JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 64/2003

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	**KENNETH HYMAN**	**APPELLANT**
AND	**AUDLEY MATTHEWS** **DERRICK MATTHEWS**	**RESPONDENTS**

SUPREME COURT CIVIL APPEAL NO. 73/2003

BETWEEN	**THE ADMINISTRATOR GENERAL FOR JAMAICA (Administrator ad litem for the Estate of Walsh Anderson deceased)**	**APPELLANT**
AND	**AUDLEY MATTHEWS** **DERRICK MATTHEWS**	**RESPONDENTS**

David Batts instructed by Livingston, Alexander & Levy for appellant Hyman

Rudolph Smellie instructed by Daly Thwaites & Co., for appellant Administrator General

Maurice Manning & Miss Catherine Minto instructed by Nunes, Scholefield, DeLeon & Co., for the respondents

27th, 28th, February, 6th, 7th, March & 8th November 2006

HARRISON, P.

These appeals, heard together by an order made on 8th January 2006, are from an order of McIntosh, J on 17th July 2003 by which the application of each defendant to set aside the judgment entered to extend time to file its defence, was refused. Costs were ordered to be paid to the respondents.

The action herein arose out of a motor vehicle accident on 28th January 1997 when a motor vehicle owned by Kenneth Hyman, the first appellant, and driven by Walsh Anderson collided with a motor vehicle owned by Audley Matthews, the first respondent, and driven by Derrick Matthews, the second respondent. The second respondent sustained personal injuries and the motor car he was driving was extensively damaged.

On 16th January 2001 a writ and statement of claim were filed by the respondents claiming damages for negligence. On 15th February 2001 the first appellant entered an appearance. On 27th February 2001 he filed his defence denying liability on the ground that Anderson was driving the motor car, neither as his the first appellant's servant nor agent.

Anderson was never served. He died on 4th February 1999.

On 20th June 2001 by a consent order on a summons for directions, after close of pleadings, the respondents and the second appellant agreed that the estimated length of trial was two days and that the matter would be set down for trial within sixty (60) days. A certificate of readiness was filed by the

respondents' attorneys-at-law on 21st June 2001 and served on the appellant Hyman's attorney-at-law on 26th June 2001. The trial date was consequently fixed for 10th February 2003 in respect of the case against the second appellant.

On 18th April 2002 on the application of the respondents an order was made appointing the Administrator General as Administrator ad litem for the estate of Walsh Anderson. Mr. Andrew Gyles, attorney-at-law was present, appearing on behalf of the Administrator General. No objection was raised to the order. An amended writ and statement of claim were filed on the Administrator General on 29th April 2002. No defence thereto was filed by the Administrator General, the second appellant.

On 18th June 2002 an "unless order" was made against the appellant Hyman for his failure to deliver answers to interrogatories sought by the respondents. The answers were ordered to be filed by 2nd July 2002. On the latter date, no answers having been filed, the defence of the appellant Hyman was struck out and judgment entered against him in default of defence.

On 31st July 2002 the said answers were filed and served on the respondents' attorneys-at-law on 2nd August 2002. Further, on 22nd October 2002 the appellant Hyman filed an application for an order to set aside the default judgment and for an order that the answers to interrogatories filed stand. The appellant Hyman contended that the delay was not intentional. He was initially off the island and then on business in rural Jamaica. He provided the answers albeit thirty (30) days late and he had a good defence to the action.

On 13th September 2002 judgment in default of defence was entered against Administrator General, the second appellant. No defence had been filed nor was any application made for extension of time to file a defence.

On 30th December 2002 the respondents served on the Administrator General a summons to proceed to assessment of damages.

On 22nd January 2003 an order was made to proceed to assessment of damages on 10th February 2003. Mr. Andrew Gyles was present on behalf of the Administrator General and voiced no objection. This order was served on the Administrator General on 24th January 2003.

The trial date of 10th February 2003 in respect of the appellant Hyman was still "in existence."

On 22nd January 2003, the appellant Hyman's re-listed application dated 22nd October 2002 to set aside the default judgment of 2nd July 2002 was adjourned sine die.

On 10th February 2003 on the application of the attorneys-at-law for the 2nd appellant, the assessment of damages was adjourned in order that the 2nd appellant could pursue an application to set aside the judgment entered by default on 13th September 2002. The trial of the action against the first appellant Hyman was also adjourned.

On 21st February 2003 the Administrator General filed a notice of application to set aside the judgment entered on 13th September 2002. By affidavit dated 20th February 2003, Mrs. Lona Brown, the Administrator General

for Jamaica stated that she was told by Mr. Andrew Gyles, that the reason why no defence was filed was that:

> (a) he assumed that the defence of the first defendant (Hyman) would "cover both the driver and owner of the vehicle," and
> (b) he was unaware of the availability of a defence or the necessity to have explored the availability of a good defence.

On 17th July 2003 D. McIntosh, J heard both the application of the appellant Hyman filed on 22nd October 2002 and the application of the appellant the Administrator General filed on 21st February 2003 to set aside each default judgment and to extend time to file the defence and in the case of the appellant Hyman, in addition, to grant relief from the sanction and to treat the interrogatories as filed in time. The learned judge dismissed both applications and refused leave to appeal.

Leave to appeal was granted to the appellant Hyman by P. Harrison, J.A. (as he then was) on 8th October 2003 and to the appellant the Administrator General by Cooke, J.A. on 29th September 2003.

First Appellant Hyman

Mr. Batts for the appellant Hyman argued before us that the learned judge failed to consider that the appellant's delay in complying with the "unless" order to file the answers to the interrogatories was not intentional, that they were in fact filed by 31st July 2002, albeit thirty (30) days late, that the late filing did not prejudice nor delay the trial fixed for 10th February 2003 and that the appellant had a good defence to the action. The learned judge consequently, he

concluded, did not give effect to the overriding objective of the Civil Procedure Rules 2002, and ought to have granted relief from sanctions and set aside the default judgment.

The writ and statement of claim having been filed on 16th January 2001, and served, the appellant Hyman entered his appearance on 15th February 2001 and filed his defence on 27th February 2001. He was thereby quite prompt in satisfying the other procedural requirements that far.

