DVMLS

**JAMAICA**

**IN THE COURT OF APPEAL**

**MOTION NO: 13/99**

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

| | | |
|---|---|---|
| **BETWEEN** | **BARRINGTON FRANKSON** | **APPLICANT/APPELLANT** |
| **A N D** | **MONICA LONGMORE** | **RESPONDENT** |

**Michael Hylton, Q.C., and Dave Garcia, instructed by Myers, Fletcher and Gordon for the applicant\appellant**

**Donald Scharschmidt, Q.C., John Graham and Christopher Malcolm, instructed by Patterson, Phillipson and Graham for the respondent**

**November 30, December 1, 2 and 3, 1999; and July 31, 2000**

**(I)**

**Downer, J.A.**

In this application we gave leave to appeal and proceeded to hear the interlocutory appeal. Leave to appeal was refused by Donald McIntosh, J on 19th May 1999, although that order does not appear in the record. It was a proposal from the parties that the application for leave be treated as the hearing of the appeal, but we would have followed such a procedure in any event as it will result in a saving of time and costs. It is an instance of how we have always managed such cases in this Court before the phrase case management became popular.

We found **Smith v Cosworth Casting Processes Ltd.** [1997] 4 All ER 840 cited by Mr Hylton Q.C. helpful especially the guidance given by Lord Woolf MR, at pages 840-841 which reads in part:

> "(1) The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient".
>
> "(4) When leave is granted, the applicant does not need to know more than that he has the leave which he needs and therefore that he is entitled to proceed with the proposed appeal. The intended respondent has no entitlement to receive reasons as to why the application has been granted, in the same way that he does not normally have any right to be heard on the application which is usually made ex parte".

The appellant Barrington Frankson is a member of the Bar and the substantive issue in dispute concerns the quantum of his fees for which the respondent Monica Longmore is liable. To understand how the issue arose it is essential to advert to the history of the litigation.

**(II)**

**The History**

The respondent Monica Longmore was married to Slydie Basil Joseph Whitter, a man of property. She was awarded one half of the proceeds of the matrimonial home Cromarty. See **Whitter v Whitter** S.C.C. Appeal 16/88 delivered June 1, 1989. This Court affirmed the order of Panton J. Barrington Frankson, the appellant, was retained by Monica Longmore and his contingency fees were provided for in a contract. The

correspondence between the parties is crucial to understanding how the dispute arose, so it is necessary to set out the letters which form the written contract. Here they are.

The initial letter at page 43 of the record reads thus:

"12th November,

Mrs. Monica Samuels-Longmore,
Venbingh Hill House, (sic)
Flat E,
1A Vanbingh Hill, (sic)
London S.E. 3 7N. E.,
England.

Dear Madam,

Re: Self vs Joe Whitter

We acknowledge receipt of your letter dated 13th October, 1986 and pursuant to same we hereby advise that we are prepared to act for you in respect of your property claims as stated in your letter aforesaid.

We note that you have expressed some anxiety in respect of our fees and so we advise herein that we would be prepared to do your matter on a Contingency Basis. Our usual Contingency fee is 33 1/3% of all sums on properties received. However, in your case our fee would be 25%.

We would need your confirmation of this and also the following information:

Volume and Folio Nos. of all properties and their estimated value.

Please let us have your early response.

Yours faithfully,

B.E. FRANKSON & CO".

The address Flat E, is of importance so it should be noted. Then Monica Longmore responded to appellant Frankson at page 45 of the record:

"Vanbrugh Hill House
Flat E.
1A Vanbrugh Hill
S. E. 3. 7NE.

6th Dec., 86

B. E. Frankson & Co.
Attorney-at-Law
1A Duke Street
Kingston
Jamaica W.I.

Dear Sir,

I am in receipt of your letter. Contents noted.

I thank you for your consideration on the reduction of your legal fee.

The fee of 25% of all sums on properties received is accepted on condition that no additional money will be paid out by me during and after this case. I need to be assured that this will be so.

In your last paragraph – my previous letter stressed that I have knowledge of my involvement – but, not to the extent of what you require. My letter continued. - That in the event of such information needed you should investigate at the Record Office or whatever body such information can be found.

The only information or document I have in hand are in relation to the £10,000 loan I have previously mentioned.

Please excuse my lack of information. I thought you would have understood after you had my first letters concerning same.

The economic situation at the time and now in Jamaica makes it impossible to give you an estimated value on the properties.

I am afraid any information you may need has to be investigated by you.

I trust this will not deterred you from acting for me.

Sgd: Yours faithfully
M.E. Samuels-Longmore".

Barrington Frankson answered as follows at page 49 of the record:

"9th April, 1987

Mrs. Monica Samuels-Longmore
Vanbrugh Hill House,
Flat E,
1A Vanbrugh Hill,
London S.E. 3 7N. E.,
England

Dear Madam,

Re: Self vs Joe Whitter

We acknowledge receipt of yours dated 6th February,1986, and in answer to your query contained in paragraph 3 thereof we hereby advise that no further fees are payable by you.

The delay in reply to your letter was due to the fact that we are conducting searches both in Montego Bay and at the Titles Office with a view to obtain the Volume and Folio number of the property.

To date hereof we have not obtained such information even though the search is still continuing at the Titles Office.

If you have any other information of the property please send same to us as it may assist us to obtain the necessary information.

Yours faithfully,
B.E. FRANKSON & COMPANY."

The response of Mrs Longmore the respondent was as follows:

"c/o 1A Vanbrugh Hill House
Flat A.
London S. E. 3 7N

25th April

Mr B. Frankson
1A Duke Street
Kingston, Jam., W.I.

Dear Sir,

Myself v Whitter

I have not had a response from my letter regarding the above. I am now anxious for things to start moving on track. Please note the property 'Cromarty' Volume No. 1080 Folio 372. Please check if it correct.

I trust you will act accordingly and I await your reply.

Yours faithfully, M.E. Samuels-Longmore."

This is the first occasion that Flat A is used as a postal address. The inference from the correspondence was that the year was 1987. There is a letter from Barrington Frankson to this address dated 20th May 1987. Here it is:

"20th May 87

Mrs. Monica Whitter-Longmore
c/o 1A Vanbrugh Hill
Flat A
London S.E. 3 7 NE
England

Dear Madam:

Re: Self vs Joe Whitter

Pursuant to the instructions taken on the telephone on the 20th instant, we now send you Affidavit in Support of your Application for partition of the property at Fairfield, Montego Bay, owned jointly with your husband as Joint Tenants.

Please take the documents to the Jamaica High Commissioner and execute it in the presence of the Legal Attache before returning it to us.

> We are forwarding this by Courier Service to prevent any delays, and we trust that you might employ the same means of communication or any other which guarantees a speedy return of the documents.
>
> The places where you and the Legal Attache should sign are indicated in pencil
>
> Yours faithfully.
> B. E. FRANKSON & COMPANY."

The important point to note is that it is arguable that an expressed term of the contract is that the fees payable were to be 25% of all sums on properties recovered. In the light of that Monica Longmore stated in her affidavit in the proceedings entitled **Barrington Earl Frankson v Monica Longmore** Suit No C L F 141 of 93 at page 196 of the record:

> "12. That during the period June 1989 when the decision of the Court of Appeal was delivered to June 1991 when I terminated Mr. Frankson's retainer, no steps had been taken to tax the legal costs to which I was entitled."

So an important issue will be whether in the circumstances of this case she had the right in law to terminate the contract. How did this suit come about? Barrington Frankson claimed he was entitled to 25% of Monica Longmore's share of the proceeds of the property together with rents. He was silent about the taxed costs of the proceeds of the litigation in **Whitter v Whitter.** He obtained a default judgment against Monica Longmore and she then stated the position thus:

> "14. That in the month of October 1996 I understood from my son that a judgment had been entered against me and that subsequently I was advised that Mr Barrington E. Frankson had sold my share of the property at Cromarty to my ex-husband for $7,875,000.00."

Monica Longmore sought to set aside the default judgment of 10th June 1994 at page 316 of the record. The hearing was before Marva McIntosh J. whose order at page 328 of the record was as follows:

> "**BETWEEN** **BARRINGTON EARL FRANKSON** **PLAINTIFF**
>
> **A N D** **MONICA LONGMORE** **DEFENDANT**
> **(Formerly MONICA WHITTER)**
>
> IN CHAMBERS
> BEFORE THE HON MRS. JUSTICE McINTOSH AG.
> THE 16TH, 17TH, 24TH 29TH AND 30TH JULY, 1997
> 4TH FEBRUARY, 1998 AND 7TH JANUARY, 1999
>
> **UPON THE SUMMONS TO SET ASIDE JUDGMENT** dated the 20th day of March, 1997 coming on for hearing this day and upon hearing Messrs John Graham and Hector Robinson of Counsel instructed by Patterson, Phillipson & Graham, Attorneys for the Plaintiff and Messrs, Earl Witter and Maurice Frankson and Miss Alayne Frankson instructed by Gaynair & Fraser for the Defendant **IT IS THIS DAY ORDERED:-**
>
> 1. That the Final Judgment filed herein be set aside.
>
> 2. That the Plaintiff be granted leave to file and deliver the Defence within twenty-one (21) days of the date of this order of this application and order.
>
> 3. Costs of this application and order to the Defendant to be agreed or taxed."

It seems that the default judgment was entered 10th June 1994, so it is appropriate to set it out as it appears at page 316 of the record:

> "ENTRY OF JUDGMENT
>
> IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
>
> IN COMMON LAW

SUIT NO. C.L. F/141 OF 1994

| | | |
|---|---|---|
| BETWEEN | BARRINGTON EARL FRANKSON | PLAINTIFF |
| A N D | MONICA LONGMORE<br>(formerly Monica Whitter) | DEFENDANT |

NO APPEARANCE having been entered by the Defendant MONICA LONGMORE and no Defence having been filed IT IS THIS DAY ADJUDGED:-

1. That the Defendant pays to the Plaintiff the sum of $1,788,069.47.

2. That the Defendant pays to the Plaintiff costs to be taxed.

DATED the 10th day of June 1994.

GAYNAIR & FRASER

PER:----------
PLAINTIFF'S ATTORNEYS-AT-LAW

ENTERED IN BINDER NO. 699 folio 111."

So the issue on appeal is whether the learned judge exercised her discretion correctly in setting aside the above default judgment. It is her order from which Frankson appeals.

**(III)**

**What is in issue? Was the default judgment a nullity because of a failure of service on the respondent Longmore?**

Was the alleged failure to serve process on the respondent Longmore a nullity or an irregularity which could be set aside ex debito justitiae? The issue is of importance because if there was no service, the proceedings which followed would be a nullity and the default judgment must be set aside. If there is an irregularity which can be set aside ex debito justitiae, then in this instance the default judgment must also be set aside. That the default judgment was a nullity was the submission developed by Mr Scharschmidt

Q.C. for the respondent, Longmore with clarity. Here is how Marva McIntosh J. adverted to that jurisdictional point at page 5 of her judgment:

> "The Defendant/Applicant also contended that she was never served with the Writ of Summons and Statement of Claim in this matter and submission were made to this effect based on the Affidavit and further Affidavit of the Defendant/Applicant."

The learned judge could have gone further but it appears that the consequence of the failure of service was not fully debated before her. As counsel took the point in this Court it will be essential in this case to ascertain the status of the judgment in default if the proceedings which brought it about were adjudged to be a nullity.

It is appropriate to refer to grounds 1 and 2 of the grounds of appeal which state:

> "1. The Learned Trial Judge erred in law when she over ruled the Preliminary objection that she had no jurisdiction to entertain the Application to set aside the Judgment entered herein
>
> 2. The Learned Trial Judge had no jurisdiction to set aside the Judgment entered herein as the said Judgment was already executed."

So the appellant's case as deployed by Mr Hylton Q.C. also raised a jurisdiction point.

Here is how Monica Longmore initiated proceedings on the basis that the default judgment was irregularly entered. At page 248 of the record it reads:

> "**LET ALL PARTIES CONCERNED** attend before a Judge in Chambers at the Supreme Court , King Street, Kingston, on Wednesday the 16th day of July 1997, at 10 o'clock in the forenoon or as soon thereafter as Counsel may be heard on behalf of the Defendant on the hearing of an application on behalf of the Defendant for an Order that:-
>
> (1) The Final Judgment entered herein and all subsequent proceedings be set aside on the ground that the said judgment is irregular since the amount claimed in the action is an unliquidated sum and the correct procedure

was for the Plaintiff to have entered Interlocutory Judgment with damages to be assessed.

(2) There be such further or consequential order as to this Honourable Court seems fit."

Be it noted that paragraph 1 of the summons was based on the ground that the default judgment was obtained irregularly. Marva McIntosh J. in her judgment states that the summons was amended. There is no copy of the amended summons in the record. In so far as the judgment at page 12 of the record states the amendment, it does not alter the substance of the original summons. Nevertheless, it is appropriate to set it out .

"(1) The judgment was irregularly entered and the defendant is entitled to have it set aside because:-

(b) The judgment ought not to have been for a liquidated sum and the correct procedure was for the Plaintiff to have entered Interlocutory Judgment with damages to be assessed.

© Even if there was a basis for the Judgment to be for a liquidated sum the Judgment would be for too much since the right of the Plaintiff to legal fees is based on recovery and no recovery of property or rental income had been effected by the Plaintiff when the Judgment was entered.

(2) Alternatively, the Defendant had a Defence on the Merits."

One of the problems with the learned judge's reasons is that she addressed paragraph 2 but did not deal with paragraph 1(b) and (c) and that prayer on these grounds was not reflected in the Order of the Court below. This judgment will attempt to deal with issues raised in both paragraphs. Additionally, the learned judge adverted to the issue of failure to serve process but did not make a finding in that regard.

