[2021] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL COA2019PCCV00009

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**MARTIN GILL**	**APPELLANT**
AND	**ANDREW SANGSTER**	**RESPONDENT**

Miss Tamara A Greene instructed by Cecil R July for the appellant

Ms Rasha Palmer instructed by Knight, Junor & Samuels for the respondent

13 January 2020 and 7 May 2021

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree with her that it was for those reasons that we allowed the appeal and dismissed the counter-notice of appeal.

EDWARDS JA

[2] I too have read in draft the judgment of my sister Foster-Pusey JA. I agree with her that it was for those reasons that we allowed the appeal and dismissed the counter-notice of appeal.

FOSTER-PUSEY JA

Introduction

[3] This is an appeal brought by the appellant, Martin Gill, challenging the decision made on 28 November 2018 by His Honour Mr Horace Mitchell, Parish Court Judge for the parish of Saint Elizabeth ("the Parish Court Judge"). The Parish Court Judge, having heard evidence and submissions, found that the appellant had failed to prove on a balance of probabilities that the default judgments entered against him should be set aside. The respondent had also filed a counter-notice of appeal.

[4] It is important to note that, while the reasons which the Parish Court Judge provided for his decision are dated 24 November 2018, the notes of evidence reflect that the decision and the endorsements on the plaints were made on 28 November 2018.

[5] On 13 January 2020, having thoroughly considered the matter, we made the following orders:

> "1. The appeal is allowed.
>
> 2. The decision of His Honour Mr Horace Mitchell Parish Court Judge made on 24 November 2018 is set aside.
>
> 3. Default judgment entered against the appellant on 1 February 2018 and all subsequent proceedings emanating therefrom for enforcement of said judgment are set aside on the basis that the appellant was not served with all the relevant processes.
>
> 4. Costs of the proceedings in the court below and in the appeal to the appellant in the sum of $50,000.00 as agreed.
>
> 5. The counter-notice of appeal is dismissed."

[6] Having made these orders, we had promised, at the end of the hearing, to give short reasons for our decision as soon as possible. We apologize for our delay in doing so.

Background

[7] The respondent, Andrew Sangster, lodged two plaints against the appellant in the Parish Court for the parish of Saint Catherine, for monies to be paid, arising out of an agreement made between them, in which the appellant was to keep and care a white Toyota Prado motor vehicle with registration plate 7727FY. In plaint 669/2017, the respondent claimed $760,000.00 for monies owing, while in plaint 670/2017, he claimed $650,000.00 for monies loaned. The plaints came up for hearing on 4 January 2018, but the appellant did not appear in court. Consequently, the matters were set for hearing on 1 February 2018 for default judgments to be entered. On that date, the appellant again did not appear, and so the Parish Court Judge entered default judgments against him.

[8] The respondent, in seeking to enforce the judgments, filed judgment summonses, which came up for hearing on 16 March 2018. Interestingly, the appellant and his counsel appeared at the hearing and indicated to the court that they intended to apply to set aside the default judgments.

[9] On 29 March 2018, the appellant filed an application, supported by affidavit evidence, to set aside the default judgments and judgment summonses. In his affidavit, he stated that he had never been served with any process in respect of the plaints or the judgment summonses, and he had a good defence to the causes of action.

[10] The respondent filed an affidavit in opposition on 27 June 2018. He deposed that Mr Royland Perry, who he had engaged as a process server, had served both the summonses relating to the plaints as well as those for the judgment summonses, and had made the required returns to the Parish Court, which included affidavits of service.

[11] The Parish Court Judge heard the application on 26 September 2018 in the course of which Mr Perry gave oral evidence. He testified that he had neither served the summonses for the plaints nor for the judgment summonses. The respondent had asked him to serve the plaints, but when he looked for the part of the documents which were to have been served on the appellant, they were not there. The respondent, nevertheless, asked him to complete an affidavit of service confirming that he had served the summonses. He stated that it was a similar process in respect of the judgment summonses.