His defence, denying liability, that the driver Walsh Anderson was not at the relevant time, driving as his servant or his agent, relied on the well known case of ***Avis Rent-a-Car Ltd v Maitland*** (1980) 32 W.I.R. 294 following ***Launchbury v Morgan*** [1971] 1 All E.R. 642. This if proven, is undoubtedly a good defence to the action.

The interrogatories delivered by the respondents and requiring answers thereto, all concerned the use by Anderson of the appellant Hyman's motor vehicle. The answers were ordered to be supplied by 2nd July 2002 but were not filed until 31st July 2002. The defence having been struck out on 2nd July 2002 and a default judgment entered, the appellant Hyman, on 22nd October 2002 applied to set aside the said judgment.

It is of significance to note, that the appellant Hyman's application on 22nd October 2002 to set aside the default judgment, would have been governed by the old rules, the Judicature Civil Procedure Code Law ("the CPC") and not the current Civil Procedure Rules, 2002, which came into force on 1st January 2003.

That application, if heard then, would have been governed by section 676 of the CPC which permitted a court to enlarge time:

> "... although, the application for the same is not made until after the expiration of the time appointed or allowed."

The said application would have been influenced by the approach of the discretion of the court then to "unless" orders in cases such as ***Samuel v Linzc Dresses Ltd*** [1980] 1 All E.R. 802, in which Roskill, L.J. at page 812, said:

> "... the law today is that a court has power to extend the time where an 'unless' order has been made but not complied with; but that is a power which should be exercised cautiously ... orders are made to be complied with..."

This Court in ***Dunscombe v Seaton*** [1989] 26 JLR 224, recognized the penalty that may arise, in default of such an order but, at page 227, said:

> "... the clear policy of the law as evidenced by section 676 ... is that a litigant should be afforded every reasonable opportunity to come in to file documents and to be heard in any pending action."

In ***Hytec Ltd v Coventry City Council*** [1997] 1 WLR 1666, Ward, L.J. observed that the unless order was one of last resort failure to observe it would attract a sanction, "a necessary forensic weapon," and a defaulter would have to satisfy a court that such failure was something beyond his control to escape a penalty, but he maintained, at page 1674:

> "The judge exercises his judicial discretion in deciding whether to excuse ... on the facts and circumstances of each case ... at the core is service to justice."

The emphasis, in an application to set aside a default judgment under the pre CPR Rules, was the nature of the good defence and the fact that the case had not been heard on its merits (***Evans v Bartlam*** [1937] A.C. 473).

Although D. McIntosh, J was hearing an application on 17th July 2003, filed on 22nd October 2002 and relisted on 22nd January 2003, and correctly applied the principles applicable to Rule 26.8 of the Rules, a Court should not in these circumstances overlook the compelling influence of the principle that amendments to procedure are usually retrospective.

The instant case is undoubtedly "a transitional case." The "unless" order and the application to set aside the default judgment were both filed prior to the Rules 2003. The trial date of 10th February 2003 (post Rules 2003) was fixed from 2001. No process entitled "relief from sanctions" existed prior to 1st January 2003. A court which was considering such a latter application in July 2003 cannot completely ignore the fact that previously all parties had been operating under the old rules even though the decisions under those latter rules were not generally applicable.

Similar problems arose and were dealt with in the English courts, with the introduction of their new Rules, on 26th April 1999. In ***Biguzzi v Rank Leisure*** [1999] 4 All E.R. 934, the Court of Appeal approved of the order of Judge Kennedy, Q.C., restoring a claim which had been struck out by a district Judge on the abuse of process ground before 26th April 1999. Lord Woolf, accepting as

correct the statement of Judge Kennedy that, "... reference to all decisions and old rules are a distraction ...", said:

> "Earlier authorities are no longer generally of any relevance once the CPR applies ..." (Emphasis added)

However, recognizing that ***Biguzzi*** was a transitional case, he said, at page 939 that a judge -

> "... could not, and should not, ignore the fact that the parties previously had been acting under a different regime."

However, said Lord Woolf, "... the decision has to be made applying the principles under the CPR, not those under the previous regime."

Rule 26.8, inter alia, reads:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
>
> (a) made promptly; and
> (b) supported by evidence on affidavit.
>
> (2) The Court may grant relief only if it is satisfied that -
>
> (a) the failure to comply was not intentional;
> (b) there is good explanation for the failure; and
> (c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.
>
> (3) In considering whether to grant relief, the court must have regard to –
>
> (a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;
(c) whether the failure to comply has been or can be remedied within a reasonable time;
(d) whether the trial date or any likely trial date can still be met if relief is granted; and
(e) the effect which the granting of relief or not would have on each party."

This Court in ***International Hotels Jamaica Ltd v New Falmouth Resorts Ltd*** SCCA 56 & 95/03 delivered 15th November 2005 held that the provisions of rule 26.8 should be read cumulatively, granted the application for relief from sanction, maintaining that the learned judge below in applying the extreme sanction of striking out failed to deal justly with the case, in all the circumstances.

In the instant case, the "unless" order made on 18th June 2002 to answer the interrogatories within 14 days not having been satisfied, the defence of the appellant Hyman was struck out and judgment by default was entered on 2nd July 2002. The affidavit of the appellant Hyman dated 22nd October 2002 in support of an application to set aside the said judgment, revealed that the answers to the interrogatories were prepared, "based upon instructions on file," by his attorneys-at-law and sent on 18th June 2002 to his insurers The Jamaica General Insurance Company. He said at paragraph 4:

> "4. That I was contacted by the Insurance Company and received the interrogatories but as I had urgent business in the rural areas and was unable to return with the document on a timely basis.

> That on or about the 29th July 2002 I returned the interrogatories to my insurers who sent same to our attorneys and the answer was filed on the 2nd August 2002."

The appellant Hyman's application for relief from sanction was filed on 22nd October 2002, in circumstances where the interrogatories were filed on 31st July 2002 and the action struck out, previously, on 2nd July 2002. The application could not therefore be regarded as "made promptly" as required by Rule 26.8(1)(a).

Rule 26.8(2) permits the court to grant relief, only if, the failure to comply was not intentional, there is a good explanation therefor, and the party in default has complied with all other rules, directions and orders. McIntosh, J., found on page 15 of the record that:

> "The purported explanation by Mr. Hyman's attorney for his failure, is at best spurious. To compound matters, he was contemptuous of the Court's 'unless orders'."

