Judgment 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1996/B141

BETWEEN	BENROS COMPANY LIMITED BENTLEY ROSE	PLAINTIFFS
A N D	WORKERS SAVINGS AND LOAN BANK WINSTON McKENZIE	DEFENDANTS

SUIT NO. C.L. 1996/M150

BETWEEN	MACRO FINANCE CORPORATION LIMITED BENROS COMPANY LIMITED BENTLEY ROSE	PLAINTIFFS
A N D	WORKERS SAVINGS & LOAN BANK WINSTON McKENZIE	DEFENDANTS

Clifton Daley for Macro Finance Corporation Ltd.
and Benros Company Ltd. - Plaintiffs

Enos Grant and Gayle Nelson for Bentley Rose - plaintiff

Dennis Goffe,Q.C., John Graham and Miss Olive Lynch
for first defendant

HEARD: 11, 12, 18, 19, 20, 30 and 31st December, 1996,
27, 28, 29 and 30th January, 1997,
26, and 27 February,
5th and 11th March, 1997 and 4th April, 1997.

HARRISON P. J,

By a summons dated the 6th day of December 1996 filed in each of the above suits, the 1st defendant seeks to set aside a judgment in default of defence entered in each suit. The grounds on which the 1st defendant relies are:

(1) In each suit, that the judgment was irregularly entered, and the first defendant is entitled ex debito justitiae, to have it set aside because,

(a) The pleadings did not disclose any basis for the judgment in favour of the second and third plaintiffs, and the default judgment not being severable, was therefore defective.

(b) The judgment ought not to have for a liquidated sum since the pleadings did not disclose any basis for such a judgment, only for an order directing the first

defendant to credit the first plaintiff's account with the relevant amounts.

(c) even if there was a basis for the judgment to be for a liquidated sum, the judgment would still be for too much, since some of the cheques mentioned in the statement of claim were payable to the first defendant and some were payable to the second plaintiff (in B141/96) and payable to the first and second plaintiffs (in M150/96), which cheques therefore should not have been included in the amount of the judgment,

(d) even if there was a basis for the judgment to be for a liquidated sum, the judgment would be for too much since a number of the items referred to in the statement of claim as cheques/debits were in fact cheques which were deposited to the account of the first plaintiff, dishonoured by the banks on which they were drawn and debited to the account as a result,

and in suit No. M141/96, that,

(e) even if there was a basis for the judgment to be for a liquidated sum the judgment was contingent on there being a declaration as prayed in the statement of claim, yet no such declaration was sought, or included in the default judgment,

and in suit No. M150/96, that,

(f) the affidavit of search dated October 8, 1996, in relation to a search made on October 3, 1996, 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,

and in both suits,

(2) alternatively, the first defendant has a defence on the merits.

The facts, inter alia, relevant to the issues are as hereunder. A writ of summons was filed in suit no. M150/96 on the 30th day of April, 1996 and in suit no B141/96 on the 3rd day of May, 1996. Appearance was entered by the 1st defendant in each suit on the 9th day of May 1996. Statements of claim were filed on the 4th day of June 1996 and the 1st day of July 1996, in suits nos. M150/96 and B144/96, respectively.

By letter dated the 30th day of September, 1996, and exhibited to the affidavit of John Graham dated the 8th day of October, 1996, the attorneys for the plaintiffs in suit no. B141/96 advised the attorneys for the first defendant,

> "You have not filed and served on us defence in the above matter, despite our sending you a consent to the defence out of time.
>
> We are accordingly proceeding in default."

On the 8th day of October, 1996 the plaintiffs in each suit entered final judgment in default of defence.

In suit No. B141/96, the plaintiffs filed, on the 8th October, 1996 an affidavit of search and an affidavit of debt, each dated the 8th day of October 1996; search was effected on the said date. The relief sought on the statement of claim was, inter alia,

> "i. a declaration that the First ... Defendant has wrongfully debited the First ... Plaintiff company's account no. 11132206 ... totalling ... $89,586.00 .... and for payment of the said sum as money due and owning ... to the First .... Plaintiff company .....
>
> .....
>
> .....
>
> ix. Repayment of the said amount of .... $89,958,586.80 as moneys had and received to the use of the Plaintiffs"

Final judgment was entered in favour of the plaintiffs in the sum of $89,958,586.80 and costs.

