

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Application No. 23 of 2017

BETWEEN:

TARA ALLEYNE

Intended Appellant

AND

QUEEN ELIZABETH HOSPITAL BOARD Intended Respondent

Before The Hon. Sir Marston C.D. Gibson, K.A., Chief Justice, The Hon. Kaye C. Goodridge, Justice of Appeal and The Hon. Margaret A. Reifer, Justice of Appeal (Acting)

2017: November 14

2019: April 9

**Moore Daisley in association with Mrs. Kristin Turton for the Appellant
Mr. Ivan Hugh Walters for the Respondent**

DECISION

REIFER JA (ACTING):

INTRODUCTION

[1] This is an application for leave to appeal filed pursuant to **CPR 62** against a ruling made by the Master. This followed an oral application made by the

intended appellant at the first case management hearing in this action before the Master.

- [2] The intended appellant seeks leave to appeal that decision on the basis that the Master erred in law when she failed to impose a sanction against the intended respondent for non-compliance with the **CPR** by entering judgment in default in favour of the intended appellant, pursuant to **CPR 26.3**.
- [3] Assuming the success of this application, she seeks an order “setting aside the decision of the Master dated 21 September 2017, striking out the defence of the respondent and ordering entry of judgment in default against the respondent.”
- [4] Secondly, she is seeking an order that “the costs of the application, including the costs of the appeal be the applicant/intended appellant’s in any event”.

ISSUES ARISING

- [5] The main issue arising from this application is whether this Court should grant leave to appeal. Stated differently, whether the threshold for grant of permission has been attained. There are several collateral issues arising from this application for leave which will be addressed below. The setting aside and striking out applications are dependent on this Court’s grant of leave to appeal.
- [6] The issue of costs will be addressed in any event.

[7] The chronology of events, historical and procedural, is pivotal in the determination of this matter and is set out hereunder.

FACTUAL AND PROCEDURAL BACKGROUND

[8] The intended appellant in the subject action was involved in a motor vehicle accident on 17 March 2013. As a result of the injuries received by her in this accident, she was admitted to the Queen Elizabeth Hospital for treatment.

[9] She is alleging clinical negligence by the intended respondent hospital in respect of her care, following her admission to that institution in March 2013. She has pursued legal action against that institution for personal injuries and consequential losses.

Chronology of events after filing of claim form

[10] The claim form, together with statement of claim in this matter, was filed on 2 March 2016.

[11] On 9 March 2016, the intended appellant filed an affidavit of service attesting to service of the claim form and statement of claim on 4 March 2016. It is significant that this affidavit merely deposed that service was effected by delivering the same to a representative of the intended respondent.

[12] On 22 March 2016, the intended appellant filed a request for default judgment.

[13] The records reflect that on 18 April 2016, an acknowledgement of service was filed by the intended respondent. It indicated that it was the intended

respondent's intention to defend the claim. The intended appellant's affidavit in support of her notice of application for leave to appeal records her attorney's refusal of a request by counsel for the intended respondent by letter dated 18 April 2016, to file the defence out of time, as he was still in the process of receiving instructions from the Board's insurers.

[14] On 4 May 2016 the intended respondent filed its defence to the action.

[15] At **paras [10] and [11]** of the affidavit in support of notice of application for leave to appeal filed on 4 October 2017, the intended appellant deposed to the following unchallenged sequence of events:

“10. On or about June 17, 2016, my Attorneys-at-Law inquired as to the status of the Request and were informed by a note penned by the Deputy Registrar on June 17, 2017 that:

“the Claim Form filed on March 2, 2016 Affidavit of Service states claim was served on March 4, 2016. Defendant had 28 days to file a defence (up to April 1, 2016) Request for Default Judgment filed on March 22, 2016 at which time Defendant was still entitled to file a Defence. Defence filed on May 4, 2016 another Request for Default Judgment was not filed Pls [sic] set down for CMC.”

11. My Attorneys-at-Law wrote to the Deputy Registrar by letter dated June 20, 2016 and set out the non-compliance by the Defendant and the reasons why Default judgment should be entered. A true copy of correspondence sent by my attorneys-at-law to the Deputy Registrar dated June 20, 2016 is attached as **TA 3.**”

[16] By letter dated 29 June 2016 the Registrar of the Supreme Court responded, articulating the reasons for the Deputy Registrar's refusal to grant the default judgment referred to above in the following terms:

“It should be noted that Part 5.9 of the Supreme Court (Civil Procedure) Rules, 2008 states:

“Service on a body corporate, other than a limited company may be effected:

(a) by sending the claim form by prepared post to the principal office of the body corporate; or

(b) by serving the claim form personally on any Principal Officer of the body corporate; or

(c) in any other way allowed by any enactment.

