IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO: B 323 OF 1998

BETWEEN	ERLDINE HENRY BROWN	PLAINTIFF
AND	JAMCON ENGINEERING LIMITED	FIRST DEFENDANT
AND	RUPERT MURRAY	SECOND DEFENDANT

Carol Malcolm for the first Defendant/Applicant

Patrick Brooks and Winsome Marsh instructed by Nunes Scholefield de Leon and Company for the Plaintiff/Respondent.

Heard on the 21 day of September and oral judgment given
Written judgment delivered 16th March, 2000.

JUDGMENT

COURTENAY ORR J

On 21st September last, I gave a brief oral summary of my reasons for judgment in this matter, but in view of the importance of some of the issues raised, I have decided to put my reasons in writing more fully.

The plaintiff's claim sounds negligence and in paragraphs 2 and 3 of her statement of claim she avers as follows:

> 2. "The Defendants were at all material times the owners and/or operators and/or controllers of a Back Hoe with Registration No. Temp. 0677 which was at all material times being driven by their servant or agent.
>
> 3. On or about the 2nd day of November, 1992, along Bog Walk Gorge in the

> parish of Saint Catherine, the said servant and/or agent of the Defendants so negligently drove managed and/or controlled the Defendant's said Back Hoe as to cause same to collide into the rear of the plaintiff's said motor vehicle.

She further alleges that she suffered personal injuries as a result of the accident and claims special damages for the cost of medical treatment and loss of earnings, and general damages.

Interlocutory judgment in default of defence was entered against the first defendant (the company) on 28th December 1998. This is an application by the company to set aside that interlocutory judgment and for leave to file a defence out of time.

The Evidence Proffered by the Applicant Company

Three affidavits were filed in support of this application : one by Miss Carol Malcolm, the Attorney-at-Law, for the applicant; the others by Mr Winston George Atkinson, Managing Director of the applicant company. Miss Malcolm's affidavit was based on information and belief, the source being the defendant company. In it she deposed to the following facts:

1. An apppearance was entered on behalf of the company on the 23rd day of November, 1998.
2. On 23rd December, 1998, she prepared and filed a defence, but withdrew it when she realized that she had inadvertently omitted to obtain the consent of the plaintiff's attorney-at-law to file the defence out of time.
3. She wrote the attorneys-at-law for the plaintiff on 28th December, 1998, seeking their consent, and they informed her that interlocutory judgment in default of defence had been filed on the 28th day of December, 1998.

4. The delay in filing the defence and in taking steps to set aside the judgment was not deliberate, but was due to administrative difficulties experienced as a result of relocating her office from Kingston to Savanna-la-Mar in Westmoreland.
5. That she believed that the defence which was exhibited to her affidavit is a good one and is likely to succeed.
6. By reason of information received and her belief the second defendant's version of how the accident happened is as follows:

> " ... On or about the 2nd day of November, 1992, Brenton Carter who was employed at the time to the first Defendant was driving the first defendant's Back Hoe along the Bog Walk Gorge whilst being piloted by another motor vehicle.
> The plaintiff who was driving motor vehicle 1licensed RR – 2175 proceeded to overtake the said Back Hoe whilst another motor vehicle was approaching from the opposite direction.
> The plaintiff then suddenly cut in between the said Back Hoe and the pilot vehicle, out of the path of the oncoming vehicle but in so doing collided with the First defendant's said Back Hoe".

Mr Winston George Atkinson deposed to the same facts regarding the failure to file a defence and as to the way in which the accident took place. For the former issue he did so on information from Miss Carol Malcolm, and regarding the latter issue on information of Mr Brenton Carter who was employed to the company at the time of the accident and was driving the Back Hoe.

In its proposed defence, the company admits that the collision took place at the time and place alleged, but denies liability and in the alternative pleads contributory negligence. The following particulars of negligence on the part of the Plaintiff are alleged:

(a) Failing to keep any or any proper look out or to have an or any sufficient regard for other traffic on the said road.

(b) Overtaking or attempting to overtake when it was unsafe to do so.

(c) Driving too close to the 1st defendant's Back Hoe.

