[2025] JMSC Civ 139

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. SU 2024 CV 00183

BETWEEN	**JOSEY-ANN KENNEDY**	**CLAIMANT**
AND	**OPERADORA PALACE RESORTS (JA) LTD T/A MOON PALACE JAMAICA GRAND**	**DEFENDANT**

IN CHAMBERS
Mr K. Teddison-Maye Jackson instructed by Kinghorn & Kinghorn for the claimant/respondent
Mr Philmore Scott and Ms Camille Scott instructed by Philmore Scott & Associates for the defendant/applicant

HEARD: 17 July & 22 October & 19 November 2025
Civil Procedure – Application to enter default judgment; application for court to decline to exercise jurisdiction to hear claim – claim documents sent by registered mail uncollected – claimant becoming aware that documents were uncollected after request for default judgment but before entry of default judgment – whether default judgment should be entered – wasted costs – whether the claimant's attorney-at-law should pay wasted costs

MASTER C THOMAS
Introduction
[1] There are two applications before the court for consideration. The first in time is the claimant's application to enter default judgment and the second is the defendant's application asking the court to decline to exercise its jurisdiction to hear the claim, among other orders.

The claim

[2] The claim arises from an incident, which, the claimant alleges occurred on 21 February 2019 while the claimant was working in the capacity of a housekeeper at the premises of a hotel that is owned by the defendant. In her particulars of claim, the claimant avers that on the date in question, while lawfully executing her duties on the premises, she fell from an elevator and was injured. The claimant alleges that she suffered personal injuries, loss and damage as a result of the negligent, dangerous and unsafe manner in which the defendant kept and maintained the hotel premises where she worked. Consequently, she commenced the instant proceedings claiming damages for negligence, breach of contract, breach of the provisions of the Occupier's Liability Act, interest, costs and other relief.

The procedural history

[3] The claim herein was filed on 18 January 2024 by way of claim form and particulars of claim. On 17 April 2024, a request for judgment in default of acknowledgment of service was filed. On the same day, the applicant also filed an affidavit of service by registered mail and an affidavit of service by email.

[4] The affidavit of service by registered mail was sworn to by April Brown, who deponed that on 16 February 2024 she received a cover letter, claim form filed 18 January 2024, particulars of claim along with acknowledgment of service form, prescribed notes and defence form dated 18 January 2024 ('the claim documents') and letters addressed to "Operadora Palace Resorts (Ja) Ltd, T/A Moon Palace Jamaica Grand, Main Street, Ocho Rios PO, St Ann". On 21 February 2024, the said documents were placed by her in an envelope addressed to the "Operadora Palace Resorts t/a Moon Palace Jamaica Grand" at the aforementioned address and posted. She exhibited the registered slip no 0266965 in proof of the posting of the documents. It is to be noted that the "aforementioned address" is the address that is pleaded at paragraph 2 of the particulars of claim as the address of the registered offices of the defendant.

[5] The affidavit of service by email was also sworn to by Ms April Brown who deponed that on 16 February 2024 at 6:22 pm, the claim documents were

emailed to jchung@palaceresorts.com. A copy of the email was exhibited and Ms Brown further deponed that she "verily believed" that the defendant had received the documents by email and that they had been duly served.

[6] On 5 September 2024, the claimant filed her application for entry of judgment in default of acknowledgment of service. The substantive orders being sought are as follows:

1. Pursuant to Rule 12.4(b), the Registrar of the Supreme Court be directed to enter Judgment in Default of Acknowledgment of Service against the Defendant.
2. Alternatively, pursuant to Rule 26.1(2)(v), the Court enters Judgment in Default of Acknowledgment of Service against the Defendant.
3. The court sets a date for a Pre-Trial Review of Assessment of Damages herein;
4. The Court takes any other step, gives any other direction or make any other order for the purpose of managing this claim and furthering the overriding objective…

[7] The application was supported by an affidavit sworn to by April Brown. The salient aspects of her evidence are to be found at paragraphs 5 – 7, which are summarised below:

(i) On 17th day of April 2024, the claimant requested judgment in default of acknowledgment of service.

(ii) Despite weekly electronic follow-up reminders to the registry of the request, and daily personal visits by the legal clerk employed to the claimant's attorneys-at-law, in respect of the request, the registry of the Supreme Court is yet to perfect the judgment in default requested.

(iii) Pursuant to rule 12.4(b) of the Civil Procedure Rules, the registry at the request of the Claimant must enter Judgment against a Defendant for failure to file an acknowledgment of

service if the period for filing an acknowledgment of service under rule 9.3 of the Civil Procedure Rules ("CPR") has expired.