On the 9th day of October, 1996, the first defendant filed in each of the said suits a summons dated 8th October, 1996 for leave to file a defence out of time, supported by affidavit, with the proposed defence appended. Both summonses were dismissed by the court on the 18th day of October, 1996 by Smith, J. and subsequently confirmed on appeal. This resulted in the current applications to set aside the said default judgments.

Mr. Goffe for the 1st defendant submitted that the judgment in suit No. M150/96 was irregular in that the search was effected on the 3rd October, 1996 and the affidavit filed on a different date, 8th October, 1996, in breach of practice direction dated the 27th March, 1987, and therefore should be set aside, ex debito justitiae; that in both suits the judgments were irregular and should be set aside, in that, in neither suit was there any basis for entering judgment in favour of any other than the first plaintiff, because the accounts were in the name of the said plaintiff who alone was entitled and the judgments were not severable; that there should not have been a judgment for a liquidated sum but for an order re-crediting the amounts to the 1st plaintiff account in

that a complaint of breach of mandate attracts a cause of action for the relief of a declaration - Encyclopaedia of Banking Law, 1995 and Limpgrange Ltd vs Bank of Credit and Commerce [1985] FLR 36; that the judgments were for too much, in that some of the cheques listed in the statements of claim were payable to the 1st defendant and payable to the 2nd plaintiff in suit no. B141/96 and to the 1st and 2nd plaintiff in suit M150/96 and therefore should not have been included in the judgment, neither should the items designated "C.R." on the statements of account, because these were items deposited by the 1st plaintiff, dishonoured by the banks on which they were drawn and debited to the account, as a consequence, in respect of both suits; that the judgments were contingent on a declaration which was not included in the judgment; that the breach of mandate and wrongful debit complained of required that there be a cause of action for re-crediting the account and the relevant procedure - contained in section 254 of the Judicature (Civil Procedure Code) Act, was not followed and in these circumstances the judgments were irregular and ought to be set aside, ex debito justitiae. He relied inter alia on S.C.C.A. No. 39/83 Morris vs Taylor, delivered on 22.11.84, Evans vs Bartlam [1937] A.C. 473, Analaby v Praetorius (1888) 20 Q.B.D. 764, Faithfull v Woodley (1889) 43 Cahn, Div. 287, Long Yong Ltd. vs Forbes (1986) 40 WIR 229 and Bolt and Nut Ltd. vs Rowlands [1964] 1 All E.R. 137. He submitted further, assuming that the judgments were regular, the 1st defendant had a good defence to the suits on the merits, as disclosed in the affidavit of Mary Powell; triable issues were raised in that, in addition to the items designated "C.R.", some of the cheques discharged the legal liabilities of the 1st plaintiff, in the payment of taxes, utility bills and insurance - Liggett vs Barclays Bank [1928] 1 K.B. 48; that the account in suit No. B141/96 was operated in accordance with the mandate, a corporate resolution authorising the signatures of "either the Chairman or Secretary"; that cheques were drawn and signed in favour of the 2nd plaintiff Bentley Rose only, and endorsed by him, thereby giving rise to the plea of estoppel; that no judgment should be given, except in a favour of the 1st plaintiff and that the 1st plaintiff was indebted to the 1st defendant in the amount of $52,742,881.16 and $304,875.02 in suits nos. M150/96 and B141/96, respectively.

