COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 153 of 2021

B E T W E E N

ALEXANDRA HENDERSON

Appellant

AND

YAMAHA MOTOR MANUFACTURING

CORPORATION OF AMERICA

First Respondent

And

YAMAHA MOTOR CO. LTD.

Second Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Evans, JA
The Honourable Madam Justice Bethell, JA

APPEARANCES: **Ms. Christina Galanos, Counsel for the Appellant**
Mr. Christopher Jenkins, with Mr. McFalloughn Bowleg Counsel for the Respondents

DATES: **27 July 2022; 8 September 2022**

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Civil Appeal – Service of Writ - Application to Dispense with the Requirement of Court of Appeal Rule 27(5) - Application for Certification of a Point of Law of General Public Importance - Court of Appeal Rules 9, 27(5)

The Appellant brought an action in the court below against the Respondents for personal injury. The matter was brought before the Registrar of the Supreme Court to decide on an issue of service of the Writ. The Registrar delivered an oral ruling to the parties then reversed her oral ruling a few days later and allowed the Appellant's application. The Respondents then appealed the Registrars decision. The appeal was heard by Supreme Court Justice Bowe-Darville who found in favour of the Respondents. The Appellant then sought and obtained leave from the Supreme Court to lodge an appeal against the decision of Justice Bowe-Darville to this Court. The Appellant made

applications to the court to certify that the proposed appeal raises points of law of general public importance that requires the consideration of this court and to dispense with the requirement of Rule 27(5) of the Court of Appeal Rules that the application for certification should first be made to a judge of the Supreme Court. The court heard the parties and reserved its judgment.

Held: the application to dispense with Order 27 (5) is allowed; the application for certification is refused. The decision of Bowe Darville J will stand. The record should however reflect that the order of the judge was to set aside the service of the writ on Yamaha and not to set aside the writ itself. Cost on both applications are the respondents to be taxed if not agreed.

The Appellant obtained leave from the judge to appeal the decision but she did not seek nor did she obtain from the judge a certification that the appeal involved a point of law and that the point is one of general public importance. That certification is a requirement to this court jurisdiction to hear this proposed appeal. Rule 9 permits this court to permit departure from the rules "where this is required in the interests of justice".

The court determined that it would be wrong to shut the Appellant out because of the mistake of her counsel in not applying to the court below for the required certification and exercised the court's power to determine whether the proposed grounds were points of law of general public importance which required the consideration by this court in the proposed appeal.

The court addressed each of the four grounds of appeal and decided that the grounds were not of general public importance and even if they were it was not satisfied that the grounds could be a basis for setting aside the decision of the judge below. The Court thereby refused the application for certification.

Birkett vs. James [1977] 2 All ER 801 mentioned
Camera Care Ltd v Victor Hasselblad [1986] 1 F.T.L.R 348 considered
Eric Newbold v Island Hotel Ltd SCCivApp No. 135 of 2020 considered
Executors of Evans and another v Metropolitan Police Authority [1992] IRLR 570 considered
Flowers v Scavella SCCivApp. No. 101 of 2020 followed
Fund Haven Ltd v The Executive Director of the Securities Commission of The Bahamas [2021] UKPC 11 considered
L and B (children) [2013] UKSC 8 mentioned
Leal v Dunlop Bio-Processes International Ltd [1984] 1 WLR 874 considered
Moss v Moss (In her capacity as Administratrix of the Estate of the late Willard Nazi Moss) [2015] 2 BHS J No. 114 considered
Pratt v Kelly SCCivApp No. 39 of 2020 considered
Re Blenheim Leisure (Restaurants) Ltd. (No. 3) The Times, 9 November 1999 considered
Stewart v Engel [2000] 1 W.L.R. 2268 considered
West Bay Management Ltd v Bahamas Hotel Maintenance and Allied Workers Union SCCivApp No. 164 of 2015 considered

J U D G M E N T

Judgment delivered by The Honourable Sir Michael Barnett, P:

1. The appellant wishes to appeal a decision of a judge setting aside the service of a Writ on the respondents.

2. The applications before the court are; (i) to dispense with the requirement of Rule 27(5) of the Court of Appeal Rules that the application for certification should first be made to a judge of the Supreme Court and (ii) to certify that the proposed appeal raises points of law of general public importance that requires the consideration of this court. The two separate applications were heard together.

