgment purported to set aside the valid verdict of Bingham J. and jury and further ordered a new trial. If a new trial were to be attempted the principle of estoppel would apply.

The Privy Council approved of **Craig v Kanseen** in **Chief Kofi Forfie v Barima Kwabena Seifah** [1958] 1 All E.R. 289 at 290 thus:

> "A court had inherent power to set aside a judgment which it had delivered without jurisdiction. LORD GREENE, M.R., in **Craig v. Kanssen** (sic) ([1943] All E.R. 108 at p. 113), after referring to several decisions, had said:
>
> "Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is

> entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary."

> "Their Lordships were of the same opinion. Assuming that the judge had no power on June 29, 1949, to review his judgment of May 10, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This, in fact, he had done, and the only criticism of the proceedings of June 29 that could be made was that, on a question of procedure, he attributed the authority to do the thing he did to a source from which it did not flow. But, although the source named was, on the assumption made, incorrect, he undoubtedly had had power to do the thing he had done. No other error could be said to have been committed. Such an error did not, in their Lordships' opinion, vitiate the act done. It followed that the judgment of June 29, 1949, was not a nullity."

Lord Diplock made the same point in **Isaacs v Robertson** (1984) 43 W.I.R. PC at 130 thus:

> "The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular, it can be set aside by the court that made it upon application to that court; if it is regular, it can only be set aside by an appellate court upon appeal (if there is one to which an appeal lies)."

It is of importance to note that it does not appear that the fact of the default judgment was brought to the attention of Hazel Harris, J. If it were I am sure that she would not have proceeded to dismiss the statement of claim

for want of prosecution. If the application had been made to her to set aside her judgment in the light of the default judgment I am sure she would not hesitate to act in accordance with the law. To my mind the submission by Mr. Witter that once there was a default judgment which was not set aside, the subsequent proceeding before Hazel Harris J. was a nullity, was well founded.

Further illustrations of the difficulty of distinguishing mere irregularities and nullities

Upjohn L.J. as he then was in **Re Pritchard** [1963] 1 All E.R. 873 adverts to the difficulty of distinguishing between a mere irregularity and a nullity: a mere irregularity is a failure to comply with the rules of procedure and this can be waived. A nullity on the other hand cannot be waived. **Pritchard** (supra) itself is such a case. It was a majority decision Denning, M.R. dissenting (Upjohn and Danckwerts L.JJ.) Upjohn L.J. explains the reason for the apparent difficulty thus at page 881:

> "I am not so sure that it is so difficult to draw a line between irregularities, by which I mean defects in procedure which fall within R.S.C., Ord. 70, and true nullities, though I agree that no precise definition of either is possible. I think that part of the difficulty is that the phrase "ex debito justitiae" has been taken as being equivalent to a nullity, but, with all respect to LORD GREENE, M.R.'s judgment in **Craig v Kanssen** ([1943]1 All E.R. 108; [1943] K.B. 56), it is not. The phrase means that the plaintiff is entitled as a matter of right to have it set it aside."

It is important to ascertain how Upjohn L.J. treats **Smurthwaite v. Hannay** [1894] A.C. 501 since that was an unanimous decision of the House

of Lords and R.S.C., Ord. 70 was applicable. This rule is still in operation in this jurisdiction. Here is the passage at p. 882:

> "We were referred to a number of other cases, all of them cases of irregularities and not nullities; it is unnecessary that I should refer to them for they do not run counter to my general view that R.S.C., Ord. 70, should be widely construed, nor on the other hand do they throw any light on the question whether in the particular case before us the proceedings should be regarded as a nullity. We were referred to **Smurthwaite v. Hannay** [1894] A.C. 494. It is not entirely easy to see whether their lordships treated the matter as a nullity or irregularity. It seems to me that LORD HERSCHELL, L.C. [1894] A.C. at p. 501, was really treating the improper joinder of the parties under the then rules as a nullity rather than an irregularity, capable of cure by virtue of Ord. 70. He said [1894] A.C. at p. 501:
>
> > "I cannot accede to the argument urged for the respondents, that even if the joinder of the plaintiff's in one action was not warranted by the rule relied on, this was a mere irregularity of which the plaintiffs by virtue of Ord. 70, could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity."
>
> LORD RUSSELL OF KILLOWEN [1894] A.C. at p. 506 put it in very much the same way. I find that case very difficult but it is unnecessary to say more about it as the Rules of the Supreme Court have been altered so that that precise point can never arise again. See R.S.C., Ord. 16, r. 1 in Annual Practice 1963, p. 301."

Upjohn L.J. then formulated the following test for a nullity at p. 883:

> "The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought

> to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service, or service by filing in default, or cases where service has properly been dispensed with: see e.g., **Whitehead v. Whitehead** (otherwise **Vasbor**) ([1962] 3 All E.R. 800); (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement: see e.g., **Finnegan v. Cementation Co., Ltd.** [1953] 1 All E.R. 1130; [1953] 1 Q.B. 688."

Be it noted that UpJohn L.J. formulated the above proposition on the basis of authorities. He acknowledges that the categories are not closed. For example the "Failure to comply with a statutory requirement" must include rules made pursuant to a statute as **Smurthwaite v Hannay** (supra) established. Also as **Isaacs v Robertson** (supra) shows, the same principle is applicable to an Order of a Court of unlimited jurisdiction if there is no appeal or the order is not set aside for lack of jurisdiction. The parties are bound by the judgment. The judgment also raises an estoppel. In this jurisdiction, section 2 of the supremacy clause of the Constitution obliges the Superior Courts of Record to declare null and void any law be it an enactment of Parliament or a judicial decision which is not in conformity with the Constitution. This is a constitutional democracy unlike the parliamentary democracy of the United Kingdom. See **Independent Jamaican Council for Human Rights (1988) Limited and others v. Hon. Syringa Marshall-Burnett, The Attorney-General for Jamaica** P.C. Appeal No. 41/2004 delivered 3rd February, 2005.

Lord Denning M.R. in his dissenting judgment would have restricted the concept of nullity even further than Upjohn L.J. He said at page 878:

> "But what about the cases? We were referred to many cases on nullity and irregularity. They are most confusing because of the loose way in which the word "nullity" is used, and the sooner it is put in its proper place the better. Often a proceeding has been said to be a "nullity", when it would have been more correct to say that if the irregularity has not been waived, it will be set aside ex debito justitiae. Thus, a judgment by default which is signed irregularly will be set aside ex debito justitiae (see **Anlaby v. Praetorius** (1888), 20 Q.B.D. 764, **Hughes v. Justin** (1894), 1 Q.B. 667), particularly when it is signed in defiance of an express rule (see **Hamp-Adams v. Hall** [1911] 2 K.B. 942); but it is not a nullity. Even when an order is obtained without due service of process, it is not a nullity (despite what was said in **Craig v. Kanssen** [1943] 1 All E.R. 108), but it will be set aside ex debito justitiae, if it has not been waived (see **Hewitson v. Fabre** (1888), 21 Q.B.D. 6, where the headnote is wrong in saying that it was a nullity, and **Wiseman v. Wiseman** [1953] 1 All E.R. 601; [1953] P. 79)."