There was no affidavit evidence in challenge to the appellant Hyman to cause one to conclude that his explanation was false or otherwise. Consequently, McIntosh, J finding that his explanation "is at best spurious", is not supported by the affidavit evidence and consequently the learned judge was thereby applying the wrong test.

The documentary history of the matter reveals that the appellant Hyman had complied with all other rules and directions and it is my view that his

affidavit evidence shows that his failure was not intentional, but rather, no more than inadvertent, if anything, and he gave a good explanation for such failure.

In addition, I agree with counsel for the appellant Hyman that the learned judge failed to consider the provisions of Rule 26.8(3). The answers to interrogatories were filed on 31st July 2002, that is, seven months before the date fixed for trial, therefore the failure to comply could be and had been remedied (Rule 26.8(3)(4)). The trial date could be met if relief was granted (Rule 26.8(3)(d)) and the granting of leave would have had no prejudicial effect upon the respondent. Its refusal would have created an unfair result to the appellant Hyman (Rule 28.8(3)(e). The delay was undoubtedly due to the fault of the appellant Hyman, but that was merely a circumstance for the consideration of the learned judge. The appellant had a good defence and along with the other factors and in the interest of justice he should be given the opportunity to advance it, thereby giving effect to the overriding objectives of the rules. I would allow the appeal of the appellant Hyman, set aside the default judgment against him, and order that his answers filed on 31st July 2002 and his defence filed on 27th February 2001 do stand with no order as to costs.

Second appellant the Administrator General for Jamaica

Counsel for appellant the Administrator General argued that the default judgment should be set aside in keeping with the provisions of Rule 13(3), in that the appellant had a "real prospect of successfully defending the claim," gave a good explanation for her failure to file a defence and applied to set aside

the judgment "as soon as reasonably practicable after finding out that judgment had been entered". I am unable to agree.

The affidavit of Mrs. Lona Brown, Administrator General dated 20th February 2003 acknowledges that on 17th April 2002 Mr. Andrew Gyles "our in-house attorney-at-law," entered an appearance on her behalf and attended a hearing on 18th April 2002 to add the Administrator General as a defendant and to amend the writ of summons and statement of claim in the said Suit C.L. 2001/M002. No defence was filed. Interlocutory judgment in default of defence was filed on 13th September 2002 and notice thereof was served on the Administrator General on 3rd January 2003. An order to proceed to assessment of damages was made on 22nd January 2003 to be heard on 10th February 2003; Mr. Gyles was present. He voiced no objection, nor made any application. On 10th February 2003 the Administrator General applied for an adjournment to file an application to set aside the judgment. Mrs. Brown's statement, in the said affidavit, that Mr. Gyles informed her that no defence was filed because he assumed that the defence of the appellant Hyman would "cover both..." and that he was unaware of the availability of, or the necessity to explore the availability of a good defence, is untenable and does no credit to either the appellant, the Administrator General or to Mr. Gyles.

Rule 13.3(1) of the Civil Procedure Rules reads:

> "13.3 (1) ... the court may set aside a judgment entered under Part 12 only if the defendant –

(a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
(b) gives a good explanation for the failure to file on acknowledgment of service or a defence as the case may be; and
(c) has a real prospect of successfully defending the claim."

The three provisions of Rule 13.3(1) must be construed cumulatively. The summons to proceed to an assessment of damages was served on the appellant Administrator General on 30th December 2002; this fixed her with knowledge that judgment had been entered. Mr. Gyles attended representing the appellant on 22nd January 2003 when the order to proceed to assessment on 10th February 2003 was made. No application was made on 22nd January 2003 nor on 10th February 2003 to set aside the default judgment. The said application was filed on 21st February 2003. The learned judge was correct to find that the application was not made in a reasonably practicable time.

An application to set aside a default judgment, being an interlocutory application, the statements of "information and belief" as recited by Mrs. Lona Brown in her affidavit, as told to her by Andrew Gyles, are admissible under rule 30 of the Rules. However, the reasons attributable to Gyles, an attorney-at-law since 1978, and a former Administrator General, for his "failure ... to file a defence" are unsupportable on any known legal basis. There is therefore, to date, no expressed good explanation for such failure. Rule 13.3(b) is also unsatisfied.

Mr. Smellie sought to argue that the appellant Administrator General had "a real prospect of successfully defending the claim," which was statute-barred, in that section 2(3) of the Law Reform (Miscellaneous Provisions) Act requires that the suit ought to have been filed within six months of the death of the deceased. He did concede, subsequently however, in agreement with the submission of Mr. Manning for the respondents, that that was not the correct statement of the law. The said section requires that action must be filed within six months after the deceased's personal representative had taken out representation. There is no evidence that any such representation has yet been taken out.

The appellant has disclosed no defence whatsoever to the action.

In all the circumstances, the appellant has failed to satisfy any of the provisions of Rule 13.3. The learned judge was therefore correct, in refusing to exercise his discretion, to set aside the default judgment.

I would refuse this appeal with costs to the respondents.

K. HARRISON J.A:

1. The appellants in this matter have appealed an order made by Donald McIntosh J, on the 17th day of July 2003 when he declined to set aside interlocutory judgments that were entered against them. The appeals were heard together pursuant to an order made by Mc Calla J.A (Ag.), at a case management conference held on the 8th January, 2006.

Filing of the cause of action and subsequent events

2. The action is one in which the Respondents are seeking damages for negligence arising from a motor vehicle accident which occurred on the 28th January 1997. Walsh Anderson was the driver of the motor vehicle which was owned by Kenneth Hyman (the first Appellant). This vehicle had collided into the motorcar driven by Derrick Matthews (the second Respondent) and owned by Audley Matthews (the first Respondent). The first Respondent's motor car was badly damaged and the second Respondent sustained severe personal injuries resulting in significant disabilities.

3. An appearance was filed on behalf of the first Appellant on the 15th February 2001 and a Defence was filed on his behalf on the 27th February 2001. This Defence pleaded inter alia, that at the material time, Walsh Anderson was driving the said motor vehicle on his own business and that the first appellant had no knowledge of the purpose for which the vehicle was being driven. The Defence also pleaded that the accident was solely caused or alternatively contributed to by the negligence of the second Respondent. A consent order was filed on the 20th June 2001 setting out the timetable for trial and a Certificate of Readiness was lodged by the Respondents on the

21st June 2001. February 10, 2003 was fixed for the trial of the claim but, that date had to be aborted for reasons which I will come to later.