3. The Appellant's relevant Notice of Motion filed 20 July 2022 was in the following terms:

> **"TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Appellant on the hearing of an application pursuant to rule 9(1)(c) of the Court of Appeal Rules FOR AN ORDER directing a departure from rule 27(5) of the Court of Appeal Rules in the ventilation of the Amended Notice of Motion for an order for the issue of a certificate that the points of law involved in the instant appeal are of general public importance, which was filed herein on the 20th day of July, A.D., 2022".**

And the same day the Appellant filed an Amended Notice of Motion:

> **"TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Appellant on the hearing of an application pursuant to section 21(1) of the Court of Appeal Act and rule 29(1) of the Court of Appeal Rules FOR AN ORDER for the issue of a certificate that the points of law involved in the instant appeal are of general importance. The said points of law are listed in the proposed grounds in the Notice to Amend, filed herein on the 28th day of March, A.D., 2022 and they all contains points/questions of law, which are of general public importance as follows:**

4. This case has a long history.

5. On the 24 February, 2013 the appellant had an accident at Harbour Island whilst driving a Yamaha Rhino golf cart. She suffered injuries. On the 23 February, 2016 she brought an accident for damages for personal injuries. The Writ was issued the day before the three year limitation period provided for by section 9 of the Limitation Act expired.

6. The defendants named in the Writ of Summons were Yamaha Motor Manufacturing Corporation of America, Yamaha Motor Co. Ltd. Harbourside Marine Ltd, Robert W. Miller and Breezes of the Caribbean Limited. The two Yamaha companies are the parties to this appeal. They are both companies operating in Georgia in the USA. They are not alleged to be carrying on business in The Bahamas other than they sold their product Yamaha Rhinos in The Bahamas.

7. Notwithstanding that the addresses of Yamaha were located outside The Bahamas, the Writ was issued without the leave of the court and the Writ was not marked "Not for service out of the jurisdiction". Order 6 Rule 6 provides:

> **"No writ which or notice of which is to be served outside the jurisdiction shall be issued without the leave of the court"**

8. On the 15 February, 2017 almost a year after the Writ was issued the plaintiff applied ex parte under Order 11 Rule 1 for the following orders:

> **"1) That the Plaintiff has leave to serve the Writ of Summons filed here in on the 23rd day of February, A.D., 2016 on the First and Second Defendants, Yamaha Motor 'Manufacturing Corporation of America and Yamaha Motor Co. Ltd. Respectively at 1000 Highway 34 East, Newman, Georgia 30265, United States of America, or elsewhere in the United States.**
>
> **(2) That the time for entering an appearance in the action by the First and Second Defendants be 28 days after service on them of the said Writ of Summons."**

9. The application was supported by an affidavit of Sherrimae Rahaming, the office manager of Henderson's attorney, based upon information and belief. The affidavit was as follows:

> **"I, SHERRIMAE RAHMING of the Southern District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas make oath and say as follows:**
> **1. I am the Office Manager of the firm Messrs. CG Chambers of MECAM House, Dowdeswell & Deveaux Streets, Nassau, Bahamas, Attorneys for the Plaintiff and I am duly authorized to make this Affidavit on its behalf.**
> **2. Unless otherwise stated I depose to the facts and matters herein from my own personal knowledge and from knowledge acquired by me from review of the pages, documents and files in our possession and from information supplied to me, which**

information I believe to be correct and true to the best of my knowledge, information and belief.

3. By virtue of a Service Agreement dated 5th November, 2011, the Plaintiff became an employee/caretaker for the Third and Fourth Defendants.

4. While working for the Third and Fourth Defendants, the Plaintiff would often commute by way of a 2005 Yamaha Rhino 660 Golf Cart, Identification Number 5Y4AMO4Y55A01477Y (hereinafter referred to as "the said Rhino"), which was purchased by the Fourth Defendant, through the Fifth Defendant for the employees' use at the Fourth Defendant's residence (hereinafter referred to as "the said residence").