[12] Mr Perry was cross-examined extensively. He acknowledged that he had been a district constable for 40 years and had taken an oath to be honest and just with dealings with the court. He insisted that people could not just ask him to do illegal things and he would do them. Nevertheless, when the respondent asked him to sign the affidavit of service, he had done so, knowing that it was illegal to say that he had served a summons when he had not done so. He stated that the respondent had paid him $6,000.00 to serve the first set of summonses and, although he had not served them, on 18 December 2017, he had filed the affidavits of service at the court's office, attesting that he had served the appellant. The respondent had asked him to sign saying that he had served two further

summonses. He signed the affidavits of service indicating that he had served the documents on 6 February 2018, but he had not in fact done so. Mr Perry stated that no one had asked him to lie to the court. In addition, he was told to give a statement to the police and he had done so.

[13] Mr Perry was re-examined, in the course of which, the statement that he had given to the police was entered into evidence as Exhibit 1. He also testified that he had collected $11,000.00 from the respondent 'to sign the summonses not to serve them'.

[14] In Exhibit 1, the handwritten police statement, Mr Perry said that the respondent called him and he agreed to meet with him in Santa Cruz. He went on to state:

> "[The respondent] then told me he wants to serve some summons on a man who he said owed him some money. [The respondent] … gave me some summons. I asked [the respondent] where is the piece that I should serve on this man name [the appellant] he said to me 'Nuh worry about that.'
>
> [The respondent] ask me to sign the original pieces of summons and have a J.P. certify them. I said 'Listen I don't like this.'
>
> After some persuasion I took the summons signed it and had it certified. Some days after [the respondent] asked me to attend court in the matter and I did not go.
>
> I did not at no time serve any summons on anyone named [the appellant]. [The respondent] asked me not to say anything to anyone about our transaction re the said summons for [the appellant]."

[15] In answer to questions from the court, Mr Perry stated that he had taken the documents to a Justice of the Peace to have them signed. He testified that, at the time

when he was giving his testimony, he had been retired as a district constable for five years. He acknowledged that he had attended the Parish Court giving evidence on many occasions when he had told the court that he was a district constable, not a retired district constable.

The decision of the Parish Court Judge

[16] The Parish Court Judge gave his decision on 28 November 2018, refusing to set aside the default judgments which had been entered against the appellant. In his reasons, the Parish Court Judge noted that the appellant was applying to set aside a regularly obtained judgment on the basis of one principle in law, which was that he had not been served with a summons to appear before the court. The appellant was, therefore, contending that the default judgment entered on 1 February 2018 had been irregularly obtained and was to be set aside.

[17] Referring to section 186 of the Judicature (Parish Courts) Act, ('the Act'), the Parish Court Judge stated that the fundamental pre-requisite for the grant of a default judgment in the Parish Court is the absence of the defendant and, on 1 February 2018, the appellant had been absent. He referred to three matters to be considered when an application has been made to set aside a default judgment. These had been enunciated in **Grimshaw v Dunbar** [1953] 1 All ER 350 and approved in **Boucher v Gayle** (1960) 2 WIR 457:

> "1. Whether there is a reason for the failure of the defendant to appear when the case was listed to be heard;
>
> 2. Any potential prejudice to the innocent party if the judgment is set aside and a new trial ordered; and

3. Whether the applicant has good prospects of success in a trial of the claim."

Insofar as the third principle was concerned, the Parish Court Judge stated that the appellant had not given evidence on his application, and so the court could not say whether he had a reasonable prospect of success if the claim were to proceed to trial.

[18] The Parish Court Judge noted that the appellant had called only one witness, the process server, Mr Perry, who testified that he had not, in fact, served any summonses on the appellant. He reiterated that that was the only evidence before him. He outlined other aspects of Mr Perry's evidence and noted that, even at the point of cross-examination, Mr Perry was maintaining that he was an honest person. The Parish Court Judge, commenting on the statement that Mr Perry had given to the police, said, at page 17 of the record of proceedings:

> "In examination in chief he was shown a statement and he admitted that he gave a statement to the Police who was carrying out investigation. No evidence was led as to what type of investigation the Police was carrying out. However, from the evidence led one could draw inference that the investigation had to do with the service or non-service of these two summonses. In this statement to the Police, which was signed on the 9th June 2018, and tendered and admitted as Exhibit 1, Mr. Perry made mention of being given two summonses to be served by [the respondent]. In his evidence, he said he was given four summonses to signed. [sic] **Why is he contradicting himself**?'" (Emphasis supplied)

[19] An ambiguous statement that Mr Perry made in the course of cross-examination was highlighted by the Parish Court Judge. In answer to a suggestion that he was being

dishonest, Mr Perry had stated "I am not being dishonest I served them". The Parish Court Judge wrote:

> "It is clear that Mr. Perry has contradicted himself in examination in chief and under cross-examination. **I have to ask myself the questions. Is Mr. Royland Perry a truthful witness** or, is he saying what he is now saying because of a Police investigation?" (Emphasis supplied)

[20] The Parish Court Judge stated that he could not divorce from his mind the fact that for the two years since he had been serving in the Parish Court, he had seen Mr Perry stating in court that he was a district constable serving in the parish, yet Mr Perry had testified in the case under consideration that he had been retired for five years. In concluding, the Parish Court Judge stated:

> "**I do not find Mr. Perry is a credible witness. The only point [the appellant] is asking this court to consider is the service or non-service of the summons.** I would like to re-visit a [sic] section 186 of the Judicature ([Parish Courts]) Act which reads in part '… the Magistrate, upon due proof of the service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only…' **There is no evidence before this court that the Judge who entered the default judgment did not have proof of the service of the summons.** No evidence was led as to the prospect of success if the judgment was set aside and whether any potential prejudice to the innocent party may be adequately compensated by suitable award of costs. I find that [the appellant] has failed to prove on a balance of probability that this judgment should be set aside. I therefore give judgment to the Respondent. Cost to the Respondent to be agreed or taxed." (Emphasis supplied)

The appeal

Notice and grounds of appeal

[21] On 3 December 2018, the appellant filed a notice of appeal and then, on 30 April 2019, grounds of appeal, as follows:

> "1. The judge totally ignored the evidence of the process server, Mr. Royland Perry, who stated on numerous occasions under oath that he did not serve [the appellant] with either the Plaint Summons or Judgment Summons, he merely completed the portion that was returned to the Courts Office, therefore [the appellant] could not have been aware of the existence of the suit against him and would not have been in Court to answer to the cause of actions, hence the default Judgment against him.
>
> 2. The judge totally ignored the evidence of [the appellant] given in his Affidavit of Support to the application to set aside the judgment that he was never served with any process by the process server Royland Perry and therefore he was unaware of the suit against him.
>
> 3. [The appellant] was present in Court, but he was never cross-examined on his affidavit and of such his evidence should be taken as unchallenged evidence on the statement of the said affidavit.
>
> 4. The Judge in coming to his decision as to whether or not the process server did serve the Plaints and Judgment Summons on [the appellant] took extraneous matters into consideration in that he said the process server in previous appearances before him, said he was a district constable, but on that occasion he said he was a retired district constable. Whether the process server Mr. Royland Perry was a district constable or a 'retired district constable' had nothing to do with his service or non-service of the Plaints and Judgment Summons, and the Judge ought not to have placed reliance on that issue.
>
> 5. Royland Perry stated quite clearly that he did not serve [the appellant] with the Plaints and Judgment

Summons and in the absence of evidence to the contrary the Judge was wrong to conclude that [the appellant] had knowledge of the cases in Court and should have attended Court, to prevent [the respondent] getting Judgment in Default.

6. The Judge ignored the fact that [the appellant] stated in his Affidavit in support of Application to set aside Default Judgment that he had a good defence, to the cause of action, and that [the appellant] should be given opportunity to put forth his defence.

7. [The appellant] craves leave to file additional Grounds of Appeal."

Counter-notice of appeal

[22] The respondent, on 23 December 2019, filed a counter-notice of appeal stating:

"1. The evidence of the Process Server was considered by the learned Judge in arriving at his decision;

2. The evidence of [the appellant] was considered by the learned Judge in arriving at his decision;

3. The evidence of [the appellant] was challenged by [the respondent];

4. The Judge did not take extraneous matters into consideration when arriving at his decision;

5. The Judge was correct in concluding that [the appellant] had knowledge of the cases in Court;

6. [The appellant] was given the opportunity to put forth his defence."

Submissions

[23] Counsel for the appellant and respondent filed written submissions on 20 December 2019 and 13 January 2020, respectively. However, in their oral submissions

before this court, the main focus was on grounds 1 and 5, of the grounds of appeal, which were argued together.

[24] I was of the view, in agreement with counsel, that grounds 1 and 5 were central to the resolution of this appeal, and for that reason, I focussed on those submissions. Grounds 2, 3, 4 and 6 related to whether the Parish Court Judge, in considering the matter:

a. ignored the evidence of the appellant,
b. took into account extraneous matters, and
c. ignored the fact that the appellant had stated that he had a good defence to the cause of action.