Then Lord Denning continued thus at pages 878-879:

> "There are many cases which show that non-service can be waived: for if a man knows of the process and allows execution to be levied against him without complaint, and does not apply to the court to set it aside within a reasonable time, he may be too late to get any relief (see **Holmes v. Russell** ((1841), 9 Dowl. 487), where there is a most instructive judgment by COLERIDGE, J., **Emerson v. Brown** ((1884) 8 Scott N.R. 215) and ARCHIBOLD's PRACTICE (1866) pp. 211, 212)). The case of **Fry v. Moore** ((1889), 23 Q.B.D. 315) seems to me a simple illustration where the defendant had not in fact been served and yet it was held that he had waived the irregularity. Even **Smurthwaite v. Hannay** ([1894] A.C. 494) is not a case of nullity. There was a

> misjoinder of causes of action contrary to the rules then in force. MR. FINLAY, Q.C., argued that it was ([1894] A.C. at p.434) "a mere irregularity and the application was not made within a reasonable time within Ord. 70, r. 2." Note that he only put it on R.S.C., Ord. 70, r. 2. The House of Lords rejected that argument ([1894] A.C. at pp 501,506); and went on to restore the order of the Queen's Bench ([1894] A.C. p. 494) which was clearly based on Ord. 70, r.1. There was a non-compliance with the rules and the court dealt with the proceedings by allowing the plaintiffs to amend and to elect on which claim they would proceed. Clearly the proceedings were not held to be a nullity, because a nullity cannot be amended. No other case gives rise to any difficulty. In most of them, I am glad to say, it will be found that the courts have refused to set aside process for technical irregularities see **MacFoy v. United Africa Co., Ltd.** ([1961] 3 All E.R. 1169; [1962] A,C. 152), **Pontin v. Wood** [1962] 1 All E.R. 294;]1962] 1 Q.B. 594). The only true cases of nullity that I have found are when a sole plaintiff or a sole defendant is dead (see **Tetlow v. Orela Ltd.,** ([1920] All E.R. Rep. 419; [1920] 2 Ch.24), or non-existent (see **Lazard Brothers & Co. v. Midland Bank Ltd.** ([1932] Al E.R. Rep. 571 at p. 575; [1933] A.C. 289 at p. 296); and I would like to see the word 'nullity' confined to those cases in future."

As for Lord Denning's disagreement with the majority in **Re Pritchard** (supra) and the House of Lords on **Smurthwaite v. Hannay,** (supra) the position is that the issue must be brought to court to have it declared a nullity. Once that is done it is open to the Court to propose in certain circumstances an amendment which would make the pleading valid. This is likely to be so in interlocutory proceedings. A classic example is **Smurthwaite v Hannay,** (supra) at page 495, Lord Russell stated that the order of the Queens Bench Division which was restored was as follows:

> "... an order that all further proceedings should be stayed, or the action dismissed, on the ground that the plaintiffs should have brought separate actions in respect of their respective claims, and further ordered that the plaintiffs should elect as to which claim they would proceed with."

This distinction between a nullity and an irregular judgment which may be set aside ex debito justitiae was also made by Lord Diplock in **Isaacs v Robertson** (supra) at 130:

> "Their Lordships would, however, take this opportunity to point out that, in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are "void" in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are "voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions "void" and "voidable", respectively, have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals **Marsh v Marsh** [1945] AC 271 at page 284 and **MacFoy v United Africa Co Ltd** [1962] AC 152 at page 160; but in neither of those appeals (nor in any other case to which counsel has been able to refer their Lordships) has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void *ipso facto* without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind; what they support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside

> orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice."

That the subject is difficult is evidenced by this last statement by Lord Diplock. Orders obtained in breach of natural justice are nullities and not mere irregularities. Therefore such orders cannot be waived. However, they must be set aside and they are set aside ex debito justitiae.

In **Marsh v. Marsh,** [1945] A.C. 271 a case from this jurisdiction, there was an entry of irregular judgment which was not set aside. The irregular judgment was the entry of a decree absolute before four days had elapsed from the entering of appearance. The irregularity was waived. If it was a nullity there could have been no waiver. The significance of all this, for the issue under consideration in the instant case is that the decree absolute in **Marsh v. Marsh** (supra) was a judgment in rem and unless and until a Court of Appeal reversed it, the marriage for all purposes was at an end.

For completeness the Editor's note at pages 873-874 of **Pritchard** (supra) should be noted. It read thus:

> "[**Editorial Note.-** The Rules of the Supreme Court (Revision) 1962, S.I. 1962 No. 2145, which come into operation on Jan.1, 1964, introduce a new rule R.S.C., Ord. 4, r. 6 ((1847), 16 M. & W. 669), which will enable a Chancery matter begun by an originating

> summons issued out of a district registry to be transferred to the Royal Courts of Justice, notwithstanding that the rules do not provide for the issue of the summons out of a district registry. The new rules will also revoke R.S.C. Ord. 70,, and contain a new Ord. 2, r. 2 of which is directed to the consequences of non-compliance with the rules as to beginning proceedings."

These amendments are not in force in this jurisdiction.

That the order of a Court of unlimited jurisdiction must be obeyed, unless set aside was adverted to in **Isaacs v. Robertson** (supra) at pages 128-129 by Lord Diplock, who spoke thus:

> "The main attack by the defendant on the Court of Appeal's judgment was based on the contention that, as a consequence of the operation of Order 34, rule 11 (1) (a), of the Rules of the West Indies Associated States Supreme Court 1970, the order made by the High Court granting the interlocutory injunction on 31st May 1979 was a nullity; so disobedience to it could not constitute a contempt of court. Glasgow J accepted this contention; the Court of Appeal rejected it (in their lordships' view correctly) upon the short and well-established ground that an order made by a court of unlimited jurisdiction, such as the High Court of St. Vincent, must be obeyed unless and until it has been set aside by the court. For this proposition Robotham acting JA cited the passage in the judgment of Romer LJ in **Hadkinson v Hadkinson** [1952] p. 285 at page 288:
>
> > "It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. 'A party who knows of an order, whether null and void, regular or

> irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed' (per Lord Cottenham LC in **Chuck v Cremer (**(1846) Cooper temp Cottenham 205, 338). Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court ... is in contempt and may be punished by committal or attachment or otherwise."
>
> "This, in their Lordships' view, says all that needs to be said upon this topic. It is in itself sufficient reason for dismissing this appeal."