The writ of summons in so far as material reads:

> "TO : Mrs. Monica Whitter-Longmore
> 1A Vanbrugh Hill
> Flat A
> Black Heath
> London S.E. 37UE
> England".

Then it continues thus:

> "WE COMMAND you that within Fourteen days after the Service of this Writ upon you exclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of Barrington Earl Frankson
> c/o Gaynair & Fraser
> 9-11 Church Street
> Kingston
>
> and take notice that in default of your so doing the Plaintiff may proceed herein and Judgment may be given in your absence
>
> WITNESS THE HONOURABLE MR EDWARD ZACCA O.J. Chief Justice of Jamaica the day of in the year of our Lord One Thousand Nine Hundred and Ninety Three."

The address on the Writ of Summons is to be noted. It is Flat A and the year is 1993. A letter resorting to this address by the respondent Longmore was in 1987 and there was a response to this letter at page 53 of the record. It is repeated for emphasis:

> "20th May 19 87
>
> Mrs. Monica Whitter-Longmore,
> c/o 1A Vanbrugh Hill,
> Flat A,
> London S.E. 3 7 NE,
> England.
>
> Dear Madam:
>
> Re: Self vs Joe Whitter
>
> Pursuant to the instructions taken on the telephone on the 20th instant, we now send you Affidavit in Support of your

> Application for partition of the property at Fairfield, Montego Bay, owned jointly with your husband as Joint Tenants.
>
> Please take the documents to the Jamaica High Commissioner and execute it in the presence of the Legal Attache before returning it to us.
>
> We are forwarding this by Courier Service to prevent any delay, and we trust that you might employ the same means of communication or any other which guarantees a speedy return of the documents.
>
> The places where you and the Legal Attache should sign are indicated in pencil.
>
> Yours faithfully,
> B. E. FRANKSON & COMPANY."

Between 1987 and 1993 the respondent corresponded from 353 Stanstead Road in London and Georgia in the United States of America.

There is a response from W.B. Frankson Q.C, to the respondent dated July 9, 1991 but her letter of 3rd June 1991 was not exhibited. The point being made is that there is no evidence that in 1993, when it was claimed the writ was served Monica Longmore used the address Flat A c/o 1A Vanbrugh Hill. Following on the Writ of Summons is the Statement of Claim whose terms are as follows:

**"STATEMENT OF CLAIM**

> The Plaintiff claim is against the Defendant to recover the sum of One Million Seven Hundred and Eighty-Eight Thousand Seven Hundred and Seventy Dollars and Forty-Seven Cents ($1,788,770.47) being monies due and owing pursuant to an agreement between the Plaintiff and Defendant and costs which amount remains unpaid despite the demands of the Plaintiff.

**PARTICULARS**

"(1) 25% of all sums received on the property:-

(a) being 25% of her share of the appraised value of the property $1,750,000,00

(b) being 25% of the appraised value of the rent payable to the Defendant from the 13.6.84 to 25.6.93 and continuing $ 38,069.47

$1,788,069.47".

Then it continues:

> "And the sum of $2,000.00 for costs. If the amount claimed be paid to the Plaintiff or his Attorneys-at-Law or Agents within four days from the service hereof further proceedings will be stayed".

The respondent Monica Longmore is contending that the contingency speaks of 25% of the money recovered from the proceeds of the property. Therefore it was argued that the entry of the particulars above is irregular. It is relevant to note that there is no reference to the material facts which would bring the claim within the ambit of section 21 of the Legal Profession Act. It is an issue which will be developed later. However it must be stated at the outset that the Statement of Claim unamended, cannot stand.

Her affidavit on the issue of service at page 192 of the record states:

> **"I, MONICA SAMUELS,** being duly sworn make oath and say as follows:
>
> 1. That I reside and have my true place of abode and postal address at 1A Vanbrugh Hill, Black Heath, London SE3 7UE, England. I am retired and temporarily residing at White River in the parish of Saint Mary.
>
> 2. That I refer to my affidavit sworn to on the 28th day of May, 1997 in this action.
>
> 3. That I have seen the affidavit of Louise Burton and I deny that the Writ of Summons dated the 20th day of September, 1993 was ever served on me by Louise Burton and I have never met any person with the name LOUISE BURTON.

4. That I have never lived at **Flat A,** 1A Vanbrugh Hill, Black Heath, London SE3. In 1993 I lived in Flat C and prior to that I lived in Flat E between 1980 until 1988. That in 1993 I had resumed using my maiden name **"SAMUELS"** and would not have responded to the surname LONGMORE."

The affidavit of Louise Burton the process server as regards service of the Writ of Summons reads at page 319 of the record:

"I LOUISE BURTON, being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode at 194A Bellenden Road, Peckham SE5 London, England, and I am a Process Server.

2. That a sealed copy of the Writ of Summons dated the 20th day of September, 1993 filed in this Honourable Court was duly served by me on the Defendant, MONICA LONGMORE (formerly Monica Whitter) at 1A Vanbrugh Hill, Flat A. Black Heath, London SE3 on the 1st day of November, 1993 at 7.55 p.m. in the forenoon by handing the said document to MONICA LONGMORE who was not known to me prior to the date of service but she answered to the name MONICA LONGMORE and admitted that was the named person on the document aforesaid and she accepted same.

SWORN to by the said LOUISE BURTON : Sgd:
at 73 Station Road West Wickham : LOUISE BURTON
Kent England
:

this 9th day of February 1994

before me:

Sgd: John Michael Williams
NOTARY PUBLIC."

Be it noted this affidavit was sworn to one month after it was alleged to have been served.

The process server did not know Monica Longmore. She makes no mention of a photograph which is generally relied on in circumstances as these. Additionally, the fact that Monica Samuels has stated that she never lived at 1A Vanbrugh Hill, Flat A, it is reasonable to find that the sealed copy of the Writ of Summons was never served on her. Moreover the initial correspondence between the appellant Frankson and the respondent Longmore was addressed to Vanbrugh Hill Flat E, 1A Vanbrugh Hill S.E. 3 7 UE and there were several letters to that address. The letter dated 25th April 1987 was addressed c/o Vanbrugh Hill Flat A S.E. 7 U from the respondent Longmore and the appellant Frankson responded on 20th May 1987. There was no further correspondence from this address to the time when the process server allegedly served her personally in 1993.

As for the authorities cited by the appellant on the issue of service, see **Emerson v Brown** (1844) Manning and Granger 476 or Vol. 135 E.R. 191. The headnote states the law as follows:

> "Unless it be distinctly shewn that process has not come to the knowledge of a defendant, the court will not set aside proceedings, upon a statement that the defendant has not been served with, or had notice of, the process."

The judgment of the Court was stated thus at page 193 :

> **"TINDAL C. J.**
>
> I think that the circumstances of this case called on the defendant for an explicit denial that he knew he had been served with a copy of the writ."
>
> **"CRESSWELL J.**
> The defendant does not swear that he did not know that the copy of the writ of summons was left with him in the manner deposed to on the other side; he does not say that he did not know that such a document was left in the

> envelope. He cautiously and guardedly speaks of notice and service."

The important facts which are stated at length in the report are as follows at page 191-192:

> "The affidavits of the daughter and the son-in-law of the defendant, stated that the defendant was ninety-one years of age, and confined to his bed-room; that, on the 17th of April last, the plaintiff and one Jacobs came to the house of the son-in-law (with whom the defendant resided), at Marston, in the county of Bedford, where they spent the night; that on the following morning they requested an interview with the defendant, alleging that the plaintiff wished to pay him a [477] quarter's rent of certain premises which he held as tenants to the defendant; that the son-in-law permitted them to go into the defendant" bed-room for the purpose of having such interview; that the daughter and son-in-law were both present all the time, but did not observe any writ or copy of any writ, served on the defendant, either by the plaintiff or by Jacobs, nor did they believe that any such writ or copy was then served, nor was any action against the defendant mentioned or alluded to during the interview; that, after the plaintiff and Jacobs had left the defendant's bed-room, the daughter found on the table an envelope containing a copy of a writ of summons against the defendant at the suit of the plaintiff; that such copy was not produced to, or brought to the knowledge of the defendant, at the interview, nor did the daughter mention to her father the circumstance of such copy having been left, until several days afterwards. The defendant also swore, that, on the 27th of April last, he was served with a notice purporting that a declaration had been filed against him in an action of covenant at the suit of the plaintiff; that, previously to the service of the said notice, he was not aware that any action had been commenced against him by the plaintiff; that he was never served with any writ of summons, or a copy of any writ of summons, or any other writ, in any such action, nor had he had notice of any proceedings in the action save and except the said notice of the declaration having been filed therein; and that he never received any letter or notice from the plaintiff or his attorney communicating the intention of the plaintiff to commence this action against him."

In marked contrast to the above case, in the instant case the respondent Longmore has demonstrated she did not reside at any time at the address sworn to by the process server. A feature to be noted is that **Emerson v Brown** was one of personal service while this is a case of service outside of the jurisdiction. There is no specific affidavit exhibited supporting the summons to explain distinctly that this was service outside the jurisdiction. The summons at page 276 of the record and the Order at page 277 of the record on it will be cited and explained later. What is important to note is that the substituted service sought and granted was by registered post. Further, Title 10 of the Judicature (Civil Procedure Code) Law, section 45 pertaining to service outside the jurisdiction was not considered by the appellant Frankson. In this context the following passage from **Craig v Kanseen** [1943] 1 All ER 108 at 112 is instructive. It reads thus:

> "An earlier case is **Hewitson v Fabre** (1888), 21 Q.B.D 6. That was a case where the defendant, who was not a British subject, had been served with the writ instead of with notice of the writ, as the rules provide. The service was out of the jurisdiction. It was held, by Field and Wills, JJ., that the effect of that wrong attempt at service was to make the proceedings void ab initio; and that such a service was no service at all".

**Re Pritchard** (deceased) [1963] 1 All ER 873 is a most interesting case which explains the distinction between an irregularity which must be set aside ex debito justitiae and an irregularity which may be waived, see section 679 the Civil Procedure Code; and a nullity which is void, and cannot be cured. The dissent by Lord Denning put it thus at page 879:

> "The only true cases of nullity that I have found are when a sole plaintiff or a sole defendant is dead (see **Tetlow v Orela** [1920] All ER Rep 419 or non-existent (see **Lazard Brothers & Co. v Midland Bank, Ltd.** [1932] All ER Rep 419 [1920] 2 Ch 24; and I would like to see the word 'nullity' confined to those cases in future."

Upjohn L.J. who gave the leading judgment for the majority in contrast said at page 883:

> "The authorities do establish one or two classes of nullity such as the following: There may be others, though for my part I would be reluctant to see much extension of the classes. (I) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service, or service by filing in default, or cases where service has properly been dispensed with: see e.g., **Whitehead v. Whitehead** (otherwise Vasbor) [1962] 3 All ER 800. Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement: see e.g., **Finnegan v. Cementation Co., Ltd.** [1953] 1 All ER 1120 : [1953] 1 QB 688."

It must be reiterated that this is a case which was treated as substituted service. The truth is it was a case of service outside the jurisdiction. This aspect of the case does not seem to have been explored in the Court below. In **Pritchard** the issue was whether an originating summons was properly issued, and the majority found that it was not and therefore a nullity. Also in issue was the time constraint of the then Order 70 (1) and (2) which corresponds to section 678 and 679 of the Civil Procedure Code. Those sections read:

> "Non-compliance with law.
>
> Effect of non-compliance with this Law*
>
> 678. Non-compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner, and upon such terms, as the Court shall think fit".

Section 679 should also be cited. It reads:

"Application for irregularity to be made within reasonable time

679. No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

**Pritchard** is also useful in explaining the important case of **Craig v Kanseen** [1943] 1 All ER 108. Lord Denning's M R dissent has been referred to previously. Upjohn L.J. for the majority put the matter on more generally acceptable terms thus at 880:

"In view of the admirable arguments which we have heard from counsel on both sides and the number of authorities to which we have been referred, I propose in the first place to say a few words about R.S.C., Ord. 70, and the authorities on it. Notwithstanding the breadth of the rule, it is quite clear that some proceedings are such that they are properly described as nullities and the rule cannot be applied to them. This is clear from the case in this court of **Craig v. Kanssen** and in particular the judgment of Lord Greene, M.R., who dealt with the cases at length. He concluded his review of the authorities by a reference to the case, also in this court, of **Fry v. Moore** (1889) 23 Q.B. D 395 and he quoted the observations of Lindley, L.J., and Lopes, L.J. (1889), 23 Q.B.D. at pp 398, 399, both of whom pointed out the difficulty of attempting to draw an exact line between an irregularity and a nullity. He concluded by pointing out:

> 'Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside.'

In that case the defendant had never been served with any proceedings at all. It was not a case of some failure to comply with the rules relating to service, but the defendant was in the position where he could say that he had no knowledge of any proceedings against him at all, until he learnt of them, and that he then made application to have the order set aside. Lord Green, M.R., with whom Goddard, L.J., agreed, held that the order obtained without

> any service on the defendant was a nullity and must be set aside."

I understand Mr Scharschmidt Q.C. to put the respondent's case on this basis and so he contended the default judgment ought to have been set aside on the ground that it was a nullity in addition to the reasons given by the learned judge below.