‘Principal Officer’ means the Chairman or President of the body, the Chief Executive Officer, Secretary or Treasurer or other similar officer of the body.

Therefore, proof of proper service of the said Claim Form and Statement of Claim was not established until the Acknowledgment of Service filed on April 18, 2016 was filed. As a result the Request for Default Judgment was therefore filed before proper service had been established and therefore, considered invalid.

We have therefore forwarded the said file to the Master of the High Court for her consideration.”

[17] This response was a clear reference to the intended appellant's affidavit of service which revealed that the “representative” referenced earlier was a clerk/typist in the office of the intended respondent. By her reference to **Part 5.9** the Registrar was clearly signalling that there was a concern as to whether service had been properly effected; in short, the validity of the service.

[18] Since this had not been answered by the intended appellant, the position taken by the Registrar was that service could only have been established when the

intended respondent filed its acknowledgment of service on 18 April 2016. This became the date on which the document was “deemed” to be served.

DISCUSSION

Was there proper service of the claim form and statement of claim?

[19] The governing principle is that, for there to be effective or proper service, a claimant must use one of the permitted methods of service for the purpose of serving the claim form. The normal method of service is personal service:

CPR 5.1 (1).

[20] **CPR 5.3** defines personal service as follows:

“A claim form is served personally on an individual by handing it to or leaving it with the person to be served.”

[21] The affidavit of service filed 9 March 2016 is critical to the determination of what method of service was employed by the intended appellant. **CPR 5.5** provides:

“Personal service of a claim form is to be proved by an affidavit sworn by the server stating

- (a) the date and time of the service;
- (b) the precise place or address at which it was served;
- (c) precisely how the person served was identified; and
- (d) precisely how the claim form was served.”

[22] The full text of the affidavit of service is as follows:-

“I, SYLNO O.B. YARDE, Process Server of Todds Land in the parish of St. George, in this Island MAKE OATH AND SAY as follows:-

1. On the 4th day of March 2016 at approximately 10:16 a.m, I did personally serve the Defendant with the Claim Form and Statement of Claim in this action at Martindale’s Road, in the parish of St. Michael.

2. At the time of the service the said document appeared to me to have been regularly issued out of the Registry, Law Courts, Bridgetown, Barbados against the above Respondent at the suit of the above-named Claimant which was dated the 2nd day of March 2016.

3. A copy of the Claim Form and Statement of Claim in this action was signed by a representative of the Defendant. A true copy of the executed document is now produced and shown to me and annexed hereto and marked A.”

[23] This affidavit establishes that the method chosen for service was personal service on the intended respondent. The copy of the claim form exhibited with the affidavit of service reveals that the representative of the intended respondent referred to in paragraph 3 of the affidavit was a Heather Gooding Clerk/Typist, who by her signature indicated that she had received the said document at 10:16 a.m. on 4 March 2016.

[24] The intended appellant in her statement of claim filed 2 March 2016 pleads at paragraph 2 thereof:

“2. At all relevant times the Defendant was a body corporate created under the Queen Elizabeth Hospital Act, Cap. 54 of the Laws of Barbados for the purpose of receiving patients and providing appropriate medical care.”

[25] The intended respondent in the impugned defence filed 4 May 2016 admitted paragraph 2 of the statement of claim.

[26] As set out in **CPR 5.9(b)** above, service on a body corporate, if effected by personal service, is effected “by serving the claim form personally on any principal officer of the body corporate”. In **CPR 5.9** principal officer is defined as meaning “the Chairman or President of the body, the Chief Executive Officer, Secretary or Treasurer or other similar officer of the body”.

[27] It is apparent, therefore, that the affidavit of service filed 9 March 2016 did not, as correctly observed by the Registrar, provide proof of proper service on the intended respondent, a body corporate. Service was effected on a clerk/typist on 4 March 2016. All of this is visible on the record, and defeats the argument of counsel for the intended appellant that there was no evidence before this Court that there was non-compliance with the rules of service on the part of the intended appellant.