Mr. Daley for the plaintiff companies submitted that the judgments entered were regular; that section 249 and not section 254 of the Code was

relevant because the claims were for liquidated sums, and there was no statutory requirement under section 249 to file an affidavit of search, therefore the fact that the affidavit of search was not filed on the day of search as required by the said practice directions was irrelevant; that the judgments were consistent with the statements of claim filed and were accordingly not entered for too much, but if the court holds that the items designated "C.R.", and the amounts to discharge the legal liabilities of the plaintiffs should not have been included in the judgments, that is not an irregularity, but a defence and a basis to set aside the judgment, in part. He also conceded that if the plaintiffs knew that they were not entitled to the said amounts and sued for them, it would be an irregularity and the plaintiffs were not claiming the sum of $1,763,065.00, the total of the items designated "C.R." which should be deducted and judgment be entered for the balance; that the plaintiffs in suit no. B141/96 having sought a declaration and in the alternative sued for money had and received, correctly exercised the option to abandon the claim for a declaration and enter judgment for the liquidated debt; that the mandate given to the 1st defendant was contained in the history and signature cards, which the court should examine and conclude that they contradict the corporate resolution relied on by the 1st defendant as the mandate; that the court should not rely on the affidavit of the 1st defendant's witness Mary Powell who was not a party to the making of the documents forming the mandate, knew the said corporate resolution was a forgery despite reciting that "the account .... was always operated by the 1st plaintiff in accordance with the terms of the mandate .... to honour cheques ..... bearing the signature of either the Chairman or the Secretary ..." and knew that cheques were returned by the 1st defendant with the notation "... second signature required," and therefore no defence of estoppel arose; that the defence was a sham - Tildesley vs Harper [1878] 10 Chan.Div.393, Critchell vs London and South Western Rly.[1907] 1 k.B. 860.

Mr. Grant for the plaintiff Bentley Rose argued that the judgments were regularly entered because the final judgment was for liquidated debts- governed by section 245 of the Code and having entered judgment under section 249, the plaintiffs in suit no. B141/96 are automatically deemed to have abandoned their claim for a declaration Morley London Development vs Rightside Properties (1973) 117 S.J. 876; that no affidavit of search is required by the wording of section 245, in constrast to section 70 when judgment

in default of appearance is sought to be entered that if the court finds that an affidavit of search was necessary the failure to file the said affidavit of the search, was a mere irregularity that did not render the said judgment as irregularity entered; that the judgments entered were not for too much because the authorities show that that only arose in cases where after the writ was issued, the defendant made part payments which were not taken into account by the plaintiff when judgment was entered - Armitage vs Parsons [1908] 2 K.B. 410, Muir v Jenks [1913] 2 K.B. 412 Morley London Development vs Rightside Properties (1973) 117 S.J. 876; that having entered unconditional appearance in both suits, the 1st defendant cannot now complain in both suits that there was no basis disclosed in the statements of claim to enter judgment in favour of the 2nd plaintiff in suit no B141/96 and the 2nd and 3rd plaintiffs in suit no. M150/96; that the relief claimed, re-payment of money had and received is the proper relief, and not an order that the account of the plaintiff be re-credited with the amounts wrongly debited - Atkin's Court Forms, Vol. 6, forms 19 and 13; that the affidavits of Mary Powell do not disclose any personal knowledge in the deponent to qualify as an affidavit of merits to support the allegations in the proposed defence and should not be relied on as a basis for the exercise of the court's discretion - Ramkissoon vs Olds Discount Co. Ltd. (1961) 4 WIR 73, Gleaner Co. Ltd. vs Wright (1976) 15 J.L.R. 18; that the said affidavits contain statements of law and several irrelevancies and do not disclose any triable issues; that in suit no. B141/96 the instructions on the signature and history cards prevail over that on the corporate resolution, but maintained that there was an issue to be tried, namely, did the conflict between the said signature and history cards and the corporate resolution put the 1st defendant sufficiently on enquiry to see that the account was not wrongly debited Paget's Law of Banking, 8th edition, page 76, Lipkin Gorman vs Karpnale Ltd [1989] 1 W.L.R. 1340, inter alia; that the said corporate resolution, not having been signed by the 1st defendant is not a contractual mandate and "the uncontraverted evidence contained in the affidavits of Bentley Rose" show th at it "was signed in blank and entrusted to the 1st defendant whose servant or agent made material alterations or additions thereto", and therefore no triable issue is disclosed; that