(d) Failing to stop, slow down, to swerve or in any other way, to manage or control the said motor car so as to avoid the said collision".

The Plaintiff/Respondent's Evidence

In exercise of the Court's inherent jurisdiction to dispense with the rule of the Supreme Court where this is in the interests of justice I permitted the plaintiff to give sworn oral testimony in addition to her affidavit and in response to the affidavits of Winston George Atkinson and Miss Malcolm. Support for this ruling may be found in the article. "The Inherent Jurisdiction of the Court" by Jack Jacobs in Current Legal Problems Vol. 23 (1970) P. 23. At page 25, he writes:

> "The inherent jurisdiction of the Court may be exercised in any given case notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are in addition to, and not in substitution of powers arising out of the inherent jurisdiction of the Court.

In her affidavit the plaintiff denied that the accident occurred as alleged in Miss Malcolm's affidavit, and made the following statements:

4. "That immediately after the collision the said driver of the vehicle (the Back Hoe) apologized for the accident and further stated that the brakes for the said Back Hoe were not working properly.

That the said driver's employer , the 1st defendant to this suit subsequently also admitted liability for the accident and reimbursed me for the monies I had to spend to repair the motor vehicle I was driving at the time of the accident.

6. That the said defendant also reimbursed me sums I incurred to rent another motor vehicle for three days."

She exhibited to her affidavit a copy of the company's cheque requisition and cheque in payment of the sums mentioned in paragraph 6 of her affidavit quoted above. The total of the sums in those documents is $6,841.14.

The requisition was addressed to the plaintiff/respondent and gave the following details of expenditure:

(1) "Reimbursement for rental of motor car – 3 days $4,091.14

(2) Reimbursement for purchase of lens for motor car $2,750.00

$6,841.14

Her affidavit further stated:

8. "That I have been diagnosed with and undergone treatment for cancer which … is now in remittance (sic)".

In her oral testimony she deposed that she made no request of anyone attached to the company for assistance in paying for the rental of the car she had been driving at the time of the accident or to repair it. It was repaired at the company's garage at Grove Road in Kingston. She was not experiencing financial difficulty. She had said that she would

report the accident to the rental company from which she had hired the car, and the Defendant company's agent, that is the man who drove the company's van to pilot the Back Hoe, had urged her not to do so as it would involve the forfeiture of the company's (insurance) deposit. She had agreed.

The rental payment was brought about by the fact that she was late in returning the car to the rental company and so she had to pay an extra fee.
She did not know Mrs Atkinson or any of the directors of the company.

The Submissions on Behalf of the Company

Miss Malcolm put forward the following arguments:

The applicant company had shown that its defence had merit.
There had been no undue delay.

The Court ought not to regard the payment as an admission of liability.
There can be no prejudice to the plaintiff as she waited until only eleven days before the limitation period would take effect, to file her writ.
The Court ought to accept the evidence of Winston Atkinson that the company's agent acted without the benefit of legal advice in making the payment.
The case of Lady Elizabeth Auson T/A Party Planners v Trump [1998] 3 ALL E.R.331. is relevant. There the plaintiff had obtained a judgment in default of defence with regard to a claim for money owed for organising a lavish party for the defendant.

The Court of Appeal allowed an appeal against the refusal to set aside the default judgment and held, inter alia:

> "Since the defendant's defence acknowledged that some moneys were due but challenged the reasonableness of the bill, and the plaintiff's

> solicitors had refused sight of the documentation in support of the claim, the defence was not hopeless but eminently arguable. It followed that the judge had erred in the exercise of his discretion, and exercising the discretion afresh, the court would set aside the default judgment and give the defendant leave to defend the disputed balance of the claim. Accordingly to that extent the appeal would be allowed."

The Submissions on behalf of the Plaintiff\Respondent

Early in his presentation the Court brought to Mr Brook's attention; the case of Day v R.A.C Motoring Services Ltd. [1999] 1ALL ER 1007, and in particular the test propounded by the English Court of Appeal for deciding whether to set aside judgment in default of defence. Hence Mr Brooks concentrated on the following arguments:
The Court should regard the conduct of the company's agents as an admission of liability and not merely as an ex gratia payment or a settlement on impulse or an attempt to get rid of a nuisance.