4. The records also disclose that Walsh Anderson died on the 4th day of February 1999 and a Notice of Discontinuance was filed in respect of the claim against him on September 17, 2001.

5. On the 26th September 2001, the Respondents sought leave of the Court to add the Administrator General of Jamaica as a Defendant and as Administrator *Ad Litem* in respect of the estate of Walsh Anderson, deceased. Leave was also sought to amend the Writ of Summons and Statement of Claim. The Amended Writ of Summons and Statement of Claim were filed on the 25th April 2002.

6. On April 18, 2002, the Respondents were granted leave to deliver interrogatories to the first Appellant. The interrogatories sought answers with respect to the first Appellant's relationship with Walsh Anderson, Anderson's authority to drive his motorcar and how frequently he drove it. The order was not complied with and on June 6, 2002, the Respondents applied to strike out the first appellant's Defence.

7. On June 18, 2002, the first Appellant was given a further fourteen days within which to file the Answers, failing which his Defence would be struck out and Judgment entered for the Respondents.

8. The first Appellant failed to comply with the "unless Order" made on the 18th June 2002; his Defence was struck out on July 2, 2002 and judgment entered for the Respondents.

9. The answers to the interrogatories were eventually served on Counsel for the Respondents on August 2, 2002. This was exactly one month after the Defence had already been struck out.

10. No Defence was filed on behalf of the second appellant and on the 13th September 2002 interlocutory judgment in default of Defence was entered against him in Binder No. 731 Folio 135 of the Register Book of Judgments. The perfected judgment was served on the Administrator General on the 3rd January 2003.

11. On the 22nd January 2003, a Summons to Proceed to Assessment of Damages came up for hearing and it was ordered inter alia, that the Assessment of Damages against the Administrator General should be set for hearing at the trial of the action against Kenneth Hyman (the 1st Defendant) which was to take place on February 10 , 2003.

12. When the trial came on for hearing on February 10, 2003 it was adjourned on the application of Counsel for the second Appellant in order to allow this appellant to apply to set aside the default judgment entered against the Administrator General on the 13th September 2002.

The applications to set aside

13. The first Appellant filed an application in the Supreme Court on the 22nd October 2002, to set aside the judgment entered against him. He sought leave to file and serve

the answers to the interrogatories and a Defence or alternatively that the Answer to Interrogatories filed on the 2nd August and Defence filed on the 27th February 2001 should stand. This application was filed three months after the time had expired to serve the answers to the Interrogatories and after the Defence had been struck out.

14. On the 21st February 2003, the second Appellant applied to set aside the interlocutory judgment. The application was supported by an Affidavit sworn to by Lona Brown, Administrator General for Jamaica and a Draft Defence was exhibited.

15. On the 17th day of July 2003, the two applications to set aside the default judgments were heard by McIntosh J. They were both refused and the learned judge declined permission to appeal. Permission to appeal was granted however in respect of both appeals. Harrison J.A (as he then was) granted leave to the first Appellant on the 8th October 2003 and Cooke JA (Ag.) (as he then was) granted leave to the second Appellant on the 29th September 2003.

The judgment of McIntosh J.

16 In his written judgment, McIntosh, J. examined the submissions made on behalf of the parties and having considered the arguments, said:

> "One cannot over emphasize the importance of applications being filed in reasonably practicable time. Both Defendants have failed in this regard. The purported explanation by Mr. Hyman's attorney for his failure, is at best spurious. To compound matters, he was contemptuous of the Court's "unless orders".

The learned judge continued:

> "The second Defendant's application depends on the affidavit of Mrs. Lona Brown. That affidavit describes Mr. Gyles as ignorant and incompetent. While she

> speaks to what Mr. Gyles did or did not do, what he knew, or did not know, there was no affidavit from Mr. Gyles himself.
>
> Further Mr. Gyles was present at the hearing, still representing her and still retained by her department as its attorney. He was the person she succeeded to her present post. Surely any excuse of ignorance or incompetence should have come from him.
>
> The practice of parties holding the other side in a dispute to ransom by delaying tactics and endless applications should have been put to rest by the new rules. Many persons have suffered because of the strength of their opposition resulting in matters being dragged out over many years ultimately making it impossible for them to be adequately compensated.
>
> The Claimant in this matter is in urgent and dire need of medical assistance and to grant the Defendants' applications where there is no real likelihood that the defences filed will succeed, can only lead to great injustice".

17. The learned judge made an order for the interim payment of damages in the sum of $250,000.00 in favour of the Respondent Derrick Matthews in order to provide for his immediate medical needs. This order is not the subject of an appeal.

The Grounds of Appeal

18. The following grounds of appeal were filed on behalf of the first appellant:

> "(a) The learned judge took into consideration irrelevant and immaterial matters at the hearing of the application namely: that the first defendant had insurance at the date of the accident and as such the insurance company for the first defendant ought to have settled the claim.
>
> (b) Further the learned Judge erred in law in failing to consider the issue of liability and the Appellant's real prospect of successfully defending the claim.

(c) The learned Judge failed to give effect to the overriding objectives of the Civil Procedure Rules 2002 which mandates (sic) the court to deal with cases justly.

(d) The learned Judge failed to consider that the Appellant's failure to comply with the period stipulated in the Unless Order made on 18th June 2002 was not intentional and that the failure did not in any way prejudice or delay the future conduct of the matter.

(e) The learned Judge failed to consider and have due regard to the fact that the Answers to the Interrogatories had be (sic) filed on the 31st July 2002, that is approximately one year before the application was heard and further that the action had come on for trial on the 10th February 2003 and was adjourned on the sole application of the second defendant."

19. The grounds of appeal filed on behalf of the second appellant are:

"(i) that the learned Judge erred in law in holding that the 2nd defendant did not apply to the court to set aside the default judgment as soon as was reasonably practicable after finding out that judgment had been entered.

(ii) that the learned Judge erred in law in holding that the 2nd defendant did not give a good explanation for the failure to file a defence in good time.

