**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL**

**Civil Appeal No. 18 of 2017**

**BETWEEN:**

**VERNON OLIVIER SMITH** **Appellant**

**AND**

**SIR MARSTON GIBSON** **First Respondent**
**THE ATTORNEY GENERAL OF BARBADOS** **Second Respondent**

**Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal.**

**2017: July 31, September 6, October 4**
**2019: March 7**

**Mr. Edmund King QC, Mr. Hal Gollop QC and Mr. Michael Springer QC for the Appellant**

**Ms. Donna Brathwaite QC and Mr. Jared Richards for the Respondents**

**DECISION**

**GOODRIDGE JA:**

**INTRODUCTION**

[1] This is an appeal against the decision of **Beckles J** given on 7 April 2017, in which she dismissed the appellant's application for an order that summary judgment be entered against the first respondent under ***CPR 15(2) (a)*** and **(*b*).**

## THE PROCEDURAL BACKGROUND

### The High Court Proceedings

#### *The Fixed Date Claim*

[2] On 14 May 2015, the appellant filed a fixed date claim form in the High Court seeking the following relief:

> "A Declaration that in the events which have occurred a decision and/or Administrative Act and/or advice and or recommendation of the First Defendant to refuse the Claimant audience in the matter of Supreme Court (sic) intituled No 99 of 2015 Clico International Life Insurance Ltd v Leroy Parris, Branlee Consulting Services Inc. and The Estate of David Thompson and by extension the right to represent his client Branlee Consulting Services Inc. in the said matter are:
>
> a) an administrative act or omission that was unauthorised and contrary to law;
>
> b) an excess of jurisdiction;
>
> c) a failure to satisfy or observe conditions or procedures required by law;
>
> d) a breach of the principles of natural justice;
>
> e) an irregular or unreasonable or improper exercise or direction;
>
> f) an abuse of power;
>
> g) an exercise of bad faith which was precipitated by irrelevant considerations;
>
> h) an example of acting on representations of an unauthorised person;
>
> i) a conflict with an Act of Parliament;
>
> j) an error of law;

k) based on an absence of evidence on which a finding or assumption of fact could reasonably be based; and

l) a breach of omission of his duty to perform a duty.

2. An order of Certrorari (sic) to quash the decision and/or Administrative Act and/or advice and/or recommendation of the First Defendant to deny the Claimant audience before the Courts of Barbados thereby disbarring him as an Attorney-at-Law qualified to practice in the Courts of Barbados.

3. An injunction restraining the First Defendant by himself or otherwise from any further action which may lead to a denial of the Claimant right of audience before the Courts of Barbados and any further act of disbarment.

4. Damages for loss of fees during and as a result of the Claimants (sic) period of disbarment.

5. Costs.

6. Further or other relief."

[3] According to the particulars of the claim, on 14 April 2015, the first respondent presided as a High Court judge in **Civil Suit No. 99 of 2015 Clico International Life Insurance Ltd v Leroy Parris, Branlee Consulting Services Inc.** and the **Estate of David Thompson**. The appellant appeared as counsel for Branlee Consulting Services Inc. in association with Mr. Steve Gollop.

[4] At the start of the proceedings, Mr. Barry Gale QC, who was holding a watching brief for the Bank of Nova Scotia, made an oral application. He

contended that the appellant, being a person who had failed to pay his annual subscription to the Barbados Bar Association (BBA) in breach of the **Legal Profession Act Cap. 370A**, had no right of audience before the court as he was not in possession of a valid practising certificate.

[5] The appellant pointed out that he was in fact the holder of such a certificate which had been issued to him by the Registrar of the Supreme Court and which remained valid until 31 January 2016. He indicated that he had never refused to pay his fee to the BBA as alleged. In fact, he had tendered his fee to the BBA for the years 1997 to 2005 minus the charge of VAT, which he considered to be illegal as he considered that the BBA was not a business to be a collector of VAT.

[6] Thereafter, the first respondent made a ruling that if the appellant's annual subscription was not paid, he had no right of audience before the court.

[7] The appellant alleged that by reason of these matters and the actions of the first respondent, he was discriminated against in the following ways by the first respondent:

( i) He was the victim of the unlawful administrative act or decision of the first respondent;

(ii) He was discriminated against in flagrant disregard of his rights under the *Constitution* as set out in **sections 1**, **18** and **21** namely:

(a) his protection against deprivation of property;

(b) his right to the protection of the law and equality under the law; and

(c) his protection of freedom of association.