(iv) Pursuant to Rule 26.1(2)(v) of the CPR, the court has power to "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective."

(v) The Court of Appeal has ruled that the registry of the Supreme Court carries out a purely administrative function. The Court of Appeal has also ruled that it is the duty of a claimant to ensure that the claim is dealt with expeditiously and to do what is necessary to set the registry in motion (see **Juliet Wright v Alfred Palmer** [2021] JMCA Civ 32).

(vi) The claimant through her attorneys-at-law have attempted to set the Registry in motion in this matter by electronic follow up reminders every week about this outstanding judgment and others. The Registry has responded as follows:

> "Please note that the court will not be going through this list. Kindly ask your bearer to make checks at the Customer Service Window regarding your matters. Customers are permitted to check up to five (5) matters per visit."

(vii) Daily and personal checks with the Registry by the Claimant's Attorneys' Legal Clerk have still borne no results.

[8] On 31 March 2025, the application came on for hearing. The application was adjourned to 17 July 2025 at the instance of counsel who then appeared for the defendant. Before the adjourned hearing date, on 29 April 2025, the defendant filed its acknowledgment of service, and on 13 June 2025, it filed its application.

[9] The defendant's application seeks the following orders: -

i. A Declaration that the Court declines to exercise its jurisdiction to hear this claim;

ii. That the Claimant's Claim Form filed on the 5th of September 2024 [sic] be struck out;
iii. That the Interlocutory Judgment in Default of Acknowledgment of Service entered against the Defendant be set aside as of right;
iv. Alternatively, that no Default Judgment be entered against the Defendant;
v. That the Acknowledgment of Service Form filed on the 29th April 2025 be allowed to stand;
vi. That there be an extension of time for the making of this application and that this Notice of Application for Court Orders and Affidavits in Support be allowed to stand as if filed and served within time;
vii. Wasted Costs be awarded against the Claimant's Attorneys-at-Law;
viii. That the cost of this Application to the Defendant/Applicant to be agreed or taxed;
ix. Such further or other relief as this Honourable Court may deem fit.

[10] The application was supported by an affidavit sworn to by Lashane Mead, the human resource manager of the defendant. The significant aspects of Ms Mead's evidence are summarised as follows:

(i) The defendant never received the claim form;
(ii) Checks of the defendant's email system revealed no record of any email being received on 16 February 2024 from the email address: legaldocs@kinghornja.com.
(iii) On 16 February 2024, Joy Chung was not an employee at the defendant company, and the email jchung@palaceresorts.com had been deactivated from in or around 5 May 2023.
(iv) The defendant never received the registered mail slip bearing registered slip no 0266965 from the Ocho Rios Post Office or

elsewhere as outlined in the affidavit of service filed on behalf of the claimant.

(v) The defendant was contacted by Ms Karen Dabdoub, attorney-at-law retained by the defendant in another matter for and on behalf of the defendant, who advised that she had seen the matter on the court list for entry of default judgment on 31 March 2025. The defendant was unaware of the claim but nevertheless asked Ms Dabdoub to attend and make enquiries about the matter.

(vi) Having become aware of the matter, the defendant made contact with its insurance company who instructed its current attorneys-at-law on record, Philmore Scott & Associates, to represent its interests and the said firm filed acknowledgment of service stating that the defendant had never been served.

(vii) The defendant's attorneys-at-law obtained a copy of the court file and made enquiries of the Legal Unit, Post and Telecommunications Department ("the Post Department") in relation to the documents allegedly served on the defendant by registered post.

(viii) The Post Department responded that the post office had received the documents in relation to registered slip no 0266965 in or around 22 February 2024, but the items remained uncollected.

(ix) The Post Department further informed that it had advised Kinghorn & Kinghorn, attorneys-at-law (attorneys for the claimant), by way of a notice, of the fact that the package was uncollected.

(x) The Post Department advised that subsequent to the issue of the notice, the claimant's attorneys-at-law provided a stamped written authorisation note that the post office was permitted to deliver the documents to a Ms Zanita Senior. Acting on those instructions, the Post Department delivered the undelivered mail to Ms Senior on 4 June 2024.

(xi) Notwithstanding being aware from in or around 4 June 2024 that the claim documents were never delivered to the defendant, the

claimant applied for default judgment on 17 April 2024 and on 5 September 2024, the claimant's notice of application was filed.

