**JAMAICA**

**IN THE COURT OF APPEAL**

**APPLICATION NO COA2019APP00010**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MISS JUSTICE P WILLIAMS JA**
**THE HON MISS JUSTICE SIMMONS JA (AG)**

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| **BETWEEN** | **SHARON BARTLEY** | **1ST** | **APPLICANT** |
| **AND** | **DIANA RAHMING** | **2ND** | **APPLICANT** |
| **AND** | **SANDRA BARTLEY** | **3RD** | **APPLICANT** |
| **AND** | **PHILLIPA ELOI** | **4TH** | **APPLICANT** |
| **AND** | **FAITHLYN JOHNSON** | **5TH** | **APPLICANT** |
| **AND** | **SILVER SANDS COTTAGE OWNERS ASSOCIATION LIMITED** | | **RESPONDENT** |

**Miss Coleasia Edmondson instructed by Earle and Wilson for the applicants**

**Miss Kashina Moore instructed by Nigel Jones and Company for the respondent**

**25, 29 November 2019 and 14 February 2020**

**F WILLIAMS JA**

[1] I have read in draft the reasons for judgment of my sister P Williams JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

**P WILLIAMS JA**

[2] In this application, the applicants by way of an amended notice of application filed 9 May 2019, seek, inter alia, the following orders:

> "1. That there be a stay of proceedings;
>
> 2. Permission be given to appeal against the decision/order delivered by Miss Rosemarie Harris, Master-in-Chambers on the 19 June 2018;
>
> 3. That the time for filing the notice of application for permission to appeal and for stay of execution is extended."

They seek to appeal the refusal of the learned Master of their application to set aside a default judgment that had been entered against them on 3 March 2016 due to their failure to file and serve an acknowledgment of service.

[3] After hearing and considering the submissions in this matter, on 29 November 2019, we refused the application and awarded costs to the respondents to be agreed or taxed. At the time of the announcement of our decision, we gave a brief summary of our reasons, with a promise to reduce to writing the full reasons. This is a fulfilment of that promise.

[4] This was not the applicants' first attempt to make this application for permission to appeal. On 26 June 2018, they filed a notice of application for court orders in the Supreme Court seeking it. This application was heard and refused by K Anderson J on 5 December 2018. The applicants then filed a notice of application in this court on 15 January 2019 for permission to appeal against that decision of K Anderson J.

[5] In their submissions to this court, the applicants first addressed their application for an extension of time for the filing of the application for permission to appeal. I propose to consider that application first, recognising that the outcome of that application will be determinative of whether the permission to appeal ought to be granted.

**The application for extension of time**

[6] The applicants are required to address four main issues in their application for extension of time:

a) The length of the delay.

b) The reason for the delay.

c) The merits of the appeal.

d) The degree of prejudice to the other parties if time is extended.

**The length of the delay**

[7] The applicants submitted that the application for permission to appeal should have been filed on 19 December 2018, which would have been within 14 days of the order of K Anderson J. They contended that the application that was filed on 15 January 2019 "was filed approximately three weeks out of time". It was their submission, that "this delay of approximately four weeks when compared (to other cases) was by no means inordinate and/or excessive". While acknowledging that the amended application for extension of time and permission to appeal the decision of the Master was eventually

filed on 9 May 2019, they did not factor this period into their calculations of the length of the delay.

[8] The respondent countered that the applicants had miscalculated and the period for the calculation of the delay ought properly to be from 19 June 2018, the date of the learned Master's order. It therefore means that the application for permission to appeal and for an extension of time was 11 months late.

[9] The parties recognised that this is a matter for which permission is required to appeal pursuant to section 11 of the Judicature (Appellate Jurisdiction) Act, it being an interlocutory order. Hence the following rules 1.8(1) and 1.8(2) of the Court Appeal Rules ('the CAR') become applicable:

> "(1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought.
>
> (2) Where the application for permission may be made to either court, the application must first be made to the court below."

[10] In an early decision from this court after the coming into force of these rules, **Evanscourt Estate Company Ltd v National Commercial Bank** (unreported) Court of Appeal, Jamaica Supreme Court Civil Appeal No 109/2007, Application No 166/2007, judgment delivered 26 September 2008, Smith JA interpreted this rule as follows, at page 6:

> "…It seems clear to me that the application to this court for permission must be made in writing and within (14) days of

> the order appealed. The fact that the application to the court below was made within the prescribed time does not remove the time limitation in respect of an application to this court."