These authorities illustrate the force of the submission made on behalf of the appellant Rhoden. The submission being that the statement of claim cannot be dismissed for want of prosecution when there was a default judgment in place and the plaintiff/appellant Rhoden is ready to proceed to assessment of damages.

Illustrations that Orders, Procedural steps or Proceedings which are nullities can be set aside at any time

Another feature of a nullity is that it can be raised at any time as was seen in **Smurthwaite v Hannay.** This is brought out in **Chief Kwame Asante v Chief Kwame Tawia** 1949 Weekly Notes p. 40 at 41 where Lord Simonds delivering the opinion of the Board, said:

> "When this case reached the West African Court of Appeal it was for the first time suggested, and made a ground of appeal, that the trial court, Court B, was not validly constituted for the hearing of the case in that certain chiefs had sat as judges in that court who were not qualified to sit, and that the proceedings before that court must accordingly be regarded as coram non judice and its judgment as a nullity. On that the West African Court of Appeal observed that that additional ground of appeal was filed without the necessary leave of the court, and that it was too late in the proceedings to raise a point of that nature, which was not raised in any of the three courts below or at the beginning of the hearing of the appeal in that court. Their Lordships of the Board could not assent to that view. If it appeared to an appellate court that an order against which an appeal was brought had been made without jurisdiction, it could never be too late to admit and give effect to the plea that the order was a nullity."

Lord Simonds had to apply the principle in **Patterson v Solomon** [1960] 2 All E.R.20. The Board had granted special leave when it had no jurisdiction to hear an appeal on the merits of the case. Lord Simonds said at page 22:

> "The details of the contract were then set out. It is not necessary to refer to them, for the merits of the case have not to be examined. In the courts of the Colony and before their Lordships, the issue has turned on questions of jurisdiction and procedure."

Then Lord Simonds continued thus on page 24:

> "At once, on the opening of the appeal, learned counsel for the respondent took the objection that no appeal lay to Her Majesty in Council from the decision of the Supreme Court of the Colony in a matter affecting membership of the Legislative Council and consequently affecting also membership of the Executive Council and the office of Minister. It was open to him to do so notwithstanding that special leave to appeal had been granted. This objection can

> conveniently be examined on the footing that the appellant's claim had been maintained in its entirety. On this footing, it appears to their Lordships that it must be sustained. Adapting the words of LORD CAIRNS, L.C. in **Theberge v. Laundry** ((1876), 2 App. Cas. 102 at p. 106, they are of opinion that, on a fair construction of the Order in Council, it does not provide for the decision by the Supreme Court of mere ordinary civil rights, but creates an entirely new jurisdiction in a particular court of the Colony for the purpose of taking out of the Legislative Council with its own consent and vesting in that court the very peculiar jurisdiction which had existed in the council itself of determining the status of those who claim to be members of the council. If so, it follows that the determination of that court is final, and that from it no appeal lies."

There are three other cases on this aspect to note. This Court recalled its order in **Dalton Yap v. Jamaica Citizen's Bank** SCCA 58 of 1998 delivered January 31, 2002, after a contested hearing, because it wrongly decided at the hearing of a preliminary objection, that an appeal was incompetent. There was a requirement for leave to appeal, the order was a mistake and was recalled and struck out as a nullity. Then there is ex parte **Pinochet Ugarte** No. 2 [1999] 1 All E.R. 577, when the House of Lords recalled its own order after it was discovered that one of its numbers ought not to have sat on the appeal. The latest case illustrating this principle is **Antonio Grant v. R.** P.C. Appeal No. 27 of 2004 delivered 14th June, 2004.

The purpose of this detailed analysis was to establish that in the instant case, the proceedings instituted by Construction Developers, 1st respondent before Hazel Harris J. had a fundamental defect; they could not be commenced

in the face of a judgment in default which had not been set aside. Although the parties participated in proceedings before the learned judge below, they were of no effect as the issue of a waiver of the default judgment cannot arise in such circumstances. Consequently the order of the learned judge setting aside the statement of claim for want of prosecution was null and void and must be struck out. It is in the light of the foregoing that the supplementary ground of appeal dated 7th November 2002 was successful. It reads as follows:

> "TAKE NOTICE that at the hearing of the Appeal herein, the Plaintiff/Appellant will crave leave of This Honourable Court to set up and rely upon the following supplemental Ground of Appeal, viz:-
>
> The Learned Trial Judge erred in law in dismissing the Plaintiff/Appellant's action for want of prosecution in face of the Judgment in Default of Defence entered on the **19th** day of **February, 1996**. All steps taken or proceedings initiated thereafter, which purported to ignore that Judgment which, at all material times remained extant, are null, void and of none effect and ought to be set aside."

Was the respondent Trevor Reid capable of instituting proceedings to dismiss the appellant's Rhoden Statement of Claim for want of Prosecution when he filed but did not serve a Defence?

Reference has already been made to the decision of the House of Lords in **Smurthwaite v. Hannay** where Lord Herschell L.C. and Lord Russell expressively stated that to take a procedural step not warranted by any enactment or rule was not a mere irregularity but a nullity. Then the submission on behalf of the appellant Rhoden was that, to file but not to serve

a copy of the defence pursuant to section 199 of the Code was of no effect. If a defence was not delivered then section 247 of the Code may be applicable. To reiterate, it reads:

> "Interlocutory judgment for damages. #3
>
> 247. If the plaintiff's claim is, as against any defendant, for unliquidated damages only, and that defendant does not, within the time allowed for that purpose, deliver a defence, 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."

Firstly, as section 199 of the Code obliges the second respondent, Trevor Reid to file and deliver a defence to the statement of claim and this was not done, he took no step in the proceedings save to move the court to strike out the statement of claim for want of prosecution. The issue is within the formulation proposed by Upjohn L.J. **Re Pritchard** (supra). It was a "proceeding which ought to have been served but never come to the notice of the plaintiff at all. Alternatively the principle enunciated by Vaughn Williams J. in **Hamp- Adams v Hall** (supra) was applicable.