(xii) The affidavit of service by registered mail filed on 17 April 2024 does not comply with rule 5.11 of the Civil Procedure Rules.

[11] Given that the issues raised by both applications are intertwined, both applications will be considered together. The parties were given the opportunity to file and serve written submissions and authorities including submissions on the applicability of the case of **Andrew Fletcher (in representative capacity, estate Margaret Fletcher) v Devine Destiny Company Limited** [2021] JMCA Civ 42. No submissions were received from the claimant's attorneys-at-law. Based on checks of the court file, the only document filed on behalf of the claimant subsequent to the filing of the defendant's application was "Affidavit of Service by Registered Mail" filed on 5 August 2025, which was sworn to by April Brown. The evidence contained in this affidavit amounted to a reproduction of the evidence contained in the affidavit filed on 17 April 2024 save that the claim documents that were posted were exhibited.

The submissions

[12] Counsel for the defendant referred to rule 5.7(a) of the Civil Procedure Rules ("CPR"), which it was submitted, prescribes how a company is to be served with process. Reference was also made to rule 5.11 of the CPR, which, it was submitted, stipulates the mandatory requirements for affidavits of service via registered mail. It was submitted that in order to obtain default judgment in the absence of an acknowledgment of service, it is mandatory that the claimant prove service of the claim form in accordance with rule 12.4 of the CPR. The registrar of the Supreme Court has jurisdiction and is only empowered to enter a default judgment when the claimant satisfies all the requirements of rule 12.4 of the CPR including the necessity to prove service by a compliant affidavit of service pursuant to rule 5.11.

[13] It was argued that although a court has wide case management powers under Part 26 of the CPR, these powers do not extend to entering a default judgment in the circumstances of this case. The request for default judgment filed on 17

April 2024 lacked validity and the court would be acting outside of jurisdiction. Where there has not been strict compliance with the requirements of rule 12.4, an application may be made to set aside the default judgment as of right. Reliance was placed on **Dorothy Vendryes v Dr Richard Keane and Karene Keane** [2011] JMCA Civ 15. It was submitted that the affidavit of service by registered post filed on 12 April 2024 does not comply with the mandatory requirements of rule 5.11. On that basis, the claimant has not satisfied the court that there has been service of the claim form and particulars of claim on the defendant and as such there has not been strict compliance with rule 12.4 of the CPR. The registrar would therefore not have been empowered to enter a default judgment. It was also submitted that the default judgment has not yet been entered and ought not to be entered in light of the defect in the affidavit, which would amount to a nullity. It was also submitted (apparently in the alternative), that the request for default judgment was irregular and the claimant was restrained from regularising the request and never in fact sought to cure the defect as they became aware that the documents were never served.

[14] It was further submitted that up to the time of the claimant's application to enter default judgment and the filing of the defendant's application, there has been no further document filed to regularise the request for default judgment to cure the defects in the affidavit of service. In these circumstances, the court cannot enter default judgment. The request for default judgment was irregular and the situation has crystallised against the claimant in that they have now been informed that the defendant was never served.

[15] It was also submitted that the request for default judgment ought not to be entertained by this court based on the non-conformity of the supporting affidavit. More compelling is that in this case, the claimant became aware that the documents had not been delivered, had in fact collected the undelivered parcel but had nevertheless filed the application to enter default judgment. This approach is wrong, it was submitted. Reference was made to **Andrew Fletcher**, in which, it was submitted, the Court of Appeal had stated that the

"plaintiff" must have had no idea that the document was not served and it must not have been returned.

[16] In respect of wasted costs, reference was made to rule 64.13 of the CPR and the case of **Catherine Nerissa Gregory v Aubrey Erlington Gregory** Suit No HCV 1930 of 2003 (23 July 2004). It was submitted that the claimant's attorneys-at-law having become aware that the documents were undelivered, having collected the undelivered documents and being aware that the limitation period had expired, they should not have taken any further action in this matter. All the actions by the claimant's attorneys-at-law taken after 3 June 2024 when the undelivered documents were collected by them were highly irregular, improper, unreasonable and negligent and the court should make a wasted costs order.

[17] Counsel for the defendant also submitted that the limitation period having expired, the court should strike out the claim and that the life of the claim had expired and cannot be resurrected in the circumstances.

Discussion and analysis

[18] Two broad issues are raised by both applications. These are: -

(i) Whether default judgment should be entered against the defendant;

(ii) Whether wasted costs should be entered against the claimant's attorneys-at-law.