[11] This interpretation has been approved and followed by this court in several matters and has been expanded to urge that an applicant who applies in the court below must also, out of an abundance of caution, file a separate application in this court at the same time. See **Attorney General of Jamaica v John McKay** [2011] JMCA App 26, **Garbage Disposal and Sanitations Systems Ltd v Noel Green et al** [2017] JMCA App 2 and **Westmoreland Parish Council et al v Errol Bacchas** [2017] JMCA App 12.

[12] The respondent's calculation of the length of the delay, which was based on the interpretation as restated by Phillips JA in **Attorney General v John McKay**, is therefore correct. The delay was not approximately four weeks as the applicants submitted. The first flaw in their calculation is that they were wrong in believing that they were required to apply for permission within 14 days of the refusal of K Anderson J.

[13] It is pellucid that the decision they sought to appeal was that of the learned Master made on 19 June 2018 and they had 14 days from that date within which to seek permission to appeal so in effect their amended application for permission to appeal made on 9 May 2019, was 11 months late.

[14] In **Westmoreland Parish Council v Bacchas**, Brooks JA, writing on behalf of the court, stated at paragraph [25]:

> "Undoubtedly, if the application had been made in good time in the court below, and were refused there, this court would be more inclined to entertain an application that was promptly filed in this court after the refusal in the court below."

[15] The applicants could therefore stand to benefit from this position. Their application to this court filed on 15 January 2019 to appeal the refusal by K Anderson J on 5 December 2018, was not made promptly. Their explanation for the error in seeking to appeal the decision of K Anderson J was that "due to a clerical error the said application erroneously stated it was an appeal from the learned Judge and not the learned Master". The amended notice of application seeking to appeal the decision of the learned Master was made five months later. The delay overall, in these circumstances does appear to be inordinate.

[16] It is of course accepted that the length of the delay is not the only factor that determines the application for an extension of time. The next matter to be considered is the reason for the delay.

**The reason for the delay**

[17] The applicants' explanation for the delay was that they reside overseas and had to discuss it amongst themselves before instructing their attorney to proceed. This was the explanation offered for the erroneous assumption that there was an approximately four-week delay. Nothing has been advanced to explain the entire period of delay from the date of the order against which they were seeking to appeal.

[18] It is to be noted that the initial application for leave to appeal the decision of the learned Master was filed on 26 June 2018, in an appropriately timely manner. It is safe to assume that at that time the applicants would have instructed their attorney-at-law to continue in their desire to have the default judgment set aside, hence the appeal of the learned Master's decision. They clearly would have not obtained what they were seeking in the refusal by K Anderson J. It therefore means that, being desirous of having the default judgment set aside, the applicants would have taken what amounted to approximately six weeks to have further discussions to instruct their attorney to proceed.

[19] It is also to be noted that in the submissions about the delay there has been a failure to factor in the period that elapsed because of the fact that the application was made to appeal the wrong decision. The explanation that there was a "clerical error" is all that has been proffered. Given that the focus of the submissions on the delay was an attempt to explain a delay of four weeks suggests that, the applicant's attorneys-at–law have not appreciated their role in and contribution to the overall delay.

[20] Generally, the court does not distinguish between the litigant and his attorney-at law (see **Hytec Information Systems Ltd v Coventry City Council** [1997] 1 WLR 1666 at page 1675). However, the court is also loath to see a litigant suffer because of the errors and failures of their attorney-at–law (see **Salter Rex v Ghosh** [1971] 2 All ER 865 at page 866).

[21] In **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, Phillips JA made this comment on the matter at paragraph [30]:

> "The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys errors made inadvertently, which the court must review. In the interest of justice, and based on the overriding objective, the peculiar facts of a particular case and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended."

[22] It is in recognition of the need to step in and protect the applicants that the errors of the attorneys-at-law in filing an application for permission to appeal the wrong decision will not be visited on the applicants themselves. However, in the circumstances, the fact that it took a further five months to recognise the error and seek to correct it cannot be ignored. I am not satisfied that the limited explanation offered for the delay can be regarded as a good one.

[23] I am however bound to recognise that even though the excuse for a lengthy delay is not a good one, I am not obliged to refuse the application on that basis. I will now consider the merits of the appeal.