[8] The appellant further claimed that through the unlawful act of the first respondent he suffered a violation of certain basic rights, namely:

(a) the right to work; and

(b) the right not to be discriminated against.

[9] On 21 May 2015, Ms. Donna Brathwaite QC, counsel for the respondents, filed an acknowledgment of service of the fixed date claim form on behalf of both respondents, indicating that it was received on 15 May 2015.

[10] On 14 September 2015, the appellant filed an affidavit of service indicating that the first respondent was served with the fixed date claim form at his residence on 29 May 2015.

[11] On 15 September 2015, the respondents filed a notice of application for an order that the appellant's statement of case be struck out on the basis of abuse of process pursuant to ***CPR 26.3***. The application was supported by an affidavit of counsel and was set for hearing on 27 January 2016.

[12] The grounds of the respondents' application were that (i) an appeal against a decision made by a judge of the High Court ought to be made to the Court of Appeal; (ii) the appellant had failed to show on the face of the claim form filed on 14 May 2015 the enactment or rule of ***CPR*** on which his

claim is grounded; and (iii) the first respondent was not a proper party to the proceedings.

[13] On 16 September 2015, a case management conference was held by **Beckles J**. Also on that date, Ms. Brathwaite QC filed an acknowledgment of service on behalf of the first respondent indicating that the first respondent received the fixed date claim form on 29 May 2015 and that he intended to defend the claim.

[14] By letter dated 17 September 2015, Ms. Brathwaite QC gave notice to Mr. Edmund King QC that an acknowledgment of service had been filed at the Registry and enclosed a copy of the filed acknowledgement of service.

***The Application for Summary Judgment***

[15] On 12 January 2016, the appellant filed a notice of application for summary judgment to be entered against the first respondent in respect of the relief claimed in the fixed date claim form. The appellant indicated that he intended to rely on his "affidavit (Statement of Claim) filed and served with the Claim Form which sets out all the points of law and evidence in support of this Application".

[16] The grounds of the appellant's application were as follows:

> "a. The First Date Claim Form dated 14 May 2015 filed in and issued from the Registration Office of the Supreme Court together with the Claimant's Statement of Claim (affidavit), The Form 3 (The Acknowledgement of Service) and the Form 5 (The Defence and counterclaim)

were served on the 1st Defendant on the 29th day of May 2015 as stated in the Affidavit of Service dated the 15th day of June 2015 and filed in the Registration Office on the 14th day of September 2015.

(i) The First Defendant has neglected, failed and refused to file and serve a defence within 28 days after the Claim Form and Affidavit (Statement of Claim) were served on him as required by Part 10.3 (1) of the Civil Procedure Rules of the Supreme Court, 2008.

(ii) The First Defendant refused and failed to attend the Case Management hearing of the claim held on the 16th day of September 2015 but on the said day after the said hearing the Attorney-at-Law for the Second Defendant filed and served an Acknowledgement of Service for and on behalf of the First Defendant.

(iii) The Claimant intends to rely on his said affidavit (Statement of Claim) filed and served with the Claim Form which sets out all the points of law and evidence in support of this Application.

(iv) It is evident in the Claimant's said affidavit that the First Defendant has no defence and no real prospect of successfully defending the Claimant's said claim.

( v) There is no reason why the issues being sought to be hereby determined should be disposed of at trial."

[17] This application was given a hearing date of 27 February 2016.

***The Judge's Decision***

[18] On 7 September 2016, **Beckles J** heard the appellant's application. She delivered a written decision on 7 April 2017.

[19] The judge stated in **para [21]** of her decision that summary judgment occurs where the court determines a particular issue or issues between

litigants without a trial and at **para [27]** that where there are disputed facts, a court is unlikely to grant an order for summary judgment.

[20] The judge concluded at **para [38]** that "Recognizing that there has been a number of procedural defects both in the filing and preparation of the documents, the court finds that the complaints made by the Claimant's attorney-at-law are claims more about form rather than substance and that the failure to comply with the rules as stated above are not fatal at this stage of the proceedings and may be amended by the exercise of the court's power under Part 26 of the *CPR*."