In this regard, the affidavit of Ms. Dundeen Ferguson, the Attorney-at-law for the respondent Trevor Reid is instructive. It reads at paragraph 4 at page 25 of the Record:

> "4. That the Writ of Summons was renewed by an Order made on the 23rd November, 1998 and that I received instructions from the Second Defendant on the 8th February, 1999 consequent upon him being served with the

> said renewed Writ of Summons. That I entered an Appearance for the Second Defendant on 15th February 1999 and that having obtained the Plaintiff's Attorneys Consent to File Defence Out of Time on the 6th April 1999 and the 16th June 1999 a Defence was filed on the 21st June 1999. I crave leave of this Honourable Court to refer to the Appearance and Defence filed herein."

Equally at page 43 of the record the 2nd respondent speaks of a defence being filed. There is no mention of service on the appellant Rhoden as required by the rules of the code . It must be noted that this point was raised for the first time during Mr. Witter's submission. He was entitled to raise it on the basis of the authorities previously cited namely **Chief Kwame Asante** and **Patterson v Solomon** (supra). It is also appropriate to adapt the words of Vaughan-Williams J. in **Hamp-Adams v Hall** cited previously. The adaptation would run thus. Where the defendant is required to serve a copy of the defence on the plaintiff, there must be strict compliance with the rules. Non compliance renders the filed defence null and void. On this basis the appellant Rhoden is free to enter a judgment in default and so proceed to assessment of damages pursuant to section 247 of the Code. The learned judge below did not realize that the defence of Reid was a nullity and exercised her discretion wrongly to dismiss the statement of claim for want of prosecution. It was open to her to strike out the filed defence so that Rhoden could enter a default judgment and proceed to assessment.

The appellant's entitlement to costs in the Court below

Mr. Earl Witter strongly contended that in any event he ought to succeed in setting aside the order of Hazel Harris J. even if the proceedings and order made by her on 18th April 2002 were not nullities. The order made by the learned judge reads as follows at page 31 of the record:

> "1 The Summons for Extension of Time is dismissed. The action is dismissed for want of prosecution
>
> 2. Cost to the First and Second Defendants in accordance with Schedule A.
>
> 3. Leave for Appeal granted."

The original grounds of appeal filed 8th April 2002 read as follows so far as is material:

> "1. The Order on Summons dated 6th day of December, 2000 be granted to the Plaintiff.
>
> AND FURTHER TAKE NOTICE that the ground (s) of appeal are that:-
>
> i. The Learned Trial Judge erred in law in not making an Order extending the time as prayed in Plaintiff's Summons.
>
> ii. The Learned Trial Judge misdirected herself on the law in dismissing the Plaintiff's action for want of prosecution."

It should be stated that these interlocutory proceedings were conducted in a slipshod manner by all parties in the proceedings. It is anticipated when cases are being managed pursuant to the new Civil Procedure Rules there will

be greater precision, which will be beneficial to all concerned in the administration of justice.

How the Summons for Extension of time was disposed of

Here is the summons of the appellant Rhoden which was before the learned judge in the Court below at page 39 of the record:

> "LET ALL PARTIES CONCERNED attendbefore the Master in Chambers at the Supreme Court, King Street, Kingston on Monday the 22nd day of October, 2001 at 12:20 o'clock in the after/forenoon or as soon thereafter as Counsel may be heard on the hearing of an Application on behalf of the Plaintiff herein for an Order that the time for setting down this action for trial be extended for a period of thirty (30) days from the date hereof notwithstanding that the time limited therefore has expired and that the costs of this Summons be cost in the cause.
>
> AND TAKE NOTICE THAT at the hearing of this Summons the Plaintiff will rely on the Affidavit of his Attorneys-at-Law herein."

Excerpts from the affidavit of Errol G. Gentles the Attorney-at-law for the appellant explains the slow progress of the case at the interlocutory stage. Part of the blame rests with inadvertence and errors in the Supreme Court registry. Here are some of the relevant facts at page 16 and 17 of the record:

> "11. That on the 21st of April, 1997 Summons for Directions was filed and a hearing was set for the 28th of October, 1997 and the Order for the Summons filed on the 28th of November, 1997.
>
> 12. That the Order on Summons for Directions required the matter to be set down for hearing within 30 days but due to inadvertence and due to the fact that efforts were being made to effect service on the 2nd Defendant, the letter

requesting the Registrar to place the matter on the Cause List was delivered on the 9th of December, 1997.

13. That by Supreme Court Memorandum dated June 10, 1998 the Attorneys-at-law for the Plaintiff and the 1st Defendant were advised by the Registrar that letter dated December 9, 1997 was being dealt with and that they would be advised when the matter was placed on the cause list and I exhibit hereto marked **"EGG2"**, a copy of the said Memorandum."

Here is the memorandum from the Supreme Court at page 22 of the record:

"June 10, 1998

DEAR SIR(s) MADAM

RE: SUIT NO. C.L.R... 147 of 1995
DELROY RHODEN VS. CONSTRUCTION DEVELOPERS ASSOCIATION LTD. & TREVOR REID

WE HAVE RECEIVED YOUR LETTER DATED December 9, 1997 ASKING THAT THE MATTER BE PLACED ON THE CAUSE LIST. PLEASE BE ADVISED THAT THE MATTER IS BEING DEALT WITH. YOU WILL BE FURTHER ADVISED WHEN IT IS PLACED ON THE LIST.

YOURS FAITHFULLY

(SIGNED)

FOR REGISTRAR."

During the period 1998 – 2000 various steps were taken and the crucial discovery was related thus in the affidavit of Errol G. Gentles at page 17 of the record:

"25. That in December 2000 when it was discovered that the matter was not on the Cause List because the matter had not been set down

> within the time set out in the order on the Summons for Directions."

Then paragraph 26 reads:

> "26. That a Summons was filed on the 8th of December, 2000 in this Honourable Court seeking an extension of the time within which to set down for Trial."

Be it noted that the accident occurred on 14th December 1994, and the long delay was due partly to the errors of the parties and above all to the errors in the Registry.

It does not seem that the learned judge took all these factors into consideration in exercising her discretion to refuse an extension of time. This is how she treated the matter:

> "It is obvious, from the history of these proceedings, that there has been inordinate delay by the plaintiff in prosecution of this action. The reasons given by the plaintiff for the delay in which he states that it was due partially to inadvertence; to his reliance on a memorandum issued by the Registrar and to the difficulty in locating the 2nd defendant, do not, in my view, offer a plausible explanation for his failure to expedite the matter. The plaintiff is under an obligation to pursue his action with dispatch. He had ample opportunity so to do but did not. The delay is inexcusable.
>
> The memorandum from the Registrar could in no way avail him, as, he had not complied with the order setting the matter down for hearing within 30 days of the order. Further, the 2nd defendant filed a defence in June 1999. If the plaintiff had been diligent, he could have had the matter set down on the cause list from as far back as 1999 and tried that year, or early the following year."