(iii) that the learned Judge erred in law in failing to consider or to give sufficient weight to the fact that the 2nd defendant had not just a real prospect of successfully defending the claim but an irresistible statutory defence to the claimant's claim, namely that the suit was statute barred at the time of filing.

(iv) that alternatively the learned Judge erred in law in failing to consider adequately or at all (a) that the substantive second defendant who would have to bear the consequences of the judgment was the estate of the deceased, WALSH ANDERSON, (b) that said estate did not choose the particular administrator *ad litem* and by extension the particular Attorney at law who in fact acted on its behalf, to so act, and (c) that there was a

distinction to be made between the Attorney at Law and the client, insofar as the default of one affecting the other was concerned".

20. Against that background, I turn to consider the submissions that were made on behalf of the parties.

The first Appellant's appeal

21. The central issue in this appeal concerns the failure to comply with the "Unless Order" of the 18th June 2002. The status of unless orders have been fully considered by the English Court of Appeal in the case of ***Hytec Information Systems Limited v The Council of the City of Coventry*** [1997] 1 WLR 1666. The judgment of Ward LJ reviewed the authorities and the following principles have been established:

1. An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order;

2. Failure to comply will ordinarily result in a sanction being imposed;

3. The sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure;

4. If a party deliberately or intentionally flouts the order, then, he can expect no mercy;

5. A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order;

6. The judge must exercise his judicial discretion in deciding whether or not to excuse the guilty party;

7. The interests of justice require that justice be shown to the injured party for the procedural inefficiencies which caused the delay and wasted costs.

22. It is abundantly clear therefore that a defaulter can only escape the consequences of judgment given against him if he demonstrates both that "there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances" (per Leggatt L.J. in ***Caribbean General Insurance Limited v Frizzell Insurance Brokers Limited*** [1994] 2 Lloyd's LR 32.

23. In England judicial authority has moved on since the decision in **Hytec** (supra) having regard to the introduction of the Civil Procedure Rules ("the CPR"). The new approach to sanctions in the United Kingdom, is contained in the judgment of Lord Woolf MR (as he then was) in ***Biguzzi v Rank Leisure plc*** [1999] 1 WLR 1926, at 1932 B-E, F-G, H, 1933 and 1934G. This approach stresses alternative sanctions to striking out. The Master of the Roll said at page 1934G-H:

> "Earlier authorities are no longer generally of any relevance once the CPR applies ..."

24. Lord Woolf MR was at pains to point out that the position is fundamentally different under the CPR because the powers of the court are much broader than they were under the old rules (see 1932E and 1933B). He said (at 1933D):

> "There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers

> will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated".

25. The cases show that the application of the principles turn on matters of fact and degree. Different factual situations will lead to different conclusions and different results.

26. In the instant case, the learned judge was concerned with the first appellant's failure to deliver the answers to the interrogatories on time. The reason given by the first appellant for his failure to comply with the order was that although he had received the interrogatories from his insurers, he was unable to return the executed document on a timely basis due to the fact that he had urgent business to attend to in the rural areas of Jamaica. He had returned the answers to the interrogatories on or about the 29th July 2002 and they were filed on the 2nd August 2002. He further stated in his affidavit that he has a good defence to the claim because at the material time, Walsh Anderson, the driver of his motor vehicle was not acting as his servant or agent.

27. Mr. Batts submitted on behalf of the first appellant's application as follows:

(i) The learned judge failed to take any or any proper account that the first Appellant had a real prospect of success in his Defence since the driver of his motor vehicle was not acting as his servant and/or agent at the

material time of the accident. For that proposition he relied on the cases of ***Avis Rent A Car v Maitland*** (1980) 32 WIR 294; and ***Morgans v Launchbury*** [1972] 2 All ER 605.

(ii) the learned judge failed, neglected and/or refused to consider that the alleged delay to comply with the order for interrogatories had occasioned no prejudice to the Respondents. In fact, the Answers to the Interrogatories had already been filed by the date of the application to set aside Judgment. Furthermore, the case he said had come on for trial prior to the hearing of the application for relief and the trial was adjourned for reasons unconnected to the first Appellant. He submitted that this was a very relevant consideration since the breach of the 'Unless Order' had **not** affected the trial of the matter. ***Woodward v Finch*** a decision of the English Court of Appeal delivered 8th December 1999 was relied upon.

(iii) The fact that the first Appellant had filed the Answers thirty (30) days after the time expired and seven (7) months before the date set for the trial of the matter was accorded little weight by the learned trial judge.

(iv) The learned judge had adopted an entirely erroneous approach to the matter. He had failed to analyze the merits of the defence of the first appellant and based on the authorities, of ***Woodward v Finch*** (8/12/99), ***Susan Keith v CPM Field Marketing Ltd*** (11/7/00); ***Horgan plc v Morgan Times*** (6/7/99), ***Caribbean General Insurance Ltd v Frizzel Insurance Brokers*** (28/9/93), the judgment ought to be set aside and the matter proceed to trial.

28. Mr. Manning submitted on the other hand, that:

(i) No proper reason had been given for the first Appellant's "perpetual failure" to file the answers to the interrogatories on time.

(ii) He had failed to provide any sufficient particulars or details which would have rendered his excuse credible and;

(iii) He also failed to highlight the length of time he was in the country, and whether he was denied access to a courier service.

(iv) This was the second order that the appellant had breached and the order ought not to be disturbed. See ***Purcell v FC Trigell Ltd*** (1970) 3 ALL E. R. 671.

(v) Contractual orders must be given their full contractual effect and if an applicant contends otherwise, then, there should be material before the Court to justify it exercising its discretion.

(vi) Rules of Court are made to be observed, and that the Court is entitled to expect that its officers and Counsel who appear before it, are more observant of that duty, than that of the litigant himself.

(vii) Although the delay in filing the interrogatories had not affected the date of the trial, a trial and an assessment of damages date had been missed, and this would have severely prejudiced the Respondents.

(viii) Part 26.8 of the CPR, states that the application must be made promptly and the Court may grant relief, only if it is satisfied that there is inter alia, a good explanation for the failure.

(emphasis supplied).

29. According to Mr. Manning the facts have revealed that:

(i) The appellant filed his initial application for relief four months after his defence was struck out.

(ii) He attended the hearing on January 22, 2003 and adjourned his own application sine die knowing quite well that the trial was scheduled to commence on February 10, 2003.

