

set-off against that judgment. The agreements allegedly breached by the plaintiff are:

- (1) the loan agreement to which the judgment obtained relates;
- (2) a loan agreement for \$250,000.00; and
- (3) a bridging finance agreement for \$1.6 million.

Because of the complex nature of the transaction which Mr. Hill described as a three-sided time sharing agreement and because the loan agreement to which the judgment obtained relates is allegedly entwined in that transaction, Mr. Hill submitted that the defendants should not be required to bring a separate action.

On this application the matters to be considered are the following:

- (a) the reason for the defendant's failure to attend when the case was heard;
- (b) whether there has been undue delay in making the application so as to prejudice the plaintiff; and
- (c) whether the defendants' defence and counterclaim disclose on the merits an arguable or triable issue.

Of those three matters the last is the most significant and transcends any reasons given by the defendants for the delay in making the application. However the impressions I form as to the credibility of the defendants may be relevant to the credibility of their defence and counterclaim.

The evidence discloses that the defendants were in these Islands when the summons to obtain judgment was filed. They left before the summons was heard but the first defendant was telephoned before the hearing by Mr. Panton and Mr. Panton wrote to him pressing him for information. There was no response. At that stage Mr. Panton had no defence to put before the Court. He had only notes left by his clients. Subsequently it is from those notes that the defence and counterclaim are with difficulty, I understand, evolved. Nothing more is heard from the defendants for

understand, evolved. Nothing more is heard from the defendants for about a year when the first defendant is found in Oregon U.S.A. by the plaintiff. In that time I accept that Mr. Panton and Mr. Hill were retained by the defendants but it is clear that they were not in communication with the defendants and did not know where they were. In an affidavit filed in proceedings in the State of Oregon U.S.A. to file the judgment obtained here, the first defendant expressed surprise:

"that a default judgment was entered due to our lawyer's failure to file a defence on our behalf"

To my mind that is a remarkable statement from an individual who is well acquainted with litigation in the Cayman Islands. From October 1989 he had known that proceedings to obtain judgment had been initiated by the plaintiff and he knew that his legal representatives wanted information from him. So that he knew that the notes left behind by him did not meet the requirements of the legal advisers. How then can he have been surprised?

If he was surprised, the surprise, I venture to think, is that he found himself faced with a judgment which he thought he had escaped. His next step delays matters further as he obtains a stay of execution in Oregon. It is only after the first defendant was discovered by the plaintiff to be in Oregon that the application to set aside is made. A further delay of ten months then elapses as evidence, it is said, was needed from certain persons who could not be found. When the history of the delay is recounted it seems to me reasonable to conclude that, but for the finding of the first defendant by the plaintiff, this application would not have seen the light of day. I accept that a search was made for the witnesses but as I have no respect for the veracity of the first defendant, I am satisfied that no search was made for them during the year following the entry of judgment. It would be quite contrary to the first defendant's pattern of behaviour to believe that he was searching for vital witnesses who, according to his evidence, were not vital as he believed, he says, that he had left his legal representatives with all the information they needed. It is also past belief that he would search for witnesses

fruitlessly and not inform his Cayman legal representatives that he searched in vain. The conclusion I reach is that in conformity with his behaviour pattern he did nothing until aroused by the plaintiff. Linking that behaviour to his non-appearance at the hearing of the summons for judgment leads me to conclude that he did not attend the hearing because he had absconded. That is why he was not in Court at the hearing of the summons to obtain judgment and clearly for the reasons I have given there was undue delay in making this application. A delay that has prejudiced the plaintiff. He had to find the first defendant and commence proceedings in Oregon which have been stayed. All to his financial detriment.

By February 1987 the time sharing project was in a state of collapse. Yet the plaintiff, who the defendants allege contributed to the collapse of the project by being in breach of his agreements, was assured by a letter from the first defendant of the 9th February 1987 that the loan which is the subject of these proceedings would be repaid to him in full. Taken into consideration with the first defendant's questionable veracity and the fact that the plaintiff's involvement in the time sharing project's bridge financing loan of \$1.6 million depends upon an alleged verbal agreement the defendants' change of front puts in question the substance of the counterclaim.

The dismissal of this application will not bar the defendants from pursuing their counterclaim by a separate action. Had their counterclaim been served earlier it may be that a setting aside of the judgment on conditions would have been the right thing to do notwithstanding the questionable substance of the counterclaim. But in this case, despite a request on the 21st May 1991 by Miss Bridges for particulars that would summarise the defence, the draft of the counterclaim makes its first appearance on 20th March 1992. One year and six days later this application was filed. The difficulty of finding the persons to swear to affidavits is offered in explanation of the delay. The defendants

may have encountered that difficulty nevertheless its effect has been to further prejudice the already prejudiced position of the plaintiff occasioned by the inexcusable delay following the entry of judgment almost two and a half years earlier. To my mind the circumstances warrant the dismissal of the application. I therefore dismiss the summons with costs in favour of the plaintiff. The costs to be taxed if not agreed.

Denis J. Malone
Sir Denis Malone

14th October 1992.