**The merits of the appeal**

**Background to the application to the Master**

[24] A brief outline of the background to the application before the learned Master is appropriate.The claim, filed by the respondent on 1 December 2015 in the court below, was for sums they asserted were due and owing to them by the applicants. The amounts due and owing were set out in a statement of accounts in the particulars of claim attached to the claim.

[25] In its particulars of claim, the respondent asserted that it is responsible for the management and maintenance of the common areas at Silver Sands, a gated community development situated in the parish of Trelawny. The applicants are registered owners of a lot, which is part of Silver Sands, having been registered as proprietors of the said lot on or about 2 July 2004. The property services to be provided by the respondent included streetlights; street light electricity; security; beach maintenance; lifeguards wages; clubhouse furniture and fittings; refuse disposal; gardening and road maintenance.

[26] The respondent further asserted that the applicants acquired the lot with the understanding that they would be required to pay assessments for property services provided in relation to the maintenance of the common area. The applicants were accordingly given invoices for the assessments relating to their lot.

[27] The respondent stated that up until June 2008, the applicants regularly paid, in whole or in part, the invoices presented for property services. However, since that time the applicants failed to settle their invoices in full and were in substantial debt to the respondent.

[28] On 17 February 2016, Mr Lenworth Dudley filed an affidavit of service asserting that, acting on the instructions of the respondent's attorney-at-law, he served the claim form, notice to the defendant, prescribed notes, acknowledgment of service and other documents on the applicants' attorney-at-law at his office on 11 February 2016. He said a Miss Maxine Spencer, the legal assistant for the attorney-at-law, accepted the

documents. He also asserted that Miss Spencer identified herself as the legal assistant for the attorney-at-law.

[29] On 3 March 2016, the respondent obtained a judgment in default of acknowledgment of service for the total sum of $ 2,815,233.73 with an interest rate at 6% per annum from the date of judgment to payment.

**The application to set aside the default judgment and for leave to file acknowledgment of service and defence out of time**

[30] The applicants filed this application on 31 July 2017. In it they stated that the grounds upon which the application was being made were as follows: -

> "i. The Defendants have a proper defence to the action\claim brought against them in that:
>
> a. No agreement exists between the Defendants and the Claimant;
>
> b. The Claim Form was not served pursuant to the Civil Procedure Rules;
>
> c. The Claim Form was purportedly served on the previous Attorney;
>
> d. The Claim Form was not served at the previous Attorney's office which is 35 Windsor Road, St Ann's Bay in the parish of Saint Ann and not 71 Duke Street Kingston;
>
> e. The previous Attorney did not certify that he accepted service of the Claim Form;
>
> f. The previous Attorney was not given instructions to accept service of the Claim Form on behalf of the Defendants;
>
> g. The Defendants were not made aware of the default judgement entered against them until

June 29, 2017 upon obtaining the Court documents from the Supreme Court's Registry;

h. The application is being made as soon as is reasonably practicable;

ii. The granting of the order would not be prejudicial to the Claimant;

iii. It is fair and just to make the order."

[31] One of the registered proprietors, Faithlyn Johnson, filed an affidavit in support of the application. She asserted that the property was held in joint tenancy among herself, her siblings and their parents, who at the time of filing were deceased. She stated that the surviving joint tenants consented to her acting on their behalf in making the application.

[32] Miss Johnson asserted that upon entering into possession of the property, the respondent invited them to join the association but they had never done so. She stated that it was their "elderly parents" who had "continued to pay monthly dues as they assumed it was an obligation". She asserted further that it was not until 2014 that they received notice to attend an Annual General Meeting and started getting annual budget reports and other reports.

[33] Miss Johnson asserted that the villa was not secured and multiple requests were made to the respondent to install fencing or walls to improve the security features of the property. She described several break-ins and burglaries that occurred on their premises in 2004, 2009 and 2016. Numerous reports were made concerning the break-ins to the respondent but nothing was done to address the concerns. She stated that the applicants

themselves placed a wall and fence with electronic gate around the property that cost approximately $1,500,000.00.

[34] Miss Johnson asserted that they "paid maintenance for a number of years but decided to stop as they were not benefitting from the services to which they were entitled". She also complained that the maintenance charges were excessive as the property was listed as a five-bedroom unit when it was a four-bedroom villa.