(iii) He re-issued his application to restore his Defence on February 5, 2003, eight months after the Defence was struck out and five days before the trial was set to commence.

(iv) When the trial came on for hearing, he had no defence before the court.

30. Mr. Manning submitted that in view of:

i) The absence of an adequate explanation for the failure to comply with a peremptory order;

ii) The previous failure to comply with the orders of the Court and the first appellant's obvious disregard for the impending trial date;

iii) The fact that the application for relief from sanctions was not made with any urgency

iv) The prejudice to the Claimant due to the fact that the trial would have been adjourned in light of the Appellant's extant application for relief from sanctions, the learned judge's discretion was judicially exercised.

31. It is my view, that when an order is made that something should be done by a particular day that is to be interpreted as an order that ought to be done on that day. The obligation on the parties is to comply with the order as soon as possible, but no later than the deadline provided by the order. In that way the administration of justice will best be effected.

32. I now turn to consider whether McIntosh J had weighed the factors that he was required to take into consideration in relation to the first appellant's application. Regard must be had therefore, to the contents of his judgment.

33. The learned judge dealt quite tersely with the issues he had before him. He took three factors into account. Firstly, he said that the applications were not made in a "reasonably practicable time". Secondly, he said that the explanation given by the appellant's attorney regarding the delay was at "best spurious"; and thirdly that the appellant was contemptuous of the Court's unless order.

34. Part 26.8 of the CPR which provides inter alia, as follows:

> "26.8 (1) An application for relief from sanction imposed for a failure to comply with any rule, order or direction must be-
> (a) made promptly; and
> (b) supported by evidence on affidavit.
>
> (2) The Court may grant relief only if it is satisfied that –
> (a) the failure to comply was not intentional;
> (b) there is good explanation for the failure; and
> (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
>
> (3) In considering whether to grant relief, the court must have regard to -

> (a) the interests of the administration of justice;
> (b) whether the failure to comply was due to the party or that party's attorney at law;
> (c) whether the failure to comply has been or can be redeemed within a reasonable time;
> (d) whether the trial date or any likely trial date can still be met if relief is granted; and
> (e) the effect which granting of relief or not would have on each party". ...

35. In ***International Hotels Jamaica Ltd v New Falmouth Resorts Ltd*** SCCA 56 & 95/03 (unreported) delivered November 18, 2005, this Court, held that the conditions in Part 26.8(2) of the CPR must be considered cumulatively and that the items in sub-paragraph 8(3) are "mitigatory factors which could influence favourably or otherwise the grant of relief from sanctions".

36. Was the application in the present appeal made promptly by the first appellant? The facts reveal that the Defence was struck out on 2nd July 2002 due to non-compliance with the court's order and it was not until the 22nd October 2002 that the first appellant applied for relief. It is my view, that the application could not therefore be regarded as being made promptly.

37. Was Rule 26.8(2) (supra) complied with?

38. McIntosh J found that the explanation given by the first appellant's Attorney for the failure to comply was "at best spurious". It is my view, however that the affidavit evidence does not support this finding. The first appellant had explained that he was unable to comply on a timely basis due to the fact that he had urgent business to attend to in rural Jamaica. This evidence had not been contradicted.

39. Looking at the documentary evidence, it reveals that this appellant had generally complied with all other rules and directions.

40. It is therefore my view that the first appellant's affidavit evidence establishes that his failure was not intentional and that he had given a good explanation for such failure.

41 Counsel for the first appellant contended that the learned judge failed to consider the provisions of Rule 26.8(3). He argued that the failure to comply with the 'unless' order did not delay the future conduct of the matter and that no prejudice was occasioned whatever from this failure. He was ready to proceed to trial on February 10, 2003.

42. There is some merit in the argument advanced by Mr. Batts. The 2nd appellant's application to adjourn the trial had made it quite un-necessary for the first appellant to make any application on the 10th February. The trial was therefore adjourned for reasons unconnected to the first appellant. The answers to the "Unless Order" were filed thirty (30) days after the time expired and seven (7) months before the date set for trial.

43. Generally speaking, it is quite unacceptable for a party to set his or her own timetable and proceed at his or her own pace without regard to the timetable set by the court. The timetable prescribed by the Court is set in the interests of both parties and, equally important, in the interests of the public generally. There was some delay on the part of the first appellant but as the evidence revealed, this could not have prejudiced the commencement of the trial.

44. It is further my view that the first appellant had a good defence and in the interests of the administration of justice he should be given the opportunity to advance it. In the circumstances, I would allow the appeal of the first Appellant.

The second Appellant's appeal.

45. The affidavit in support of the second appellant's application was sworn to by Lona Brown, the Administrator General for Jamaica. In that affidavit she has set out the reasons for the delay for filing a Defence as well as the merits of the proposed Defence. She stated inter alia:

> "7. ...I am informed by the said Mr. Gyles and verily believe that, not being aware of the particular import of the first defendant's Defence which he assumed would cover both the driver and the owner of the vehicle, and his having been accustomed to representing me, the Administrator General only in circumstances where I had been joined as a Plaintiff, as against as a Defendant, he was, in the circumstances of this matter, unaware of the Defence available to the Administrator General herein or even of the necessity to have explored the question of the availability of a good Defence herein to safeguard the interests of the estate of Walsh Anderson, and that is why no steps were taken to file a Defence before the Interlocutory judgment was served on me, and why no steps were taken to do so immediately after said judgment was served.
>
> 8. That I am informed by the said Mr. Gyles and verily believe that on or about the 6th or 7th day of February 2003 he was advised of this said necessity and of the availability of a good Defence and that as soon as he was so advised he then took steps to retain Counsel to apply to have the Interlocutory Judgment set aside and to extend time within which a Defence could be filed.
>
> 9. That I am advised by my Attorneys at Law Messrs. Daly, Thwaites & Company and verily believe that I

> have more than just a real prospect of successfully defending this claim, as the person for whom I am subrogated as second Defendant, Walsh Anderson the alleged driver of one of the vehicles involved in the accident, whose allegedly negligent driving has formed the basis of the suit died nearly some two full years before the suit was instituted and s. 2(3) of the Law Reform (Miscellaneous Provisions) Act which provides for the survival of actions against Defendants only provides for such survival where the suit in question was already pending (filed) at the time of the relevant Defendant's death, or was filed no later than 6 months after such death".