In considering the argument regarding the timing of the bringing of the action, the Court should look at the resolution of medical issues and the question of the identify of the parties.

The case of Lady Elizabeth Anson T/As Party Planners v Trump [1998] 3 ALL ER 331 cited by Miss Malcolm is distinguishable.

The court should rule that the affidavit of Winston Atkinson on behalf of the company, is inadmissible in that it is not based on his personal knowledge. - See dictum of Downer J.A. in Book Trader's Caribbean v West Indies' Publishing Limited and another, SCCA No 59 of 1997, Judgment delivered November 10, 1997. (unreported).

The Court's Analysis and Conclusion

(a) The question of the Admissibility of the Affidavits Filed on behalf of the company

(i) The Nature of these Proceedings

These proceedings are interlocutory.

In Salamon v Warner [1891] 1 QB 734 it was held that proceedings are final when the decision made will determine finally the rights of the parties. It is clearly not so in this case. If one adopts the "application test" as enunciated byword Denning in Salter Rex & Company v Ghosh [1971] 2 All ER 865 at 866, the result is the same . He said:

> "I look to the application for a new trial and not the order made. If the application for a new trial were granted it would clearly be interlocutory. So equally if it were refused ."

The status of these proceedings is crucial to an analysis of the cases referred to by Mr Brooks as rendering the affidavits of Mr Winston George Atkinson, inadmissible.

(ii) Nature of the Court's Discretion

The power or nature of the discretion given to the Court in proceedings such as these, is a wide discretion to set aside a judgment on such terms as it thinks fit. Section 258 of the Judicature (Civil Procedure) Code Law, enacts:

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

In his speech in Evans v Bartlam [1937] A.C. 473 at 480, Lord Atkin gave a definitive

and most helpful description of the Court's approach to the exercise of this discretion. He said:

> "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 the Court's 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 s 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 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 judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.
>
> But in any case in my opinion, the Court does not, and I doubt whether it can lay down rigid rules which deprive it of jurisdiction. Even the first rule as to an affidavit of merit could, no doubt in rare but appropriate cases, be departed from. The supposed second rule does not in my opinion exist.

(ii) The Cases cited by Mr Brooks

1. Ramkisson v Olds Discount Co. (TCC) Ltd.

(1961) 4 W.I.R. 73

The headnote sets out the background as follows:

> "The respondent obtained judgment in default of defence against the applicant on November 28, 1960. On December 15, 1960, the appellant applied to a judge in chambers to have judgment set aside. The application was supported by an affidavit sworn to by the appellant's solicitor and a statement of defence signed by counsel. The application was refused".

The appellant appealed and the appeal was dismissed by the Supreme Court of Trinidad and Tobago – Appellate Jurisdiction. The Court consisted of two judges, McShine, Acting CJ, and Corbin J

The decision of the Court is encapsulated thus in the headnote:

> "Held : (I) the solicitor's affidavit did not amount to an affidavit stating facts showing a substantial ground of defence and as the facts related in the statement of defence were not sworn to by anyone, there was no affidavit of merit before the judge or the Court of Appeal;
>
> (ii) the judge had given consideration to the relevant factors before exercising his discretion and as there was no sufficient ground for saying that he had acted contrary to principle, his decision could

not be disturbed. Evans v Bartlam … applied".

Regrettably, the judgment does not give any excerpts from the affidavit of the solicitor, which was criticized and held to be inadequate for the purposes of the application. But the court did make the following ruling at page 75 line b:

> "Since the facts related in the statement of defence have not been sworn to by anyone, consequently there was not, in our view, any affidavit of merit before the judge nor before us".

Earlier at page 74 line E the Court said:

> This affidavit merely attempts in our view to excuse the defendant for not filing this defence".

On the basis of these two extracts from the judgment, the decision of that Court is unobjectionable. But there are other passages where the principles which should guide the Court are stated too narrowly and seem to be not in keeping with the principle that in interlocutory proceedings hearsay evidence is admissible.