[28] The learned authors of **Blackstone’s Civil Practice 2011** observe at **15.11**:

“Leaving the claim form with a third party who has no authority to accept it on behalf of the defendant does not amount to personal service (*Cherney v Deripaska [2007] 2 All ER (Comm) 785*). This is so even if the third party hands the documents to the defendant, unless the third party agrees to become the claimant’s agent for the purpose of effecting service of the claim form

(Kenneth Allison Ltd v A.E. Limehouse and Co [1992] 2 AC 105).”

[29] **Cherney v Deripaska** was a case about jurisdiction. It concerned the domicile and/or residence of a Russian national with extensive business interests and a home in the United Kingdom. The validity of the service under rule 6.4 of their CPR was the issue in this case. *Langley J* in the Queens Bench Division (Commercial Court) stated as follows:

“[49] The rule requires the claim form to be served by ‘leaving it with’ Mr Deripaska. Mr Hoskinson did not leave the claim form with him. He left it with Mr Lawrence to deliver it to Mr Deripaska. Despite Mr Brisby’s submission that this ‘amounted to’ leaving it with Mr Deripaska, in my judgment it plainly did not: **see Kenneth Allison Ltd v AE Limehouse & Co (a firm) [1991] 4 All ER 500, [1992] 2 AC 105.**

[51]...I do not think Mr Lawrence became an agent for service of Mr Cherney, anymore than a receptionist at an office or hotel would do so in similar circumstances. He was not asked to act as such an agent; nor did he consent so to do... The most he agreed to do was to hand the envelope to Mr Deripaska.

[52]... The submission that Mr Lawrence had apparent authority to accept service for Mr Deripaska is, if anything even more fanciful. Mr Deripaska made no relevant representation to Mr Hoskinson. At the highest he allowed Mr Lawrence to stand on the steps of 5, Belgrave Square and to enter the house. In my judgment that does not begin to establish any case of agency.”

In this case, the person on whom the document was served, Mr. Lawrence, was a security guard working at the defendant’s premises.

[30] **Kenneth Allison Ltd et al v A.E. Limehouse & Co (a firm) [1992]** (**Kenneth Allison Ltd et al**) was a pre-CPR case in which the issue for determination was whether a writ was validly served in accordance with the

Rules of the Supreme Court. The plaintiffs issued a writ against the defendant partnership and sought to serve it at its principal place of business. A personal assistant, acting on the instruction of one of the partners who was in another part of the premises, agreed to accept service and signed the appropriate form in acknowledgement. The defendants applied to set aside such service for failure to comply with RSC, Order 10, r. 1 and Order 81, r. 31.

[31] On appeal to the House of Lords, it was held that personal service required the handing of the document to the person to be served or telling him what it contained and leaving it with or near him; and that, therefore, the plaintiffs' writ had not been served personally on the defendants in accordance with the provisions of the RSC. However, the parties can agree on a mode of service outside its provisions, and accordingly, the service of the plaintiffs' writ on the partners' personal assistant with the partners' express authorisation had constituted valid service.

[32] It is our view, that **CPR** has not changed the long standing principles on service of process. In short, pre-**CPR** and post-**CPR** authorities are equally relevant.

[33] On this authority, the affidavit of service of 4 March 2016 was insufficient because it should have stated that the claimant 'personally served' the Principal Officer, or Chairman or President or Chief Executive Officer or

Secretary, or Treasurer or other similar officer, such as, perhaps, the Legal Officer; and, it did not. The word ‘perhaps’ is used because it is not presently known whether in the context of this corporation’s hierarchy, the Legal Officer is a “similar officer” of the same genus as the Principal Officer, Chairman, President, Chief Executive Officer, Secretary or Treasurer. Failing this, it should have deposed to the factual basis of the clerk/typist’s authority to accept service.

[34] There is no evidence in the affidavit of service indicating that the parties, prior to service, agreed to a mode of service outside the provisions of **CPR**. In other words, that one of the persons to be served in accordance with **CPR 5.9** had authorised a clerk/typist to accept service on his or her behalf, as was the case in **Kenneth Allison Ltd et al (supra)**.

[35] In light of the foregoing, it is our judgment that there was no proper service of the claim form and statement of claim on the intended respondent.

[36] Having decided that there was no proper service, we now look at the effect of improper service.

What is the effect of an improper service on timelines for acknowledgment of service and filing of defence?