[19] Before embarking on the issues, I must first consider whether it is appropriate to grant the order asking that the acknowledgement of service filed on 29 April 2025 be allowed to stand. The evidence of the defendant indicates that it was not aware of the claim until 31 March 2025 when the matter was seen on the court list. Thereafter, contact was made with its insurers who contacted the defendant's present attorneys. Given the evidence of when the defendant became aware of the claim and the steps taken thereafter which would have been occasioned by some delay, I am of the view that the acknowledgment of service ought to be allowed to stand.

Whether default judgment should be entered against the defendant

[20] In resolving this issue, the question of whether service was effected on the defendant looms large. As counsel for the defendant correctly pointed out, rule 5.7 of the CPR prescribes the methods by which service may be effected on a limited company. It provides:

> "5.7 Service on a limited company may be effected –
>
> (a) by sending the claim form by telex, FAX, prepaid registered post, courier delivery or cable addressed to the registered office of the company;
>
> (b) by leaving the claim form at the registered office of the company;
>
> (c) by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company;
>
> (d) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim; or
>
> (e) in any other way allowed by an enactment."

With respect to service allowed by an enactment as contemplated by subparagraph (e), section 387 of the Companies Act also provides that documents may be served on a company by leaving it at or sending it by post to the registered office of the company.

[21] The defendant in filing the affidavit of service by email has introduced the question of whether the company may be served by email. In my view, the provisions of rule 5.7(a) – (d) do not expressly provide for service by email nor do the relevant statutory provisions under the Companies Act. I am therefore of the view that service by email is not a method of service contemplated by rule 5.7 of the CPR. The claimant's attorneys-at-law did not seek any order pursuant to the provisions of rule 5.13 of the CPR, which allows for service by alternative means, so it is not necessary for me to decide whether the provisions of rule 5.7 are exhaustive in that they include alternative means of service or whether

service by email could be regarded as alternative service under rule 5.13. Accordingly, it is my view that service by email is not a valid method of service under rule 5.7 of the CPR and as a consequence, there could not have been valid service on the defendant company by email.

[22] It is now necessary to consider whether the claimant had proven service by registered mail in accordance with the provisions of the CPR. The affidavit of service of registered post indicates that the claim documents were mailed to the defendant at a particular address, which the particulars of claim indicates is the registered address of the defendant. The defendant has not denied that the address to which the documents were posted is the address of its registered office. The defendant has instead maintained that it was never served. The defendant has filed evidence which demonstrates that the documents which were sent by registered mail were not collected and were in fact returned to the claimant's attorneys-at-law. This has not been denied by the claimant. So, the evidence that the defendant was not served is unchallenged. In those circumstances, I am of the view that the evidence on behalf of the defendant that it did not receive the claim documents ought to be accepted. However, the fact that the defendant never received the documents that were served by registered post does not mean that the default judgment ought not to be entered against the defendant given the decision of the Court of Appeal in **Andrew Fletcher**.

[23] In **Andrew Fletcher,** the defendant was a company and the claim documents were sent by registered mail to the correct address of its registered office but were not collected. No acknowledgment of service was filed and default judgment was requested and entered against the defendant. The claimant's attorneys-at-law did not become aware that the documents had not been collected until after they had served the defendant with a sealed copy of the default judgment. Foster-Pusey JA, with whom the other members of the court agreed, applied the earlier decision of the court in **A C E Betting Co Ltd v Horseracing Promotions Ltd and Summit Betting Co Ltd v Horseracing Promotions Ltd** SCCA Nos 70 & 71/1990 (17 December 1990). In **ACE**

Betting, Forte JA applied the following dicta of Denning MR in **A/S Cathrineholm v Norequipment Trading Ltd** [1972] 2 WLR 1242 :

> … Accordingly, when the plaintiff sends a copy of the writ by prepaid post to the registered office of the company, and it is not returned and he has no intimation that it has not been delivered it is deemed to have been served on the company and to have been served on the day on which it would ordinarily be delivered. If no appearance is entered in due time, the plaintiff is acting quite regularly in signing the judgment. If the defendant should seek to set it aside, he ought to explain the circumstances and go on to show that he has merits, that is, that there is a triable issue.

[24] In applying **ACE Betting**, Foster-Pusey JA stated:

> In the case at bar, the letter to the respondent was sent to the correct address of its registered office. The letter arrived at the post office, but was not collected. Since the letter was posted on 6 January 2009, it was deemed to have been served 21 days afterwards. When the [claimant's] attorneys-at-law requested default judgment on 8 July 2009, the time when the respondent should have filed an acknowledgment of service and a defence, had long passed. The firm, prior to the entry of default judgment did not receive any intimation that the registered letter sent to the respondent remained unclaimed. The letter from the Negril Post Office was useful, as it showed that the letter had arrived at the post office, but was not collected by the respondent. The evidence from the firm is that the letter was not returned to it. Consequently, no appearance having been entered and no defence filed, the judgment in default was regularly entered.