in suit no. M150/96 apart from the issue of the 1st defendant's claim to the sum of $1,763,065.00 no triable issue is disclosed and the 1st defendant is vicariously liable for the unlawful acts committed by its servant or agent, the 2nd defendant - Lloyd v Grace, Smith & Co. [1912] A.C. 716; that the amounts sought by way of counter-claim is not a triable issue, being irrelevant to the plaintiffs' claims and that the said affidavits of Mary Powell contain no evidence in support of the defence of estoppel. He concluded that the court if it decided so to exercise its discretion could only properly set aside the judgment in default, in suit no. M150/96, and in part, only as to the sum of $1,763,065.00, and grant leave to defence as to that said sum.

Under section 258 of the Code, a judge is empowered to set aside "any judgment by default .... upon such terms as to costs or otherwise ..." Section 249 provides inter alia that,

> "If the plaintiff's claim be for a debt or liquidated demand, and also for pecuniary damages only ... and any defendant make default as mentioned in section 245, the plaintiff may enter final judgment for the debt or liquidated demand .... and also ..... interlocutory judgment for ... the damages only ..."

Section 245 permits a plaintiff to enter final judgment in respect of a claim for "debt or unliquidated demand" in cases where the defendant fails "to file a defence and deliver a copy thereof", within the time allowed. The mechanics for entering such a judgment is not detailed. Section 70 which governs the entry of judgment in default of appearance specifically stipulates such entry by the plaintiff, on filing,

> " .... an affidavit of service of the writ and of such non - appearance as aforesaid, and to the effect that the debt is due and payable and still subsisting and unsatisfied ...."

Entry of judgment merely entails the filing of documents, without judicial intervention, but the Registrar of the Supreme Court has to be satisfied of the state of affairs at the time of such entry, e.g. whether or not the defendant has "..failed to file a defence" and what is the amount claimed and now due to the defendant. A defence may be filed, even out of time, and "a copy thereof" not yet served on the plaintiff. In such circumstances the Registrar is still obliged to accept such a defence, it is not a nullity-

Gill vs Woodfin (1884) 25 Chan, Div. 787. The plaintiff would not then be entitled to enter judgment, until the said defence is set aside. I therefore hold that the plaintiffs in the instant suits, on entering judgment under section 249 were required to file the affidavit of search, as they in fact did. I agree with the submissions of Mr. Goffe that although section 245 does not specifically mention the filing of an affidavit, some evidence on affidavit must be put before the Registrar, stating that no defence has been filed.

A practice direction issued by the Registrar of the Supreme Court and dated the 27th day of March 1987 requires that,

> "Every affidavit of search must be sworn and filed on the same day on which search is made."

Although practice directions have no statutory force, non-conformity with any, is an irregularity.

Where a plaintiff has obtained judgment irregularly, the defendant is entitled ex debito justitiae to have it set aside - Anlaby vs Praetorius, supra. I therefore hold that because the default judgment in suit no. M150/96 was supported by an affidavit of search sworn to and filed on the 8th day of October, 1996 but revealing that search therein was effected on the 3rd day of October 1996, it would have been irregularly entered and ought to be set aside.

In the instant suits, the plaintiffs' claims are based on a breach of mandate given to the 1st plaintiff for the operation of the specific account.

In suit no. B141/96, paragraphs 9 and 10 of the statement of claim recite that the 1st plaintiff operated current account no. 11132206 at the Tower Street branch of the 1st defendant and that,

> "on the 11th day of September, 1991, by agreement in writing between the first named plaintiff company and the first named defendant bank made on the same date and by the mandate given to the first named defendant bank for the operation of the said account, any of the first named plaintiff company's cheques ... over ...$5,000 was to be paid or honored (sic) ...."

The 1st named plaintiff complained that during "... the period September 11, 1991 to May 30, 1995" the 1st defendant committed breaches of the said mandate.

In suit no. M150/96, paragraphs 5,6,7 and 8 recite that the 1st plaintiff operated a current account no. 121100408 at the Adelaide Street branch of the 1st defendant and that,

> "... on the 21st day of January, 1993... the agreement in writing made on that date between the first plaintiff and the 1st defendant .... the mandate given to the first defendant by the first plaintiff .... provided that cheques of the first plaintiff should only be paid or honoured (sic) by the first defendant on the signatures of any two of the .... directors .... ".