As regards the 2nd respondent the learned judge did not point out that the defence was not served on the appellant Rhoden.

The period between 6th December 2000, when the summons for extension was filed and 20th November 2002 when the matter was heard does not reveal inordinate delay on the part of the appellant. The matter was delayed in part because of the error in the Registry, adjournments granted by the Court and because of a change of the Attorney-at-law for the 2nd defendant.

In the affidavit of the Attorney-at-law for Rhoden, Errol Gentles, the matter was stated thus:

> "27. The matter was set for hearing on the 13th of March, 2001 on which date the matter was adjourned sine die for an Affidavit to be filed.
>
> 28. That the matter was reissued on the 14th of March 2001 to be heard on the 2nd of April, 2001 and a copy of the summons was served on both defendants on the 23rd of March, 2001.
>
> 29. That on the 2nd of April, 2001 the matter was adjourned sine die as service had been acknowledged by the Attorney for the 2nd Defendant in a name different from the name on the records.
>
> 30. That the matter was relisted on the 4th of April, 2001 to be heard on the 19th of June, 2001 on which date the matter was adjourned sine die as the 1st Defendant opposed same.
>
> 31. That on the 24th of May, 2001 an Affidavit was filed on behalf of the 1st Defendant and was served on the Attorney-at-Law for the Plaintiff.

32. That on the 28th of May, 2001 a Notice of Change of Attorney was filed on behalf of the 2nd Defendant.

33. That on the 12th of July, 2001 the Summons for Extension of Time was relisted to be heard on the 22nd of October, 2001 on which date it was adjourned sine die by the Court.

34. That the delay in prosecuting this matter was due in part to inadvertence and to reliance on the Memorandum issued by the Registrar and also because of the difficulty in locating the 2nd Defendant."

In the light of the above explanations the learned judge should have granted the extension of time as prayed. Therefore the appellant Rhoden, has succeeded on this aspect of the appeal.

Dismissal for Want of Prosecution

Both the appellant's submission for extension of time and the respondents' submission for dismissal for want of prosecution were heard together and it is now time to turn to the specifics in the learned judge's reasons as to why she allowed the respondent's summons on this aspect of the case. Here are her reasons:

> "In addition, the cause of action is one of negligence by which the plaintiff claims damages for personal injuries sustained in a motor vehicle accident in 1994. The 1st defendant company has deposed in their affidavit that two of their witnesses are no longer employed to the company and the whereabouts of these witnesses are unknown. The 2nd defendant states that his witnesses cannot be located.

> This shows that the defendants would not be in a position to properly defend this action if matter proceeds to trial.
>
> Even if witnesses were located, their memories of the accident would have diminished and this would affect their ability to recount accurately what transpired seven years ago. If the plaintiff proceeds to trial there is a substantial risk that there would not be a fair trial of the issues. If either defendant or both defendants should be found liable, any award made then, would far exceed that which would have been made had the matter already been tried any trial sometime in the future would be prejudicial to the defendant.
>
> The plaintiff has failed to prosecute his action with due skill and care. He ought to have acted expeditiously. If he were permitted to continue with the pursuit of this action, this would result in severe prejudice to the defendants. The plaintiff will therefore not be allowed to extend the time within which to set down the action for hearing."

This is how Roy Williams, the Managing Director of the 1st respondent tells his story:

> "4. That as a direct result of the Plaintiff's dilatory conduct, the First Defendant has suffered prejudice as at least two (2) of the First Defendant's witnesses are no longer employed to the First Defendant Company, and the whereabouts of the witnesses are not known, and consequently the First Defendant will not be able to sufficiently defend this matter."

Yet the defence of the first respondent filed February 22, 1996, reads as follows:

> "4. The First Defendant denies that the Second Defendant was acting as the servant or agent of the First Defendant at the material time.

> 5. If and in so far as the Second Defendant acted as alleged in paragraphs 5 and 6 of the Statement of Claim, which is not admitted, he did not do so as servant or agent of the First Defendant and/or did so outside the scope of his employment by the First Defendant and it is denied that the First Defendant is liable in respect thereof as alleged or at all.
>
> 6. The First Defendant further avers and says that the Second Defendant was on a frolic of his own."

So if the defence was not found to have been a nullity, then Roy Williams could give the evidence which he gave in his affidavit. Further, he has not indicated whether there were statements taken by the two employees who have left his employ or that he has made any effort to find them.

In light of all of this, the reasons of the learned judge are of no assistance to the first respondent, Construction Developers.

As for the second respondent, Trevor Reid, his defence which was filed but not served on the plaintiff reads as follows at page 12 of the Record:

> "3. Paragraph 5 is not admitted. The Second Defendant states that he was travelling along Mountain View Avenue, returning from an errand he was sent on by the First Defendant and on approaching the vicinity of the Excelsior High School, a group of students suddenly ran out into the road before the motor vehicle. That the Defendant swerved to avoid hitting the children and the vehicle got out of control and came to a halt by the Bus Stop."

The affidavit evidence of the second respondent, Trevor Reid in so far as is material reads thus:

> "15. That further the witnesses upon whom I could rely on are no longer employed to the First

> Defendant and I have no knowledge of their whereabouts. That I also do not know of the whereabouts of the potential witnesses who could testify on my behalf regarding the circumstances surrounding the accident.
>
> 16. That further, I do verily believe that if any potential witnesses were now to be located, and this case is permitted to proceed to trial their recollection of the details of the cause of the accident which occurred over seven years ago would have faded."

As for the reasons of the learned judge on this aspect she stated it thus at page 4 of her reasons:

> "The 2nd defendant states that his witness cannot be located."

Since he was the driver of the motor vehicle he would be the best witness for the reasons outlined in his defence. The significance of this is that even if the proceedings leading to the filing of both defences were not nullities, the reasons given would not be sufficient to warrant the Court dismissing the appellant's statement of claim for want of prosecution.

So the appellant has made good his claim. The order in favour of the respondent's should be set aside in any event, and he should have his costs for the proceedings both here and below.

Conclusion

To my mind, the proceedings subsequent to entry of the default judgment against the appellant Rhoden were nullities so he is free to proceed to assessment of damages. Therefore there should be an order in favour of

the appellant Rhoden that he should be permitted to set down the assessment of damages within 30 days of this order. In the case of the respondent Reid, he was required to file and serve a defence to the statement of claim. He not having done so there was no defence and the appellant Rhoden may enter a default judgment forthwith and proceed to assessment. The order should read:

ORDER

(1) Appeal Allowed.

(2) The order of the Court below dismissing the statement of claim is struck out.

(3) Defence filed by Trevor Reid to be struck out as being of no effect having not been served.