[35] Miss Johnson acknowledged that a caveat was lodged against the property forbidding any dealing with the land without first notifying the respondent. She asserted that they retained an attorney-at-law, Mr Kristopher Nathan, to represent them in having the caveat removed.

[36] Miss Johnson asserted that the applicants were never served with any originating documents for the claim. She however exhibited a letter dated 2 February 2016 in which the attorney-at-law, Mr Nathan, had indicated to the respondent's attorney-at-law that he was authorised to accept service on her behalf. She said she "did not recall authorizing" him to accept service on her behalf.

[37] She further asserted that she was not advised that a suit was being brought against her. However, she said that Mr Nathan had advised her that a "counter claim was being brought against [her] and made some reference to the outstanding fees resulting in the lodging of the caveat". She accepted that her previous attorney-at-law, Mr Nathan, did not file an acknowledgement of service or a defence on her behalf.

[38] She said she was not made aware that a default judgment was entered against her but learnt of it upon retaining the attorneys-at-law now on record. She further asserted that, upon obtaining the court documents from the Supreme Court registry on 29 June 2019, she "determined that [her] previous attorney-at-law's office located at 71 Duke Street Kingston was served with the originating documents on February 11, 2016 which was [sic] received by Ms Maxine Spencer". She was, however, informed by her previous attorney-at-law that Miss Maxine Spencer was not his agent and had no authority to accept documents on his behalf.

[39] She ended her affidavit with the following bald assertion:

> "That my previous Attorney-at-law did not attend any of the three (3) Hearings [sic] set before the Court. He did not convey his intention not to attend any of the three 3 Hearing [sic]."

[40] Miss Margaret Gaynair, who described herself as a director of the respondent, filed a response to this affidavit on behalf of the respondent. She refuted the assertion that the respondent had any obligation to provide each villa with a personalised security system but rather that it was the responsibility of each proprietor to take care of the actual lot.

[41] Miss Gaynair asserted that Miss Johnson had acknowledged, in writing, owing the respondent. She exhibited an affidavit filed by Miss Johnson in her application to have the caveat removed in which Miss Johnson had stated:

> "That some of the property services in respect of which the sum of $1,195,228.94 is being claimed were never performed in full by the Respondent. Thus, the Respondent is not entitled to the sum claimed."

[42] She further exhibited the letter, which had been sent by the respondent's attorneys-at-law to the applicants' previous attorney-at-law. She highlighted that in this letter they were seeking to ascertain if he had instructions to accept service on behalf of all the applicants, and not just Miss Johnson who was the sole party named in the application regarding the caveat.

[43] This letter dated 27 January 2016 was sent to the attorney-at-law at a 71 Duke Street address. It was endorsed by what appears to be the name 'L Spencer' and this endorsement is dated 28 January 2016. She also exhibited the letter from the attorney-at-law dated 5 February 2016 indicating he had "instructions to accept service on behalf of Miss Johnson and all the other persons listed in your previous correspondence".

[44] There was one other affidavit, which was filed by a Karen Brown-Gordon in response to the affidavit of Miss Johnson. Miss Karen Brown-Gordon asserted that she was instructed to serve the package with court documents on the applicants' attorney-at-law. She also asserted that the claim was served at 71 Duke Street - it being his Kingston address to which other court documents and correspondence were sent to him. She exhibited the notice of application relating to the caveat that the attorney-at-law had filed on behalf of Miss Johnson with his address for service stated as 71 Duke Street.

[45] On 31 January 2017, the applicants filed a draft defence in which the following were some of the assertions made in their purported challenge to the claim:

> "8. …Due to the Claimant's failure to provide security service as promised, the Defendants ceased payments after more break-ins occurred at the said Lot, in or around the year 2014.
>
> 9. …The Claimants have inaccurately quoted the said Lot as a 5-bedroom unit resulting in an excessive charge for maintenance fees.
>
> 10. …The Claimants have failed to provide any security for the property which has resulted in the Defendants paying money to provide their own security. As a result, the defendants have not continued payments for maintenance. However, the Defendants are willing to make payments for general maintenance with the exception of security costs as the Defendants have received no such benefits from said services."