The 1st named plaintiff complained that during ".... the period January 1993 to November 1994 ...." the 1st defendant committed breaches of the said mandate, in that several cheques were drawn containing the signature of one director only, presented to the 1st defendant and payment obtained thereon.

Where the claim is based on a breach of mandate given to a bank, the basic action is one for a declaration or for an account to be taken. The authors in the Encyclopaedia of Banking Law, 1995 at paragraph 208, under the caption "Payment without Mandate" wrote,

> "If the paying bank does not pay a cheque or analogous instrument in accordance with its mandate or in due course the customer's basic cause of action is for a declaration that the bank was not entitled to debit the customer with the amount of the cheque." (emphasis added).

The footnote to this statement quoted the case of Limpgrange vs Bank of Credit and Commerce, supra, in support of this proposition.

This procedure is supported by the work, Atkin's Court Forms, Volume 6, as to the format of the statement of claim where the plaintiff claims a wrongful debit. Form 31 reads, inter alia,

> "Statement of claim for declaration that plaintiff's amount wrongly debited with amount of cheque which defendants were instructed not to pay.

Statement of Claim

1. The defendnat are bankers .....
2. ... the plaintiff was a customer of the defendants .....
3. ... The plaintiff drew a cheque for Lx.....
4. ... the plaintiff by telegram instructed the defendants to stop payment of the said cheque
5. ... it was the duty of the defendant not to pay ... Alternatively the defendants had no authority to pay... But in breach of the said duty and/or without authority the defedants paid the said cheque ....

The Plaintiff claims

(1) a declaration that the defendants have wrongfully debited the plaintiffs account and that the sum of Lx... is due and owning to the plaintiff.

(2) Alternatively, Lx... as money had and received by the defendant...."

Seeing that the basic cause of action is for a declaration, the judgment in default in such a suit cannot be entered in accordance with section 245 of the code; but would be governed by section 254, which reads,

> "245. In all other actions that those in the preceding sections ... if the defendant makes a default in filing a statement of defence and delivering a copy thereof, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as, upon the statement of claim, the Court or a Judge shall consider the plaintiff to be entitled to."

The fact that the plaintiff seeks to rely on the alternative claim of "money had and received" does not make the cause of action otherwise than based on a breach of mandate by a wrongful debit. A change of wording cannot thereby change the substance of the basic cause of action. It is fallacious to argue that such a cause of action requiring a declaration by the court and which cannot qualify for the entering of judgment, as a "debt or liquidated demand" under section 245, is of such an amorphous character that in the same breath, by the plaintiff electing to pursue the alternative claim of "money had and received", the said cause of action can now qualify as a "debt or liquidated demand" for which final judgment may be entered in default of defence; it still have as its base, the complaint of a breach of mandate as a result of a wrongful debit. The procedure corresponding to such a cause of action remains unchanged.

By way of analogy in respect to causes of action, in the case

Drane v Evangelou [1978] 2 All ER 437, Lord Denning agreed with the view that once the facts are sufficiently alleged it does not matter what label was placed on the cause of action. He then referred, at page 440, to his view previously expressed in Re Vandervells Trust [1974] 3 All ER 205 at page 213,

> "It is sufficient for the pleader to state material facts. He need not state the legal result. If for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit."

In the instant case, the true substance of the cause of action determines the nature of the relief; it is not a case of a mere "arithmetical calculation", it is not a liquidated sum. In Limpgrange Ltd. vs Bank of Credit and Commerce, supra, the plaintiff claimed that certain amounts were wrongly debited in breach of mandate and should be repaid to the plaintiff. Staughton, J, in in identifying some of the issues involved, said,

> "Issue (A) Did the mandate authorise the transfers in question?"

and found in respect of the challenge to the said mandate, that,

> ".... there was no plea of customer practice, no evidence worth the name that this was the generally accepted custom or practice, and no ground in my judgment why I should allow it to contradict the written mandate....."

