[TRIANTAFYLLIDES, P., HADJIANASTASSIOU, A. LOIZOU, JJ.]

SPYROS STAVRINIDES,
Appellant-Defendant,

v.

CESKOSLOVENSKA OBCHONDI BANKA A.S.,
Respondent-Plaintiff.

(*Civil Appeal No.* 4974).

Civil Procedure—Specially indorsed writ—Order 2, *rule* 6, *of the Civil Procedure Rules—Application for summary judgment under Order* 18, *rule* 1*—Sufficiency of the affidavit* (*or affidavits*) *in support—Claim by a foreign plaintiff on bills of exchange—Affidavits in support of application for summary judgment sworn by the clerk of plaintiff's counsel—Insufficient—Applicant unable to swear positively to the facts verifying the cause of action and the amount claimed—Defect not cured either by supplementary affidavits or otherwise by the end of the day—Consequently, conditions required by Order* 18, *rule* 1, *having not been fulfilled, the trial Court had no jurisdiction to make the summary judgment appealed from—And which, therefore, has to be set aside.*

Writ specially indorsed—Summary judgment—Application for—Affidavit in support—Insufficiency—See supra.

It was held in this appeal that the judgment appealed from, given on an application for summary judgment under Order 18, rule 1, of the Civil Procedure Rules must be set aside on the ground that the affidavit in support of the application does not comply with the requirements provided under the aforesaid rule and that, consequently, the trial Court had no jurisdiction to give such judgment.

This is an appeal by the defendant in the action against the judgment given against him on 21 bills of exchange for the sum of £23,053.595 mils, on an application for summary judgment under Order 18, rule 1 of the Civil Procedure Rules, there being no dispute that the writ in question is a specially indorsed writ under Order 2, rule 6. It is to be noted that under Order 18 the plaintiff applying for summary judgment must not only satisfy the Court that there is such writ specially

indorsed under Order 2, rule 6, but he must do something else : He must support the application with an affidavit made by himself, or by any other person, duly authorised by the plaintiff to make such affidavit, who can swear positively to the facts, verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the action.

It was argued on behalf on the appellant-defendant : (1) That the affiant in this case (the clerk of plaintiffs' counsel) does not state in his affidavit in support of the application for summary judgment that at the time of the making by him of the affidavit in question he was duly authorized by the plaintiffs to make such affidavit and on their behalf ; (2) that " the affiant did not state and could not possibly have truthfully stated that he himself was in a position positively to swear to the facts, or indeed that he had first hand knowledge of the facts otherwise than on information and instructions obtained from the plaintiffs or the correspondence with them or other documents or even from the learned counsel of the plaintiffs ".

Allowing the appeal and setting aside the judgment of the District Court of Nicosia obtained through the machinery of an application for summary judgment applicable to actions in which the writ is specially indorsed as aforesaid, the Supreme Court :—

Held, (1). Both objections of the appellant-defendant go to the jurisdiction of the trial Court as the conditions imposed by Order 18, rule 1 of the Civil Procedure Rules have to be fulfilled in order that the Court can have jurisdiction to make an order for summary judgment thereunder.

(2) Dealing with the first leg of the argument on behalf of the appellant (*supra*) we take the view that on the material before the trial Court it was open to it to arrive at the conclusion that the affiant (the clerk of counsel of the plaintiffs-respondents) was authorized to make the affidavit in support of the application for summary judgment.

(3) Turning now to the second leg of the argument (*supra*), a distinction should be drawn between the personal positive knowledge of an employee of a plaintiff and the knowledge of the clerk of plaintiffs' advocate in the present case whose means of knowledge emanated from information and instruc-

tions received by their law office (*Pathè Fréres Cinema Ltd.* v. *United Electric Theatres Ltd.* [1914] 3 K.B. 1253, *distinguished*).

(4) On the authorities, it may be said that the trial Court had no jurisdiction to give judgment on the application, unless the affidavit was supplemented by other supplementary affidavits and the defects cured by the end of the day. But looking at the affidavits sworn by the said clerk it is clear that he was always speaking on the basis of the instructions and on the basis of information received, and not on facts within his own personal knowledge. Obviously, it cannot be said that he could swear positively to the facts as required by Order 18, rule 1. On the other hand, it cannot be said, either, that the said defects have been cured by the end of the day by some admission of the appellant-defendant. In the present case, the appellant most strenuously denied liability and raised outright the preliminary objection as to the insufficiency of the affidavits filed in support of the application for summary judgment (*Dummer* v. *Brown and Another* [1953] 1 Q.B. 710, *distinguished*).