[21] She stated that the appellant knew that the respondents intended to defend the action in that the acknowledgment of service was filed and notice given pursuant to ***CPR***. Accordingly, at **para [42]**, **Beckles J** refused the appellant's application for summary judgment and gave the following reasons:

> "(1) there are issues which in my judgment should go to trial on the evidence;
>
> (2) the pleadings are not a nullity but are merely defective and can be cured by amendment; and
>
> (3) the court exercises its discretion under Rule 26.4 of the CPR to allow Rectification of these errors."

## THE APPEAL

### The Notice of Appeal

[22] Having obtained the leave of this Court to appeal the judge's decision, on 14 June 2017, the appellant filed a notice of appeal in which he sought the following orders:

> "(i) that the decision of Madam Justice Beckles High Court Judge dated the 6th day of September 2016 and delivered on the 7th day of April 2017 be set aside.
>
> (ii) that Summary Judgment be entered for the Claimant in terms of the Fixed Date Claim filed on the 14th day of may (sic) 2015;
>
> (iii) that damages be assessed;
>
> (iv) costs of the Appeal to the Claimant."

[23] There were no grounds of appeal expressly stipulated in the notice of appeal as required by ***CPR 62.4(1)(b)***. However, the appellant has challenged various findings of fact by the judge, and averred that **Beckles J** erred in law. The details of holdings of law are as follows:

> "(i) The Trial Judge erred in fact and in law in holding that the power of the Court to make summary order is contained only in Part 15 of the CPR since in fact summary judgment can be made under Part 27 2 (sic) of the CPR at the first hearing of the Case Management Conference.
>
> (ii) The Trial Judge erred in fact and in law in finding that there are procedural defects/errors in the filing and preparation of the documents and that the complaints made by the Claimant's attorney are claims more about form rather than substance although in her decision she neither stated nor identified the said procedural defects in the documents filed. In addition, no application oral or in

writing was at any time made by the Defendants for an amendment of any error or defects.

(iii) The judge erred in fact and in law in holding that to strike out the First Defendant's claim which has never been indicated nor filed in the proceedings would be a totally disproportionate response to the errors that were made.

(iv) The Judge erred in law in holding that the filing of the Application of the First Defendant on the 15th September 2015 before filing an acknowledgement of service is a procedural error which in fact is an abuse of process which cannot be cured by amendment.

(v) The Judge erred in fact and in law in holding that there are issues of fact to be determined by the Court when there has been no evidence filed in the proceedings by the Defendants either by way of a defence or affidavit to challenge or dispute the Claimant's statement of Claim.

(vi) Accordingly, the Judge erred in fact and in law in holding:

(a) that there are issues which should go to trial on the evidence;

(b) that the pleadings are not a nullity but are merely defective and can be cured by amendment.

(vii) The Judge erred in law in purporting to exercise a discretion under Rule 26.4 of the CPR to allow for rectification of these errors.

(viii) The Judge erred in law in refusing to enter/grant Summary Judgment on the application of the Claimant filed on the 12th day of February 2016. The judge erred law (sic) or under Part 27(2) at the hearing of the Case Management Conference on the 27th of February 2016.

(ix) The Judge erred in law in holding

> (a) that the power of the Court to make summary judgment is contained in Part 15 of the Civil Procedure Rules only.
>
> (b) that summary judgment occurs where the Court determines a particular issue or issues between the litigants without a trial.
>
> (c) that there are important disputes of facts although there has not been a defence in any form filed by the First Defendant to dispute or challenge the facts stated and set out in the Claimant's statement of Claim and affidavits.
>
> (d) that the First Defendant's compliance with the Civil Procedure Rules 2008 are irregularities and procedural defects/errors but in fact constitute abuses of process that cannot be amended under the Court's powers of Part 26.4 of the CPR."

**THE SUBMISSIONS**

***The Appellant's Submissions***

[24] Counsel for the appellant, Mr. King QC, filed written submissions on 14 June 2017, while Mr. Hal Gollop QC, made oral submissions to the Court on behalf of the appellant.

[25] Mr. King QC submitted that the first issue is the validity of the respondents' application to strike out the appellant's claim. Counsel argued that at the time of the respondents' filing of their application, there was no acknowledgment of service indicating an intention to defend the claim, no defence, nor application for an extension of time to file a defence on behalf of the first respondent. Therefore the first respondent had no standing in the matter.