> "Issue (B) Was some other authority given to B.C.C.I. (the defendant company) by the company?",

and declared,

> ".... I find that there was no letter authorising transfers between the ..... accounts."

He then, with the assistance of evidence of accountants, proceeded to conclude what was the amount due from his calculations.

It seems to me that in the Limpgrange case even though the claim did not specifically seek a declaration, the substance of the claim and the findings were in the nature of a declaration and an order for payment.

I therefore hold that in suit no B141/96 the argument advanced that the plaintiffs were proceeding on the basis of paragraph ix, of the statement of claim, namely,

> "ix. Repayment of the amount of ...$89,958,596.00 as money had and received to the use of the plaintiffs",

and therefore entitled to treat the said sum as a debt or liquidated demand is without force. The claim remains what it always was, in both suits, a complaint of wrongful debit in breach of mandate; a pre-condition to a judgment is a judicial intervention for a delclarat ion as to the existence of and breach of the mandate. This attracts the operation of section 254 obliging the plaintiffs to proceed by motion and not by way of a entering of judgment under section 245. See Metzger et al vs Dept. of Health [1977] 3 All E.R. 444 and Faithfull vs Woodley supra. The default judgments in the instant suit were accordingly improperly and irregularly obtained.

The 1st plaintiff, a limited liability company, in suit no. B141/96 operated its currecnt account no. 11132206 with the 1st defendant, and claimed that the mandate given on the 11th September, 1991 was breached by the 1st defendant by the unauthorised debit of the said account in respect of cheques exceeding $5,000 which were not signed by the 2nd plaintiff. Paragraph 23 of the statement of claim recited that the ".... first plaintiff has suffered loss and damages .... $89,958,586,80...". The prayer that "... all the plaintiffs ... claim against the defendant" the said some of money, ".... due and owning by th first named defendant bank to the first named plaintiff company..." is not justified on th pleadings, nor is it explicable in law, by the further claim that "... the plaintiffs have been constrained to borrow money to finance their business ....". No liability is owed to the 2nd plaintiff by the 1st defendant, on the pleadings.

Similarly, in suit no. M150/96, the contractual liability is shown on the pleadings to exist between the 1st plaintiff and the 1st defendant; ".... loss and damage ...." was claimed to have been suffered by the 1st plaintiff. However, the pleadings do claim, in the alternative, loss to all the plaintiffs, without showing a justifiable basis on the pleadings. To the extent that the final judgment was entered for the plaintiffs other than the first plaintiff in each suit, it is irregular. However, had the judgment been otherwise regular, the joinder of the plaintiffs other than the 1st plaintiff, would be a nullity and in my view severable.

Where a plaintiff entered judgment in default, for a sum in excess of what is due to him, the defendant is entitled to have it set aside - Muir vs Jenks [1912] 2 K.B. 412. This circumstance is not restricted to payment made by the defendant and accepted by the plaintiff after the writ was filed and not taken into consideration by the plaintiff when entering judgment, as argued by counsel for the plaintiffs. In Long Yong Ltd. vs. Forbes Manufacturing (1986) 40 WIR 229, the court held that judgment was entered for too much and ought to be set aside because it included a claim for interest not claimed in the writ. In Bolt and Nut Ltd. vs Rowlands [1964] 1 All E.R. 137, although payment was made by the defendants after issue of the writ, and the judgment entered by default thereby, held to be bad and irregular and set aside, it was confirmed that the general rule was that before the issue of a writ, where a creditor accepts payment of a cheque, ...

> "... the remedy by action was suspended for the time being to the extent of the amount of the cheque, and the plaintiffs had no right until it was seen whether the cheque was dishonoured or not, and no right unless it was dishonoured, to sign judgment in default."