The following passage from **Craig v Kanseen** is also useful in distinguishing the difference between an irregularity which may be waived and a nullity. At page 112 it reads thus:

> "The next case is **Hamp-Adams v Hall** [1911] 2 K.B. 942. That again was a case of default in appearance; but was not treated, so far as anything appears in the judgments, as being a mere exercise of jurisdiction under the rules relating to default, but as an exercise of an inherent jurisdiction in the court. There the writ was served, but the date of service was not indorsed upon it within 3 days, as required by the rules. The plaintiff signed judgment in default of appearance and a verdict of damages was given by a sheriff's jury. It was held that non-compliance with the rule which required due endorsement of the date of service was not an irregularity which could be waived; and that the plaintiff, not having complied with the rule, was not entitled to proceed by default; and that the verdict and judgment must be set aside. Vaughn Williams L.J., said at pp. 943, 944 [Emphasis supplied].
>
> > 'It is contended for the plaintiff that the non-compliance with the rule has been waived by the defendant. In my opinion, it was impossible for the defendant to waive the defect, for the result of the non-compliance with the rule was that there was no writ on which the plaintiff was entitled to proceed. Then it was said that at the most the case should be regarded as one in which there has been a mere irregularity, and Ord. 70, r. 2, was called to our attention as showing how the right of a party to take advantage of a defect in the nature of an irregularity may be limited or taken away. In my opinion, that rule has no application to the circumstances of the present case. It is said that it is a very severe penalty to put on a mistake of this kind that all the

> subsequent proceedings should be set aside. I am not at all impressed by that argument. Where proceedings are taken by a plaintiff in the absence of the defendant, it is most important that there should be at every stage a strict compliance with the rules, and therefore it is a reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule as Ord. 9, r. 15, not as a mere irregularity which can be waived, but as a matter which prevents any further proceedings from being taken on the writ'." [Emphasis supplied]

Some emphasis must be placed on the phrase 'entitled to proceed by default'. It was relied on both by Vaughn Williams and Buckley L.J.J. in **Hamp-Adams v Hall**. It is important to note once the default judgment is regular, the subsequent contested proceedings can only be challenged on appeal. See **Winston Broad v Port Services Ltd** (1968) 25 J.L.R. 275 and **Gleaner Co. Ltd. and Dudley Stokes v Leymon Strachan** unreported judgment delivered November 19,1996. The plaintiff who secures a default judgment is entitled to proceed save in an instance where the default judgment is a nullity. The defendant cannot set aside, where the default judgment amounts to estoppel per rem judicatam see **Kok Hoong v Leong Cheong Kweng Mines Ltd** [1964] A.C. 993; 1964 2 WLR 815. It was a failure to understand that an interlocutory judgment by default entitles the plaintiff to proceed to assessment and that such a final assessment can only be challenged on appeal which has led to the unnecessary litigation subsequent to **Gleaner Co. Ltd. and Dudley Stokes v Leymon Strachan** unreported SCCA No. 44/95 delivered November 19, 1996 per Downer, JA. To contend that entitlement to proceed can be set aside when that entitlement gives rise to a final judgment is to misunderstand the nature of a judgment by default. In the above case I treated the order of Walker J. in favour of the Gleaner as a nullity and I adhere to that view. The sections of the Judicature (Civil Procedure Code) Law (the "Code") which

makes the phrase "entitled to proceed" apt are sections 72 and 247 and sections 69 and 254. Section 366B of the Code makes it clear that the order of Bingham J. was a final order.

Walker J's order fell within category (111) of Lord Upjohn's classification in **Pritchard** and was set aside as a nullity. It purported to set aside the order of Bingham J., which could only be challenged on appeal. Provisions for the appeal of a final order as that made by Bingham J., and jury are to be found in section 10 of the Judicature (Appellate Jurisdiction) Act and the relevant rules of court. Provision for appeal against interlocutory orders is to be found in section 11(f) of the Judicature (Appellate Jurisdiction) Act.

The Court of Appeal Rules, 1962 rule 18 paragraph (6) reads:

> "The powers of the Court in respect of an appeal shall not be restricted by reason of an interlocutory order from which there has been no appeal".

The necessary implication is that if there is a final judgment where the proceedings to finality commenced with an interlocutory judgment by default any complaint about such a default judgment must be taken on appeal pursuant to rule18(6) above. Two other cases cited **HARRACKSINGH V AZIZ AND ANOTHER** (1960) 2WIR 485 and **Ebrahim v Ali (otherwise Ebrahim)** [1983] 3 All ER 615 followed **Craig v Kanseen.** (supra).

Turning to the facts of the instant case the summons for leave to effect substituted service (at 157 of the record) reads thus:

> "IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
> IN COMMON LAW
>
> SUIT NO C.L. 141 OF 1993
>
> | | | |
> |---|---|---|
> | BETWEEN | BARRINGTON EARL FRANKSON | PLAINTIFF |
> | AND | MONICA LONGMORE (FORMERLY MONICA WHITTER) | DEFENDANT |

IN CHAMBERS
BEFORE THE MASTER (AG)
ON THE 9TH DAY OF MARCH, 1995

UPON THE SUMMONS FOR LEAVE TO EFFECT SUBSTITUTED SERVICE coming on for hearing this day and after hearing Ms Jacqueline Cummings, Attorney-at-Law instructed by MESSRS GAYNAIR & FRASER, Attorneys-at-Law for the Plaintiff and the Defendant not appearing nor being represented IT IS HEREBY ORDERED as follows:-

1. That Personal Service of the Summons for Sale of Realty and Affidavit be dispensed with.

2. That leave be granted to the Plaintiff to serve the Defendant a copy of the said Summons for Sale of Realty and Affidavit in Support and all Subsequent Proceedings by Registered Post.

3. That the costs of the Summons be costs in the Cause".

In this context the affidavit of Louise Burton must be referred to in full again. It reads:

"I, LOUISE BURTON, being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode at No. 194A Bellenden Road, Peckham SE5 London, England and I am a Process Server.

2. That Sealed Copy of Attested Copy Entry of Judgment dated 10th day of June, 1994, Summons for Sale of Realty and Affidavit in Support of Summons for Sale of Realty dated the 18th day of August, 1994 filed in this Honourable Court were duly handed to me for service upon the Defendant. The said Summons was fixed for hearing on the 6th day of October, 1994.

3. That upon receipt of the said documents referred to in paragraph 2 hereof I made several visits to the premises of the Defendant situate at 1A

Vanbrugh Hill Flat A, Black Heath, London, SE so as to effect service on the Defendant but I was unsuccessful in so doing in that Defendant failed to answer and/or respond whenever I visit her premises.

4. That it appears that the premises are occupied as I noticed the movement of curtains at her window on some occasions when I visit the said premises.

5. That I know the Defendant, as the Writ of Summons herein was served by me upon the Defendant on the 20th day of September, 1994 at the Defendants premises aforesaid.

6. That I am reliably informed and do verily believe that the Defendant resides and still continues to reside at premises No. 1A Vanbrugh Hill, but that she is trying to evade and/or avoid service of process herein.

SWORN to by the said LOUISE BURTON:
In the County of Kent:
On the 4th day of 1994: ----------
LOUISE BURTON
NOTARY PUBLIC."

The first point to note is that the summons sought leave to effect substituted service by registered post. So there ought to be some affidavit with respect to the posting by registered post in respect of the suit by Frankson. The Writ of Summons AND Statement of Claim were cited earlier as well as the Default judgment obtained. As for the specific evidence of service here is the affidavit of service:

" I, LOUISE BURTON, being duly sworn make oath and say as follows:

1. That I reside and have my true place of abode at 194A Bellenden Road, Peckham SE5 London, England, and I am a Process Server.

> 2. That a sealed copy of the Writ of Summons dated the 20th day of September, 1993 filed in this Honourable Court was duly served by me on the Defendant, MONICA LONGMORE (formerly Monica Whitter) at 1A Vanbnrugh Hill, Flat A. Black Heath, London SE3 on the 1st day of November, 1993 at 7:55 p.m. in the forenoon by handing the said document to MONICA LONGMORE who was not known to me prior to the date of service but she answered to the name MONICA LONGMORE and admitted that was the named person on the document aforesaid and she accepted same".

We have had Monica Longmore's response to this affidavit in which she denied she was served. Monica Longmore lived at 1A Vanbrugh Hill, Flat E, Black Heath, London SE3 in 1986 and there is correspondence with her and Frankson the appellant which confirms this. For the first time we have an address c/o Vanbrugh Hill Flat A dated 25th April 1987, at page 51 of the record, and Frankson's response 20th May 1987 at page 53 of the record. Then there is further correspondence from another address in London and Georgia, U.S.A. Then we have the process server going to 1A Vanbrugh Hill Flat A, in 1993, six years after the last correspondence from Monica Longmore at that address admitting that she did not locate her. Further there is no indication in the summons that the Court was informed of service outside the jurisdiction. Further paragraph 2 of the summons reads:

> "2. That leave be granted to the Plaintiff to serve the Defendant a copy of the said Summons for Sale of Realty and affidavit in Support and all Subsequent Proceedings by Registered post".

I can see no evidence that Registered post was used to effect service on this issue. Here is Frankson's account of this aspect of the matter at page 27 of the record:

> "31 That by letter dated the 9th July, 1991 W.B. Frankson Q.C. wrote to the Defendant in response to the letter dated the 3rd day of June, 1991 and I exhibit hereto marked "B.E.F. 45." a copy of the said letter. That to the date hereof we have not received a response from the Defendant to the said letter."

It is important to note that the above letter at page 229 of the record was posted to Flat A although the correspondence from this address was in 1987 and there were other London or U.S.A. addresses by the respondent Longmore between 1987 and 1991.

The respondent Frankson's account continues thus:

> "32 That I received no further correspondence from the Defendant and on the 20th day of September, 1993, by which time the Defendant had resumed residence at her former address in London, Writ of Summons and Statement of Claim herein was filed on my behalf to recover my fees that were legally due to me which said fees the Defendant had no intention to honour having obtained a Judgment in her favour.
>
> 33. That the Defendant was personally served with the Writ of Summons with endorsement thereon on the 12th day of November, 1993 and I crave the leave of this Honourable Court to refer to the Affidavit of Service dated the 9th day of February, 1994 and filed herein. The Respondent failed to enter an Appearance or filed a Defence and Judgment dated the 10th day of June, 1994 was duly entered in Default of Appearance".

It is clear that he was relying on the inadequate affidavit of Louise Burton to establish personal service. This is unacceptable. In the circumstance I am prepared to rely on the statement of principle by Lord Green in **Craig v Kanseen** (supra) to find that there was no service on Monica Longmore. So the evidence establishes that a default judgment was obtained in her absence when she was not aware of the proceedings. That default judgment was a nullity and must be struck out. The learned judge did not

address this issue in depth but I am prepared to affirm her judgment on this basis. **Norwich Corporation v Norwich Tramway Co.** [1906] 2 K.B. 119 approved in **Westminster Bank v Edwards** [1942] A.C. 529 and **Benson v Northern Ireland Road Transport Board** [1942] A.C. 320 makes it clear that the issue of proceedings being a nullity can be raised at any stage of the proceedings. See also **Kofi Forfie v Seifah** [1958] 1 All E.R. 289 approving **Craig v Kanseen** .

**(IV)**

**Was the default judgment irregular? Ought the matter to have been set down for the determination for the appropriate fee pursuant to section 21 of the Legal Profession Act?**

Mr Hylton contended that the following passage in **BIRBARI, LTD. V. FREDA BIRBARI AND ANOTHER** (1976) 23 W.I.R. 98 at 100 was in his favour on this issue. Graham-Perkins J.A. said:

> "Section 245 of cap 177 provides:
>
> If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, file a statement of defence, and deliver a copy thereof, the plaintiff may, subject to the provisions of section 258A of this Law, at the expiration of such time, enter final judgment for the amount claimed, with costs."

[If I may interpose, this is the section which governs **Evans v Bartlam** [1937] A.C. 423. Evans was a judgment debtor.] Then the learned judge continues thus:

> "What then is a debt or liquidated demand within the meaning of s.245 and, indeed s. 249? The history of the former section and the authorities relating thereto make it abundantly clear that in order to be entitled to enter final judgment on a defendant's failure to file a defence to his claim on the ground that his claim is for a debt or liquidated demand, a plaintiff must: (i) show that his claim arises under a contract; (ii) state the amount demanded, or so express it that the ascertainment of the amount due is a mere matter of calculation; and (iii) render sufficient particulars of the contract so as to describe its real nature.

> It is the nature of the contract on which the claim is based, as well as the fact that a specific sum, is claimed, which brings the claim, or fails to bring it, within the meaning of the words, 'debt or liquidated demand'. See ENCYCLOPAEDIA OF Laws of England (2nd edn.), 1908. Be it observed, too, that a plaintiff does not bring his claim within s. 245 of Cap. 177 by the mere device of particularising in his statement of claim, in the forms of definite sums of money, that in effect are unliquidated damages: see Knight v Abbott (1882), 10 Q.B.D 11."

It is because the respondent has contended successfully that the sum claimed is not a liquidated demand, but a sum which is to be assessed in contested proceedings that the appellant Frankson cannot succeed in this appeal. Moreover Section 21 of the Legal Profession Act governs the matter.

This is how Marva McIntosh J disposed of the matter (at page 16 of the record):

> "In assessing the evidence contained in the Affidavits of Monica Longmore (Formerly Monica Whitter) the Defendant/Applicant/ and the Affidavit of Barrington Earl Frankson, the Plaintiff/Respondent the Court must be convinced that there is a valid and meritorious defence to the action. Based on the contingency agreement and the proposed defence annexed and having fully considered the submissions made by both parties I find that the evidence is not conducive to a final Judgment as it is clear that the work done by the Plaintiff/Respondent must be assessed on a 'qantum meruit' basis
>
> In view of this finding a final Judgment is not the appropriate course of action to be taken. In the circumstances the Order of this Court is that the Judgment dated 10th June 1994 be set aside and leave is given to the Defendant/Applicant to file and deliver a defence within 21 days of the date of this Order."

