

The statement that no defence had been filed by the Fourth Defendant prior to the Plaintiffs' application was inaccurate. A defence had been filed on 26th September 1997 – four days before the date of the summons applying for the default judgment. This had been brought to the attention of Mr. Chapman, solicitor for the applicants in a memorandum dated 2nd October 1997. That defence it would appear was served on the plaintiff on 3rd October 1997. The default judgment was entered on 3rd November 1997.

The basis for the entry of the default judgment is Grand Court Rules Order 19 rule 3 which is in near identical terms with order 19 rule 3 of the English rules.

The comment under the reference 19/2/2 on order 19 rule 2 which in our view is equally applicable to order 19 rule 3 reads:-

“If before judgment is entered the defendant serves a defence even though it be out of time judgment in default cannot be entered”

The language of Grand Court Rule O.19 r.3 is clear-

“Where the plaintiff's claim against a defendant is for unliquidated damages only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.”

The power to enter a default judgment does not arise unless the defendant has failed to serve a defence on the plaintiff and the period for service has expired. In his notes of the hearing of the application to set aside the judge states-

“Leave is sought by 4th defendant to set aside judgment in default of defence. Draft defence and counter claim but filed out of time”

The prerequisites for entering a default judgment had not been established with the consequence that the default judgment entered was irregular and should have been set aside *ex debito justitiae*.

For these reasons we set aside the judgment at the close of the arguments and made the following order:

Application for leave to appeal is granted.

Application treated as the hearing of the appeal.

The appeal is allowed.

Order of Mr. Justice Graham with respect to the Fourth Defendant is vacated.

Default Judgment set aside.

Costs below to be costs in the cause.


Defence and Counterclaim restored.

Costs of the appeal to be to the appellants to be agreed or taxed.

The 5th day of August 1998


Zacca, P


Georges, J. A.


Kerr, J. A.