However, the essential issue to be determined was whether the judge correctly assessed the evidence given by Mr Perry, so as to determine whether there was proof, on a balance of probabilities, that the appellant had been served with the summonses. As a result, while the parties made submissions on grounds 2, 3, 4 and 6, it was not necessary to make a ruling on them.

Appellant's submissions

[25] In arguing grounds 1 and 5, counsel submitted that if the affidavits of service were accepted as true, the default judgments entered against the appellant would have been obtained regularly, with the appellant deemed to have been served at least eight clear days before the return day, and required to attend court. However, the appellant failed

to attend court on two occasions and judgments in default were obtained on 1 February 2018.

[26] Counsel submitted that section 186 of the Act speaks to the conditions which the respondent must satisfy before default judgment can be entered. She noted that the section required the respondent to prove service of the summons on the appellant before default judgment can be entered. Counsel submitted that the appellant's application to set aside the default judgments was predicated on the proviso to section 186 of the Act.

[27] Counsel accepted that the setting aside of a default judgment is discretionary, and that the Parish Court Judge had entered default judgments in the exercise of his discretion. She referred to the oft-cited statement of Lord Diplock in the case of **Hadmor Productions Limited v Hamilton** [1983] 1 AC 191 at 220, that an appellate court will not lightly interfere with the exercise of a judge's discretion unless, primarily, the judge misunderstood the law or the evidence, misapplied the law or his decision was so aberrant that it ought to be set aside. She submitted that the issue, therefore, was whether the Parish Court Judge, in refusing to set aside the default judgments, was demonstrably wrong.

[28] Counsel stated that the central issue was the credibility of the parties and the witness. This assessment was crucial in determining whether the appellant was personally served with the plaints and the particulars of claim. The appellant, in his affidavit in support of the application to set aside the default judgments, contended that he had not

been served with the relevant documents, and that he only became aware of the claims against him when he was informed of them by his attorney-at-law.

[29] Counsel argued that the presumption that the appellant had been served because he appeared in court on 16 March 2018 with his attorney-at-law, had been rebutted by the evidence of the process server during examination-in-chief and cross-examination. Counsel pointed out that the process server, under oath, had stated on numerous occasions that he had not served the appellant with either the plaint summons or the judgment summons. In addition, the appellant stated in his affidavit evidence that he only became aware of the claims when his attorney-at-law told him about them.

[30] Counsel emphasized the evidence of the process server who stated that he had merely completed the portion that was returned to the court's office. In addition, the process server's sworn evidence was supported by the statement which he had given to the police, and which had been tendered into evidence as Exhibit 1. Counsel submitted that in the absence of the contrary evidence, the Parish Court Judge was wrong to have concluded that the appellant had been served, knew about the cases in court, and should have attended court to prevent the respondent getting judgments in default.

[31] In closing, counsel submitted that the default judgments entered on 1 February 2018 were therefore irregularly obtained, and, on the sworn evidence of the process server alone, the Parish Court Judge ought to have set aside the default judgments. Counsel also contended that the Parish Court Judge had failed to properly exercise his discretion when he refused to set aside the default judgments.

Respondent's submissions

[32] In response, counsel for the respondent reiterated the principles enunciated in **Hadmor Productions Limited v Hamilton** and cited the cases of **Thomas v Thomas** (1947) AC 484 and **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, arguing that the appellate court, as a court of review, should be slow to interfere with the exercise of discretion and findings of fact of a judge at first instance, if it cannot be said that the judge was plainly wrong.

[33] Counsel highlighted that it was the appellant who had brought the process server as his witness during the hearing of the application. Counsel accepted that the central matter in determining whether the appellant was served with the plaint notes and the particulars of claim, was the credibility of the parties. Counsel contended that the appellant had failed to support his assertions that the Parish Court Judge totally ignored the evidence of the process server, as the fact that the application was refused did not mean that this is what had occurred. Counsel pointed out that, on the contrary, the Parish Court Judge had carefully considered the evidence of the process server, summarizing his evidence, and quoting aspects of it (see pages 14 and 16 of the record of proceedings).

[34] Although counsel for the appellant had argued that there was no evidence to suggest that the documents had been served, counsel for the respondent noted that the process server had provided the court with four affidavits of service of summons in respect of the two plaints and two judgment summonses. In addition, the respondent

filed an affidavit to oppose the appellant's application to set aside the default judgments to which he exhibited copies of the returns dated 9 December 2017 and 6 February 2018.