46. Mr. Smellie for the second appellant submitted as follows: (i) On the 7th February 2003 the second appellant retained Counsel and was advised of the availability of a good defence and of the necessity to file it.

> (ii) By virtue of Rule 30.3(2)(b) of the CPR it was permissible for the affidavit sworn to by Lona Brown to have included statements of information and belief and for such statements to be accepted as authentic and accurate representations of the evidence that Mr. Gyles himself would have given.
>
> (iii) The second appellant had at all times a real prospect of defending the claim having regard to the fact that the action against the estate of Walsh Anderson was statute barred.
>
> (iv) The second appellant applied to the court to set aside the default judgment as soon as was reasonably practicable after finding out that judgment had been entered. This was after the 6th or 7th February 2003 when the defendant's Attorney was advised of the necessity of filing a defence and of the availability of same, and

that the defendant could not reasonably have been expected to file a Defence before the said date and which was done on the 21st February 2003.

(v) The second appellant gave a good explanation for the failure to file a Defence in good time.

(vi) In ensuring that it is dealt with justly, a distinction should be made between the default of the Attorney at law involved as against that of the substantive party, the estate of Walsh Anderson.

47. Mr. Manning has submitted however, that:

(i) The second appellant did not apply to set aside the judgment as soon as it was reasonably practicable after finding out that a judgment had been entered. The summons to proceed to assessment of damages he said, was served on the second defendant on December 30, 2002 but he failed to make the application to set aside the judgment until February 21, 2003. Mr. Manning argued that Counsel for the second defendant attended the Assessment hearing on the 22nd January 2003 and made no objection to the application proceeding, and that he failed to indicate any intention to set aside the judgment.

(ii) On February 10, 2003 the date of hearing the Assessment of Damages, no application had been filed to set aside the judgment.

(iii) The second defendant failed to provide a good reason for failing to file a defence for in excess of ten months prior to the application.

(iv) The proposed defence was without merit, in light of section 2(3) of the Law Reform (Miscellaneous Provisions) Act because as it relates to legal proceedings, section 2(3) provides that legal proceedings are maintainable against an estate, if the proceedings were pending at the deceased's death or are commenced, not later

than six months after his personal representative has taken out representation. In this case he said, no grant had been made in the estate of Walsh Anderson.

48. The Court's power to set aside a Default Judgment is governed by Part 13 of the Civil Procedure Rules. Part 13.3 empowers the Court to set aside a Judgment only if the Defendant:

> "a) Applies to set aside the judgment as soon as reasonably practicable after finding out a Judgment had been entered against him
>
> b) Gives a good explanation for failure to file a Defence
>
> AND
>
> c) Has a real prospect of successfully defending the claim".
>
> (emphasis supplied)

49. These provisions are to be read conjunctively which means that the learned Judge can only set aside the Judgment, if the Appellant has satisfied all of the above three conditions. Mr. Smellie has conceded in his written submissions that all three conditions must be fulfilled but he submits nevertheless, that it still remains the law that the most important consideration in determining whether the interlocutory judgment should be set aside is the question of whether the Defendant has a good Defence.

50. I should use this opportunity to remind practitioners that the provisions in Part 13.3 of the CPR are in contrast with its English counterpart. Part 13.3 of the English Rules uses the words: "...the court may set aside ... if" whereas our Part 13.3 says: "...the court may set aside a judgment ... only if". The words "only if" make a great difference so, an applicant must satisfy all three conditions in order to succeed. One

should therefore be careful in relying on English cases where they deal with setting aside a judgment entered under Part 12.

51. In considering whether to set aside a judgment entered under Part 12, the judge has no residual discretion if any of the conditions are not satisfied.

52. We are operating a new procedural code (rule 1.1) so we must not be tempted to return to earlier judgments decided under the previous rules and have them cited all over again, with attempts to distinguish one conflicting decision from another. Judges in the lower courts are given ample scope to decide justly, having their eyes on the overriding objective, how to exercise their discretion in different situations. From time to time it may be that this court will have to give further guidelines.

53. The question for consideration in this appeal is whether the learned judge in exercising his discretion erred in principle. What information should the affidavit in support of the application contain? The rule speaks of (a) the applicant applying to the court as soon as reasonably practicable (b) the applicant giving a good explanation for the failure; and (c) the applicant having a real prospect of successfully defending the claim.

54. I turn now to consider Rule 13.3(a). How did the learned judge deal with the evidence before him? He had stressed that it was important for applications to be filed in a reasonably practicable time. He concluded that the second Appellant had failed in this regard.

55. The 2nd Appellant has contended that the interlocutory judgment was not served on her until the 3rd January 2003. The Respondents on the other hand, have said that on the 30th December 2002, a summons to proceed to assessment of damages was served on the 2nd Appellant and that the order to proceed to assessment was made on the 22nd January 2003.

56. The Respondents have further contended that the second Appellant was represented by Counsel on the 22nd January and that no objection was made by Counsel when the order to proceed was made. The assessment of damages was therefore set for hearing with the trial on the 10th February 2003. No application had been filed to set aside the judgment and Counsel for the 2nd Appellant had merely applied for an adjournment of the assessment of damages and intimated to the Court that this Appellant had intended to set aside the judgment. It seems strange however, that on the 10th February the trial judge had acceded to his request without a formal application being filed. Be that as it may, the trial was adjourned and it was not until some eleven days later (February 21, 2003) that the application was filed to set aside the judgment.

57. The application to set aside was finally heard on the 17th July, 2003. The chronology of events set out above would be relevant factors for a judge to consider on the hearing an application to set aside.

58. I turn next to Rule 13.3(b). Was there a good explanation given by the applicant for his failure to file a Defence? The learned judge in dealing with this aspect of the case had this to say:

> "The second Defendant's application depends on the affidavit of Mrs. Lona Brown. That affidavit describes Mr. Gyles as ignorant and incompetent. While she speaks to what Mr. Gyles did or did not do, what he knew, or did not know, there was no affidavit from Mr. Gyles himself.
>
> Further Mr. Gyles was present at the hearing, still representing her and still retained by her department as its attorney. He was the person she succeeded to her present post. Surely any excuse of ignorance or incompetence should have come from him".