(5) For all the above reasons the appeal is allowed and the judgment entered by the trial Court is hereby set aside but we make no order as to costs. Costs in the trial Court to be costs in cause.

Appeal allowed. No order as to costs.

Per curiam : It may be that on account of the world-wide character of present day transactions the shortening of distances and the frequency with which actions involving plaintiffs from abroad are instituted in our Courts, the time has come for consideration to be given to amending our Rules so that they will take cognizance of this situation and be brought into line with the present day needs.

Cases referred to :

Chirgwin v. *Russell* [1910] 27 T.L.R. 21 C.A. ;

Les Fils Dreyfus et Cie Anonyme v. *Clarke* [1958] 1 All E.R. 459, at p. 460 ;

Hallett v. *Andrews* [1898] 42 S.J. 68 ;

Pathè Fréres Cinema Ltd. v. *United Electric Theatres Ltd.* [1914] 3 K.B. 1253 C.A. ;

Lagos v. *Grunwaldt* [1910] 1 K.B. 41 ;

Symon and Co. v. *Palmer's Stores* (1903) *Ltd.* [1912] 1 K.B. 259, at p. 266 ;

James Lamont and Co. Ltd. v. *Hyland Ltd.* (No. 2) [1950] 1 All E.R. 929, at 931 ;

Roberts v. *Plant* [1895] 1 Q.B. 597, at p. 603 ;

Dummer v. *Brown and Another* [1953] 1 Q.B. 710 ;

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Kourris, D.J. and Santamas, Ag. D.J.) dated the 29th March, 1971, (Action No. 6551/70) whereby the defendant, as acceptor of 21 bills of exchange was ordered to pay the sum of £23,053.595 mils by way of damages to the plaintiff.

C. Glykys, for the appellant.

L. Demetriades, for the respondent.

TRIANTAFYLLIDES, P.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU, J.: This is an appeal by the defendant from the judgment given against him on 21 bills of exchange for the sum of £23,053.595 mils with 4% interest per annum thereon and costs, on an application for summary judgment under Order 18, r. 1 of the Civil Procedure Rules. This Order corresponds to the English Order 14, r.1, before the latter was recast by R.S.C. (Rev.) 1962, which greatly extended the operation of this procedure, and made significant changes in the practice under Order 14. Under Order 18, r.1, the plaintiff must not only satisfy the Court that there is a specially endorsed writ under Order 2, r.6, but he must do something else : He must support the application with an affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the action.

The application for summary judgment was indeed supported by an affidavit sworn by a law clerk employed in the law office of the plaintiff's counsel. He swore to the facts of the case on the strength of instructions received by counsel from the plaintiffs in writing through exchange

of correspondence with them. It is a formal affidavit supporting the claim endorsed on the writ and it will be useful to quote here paragraphs 3, 4 and 5 thereof, which say :

"3. The above named defendant is justly and truly indebted to the plaintiffs in the sum of £23.053.11. 11d. by virtue of 21 bills of exchange issued by Messrs. Motokov, Foreign Trade Corporation, of Praha, which the defendant accepted to pay at Nicosia.

4. The above bills of exchange were protested and then handed over to us by the Bank of Cyprus Ltd., and they are now in our possession.

5. The particulars of the plaintiff's claim in the present action appear in the endorsement of the writ of summons service of which has been effected on the defendant on the 5th February, 1971. The claim of the plaintiffs in the said endorsement as set out is a valid true and correct one."

A second affidavit sworn by the same affiant, filed in support of the opposition to an application by the appellants for leave to issue and serve a third party notice, was also relied upon and referred to in the course of the hearing of this application. Paragraphs 2, 3 and 4 thereof read as follows :

"2. Following the filing of the affidavit of the defendant in opposition to the Application for Summary Judgment, we sent to our clients, the plaintiffs in the present Action, a cable as per attached Exhibit marked 'A' and we received in reply two cables as per attached Exhibits 'B' and 'C'.

3. The words CEKOBANKA appearing at the end of the cables marked 'B' and 'C' are the cable address of our clients, the plaintiffs in the present Action and the word 'Helenus' is our cable address.