[37] The precise time of service or deemed service is of fundamental importance in the civil litigation process, because this is the point of reference for

calculating time for all subsequent steps in the litigation process or stated differently, the start time for calculating the period for responding to the claim. In fact, as occurred in the matter at hand, it became critical to a determination of the appropriate time limits for the filing of the acknowledgment of service and the defence in this action. And ultimately, of fundamental importance in a determination as to whether the requisite conditions for an application and grant of default judgment had been met.

[38] The core of the intended appellant's argument rested on the assumption of proper service, since from the time of such service a defendant has 14 days pursuant to **CPR 9.3** to respond to the claim failing which the claimant may seek a judgment in default of defence. **CPR 10.3** provides that the period for filing a defence is the period of 28 days after the date of service of the claim form and statement of claim. *David Di Mambro* in the text *The Caribbean Civil Court Practice 2011*(2nd edi, London: Lexis Nexis, 2011) 104 describes this process as affording a defendant who wishes to contest any part of a claim, two options as follows:-

“(1) if he is able to and so wishes, he can file his defence within the time specified in CPR 9.3 (the time specified for filing an acknowledgment of service; generally 14 days after the date of service of the claim form); if he does file a defence within that period then he need not also file an acknowledgment of service (CPR 9.2 (4)); or

(2) he may simply file an acknowledgment of service within the time specified in CPR 9.3; if he takes that course he will still have

to file a defence and he must do so within the period specified in CPR 10.3”.

- [39] Most importantly, this issue, as expressed by the Master in her decision, impacted on the question of her jurisdiction.
- [40] Where a claim is not duly served on a defendant, but he acknowledges service of it, the claim is deemed to have been duly served on him and to have been so served on the date on which he acknowledged service.
- [41] The purpose of the function of deemed date of service is to compute with certainty the next steps to be taken in the claim.
- [42] **CPR 5.19** speaks directly to this under the heading ‘Deemed date of service’ as follows:

“(3) Where an acknowledgment of service or a defence is filed, whether or not the claim form has been duly served, the claimant may

(a) if he so wishes, treat the date of the filing of the acknowledgment of service or defence as the date of service; or

(b) if either of those documents, that is the acknowledgment of service or the defence, acknowledge some earlier date as the date of service, treat that earlier date as the date of service.

(4) A claimant may file evidence by affidavit to prove that service was effected on a date earlier than a date on which, by these Rules, it is deemed to have been effected.”

- [43] It is evident, therefore, that while there might not have been personal service as alleged by the intended appellant, service was “deemed” to have been effected by the filing of the acknowledgment of service.

What is the effect of the intended respondent's failure to notify the intended appellant's attorneys of the filing of the acknowledgement of service.

[44] Failure to comply with **CPR 9.4**, that is, failure to notify the claimant's attorney of the filing of an acknowledgment of service, does not entitle the claimant to the automatic sanction of a default judgment. **CPR 26.4** speaks directly to this in the following terms:

“(2) An error of procedure or failure to comply with a rule, practice direction or court direction does not invalidate any step taken in the proceeding unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to rectify the error or failure.

(4) The court may make such an order on or without an application by a party.”

[45] The settled jurisprudence which had emerged from this Court's decisions in **Victorine Patricia Garvey v Peter Athelston Wilkinson [unreported] C.A. B'dos Civil Appeal No. 7 of 2011; decision 29 April 2015** and **Joseph Tudor et al v Bank of Nova Scotia [unreported] B'dos Court of Appeal Civil Appeal No. 5 of 2016; decision 13 June 2018** is that in managing cases post-CPR, courts should take a tough robust approach to compliance with rules, practice directions and orders and should be less willing to permit laxity or to tolerate or forgive non-compliance than it did in the pre-CPR times. This approach must always be cognizant of the overriding objective.

[46] The current principles guiding the courts in the United Kingdom are described by the learned authors *O’Hare and Browne: Civil Litigation 18th edition* as follows at 32-002:

“The current principles guiding the court when enforcing compliance with rules, practice directions and orders are known as the *Denton* principles. The court has to consider the seriousness of the conduct complained of, the causes of it, and all the circumstances of the case. This three-stage test was first developed in the context of applications for relief from sanctions but is also applied, directly or indirectly, in many other contexts including applications for extensions of time, strike out applications and applications to set aside default judgments. The *Denton* principles can apply to any case”.