The only omission in this passage is that the quantum meruit must be determined in accordance with section 21 of the Legal Profession Act and the inherent jurisdiction of the Court as declared by that Act.

There is another useful passage on this issue in **Long Yong (Pte) Ltd. v Forbes Manufacturing & Marketing Ltd.** [1986] 40 WIR 229 at p. 231 where Rowe P. said:

> "I adopt the passage from 37 Halsbury's Laws of England (4th Edn) paragraph 397
>
> > **'Meaning of 'liquidated demand'.** A liquidated demand is a debt or other specific sum due and payable by the defendant to the plaintiff. It must be ascertained or capable of being ascertained as a mere matter of arithmetic. It does not extend to unliquidated damages, whether in contract or tort, and such a claim does not become liquidated merely because it is expressed as a definite or specific figure. On the other hand, liquidated damages stipulated as a genuine pre-estimate of the damage which would probably arise in respect of a breach of contract constitute a liquidated demand. So does a claim based on a quantum meruit, such as reasonable remuneration for services rendered or a claim for bank charges'.
> >
> > 'A claim does not cease to be a liquidated demand merely because there is added to it a claim for interest, since interest is, juridically speaking, merely an addition or accretion or ancillary to the principal sum claimed. If it is claimed as being payable or recoverable under some contract, express or implied, or by statute, default judgment may be entered for the amount of the interest claimed or for interest to be assessed. A claim for interest under the Law Reform (Miscellaneous Provisions) Act 1934 need not be pleaded, and in the case of a claim for a debt or liquidated demand the plaintiff may enter final judgment for the principal sum claimed and interlocutory judgment for interest under the Act to be assessed'." [Emphasis supplied]

For Frankson to set his claim as a liquidated sum was regarded by the respondent Longmore as irregular, further the substance of her summons was to set aside the final judgment and that the matter ought properly be set down for ascertainment of fees. In such circumstances there was no need for an affidavit on the merits and delay was not in

issue. Lord Green M.R., put the matter with force in the following passage in **Craig v Kanseen** (supra) at page 111. It reads thus:

> "Before looking at one or two more authorities, I may refer to **Daniel's Chancery Practice,** 8th edn., Vol 1, p. 708, where this statement is made :
>
> > 'A judgment may also be set aside for irregularity if the irregularity consists in non-compliance with one of the rules. The court or a judge may either set it aside, or amend or otherwise deal with it in such manner and upon such terms as the court or a judge may think fit.'
>
> After referring to R.S.C., Ord. 70, r. 1, he then proceeds:
>
> > 'A judgment obtained by some steps not warranted by the rules or capable of being sanctioned is wholly void and may be set aside'
>
> and he cites **Smurthwaite v Hannay** [1894] A.C. 494(H.L.). Then, in referring to the necessity of showing that the application is made promptly in the case of applications under R.S.C., Ord, 70, it is said:
>
> > 'The provision only applies where the irregularity is capable of being waived under R.S.C., Ord 70, r. 1; but where the proceedings are wholly void, they may be set aside at any time. In such a case no defence need be shown; but it is otherwise where the court has discretion as to setting aside'
>
> and he cites for that **Hamp-Adams v Hall** [1911] 2 K.B. 942 to which case I shall refer in a moment. Then the following statement is made:
>
> > 'Where judgment against a party has been signed irregularly, it is worse than a mere non-compliance with the rules, and he is entitled ex debito justitiae to have it set aside; and the court has no power to impose

> any terms upon him except as a condition of giving him costs'."

Then Lord Green M.R., at pages 111-112 continues thus:

> "Returning to the reported cases, the matter was fully discussed in **Anlaby v Praetorius**(1888), 20 Q.B.D. 764. It is true that it was a case where judgment was obtained in default of defence; but the reasoning of the court was not based on any special rule relating to default judgments, but was of general application. Fry, L.J., at p. 768 says:
>
> > 'It follows that the defendant had 10 days from the delivery of the statement of claim, or from the time limited for appearance, within which to deliver his defence; and as the writ was served on January 21, and the time limited for appearance was January 28, the last day for delivering the defence was 10 days from January 28, and the judgment entered on February 7 was premature and irregular. In such a case the right of the defendant to have the judgment set aside is plain and clear. The court acts upon an obligation; the order to set aside the judgment is made ex debito justitiae, and there are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution, and possibly to an action of trespass. We are pressed with the argument that Ord. 70, r. 1, gives a discretion to the court which applies here.'
>
> Then he reads Ord. 70, r. 1, and proceeds, at p. 769:
>
> > 'But in the present case we are not concerned with an instance of non-compliance with a rule, nor with an irregularity in acting under any rule. The irregular entry of judgment was made independently of any of the rules; the plaintiff had no right to obtain any judgment at all. I do not think, therefore, that the case comes within r. 1, and we must consider what is the right practice without reference to that rule. There is a strong distinction

> between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the court has a discretion to impose terms as a condition of granting the defendant relief. But although the court is bound to set aside an irregular judgment ex debito justitiae, it has always exercised a discretion – a common term being that the defendant shall not bring any action.'

At pp. 770, 771, Lopes, L.J., said this:

> 'I entirely agree that Ord. 70, r. 1, does not apply here. It was meant to apply where a party had made some blunder in his proceedings, as by delivering a pleading too late; but the present case seems to me altogether outside the operation of r. 1, because the judgment was entered prematurely, without any right whatsoever. To obtain that judgment was a wrongful act, and not an act done within any of the rules. The defendant is therefore entitled ex debito justitiae to have it set aside.'

> The next case to which I wish to refer is **Hughes v Justin** [1894] 1 Q.B. 667. There, after the issue of the writ, the parties had come to some sort of an agreement, as a result of which a payment was made. In spite of that, judgment was signed for the full amount claimed. It was held that the case fell within the class of case referred to in **Anlaby v Praetorius** (1888), 20 Q.B.D. 764 and was one where the defendant had a right ex debito justitiae to have the judgment set aside."

This then is the basis for setting aside the default judgment. The appropriate fee will be determined pursuant to section 21(1) and 5(1)(b) of the Legal profession Act which in substance means the fees will be determined by the Taxing Master. This aspect will be developed later.

(V)

**The Merits: Did Marva McIntosh J exercise her discretion correctly in setting aside the default judgment?**

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

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

Be it noted that the above section falls under Title 26 captioned Default of Pleading. It covers several types of default judgments simpliciter. It does not deal with instances where the default judgment determines liability and there is an entitlement to proceed to assessment and that contested assessment results in a final order of the court. To reiterate, such a final judgment can only be set aside on appeal. As regards an uncontested assessment see section 354 of the Civil Procedure Code. The judgment by default applicable to this case as contended by Mr Hylton Q.C., is provided for in section 245 of The Civil Procedure Code. That section reads:

> "*Non-delivery of defence in indorsed claims.*#1
>
> **245** If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, file a statement of defence, and deliver a copy thereof, the plaintiff may, subject to the provisions of section 258A of this Law at the expiration of such time, enter final judgment for the amount claimed, with costs".

This section as previously stated governs the classic case of **Evans v Bartlam** as Evans was a judgment debtor.

As for the default judgment as previously stated it reads at page 316 of the record:

"NO APPEARANCE having been entered by the Defendant MONICA LONGMORE and no Defence having been filed IT IS THIS DAY ADJUDGED:-

1. That the Defendant pays to the Plaintiff the sum of $1,788,069.47.

2. That the Defendant pays to the Plaintiff costs to be taxed.

Dated the 10th day of June 1994."

Then there is the Affidavit of Debt by appellant Frankson which reads as follows at page 317 of the record:

"1 That my true place of abode is Bartons in the parish of Saint Catherine, my postal address is Bartons District, Bartons P.O. in the parish of Saint Catherine.

2. That the Defendant was at the time of the issue of the suit justly and truly indebted to me in the sum of $1,788,069.47 as set out in the Writ of Summons filed herein.

3. That since the issue of the Writ of Summons the Defendant has paid nothing on account of the said sum of $1,788,069.47 which amount is now due and payable and still subsisting and unsatisfied."

Then there is the affidavit of service of Louise Burton already adverted to supra. Dates are important. The application to set aside was 20th March 1997at page 8 of the record. The judgment in default was 10th June 1994, three years before. The respondent Longmore was informed by her son of the default judgment in October 1996.

As for the evidence adduced by the respondent Monica Longmore. The draft defence is to be found at pages 245-247 of the record. The strength of Monica

Longmore's case can best be ascertained by citing certain paragraphs from her affidavit. Here is her initial complaint at page 195 of the record:

> "6 That it was the clear understanding between Mr Barrington E. Frankson and I that he should always keep me fully advised of all the legal proceedings and relevant matters relating to the suit as I was living in England at all material times.
>
> 7. That it was a fundamental term of the agreement between Mr. Barrington E. Frankson and I that he should conclude this matter and take all reasonable steps to recover the legal costs awarded in my favour.
>
> 8. That during the period which Mr Barrington E. Frankson acted on my behalf, I had great difficulty in contacting him by telephone and he hardly ever communicated with me in writing for the many years that he acted on my behalf, I did not receive as much as five (5) letters from him.
>
> 9. That in or around February 1991, I received a telephone call from Mr Barrington E. Frankson who advised me that I should come to Jamaica as a matter of urgency to attend a hearing court. That at the time that I received the telephone call, I was in Atlanta, Georgia in the United States of America.
>
> 10. That at great expense and inconvenience, I came to Jamaica. When I arrived, Mr Barrington E. Frankson was not in office. I made inquiries from his secretary and she advised me that Mr Barrington E. Frankson was not in the island and that she had no information about an appointment having been made for me to see him nor did she know of any arrangements having been made for me to attend court in relation to my matter.
>
> 11. That I went to England from Jamaica and before doing so, I informed Mr Barrington E. Frankson's secretary where I could be located during the time that I would be in England. I received no verbal or written communication from Barrington E. Frankson concerning my trip to Jamaica and by a letter dated the 3rd day of June, 1991 I terminated his retainer.

12. That during the period June 1989 when the decision of the Court of Appeal was delivered to June 1991 when I terminated Mr Frankson's retainer, no steps had been taken to tax the legal costs to which I was entitled".

These paragraphs suggest that the relationship between attorney-at-law and client gave rise to a fiduciary relationship.

Then comes the gist of the case against the respondent Frankson:

13. "That I received a letter from Gaynair & Fraser dated the 9th of July, 1991 ( a copy of which is exhibited hereto marked **"MS 4"**). That insofar as Mr. Barrington E. Frankson had not completed the work related to the matrimonial dispute between my ex-husband and I, it was my expectation that there would be a hearing in court when the amount of legal fees to which Mr. Barrington E. Frankson was entitled would be assessed and that thereafter I would be informed

14. That in the month of October 1996 I understood from my son that a judgment had been entered against me and that subsequently I was advised that Mr Barrington E. Frankson had sold my share of the property at Cromarty to my ex-husband for $7,875,000.00

15. That I have been informed by Mr John Graham and do verily believe that the entire sum of $7,875,000.00 has been paid over to Mr. Barrington E. Frankson/Gaynair & Fraser since September 1996 and that Mr. Barrington E. Frankson has retained all the monies for his own use, even though he has no legal basis for so doing."

The other aspect of her case is continued on page 198 and reads:

"21 That Mr. Barrington E. Frankson has not completed the work that he was retained to do and consequently he is not entitled to the sum claimed as a liquidated sum. That I have been advised and do verily believe that the judgment which has been

> entered against me is irregular and should be set aside."

The affidavit evidence demonstrates that Monica Longmore's affidavit raises serious issues that ought to be determined at a trial. So it is appropriate to turn to the authorities to see what they have to say in such circumstances. Before doing that, reference ought to be made again to the Legal Profession Act in particular Section 21 which reads:

> "21. (1) An attorney may in writing agree with a client as to the amount and manner of payment of fees for the whole or part of any legal business done or to be done by the attorney, either by a gross sum or percentage or otherwise; so, however, that the attorney making the agreement shall not in relation to the same matters make any further charges than those provided in the agreement:
>
> Provided that if in any suit commenced for the recovery of such fees the agreement appears to the court to be unfair and unreasonable the court may reduce the amount agreed to be payable under the agreement.
>
> (2) Fees payable under any such agreement shall not be subject to the following provisions of this Part relating to taxation nor to any other provisions thereof."

It does not appear that this Act was brought to the attention of the learned judge below, nor was it mentioned in this Court. I have good reasons to remember this Act. As for section 21(2) it excludes written agreements from the provisions of section 22 of the Act. But it does not touch the inherent jurisdiction of the Court to refer written agreements to the Registrar on the fees of an attorney and his own client basis and report the matter to the judge for a final determination of a fair and reasonable fee. It is the only area in which I have a disagreement with Carberry J.A., as at page 114 of his

judgment in **W. Bentley Brown v Raphael Dillon and Sheba Vassell** (1985) 22 JLR 77 he suggested that section 21(2) of the Act provides that fees payable under a written agreement pursuant to section 21(1) shall not be taxed. The true effect of section 21(2) is that a written agreement for fees is not governed by section 22 in relation to taxation or to any other provision, such as the time within which to institute proceedings to recover fees, see section 22(2) and (3) or 22(4) which makes provision for an attorney to approach the taxing master directly. But section 21 did not touch the inherent jurisdiction of the Court to refer written agreements to the Registrars of either court for taxation on a solicitor and own client basis. Had it been recognised that section 21 of the Act was in issue, the parties by agreement could have asked the learned judge to decide the issue as to whether the contract could have been terminated by the respondent Longmore in the manner she did and in any event refer the matter to the Registrars for taxation on an attorney and own client basis. Time and costs would have been saved.