Firstly, there seems to be an unwarranted requirement that the matters stated in the affidavit of merit, and in the affidavit explaining why the defendant allowed judgment to be entered in default, should be within the personal knowledge of the deponent. In this regard I adopt the definition of "personal" given in the Shorter Oxford Dictionary which is:

> "Done made etc in person; involving the actual <u>presence</u> or <u>action</u> of the individual"
>
> (emphasis mine)

The rule governing the contents of affidavits in interlocutory proceedings is set out in Section 408 of the Judicature (Civil Procedure Code) Law

It reads as follows:

> "Contents of affidavits:
>
> 408. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove except that on interlocutory proceedings or with leave under Section 272 A or Section 367 of this Law, an affidavit may contain statements of information and belief with the sources and grounds thereof"
>
> (emphasis supplied)

In Ramkissoon's case the court said at page 74 D:

> "Nothing in the affidavit of the solicitor says or suggests that the solicitor had any personal knowledge of the facts of the case, or that what appears in the statement of defence is true ."
>
> (emphasis added)
>
> Later at page 75 A, the Court said:
>
> "In his affidavit the solicitor does not purport to testify to the facts set out in the defence nor does he swear of his personal knowledge as for the failure and so this does not amount to an affidavit stating facts showing a substantial ground of defence".

(emphasis mine)

The rules governing affidavits in interlocutory proceedings are the same in Trinidad and Tobago as in Jamaica and England, hence the positions underlined in the two extracts just quoted, if meant to indicate requirements to be met for admissibility are with respect wrong statements of law, and in any event could not apply in Jamaica. So far therefore as this judgment suggests that personal knowledge is necessary it is in the context of our law plainly wrong.

Secondly, there also appears from the judgment, that the Court was requiring that the appellant himself should have sworn to an affidavit in support of his application. Again, it must be emphasized that in Jamaican law, as in English law there is no such requirement.

The Court in summarizing the arguments of the appellant said this at page 74 C:

> "Counsel for the appellant submitted that the affidavit of the appellant's solicitor along with the defence signed by counsel and attached thereto constituted a sufficient disclosure of merit in the defence, and dispensed with the need for an affidavit from the defendant personally.
>
> (emphasis added)

Later, at line G. the Court said:

> "No reason is advanced for the absence of such an affidavit from the defendant ..."

It is useful at this point to advert to the rationale for allowing hearsay in affidavits in interlocutory proceedings. Peter Gibson J., in Savings and Investment Bank Ltd. v Gasco Investments (Netherlands) BV [1984] 1 WLR 271 at 282 F said:

> "To my mind the purpose of rule 5 (2) (the equivalent of our Section 408) is to enable a deponent to put before the Court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief".
>
> (emphasis added)

Peter Gibson J., went on to state that such hearsay, must be first hand hearsay, but in Deutche Ruckverichering Akfiengesellchaft v Walbrook Insurance Co. Ltd. and Others, Group Josi Reinsurance Co. SA v Same, The Times, May 6, 1994, Phillips J disagreed that only first hand hearsay was admissible. The report in the Times records his reasoning in these words:

> "While agreeing with the judge in Gasco that the purpose of rule 5(2) was to enable a deponent to put before the Court, frequently in circumstances of great urgency, facts which he was not able of his own knowledge to prove, his Lordship could not conclude that, at the interlocutory stage, a deponent must identify as the source of his information or belief an original source of evidence which would be admissible at the trial.
>
> The object of the rule militated against placing that restriction upon the natural

meaning of it words. In a situation of urgency a plaintiff might well not have time to identify or trace evidence which would be admissible at the trial.

If he had learned of facts via an intermediate source which there was good reason to believe would itself have had access to primary sources of information, his Lordship could see no good reason for precluding the plaintiff relying upon that intermediate source as a ground for seeking interlocutory relief.

Perhaps the most important form of interlocutory relief was the injunction. The power of the Court to grant an interlocutory injunction was one that should be flexible and not fettered by the technical rules of admissibility of evidence that applied at trial.

An original source would normally carry much more weight than an intermediate source, and where original sources were known, they had to be identified. But it did not follow that intermediate sources could not be referred to or relied upon.