[47] The learned authors further suggest that in determining how to deal with non-compliance it is appropriate for the court to take into account the strength or weakness of the non-complying party’s case.

[48] This takes us to the application for default judgment.

[49] The philosophical ethos underpinning the rules of service is based on fairness. It buttresses the fundamental principle that no person should be made liable to an order of the court unless he had been given fair notice of the proceedings sufficient to enable him to appear and defend them. It reflects a basic repugnance for the concept of holding a party bound to the results of proceedings of which he had no notice and in which he had no opportunity to participate. It is often emphasised that one of the guiding principles of this new regime of civil process is that trial should no longer be by ambush.

[50] As always, there are balancing considerations applied to this principle to ensure fairness to both sides. One such example is the power vested in the court to proceed and deliver judgment in the absence of a party. Another example, is the power to apply to set aside such judgment.

[51] It is against this background that we look at the provisions for default judgments to be found in **CPR** and the importance of service to this exercise.

[52] The relevant provision is to be found at **CPR 12.4 (a)** and **(b)** under the rubric **“Conditions to be satisfied to obtain judgment for failure to file acknowledgment of service”**, and reads as follows:

“The Registrar may, at the request of the claimant enter judgment for failure to file an acknowledgment of service where

- (a) the claimant proves service of the claim form and statement of claim;
- (b) the period for filing an acknowledgment of service has expired...”

[53] In summary, a claimant may obtain a default judgment if the defendant has not filed an acknowledgement of service or a defence to the claim and the relevant time for doing so has expired.

[54] **Part 12.5** which enumerates the **“Conditions to be satisfied to obtain judgment for failure to defend”** is in similar terms, the starting point in each case being proof of service.

Was the Registrar’s interpretation of the rules resulting in her refusing the application for default judgment the right one?

[55] The Registrar acted appropriately when she rightly concluded that the application for a default judgment was premature. It was evident to her and to this Court, that at the time of the said application, the issue of valid service, the burden of which rests on the intended appellant, had not been satisfied. In other words, it had not been proven that there was good and effective service.

[56] It was open to the intended appellant when counsel read the note on the file, and later received the written confirmation of this from the Registrar, to file an affidavit proving valid service. Or, as was done by the Registrar, determine the date of deemed service from the acknowledgment of service and thereafter, file a renewed application for default judgment.

[57] The position of counsel for the intended appellant on the issue of service is clearly expressed at paragraph 18 of her written submissions filed 19

January 2017 as follows:

“With respect to the allegation that proper service had not been effected, it is submitted that the agent and/or servant and/or employee of the Defendant board, is and authorized to accept service of documents, and as such the receipt and acceptance of the claim form and statement of claim by the agent and/or servant and/or employee of the Defendant board waived any possible objection which could be raised by the Defendant.”

[58] However, the issue here is whether the affidavit of service satisfied the Registrar that there had been good and effective service, thus enabling her to be assured that **CPR 12.4** had been satisfied.

[59] It is against the backdrop of the foregoing that we turn next to the Master's decision.

THE MASTER'S DECISION

[60] On 2 March 2017 an oral application was made to the Master at a case management conference. There is some lack of clarity as to the exact wording of the application. This Court will review the Master's decision and what can be discerned from that document.

[61] As outlined in paragraph 3 of the Master's decision, the application was for a judgment in default to be entered against the intended respondent for its failure to file and serve its acknowledgment of service pursuant to **CPR 12.4**.

[62] Counsel for the intended respondent in his written submissions to the said application filed 2 February 2017 characterised the application as one for default judgment made on three occasions, twice to the Registrar which was rejected, and once, to the Master. Counsel interpreted the application as an appeal of the Registrar's rejection of the intended appellant's application for a default judgment.

[63] On the other hand, counsel for the intended appellant in her written submissions to the Master filed 19 January 2017 prefaced her submissions with the following introductory statement:

“These are submissions on the part of the Claimant on the law relevant to Part 12.4 of the Supreme Court (Civil Procedure)

Rules, 2008, and the request for default judgment filed by the Claimant in default of the Defendant filing and serving its Acknowledgement of Service.”

[64] The Master in her decision outlined the parties’ arguments: The intended appellant’s arguments were grounded primarily in **CPR 12.4**, alleging a failure of the intended respondent to file and serve its acknowledgement of service. Counsel for the intended appellant argued on the basis of **CPR 9** that the Registrar was required to enter judgment in default. She denied that proper service had been effected, but submitted that in such a case the proper procedure was set out in **CPR 5.13**.