[25] So, the principle emanating from **Andrew Fletcher** following **ACE Betting** is that where documents had been served on a defendant company by registered

post and the plaintiff filed a request for default judgment without any intimation that the registered letter containing the claim documents remained uncollected, the default judgment entered pursuant to the request was a regularly entered judgment and any application to set aside should be one to set aside a regularly entered judgment.

[26] It is important to note that in the case of **ACE Betting**, the applicable framework governing civil proceedings was the Civil Procedure Code ('CPC'), section 451 of which applied to the entry of default judgments. **Workers Savings and Loan Bank Limited v Mckenzie et al** (1996) 33 JLR 410 is authority for the position that the effect of section 451 was that once a request for judgment in default was filed supported by the documentation required by section 70 of the CPC (affidavits of service, search and debt and final judgment) and the filed documentation was in order, the registrar of the Supreme Court was under a duty to enter the judgment, which took effect from the date of filing. The implication of this is that the date of entry of the default judgment would be the date of the request for default judgment although the request may not have been, and was unlikely to have been considered on the day that it was made. This was subject to the condition that the request and all the accompanying documents were in order. By the time **Andrew Fletcher** came to be considered, the CPC had been repealed and replaced by the CPR, which does not include a provision in the terms of section 70 of the CPC. I opined in **Dwayne Jacobs v Progressive Grocers & anor** [2023] JMSC Civ 150 that despite the difference in the default judgment provisions under both regimes, the provisions of both were not at such variance so as to render the decision in **Workers Savings and Loan Bank** case totally inapplicable. Indeed, the practice of the default judgment taking effect from the date of the request for judgment is still the current practice. It is of note that the issue did not arise for consideration in **Andrew Fletcher** and therefore the court made no pronouncements on it.

[27] It is also important to note that in **ACE Betting** and **Andrew Fletcher**, the plaintiff did not become aware that the claim documents were not collected by the defendant until after the entry of default judgment. This is distinguishable from the instant case where a request for default judgment has been filed but

no default judgment has been entered and the claimant is now aware that the documents were not delivered.

[28] It seems to me that the result of the application of **ACE Betting** and **Andrew Fletcher** is that if the period for filing an acknowledgment of service had passed and the claimant was not aware at the time of the request for default judgment that the claim documents were not collected by the defendant company, she was entitled to file the request for default judgment and to have judgment entered in default of acknowledgment of service if the request was in order. Further, if the fact of the non-collection of the claim documents by the defendant came to the attention of the claimant before the actual entry of judgment, given the principle that the default judgment takes effect from the date of the request, the claimant would still be entitled to have default judgment entered provided that the request for default judgment was in order.

[29] The request for judgment in default of acknowledgment of service was filed on 17 April 2024 and though it was not indicated in the request that the request was supported by the affidavits of service, it is a reasonable inference from the filing of the two affidavits of service on the same day as the request that the affidavits were intended to support the request for default judgment. I have already determined that the service by email was not valid. At the time of the filing of the request on 17 April 2024, the claim documents having been mailed from 16 February 2024, the deemed date of service would have expired 21 days after and the time for the filing and service of the acknowledgment of service would have long expired. I am of the view, therefore, that at the time when the request for default judgment was filed, the claimant was entitled to apply for judgment. However, the critical issue is whether the claimant is entitled to have default judgment entered.

[30] Based on the letter dated 5 June 2025 from the Post Master General along with its attachments, which were exhibited to the affidavit of Lashane Mead, the post office did not issue the notice advising the claimant's attorney-at-law of the non-collection of the claim documents until 18 April 2024. There is no indication of the means by which this was communicated to the attorneys-at-law and

therefore when it was received by them. However, the letter of 5 June 2025 also indicated that the documents were collected by the claimant's attorneys-at-law on 4 June 2024. It is my view, therefore that it is clear that by latest 4 June 2024, the claimant's attorneys-at-law would have been aware that the claim documents were undelivered. Even if they became aware on an earlier date, it is clear that at the time when the request was filed on 17 April 2024, they were not aware of the non-collection of the documents. It follows that if the request was in order, the claimant would have been entitled to have default judgment entered with effect from the date of the filing of the request for judgment and the defendant's recourse in light of the non-collection of the documents would have been to apply to set aside a regularly judgment. The non-collection of the claim documents would then have been one of the facts prayed in aid to satisfy the provisions of rule 13.3 of the CPR, which set out the criteria for setting aside a regularly entered judgment.