[46] These then represent the material shared with this court that would have been before the Master. I think it is necessary to recognise that flowing from the fact that the focus of the initial records of appeal was the decision of Anderson J, there is little in the records before this court concerning the application before the learned Master. There is an affidavit from the attorney-at-law who appeared for the applicants before K Anderson J referencing the submissions he had made at that time. In addition, it is the formal order from the hearing by K Anderson J that forms a part of the record before this court. The formal order of the learned Master is not part of the record, which is a breach of rule 2.2 of the CAR. Given the nature of this application, it is not surprising that in these circumstances, this court has not benefited from her reasons for her decision.

**Discussion and analysis**

[47] It is trite law that this being an exercise of her discretion, this court will only interfere with the learned Master's decision if satisfied that it was based on a misunderstanding of the law or evidence, an inference of fact that was demonstrably wrong, or was a decision so aberrant that no judge regardful of his duty to act judicially could have reached it (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1). In the absence of the learned Master's reasons, this court has to assess whether the discretion was appropriately exercised based on what was presented to her.

[48] The applicants in their amended notice of application set out two grounds upon which the application for permission to appeal is being made. The first is as follows:

> "4. The learned Master erred as a matter of fact and/or law in finding that the Default Judgment entered herein was not irregular despite the Claim Form not being in accordance with Civil Procedure Rules, 2002 in that:
>
> "a. The Claim Form was purportedly served on the Applicants' previous Attorney at the wrong address;
>
> b. The Claim Form was not served at the previous Attorney's office which is 35 Windsor Road, St. Ann's Bay in the parish of Saint Ann, but instead at 71 Duke Street Kingston;
>
> c. The previous attorney did not certify that he accepted service of the Claim Form;
>
> d. The Applicants' previous attorney was not given instructions to accept service of the claim form on behalf of the Applicants."

[49] In responding to this ground, the respondent countered that there was sufficient material before the learned Master for her to properly find that the applicants were

served. It was noted that as it relates to the address at which the attorney-at-law was served, there was in fact no previous challenge to it being the correct one for service.

[50] Further, it was noted that Miss Johnson in her affidavit expressly asserted that she had determined that the originating documents were served at her previous attorney-at-law's office at 71 Duke Street and were received by Miss Maxine Spencer. The challenge before the learned Master seemed to have been as it related to Miss Spencer receiving the package and purporting to accept service on behalf of the attorney-at-law.

[51] These facts pointed to by the respondent are supportive of the conclusion that in these circumstances the applicants cannot deny that their previous attorney-at-law was served at an address he had identified as being his address for service.

[52] It is unfortunate that the previous attorney-at-law did not himself file an affidavit, confirming the applicants' assertion that he had informed them that Miss Maxine Spencer was not his agent and had no authority to accept documents on his behalf. In any event, the fact is that someone named Spencer must have brought the letter served at the address at 71 Duke Street to the attention of the attorney-at-law since he had responded to it.

[53] It was also, correctly, submitted that by virtue of the letter in response to the respondent's enquiry, in which the attorney-at-law had indicated that he had instructions to accept service on behalf of all the applicants, the respondent was entitled to serve the attorney-at-law the documents.

[54] Miss Moore submitted that rule 5.6 of the Civil Procedure Rules ('the CPR'), relating to service on an attorney-at-law, does not require him to certify that he accepts service for the defendant for the proceedings to move forward. She contended that rule 5.6(2) referring to the attorney-at-law certifying that he accepts service on behalf of the defendant when a claim form is sent to him, is for the purpose of ascertaining a deemed date of service. The claim is deemed to be served on the date on which the attorney-at-law certifies that he accepts service. However, she pointed out that rule 5.6(3) of the CPR provides for what is to happen if the attorney-at-law is served and fails to file an acknowledgment of service in the matter. In that instance the claim form is deemed to have been served on the defendant on the date at which that defendants' attorney-at-law was served.

[55] There is merit in this interpretation of the rule. The failure of the attorney-at-law to certify that he accepted service is not a basis for alleging that service is irregular. The attorney-at-law having notified the respondent in writing that he was authorised to accept service on behalf of all the parties meant that the claim form was properly served on him and personal service on the applicants was not required (as per rule 5.6(1)). The claim form was deemed to have been served on the respondents on the date that the attorney-at-law was served.

[56] Miss Moore also submitted that it is clear that some discussions took place about the claim by the respondent, in light of Miss Johnson's assertion in her affidavit that the attorney-at-law had advised her "a counter-claim was being brought against [her] and made some reference [to] the outstanding fees resulting in the lodging of the caveat".