In the instant case in the statement of claim case in suit no. M150/96 several cheques were payable to the 1st defendant and also to the 1st and 2nd plaintiffs and therefore should not have been included in the default judgment representing an amount due from the 1st defendant. However, I cannot find any recital in the statement of claim in suit no. B141/96 to support a similar contention by counsel for the 1st defendant in respect of the latter suit. In addition, in both suits, the statements of claim reveal that several items with the designation "C.R." were included in the amount of the default judgment.. These items represent cheques which were lodged to the relevant accounts by the account holders, the 1st plaintiff in each suit, credited to the account, returned by the paying bank as dishonoured and consequently debited to the account. Neither should these amounts have been included in the default judgment as amounts due from the 1st defendant.

The inclusion of the above cheques in the default judgments, would cause the said judgments to have been entered for too much (assuming that judgment could have been enter under, section 249, and I hold that it could not have been) and consequently irregular and liable to be set aside. It

is no justification nor answer to these inclusions, to state, as Mr. Grant does, that the plaintiffs sued for an "omnibus sum."

If however, the judgments were regularly entered, and I hold that they were not, in order to be entitled to have them set aside the 1st defendant would need to show a defence on its merits and satisfy a court that in the circumstances, it should exercise its discretion in its the 1st defendant's favour - Evans Bartlam [1913] A.C.; in that regard the defendant should file an affidavit showing a good defence on its merits - Ramkissoon vs Olds Discount Co. Ltd. (1961) 4 W.I.R. 73. The affidavits of Mary Powell dated the 5th day of December, 1996 are filed in support of the applications. Miss Powell, described as "Senior General Manager of the 1st defendant" is qualified to give evidence of the merits of the defence.

The proper approach of a court is that stated by Lord Wright in Evans vs Bartlam, supra. He said at page 656,

> "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 desial to let pass a judgment on which there has been no proper adjudication."

The defendant need not show a likelihood of success.

In suit no. B141/96, the said affidavit of Mary Powell refers, in paragraph 9, to the fact that, ...

> "... the said account ... was always operated by the 1st plaintiff in accordance with the terms of the mandate signed by the 1st plaintiff on the 11th day of September 1996 ....."

and paragraph 10, that the cheques were drawn to discharge the legal liabilities of the 1st plaintiff. These are defences of estoppel and the Liggett defence respectively - see Encyclopaedia of Banking Law, paragraph 208. The submission of counsel for the plaintiffs that there are no triable issues is unsupported by the affidavit evidence and the law. A trial court is the appropriate forum to examine the evidence of the effect of the history and signature cards along with the corporate resolution and the issue of vicarious liability if fraud is proven, and not this Court at this interlocutory stage; equally inappropriate is the invitation

to examine at this stage the competing evidence of the deponent Bentley Rose that the cheques bearing his signature only, and relied on by the 1st defendant to ground the defence of estoppel, were in fact sent on by him to the 2nd defendant for the latter to add a second signature.

In the Limpgrange case, supra, it is worthy of note that after an examination of the evidence, the defence of estoppel succeeded in respect of a portion only of the transfers under query.

It is no business of this court at this stage to resolve conflicts of evidence or to make findings of fact. The defence must be one known to law, and must arise on the affidavit evidence, and if it is patently not authentic the application will be refused - Critchell vs London & Smith Western Railway, supra.

In suit no. M150/96, the said affidavit of Mary Powell discloses a defence in respect of the said claims bearing the notation "C.R." and debited to the account; the attorneys for the plaintiffs concede this. In both suits, Miss Powell, in paragraph 6, claims that in the case of a complaint of a wrongful debit the proper judgment is a re-crediting of the customer's account; this complaint is less relevant to the merits of the defence than to the true substance of the relief claimed.

I do not agree that the counter claims are irrelevant to the suit; they can properly be set off against the claims; however there does not appear to be a right to set off the sum of $52,742,881.16 twice, i.e. against each amount as pleaded. The loans to the 2nd plaintiff were guaranteed by the 1st and 3rd plaintiffs in suit no M150/96; an order for repayment in favour of the 1st defendant would totally eclipse the claim of the plaintiffs therein.

A defence on the merits exists in respect of each suit.

For the reasons stated I find that the default judgment were bad and irregularly entered and are hereby set aside. There shall be costs to the first defendant and to be agreed or taxed.