5. On or about 24th February, 2013 at approximately 9:00 pm, the Plaintiff was operating the said Rhino, which was provided to her by the Fourth and Fifth Defendants as part of her employment in commuting around the said residence on a daily basis in order to fulfill her duties under the said Service Agreement when the said Rhino tipper over at a low rate of speed and crushed the Plaintiff's left leg causing the Plaintiff to suffer devastating injuries to her left leg.

6. Since the First and Second Defendants introduced the Yamaha Rhino to the market in 2003, the Yamaha Rhino's defective design and multiple hazards caused thousands of tip over and rollover accidents, resulting in catastrophic injuries and numerous deaths, including the deaths of several children.

7. Between 2004 and 2007, many Yamaha Rhino drivers and owners complained that the Yamaha Rhino is unstable even at low speeds, and is prone to tip over.

8. The Yamaha Rhino is excessively prone to tip over even at low speeds, on flat terrain, and while conducting safe turns, because of inherent flaws in its design, including having a narrow track width, high platform, high center of gravity, wheels too small to maintain stability, and a top-heavy design.

9. The Yamaha Rhino is significantly narrower than other vehicles in its class because the First and Second Defendants designed the Yamaha Rhino to fit in the bed of a standard size pick-up truck and to market that "convenient" feature to consumers. Unfortunately, this feature resulted in a narrow track width and greatly decreased stability. The Yamaha Rhino's high center of gravity, narrow track width, and side-by-side occupant seating, combine to make the Yamaha Rhino especially susceptible to tipping and rolling over.

10. Additionally, the Yamaha Rhino has an unpadded, heavy and rigid steel roll cage outlining the entire side of both occupant compartments. When a Yamaha Rhino tips over, its unpadded roll cage can itself become extremely dangerous, causing severe injuries or death.

11. The dangerously low Static Stability Factor (a reliable predictor of rollover propensity) of the Yamaha Rhino makes it more prone to tip over than virtually any automobile or truck. But unlike automobiles and trucks that travel mostly on smooth roads designed for safety, the Yamaha Rhino is advertised for use on uneven ground, where it is at the highest risk of tip over.

12. The wheels placed on the Yamaha Rhino by the First and Second Defendants are also too small to properly maintain stability, and the Yamaha Rhino's steering geometry facilitates rollovers and tip-overs, which further contributes to the propensity of the Yamaha Rhino to tip over and injure its occupants.

13. Between 2003 and late August of 2007, all Yamaha Rhinos lacked doors or leg guards to keep occupants' legs inside the vehicle, and handles for passengers to grasp onto in the event of a tip over.

14. Between June of 2003 (when the Yamaha Rhino was first introduced) and September of 2006, the number of injuries and deaths caused by the Yamaha Rhino continued to rise. However, rather than recalling the Yamaha Rhino or redesigning it to improve safety, in September of 2006, the First and Second Defendants decided to send a letter and new labels to some of the registered owners of Yamaha Rhinos. The letter discussed the vehicle's propensity to tip over. Many consumers and users of the Yamaha Rhino, including the Plaintiff, never even received this letter.

15. In July of 2007, rather than recalling the Yamaha Rhino or improving the safety of its design, the First and Second Defendants updated the Yamaha Rhino 2007 Owners Manual.

16. On the 27th day of August, A.D., 2007, instead of recalling the Yamaha Rhino or redesigning the vehicle for improved safety, the First and Second Defendants sent another letter to some of the Yamaha Rhino owners who had registered their contact information with the First and Second Defendants. At that time, the First and Second Defendants mentioned a "special offer" for Yamaha Rhino owners that included installation of doors and handholds on all 2004 to 2007 Yamaha Rhinos.

Unfortunately, many Yamaha Rhino users, including the Plaintiff, never received this letter.

17. In September of 2007, rather than recalling or improving the design of the Yamaha Rhino, the First and Second Defendants issued a guide for owners who had the doors installed, which again was only received by certain individuals.