4. I was given possession of the Bills of Exchange, the subject matter of the present proceedings, and I can produce them at Court if so requested."

The contents of the documents referred to therein amount to nothing else but instructions and information supplied by clients to their counsel.

Furthermore, at the hearing of the application the affiant, at the request of counsel for appellant, was called and cross-examined on his affidavit. The 21 bills of exchange were produced as *Exhibit* 1. His evidence was to the effect

that he swore the affidavits on the instructions given to him by his employer, who was instructed by the plaintiffs to proceed against the defendant ; his knowledge that the amounts due on the bills had not been paid emanated from the fact that he was in possession of them, they had been protested, and he had read the instructions received from the plaintiffs. In effect, at the conclusion of the case there had been placed before the court below only correspondence exchanged between counsel for respondent and his clients, the 21 bills of exchange, and the two affidavits, hereinabove referred to, made by the affiant on information and belief.

The appellant opposed the application for summary judgment and filed an affidavit whereby he set up a defence to the application for summary judgment both by way (i) of a preliminary objection and (ii) on the merits.

The preliminary objection raised by the appellant before the trial court, and which is the basis of the first two grounds of appeal in this Court, is twofold : First that the affiant does not state in his affidavit in support of the application that at the time of the making by him of same he was duly authorized by the plaintiffs to make such affidavit and on their behalf. He is relying for this proposition on the authority of *Chirgwin* v. *Russell* [1910] 27 T.L.R. 21 C.A. referred to in the Supreme Court Practice, 1970, at p. 124 and also in the editorial note in the case of *Les Fils Dreyfus et Cie Societe Anonyme* v. *Clarke* [1958] 1 All E.R. 459 at p. 460.

The second part of the preliminary objection was that the " affiant did not state and could not possibly have truthfully stated that he himself was in a position positively to swear to the facts, or indeed that he had first hand knowledge of the facts otherwise than on information and instructions obtained from the plaintiffs or the correspondence with them or other documents or even from the learned counsel of the plaintiffs." We have been referred in support of this argument to a number of authorities with which we shall deal in due course.

Both objections go to the jurisdiction of the Court as the conditions imposed by Order 18, r.1 have to be fulfilled in order that the Court can have jurisdiction to make an order for summary judgment thereunder ; there is ample authority for this proposition to which we shall shortly be referring.

Being a question of jurisdiction it was thought fit, and counsel on both sides agreed, that it should be determined first before hearing argument on the remaining grounds of appeal that go to the merits.

In dealing with the first leg of the preliminary question the trial court had this to say :

> " We are of the view that this person is authorized to make this affidavit which can be deducted from the context of the affidavits filed in support and the relationship between the affiant, his employer and the plaintiffs. It is the only irresistible inference that he had authority to swear the affidavit because instructions were given by the plaintiffs to his employer to institute the present proceedings and further the affiant said that they had written instructions to bring the action and the application for summary judgment ".

On the material before the trial court it was open to it to arrive at this conclusion. It can be said that the affidavits filed in support of the application showed that the deponent was authorized to make it ; though the very word ' authorized ' is not used, this omission does not change in our view the position. This disposes of the first leg of the preliminary objection.

We turn now to the second leg which raises very important and interesting issues. The trial court dealt with it as follows :

> " According to the Annual Practice the Plaintiff or any other person can swear the affidavit in support of an application for summary judgment and under the heading ' By any other person ' it was held that an affidavit by the Clerk of the plaintiff's Solicitor has been held to be sufficient and judgment ordered thereon".

The authority for this proposition, given in the Annual Practice 1970 at p. 124, is *Hallett* v. *Andrews* [1898] 42 S.J. 68 ; and it may be added here that there is, also, stated that the affidavit may be made by some " competent person in the employ of a limited company " (*Pathè Fréres Cinema, Ltd.* v. *United Electric Theatres, Ltd.* [1914] 3 K.B. 1253 C.A.).

There is no doubt that, as our relevant rule stands, an affidavit may be made by another person, apart from the plaintiff, but the rule does not stop there ; it must be a person

that " can swear positively to the facts, verifying the cause of action and the amount claimed. " The deponent must be clearly in a position to swear positively to the facts and the affidavit must show this. It cannot be an affidavit where the deponent can only depose upon information and belief. Order 39, r.2 which regulates the contents of affidavits provides that the affidavits shall be confined to such facts as the witness is able of his own knowledge to prove. Statements on information and belief, with the sources and grounds thereof, are allowed only in affidavits for interlocutory applications.