[26] Mr. King QC also submitted that the first respondent cannot dispute the court's jurisdiction to try the appellant's claim because the first respondent ought to have first complied with ***CPR 9.7(1),(2)*** and ***(3*)** and first file an acknowledgment of service within the period for filing a defence.

[27] Mr. King QC contended that there were a number of procedural irregularities relating to the first respondent's application: (i) neither the application nor the affidavit filed by the attorney-at-law contain a certificate of truth in the form and with the content as required by ***CPR 3.12 (4) (a*)** and **(*b);*** (ii) the attorney-at-law representing the first respondent is precluded from swearing and filing an affidavit, giving evidence and being a witness for her client by virtue of ***section 29*** of the ***Legal Profession Code of Ethics*** (***Committee Reference to the Court of Appeal) Rules 1985***).

[28] According to Mr. King QC, the second issue is whether the first respondent has any real prospect of successfully defending the claim. The first respondent did not comply with ***CPR 15.5(1)*** and **(*2)*** which required the first respondent to file written evidence and serve copies thereof on every other party to the application at least 7 days before the summary judgment hearing.

[29] Mr. King QC argued further that the court should not allow any unfairness that was caused to the appellant by virtue of the delay consequent upon the first respondent's procedural errors. He contended that at the date of the

hearing of the appellant's application for summary judgment on 7 September 2016, no defence had been filed nor did the first respondent or anyone attend on his behalf.

[30] Further, counsel argued that the acknowledgment of service filed on 16 September 2015 on behalf of the first respondent was defective in that it did not contain the name or personal address of the first respondent, and counsel for the first respondent therefore lacked the authority to act on his behalf.

[31] In his oral submissions to the Court, Mr. Gollop QC contended that the order of **Beckles J** stating that the issues should go to trial on the evidence did not constitute an order giving the first respondent unconditional leave to defend, especially in light of the absence of an application by the first respondent for leave to defend. He contrasted the present case with the decision of the **CCJ** in **Aaron Truss v Windsor Plaza Ltd CCJ Application No. BBCV 2016/002** (**Aaron Truss**) where the defendant had filed his defence and counterclaim.

[32] Furthermore, counsel submitted, since there was no defence filed in the action there could be no joinder of issue and therefore there could be no evidence disclosing that serious issues had been raised. He also submitted that there could be no reason to exercise any power to amend pleadings or correct errors in pleadings which had not been filed.

***The Respondents' Submissions***

[33] In response, Ms. Brathwaite QC, submitted that the appellant is barred from having his appeal heard by this Court since **Beckles J's** decision that there were issues which should go to trial on the evidence constituted an order granting the respondents unconditional leave to defend the claim. Counsel relied on **section 54(1)** of the **Supreme Court of Judicature Act, Cap. 117A** (**Cap. 117A**) and **Aaron Truss** to support her submission.

[34] Ms. Brathwaite QC contended that, notwithstanding that the acknowledgment of service was filed on behalf of the first respondent outside of the time stipulated for him to do so, the acknowledgment was filed and notice given by letter of 17 September 2015 to this effect, prior to the summary judgment hearing on 7 September 2016. Therefore, the appellant had been alerted to the first respondent's intention to defend the claim.

[35] Counsel also contended that there is no mandatory requirement for the first respondent to state his personal address in the acknowledgment of service and therefore there was no defect in the acknowledgment. In any event, the omission did not prejudice the appellant.

[36] Ms. Brathwaite QC argued that ***CPR 10.3(1)*** provides that the general rule is that the period for filing a defence is a period of 28 days after the service of the claim form and statement of claim. However, counsel submitted that ***CPR 10.2(8)*** provides for the deviation from the stipulated time where the

court's jurisdiction is being disputed by, *inter alia*, the filing of an application to strike out a claim. Counsel submitted that such an application was filed on 15 September 2015, and thus the requirement for the filing of a defence was dispensed with.

[37] With regard to the perceived procedural deficiencies, counsel submitted that the judge was entitled to exercise her discretion to rectify any failures under ***CPR 26.4(3)*** and ***(4).***

[38] Ms. Brathwaite QC submitted further that she, as the respondents' attorney-at-law, was entitled to swear and file the affidavit of 15 September 2015 on the respondents' behalf since the affidavit did not seek to give evidence of facts in dispute between the parties but that the content can be regarded as formal matters of law.