18. The First and Second Defendants have been aware, and has known, since at least 2003, of the propensity of the Yamaha Rhino to tip over, and of the serious injuries and deaths that it could cause to drivers and passengers in tip over and rollover accidents.

19. Since at least 2003, the First and Second Defendants' officers, directors, and managing agents, were also on notice of the dangers of the Yamaha Rhino and the injuries that it caused. This notice to the First and Second Defendants came in the form of test results, analysis, research, complaints of users, criticisms, lawsuits, claims, and other information. Despite such knowledge, the First and Second Defendants refused to recall or redesign the Yamaha Rhino, and to date, the First and Second Defendants has refused to modify the vehicle to correct its stability and crashworthiness problems.

20. Given the foregoing, the First and Second Defendants owed the Plaintiff a duty to exercise reasonable care in the design, engineering, development, manufacturing, fabrication, assembly, equipping, testing, inspection, repair, retrofitting, labeling, advertising, promotion, marketing, supplying, distribution, wholesaling, and selling of the said Rhino, including a duty to assure that the said Rhino did not cause the Plaintiff, other users, bystanders, or members of the public, to suffer from unnecessary injuries.

21. The First and Second Defendants knew or ought to have known that the said Rhino was defectively designed and inherently unstable and has a propensity to tip over in foreseeable handling situations, even at low speeds, and can cause injuries and death.

22. Based upon the foregoing, the First and Second Defendants have failed to exercise ordinary care and have breached their duty to the Plaintiff.

23. The First and Second Defendants are not ordinarily resident within the jurisdiction. By the Writ of Summons filed herein on the 23rd February, 2016, the Plaintiff claims special damages, general damages, interest pursuant to the Civil Procedure (Award of Interest) Act, 1992, further or other relief and costs.

> **24. To the best of my knowledge, information and belief, the address of the First and Second Defendants is 1000 Highway 34 East, Newman, Georgia 30265, United States of America.**
> **25. 1 am advised and I verily believe that the Plaintiff has a good cause of action and that her case is a proper one for service out of the jurisdiction.**
> **26. In the circumstances, I respectfully crave leave for service of the Writ of Summons out of the jurisdiction on the First and Second Defendants."**

10. The affidavit is material for the fact that it does not make clear which ground or which sub rule of Order 11 Rule 1 is being relied upon for the grant of leave. Order 11 Rule 4(1) states:

> **"(1) An application for the grant of leave under rule 1 or 2 must be supported by an affidavit <u>stating the grounds on which the application is made</u> and that, in the deponent's belief, the plaintiff has a good cause of action, and showing in what place or country the defendant is, or probably may be found."** [Emphasis added]

11. The affidavit also does not provide any basis for determining that The Bahamas is the appropriate forum for adjudicating the claims against Yamaha which is grounded on faulty design of the golf cart.

12. On the 14 February, 2017, Deputy Registrar Darville Gomez (as she then was) made an order on that ex parte summons in the following terms:

> **"(1) That the Plaintiff has leave to serve the Writ of Summons filed herein on the 23rd day of February, A.D., 2016 on the First and Second Defendants, Yamaha Motor Manufacturing Corporation of America and Yamaha Motor Co. Ltd. Respectively at 1000 Highway 34 East, Newman, Georgia 30265, The United States of America, or elsewhere in the United States.**
>
> **(2)That the time for entering an appearance in the action by the First and Second Defendants be 28 days after service on them of the said Writ of Summons."**

13. It is to be noted that the Order gave Henderson leave to serve the Writ and not notice of the Writ on Yamaha in the United States of America. This is surprising as Order 11 Rule 3 provides that:

> **"Leave granted under rule 1 or 2 shall be leave for service out of the jurisdiction of notice of the writ <u>and not the writ</u>".** [Emphasis added]

14. The Order also gave Yamaha 28 days to enter an Appearance and not 14 days to do so.

15. Yamaha was served with the original Writ (which 14 days to enter an Appearance) and not notice of the Writ. The Order granting leave to serve the Writ out of the jurisdiction and 28 days to enter an Appearance was not served on Yamaha. Yamaha would not have known that it had 28 days and not 14 days to enter an Appearance.