In *Lagos* v. *Grunwaldt* [1910] 1 K.B. 41, Farwell L.J., after dealing with the requirements of an affidavit under Order XLV., r.1 where the words were " upon affidavit by himself or his solicitor stating that judgment has been recovered or order made . . . . . " had this to say :

> " But when I contrast those words with the very special words in Order xiv . . . , r.1, ' swear positively to the facts,' and when I bear in mind the summary proccedings which are founded upon this order, it seems to me that it is most important that the admission of such affidavits by solicitors should not be allowed. A solicitor may be a perfectly good witness from his own knowledge of the facts, but the mere fact that he is the solicitor cannot make his information and belief any better than that of any other person. To say that the solicitor can take his client's instructions and then swear ' positively ' that they are true seems to me an extravagant proposition. I think on that ground that there was no jurisdiction to make this order."

What was said hereinabove regarding the sufficiency of an affidavit by a solicitor applies a fortiori to an affidavit filed by an advocate's clerk who may or may not be competent to make an affidavit satisfying the conditions of Order 14, r.1. The jurisdiction of the Court given by Order 18 is conditional upon the making of an affidavit of the nature therein mentioned. It was pointed out in *Symon & Co.* v. *Palmer's Stores* (1903) *Limited* [1912] 1.K.B. 259, that an affidavit made for the purpose of verifying the cause of action was insufficient as being made by a person other than the plaintiff who could not swear positively to the facts but could only depose thereto upon information and belief. The principle in the *Lagos* case (*supra*) was adopted and followed, to the effect that in such circumstances there was no jurisdiction to make an

order for judgment under Order 14. The reason for such strict approach to the sufficiency of the affidavit in support of an application under Order 18 appears in the judgment of Buckley L.J., in the *Symon* case (*supra*) at p. 266, where he said :

> " Trial, as a rule, must precede judgment. Order 14 provides an extraordinary procedure in certain cases ; it is a procedure in which, instead of trial first and then judgment, there is judgment at once and never any trial. Such a procedure must be strictly confined to the specific cases for which it is provided, as set forth in the order."

And at the bottom of the same page and continuing at page 267, he says :

> " again, an application is often made under Order 14, not with any expectation of success, but in order to induce the defendant to make an affidavit, and so get information on oath as to the nature of his defence. That is not legitimate. If there is no such affidavit as is required by Order 14, r.1, there is, I think, no jurisdiction under that Order to give judgment. The Judge is bound to leave the action to proceed to trial in the usual way. He can only give judgment without a trial if the conditions mentioned in the rule are satisfied. The question of the sufficiency of the affidavit is, in my opinion one which goes to jurisdiction."

The picture would not have been complete if no reference was made to the case of *Pathè Fréres Cinema Ltd.*, v. *United Electric Theatres Limited* [1914] 3 K.B. 1253. This was a case in which the writ was specially endorsed with a claim for a balance on an account for goods sold and delivered. Application for leave to sign final judgment under Order 14 was supported by the affidavit of a clerk in the employ of the plaintiffs who stated that he was duly authorized to make the affidavit and added that it was within his own knowledge—and this is significant—that the debt was incurred and, to the best of his knowledge and belief, it remained unpaid. The affidavit contained no statement of the means of knowledge—of the matters referred to—possessed by the deponent. It was held that the affidavit was reasonable compliance with the Order 14, r.1. Buckley L.J. at p. 1255 said :

> " In the present case the plaintiffs are a company ; they cannot swear ; somebody must therefore do

it for them. The affidavit is made by a clerk in their employ ; he describes himself as a clerk of the plaintiffs and in their employ and says that the facts are within his own knowledge ; that, in my opinion, brings this affidavit reasonably within the rule. I think the affidavit complies with the requirements of the rule."

Phillimore, L.J., agreeing with the above judgment said :-

" If we were to take the opposite view it would make things very hard for plaintiffs. I agree that the rule should receive a reasonable construction."

It cannot, however, be claimed that the facts and circumstances of the present case would justify such an approach. The distinction should be drawn between the personal positive knowledge of the employee of the plaintiffs in the *Pathè Fréres* case (*supra*), and the knowledge of the clerk of plaintiffs' advocate in the present case, whose means of knowledge emanated from information and instructions received by their law office.