[39] Counsel contended that there is a real prospect of the respondents defending the appellant's claim and that the respondents' application to strike out the claim was highly likely to succeed and ought to be heard by the court. Counsel further contended that there is evidence given by the appellant which raises issues to be determined at trial, and although the respondents did not raise issues with regard to certain facts, that did not mean that the facts did not trigger issues which should be determined by the court.

[40] Ms. Brathwaite QC also argued that there is no requirement in ***CPR 15.5*** that the first respondent provide written evidence prior to the summary judgment hearing.

[41] Counsel's final submission was that there was no prejudice to the appellant because he was aware that the first respondent intended to defend the action by way of his acknowledgment of service and that delay was occasioned by the frivolous and vexatious applications filed by the appellant.

**THE PRINCIPAL ISSUE**

[42] The principal issue which arises for our determination is whether this Court ought to interfere with the exercise of discretion by **Beckles J** in dismissing the appellant's application for summary judgment.

[43] We have reminded ourselves that in order for this Court to do so, we must find that the judge erred in principle in her approach in dismissing the appellant's application for summary judgment, or that she took into account irrelevant considerations, or failed to take into account relevant considerations in arriving at her decision; or that her decision was wholly wrong.

**DISCUSSION**

**Subsidiary Issue**

[44] Before dealing with the principal issue, however, there is a subsidiary issue of whether the appellant complied with the evidential requirements in an application for summary judgment.

[45] In the application for summary judgment, the appellant stated that he intended to rely on his "said affidavit (Statement of Claim) filed and served with the Claim Form which sets out all the points of law and evidence in support of this application".

[46] ***CPR 15.5*** provides as follows:

"**Evidence for the purpose of a summary judgment hearing**

15. 5 (1) The applicant must

(a) file evidence on affidavit in support of his application; and

(b) serve copies on the party against whom summary judgment is sought not less than 14 days before the date fixed for the hearing of the application."

[47] Though the statement of claim is endorsed on the claim form which contains a certificate of truth, it is not an affidavit. A document headed "affidavit" was filed on even date with the claim form and signed by the claimant. It contained a certification that the facts set out in the claim form were true to the best of the appellant's knowledge, information and belief. Contrary to ***CPR 30. 5(1) (b)*** it was, however, unsworn.

[48] The claim form and statement of claim contain the allegations against the respondents and are pleadings and not evidence. Under ***CPR 15.5***, evidence in affidavit form is required for summary judgment and there must be service on the respondent of such affidavit not less than 14 days before the date fixed for the hearing of the application.

[49] In our opinion, the appellant's non-compliance with the requirement of filing an affidavit is a procedural defect which negates the basis for the order sought.

**The Principal Issue**

[50] Notwithstanding the above, we turn now to the principal issue raised in this appeal.

[51] It is the appellant's contention that the judge fell into error in refusing to grant summary judgment for the reasons which she gave. It is therefore necessary to examine these reasons in order to resolve this issue.

[52] As set out at **para [21]** above, the judge gave three reasons for her refusal to enter summary judgment against the respondents, namely:

> "(1) there are issues which in my judgment should go to trial on the evidence;
>
> (2) the pleadings are not a nullity but are merely defective and can be cured by amendment; and
>
> (3) the court exercises its discretion under Rule 26.4 to allow for rectification of the errors."

***Reason No. 1 - There are issues which should go to trial on the evidence***

[53] Ms. Brathwaite QC submitted that the judge's decision that "there are issues which....should go to trial on the evidence" constituted an order that the parties go to trial on the issues and that can be seen as the judge granting the respondents unconditional leave to defend the action.

[54] Conversely, Mr. Gollop QC argued that there was no order of **Beckles J** giving the first respondent leave to defend in the absence of a defence and counterclaim.

[55] According to **section 54(1)(c)** of **Cap. 117A** no appeal lies to this Court from an order of a judge of the High Court giving unconditional leave to defend an action.

[56] In **Aaron Truss**, the **CCJ** held that "the decision and order of **Reifer J** constitute an order that the parties go to trial on the issue whether there is an existing right of way of Windsor's property. To that extent, the effect of the order is to give the parties unconditional leave to go to trial and ventilate the issue. **Section 54(1)(c)** of the **Act** therefore is a bar to appealing a refusal of a summary remedy on that issue."