[65] Counsel for the intended respondent argued that the intended appellant had not satisfied the conditions for a default judgment as the defendant still had two or three days to file when the Deputy Registrar rejected the application. He submitted that the defence filed shows an arguable case with a real prospect of success and it would be disproportionate and not in keeping with the overriding objective, to enter judgment in default against the defendant in these circumstances. Counsel made the point that **CPR 9.3 (3)** allowed the filing of an acknowledgement of service anytime before a request for judgment in default was received in the Registry and, in any event, an entry of judgment in default is discretionary. He argued further that the Master has no jurisdiction to hear an appeal of a decision of the Registrar.

[66] The Master having reviewed the circumstances concluded that the application made to her was in effect a review of the administrative act or decision of the Registrar which had denied the request to enter judgment for failure by the defendant to file an acknowledgment of service. The Master focused on the jurisdiction issue and examined the source of her jurisdiction under **sections 69 and 82 of the Supreme Court of Judicature Act, Cap 117A (Cap 117A)** and **Rule 16A (4) of the Rules of the Supreme Court (Amendment) Rules, 2007.**

[67] Certain critical findings flowed from this examination and analysis, namely: (i) that the Registrar is the only functionary under **CPR 12** authorised to exercise the discretion to enter judgment for failure to file an acknowledgment of service where the relevant conditions are satisfied; (ii) that pursuant to **section 72 Cap 117A**, an appeal from the Registrar is to the High Court or this Court. The Master, being a creature of statute with no appellate jurisdiction, has no jurisdiction to hear appeals from the Registrar. In fact, the clear inference is that the right to appeal is excluded.

[68] The Master expressed the view that the entry of a default judgment is a purely administrative act. Further, if the applicant was aggrieved by the failure of the Registrar to enter a default judgment, recourse should have been by way of judicial review under the **Administrative Justice Act Cap. 109B.**

DISCUSSION

The Appellate Approach to Interim Decisions: Appeals against Case Management Decisions of the Master

[69] The appellate approach to interim decisions, such as the subject of this appeal, is one of review. It consists of a scrutiny of the lower court's decision and not a fresh determination of the issues. As long as the decision cannot be said to be clearly, blatantly or plainly wrong, an appeal court will defer to it even though it would have dealt differently with the matter.

[70] Counsel for the intended appellant submitted on the authority of **Tanfern Ltd v Cameron-MacDonald [2000] 1 WLR 1311** and **G v G (Minors Custody Appeal) [1985] 1 WLR 647** and **Alltrans Express Ltd v CVA Holdings Ltd [1984] 1 WLR 394** that the appeal will be allowed only if the decision of the lower court was wrong, or where it was unjust because of a serious procedural or other irregularity in the proceedings.

[71] In this regard, there is a plurality of legal precedent to be found in the decisions of this Court. For example, **Locke v Bellingdon Limited et al Civil Appeals No. 31 and 34 of 2001 [unreported]**; **Toojay's Limited v Westhaven Limited Civil Appeal No. 14 of 2008 [unreported] decision 16 September 2011**; and **Cellate Caribbean Limited et al v Harlequin Property (SVG)**

Limited Civil Appeal No. 3 of 2011 [unreported] decision 23 October 2013

are but a few.

The Application for Leave

[72] As earlier stated, the primary issue for adjudication is whether this Court should grant leave to appeal. In that regard, this Court must consider against the background outlined above, whether the intended appellant has a real prospect of succeeding in this appeal, by persuading the court that the Master's exercise of her discretion "was clearly and/or blatantly wrong".

[73] This approach and what is meant by "real prospect" is discussed at length by this Court in **Financial Services Commission and BIPA Incorporated v British American Insurance Company (Barbados) Limited Civil Appeal No.4 of 2012 (BIPA)** where **Burgess JA** outlined the template for the handling of applications such as this in the following terms:

"[9] That said, the basis criteria which must guide me in determining whether or not to grant leave to appeal a decision of a lower court are not spelt out in our **CPR**. This notwithstanding, it seems to be accepted practice in this court that the basic threshold which must be met in order to obtain leave of this court ... is that BIPA's intended appeal has a realistic prospect of success: As to this, see the authoritative Caribbean Civil Court Practice 2011 at pg 389 and Barrow JA in the St. Vincent and the Grenadines Court of Appeal case of *Sylvester v. Faelleseje, A Danish Foundation*, St. Vincent and the Grenadines Civil Appeal No. 5 of 2005 at para [1]."