On the authorities, therefore, it may be said that the trial court had no jurisdiction to give judgment on the application, unless the affidavits were supplemented and the defects cured by the end of the day.

As stated in the case of *Les Fils Dreyfus et Cie Societe Anonyme* (*supra*) at page 463, " there always has been and is jurisdiction in the court to allow an affidavit filed in support of an application for summary judgment to be supplemented and in deciding jurisdiction one looks at the matter at the end of the day on the affidavits which have been filed."

This brings us to the able argument of learned counsel for the respondent : It was contended that in determining whether judgment should be given or not, the Court should consider the position as it was at the end of the day. By this it was meant that the Court should look not only to the affidavits filed in support of the application and the oral evidence heard, as well as the *exhibits* produced, but also to the affidavit filed by the appellants—defendants, inasmuch as the cause of action on the bills of exchange, which is basically the non-payment thereof, was being verified by the fact that they had been protested and produced and, moreover, their execution was not denied by the respondents. Apart from the principle laid down in the *Les Fils Dreyfus* case (*supra*), counsel relied on the case of *James Lamont & Co. Ltd.* v. *Hyland Ltd.*, (*No.* 2) [1950] 1 All E.R. p. 929.

In the *Lamont* case, as stated by Roxburg L.J., at p. 931—

> " The position in law arising on these affidavits is, therefore, shortly that the plaintiffs sue on a bill of exchange and the defendants seek to prevent the plaintiffs from having liberty to sign immediate judgment without a stay by alleging that the bill was given in pursuance of a contract which the plaintiffs have broken and for which the defendants claim unliquidated damages in excess of the amount of the bill . . .".

The point, therefore, for determination in that case was one going to the merits of the action on the bill of exchange and not one to the jurisdiction of the Court arising from the sufficiency or not of the affidavits filed in support of the application.

In the *Les Fils Dreyfus* case the jurisdiction of the court to give summary judgment was determined on the basis of affidavits filed by the plaintiff and independently of the affidavit filed by the defendant, which was only relied on regarding the aspect of the merits of the case. The expression ' on the affidavits which have been filed ' in the above quoted passage from the *Les Fils Dreyfus* case should therefore be taken as referring to the affidavits filed by the applicant in support of his application. As it appears from the already quoted passage of the judgment of Buckley, L.J. in the *Symon* case (*supra*) at. p. 266, it is not legitimate to expect to file an application with an affidavit not complying with the rule and so get information on oath as to the nature of the defendant's defence. So if there is no such affidavit as is required by Order 18, r.1, there cannot be jurisdiction under that Order to give judgment. A defendant by making a defence to the merits in addition to taking a preliminary objection as to the sufficiency of the affidavits filed by the applicant—plaintiff should not be taken as submitting to the jurisdiction of the Court. It should be examined if the plaintiff by his application has brought himself within the ambit of the order. As it was stated by Lord Esher, M.R. in the case of *Roberts* v. *Plant* [1895] 1 Q.B. p. 597 at p. 603, in relation to the procedure under Order 14 :

> " That is a stringent power to give, and therefore the Courts have said that its exercise must be strictly watched, in order to see that the plaintiff has brought himself within the scope of the provisions of the orders."

We have considered whether the second affidavit filed by the law clerk, or the evidence given and bills of exchange

produced by him when at the request of counsel for the defendants he attended for cross-examination, cured the defect in the original affidavit. In our view nothing of the sort happened, as he was still speaking on the basis of the instructions and on the basis of the information received, and not of facts within his own personal knowledge. It cannot be said that he could swear positively to the facts as required by Order 18, r.1.

Further support of our approach to the issues before us can be found in the following statement which appears in the Supreme Court Practice, 1970, p. 124 where in the note to Order 14 it is stated under the heading " Statements of information or belief ":—

> " Para. (2) was introduced by R.S.C. (Rev), 1962, and changed the practice under the former O.14, r.1, which had required the affidavit in support to be made by the plaintiff or a person who could swear positively to the facts. The affidavit in support, unless the Court otherwise directs, may be made by any person on statements of information or belief though the sources and grounds thereof must be stated. This change equates the affidavit in support of a summons under 0.14, with any other interlocutory affidavit. (See 0.14, r.5(2) *infra*).
>
> This change increases the usefulness of 0.14. It enables such affidavit to be made by the solicitor for a foreign plaintiff on information obtained from instructions and correspondence and other documents (reversing *Lagos* v. *Grunwaldt* [1910] 1 K.B. 41), or by the manager or other person employed by the plaintiff who has no first hand knowledge of the facts (reversing *Symon & Co.* v. *Palmer's Stores* (1903) *Ltd.*, [1912] I.K.B. 259).
>
> It also enables some persons to invoke 0.14 procedure who could not strictly do so formerly, e.g., personal representatives of a deceased person, the liquidator or receiver of a company, the trustee in bankruptcy, and such like persons."