It is necessary to cite the relevant grounds of appeal. They are set out at page 21 of the record:

> "2. The Learned Trial Judge had no jurisdiction to set aside the Judgment entered herein as the said Judgment was already executed.
>
> 3 The Learned Trial Judge wrongly exercised her discretion in setting aside the Judgment and granting leave to Defendant to file a Defence to the Plaintiff's claim as the evidence adduced by the Defendant/Respondent did not support the exercise of such discretion. Alternatively the Learned Judge failed to properly exercise her discretion in setting aside the Judgment and granting the Defendant/Respondent leave to Defend same.
>
> 4. The finding by the Learned Trial Judge that the work done by the Plaintiff/Appellant must be

> assessed on 'a quantum meruit' is inconsistent with the Order granting the Defendant/Respondent leave to file a Defence."

**The authorities.**

**Evans v Bartlam** [1937] A.C. 473 (H.L.) is the leading case on setting aside a default judgment and the following statements of principle therein ought to guide the deliberations and decision of this Court. Before turning to the speeches of their Lordships it is necessary to reiterate that a default judgment is an interlocutory judgment. It can be set aside, but if it is not, then it entitles the plaintiff to proceed to a final judgment. That is, the implication which governs **Broad v Port Services Ltd., and, Gleaner v Strachan** referred to earlier in this judgment. So a default judgment may be described as an interlocutory originating motion enabling the plaintiff to proceed to a final judgment.

The other point to note again is that **Evans v Bartlam** was not a default judgment where there was a subsequent contested proceeding which resulted in the final determination which could only be challenged on appeal. Evans was a judgment debtor. So once the default judgment was not set aside **Bartlam** could have entered a final judgment. It is against this background that we turn to the judgment.

Lord Atkin said at page 479-480

> "I agree that both rules, Order XIII., r. 10, and Order XXVII., r. 15, give a discretionary power to the judge in Chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if

> any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

Then Lord Russell, **Evans v Bartlam**, put it thus at page 482:

> "In the case now under discussion the judge in Chambers thought it proper, in the exercise of his discretion, to set aside the judgment; and unless an appellate Court is satisfied that the discretion has been wrongly exercised and should have been exercised in the contrary way, the judge's order should be affirmed".

Here again it is clear that Lord Russell was dealing with a default judgment simpliciter and not one where the default judgment was used as an entitlement to secure a final determination which could be challenged on appeal.

Lord Wright made his contribution thus at page 489:

> "A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito justitiae once the facts are ascertained. In a case like the present there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the Court should pay heed ; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. This point was emphasized in **Watt v Barnett** (1878) 3 Q.B.D. 363. Here the appellant shows merits, in that the debt was primarily a gaming debt ; he denies that he made any new contract within **Hyams v Stuart King** (1908) 2 K.B. 696 an authority which has not yet been considered by this House. He clearly shows an issue which the Court should try. He

> has been guilty of no laches in making the application to set aside the default judgment, though as **Astwood v Chichester** [(1878) 3 Q.B.D. 722] and other cases show, the Court, while considering delay, have been lenient in excluding applicants on that ground. The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose ---."

It is important to emphasise that in **Evans v Bartlam** the House of Lords was dealing with a default judgment where the issue was a judgment debt. There was no other issue to be determined on the Statement of Claim. To stress the point that their Lordships were dealing with an interlocutory judgment which determined the final issue, Lord Wright earlier said at pages 486-487:

> "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal. Thus in **Gardner v Jay** (1885) 29 Ch. D. 50, 58, Bowen L.J. in discussing the discretion of the judge as regards mode of trial says: 'That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed'. Bowen L.J. in that case held that the appellant had not satisfied the onus of showing that the discretion of the judge had been wrongly exercised. But there are many cases in the books where it has been held that the appellant has satisfied the onus of showing that the exercise of the

> discretion by the judge was not justified on the facts. A judge's order fixing the date of trial or refusing to grant an adjournment is a typical exercise of purely discretionary powers, and would be interfered with by the Court of Appeal only in exceptional cases, yet it may be reviewed by the Court of Appeal. Thus in **Maxwell v Keun** [1928] 1 K.B. 645 the Court of Appeal reversed the trial judge's order refusing to the plaintiff an adjournment. That was a pure matter of discretion on the facts. Atkin L.J. said at p 653 'I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so'. The reporter adds a note that the plaintiff succeeded in the action when it came on at the adjourned date". [Emphasis supplied]

The other authority cited on this aspect of the case was **Vann and Another v Awford and Others** 130 S.J. 682, (and) The Times 23rd April 1986, which cited the unreported judgment of **Ladup Limited v Siu** of 21st November 1983. Dillon L.J. said at page 4 of the Internet copy:

> "We have the advantage in this court, which the learned judge in the court below did not have, of having been able to look at the transcripts of the judgment in this case from the Supreme Court Library. It was a case in which the defendant had given an explanation of his delay in applying to have a default judgment set aside which did not find favour with the courts. Lord Justice May said at page 10 of his judgment:
>
> > 'Although in these cases where an application is made to set aside a judgment obtained by default it is frequently said that not merely must a defence on the merits be shown, but also a reasonable explanation for the delay and default, I think that the passages to which I have referred from the speeches in **Evans v Bartlam** make it quite clear that it is the first, the defence on the merits, which is of the

> prime importance at least in the case of an interlocutory judgment, and that the question of delay is a matter which falls to be dealt with only secondarily.' Lord Justice Dunn, concurring, said this at page 12:
>
> 'In applications to set aside a judgment I entirely agree with my Lord that the primary consideration is whether there is a defence on the merits, and the judge should have considered that first before considering the question of delay'."

Then Nicholls L.J., said at page 7 of the Internet copy:

> "In this court Mr Gallagher conceded at the outset of the appeal that his client's sworn explanation of why he took no steps to defend the proceedings, namely, that he was out of the country at the time, was untrue. In this court the appellant has put forward no further affidavit, offering an explanation of this or stating belatedly what is the true reason for him having let judgment be entered against him and damages be assessed without any defence or opposition from him. This being so, I agree with Mr Wright that it is a proper inference to draw that at all material times the appellant knew of the proceedings and that he chose not to give notice of intention to defend or to become involved in the assessment of damages. Thus the appellant has brought upon himself his present predicament where judgment has been entered against him and damages assessed at over £50,000. To set that sum in context: the original contract price was £28,927.
>
> These circumstances form, to say the least, a most unattractive basis on which a party should apply to the court and ask for the judgment and the assessment of damages, both regularly obtained in accordance with the rules of the Supreme Court, to be set aside. But on such an application the primary consideration is not the explanation for the applicant's delay, but whether there is a triable issue on the merits. If there is, then, as pointed out by Lord Wright in **Evans v Bartlam** [1937] AC 473, 489, prima facie the court will not wish to let a judgment pass on which there has been no proper adjudication. The court is concerned to do justice between the parties with regard to the plaintiffs' claim, not to punish the defaulting defendant, inexcusable though his conduct may have been. Here, the learned judge proceeded on the assumption that the

> appellant's affidavit showed a prima facie defence on the merits, but then he treated the wilful misconduct of the appellant in behaving with deception right up to the hearing of his application as in itself decisive against the judgment being set aside. Plainly the judge was right to treat the appellant's conduct as a very serious matter, but in my view he fell into error in not also considering and giving proper weight to the respects in which and the extent to which, the plaintiffs would suffer prejudice if the judgment were set aside. Accordingly, it is for this court to exercise its own discretion regarding the appellant's application to set aside the judgment."

It is to be noted that Section 354 of the Civil Procedure Code deals with setting aside an uncontested trial e.g. an assessment of damages. For a more recent case on this issue see **Shacked v Goldschmidt** [1998] 1 All ER 372.

Another case cited on behalf of the respondent Longmore was **Burns v Kondel** [1971] Vol 1 Lloyds Law Report 534 where a defence of contributory negligence was relied on as the basis to set aside a default judgment. Lord Denning M.R. put it thus at page 555:

> "We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a good defence on the merits. He need only show a defence which discloses an arguable or triable issue. In an accident case, it is sufficient if he shows that there is a triable issue of contributory negligence. A plea of contributory negligence, if successful, may reduce the damages greatly."

So it is clear that the dominant factor is whether the respondent Monica Longmore established in the Court below that she had arguable defence. I think she did so establish. The issues were, was she entitled to terminate the contract for the contingency fee? If she was so entitled, is Frankson then entitled to a quantum meruit determined pursuant to section 21 and 5(1)(b) of the Legal Profession Act for the

services he had rendered in securing a judgment in her favour in **Whitter v Whitter** both before Panton J and in the Court of Appeal? Was Frankson liable to pay over to Monica Longmore the proceeds he had secured before taxation of costs? If he was not, would the respondent Longmore be entitled to interest? There are issues of general public importance both to the profession and to the public. They are vital to the parties in this case.

**The issue of delay**

It was also argued on behalf of the appellant that there was undue delay in seeking to set aside the default judgment. **Harley v Samson** [1914] Vol. XXX .The Times Law Reports 450- 451 was prayed in aid and the report has Mr Justice Scrutton saying :

> "The defendant now moved to set aside the judgment. His Lordship said that it was admitted by counsel that he had power, notwithstanding the lapse of time, to set aside the judgment, and it was clear that if the facts contained in the plaintiff's answers to interrogatories had been brought to his attention at the time he would not have entered judgment for the plaintiff. The question was whether, after the lapse of one year from the date of the judgment, he should help the defendant, who was a party to the illegality, to get rid of this liability. He saw no reason for exercising the discretion of the Court in favour of the defendant. He thought Mr Barrington-Ward was right in saying that Mr. Blair was in the position of a bone fide holder for value with regard to this judgment debt. That being so, he declined to exercise his discretion. The application would therefore be dismissed."

These circumstances are remarkably different here. One important fact is that the respondent Monica Longmore was outside the jurisdiction. Mr Frankson was her lawyer. She has stated that it was in October 1996, that she was informed by her son that a default judgment was entered against her. Application to set aside was made on 20th March 1997. The earlier memorandum of appearance and entry of appearance of

24th January 1997 cannot detract from the application to set aside. That judgment was entered on 10th June 1994. The particular facts of each case must be carefully considered as they were in the authorities considered in **Fred Smith v George Reeves** a useful judgment delivered by Patterson J.A. 31st June 1995, SCCA 94/94, the panel comprising (Rattry P., Forte and Patterson J.J.A.). Mr Hylton has not persuaded me that on this ground there should be a refusal to set aside. The strength of the defence is the fact on which the learned judge considered the matter and her approach was admirable. Further she seems to have accepted the approach of Lord Wright in **Evans v Bartlam** (supra) which stated at page 489:

> "He has been guilty of no laches in making the application to set aside the default judgment, though **Atwood v Chichester** (1878) 3 Q.B.D. 722 and other cases show, the Court, while considering delay, have been lenient in excluding applicants on that ground."

In **Smith v Reeves** Patterson J.A., interpreted **Atwood v Chichester** somewhat differently but this approach of Lord Wright is to be preferred.

**(VI)**

**Analysis of Section 21 of the Legal Profession Act**

Section 21 of this Act was interpreted by Carberry J.A. in the important case of **W. Bentley Brown v Raphael Dillon and Sheba Vassell** (1985) 22 J.L.R 77 on appeal from **Walter B. Brown v Raphael Dillon and Another** (1983) 20 J.L.R. 37 with characteristic erudition and skill. Any decision on section 21 must refer to this judgment as a starting point. There will seldom be any need to go further. It is important on this aspect of the case and will be of even more importance if there is a hearing on the merits.

## (VII)

**The history of the English legislation which has been adapted to form the basis of the Legal Profession Act.**

Firstly, Carberry J.A. demonstrated that legislative antecedents was the English Statutes on Solicitors and particularly the Attorneys' and Solicitors' Act 1870 and the Solicitors Remuneration Act 1881. With respect to the first Act, here is how the learned judge illustrated the issue at page 96 of his judgment by citing section 4 of that Act.

> "4. An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements, in respect of business done or to be done by such attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a lesser rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and condition in this part of this Act contained; Provided always that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require an opinion of a court or judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made".

In introducing the 1881 Act the learned judge said at pages 87 and 88:

> "Mr Fairclough on behalf of Dillon appeared to base his argument on the analysis contained in Cheshire and Fifoot on Contract 10th edition (1981) pages 274 et seq. He argued that in this case there was a fiduciary relationship, the presumption of undue influence arose and had not been rebutted. Alternatively, there was sufficient evidence to find that undue influence had in fact been exercised. In support of his argument, he cited

> **Mearns v Knapp** (1889) 37 W.R. 585; this was a case in which the plaintiff, gentleman's valet, instructed the defendant, a solicitor, to act for him in the proposed purchase of a tea and coffee business (apparently a café) for the sum of £500. The sale eventually fell through. In its closing stages, the solicitor when asked for his bill asked for forty guineas to settle his fees to date, and in lieu of an itemized bill prepared a memorandum which was signed by both the solicitor and the client and which 'agreed' the cost at £42. The plaintiff went to new solicitors and presently brought action to set aside the agreement regarding fees as unfair, and claiming that it was signed by the client through ignorance and pressure. (The solicitor had moneys in hand for the client). Kekewich, J., found for the plaintiff (the client) and set aside the agreement, but be it observed, left it open to the solicitor to submit a detailed bill in respect of his costs. He did so on the basis that the agreement appeared prima facie to be unfair and unreasonable. On this finding the solicitor agreed to accept the scaled fee, based on the value of the premises proposed to be bought, which yielded a fee of £7.10 (30s pr £100). At that date, under the Solicitor's Remuneration Act 1881, s. 8, an agreement as to costs could be entered into but to be enforceable had to be fair and reasonable. The English legislation on the subject is discussed below. The moral to be drawn from the case is that the setting aside of an agreement as to costs made between a solicitor and client does not necessarily result in the former getting nothing at all for his work and labour, which was the result Downer J reached in the instant case. To anticipate the correct attitude or approach to this problem appears in a sentence taken from the judgment of Wilberforce, J., in **Electrical Trades Union v Tarlo** (1964) Ch. 720 at 734:
>
> > ' ... The court has inherent jurisdiction to secure that the solicitor, as an officer of the court, is remunerated properly, and no more, for work he does as solicitor.'
>
> This also seems to be the principle on which section 21 (1) of the Legal Profession Act is based."