[74] Real prospect, as addressed by this Court in the words of **Burgess JA**, is defined as follows:

“... that there is more than a fanciful prospect of it persuading the Court of Appeal to depart from that court’s entrenched principle of non-interference with the judicial exercise of a trial court’s discretion unless such exercise is “clearly or blatantly” or “plainly wrong”.

[75] This mimics the standard established by Lord Woolf in **Swain v Hillman [2001] 1 All ER 91**, a case usually touted as the *locus classicus* in applications for summary judgment under **CPR**, as is **Three Rivers District Council v Bank of England (No. 3) [2001] UKHL 16, [2003] 2 A C 1**.

[76] At **para [12]**, **Burgess JA** outlines the two-step process to be followed by courts of appeal on receiving an application for leave to appeal, in the following terms:

“[12] In light of the foregoing, two fundamental issues arise for determination by this court in deciding whether or not leave to appeal ought to be granted to BIPA. The first is whether the intended appeal has a realistic prospect in showing **Beckles J. Ag** to have been clearly, blatantly and plainly wrong in the exercise of her discretion. If the answer to this is no, then the second is whether there are compelling reasons why the appeal should nevertheless be heard”.

[77] We turn next to a consideration of the intended appellant’s grounds of appeal.

THE GROUNDS OF APPEAL

[78] The intended appellant’s grounds of the application are articulated in the Notice of Application for leave to appeal as follows:

“[5] The grounds of the proposed appeal are set out as follows and in the attached proposed Notice of Appeal:

- a. The learned Master erred in fact by finding that the Claimant’s Application at the Case Management Conference was to review the decision of the Deputy Registrar/Registrar who refused the Claimant’s request to enter judgment for failure to file an acknowledgment of service, rather than an application pursuant to the Court’s powers under Parts 26.2 and 26.3 to strike out a matter for non-compliance with a rule or order.
- b. The learned Master erred in law by failing to exercise the court’s discretion to strike out the Statement of Case of the Respondent filed on May 4, 2016 in view of the fact that the Statement of Case had been filed in breach of Part 9.1 (2) (a) or (b) or Part 9.4.
- c. The learned Master erred in law and fact, by referring to the amendment of the Rules of the Supreme Court (Amendment) Rules, 2007 and specifically Rule 16 A(4) which had been revoked by Part 74.2 of the Supreme Court (Civil Procedure), Rules, 2008.
- d. The learned Master erred in law and fact, in taking into consideration extraneous facts relevant to the application for sanction pursuant to Part 26.3(2).
- e. The learned Master erred in law by finding that the Court was not authorised to enter judgment in default in view of the powers provided pursuant to Part 26.3(2): See para 31 of the decision.
- f. The learned Master erred in law in failing to impose any sanction against the Defendant for its failure to comply with the provisions of Part 9 and Part 10.
- g. The learned Master erred in law in making a determination that unreasonably limited her jurisdiction in the circumstances.

6. In light of the foregoing, the Applicant/Intended Appellant has a real prospect of succeeding in this Appeal.”

The Submissions

[79] Counsel for the intended appellant argued against the backdrop of the above articulated grounds that there is a real prospect of success.

[80] Counsel argued that the failure of the Master to exercise the discretion vested in her at case management was “clearly and/or blatantly wrong”. The intended appellant remained true to the grounds as enumerated in her notice of appeal which in essence was the alleged failure of the Master to exercise her powers under **CPR 26.2** and **26.3**.

[81] While agreeing that the actions of the Registrar were purely administrative, and that the Master has no jurisdiction to hear appeals from the Registrar, the kernel of counsel’s argument could be found in this extract from the transcript of proceedings:

“The jurisdiction that we were asking the Master to exercise was a judicial function. That she is empowered under Part 2.4, 26 the entirety of the Rules to exercise. We say that she unreasonably circumscribed herself by saying that because another judicial officer dealt with it in one aspect of the Rules, I do not have to deal with it. She unreasonably fettered her authority, she ignored the power that has been invested in her to manage the cases appropriately. Even if she had come to the determination that administratively the Registrar had dealt with it, it was still incumbent on her to say judicially that is what ought to have happened”.