Before concluding consideration of the matter before us we must refer to the case of *Dummer v. Brown and Another* [1953] 1 Q.B. 710, which could not but deserve serious consideration. In this case it was held by majority that the affidavit sworn by the plaintiff though open to criticism, in that it turned on matters which were not within the plaintiff's own knowledge and failed to state in accordance with the Rules of Court the deponent's means of

knowledge, had not been answered by the defendants in a manner giving some indication of a real defence on the issues of liability and, therefore, the Judge having in the exercise of his discretion come to the conclusion that there was no defence and it being a proper case for summary judgment, the appeal should be dismissed.

The *Dummer* case is distinguishable from the facts of the case before us inasmuch as in that case the Court of appeal was faced with a situation whereby the trial judge had considered the insufficiency of the applicant's affidavit but nevertheless in the light of the statements of counsel and other very special circumstances before him rendering the case an exceptional one came to the conclusion that he was competent to give summary judgment and in the exercise of his discretion he made the order accordingly ; however in the case before us the trial court did not direct its mind to the consequences which are brought about in law when an affidavit not complying with Order 18 is filed in support of an application for summary judgment. The trial court was contented on the authority of *Hallett* v. *Andrews* (*supra*), that ' an affidavit of the clerk of the plaintiff solicitor was held to be sufficient '. A passage from the judgment of Morris, L.J., at page 722 of the report of the *Dummer* case shows the grounds for the distinction we are making. It reads as follows :—

> " I agree that the affidavit is in many respects defective, but we have been told by Mr. MacDermot that he accepted and acknowledged that the affidavit was defective, and that before the judge he offered to file a further affidavit which would correct the defects in the existing affidavit. We were further told that any point based upon the defects in the affidavit was virtually abandoned before the judge by counsel who then appeared for the defendants, and that it was agreed that the plea of guilty to dangerous driving was made by Sell in reference to the time and the event that led to the death of Mr. Dummer. It seems to me that matters concerning an admission such as was made by counsel were matters for the judge and were within his discretion. He was satisfied that it was shown that Sell had pleaded guilty to dangerous driving in reference to the event which brought about the death of Mr. Dummer. It has not been said by Mr. Chapman that the admission made by Sell, an admission made in the face of the court, of guilt of the act of dangerous driving, was

not an admission that included within it an admission of negligence. It seems to me clear that it did include such an admission."

We are not faced in the case before us with an admission verifying unreservedly the cause of action, which was relied upon by the trial court in exercise of its discretion to make an order of summary judgment. Unlike the attitude of the defendants in the *Dummer* Case where, as Jenkins L.J. said, they adopted a purely passive attitude, in our case the appellants most strenuously denied liability and raised outright the preliminary objection as to the insufficiency of the affidavits filed in support of the application.

On the true construction, therefore, of the relevant provision of our Rules we hold that the trial court had no jurisdiction to give judgment on the strength of the affidavits filed in support of the application.

It may be that on account of the world-wide character of present day transactions the shortening of distances and the frequency with which actions involving plaintiffs from abroad are instituted in our Courts, the time has come for consideration to be given to amending our Rules so that they will take cognizance of this situation and be brought into line with the present day needs. Until that, however, is done the procedural advantages of judgment without trial under Order 18 can only be made use of if the conditions precedent laid down therein are duly complied with.

For all the above reasons the appeal is allowed, the judgment entered by the trial court is hereby set aside but in the circumstances we make no order as to costs. Costs in the trial court to be costs in the cause.

In arriving at these conclusions we have refrained from dealing with the approach of the trial court on the merits of the case which we leave entirely open so that when the case proceeds for hearing nothing said in this judgment might be taken as prejudicing the rights of either party therein.

Appeal allowed; no order as to costs.