16. On the 14 March, 2017 the Yamaha companies issued a summons as follows:

> **"a) The First and Second Defendants be at liberty to enter a Conditional Appearance in this action;**
>
> **b) The purported Service of the Writ of Summons filed on 23rd February 2016 be set aside;**
>
> **c) The Order granting leave to serve the First and Second Defendants be set a side; and**
>
> **d) The costs of this application be paid by the Plaintiff, such costs to be taxed if not agreed."**

17. Prior to that summons being determined, Henderson issued a summons on 12 June, 2017 in the following terms:

> 1. **"The service on the First and Second Defendants of the Writ of Summons filed on 23 day of February, A.D., 2016 be treated as a mere irregularity and that service of the Writ of Summons on the First and Second Defendants be treated as if it were service of Notice of the Writ on the First and Second Defendants;**
> 2. **The Plaintiff's failure to include the time for entering an appearance on the Writ of Summons be treated as a mere irregularity and that leave be granted to amend the Writ of Summons to include the time for the First and Second Defendants to enter an appearance;**
> 3. **The Plaintiff's failure to mark the Writ "Not for service within the jurisdiction" be treated as a mere irregularity;**
> 4. **The Plaintiff's failure to explicitly state the sub-paragraph upon which she relies under Order 11, rule 1(1) in the Summons filed herein on the 13th day of February, A.D., 2017 be treated as a mere irregularity;**
> 5. **Service of the existing Writ of Summons and all proceedings subsequent thereto be confirmed as valid;**
> 6. **The costs of this application be costs in the cause."**

18. It is readily apparent that Henderson by its summons recognized it's non-compliance with the Rules of The Supreme Court.

19. Yamaha countered with another summons issued on the 12 September, 2017

"1. The purported Service of the Writ of Summons filed on 23rd February 2016 be set aside on the grounds that:

a. The First and Second Defendants were not served with a Notice of the Writ as mandated by Order 11 rule 3, but rather a copy of the Writ of Summons itself:

b. The Original Writ was not marked 'not for service out of the Jurisdiction" as it should have been:

c. The Writ of Summons served on the First and Second Defendants purported to give 14 days for the First and Second Defendants to enter an appearance, and threatened that in default of such appearance within 14 days judgment might be given in their absence, whereas the Order granting the Plaintiff leave to serve the First and Second Defendants outside of the jurisdiction (which was not served with the Writ) gave a period of 28 days.

d. The affidavit in support of the application for leave to serve out of the jurisdiction failed to state which paragraph under Order 11 rule 1 was relied on as the basis for service outside of the jurisdiction.

2. The costs of this application be paid by the Plaintiff, such costs to be taxed if not agreed."

20. They also issued another summons on 19 September, 2017. That Summons was for

"1. The issue of the Writ of Summons be set aside on the basis that it was issued without the leave of the Court as required by RSC Order 6 rule 6.

2. The purported Service of the Writ of Summons filed on 23 February 2016 be set aside on the grounds that:

a. The Writ was issued without the leave pursuant to RSC Order 6 rule 6.

b. The Original Writ was not marked 'not for service out of the Jurisdiction' as it should have been;

c. The First and Second Defendants were not served with a Notice of the Writ as mandated by Order 11 rule 3, but rather a copy of the Writ of Summons itself;

d. The affidavit in support of the application for leave to serve out of the jurisdiction failed to state which paragraph under Order 11 rule 1 was relied on as the basis for service outside of the jurisdiction; and

e. The Writ of Summons served on the First and Second Defendants purported to give 14 days for the First and Second Defendants to enter an appearance, and threatened that in default of such appearance within 14 days judgment might be given in their absence, whereas the Order granting the Plaintiff leave to serve the First and Second Defendants outside of the jurisdiction (which was not served with the Writ) gave a period of 28 days.