[35] Counsel highlighted the inconsistencies in the process server's evidence in respect of the service of the relevant documents. She pointed out that, although there were instances where the witness denied that he had served the documents, he admitted twice, once in examination-in-chief and in cross-examination, that he had served the summonses. Then, in re-examination, he claimed that he was paid to sign the summonses and not to serve them. However, in a police statement tendered into evidence he did not, at any point, indicate that he had been paid to sign and not serve the summonses.

[36] In light of the above, counsel submitted that there was evidence before the Parish Court Judge to support a finding that the appellant had been served with the relevant summonses. Additionally, the Parish Court Judge had the benefit of assessing the credibility of the process server and determining how much weight should be accorded to the evidence. The Parish Court Judge found that the process server was not credible when he stated that he had not served the summonses on the appellant.

[37] In concluding her submissions, counsel contended that this court was at a disadvantage, not having seen the witness. Therefore, the burden was on the appellant to prove that the Parish Court Judge failed to use or had misused this advantage (see **Beacon Insurance Company Limited v Maharaj Bookstore Limited**). Further, the appellant had not proved that:

> "(a) there was no evidence to support the parish court judge's finding of fact;
>
> (b) the finding of fact was based on a misunderstanding or lack of full understanding of the evidence or the correct principles of law; or
>
> (c) that no reasonable parish court judge could have reached the same conclusions."

Counsel relied on and referred to **Harracksingh v AG of Trinidad and Tobago** [2004] UKPC 3 as cited in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**.

Analysis

Scope of review

[38] In reviewing the exercise of discretion of a judge at first instance, this court is guided by the well-established principles outlined in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 in which Morrison JA (as he then was), stated:

> "[19] ... It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046 (which although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):
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> > **'[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'**
>
> [20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a **misunderstanding by the**

> **judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'**." (Emphasis supplied)

[39] I also acknowledge that this court, in reviewing the findings of fact made by a judge at first instance, must do so cautiously. In **Capital Solutions Limited v Marietta Rizza (who claims by her attorney, Roberto Rizza) et al** [2020] JMCA Civ 39, a recent decision of this court, Morrison P said:

> "**The approach of this court**
>
> [27] I think it is pertinent to observe at the outset that, save for the agency issue, the issues which I have identified all relate to the judge's findings of fact. **I therefore approach these issues, as I must, on the basis of the long-established principle that, where questions of credibility are involved, this court will not lightly interfere with a trial judge's findings of fact, unless it can be shown that the judge misdirected him or herself in some material respect, or if the conclusion arrived at by the trial judge was plainly wrong. In Beacon Insurance Company Limited v Maharaj Bookstore Limited**, Lord Hodge explained the principle of appellate restraint in this way:
>
> > 'It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. See, for example, Lord Macmillan in **Thomas v Thomas** at p 491 and Lord Hope of Craighead in **Thomson v Kvaerner Govan Ltd** 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: **Piggott Brothers & Co Ltd v Jackson** [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the

> appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. **Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: Choo Kok Beng v Choo Kok Hoe** [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.'" (Emphasis supplied)

Section 186 of the Judicature (Parish Courts) Act

[40] A Parish Court Judge, by virtue of section 186 of the Act, may grant default judgment in specific circumstances, and may also set aside such default judgment where necessary. Section 186 provides:

> "If on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Magistrate, **upon due proof of the service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only; and the judgment thereupon shall be as valid as if both parties had attended**:
>
> Provided always, that the Magistrate in any such cause, at the same or any subsequent Court, **may set aside any judgment so given in the absence of the defendant and the execution thereupon, and may grant a new trial of the cause, upon such terms as to costs or otherwise as he may think fit, on sufficient cause shown to him for that purpose**." (Emphasis supplied)

Setting aside a default judgment

[41] In **Leeman Vincent v Fitzroy Bailey** [2015] JMCA Civ 24, McDonald-Bishop JA (Ag) (as she was then), at paragraphs [22]-[30] of the judgment, in examining the discretion of a Parish Court Judge to set aside a default judgment pursuant to section 186 of the Act, highlighted the considerations laid down in **Grimshaw v Dunbar**, approved in this court in **Boucher v Gayle** (1960) 2 WIR 457.