59. Let me say from the very outset, that the Rules do make provision for facts to be deposed by an affiant concerning what a third party said, provided the source and grounds of the information are given in the affidavit. In the circumstances, it was therefore unnecessary for Mr. Gyles to have sworn to a separate affidavit.

60. Mr. Smellie submitted that McIntosh J, should have had no difficulty in concluding that a good explanation had been given for the failure to file a Defence. It was explained that the reason for not filing a Defence was due to the ignorance of the second appellant's Attorney at Law. Mr. Smellie further submitted that despite Mr. Gyles lack of competence the appellant had shown every intention to defend the matter, thus, Counsel had constantly attended at the various proceedings. He submitted that the explanation given by Counsel was sincere, not willful and more inadvertent.

61. Mr. Smellie also submitted that the delay in filing a Defence had caused no prejudice to the Respondents. He argued that trial of the matter was set for an unusually early date, only some six (6) weeks after judgment was served on the Appellant. He submitted that one cannot take a step until one realizes that it was necessary to do so and that it was not until 7th February 2003, that Counsel became aware of the

interlocutory judgment. He conceded in the end that the conduct of Counsel in the case was appalling but the Court should nevertheless exercise its discretion in favour of the Appellant.

62. What were the reasons given by the 2nd Appellant for not filing the Defence? The Administrator General has stated in her affidavit that Mr. Gyles had assumed that the 1st Appellant's Defence would have covered both the driver and owner of the vehicle. But, how could this be when the 1st Appellant had from the very outset pleaded that the driver of his vehicle was not acting as his servant or agent at the material time? It is also stated that Mr. Gyles, who is a trained lawyer and the Administrator General at the time, was unaware of the Defence available to him and that he had not even explored the question of the availability of a good defence so this is why no steps were taken to file a defence before or immediately after the interlocutory judgment was served. The Administrator General has also deposed that it was not until the 6th or 7th February that the department was advised of the availability of a good defence. In my judgment, the learned judge was quite correct in not accepting the explanations put forward. In my view they were most unsatisfactory.

63. Let me now turn to the final condition that is, whether the 2nd Appellant has a real prospect of successfully defending the claim. McIntosh J, held that there was no real likelihood that the proposed defence of the 2nd Appellant would likely succeed.

64. Mr. Smellie submitted with considerable force that the action against the 2nd Appellant was not likely to succeed because it would be statute barred. He has relied on

section 2(3) of the Law Reform (Miscellaneous Provisions) Act ("the Act"). Sections 2(1) and (3) are important and they provide as follows:

> "2. (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:
>
> ....
>
> (3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either -
>
> (a) proceedings against him in respect of that cause of action were pending at the date of his death; or
>
> (b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation".

65. While subsection (1) deals with the survival of causes of action, subsection (3) deals with proceedings in respect of such causes of action. The section has laid down certain alternative conditions which must be fulfilled if such proceedings are to be maintained. The first condition, contained in paragraph (a), is that proceedings against the deceased person should have been pending at the time of his death. This is certainly not the case here since the cause of action was filed subsequent to the death of Walsh Anderson. The writ of summons was filed some two years after his death. The second condition, contained in paragraph (b), which is alternative to the first and which is relevant to this case, contains two elements: the first relating to the time when the cause of action arose, viz, it must have arisen not more than six months before the death of the tortfeasor; the second relating to the time when the action was started, viz,

it must have been started within six months after his personal representative took out representation.

66. Section 2(3) of the Act is quite clear in my view, and does not need any aid for construction. The words of Diplock J (as he then was) in ***Airey v Airey*** [1958] 2 All ER 59 are quite instructive and are worthwhile repeating here. At page 61 of the judgment he stated inter alia:

> "...It would seem, therefore, that today, although so long as a tortfeasor lives no action can be brought against him for damages for personal injuries after three years have passed since the cause of action arose, the moment he dies, however long after the cause of action arose, an action can be brought for the tort against his personal representative, since the only limitation period for such an action is six months after the appointment of his personal representative. A cause of action does not cease to exist because a limitation period has expired, and the original cause of action would, therefore, be one subsisting against the tortfeasor at the time of his death and would survive against his estate by virtue of s 1(1) of the Act of 1934".
>
> (emphasis supplied)

67. As far as this Court is aware, no grant has been made in the estate of Walsh Anderson. The Administrator General was appointed by the Court as Administrator ad Litem for the purpose of continuing the suit as a result of the death of Walsh Anderson. This appointment would not clothe her with the capacity of Administrator.

68. The appellant has failed in my view, to satisfy the conditions set out in Rule 13.3. In my judgment therefore, the learned judge had correctly exercised his discretion in refusing to set aside the judgment against the 2nd Appellant.

69. There is just one final comment I wish to make. Lord Woolf M.R (as he then was) had said in ***Lownes v Babcock Power Ltd*** [1998] EWCA Civ. 211 delivered 11th February 1998:

> "The message to the profession, which should be heard and learned as a result of this case, is that the standards of diligence displayed in this case are totally unacceptable ..."

Those words are also applicable to the present case. I bear in mind that discretionary powers are not to be exercised in order to punish a party for his or her Attorney's incompetence - they must be exercised in order to further the overriding objective. In the present case Counsel who had conduct of the proceedings in the Court below on behalf of the 2nd Appellant acted most unprofessionally. One hopes that this type of conduct will not be repeated. Attorneys at Law are officers of the court and it is their duty to do all within their power to ensure that the client or the client's estate personally suffers no more than is unavoidable as a result of their default.

70. I would dismiss the appeal of the 2nd Appellant.

McCALLA, J.A:

I have read the judgments of Harrison, P. and Harrison, J.A., and I am entirely in agreement with their reasoning and conclusions in respect to both appeals.

ORDER

HARRISON, P:

1. The Appeal in respect of the 1st Appellant Hyman is allowed.
2. The Default Judgment against the 1st Appellant is set aside.
3. The Answers filed by the 1st Appellant on 31st July 2002 do hereby stand.

4. The Defence filed by the 1st Appellant on 27th February 2001 is hereby ordered to stand.

5. No order as to costs in respect of the 1st Appellant.

6. The Appeal in respect of the 2nd Appellant is dismissed.

7. Costs to the Respondent to be taxed if not agreed.