(4) The appellant Rhoden may enter a default judgment with respect to Trevor Reid forthwith.

(5) The appellant is ordered to set down the action for assessment of damages with respect to both respondents within 30 days hereof.

(6) The taxed or agreed costs both here and below are to be paid by the respondents to the appellant.

PANTON, J.A.

1. This appeal is against the dismissal of an action for want of prosecution, and the refusal to extend the time to set the matter down for trial. The learned trial judge was unimpressed by the efforts made on behalf of the plaintiff to bring the matter to trial. After chronicling the events over time, and taking note of the reasons given for the delay, she concluded that the delay was inexcusable. She found that there had been a lack of "due skill and care" in the prosecution of the action and that there was a substantial risk that there would not be a fair trial considering the absence of witnesses and the failure of memories due to the passage of time.

The grounds of appeal

2. The original grounds of appeal filed on April 8, 2002, merely stated, without giving any particulars, that the judge "erred in law in not making an order extending the time", and "misdirected herself on the law in dismissing the plaintiff's action for want of prosecution". Then, on November 11, 2002, the following supplemental ground was filed:

> "The learned trial judge erred in law in dismissing the plaintiff/appellant's action for want of prosecution in face of the judgment in default of defence entered on the 19th February,1996. All steps taken or proceeding initiated thereafter, which purported to ignore that judgment which, at all material times, remained extant, are null and void and of none effect and ought to be set aside".

The history of the matter

3. The appellant was injured in a motor vehicle accident in December, 1994. He filed action in July, 1995. The first respondent was served soon thereafter, and appearance was entered on its behalf. Negotiations took place between the appellant and the first respondent with a view to the matter being settled. The first respondent offered a sum of money to the appellant who did not accept same. During this period, no defence had been filed. The evidence of Errol Gentles on page 16 of the record of appeal is that on January 30, 1996, interlocutory judgment in default of defence was entered against the first respondent. The judgment is exhibited at page 32 of the record. This date that has been sworn to by Mr. Gentles is different from that put forward by Miss Phillips in her submissions. She relied on a copy document certified by the Deputy Registrar (Ag.) of the Supreme Court which gives the impression that the interlocutory judgment may have been filed with the Registrar on the 19th February, 1996. The impression arises from the fact that the figures "19-02-96" appear on the document without an indication that that is the date of filing or entry, and at the same time the document at page 32, though showing the same folio number, does not exhibit those figures. Notwithstanding this entry of judgment, the appellant gave written consent on February 15, 1996, for the first respondent to file its defence out of time. The defence was dated, filed, and served on the 22nd February, 1996 (not on the 2nd February, 1996, as stated in the affidavits of Helenore Farquharson and Roy Williams and in the reasons for

judgment). Thereafter, a summons for directions was taken out and those proceedings were conducted on October 28, 1997. At that hearing, the Master ordered that the action against the first respondent be set down for hearing within thirty days, that is, by November 27, 1997. It should be noted that up to this time the second defendant had not been served, so at this stage we are concerned only with the first respondent.

4. On December 9, 1997, the appellant sent a letter to the Registrar of the Supreme Court asking for the matter to be placed on the cause list. Admittedly, that request was twelve days outside the time given by the Master. However, it took the Registrar six months to acknowledge receipt of the letter. In doing so, the Registrar advised the appellant by letter dated June 10, 1998, that his request was "being dealt with". The Registrar's letter further stated that the appellant would "be further advised when it is placed on the list". This letter was copied to the attorneys-at-law for the first respondent. Thereafter, nothing more was heard from the Registrar, and the matter has not been placed on the cause list.

5. On July 27, 1998, the second respondent not having been served and the writ having expired, the appellant filed a summons for the renewal of the writ. The application was listed for hearing on October 5, 1998, but was then adjourned sine die as the appellant had not filed the necessary accompanying affidavit. The summons was re-listed and, eventually, on November 23, 1998, the writ was renewed for six months from October 5, 1998. The renewed writ

was served on the second respondent on January 27, 1999. The attorney-at-law for the appellant asserted in his affidavit dated November 6, 2001, that on February 15, 1999, a certificate of readiness was filed but the matter did not appear on the cause list. On February 16, 1999, the second respondent entered appearance. On March 1, a copy of the statement of claim was served on the second respondent who filed a defence on June 21, 1999, but up to the time of the hearing of the appeal, that defence had not been served on the appellant.

6. The certificate of readiness was re-issued on July 13, 2000, but the matter did not appear on the cause list. The next important step was that a summons was filed on December 6, 2000, seeking extension of time within which to set the matter down for trial. That summons was fixed for hearing on several occasions but was adjourned for a variety of reasons, quite a few of which had nothing to do with the appellant. Eventually, the matter was heard on March 23, 2002, when the application was refused and the action dismissed for want of prosecution.

The judgment

7. In her reasons for judgment, Mrs. Justice Harris pointed to the tardiness of the appellant in several respects:

(a) filing the summons for directions more than a year after the plaintiff would have deemed the pleadings closed;

(b) applying to set the matter down for hearing twelve days outside the prescribed period;

(c) issuing the summons for the renewal of the writ two years after the expiration of the writ; and

(d) not attempting to get an extension of the time within which to set the action down for hearing until one and a half years after the second defendant had filed his defence;

The learned judge then said:

> "It is obvious from the history of these proceedings that there has been inordinate delay by the plaintiff in prosecution of this action. The reasons given by the plaintiff for the delay in which he states that it was due partially to inadvertence; to his reliance on a memorandum issued by the Registrar and to the difficulty in locating the second defendant, do not, in my view, offer a plausible explanation for his failure to expedite the matter. The plaintiff is under an obligation to pursue his action with dispatch. He had ample opportunity so to do but did not. The delay is inexcusable. The memorandum from the Registrar could in no way avail him, as, he had not complied with the order setting the matter down for hearing within 30 days of the order."

The issues

8. The issues in the substantive action are quite simple. The appellant is claiming that the second respondent who was employed by the first respondent as a driver, negligently drove the first respondent's vehicle and caused injuries to the appellant during the process. The first respondent has denied that the second respondent was acting as its servant or agent at the time. The second respondent's defence, however, is that he was on an errand for the first respondent when the appellant and others ran out into the road thereby causing the accident. In the normal course of events, an action such as this ought not to

have taken so much time to be disposed of. That an effort was made to settle the matter is not surprising. It is therefore regrettable that the matter is still pending.

9. At the hearing before us, there was extensive debate on the following matters: the effect of the entry of the judgment in default of defence, the role of the Registrar of the Supreme Court in respect of the setting down of the matter, inordinate delay on the part of the appellant, and prejudice to the respondents in relation to the availability of witnesses.