[31] However, as was pointed out by Mr Scott, the claimant had not complied with the requirements of rule 5.11 of the CPR in seeking to prove that there had been service on the defendant by registered post. However, I do not agree with him that the affidavit would amount to a nullity or that the request lacked validity. This is not the case where the claim documents had been sent to the incorrect address or the request had been filed prior to the expiry of the deadline for filing the acknowledgment of service as in those cases the essential requirement of service could never be satisfied at the date of the filing of the request. In the instant case, having regard to the affidavit of service of registered mail, which exhibited the registered slip that had the address of the defendant's registered office (which was not denied by the defendant), it can be said that on the face of it, there was proof of service of the documents but that the proof was inadequate in that the copies of the documents which were posted as required by rule 5.11 were not exhibited and the affidavit did not state the time of posting. So, in this case, the request was an irregularity, which in my view, could have been addressed by the filing of a supplemental affidavit exhibiting the documents and stating the time of posting. In fact, the court file indicates that on 15 August 2024, a requisition was issued for the documents which were mailed to be exhibited and the date and time of posting to be

included as well as for the filing of an affidavit of search (although the latter is not required by the CPR).

[32] It is my view that given that the request for default judgment was not in order, the claimant was not entitled to have default judgment entered until the shortcoming in proving service was rectified. Given that the claimant's attorneys-at-law had become aware that there was no actual service on the defendant prior to them providing further proof to establish service, the request for default judgment could no longer be acted upon because the fiction of service had now been overcome or dispelled by the actual fact of non-service prior to the actual entry of the default judgment. I am of the view that default judgment could not be entered in these circumstances because service is the cornerstone of civil proceedings. Therefore, if default judgment is to be entered on the bases that there is service of claim documents and a subsequent failure to file an acknowledgment of service but there then emerges evidence of non-delivery of the claim documents before the default judgment is actually entered, then in the interests of justice, the default judgment cannot be entered. In this case, as was argued by Mr Scott, up to the time of the defendant's application, the irregular request for default judgment had not been regularised. Attempts at regularising the request were not made until 5 August 2025 when there was the filing of an affidavit of service exhibiting the documents which were mailed but this attempt still did not fully comply with rule 5.11.

[33] In light of the foregoing, I have come to the view that the registrar ought not to be directed to enter default judgment pursuant to the request for default judgment given that the request is not in order in that evidence of service is not complete and the presumption of service has now been dispelled by the evidence of non-delivery of the claim documents.

[34] The case for the court to enter default judgment is even weaker. This is so as the court is really being asked to enter default judgment pursuant to its power to take any step to manage the claim and further the overriding objective under rule 26.2(1)(v) of the CPR. Assuming that an order granting default judgment may properly be made pursuant to the court's power under this rule, the court

would have to be satisfied that the conditions for default judgment including service of the claim documents has been satisfied. There is unchallenged evidence that there was no service on the defendant. In these circumstances, the entry of the default judgment would not be furthering the overriding objective, which includes dealing with cases justly.

[35] I am therefore of the view that no default judgment may be entered against the defendant. Given my earlier finding that the defendant was not served with the claim documents and given that the time for the service of the claim form has expired, there is no valid claim form and particulars of claim that can now be served. Consequently, the claim form and particulars of claim must be struck out.

Whether wasted costs should be entered against the claimant's attorneys-at-law

[36] The defendant is asking the court to make an order for wasted costs against the claimant's attorneys-at-law on the basis that the actions by the claimant's attorneys-at-law taken after 3 June 2024 when the undelivered documents were collected by them were highly irregular, improper, unreasonable and negligent.

[37] Section 28E of the Judicature Supreme Court Act empowers the Court to award wasted costs. This section states: -

> "28E.- (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court.
>
> (2) Without prejudice to any general power to make rules of court, the Rules Committee of the Supreme Court may make provision for regulating matters relating to the costs of civil proceedings including, in particular prescribing –
>
> (a) scales of costs to be paid –
>
> (i) as between party and party;

(ii) the circumstances in which a person may be ordered to pay the costs of any other person; and

(b) the manner in which the amount of any costs payable to the person or to any attorney shall be determined.

(3) Subject to the rules made under subsection (2), the Court may determine by whom and to what extent the costs are to be paid.