Returning to the 1881 Act the learned judge continued thus at page 97:

> "A further U.K. Act, the Solicitors' Remuneration Act 1881 (44 & Vict. C. 44) introduced a distinction between

'uncontentious' and 'contentious' business; as to the former it provided for the laying down of set scales of fees by general orders to be made by a committee presided over by the Lord Chancellor. Section 8 dealt again with the possibility of solicitors and client agreeing in writing as to the remuneration to be paid for such work.

In **Clare v Joseph** (1907) 2 K.B. 369 (C.A.) the Court of Appeal reviewed the position as it stood before the 1870 Act and considered the effect of the Acts."

"Lord Alverstone, C.J., at page 372 et seq. said:

> 'We have had considerable discussion in this appeal as to the state of the law before 1870; in my opinion it is correctly stated in Corderry on solicitors, 3rd edn. At p. 262. Agreements as to costs were often made before 1870 and upon the application of the client, they were not infrequently held to be binding both on the solicitor and the client. The inquiry was always directed to the question whether the agreement was fair and reasonable, and an agreement by the solicitor to take less than the usual remuneration was not looked upon as unfair or unreasonable, but was held binding upon him. We must remember that that was he state of the law in 1870 when we are called upon to construe the Act of that year, an Act which was designed to provide fresh safeguards for the protection of the client and to give the solicitor certain rights which he did not previously possess, provided that he himself complied with the requirements of the Act ... (the Act) provided that he might enter into an agreement in writing as to his costs, and went on to enact that, if he did so, there should be a further safeguard for the protection of the client, who should be entitled to have the agreement examined by the taxing master to see if it was fair and reasonable, and if the officer was of opinion that it was not fair and reasonable he could require the opinion of the court or a judge upon that point. The section is an empowering section, and in my opinion does not affect the position of a client who sets up an agreement as to costs with a solicitor'."

In **Clare v Joseph** the agreement was an oral one by the solicitor to charge no costs if he won his action, if he lost it, to charge only the same amount for costs as he would have recovered from the opposite party had the action been successful. Though oral, it was upheld against the solicitor.

Fletcher Moulton, LJ., at page 376 put the matter thus:

> 'Let us now consider the state of the law on this subject at the date of the coming into operation of the Act of 1870. At that date agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. There were however viewed with great jealousy by the courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence that the courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense ...
>
> Section 4 therefore was not required for the purpose of enabling persons to enter into these agreements, nor was it required in order to strengthen the hands of the courts in their examination of them. Before 1870 the court had full power to investigate their propriety and in my opinion the specific provision of s. 4 did no more than provide and regulate a procedure for the control of such agreements; they did not in substance alter the law affecting them ...'
>
> [Emphasis supplied]

Fletcher Moulton, L.J., then considered the scheme of the Act as a whole. Buckley, L.J., at p. 378 said:

> 'The law in existence when the Act of 1870 was passed is clear; the solicitor could not charge his client more than the amount of his bill of costs

> when taxed, and it was his duty to advise his client that it was contrary to his interest to pay more ...'

He concluded his examination of the Act of 1870, s. 4:

> 'The effect of s. 4 is I think that whether the solicitor is to have remuneration at a greater or less rate than the ordinary rate, an agreement between him and his client to that effect must be in writing, if the solicitor sets it up ...'

This case I think indicates very clearly the approach of the common law to what one may call lumpsum agreement as to costs made between solicitor and client. They were viewed with suspicion as there was so great an opportunity for the exercise of undue influence, and the solicitor wishing to enforce them had to satisfy the taxing master and/or the court that they were fair and reasonable."

[Emphasis supplied]

**How Carberry J.A. interprets section 5(1)(b) of the Legal Profession Act.**

The inherent jurisdiction of the court to control attorneys-at-law is preserved by section 5(1) (b). Here is how Carberry J A deals with it at page 98:

> "Before the Act of 1870 the courts were prepared to examine such agreements to see whether they were fair and reasonable. It is important to appreciate that even after the Act, and the subsequent Acts, (they were consolidated in 1932 and again in 1957) the courts have exercised an inherent jurisdiction over and above any powers given to them by the statutes. That power rests on the concept that the solicitors or attorneys are officers of the court; as we have seen in looking at the position of the barrister, courts have an inherent jurisdiction over those who practice in the courts, and this is especially true of solicitors and attorneys, who are (unlike the barrister) officers of the court. The following cases, illustrate the continued exercise of this inherent jurisdiction separate and apart from statute".

It is important to note when we come to deal with the judgment of the presiding judge Kerr J A that he paid little or no attention to this principle and the important cases which illustrate it. Carberry J.A. thought this aspect so important that he reiterated it, together with the relevant cases towards the conclusion of his judgment.

Then the learned judge continues thus at page 110:

> "Section 41 of the Legal Profession Act refers to a schedule 5 consisting of laws repealed by the new Act; they include the entirety of (a) the Old Jamaica Bar Regulation Law (Cap. 171), (b) the Solicitors Law (Cap. 363), (c) the new Bar Regulation Law, Law 3 of 1960, and in addition section 19 of the Judicature (SC) Law, (Cap. 180). The fact that a repealing law has itself been repealed does not of course revive the laws that it repealed. The draftsman of the Legal Profession Act has however gone out of his way to repeal all the sections, wherever they were to be found, that recognized in the judges of the Supreme Court an inherent jurisdiction over both solicitors and barristers. The reason appears to have been because it was thought that such inherent powers related solely to the disciplining of these legal practitioners by striking off or suspending and these particular powers had now been given to disciplinary committees appointed for that purpose. This was of course not so, as reference to cases dealing with the enforcement of undertakings and costs will show: see again **Myers v Elman** (1940) A.C. 282. However the insertion in the new Legal Profession Act of Section 5 (1) (b) which expressly makes the Attorney-at-Law 'an officer of the Supreme Court' will have the effect of once again recognizing the learned judge of the judges over the legal practitioners, so that one may perhaps say 'all is well that ends well."

Turning to the issue of fiduciary relationship and the onus of proof the learned judge said at page 112:

> "When Downer, J., in this case found that there was a fiduciary relationship (which there was) and that this put upon the attorney the burden of establishing that the agreement was fair and reasonable, he was applying the old common law and equitable principles applicable

> before the enactment of Section 21, and in this respect he was in error, no doubt because the effect of Section 21 and apparently the entire Act was not brought to his attention below.
>
> Nevertheless it appears that his instinct was sound. I would hold in the circumstances of this case that the client, the defendant Dillon, had discharged the onus of showing that the agreement was 'unfair and unreasonable' for the following reasons".

This is another important aspect where Kerr J.A. differs from Carberry J.A. although purporting to agree with him.

**How section 21 of the Legal Profession Act determines the fees of attorneys-at-law where there is a written agreement**

As for the central issue with regard to the remuneration, to which an attorney-at-law is entitled if the issue is litigated, Carberry J.A. put the issue thus at pages 88-89:

> " We have reviewed so far the pleadings, the evidence the judgment and the arguments presented to us on appeal. The central problem in this case is what control, if any, do the courts in Jamaica have over the fees demanded or agreed to be paid to attorneys at the private bar by their own clients.
>
> The words 'their own clients' are used to distinguish the present question from a different but associated question, i.e., what fees may be recovered from the other side by the successful party in litigation. Those fees have always been subject to taxation of costs; what is recoverable is not necessarily the fee that the victorious party had paid or agreed to pay to his barrister or solicitor, but the fee that the taxing master or registrar will allow as reasonable on taxing costs. What we are concerned with is the question of the extent to which the barrister, solicitor, or attorney can recover from his own client recompense for work done on his behalf, and more particularly when the fee has been agreed between them before, during or after the litigation in question. There is some common ground in that the costs that the successful party may recover from the other side is by way of indemnity only."

Regarding this central issue Carberry J.A. made an important finding which ought to be followed, although Kerr and Ross J.J.A. appeared to have missed the point in their judgments. Kerr J.A. expressly stated that he agreed with Carberry J.A. when in fact he did not on at least two vital issues as I will attempt to demonstrate. Ross J.A. made no contribution to this aspect of the case or any other, apart from concurring with the order proposed by Kerr J.A.

Returning to the judgment of Carberry J.A. on the central issue he said at page 114:

> "The second point is shorter: I have suggested that the Registrar of the Supreme Court be asked to tax Mr. Brown's bill; section 21 (2) of the Act says that fees payable under an agreement of this sort shall not be taxed. Yet is seems to me that this would be a proper way in which to arrive at material on which to base a reduction of the bill. Perhaps the way out of this apparent impasse is to ask the Registrar to make a report to this court, and to give liberty to apply when it is made.
>
> The reference to the Registrar should be regarded as the exercise of the court's inherent jurisdiction over attorneys as 'officers of the court', and is a jurisdiction separate and distinct from that given by the statute. I have already cited a number of cases in which the courts in England have ordered taxation though it was clear that this was not possible under the UK Solicitors Acts. For convenience they are again referred to: see **In Johnson & Weatherall** (1888) 37 Ch. D. 433 (C.A) affirmed by the House of Lords in **Storer & Co. v Johnson & Weatherall** (1890) 15 A.C. 203 (ante); see also **In re Parke, Vole v Park** (1889) 41 Ch. D. 326; **In re Foss** (1912) 2 Ch. D. 161; **Jones & Son v Whitehouse** (1918) 2 K.B. 61 (C.A.). **In Re a Solicitor** (1961) 1 Ch. D. 491 and **Electrical Trades Union v Tarlo** (1964) Ch. D. 720 are modern instances of assertions of and exercise of this jurisdiction."
>
> (Emphasis supplied)

The emphasised words were criticised earlier in this judgment under the caption **"V The Merits."**

The importance of the above passage is that it recognises the position of attorneys-at-law as 'officers of the court' pursuant to section 5(1)(b) of the Legal Profession Act. It declares the inherent jurisdiction of the court which empowers it to call for the assistance of the Registrar who is the court's expert in this area. To reiterate for emphasis, when his or her report is obtained then this Court or the Court below is enabled to fix a fee which is not 'unfair or unreasonable'. The superiority of this procedure over a procedure which relies on the uninformed guess work of judges alone should be evident. Such a procedure is affirmed by the Act. When the Registrars set out their taxed bills on the basis of solicitor and own client then there will be basis for making an informed judgment. I say Registrars as both the Registrar of the Supreme Court and the Court of Appeal were involved in the instant case.

This is the procedure which ought to be followed. Yet Carberry J.A. with modesty of a legal scholar closed his judgment thus:

> "Since writing the above, I have had the opportunity of reading the judgment of Kerr, J.A., and though I would have been happier to have the Registrar tax the appellant's bill I agree with the judgment proposed by him which will hopefully secure finality in respect of these unhappy proceedings."

**The approach by Kerr J.A. to section 21 of The Legal Profession Act.**

As for the judgment of Kerr J.A., the presiding judge, he paid a notable and generous tribute to Carberry J.A. thus:

> "I have had the benefit of reading the draft of the judgment of Carberry, J.A., in which he has reviewed

> with scholarly industry a number of cases relevant to the relationship of solicitor and client and the changes brought about by the fusion of the two branches of the profession – solicitors and barristers – by the Legal Profession Act and in which he has carefully summarised the evidence.
>
> I am in agreement with him that in respect to the appeal against the judgment in favour of the respondent Vassell that the appeal should be dismissed, the judgment of the court below affirmed with costs of appeal to the respondent for the reasons set forth in his judgment.
>
> With respect to the judgment in favour of the respondent Dillon I agree that the appeal should be allowed, the judgment in the court below set aside and judgment entered for the plaintiff/appellant.
>
> Having regard to the full treatment given to the question raised on appeal by Carberry, J.A.., this addendum of mine will concisely be confined to the bare essentials."

It should be stated at the outset that one essential which Kerr J.A, forgot to address was the issue of the inherent jurisdiction of the Court declared in section 5(1)(b) of the Legal Profession Act. On the issue of undue influence there was a sharp division, Kerr J.A. was impressed by the submission of Mr Macaulay, Q.C. and stated the position thus at pages 117 to 118:

> "Mr Macaulay submitted that the principle as to the presumption of undue influence arising from the special relationship between attorney and client applied to transactions, e.g. sale, purchase, gift, where the relationship already existed and should not be extended to the negotiations between prospective client and attorney leading up to and concluding with the establishment of such a relationship and could not extend or include arrangements made for payment of fees for professional services rendered under the contract of service. He contended that the cases on which the learned judge relied both dealt with transactions entered into during the existence of the special relationship. Further, that the special relationship may have such residual effect that even after the relationship may technically be said to have

terminated, the undue influence may exist so as to set aside a transaction. As illustrative he referred to **Demerara Bauxite Co. Ltd.v Louis Hubbard & Others** (1923) A.C. 673 and **McMaster v Byrne** (1952) 1 All E.R. 1362. The law applicable argued Mr Macaulay is contained in section 21 of the Legal Profession Act. Neither by presumption nor on the evidence was any undue influence made out against plaintiff.

Mr Fairclough in supporting the judgment submitted that there was apart from the presumption evidence upon which the learned judge could find that there was undue influence. He cited in support the case of **Mearns v Knapp** (1889) 37 W.R. 585."