The default judgment

10. The main argument advanced by Mr. Witter on behalf of the appellant was that the interlocutory judgment in default of defence that was entered against the first respondent was regularly obtained and entered. Consequently, all proceedings initiated and done thereafter with a view to avoiding the judgment are null and void even though the appellant may have agreed to them. Although no issue as to nullity was argued in the Court below, he contended that the point may be taken at any stage for, in any event, the Court below had no jurisdiction to act while ignoring the default judgment, such acts being of no effect. He added that the Civil Procedure Code contains no warrant or authority for the Court below to have entertained applications or steps that ignore the existence of the default judgment.

Mr. Witter referred to several cases, the most important of which was **In re South American And Mexican Company, Ex parte Bank of England** (1895) L.R. Ch. 37.

11. Miss Phillips, on the other hand, submitted that the judgment that was entered was premature. For this, she relied on section 674 of the Civil Procedure Code and the case **Anlaby v. Praetorius** [1886] 20 Q.B. 674. In any event, she argued, the appellant ought to be estopped from relying on the judgment in view of the steps taken by him after its entry to proceed to trial - **Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd** [1985] 1 All E.R. 120.

12. The Judicature (Civil Procedure Code) Law provides as follows:

> "If the plaintiff's claim is, as against the defendant, for unliquidated damages only, and that defendant does not, within the time allowed for that purpose, deliver a defence, 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". (section 247)

The appellant acted in keeping with this section. Further, it is noteworthy that prior to opposing the application for an extension of time and applying to have the action dismissed, no step was taken by the first respondent to invoke section 258 of the Code which provides as follows:

> "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".

So far as the validity of the judgment is concerned, as said earlier, Mr. Witter relied on **In re South American And Mexican Company. Ex parte Bank of England** [1895] 1 Ch. 37. At issue in that case was a judgment that was entered by consent after a trial had been in progress for two days. One month later, the company was ordered wound up by the Court. In the winding-up, the Bank claimed to prove the sum due to it by virtue of the consent judgment but the Official Receiver and Liquidator rejected the proof, substantially on the same grounds as those that had been alleged as a defence to the action. The Bank took out a summons asking for a reversal of the Official Receiver and Liquidator's decision. Vaughan Williams, J. heard the summons which was adjourned into Court. This is how he dealt with the matter:

> "I am of the opinion that my decision must be in favour of the Bank of England and against the Official Receiver. My only reason for hesitating to come to such a decision has been that I could see so little ground for doubt in the matter that I was afraid I must be overlooking something: but I must now give judgment according to my own view of the matter".(page 44).

And at page 45, he stated:

> "It has always been the law that a judgment by consent or default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter".

The Official Receiver and Liquidator appealed, and the English Court of Appeal upheld the judgment of Vaughan Williams, J., without calling upon the respondent Bank of England.

13. Miss Phillips contended that the judgment was premature. However, this contention cannot be upheld as it is based on the fact that the appellant had given consent to the filing of the defence out of time, this consent having been given after the judgment had been entered. There is nothing premature about the entry of this judgment in view of the fact that it was entered in keeping with section 247 of the Civil Procedure Code. **Anlaby v. Praetorius** (supra) does not help the first respondent's cause as in that case it was held that where a plaintiff has obtained judgment irregularly, the defendant is entitled ex debito justitiae to have such judgment set aside. In the instant case there is no irregularity.

14. The alternative argument mounted by Miss Phillips was that the appellant chose to go to trial and has acted in keeping with that choice, so he should be estopped from relying on the default judgment, especially since the point was being raised for the first time at the appellate stage. She has relied heavily on the case **Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd** [1985] 1 All E.R. 120. In that case, a purchaser brought an action against the vendor seeking specific performance of a contract for the sale of a property in Singapore or alternatively damages for breach of contract. The judge, mistakenly believing that it was not open to him to grant specific performance as the vendor had sold the property to a third party who was not before the court, refused that relief. Accordingly, he awarded damages in lieu. The vendor appealed against the quantum of damages. At the purchaser's insistence and in order to forestall the purchaser levying execution, the vendor paid the full

damages awarded into a bank account in the name of the purchaser's solicitors to await the outcome of the appeal. The Court of Appeal of Singapore, at the hearing of the appeal, pointed out that the purchaser's right to specific performance at the time of the trial could not have been affected by any sale to a third party with notice of the contract, and gave leave to the purchaser to cross-appeal for specific performance. The vendor's appeal against the quantum of damages was accordingly adjourned. When the hearing resumed, the court dismissed the vendor's appeal and allowed the purchaser's cross-appeal for specific performance. The court was at no time alerted to the deposit of damages in the bank account. The vendor appealed to the Privy Council.

15. In allowing the vendor's appeal, and setting aside the order for specific performance, the Privy Council held that the purchaser's action in demanding and accepting the deposit of the damages awarded was consistent with an election on its part to accept the trial judge's award of damages and abandon its right of appeal seeking specific performance. Since the vendor had altered its position to its detriment by raising and paying over the damages when it would not have been required to do so if the purchaser had sought specific performance on appeal, the purchaser was estopped from seeking specific performance on appeal.

16. The judgment of the Privy Council accepted as good law and good sense the following passages in "The Law Relating to Estoppel by Representation" (3rd edition, 1977) by Spencer Bowen and Turner:

> "Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be "confronted" with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice". (page 313 para 310).

AND

> "Where a litigant has taken the benefit, in whole or in part, of a decision in his favour, he is precluded from setting up in any subsequent proceedings between the same parties, by way of appeal or otherwise, that such decision was erroneous, or, though correct as to the part which was in his favour, was wrongly decided as to the residues". (page 334, para 322).

17. The **Meng Leong** case (supra) does not give to the first respondent's cause the comfort that it has been put forward as giving. On the contrary, it seems supportive of the appellant's position. The purchaser had a judgment in its favour and was not allowed to go outside the realms of that judgment in search of the alternative claim, it having indicated acceptance of the fruits of the judgment. That was clearly a just result. In the instant case, there has been no conduct on the part of the appellant that can legitimately attract the principles governing estoppel. It seems that on this aspect of the case, the only party who is at a disadvantage in the proceedings before us is the appellant who:

(a) has a judgment in his favour;

(b) was persuaded to ignore the judgment and consent to a trial; and

(c) was eventually ousted from the right to a trial by the very party which engineered the disregard of the judgment.

Therefore, on the basis of the judgment in default of defence which has not been set aside, and the fact that the first respondent has been very active in creating a situation which ignores the existence of the judgment, the appellant is entitled to succeed.