3. The costs of this application be paid by the Plaintiff, such costs to be taxed if not agreed."

21. Yamaha then entered a conditional appearance.

22. On the 6 October, 2017 Henderson issued another summons. That summons was as follows:

"1) The Plaintiff's failure to obtain leave to issue the Writ of Summons filed on the 23rd day of February, A.D., 2016 be treated as a mere irregularity;

2) The Plaintiff's failure to mark the Writ "Not for service within the jurisdiction" be treated as a mere irregularity;

3) The service on the First and Second Defendants of the Writ of Summons filed on 23rd day of February, A.D., 2016 be treated as a mere irregularity and that service of the Writ of Summons on the First and Second Defendants be treated as if it were service of Notice of the Writ on the First and Second Defendants;

4) The Plaintiff's failure to explicitly state the sub-paragraph upon which she relies under Order 11, rule 1(1) in the Summons filed herein on the 13th day of February, A.D., 2017 be treated as a mere irregularity;

5) The Plaintiff's failure to include the correct time of 28 days for entering an appearance on the Writ of Summons filed herein on the 23rd day of February, A.D., 2016 be treated as a mere irregularity and that leave be granted to amend the said Writ of Summons to include the time for the First and Second Defendants to enter an appearance;

6) The issue and service of the existing Writ of Summons filed herein on the 23rd day of February, A.D., 2016 and all proceedings subsequent thereto be confirmed as valid,;

7) That this application be paid by the First and Second Defendants, such costs to be taxed if not agreed."

23. The various summonses were heard on the 8 November, 2017.

24. On the 16 April, 2020 (some 29 months after the hearing) Deputy Registrar Darville Gomez delivered an oral Ruling. In that oral ruling the Deputy Registrar acceded to Yamaha's application to set aside service of the Writ. She promised a written ruling.

25. On 18 April, 2020 (two (2) days later) and before the written ruling was given and before the Order was drawn up and perfected, the Deputy Registrar called the parties and told the parties that after further consideration she had changed her mind and decided that she would refuse Yamaha's application to set aside service of the Writ and that she would accede to Henderson's application to treat the various defects as irregularities and not set aside the service of the Writ on Yamaha. The Deputy Registrar on the 18 April, 2020 sent the parties her written ruling by email. The thrust of that Ruling was as follows:

> **"26. I have considered the numerous authorities submitted by each of the parties and have formed the view that notwithstanding the force of the Defendants' submissions, I am bound by the decision of Evans J. in Moss v Moss supra and the authorities therein cited. In that case the facts were similar to the facts of the instant matter and his Lordship in a reasoned and detailed ruling acceded to the application for the grant of a judicial waiver of the irregularities which had occurred in that case.**
>
> **27. 1 do not agree that the limitation defence has accrued because the application was made in time that is, prior to the expiration of the limitation period and in any event the Plaintiff may have the benefit of section 36 of the Limitation Act.**
>
> **28. Accordingly, I therefore accede to the Plaintiff's application however, I believe that in the circumstances of the instant application, (the application for a Judicial waiver is predicated on the Plaintiff's procedural errors) it would be unfair to award costs against the Defendants and therefore, I make no order as to costs. I so order."**

26. The Deputy Registrar considered herself bound by the judgment of Evans J in **Moss v Moss (In her capacity as Administratrix of the Estate of the late Willard Nazi Moss)** [2015] 2 BHS J No. 114 where he exercised his discretion to cure certain irregularities. The irregularities in **Moss** were (1) that the Plaintiff served the Writ and not notice of the Writ; (2) that the Plaintiff did not issue a Concurrent Writ; and (3) the Plaintiff obtained leave to serve the Writ out of the jurisdiction on a ground which was not applicable. In that case Evans J exercised his discretion to cure the irregularities under Order 2 Rule 1 and allowed the service out of the jurisdiction to stand.

27. Although not particularly material to this appeal, whilst a Registrar may be persuaded to exercise her discretion in a similar manner as a judge of the Supreme Court in similar circumstances as was presented to a judge, she was not 'bound' to do so. The exercise of judicial discretion is very much fact sensitive with the interests of justice a judge primary concern. Judicial discretion of one judge cannot ever be "bound" to be exercised in the same manner as another judge, even when that judge holds a higher position in curial hierarchy.