Ultimately, it had to be for the Court to weigh all the material to decide whether the applicant had made out his case"

(emphasis supplied)

I respectfully adopt this reasoning.

Finally in Day v RAC Motoring (supra) Ward LJ. had this to say at page 1009 line j:

> "The matter went on appeal to Judge Nash,supported this time by an affidavit from a solicitor in the office who had the conduct of the action on the defendant's behalf. She deposed to the merits and stated that she had spoken to the area service manager of the defendant who was responsible for the service contractor it employed on the day or night of 5 November, when this injury was sustained by the plaintiff." The affidavit is therefore hearsay. It may perhaps in part be double hearsay, but, this being interlocutory, it was acceptable for the purpose for which it was tendered and the judge later so held."
>
> (emphasis mine)

Again I respectfully adopt the above quotation as a correct Statement of Law.

I now turn to the second case referred to by Mr Brooks in this regard. Book Traders Caribbean Limited and West Indies Publishing Limited v Jeffrey Young, SCCA 59 of 1997, (unreported) judgment delivered November 10, 1997. This case concerned an application to set aside judgment obtained in default of defence. In the transcript Downer JA giving the judgment in which Forte JA as he then was, and Gordon JA, concurred is quoted as saying at page 6:

> "Two preliminary observations ought to be made on affidavits of merits. They ought to disclose facts within the personal knowledge of the deponents and secondly if reliance is based on hearsay evidence then those who supplied the information should be asked to give affidavit evidence"
>
> (emphasis mine)

I do not agree that this dictum supports Mr Brooks' contention. A careful analysis shows two things.

Firstly, the learned judge was merely attempting to restate the two principles evident from Section 408 quoted above. In interlocutory proceedings affidavits may either conform to the general rule and "be confined to such facts as the witness is able of his own knowledge to prove" or, they may be based on hearsay, that is, statements of information and belief with the sources and grounds thereof".

That the learned judge was setting out the two alternatives is evidenced by the fact that after stating the first proposition he says:

"If reliance is based on hearsay evidence"

However the second proposition – the portion underlined contains a logical inconsistency or contradiction which so learned a judge could not have intended. The first part of the quotation underlined. -"if reliance is based on hearsay evidence" - is the very opposite of the second part" those who supplied the information should be asked to give affidavit evidence".

Affidavit evidence given by "those who supplied the information" would be unlikely to be hearsay, thus in such circumstances reliance would not be based on hearsay. It seems to me that there has been a typographical error, that the words "would not" were intended in place of the word "should" in the second part of the sentence. With this change the inconsistency is removed and the passage accurately reflects the provisions of Section 408. (supra). It would then read:

> If reliance is based on hearsay evidence, then those who supplied the information <u>would not</u> be asked to give affidavit evidence"

Ramkisoon's case has been distinguished. In Jamaica Record Ltd. v Western Storage. (1990) 27 JLR 55 at page 58B, Campbell JA, in the Jamaica Court of Appeal held that the affidavit of the defendant's in house attorney who was also the secretary of the company provided a sufficient affidavit of merit. With respect I do not regard it as necessary to distinguish – Ramkisoon's case.

As far back as 1972, in Water and Sewage Authority v Waite (1972) 21 WIR 498, Phillips CJ (Ag) in the Court of Appeal of Trinidad and Tobago held that because proceedings to set aside a default judgment are interlocutory, the affidavit of merit could contain statements of information and belief; provided the sources and grounds thereof were stated. The headnote reads as follows:

> The respondent obtained against the appellant, the Water and Sewerage Authority, judgment in default of appearance to a writ of summons whereby she claimed damages for injury alleged to have been sustained through the negligence of the appellant in leaving on a public highway an unguarded excavation into which the respondent was alleged to have fallen. On an application for leave to have this judgment set aside the appellant relied upon an affidavit sworn to by its secretary deposing that he had been informed by a named employee of the appellant and verily believed that proper measures had been taken to prevent injury to users of the highway. The allegations in question, if true, were such as prima facie would provide a defence to the respondent's claim.
>
> O. 38, r. 3 of the [R.S.C. 1946 provides (so far as is material for] present purposes) as follows:

> 'Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove ...
>
> Provided that in interlocutory proceedings ... an affidavit may contain statements of information and belief, with the sources and grounds thereof'

The respondent's application was dismissed by a judge in Chambers who held (inter alia) that as the proceedings were final in nature the effect of O 38, r. 3 was to render it incompetent for the respondent to rely upon the affidavit filed in support of the application.