17A. I have noted the comments of my learned brother Downer, J.A. on the case **Strachan v. The Gleaner Co. Ltd.** and **Stokes** (SCCA 133/99 delivered April 6, 2001). However, the ratio decidendi therein should be carefully noted. It is simply this: where Judge A has set aside a judgment in default of pleading, Judge B (a judge of equal jurisdiction) may not set aside what Judge A has done. A dissatisfied party in such a situation should file an appeal against the decision of Judge A. It is understood that this particular judgment is on appeal to the Judicial Committee of the Privy Council.

The role of the Registrar of the Supreme Court

18. Section 343 (1) of the Judicature (Civil Procedure Code) Law reads:

> "In order to set down for trial an action commenced by writ of summons the party setting it down shall deliver to the Registrar a request that the action be set down for trial at the place specified in the order made on the summons for directions".

As mentioned in paragraph 4 (supra), the appellant requested the Registrar of the Supreme Court to place the matter on the cause list. Six months later, the Registrar replied advising him that the matter was being dealt with and that he would be further advised when it is placed on the list. The appellant is still awaiting this advice.

Section 344 (1) mandates the Registrar to keep two Cause lists, one for actions the trials of which are expected to last not more than two days, and the other list for actions estimated to occupy three or more trial days. The attorneys for parties have a duty to watch the Cause lists and to prepare for trial as soon as the trial of their matters approaches.

Section 344 (5) requires the Registrar to prepare "the Term's List" four weeks before the commencement of each Term. This list is of actions expected to be tried during the forthcoming term. The Registrar is then required to notify the attorneys involved in these actions of the listing and request them to arrange a date for trial. After this, the Registrar is to proceed to prepare a Trial list showing the actions fixed for trial and the dates for trial. This Trial list is to be posted on the notice boards of the Registry and of the Courts.

Section 344 (6) provides that where a party to an action, having been notified by the Registrar, fails to arrange a date for trial, the Registrar is at liberty to fix the date, remove the case from the Term's List, or remove the case from the Cause list.

19. In addition to complying with section 343 (1) of the Civil Procedure Code, the appellant also filed certificates of readiness. There has been no explanation for the Registrar's failure to comply with the provisions of the statute set out above. It cannot be expected that a litigant has to constantly write letters to remind the Registrar of the duties of the post. The Registrar is a creature of statute who is not only expected to follow the law but also to execute all undertakings that have been given. In the instant situation, the appellant having done what was required of him, and there having been the undertaking by the Registrar to do what was necessary to put the case on the Cause list, and there being no explanation for the Registrar's failure, it would not be just for the appellant's case to be dismissed without a hearing.

Inordinate and inexcusable delay

20. It is undeniable that there has been inordinate delay in the disposition of this matter. The question for determination is whether the learned judge was correct when she laid the blame for the state of affairs squarely at the feet of the appellant. As shown earlier, there are two indisputable facts: (1) the appellant entered judgment in default of defence, and that judgment has not been set aside, (2) the Registrar failed to place the matter on the Cause list although requested so to do by the appellant. It follows that this Court has to examine the reasoning of the judge on the question of delay against that factual background.

21. The cause of action arose in December, 1994, and the suit was filed within seven months thereof. Appearance was entered two months later on

behalf of the first respondent, whose defence should have been filed and delivered within fourteen days thereafter, that is, by mid-October, 1995. This did not happen, and the judgment was entered January 30, 1996. There can be no legitimate claim of delay on the part of the appellant up to the time of the entry of the judgment, and it matters not whether, instead of January 30, 1996, one uses February 19, 1996, as the date for the entry of the judgment as advanced by the first respondent.

22. Seeing that there was no delay on the part of the appellant in the pre-judgment period, it is necessary to consider what transpired thereafter. Two situations are worthy of note. Firstly, at the request of the first respondent, the appellant cooperated with the filing of the defence. If this were a valid act, it would mean that a trial would be in the offing. Towards this end, after doing nothing significant for about a year, the appellant filed a summons for directions. Six months passed before the summons was heard, and the necessary directions given for the trial to proceed. Secondly, the appellant, though a few days late in so doing, requested the Registrar of the Supreme Court to place the matter on the Cause list. The Registrar did not act on the request.

23. On the basis of the above facts, the only period of delay that could legitimately attract criticism from the first respondent was the period between the filing of the defence and the filing of the summons for directions. Thereafter, the matter was out of the appellant's hands. There was clearly no proof of inordinate and inexcusable delay in this regard.

24. In relation to the second respondent, there was delay in effecting service of the writ. The appellant, having served the first respondent in 1995, experienced difficulty in locating the second respondent and it was not until January, 1999, that the latter was served. Thereafter, the appellant co-operated with the second respondent by granting his requests for extension of time to file his defence. This was done on June 21, 1999. A further supplemental bundle of documents that was supplied to us during the hearing contains a letter dated August 26, 1999, from the appellant to the second respondent's attorney-at-law informing her that up to that date the defence had not been served on the appellant . According to Mr. Witter, up to the time of the hearing of this appeal, the second respondent had not remedied the situation as his defence had still not been served on the appellant. It is ironic therefore that the second respondent should be complaining about delay and lack of activity on the part of the appellant. The learned judge below dismissed the appellant's difficulty in locating the second respondent as offering no plausible explanation for the failure to expedite the matter. It seems that this dismissal was unwarranted as the appellant had taken the precaution of engaging the services of a police officer to locate and serve the second respondent. This shows that a serious effort was being made on the part of the appellant.

Prejudice

25. The learned judge found that the respondents would not be in a position to properly defend the action if it were to proceed to trial due to the evidence

that the whereabouts of the witnesses are unknown. It is understandable that there might be a difficulty in locating witnesses after such a long period of time. However, that claim ought to be examined properly as it is one that can be made quite easily without there being any basis for it. In the instant situation, there is no evidence from either respondent as to the identities of their potential witnesses. If such witnesses exist, there is nothing to say that they had even given statements as to the accident or the circumstances leading up to the accident. Given the nature of the case and the defence each respondent has filed, it would have been expected that at least the Court below would have been informed of the identities of these witnesses. That was not done, so there was no basis for the Court below to have concluded that the respondents would not be in a position to defend the action.

Conclusion

26. The judgment in default of defence that was entered against the first respondent is a valid judgment. All that is left to be done is the assessment of damages. Hazel Harris, J. was therefore in error when she dismissed the appellant's action for want of prosecution. The second respondent is in no better position than the first respondent, seeing that he has failed to serve his defence on the appellant. Consequently, I am in full agreement with the order proposed by my learned brother, Downer, J.A., in his reasons for the decision at which we arrived.

SMITH, J.A.

I agree.