(4) In any proceedings mentioned in subsection (1), the Court may disallow, or (as the case may be) order the attorney-at-law concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.

(5) In subsection (4) "wasted costs" means any costs incurred by a party –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any attorney-at-law or any employee of the attorney-at-law; or

(b) which, in the light of any such act or omission occurring after they were incurred, the Court considers it is unreasonable to expect that party to pay."

[38] The provisions of subsections (4) and (5) above find expression in rule 64.13 and 64.14 of the CPR, which state:

"64.13 (1) In any proceedings the court may order –

(a) disallow as against the attorney-at-law's client; and/or

(b) direct the attorney-at-law to pay,

the whole or part of any wasted costs.

(2) "Wasted costs" means any costs incurred by a party –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any

attorney-at-law or any employee of such attorney-at-law; or

(b) which, in the light of any act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.

64.14 (1) This rule applies where –

(a) an application is made for; or

(b) the court is considering whether to make without an application, an order under rule 64.13(1).

(2) Any application by a party must –

(a) be on notice to the attorney-at-law against whom the wasted costs order is sought; and

(b) be supported by evidence on affidavit setting out the grounds on which the application is made.

(3) If the court is considering making such an order without an application it must give the attorney-at-law notice of the fact that it is minded to make such an order.

(4) A notice under paragraph (3) must state the grounds on which the court is minded to make the order.

(5) A notice under paragraph (2) or (3) must state a date, time and place at which the attorney-at-law may attend to show cause why a wasted costs order should not be made.

(6) 7 days' notice of the hearing must be given to the attorney-at-law against whom the wasted costs order is sought and all parties to the proceedings."

[39] Sykes J (as he then was) in **Jevene Thomas (an infant who sues by his mother and next friend Annette Innerarity) v McIntosh Construction**

Company Limited [2013] JMSC Civ 114 having reviewed the three step process expounded in **Ridehalgh v Horsefield** [1994] Ch 205 and his earlier decision in **Gregory v Gregory** 2003 HCV 1930 (which was relied on by Mr Scott) adumbrated a five stage enquiry to be made in determining whether such an order should be made as follows:

a. Has the attorney-at-law acted improperly, unreasonably or negligently?
b. If yes, did the conduct of the case cause the applicant or any other party unnecessary costs?
c. If yes, is it in all the circumstances just to make order?
d. Whether the enquiry can be done without breaching legal professional privilege?
e. Are the circumstances such that the facts necessary to establish the attorney's conduct has caused unnecessary expense to any party to the proceedings immediately and easily verifiable?

[40] Sykes J considered the fourth and fifth questions first as he was of the view that they would determine whether the application could go further. In other words, if they are answered in the negative, the court would not proceed to answer the other questions. I too will adopt this approach.

Whether the enquiry can be done without breaching legal professional privilege?

[41] In **Gregory v Gregory**, Sykes J also considered the dictum of Lord Hope in **Harley v McDonald** that "the court must take great care to confine its attention to the facts which are clearly before it or to facts relating to the conduct of the case that are immediately and easily verifiable. Allegations that may raise questions about duties owed to the client by the barrister or solicitor and the conduct of the case outside the court room are unlikely to be of that character". In my view, the enquiry as to whether the claimant's attorneys-at-law acted unreasonably, improperly or negligently can be made based on the facts that are before the court and without any further enquiry that would require delving into the instructions given by the clamant to her attorney. I am therefore of the view that the question is to be answered in the affirmative.

Are the circumstances such that the facts necessary to establish the attorney's conduct has caused unnecessary expense to any party to the proceedings immediately and easily verifiable?

[42] In my view, since there was no attempt by the claimant's attorneys-at-law to file any evidence in opposition to the application or challenging the evidence filed on behalf of the defendant, there is nothing before the court to suggest that there are any other facts which the court should have regard to in its enquiry before coming to its decision. I am of the view that the answer to this question should also be in the affirmative.

[43] With respect to question one, in considering the type of conduct that would amount to "improper, unreasonable or negligent" conduct, Sykes J in **Jevene Bent** stated:

> "18. **In the judgment his Lordship gave an indication of the meaning of the important words "improper, unreasonable or negligent." His Lordship held that "improper" covers but was not confined to conduct which would justify disbarment, striking off, suspension from practice or other serious professional penalty (p 861). Unreasonable means conduct that was designed to harass the other side rather than advance the resolution of the case. Even if the harassment arose from "excessive zeal" and not "improper motive" it would still fall within the definition of unreasonable (pp 861-862). Negligent should be understood as failing to act with "competence reasonably to expected of ordinary members of the profession"** (p 862). **To succeed under this head the applicant would have to prove that the conduct was such that "no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do what was done** (p 862).