[82] Counsel for the intended respondent made the following arguments *inter alia*, in reply: (i) he argued, that the combined effect of **CPR 9.3(1)** and **(3)** is that an acknowledgement of service may be filed outside of 14 days since there was no proper request for default judgment before the Registrar; (ii) that pursuant to **CPR 12.4(b)**, the filing of the defence would prevent the claimant from obtaining judgment in default provided that the defence discloses substantial grounds for challenging the claim; and, (iii) the intended appellant's application constitutes the third attempt to appeal the Registrar's administrative decision.

[83] In a further submission, counsel for the intended respondent argued that in order to invoke the jurisdiction of the Master for sanction under **CPR 26**, there must be a formal application on notice before the Master. Counsel relied on **CPR 26.3 (1) (2) and (3)** and **Michael Laudat v Danny Ambo [2010] EC SC J1215-4, Civil Appeal H C VAP 2010/016, decision delivered December 15, 2010** and **Grace Kennedy Remittance Services Limited v Paymaster (Jamaica) Limited (SCCA No. 5/2009 judgment delivered 2 July 2009)** as supporting authority.

CONCLUSIONS

[84] It is our view that there is no arguable case or triable issues in this appeal, and no realistic prospect of success, for the following reasons:

- (i) As outlined above in the discussion on proper and valid service, this Court is of the view that the Registrar acted in keeping with the requirements of **CPR** when administratively refusing the application for default judgment as the intended appellant had failed to prove proper/valid service of the claim form as required by **CPR 12.4(a)**. There was therefore no consideration at that time of whether judgment in default could have or should have been granted because it was impossible, owing to the claimant's default, to determine the date by which the time for filing the acknowledgment of service had expired.
- (ii) Counsel for the intended appellant having agreed with the submission of law that the Master has no power or authority to review an administrative decision of the Registrar, by making such application to the Master was subverting the law and to that extent was guilty of an abuse of process. This view is re-inforced by counsel's repeated submissions to this Court in the following terms:
- “Yes, we agree with that finding but what we are submitting is that the fact that she doesn't have the power to review a decision of the Registrar, does not take away the power that she does have to address the breach that took place. The Registrar has a power under Part 12 but that doesn't mean that a failure to comply with Part 9 is not a breach and that it is not the type of breach that she has the power to address and to sanction for. We are arguing that she does have that power, and that she did not rule on that issue even though it was raised”.
- (iii) There can be no consideration of a breach of **CPR 9.4** and **10**, if **CPR 5**, the foundation stone, has not been laid. Despite the phrasing of the application to the Master, it was guided by the intended appellant's belief that the Registrar wrongly refused to grant the default judgment, and was intended to right that wrong.
- (iv) The Master did in fact err in law by referring to and applying **Rule 16A(4)** of the **Supreme Court (Amendment) Rules 2007**, which had been revoked by

Part 74.2 of the Supreme Court (Civil Procedure) Rules 2008. In the opinion of this Court, the error of the Master is not determinative of this application or the ultimate conclusion reached by the Master.

- (v) Whilst striking out is one of the powers of the Master under **CPR 26.3** and is the ultimate sanction, it is not applicable in these circumstances.
- (vi) In answering the intended appellant's question as to whether the Master answered what was asked of her, the only answer must be that the question ought not to have been asked. That being said, the Master did not ignore the non-compliance of the intended respondent and did, however, answer the question. This bears repetition: a consideration of **CPR 9.4** and **10** was unmerited without a consideration of **CPR 5** in the circumstances of this case.
- (vii) We do not consider it necessary to address the issue raised as to the failure of Master to exercise her discretion under **CPR 26.3**. In any event this Court has on numerous occasions iterated the appellate function in an appeal against the exercise of its discretion by a lower court: See **para [72]**.
- (viii) Notwithstanding the above, the intended respondent is in breach of the timeline requirements of **CPR**. Having cured the flawed service of the intended appellant, the intended respondent's acknowledgment of service and defence were filed out of time.

[85] On a consideration of the second step referred to in **BIPA**, there is no compelling reason for this appeal to be heard despite the fact that the intended appeal is unlikely to succeed. There are no questions of great public interest and importance nor of general policy.

DISPOSAL

[86] In light of the foregoing, the application for leave to appeal is dismissed.

[87] Both parties shall bear their own costs.

Chief Justice

Justice of Appeal

Justice of Appeal (Ag.)