Kerr J.A. continued thus at page 118:

"I am in agreement with Mr Macaulay that in the cases on which the learned judge relied the special relationship existed when the transactions were affected. I am therefore of the view that an in-depth examination of the dicta, reasoning and the accepted propositions of law in those cases is unnecessary. Were it, as the learned trial judge held, then before an attorney could conclude the business of his retainer with a prospective client he had to ensure that the client had independent advice otherwise the agreement as to his fees would be enforceable by action. It would be like employing a watchman to watch the watchman – so incongruous, inconvenient and extravagant. There is neither good sense nor am I adverted to any authority to support such a proposition. In that regard **Mearns v Knapp** is distinguishable and unhelpful to the respondent. In that case, Kekewich, J., observed:

> 'If I set aside this agreement I must necessarily reserve the power to Mr Knapp to deliver a bill of costs which will be subject to taxation in the usual way. And it may be that if Mr Knapp's view of the matter is correct the taxing officer, with whose discretion I must not in the slightest degree interfere, may allow Mr Knapp, not only the forty guineas, but perhaps more.'

And although he held that the agreement was unfair and unreasonable nevertheless the solicitor was not as in the instant case wholly deprived of his fees as the defendant

> consented to the officer by the plaintiff of the scale charge fee of 30s per cent, according to schedule 1, part 1 of the General Order under the Solicitor's Remuneration Act, 1881.
>
> In holding that there was no presumption of undue influence in the negotiations concluding with the establishment of attorney and client relationship, I am not to be taken as saying it could never occur. The absence of the presumption means that the client has the burden of proving that there was in fact undue influence."

This stance is in marked contrast to that taken by Carberry J.A. who found that there is a fiduciary relationship, but that section 21 reversed the onus of proof. I repeat for emphasis the following passage from his judgment at page 112:

> "Certainly before Section 21 was enacted the onus lay at common law and equity on the solicitor or attorney to justify the agreement but giving the proviso the construction intended by the Act as a whole, it appears that the onus of proving the agreement unfair and unreasonable now rests upon the client who is sued on it.
>
> Nevertheless it appears that his (Downer's J.) instinct was sound. I would hold in the circumstances of this case that the client, the defendant Dillon, had discharged the onus of showing that the agreement was 'unfair and unreasonable' for the following reasons."

In addition to the passage at page 88 of the judgment previously cited that there was a fiduciary relationship, Carberry J.A. in the concluding passages of his judgment at pages 114-115 said:

> "Finally, I would draw attention to the fact that while in the better known case of 'undue influence', gifts, conveyances and the like are set aside usually in their entirety, there exists and derives from the same set of equitable principles a doctrine often called 'the unconscionable bargain' in which what is involved is not a gift or voluntary conveyance, but a bargain in which the inequality of the bargaining parties has been such as to move the court to set aside the bargain as unfair; in these cases in as much as there has been some consideration

> moving from the stronger to the weaker, the bargain is usually set aside on terms which permit the return of the consideration or a fair value for it. There are a long line of cases dealing with this type of situation, starting from cases such as **Longmate v Ledger** (1860) 2 Giff. 157; 66 E.R. 67; **Clark v Malpas** (1862) 31 Beav. 80; 54 E.R. 1067; **Blake v Monk** (1864) 33 Beav. 419; 55 E.R. 430; **Fry v Lane** (ante); **Marshall v Canada Permanent Trust Co.**(1888) 40 Ch. D. 312 (purchases of land from poor and ignorant (and often senile) people at a gross undervalue). See also cases such as **Blomley v Ryan** (1954) 99 C.LR. 363; (High Court Australia); **Morrison v Coast Finance Ltd.** (1965) 55 D.L.R. (2D) 710 (C.A). British Columbia following **Fry v Lane** (ante); **Marshall v Canada Permanent Trust Co.** (1968) 68 D.LR. (2D) 60; citing an article from the Canadian Bar Review Vol. 44 p. 142 entitled 'Restitution - unconscionable transaction – undue advantage taken of inequality between parties' by B.E. Crawford).
>
> In this case, Mr. Brown the Attorney-at-Law had rendered services to the defendant D. The bargain made as to fees was unconscionable and cannot stand, but to cite once more Wilberforce J in the **Electrical Trades Union v Tarlo** (1964) Ch. D. 720 at 734
>
> > ' ... the court has inherent jurisdiction to secure that the solicitor, as an officer of the court, is remunerated properly, and no more, for the work he does as a solicitor.'
>
> If Downer, J., had been referred to this line of authority, the most recent exposition of which is to be found in the judgment of Lord Denning M.R. in **Lloyds Bank v Bundy** (1975) Q.B. 326; (1974) 3 All E.R. 757 at page 765, and which was cited to us, doubtless he would not merely have set aside the agreement as to fees, but would have gone on to consider as was done in several of the cases cited earlier, the further question of what was the proper fee that should be awarded for the work done here."

There is another area where there is a subtle distinction between the different approaches between the two eminent judges. Carberry J.A. in a passage previously cited at length made the distinction between solicitor and own client costs and party and party costs. One sentence from the passage previously cited is reiterated for emphasis:

> "The central problem in this case is what control, if any, do the courts in Jamaica have over the fees demanded or agreed to be paid to attorneys at the private bar by their own clients."

Because of the duty the solicitor owes to the court, then that feature gives the court control over fees quite apart from statute. Thus Carberry J.A. states at page 89:

> "A preliminary observation may be made: an agreement between an attorney and his client, if one is made expressly, is like any other agreement in that it is subject to all the rules affecting a normal contract, and is for example liable to be set aside on the grounds of undue influence, or that it is unconscionable, or that it is affected by fraud, misrepresentation and the like. But it has additional features not present in ordinary contracts. The attorney apart from the duty he owes to his client owes a duty to the court, and this duty may on occasion override the duty owed to the client."

In such circumstances to dispense with the report from the Registrars, ought not to be supported. The finding by Kerr J.A. on fees reads thus at page 119:

> "Surprisingly, the provisions of Section 21 of the Legal Profession Act were not brought to the attention of Downer, J., nor was he asked to consider the effect of those provisions in relation to a finding in quantum meruit if he was of the view that the amount stated in the agreement was unfair and unreasonable. Instead, he wrongly declined to consider quantum meruit because it was not pleaded.
>
> However it was highly improper and wholly inexcusable for Brown to style himself in the document as 'Q.C. for despite his many years at the bar, he has not been so honoured. The honour is usually conferred on the basis of excellence in advocacy. In representing himself as a senior counsel to the plaintiff it is reasonable to infer that he charged fees commensurate with that status. On that basis his retainer in keeping with general practice should be one-third less.
>
> Further, the appellant has been retained by the co-defendant before concluding his arrangements with the respondent and it is reasonable to infer that his expenses for traveling to Bermuda on behalf of the co-defendant were included in the fees charged to that defendant.

> Accordingly, in all circumstances including the fact that he had not appeared in the preliminary examination I am of the view that his global fee of $40,000.00 was manifestly excessive, unfair and unreasonable.
>
> On the other hand, in assessing what would be fair and reasonable, due regard must be given to the length of the trial -- the gravity of the charges and the jurisdiction in which the cases were tried. With due consideration to these factors, I am of the view that an award of $20,000.00 less $1,000.00 already paid would be adequate.
>
> Accordingly, I would enter judgment for the plaintiff for $19,000.00 with costs here and in the court below".

With great respect to the learned judge the decision was arrived at without the benefit of the expertise of the Registrars. Those officers would make a report on which this would be the basis and make an exact finding in the instance case. In taxing the fees, no doubt the Registrars will take into account the risk associated with a contingency fee and skills which secured success in both courts. These features must be necessary elements in the taxing of fees.

The contribution by Ross J.A. was unhelpful. It reads at page 119:

> "Having read the judgments of my learned brethren Kerr and Carberry, JJA, there is nothing that I can usefully add. I agree that the appeal must be allowed in so far as the respondent Dillon is concerned and that the appellant should be awarded $19,000.00 as fees on a quantum meruit basis."

What ought to have been resolved by Ross J.A. was whether the basic procedure propounded by Carberry J.A. was correct having regard to the inherent jurisdiction of the Court over attorneys-at-law and the numerous authorities on this issue or whether the Court should come to its conclusion without the Registrar's assistance.

I hope I have demonstrated why the approach of Carberry J.A. is the correct approach and that the assistance of the Registrars will be invaluable on the important issues of fees in the instant case. This important fact must be brought into play and the failure to take it into account is a good reason for setting aside the default judgment. The omission to take into account the provisions of the Act demonstrates that the respondent Miss Longmore has established there is an important issue to be tried.

**(VII)**

**Conclusion**

In all the circumstances the appeal is dismissed because the "default judgment" was a nullity as the respondent Longmore was never served. Also she was outside the jurisdiction and the proper process was never sought. In claiming his fees section 21 of the Legal Profession Act was not taken into account by the appellant, Frankson, in his statement of claim. Thus the unamended statement of claim cannot stand. The inherent jurisdiction of the court to set aside an irregular judgment ex debito justitiae is applicable as the amount claimed is not a liquidated demand or debt as contemplated by section 245 of the Judicature (Civil Procedure Code) Law.

Additionally the judgment of Marva McIntosh J stating the serious issue to be tried and thereby setting aside the default judgment was correct. The order below must be affirmed and the respondent Longmore must have the agreed or taxed costs of the appeal.

**LANGRIN, J.A:**

Having read the foregoing judgment of Downer, J.A., in draft, and that of Panton, J.A. which here follows, there is nothing further I could usefully add. I agree with the decision and the Order set out by Downer, J.A.

**PANTON, J.A.**

This application for leave to appeal results from a dispute between the applicant, who is an attorney-at-law, and the respondent in relation to professional fees owed by the latter to the former.

On January 7, 1999, Marva McIntosh, J (Ag.) (as she then was) set aside a judgment dated June 10, 1994, which had been entered in favour of the applicant herein. She also gave leave to the respondent to file and deliver her defence within twenty-one (21) days of the date of the order. Before us now is a motion whereby the applicant seeks leave to appeal this order.

Between October and December, 1986, an attorney/client relationship was discussed and formed between the parties. The applicant undertook the performance of legal work for the respondent on a "contingency basis". The applicant's "usual contingency fee is 33 1/3 % of all sums on properties received". However, in the case of the respondent, the agreement was for a contingency fee at a rate of 25%. The respondent agreed to this "on condition that no additional money will be paid out" by her "during and after the case". She needed assurance that that would have been the position. The applicant, on behalf of B.E. Frankson and Co., gave this assurance in a letter dated April 9, 1987. The suit for which the applicant was being engaged was one between the respondent and her former husband.

In an originating summons dated 2nd June, 1987, the respondent claimed in respect of land known as Fairfield Estate that she was "the registered owner of an estate in fee simple as joint tenants with ... Slydie Basil Joseph Whitter" (her former husband).

She sought a determination as to whether the dissolution of the marriage had constituted a severance of the joint tenancy and the substitution of a tenancy in common in equal shares. The summons sought an order to that effect, and for the property to be "partitioned by sale or otherwise". The order for sale was duly made on January 25, 1988, after a contested hearing. The proceeds of sale were ordered to be divided equally between the parties. An appeal by the respondent's husband was dismissed by the Court of Appeal which ruled on June 1, 1989, as follows:

> "1. Appeal dismissed
>
> 2. Order of Mr Justice Panton varied as follows:
>
> (i) that the joint tenancy be and is hereby severed and there is substituted a tenancy in common in equal shares as and from the date of the decree absolute, 13th June, 1984;
>
> (ii) it is further ordered that the property be valued and sold and the proceeds thereof be divided equally between the parties after the deduction therefrom of the assessed increase in the value of the property directly referable to any improvement effected by the appellant subsequent to 13th June, 1984;
>
> (3) That the accounts be taken as follows:
>
> (a) the parties agree on the appointment of an accountant and of a valuator;
>
> (b) a valuation of the property as of 13th June, 1984, be obtained;
>
> (c) all expenditure on improvement and outgoings by the appellant be verified by bills and vouchers;
>
> (d) the respondent to pay half of maintenance and property tax since 13th June, 1984;

(e) subject to sub-paragraph (d) above, the mesne profits, that is, half the estimated rent of the property be obtained from a valuator for the period commencing 13th June, 1984, up to the time of sale and be paid by the appellant to the respondent.

(4) Costs to the respondent to be agreed or taxed".

There is no dispute that the applicant appeared for and represented the respondent at the hearings in the Supreme Court and the Court of Appeal. He, signing on behalf of B.E. Frankson and Co., communicated the decision of the Court of Appeal to the respondent in a letter dated 27th June 1989. Next, on the 18th October, 1989, he, signing on behalf of Gaynair and Fraser (attorneys-at-law), wrote to the respondent's former husband's attorney-at-law inquiring as to the progress being made in perfecting an appeal that had been filed with a view to having final determination by the Judicial Committee of the Privy Council. In that letter, the applicant also said that valuators had been commissioned "to assess the property and to identify and appraise the value of the alleged improvements made to the property subsequent to the 13th day of June 1984".

On April 30, 1991, Gaynair and Fraser sought a valuation of the property in keeping with the order of the Court of Appeal. By letter dated June 3, 1991, the respondent terminated the applicant's retainer. This action by the respondent triggered the suit by the applicant. On July 9, 1991, W.B. Frankson, Q.C., writing on behalf of Gaynair and Fraser, reminded the respondent that she was "obligated to us to the extent of twenty-five percent (25%) of the value of the property which the Courts found was your share of the property jointly owned by you and your former husband Slydie Whitter". The letter continues:

> "Arising out of that judgment and order and by reason of the agreement between yourself and us twenty-five percent (25%) of your half (1/2) share vested in us from the date of the judgment and even if you wish to let your former husband have the property you may only do so after we have been paid our interest in full".