> 19. Sir Thomas made the important observation that conduct is not unreasonable because it leads to an unsuccessful result or because more cautious counsel would have gone about the matter in another way (p 862). The critical question is whether the conduct permits of reasonable explanation. If it does, then counsel should receive the benefit of the doubt. Sir Thomas Bingham also indicated that the three heads should not be kept in water-tight compartments. There may well be overlap between the three.
>
> 20. …
>
> 21. The Master of the Rolls emphasised that there must also be a causal link between the conduct complained of and the costs wasted. If the conduct is proved but there is no causal connection, then the order should not be made. It may be a disciplinary matter but not one for a wasted costs order (p 866). (Emphasis supplied)

Has the attorney-at-law acted improperly, unreasonably or negligently?

[44] In considering this issue, I take into account that there does not appear to be any authority on whether a default judgment can be properly entered or is valid where subsequent to the request for judgment but before the actual entry of default judgment there is evidence that the claim documents were not served on the defendant. As I observed earlier, the authorities of **ACE Betting** and **Andrew Fletcher** both concerned circumstances where the fact of non-service of the claim documents came to the attention of the claimant after default judgment was entered.

[45] I am of the view that given the absence of any clear guidance on this aspect of the law, and given the court's current approach of relating the entry of default judgment back to the date of the request for default judgment, despite the fact that the claimant's attorneys-at-law received the uncollected documents on 4 June 2024, it was open to the claimant's attorneys-at-law to take the view that in

light of the law in **ACE Betting** and **Andrew Fletcher**, a valid default judgment could still be entered as the request had been filed at a time when the claimant's attorneys-at-law were not aware that the documents were undelivered.

[46] I am also of the view that as a consequence of this view taken by the claimant's attorneys-at-law, they would not have acted unreasonably, improperly or negligently in filing the application seeking the court's assistance in having the registrar enter default judgment on the basis that the request had not been considered and that by virtue of **Juliet Wright**, it was incumbent on them to take the necessary steps to move the matter forward by seeking to have their request acted upon. This was in circumstances where although the requisition which indicated that proof of service was lacking was issued on 4 August 2024, the court file indicates that the requisition was not emailed to the claimant's attorneys-at-law until 4 September 2024. The email was sent to the address which was indicated on the claimant's documents as being the email of her attorneys-at-law. By virtue of the Practice Direction No 1 of 2024, this email was deemed served on the next business day. The application to enter default judgment was filed on 5 September 2024 and the registry's time notation on the application indicated that it was filed at 9:08 am. Given the evidence contained in the application as well as the time of filing, it does not appear that the claimant's attorneys-at-law were aware of the requisition and therefore that their request was not in order. In these circumstances, I am not of the view that the claimant's attorneys-at-law acted unreasonably, improperly or negligently in filing the application because at the time of the filing of the application, they would not have been aware that the registrar considered that their request for default judgment was not in order.

[47] However, it seems to me that by the time the claimant's application came on for hearing in March 2025, the claimant's attorneys-at-law should have then become aware that their request was not in order as it required further evidence of service of the documents. This was against the background that they had previously become aware in June 2024 that the documents had not been collected by the defendant. In my view, in these circumstances, it ought to have become apparent to them that they were not entitled to judgment as the request was not in order

and therefore they ought not to have pursued the application any further. In my view, they ought to have withdrawn the application. This they did not do, which then necessitated the defendant filing its application for the court to decline to exercise its jurisdiction to hear the claim or to enter the default judgment.

[48] It is my view that in those circumstances, the actions of the claimant's attorneys-at-law in pursuing their application beyond 4 March 2025 cannot be viewed as being for the purposes of advancing the resolution of the case as the case could proceed no further and they were aware of this. In that way, their actions can be viewed as unreasonable. Consequently, I am of the view that the claimant's attorneys-at-law ought to pay the wasted costs of the defendant's application.

CONCLUSION

[49] I therefore make the following orders:

1. The acknowledgment of service filed on 29 April 2025 is allowed to stand.
2. The request for default judgment filed on 17 April 2024 is set aside.
3. The application for entry of default judgment is refused.
4. The claim form and particulars of claim filed on 18 January 2024 are struck out.
5. The claimant's attorneys-at-law are to pay the wasted costs of the defendant's application.

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