This submission is credible. Further, Miss Johnson's failure to indicate what action she took, following on this information from her attorney-at-law, can be viewed as curious.

[57] Finally, on this matter of service, although the applicants now seek to maintain that the attorney-at-law was not given instructions to accept service of the claim form, it is noted that in her affidavit Miss Johnson does not categorically deny authorising him to do so but rather stated that she could not recall doing so. There was, in any event, no basis to look behind what was clearly stated by the attorney-at-law in his letter to the contrary.

[58] In these circumstances, I am satisfied that it has not been demonstrated that the learned Master would have erred in finding that the documents were properly served.

[59] The second ground advanced by the applicants is as follows;

> "5. The learned Master erred as a matter of fact and/or law in finding that the Applicants' have no realistic prospect of successfully defending the claim in circumstances where there was no legal basis for the claim in that:
>
> a. The Respondent did not outline or establish a cause of action;
>
> b. No agreement exists between the Applicants and the Respondent for the payment of the maintenance fees and;
>
> c. The Applicants were not made aware of the claim or that Default Judgment was entered against them until June 29, 2017 upon obtaining the Court documents from the Supreme Court's Registry."

[60] Miss Edmondson, in her submission dealing with the applicants' prospect of success, contended that the applicants had never agreed to join the respondent and never signed an owner's agreement hence there was no contract. Further, she continued, the fact of the applicants making payment in respect of maintenance fees does not establish an agreement or create an enforceable obligation on the part of the applicants.

[61] In response, Miss Moore submitted that the respondent was seeking to recover for services provided based on an agreement stemming from a course of conduct. She submitted that the respondent's position was that the applicants accepted the services, understood their obligation to pay for the services, and did so until they stopped paying them. She relied on **In re Henry, Marquis of Anglesey, Wilmott v Gardner** [1901] 2 Ch 548 in support of this submission.

[62] Although these submissions by Miss Moore are well made and of some merit, I think there is another more significant hurdle that prevents the applicants from succeeding on this ground. On the material before the learned Master, the applicants seemed to have been seeking to challenge the quantum alleged to be due and not the fact that it was due. Their major complaint was that the break-ins they suffered at their premises pointed to a failure on the part of the respondent to provide adequate security. It was based on this complaint that Miss Johnson sought to justify their withholding the fees they were clearly not disputing were to be paid. Miss Johnson also complained that the amount was excessive since they were being assessed for a larger villa.

[63] In the draft defence, which would have been before the learned Master, it is significant to note that the applicants indicated a willingness to make payments for general maintenance with the exception of security costs. In light of this concession and in the face of the statement of accounts indicating clearly the amounts which remain outstanding, the learned Master could not have been faulted for arriving at a conclusion that the applicants had not demonstrated a basis on which they could be said to have presented a real prospect of successfully defending the claim.

[64] The applicants submitted that the application to set aside the default judgment was made as soon as was reasonably practicable and it was contended that they were notified of the default judgment upon acquiring a copy of the court file on 29 June 2017 with the application to set it aside being made on 31 July 2017. This application was made over a year after the default judgment had been entered.

[65] In her affidavit, Miss Johnson did not in fact clearly state when she learned of the default judgment. She said she learned of it upon retaining her present attorneys. She further said that on 29 June 2017, she obtained the court documents from the Supreme Court registry and it was then that she determined the originating document had been served on her previous attorney. She did not assert that it was on that date she learned of the default judgment. In effect, therefore, the applicants would not have presented to the learned Master any clear information as to when they had learned of the default judgment such that a proper determination as to whether the application to set it aside had been made as soon as was reasonably practicable thereafter, could have been made.

[66] It should also be noted that in their application to set aside the default judgment, the applicants failed to offer any explanation for the failure of their attorney-at-law to file an acknowledgment of service and defence within the stipulated time.

[67] In all the circumstances, I am not satisfied that the applicants have established that they have a real prospect of succeeding if they were granted permission to appeal.

**Disposal**

[68] In the circumstances, the applicants were unsuccessful in the application that they should be granted an extension of time for filing the notice of application for permission to appeal. Following from this, the application for permission to appeal could not be granted.

[69] It is for the foregoing reasons that the order outlined in paragraph [3] herein was made.

**SIMMONS JA (AG)**

[70] I too have read the draft reasons for judgment of my sister P Williams JA. I agree with her reasoning and conclusion.