[57] It is noteworthy that in **Aaron Truss**, pleadings were filed by both parties. The defendant filed an application for summary judgment contending that the claimant had no reasonable prospect of defending his counterclaim and the claimant filed a defence to the defendant's counterclaim.

[58] This leads us to the question whether a judge may grant unconditional leave to defend an action where the defendant has filed no defence. In our view, a defendant who has not filed a defence to a claim, nor filed affidavit evidence on which he wished to rely at the summary judgment hearing pursuant to ***CPR 15.5(2)***, cannot successfully argue that a judge has granted him unconditional leave to defend.

[59] In light of the above, we are of the opinion that the judge's decision that "there are issues which in my judgment should go to trial on the evidence" did not, nor could not, constitute an order granting the respondents unconditional leave to defend the action.

[60] A collateral issue here is whether the judge needed to have pleadings from both parties before her in order to hold that there are issues which should go to trial on the evidence.

[61] Mr. Gollop QC contended that since there was no defence filed in the action by the respondents there could be no joinder of issue and therefore no evidence disclosing that serious issues have been raised.

[62] However, Ms. Brathwaite QC submitted that there is evidence given by the appellant which raises issues to be determined at trial. She argued that although the respondent did not raise issues with certain facts, did not mean that the facts did not trigger issues which should be determined by the court. Counsel submitted by way of example that if a judge looks at all the evidence and finds that a claimant's evidence is at odds with the prevailing law, the judge can hold that a triable issue arises, notwithstanding that the issue has not been brought to the court's attention by a defendant.

[63] In all the cases cited by the judge in her discussion relating to summary judgment, it should be noted that pleadings were filed by both parties. However, in the English Court of Appeal case of **Munn v North West Water Limited and Another-All England Official Transcripts (1997-**

**2008**) the pleadings were deemed by the court to be inadequate. And, in **Lyle v Lyle (2005) Supreme Court of Jamaica No. HCV 02246/2004,** the defence was filed out of time.

[64] Nevertheless, we are of the opinion that there is no requirement that pleadings be filed by a defendant in order for a judge to find that issues have been raised which need to be determined at trial.

[65] ***CPR 15.4(1)*** provides that notice of an application for summary judgment identifying the issues to be raised must be served not less than 14 days before the date fixed for hearing the application. It follows that upon filing an application for summary judgment, issues have already been defined which will be raised at the hearing of the matter. Thus, in our view, issues arise irrespective of whether or not a defendant defends the application.

[66] Therefore, an applicant must still establish, *inter alia*, that the application is grounded in a cause of action known to the law, that the elements of the cause of action have been made out, that the evidence in support of the application adduced by the applicant in affidavit form supports the facts pleaded and ultimately that the law supports the grant of the application based on the facts and evidence. This reasoning was adopted by **Reifer J** in the case of **Homer and Homer v David Haynes HCV No. 995 of 2016**.

[67] At **para [30]** of her decision, **Beckles J** identified the issues which in her judgment required a trial on the evidence as follows:

> "Based on the information before the court thus far, it would seem to me that there are issues of fact to be determined. For example (1) what transpired on the 14th day of April, 2015 when the claimant appeared before the First Defendant, then sitting as a presiding judge in the High Court Suit 99 of 2015; (2) was the Claimant refused audience in the said matter by the First Defendant; (3) if so, was the action of the First Defendant justified, and (4) if not so justified, what are the consequences for such actions - these are but only some of the issues which arises(sic) in this matter and which in my judgment should go to trial on the evidence."

[68] In our view, there are also other issues not mentioned by the judge which are raised in this case. In the statement of claim, the appellant claims a declaration that in the events which have occurred "a decision and/or Administrative Act and/or advice and/or recommendation of the First Defendant to refuse the Claimant audience" was "...an administrative act or omission that was unauthorised and contrary to law.....". The appellant also sought an order of certiorari, an injunction and damages. Though not stated to be an application under the **Administrative Justice Act, Cap. 109B,** on the face of the claim, the language employed throughout the statement of claim is that of that Act.

[69] Therefore, of particular relevance is the question whether the appellant sued the first respondent in his judicial capacity and a consideration which would arise is a judge's civil immunity. See **Maharaj v The Attorney General of Trinidad and Tobago (1978) 30 WIR 310**. Also, if the decision of the first respondent is a judicial decision, such a decision cannot

be reviewed by another High Court judge but must be appealed in accordance with **section 52(1)** of **Cap. 117A**.