28. Yamaha appealed that decision to a judge of the Supreme Court. The grounds of that appeal were as follows:

> **"(1) The learned Registrar erred in law in varying her ruling orally delivered on 16th April 2020 without exceptional circumstances justifying such variation;**
>
> **(2) The learned Registrar erred in law in reliance upon L and B (Children), Re [2013] UKSC 8, as the law in the Bahamas regarding variance of judgments prior to perfection of an Order is Re Barrell Enterprises [1973] 1 WLR 19;**
>
> **(3) The learned Registrar erred in fact and law in exercising her discretion to accede to the First Respondent's Summons filed on 12th June 2017, seeking to validate the First Respondent's procedural errors in serving the Appellants outside of the jurisdiction with the Writ of Summons filed on 26th February 2016;**
>
> **(4) The learned Registrar failed to take into account all the relevant law, facts and circumstances of the case, and as such, erred in the exercise of her discretion;**
>
> **(5) The learned Registrar erred in law in ruling that she was bound by the decision of Moss v Moss (In her capacity as Administratix of the Estate of the late Willard Nazi Moss) [2015] 2 BHS J No. 114;**
>
> **(6) The learned Registrar erred in fact and law in holding that the Appellants could not rely upon a limitation defence under the Limitation Act;**
>
> **(7) The learned Registrar erred in fact and law in ruling that the First Respondent could rely upon s.36 of the Limitation Act; and**
>
> **(8) No Registrar regardful of their duties to act judicially could reasonably have exercised their discretion in the manner in which the Registrar did."**

29. That appeal was heard by Justice Bowe Darville and in a Ruling dated 29 October, 2021 Justice Bowe Darville allowed the appeal and said:

"1. The instant appeal deals with the validity of judicial tergiversation born out of procedural irregularities related to the service of a Writ of Summons out of jurisdiction. The Learned Registrar concluded that her ex-tempore decision delivered orally on the 16th April 2020 was untenable after a more thorough reading of the decision of Justice Milton Evans in Moss the (in her capacity as Administratrix of the of the Estate of the late Willard Nazi Moss) 2014 PRO/cpr/0003. The Learned Registrar also stated that since her order had not yet been perfected, she was able to rely on RE L and B (children) (care proceedings: power to revise judgment) [2013] 2 All ER 294 for her change of position. As a result, the Learned Registrar deemed the procedural errors made by the respondent as mere irregularities.

2. It is established law that the learn registrar possesses the right to change your judgment before it is perfected. However, the more important question is - should the Registrar have exercise her discretion?

3. The appeal is made pursuant to order 58 of the rules of the Supreme Court (RSC):

> **(1) An appeal should lie to a judge in Chambers from any judgment, order or decision of the registrar.**
>
> **(2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice to attend before the judge on a day specified in the notice.**
>
> **(3) Unless the court otherwise orders, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than two clear days before the day fixed for hearing the appeal.**
>
> **(4) Except so far as the court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.**

Background

4. Both parties agree the background facts in this appeal and the same is set out in the affidavit of Victoria Webster filed on the 17th of July, 2020. In summary:

- on the 23rd of February 2016, the Respondent/Plaintiff commenced an action via a Writ of Summons seeking damages for personal injuries suffered as a result of a vehicular accident which occurred on the 24th of February 2013.

- On the 13th of February 2017, approximately 2 weeks before the Writ of Summons was to expire, the Respondent/Plaintiff filed an ex parte summons supported by the Affidavit of Sherrimae Rahming seeking inter alia leave to serve the Appellants outside the jurisdiction.

- On 14th of February, 2017 the ex parte summons was heard before the Deputy Registrar and leave was granted to serve the Appellants with the Writ of Summons filed on the 23rd of February, 2016.

- The order was filed on 15th of February, 2017 and on that same date the Appellants/Defendants were served a copy of the Writ of Summons at their registered offices in the Georgia, USA.

- on 14th of March 2017 the Appellants/Defendants filed a summons seeking an order inter alia to set aside the purported service Writ of Summons.