[42] In **Boucher v Gayle**, Waddington J at page 459 stated:

> "The resident magistrate in exercising his discretion to refuse the application was guided by and endeavoured to apply the principles laid down in *Grimshaw v Dunbar* ([1953] 1 All ER 350, [1953] 1 QB 408, 97 Sol Jo 110, CA, 3rd Digest Supp.). He correctly stated the four matters which he ought to have considered in this case, namely:
>
> (1) **the reason for the failure of the appellant to appear** when the case was heard on 15 December 1959;
>
> (2) whether there had been undue delay in making the application so as to prejudice the respondent;
>
> (3) whether the respondent would be prejudiced by an order for a new trial so as to render it inequitable to permit the case to be re-opened; and
>
> (4) whether the appellant's case was manifestly insupportable." (Emphasis supplied)

[43] It is clear that in granting a default judgment, the Parish Court Judge must be satisfied that the defendant was served with the relevant summonses. In addition, if there

is evidence to the contrary, a Parish Court Judge, in light of the proviso in section 186 of the Act, has the power to set aside that default judgment.

[44] The essential issue which the Parish Court Judge had to determine was whether the appellant had shown sufficient cause for the default judgments to be set aside. This required a determination as to whether he had been served with the summonses.

[45] I acknowledge the caution that this court must exercise in reviewing the exercise of discretion of the Parish Court Judge, his assessment of the credibility and reliability of a witness and his findings of fact. Nevertheless, even with all of these principles of judicial restraint at the forefront of my consideration, in my view, the Parish Court Judge erred. The Parish Court Judge misunderstood the evidence before him regarding service and arrived at a conclusion that was plainly wrong. It is also clear that the Parish Court Judge failed to properly analyse all of the evidence before him regarding service.

[46] There is no gainsaying that the Parish Court Judge was entitled, and was required, to assess the credibility and reliability of Mr Perry. It was also clearly open to him to conclude that Mr Perry was not a credible witness.

[47] There is no dispute that completed affidavits of service had been returned to the court's office, and these would have been before the judge who entered the default judgments. But that was not the end of the matter. The question which the Parish Court Judge had to determine was whether, on a balance of probabilities, the affidavits had conveyed a falsehood.

[48] The respondent, in opposing the appellant's application to set aside the default judgments, stated in his affidavit that he had engaged Mr Perry to serve the summonses and Mr Perry had effected personal service of them. That same Mr Perry, the process server, who had completed the affidavits of service, came to court and gave sworn evidence that he had not in fact served the summonses on the appellant. Furthermore, Mr Perry had provided a statement to the police indicating that he had not served the summonses on the appellant. In the face of this evidence from the process server, Mr Perry, it was difficult to understand why the Parish Court Judge preferred to believe that the summonses had in fact been served. Importantly, this evidence was coming from an individual on whose actions both the appellant and respondent were relying. At the very least, even if the Parish Court Judge felt that Mr Perry was not a credible witness, the evidence he gave would have sown serious doubts as to whether he had, in fact, served the summonses, and this doubt should have enured to the benefit of the appellant, who was also saying that he had not been served.

[49] It also seemed to me that the Parish Court Judge did not properly assess the significance of the fact that Mr Perry had given a statement to the police, in which he declared that he had not served the summonses on the appellant. It was difficult to believe that Mr Perry would have given a statement to the police which was against his interest, untruthfully stating that he had done something morally wrong and illegal, thus unnecessarily damaging his character and possibly placing his liberty in jeopardy.

[50] Upon a review of the entirety of the evidence, I formed the view that the Parish Court Judge ought to have found that the appellant had proved on a balance of probabilities that he had not been served with the summonses and had thereby shown sufficient cause why the default judgments ought to have been set aside.

[51] In the circumstances there was no need for this court to consider whether the appellant had satisfied the other requirements for the default judgments to be set aside.

[52] In light of the findings in respect of the appeal, the counter-notice filed could not succeed. However, even if the appeal had not succeeded, the counter-notice would have had to be dismissed as it did not conform with the Court of Appeal Rules (CAR). The respondent did not appeal any aspect of the decision of the Parish Court Judge, or ask the court to affirm his decision on grounds other than those relied on which he relied (see rule 2.3 of the CAR).

[53] These are the reasons why I agreed with the orders that were set out at paragraph [5] of this judgment.