The next major step was the filing of a writ dated September 20, 1993, by the applicant seeking to recover $1,788,069.47 being monies due and owing pursuant to the aforesaid agreement between the applicant and respondent. The particulars were stated thus:

> "(1) 25% of all sums received on the property:-
>
> (a) being 25% of her share of the appraised value of the property $1,750,000.00
>
> (b) being 25% of the appraised value of the rent payable to the defendant from the 13.6.84 to 25.6.93 and continuing 38,069.47
>
> $1,788,069.47"

As stated earlier, judgment was entered in favour of the applicant on June 10, 1994. This was the result of the failure of the respondent to enter appearance and to file a defence within the time specified by the law.

## THE SUMMONS TO SET ASIDE THE JUDGMENT

On March 21, 1997, the respondent filed a summons to set aside the judgment as well as all proceedings subsequent thereto

> "on the ground that the said judgment is irregular since the amount claimed in the action is an unliquidated sum and the correct procedure was for the plaintiff to have entered interlocutory judgment with damages to be assessed".

At the hearing, the summons was amended. The respondent then proceeded to apply for the judgment entered to be set aside on the ground that:

"(1) The judgment was irregularly entered and the defendant is entitled ex debito justitiae to have it set aside because:

(a) the affidavit of search sworn to on the 24th day of March, 1994, is defective in that it does not indicate when the search was done and did not comply with the Practice Direction dated March 27, 1987, which requires an affidavit of search to be sworn and filed on the same day on which the search is made.

(b) The judgment ought not to have been for a liquidated sum and the correct procedure was for the plaintiff to have entered interlocutory judgment with damages to be assessed.

(c) Even if there was a basis for the judgment to be for a liquidated sum the judgment would be for too much since the right of the plaintiff to legal fees is based on recovery and no recovery of property or rental income had been effected by the plaintiff, when the judgment was entered.

(2) Alternatively, the defendant had a defence on the merits".

## WAS THE WRIT OF SUMMONS SERVED?

In an affidavit that was placed before the Court below, the respondent stated that she had not been served with the writ of summons. Although submissions were made in respect of the service of the writ, the learned judge made no finding in that regard.

The record indicates that there are two conflicting statements by the process server, Louise Burton, as to the date of service. There is also a discrepancy as to whether the respondent lived in Flat A or Flat E at the time of service.

The importance of service of the writ cannot be overstated. It should not have been ignored by the learned judge. Section 35 of the Judicature (Civil Procedure Code) Law specifies how writs are to be served. It reads thus:

> "When service is required the writ shall wherever it is practicable be served by delivering to the defendant a copy of such writ under the seal of the Court; but if it be made to appear to the Court or a Judge that the plaintiff is from any cause unable promptly to effect service in manner aforesaid, the Court or Judge may make such order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise as may be just."

This section therefore provides for **personal service** and "substituted or other service" where a plaintiff is "from any cause unable promptly to effect service" personally.

In the instant case, there is no doubt that the defendant lives outside the jurisdiction. The Judicature (Civil Procedure Code) Law provides a different regime in this situation. In section 45 there is a list of instances when service out of the jurisdiction is permissible. It reads, so far as is relevant, thus:

> "Service out of the jurisdiction of a writ of summons or notice of a writ of summons, may be allowed by the Court of Judge whenever –
>
> ...
>
> (e) the action is founded on any breach or alleged breach, within the jurisdiction, of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction;"

The record of appeal contains orders for substituted service. There is, however, no order granting leave to serve the writ out of the jurisdiction. That is a prerequisite. Without it, my opinion is that the judgment cannot stand.

## THE JUDGMENT APPEALED FROM

Having heard arguments for five days in July 1997, and two days in early 1998, the learned judge reserved her judgment which she delivered a year later. The relevant portion of the judgment reads thus:

> "In assessing the evidence contained in the affidavits of Monica Longmore ... and the affidavit of Barrington Earl Frankson, ... the Court must be convinced that there is a valid and meritorious defence to the action. Based on the contingency agreement and the proposed defence annexed and having fully considered the submissions made by both parties I find that the evidence is not conducive to a final judgment as it is clear that the work done by the plaintiff/respondent must be assessed on a "quantum meruit" basis.
>
> In view of this finding a final judgment is not the appropriate course of action to be taken. In the circumstances the order of this Court is that the judgment dated 10th June, 1994, be set aside and leave is given to the defendant/applicant to file and deliver a defence within 21 days of the date of this order".

The above quoted paragraphs give the essence of the findings and the ruling of the learned judge.

## THE GROUNDS OF APPEAL

The notice of motion seeking leave to appeal states that the application is founded on the fact that "the applicant has good and arguable grounds of appeal upon which it is proposed to rely". Those grounds were listed as follows:

> "1. The learned trial judge erred in law when she overruled the preliminary objection that she had no jurisdiction to entertain the application to set aside the judgment entered herein.

2. The learned trial judge had no jurisdiction to set aside the judgment entered herein as the said judgment was already executed.

3. The learned trial judge wrongly exercised her discretion setting aside the judgment and granting leave to defendant to file a defence to the plaintiff's claim as the evidence adduced by the defendant/respondent did not support the exercise of such discretion.

   Alternatively, the learned judge failed to properly exercise her discretion in setting aside the judgment and granting the defendant/respondent leave to defend same.

4. The finding by the learned trial judge that the work done by the plaintiff/appellant must be assessed on a "quantum meruit" is inconsistent with the order granting the defendant/respondent leave to file a defence".

It should be pointed out that the parties had agreed, subject to the approval of the Court, to the hearing of this motion being treated as the hearing of the appeal itself. The Court agreed.

**GROUND ONE** was abandoned by the applicant.

**GROUND TWO**

The judgment that was entered in favour of the applicant was for a specific sum of money. It was calculated on the basis of the value of property to which the respondent is entitled, and which has been sold. That is the only connection between the sold property and the judgment entered in favour of the applicant. The setting aside of the judgment can have no conceivable effect on the sale of the property which has already taken place. The learned judge, in setting aside the judgment, is merely saying to the applicant: you are required to prove your claim which is being resisted by the

respondent. The defence of this action does not in any way affect the sale of the property. This ground accordingly fails.

**GROUND THREE**

In complaining that the learned trial judge wrongly exercised her discretion in setting aside the judgment as there was no evidence to support the decision, the applicant has submitted that there is no arguable defence. It has also been pointed out that the learned judge made no finding on this aspect of the case.

In the absence of a specific finding by the judge below, this Court has to examine the evidence to see if there is an arguable defence. A good starting point is to look at the nature of the claim.

Section 245 of the Judicature (Civil Procedure Code) Law reads thus:

> "If the plaintiff's claim be only for a debt or **liquidated demand**, and the defendant does not, within the time allowed for that purpose, file a statement of defence, and deliver a copy thereof, the plaintiff may, subject to the provisions of section 258A of this Law at the expiration of such time, enter final judgment for the amount claimed, with costs".

Where the claim is for **unliquidated damages**, section 247 provides:

> "If the plaintiff's claim is, as against any defendant, for unliquidated damages only, and that defendant does not within the time allowed for that purpose, deliver a defence, the plaintiff may enter interlocutory judgment against him for damages to be assessed and costs, and proceed with the action against the other defendants, if any".

In order for the applicant to have entered judgment, as he did, that is for **final judgment,** the sum claimed must be shown to be a liquidated sum.

In **Birbari v Birbari** (1976) 23 W.I.R. 98, Graham-Perkins, J.A. in delivering the judgment of the Court posed this question at page 100 B: "What then is a debt or

liquidated demand within the meaning of s.245 and, indeed, s. 249?". He answered it thus:

> "The history of the former section and the authorities relating thereto make it abundantly clear that in order to be entitled to enter final judgment on a defendant's failure to file a defence to his claim on the ground that his claim is for a debt or liquidated demand, a plaintiff must: (i) show that his claim arises under a contract; (ii) state the amount demanded, or so express it that the ascertainment of the amount due is a mere matter of calculation; and (iii) render sufficient particulars of the contract so as to describe its real nature. It is the nature of the contract on which the claim is based, as well as the fact that a specific sum is claimed, which brings the claim, or fails to bring it, within the meaning of the words "debt or liquidated demand". See ENCYLOPAEDIA OF LAWS OF ENGLAND (2nd edition), 1908. Be it observed, too, that a plaintiff does not bring his claim within s. 245 of Cap 177 by the mere device of particularising in his statement of claim, in the form of definite sums of money, what in effect are unliquidated damages: see **Knight v Abbott** (1882) 10 Q.B.D 11".

The facts of the **Birbari** case were as follows: The respondents (landlords) sought to recover damages from the appellant (lessee) for breach of contract due to the failure of the appellant to observe certain obligations under the lease. The claim particularised the details of expenditure incurred by the respondents in respect of repairs to the premises occasioned by the appellant's failure. The respondents also claimed a sum of money in respect of telephone services supplied to the premises during the term of the lease.

The appellant failed to file a defence so the respondents entered final judgment in respect of both heads of claim. The Master refused to set aside the judgment on the ground that the judgment was for a liquidated amount. This Court held that with respect to those sums claimed by the respondents in connection with repairs to the premises, they clearly were not liquidated sums entitling the respondents to enter final judgment.

However, the claim in respect of telephone services was fairly to be described as a claim for a debt or liquidated demand and in respect of which the respondents would have been entitled to enter final judgment. Consequently, the judgment would be set aside and the appellant given leave to defend the action.

In the instant case, the claim is for two specific sums, namely:

(1) 25% of the respondent's share of the appraised value of the property; and

(2) 25% of the appraised value of the rent payable to the respondent from June 13, 1984 to June 25, 1993, and continuing.

The question that was for consideration by the learned judge was whether those sums were liquidated sums, and whether they arose under the contract between the parties. As said earlier, the contract provided for services to be performed by the applicant, with remuneration being "25% of all sums on properties received". To see what sums on properties have been received, one has to look at the judgment of the Court of Appeal, and the receipt or recovery of property resulting therefrom. The 1989 decision of the Court of Appeal , it should be recalled, ordered the severance of the joint tenancy and the substitution of a tenancy in common in equal shares. It also directed the valuing and sale of the property and the division of the proceeds equally, with deduction therefrom of the assessed increase in the value of the property directly referable to any improvement effected by the appellant subsequent to 13th June, 1984. Further, the Court of Appeal ordered the taking of accounts, including a valuation of the property as of 13th June 1984. The respondent was required to pay half (½) maintenance and property tax since 13th June, 1984, and the mesne profits were to be determined by a valuator for the period 13th June, 1984, to the time of the sale.

It appears that the first part of the claim filed by the applicant for $1,750,000.00 is arrived at on the basis of a valuation of $14 million for the property, made by Sadler and Co. Ltd. in May 1993. However, there is no reference made in that valuation to any improvement effected by the respondent's former husband subsequent to 13th June, 1984, as required by the judgment of this Court. There is, further, no evidence of this Court's direction having been complied with especially in relation to the second portion of the applicant's claim in respect of sums due for rent. In the light of these deficiencies arising from the absence of evidence of compliance with the judgment of this Court, so far as the various valuations and taking of accounts are concerned, the sums quoted in the applicant's claim cannot be verified and cannot in my view be regarded as liquidated sums.

The existence of an arguable defence to the amounts claimed is obvious, even if there is no doubt that there is a valid contract. That being so, the learned judge was right to set aside the final judgment and give leave to defend.

**GROUND FOUR**

The conclusion arrived at in respect of ground 3 makes it unnecessary to consider ground 4. However, for the sake of completeness, and due to what appears to be a misunderstanding, it is not inappropriate to deal with the complaint contained in the ground.

The learned judge found "that the evidence (was) not conducive to a final judgment". She then stated that it was "clear that the work done by the plaintiff/respondent must be assessed on a 'quantum meruit' basis".

In examining this opinion of the judge, consideration has to be given to the nature of a "quantum meruit". In this regard, **Cheshire Fifoot and Furmston's "Law of Contract"** (eleventh edition) is helpful. At page 650, it reads thus:

> "The common law has long provided a convenient remedy when the plaintiff seeks, not a precise sum alleged to be due to him, but a reasonable remuneration for services rendered. He is then said to sue on a quantum meruit. Confusion has been caused in classifying the cases to which this remedy applies through the dual character with which it is invested. Sometimes it operates as a legitimate remedy in contract, and sometimes as a quasi-contractual remedy. Its incidence thus cuts across the logical distinction between contract and quasi-contract".

**Osborn's Concise Law Dictionary** (eighth edition) provides some more assistance in that it categorises the situations in which "quantum meruit" as a remedy in quasi-contract is available. The situations are:

> (1) where one person has expressly or impliedly requested another to carry out a service without specifying remuneration, but where it is implied that a payment will be made of as much as the service is worth
>
> (2) if a person is committed by contract to carry out a piece of work for a lump sum, and he only carries out part of the work or carries out work different from the contract, he cannot claim under the contract, but may be able to claim on a quantum meruit (e.g. if he was unjustifiably prevented by the other party from completing the contract.
>
> (3) when work was done and accepted under a void contract which was believed to be valid.

The contractual situation which forms the basis of the claim in this case does not fall within either category 1 or 3 above. It is debatable however as to its position in

respect of category 2. That being so, there would be an issue for trial. This ground of appeal, therefore fails.

For the several reasons that I have stated, I would dismiss this application with costs to the respondent to be agreed or taxed.

**DOWNER, J.A:**

**ORDER**

1. The order below setting aside the default judgment is affirmed.

Additionally

2. The default judgment is struck out as being null and void.

3. The appellant Frankson must pay the agreed or taxed costs of this appeal.