Held: that the proceedings were interlocutory, as the test for deciding that an order is final is that it must appear that, whichever way it went, it would finally determine the rights of the parties. Salaman v Warner and Ors. (1) applied.

Appeal allowed – Judgment set aside and leave granted to appellant to deliver its defence within 14 days.

In light of the above, I hold that the affidavits filed on behalf of the defendant/applicant are admissible.

(b) Is there a Defence on the Merits?

It was submitted that there has been a two fold admission of liability which binds the company – the alleged oral admission by its driver at the scene of the accident and the conduct of the company in repairing the plaintiff's car and paying the extra cost of rental.

The company says that the payment was ex-gratia and done out of sympathy as the plaintiff had requested payment and stated that she was financially embarrassed.

At this stage the Court is not required to make findings as to whom it believes. It will be a question of fact for the trial judge as to whether the conduct of the company's servants amounts to an admission, and whether an oral admission of liability was made by its driver, as alleged. That is not for me to decide at this stage.

Further as the case of Lady Elizabeth Anson v Trump (supra) shows a mere contest as to quantum is sufficient to constitute a defence which would entitle the defendant to have a judgement sit aside. A. Fortiori where there is a denial of liability and the offering of an explanation which is within the bounds of possibility.

I adopt as a correct statement of the law the following portion of the headnote in Day v RAC Motoring (supra).

> "Held – when considering whether to set aside a judgment obtained in default of defence, the court did not need to be satisfied that there was a real likelihood that the defendant would succeed, but merely that the defendant had an arguable case which carried some degree conviction. The court should however, be very wary of trying issues of fact on affidavit evidence where facts were apparently credible and were to be set against the facts being advanced by the other side, since choosing between them was the function of the trial judge, not the

> judge on the interlocutory application, unless there was some inherent improbability in what was being asserted, or some extraneous evidence which would contradict it"

(emphasis added)

I regretfully agree with the view expressed by Ward L.J. in Day v RAC Motoring (supra) at page 1013 line g, that the following statement at paragraph 13/9/18 of the Supreme Court Practice 1999, "is yet another move of the goalposts". The statement criticized by Ward LJ reads thus:

> "The preferred view is that unless potentially credible affidavit evidence demonstrates a real likelihood that a defendant will succeed on fact no 'real prospect of success' is shown and relief should be refused"

I therefore reject this statement as an incorrect representation of the law.

I wish to point out that so strong is the principle enunciated by Lord Atkin – in Evans v Bartlam (supra) – that a defendant should not lightly be deprived of his day in court, that in Vann v Awford, The Times 23rd April, 1986, a defendant was allowed to set aside a default judgment even though he had lied as to the reasons for his failure to file a defence.

In the result I find that the affidavits on behalf of the applicant disclose a defence on the merits.

(c) Has The Defendant\Applicant Explained the Delay?

I think that the explanation offered is satisfactory. It is understandable in particular that in moving her office from the city to the country, that a file may have been overlooked by the attorney.

Should the Court Set Aside The Default Judgment and Grant Leave to File a Defence?

The unfortunate illness of the plaintiff is not a matter which should shut out the defendant who acted within two months of the service of the writ and statement of claim, to file a defence. I accept as reasonable the company's explanation of the delay in doing so.

The court therefore set aside the default judgment and ordered that the defence be filed within three days of the date of the order and orders that any reply should be filed within fourteen days of the service of the defence.

Both sides are agreed that the trial should be a short one, lasting no more than one day, so that it would be placed on the Short Cases List.

In view of the state of the plaintiff's health I ordered that this matter be placed on the speedy trial list.

Costs of this application and costs thrown away to be the plaintiff's to be taxed if not agreed.

Certificate for counsel.