[70] However, if the appellant sued the first respondent in an administrative capacity, regard must be had to whether the summary judgment application was against the first respondent as an authority of the Crown or against the Crown per se. Thus a relevant and potentially dispositive consideration would be whether the appellant commenced the action against the proper parties.

[71] In view of the above, we are of the opinion that the judge's determination that there were issues which arose in the claim requiring resolution at trial was correct.

***Reason - 2 The pleadings are not a nullity but are merely defective and can* be *cured by amendment***

***Reason - 3 The exercise of the judge's discretion under CPR 26.4 to allow for rectification of the errors***

[72] It is convenient to deal with these reasons together.

[73] The second reason stated by the judge is that the pleadings are not a nullity but merely defective and can be cured by amendment.

[74] In our opinion, the judge acted on a misunderstanding of the facts. It is not in dispute that no defence had been filed by the first respondent in response to the claim filed by the appellant on 14 May 2015. Consequently, there could be no pleadings which required amendment. It

therefore appears that the judge either confused the factual history or wrongly considered the application filed by the respondents on 15 September 2015 to strike out the appellant's case as pleadings in the case.

[75] This misapprehension of the facts is also apparent in the judge's statement at **para [40]** that "the court can see no prejudice to the Claimant in exercising its power to amend the pleadings at this early stage of the proceedings." As a result, the judge, in our view, took into account an irrelevant consideration in arriving at her decision.

[76] In addition, the judge, having considered that the issue in the matter was whether the court should in the circumstances make an order for summary judgment, and having considered the relevant law, made an abrupt transition into a discussion on the law relating to striking out at **para [33]** of her decision.

[77] The judge proceeded to discuss ***CPR 26.3*** and this Court's decision in **Paradise Beach Limited and Paradise 88 Limited v Edgehill and Patel Civil Appeal No 15. of 2012** (**Paradise Beach Limited**) which laid down guidelines to be followed in an application for striking out a claim. The judge noted in relation to **Paradise Beach Limited** that "It was held that the master would have acted quite unjustly had he summarily struck out the claim in circumstances in which on the documents there were clearly issues to be tried."

[78] It must be pointed out that the appellant did not make an application to strike out the respondents' case, and he could not have made such an application since there can be no striking out of a non-existent statement of case under ***CPR 26.3***.

[79] Therefore, the judge took into account irrelevant considerations when she stated at **para [41]** that "to strike out the First Defendant's claim in these circumstances would be to this court, a totally disproportionate response to the errors that were made."

[80] In our opinion, the judge's discussion on the law relating to striking out was premised on an erroneous finding that pleadings had been filed by the first respondent. Accordingly, the judge misdirected herself when she held that "the pleadings are not a nullity but merely defective and can be cured by amendment."

[81] This brings us to the final reason given by the judge. At **para [38]** the judge held that:

> "Recognising that there has been a number of procedural defects both in the filing and preparation of the documents, the court finds that the complaints made by the Claimant's attorney are claims more about form rather than substance and that the failure to comply with the rules as stated above are not fatal at this stage of the proceedings and may be amended by the exercise of the court's power under Part 26 of the CPR."

[82] As was previously stated, no defence was filed by the respondents. The only documents filed on behalf of the respondents were acknowledgement of service forms and the judge could only have been referring to the

omission of the first respondent's name and personal address from the acknowledgment of service.

[83] Notwithstanding that the judge took into account irrelevant considerations, we have arrived at the conclusion that the judge's decision not to grant summary judgment was correct. The appellant's appeal should therefore be dismissed.

[84] A further matter is the respondents' application to strike out which is yet to be heard. That application challenges the jurisdiction of the High Court to hear the appellant's claim. It was filed prior to the appellant's application for summary judgment and ought properly to have been heard before the summary judgment application.

[85] The matter is now remitted to the judge for adjudication.

**DISPOSAL**

[86] In view of the foregoing, the Court makes the following orders:

1. The appeal is dismissed.
2. The matter is remitted to the judge to determine the respondents' application to strike out the claim form.
3. Each party shall bear their own costs.

Justice of Appeal

Justice of Appeal Justice of Appeal