- on 12th of June, 2017 the First Respondent/Plaintiff filed summons seeking an Order that the deficiencies raised by the Appellants be treated as "mere irregularities" and that the service so perform was valid.

- On 19th September, 2017 the Appellants filed a Summons setting out their challenge to the Writ of Summons.

5. The parties appeared before the Deputy Registrar on the 13th June, 13th September and 10th October, 2017.

6. On the 16th of April, 2020 the Registrar delivered an oral ruling acceding to the Appellant's application to set aside service of the Writ of Summons on the Appellants and awarded costs to be taxed if not agreed. A written ruling was promised.

7. Then, 48 hours later on 18th April 2017 by way of teleconference, the Registrar reversed her oral ruling dismissing the Appellants/Defendants' application and allowing the

Respondent/Plaintiff's application. The written ruling was delivered and dated 8th November 2017.

Appeal

8. On appeal, the Appellants/Defendants contend the following:

> **(i) The Learned Registrar erred in law in varying her orally delivered ruling on 16th April 2020 without exceptional circumstances justifying such variation;**
>
> **(ii) The Learned Registrar erred in law in reliance upon L and B as law in The Bahamas regarding variance of judgments prior to perfection of an order as the law in The Bahamas is Re Barrell Enterprises and others [1972] All ER 631;**
>
> **(iii) The Learned Registrar erred in fact and law in exercising her judgment to accede to the Respondent/Plaintiff's summons filed 12th June 2017 seeking to validate the procedural errors;**
>
> **(iv) The Learned Registrar failed to take into account the relevant law, facts and circumstances of the case and aired in the exercise of her discretion.**
>
> **(v) The Learned Registrar erred in ruling that she was bound by the decision of Moss v Moss**
>
> **(vi) The Learned Registrar erred in fact and in law in holding that the Appellants/Defendants could not rely upon a limitation defense under the limitation Act.**
>
> **(vii) The Learned Registrar erred in fact and law in ruling that the Plaintiff/Respondent could rely upon section 36 of the limitation act; and**
>
> **(viii) No Registrar regardful of their duties to act judicially could respond reasonably have exercised their discretion in the manner in which the registrar did.**

9. The Appellants asserted that the Writ of Summons served on them was defective in that it

> **a. The Writ of Summons was served as opposed to the Notice of the Writ as is provided for under Order 11 /3 (1);**
>
> **b. The time for entering appearance was not included in the writ of summons as provided for in order 11/4/3;**
>
> **c. The Writ of Summons was not marked "Not for service within the jurisdiction"; and**

d. The ex parte Summons filed on 13th January, 2017 failed to State the appropriate sub paragraph of order 11/1.

The Respondent/Plaintiff has acknowledged the "mere irregularities" and as such the court does not have to consider the order 11 offenses.

10. The Plaintiff/Respondent contended the following:

(i) Re L and B (children) is substantially similar to the instant case and is more germane to the present situation than Barrel. Exceptional circumstances are not required, only a carefully considered change of mind exercise judicially and not capriciously barring that any party had acted to the detriment upon the issuance of the first ruling.

(ii)The Appellants/Defendants have not suffered any injustice or prejudice resulting from the Learned Registrar's change of mind. Even if Re Barrel's is the relevant case to be used, the Learned Registrar changed her mind in exceptional circumstances being bonded after her consideration of Moss v Moss.

(iii) The Appellants/Defendants do not have a limitation defense.

Judgement

11. The Registrar's pronouncement at paragraph 3 of the ruling is the thrust of her decision making:

"Further, since the Order has not been perfected in this matter, I have jurisdiction to change the outcome of my decision. I rely on the decision of L and B (children) [2013] UKSC 8"

12. In H v T [2018] EWHC 3962 (Fam)-1 McDonald J. in giving his judgment described his judicial change of mind thus:

"Whilst I had not formally handed down judgment, and, accordingly, … there was nothing to prevent this change of mind following careful consideration … I am conscious that judicial tergiversation [i.e. change of mind] is, rightly, not encouraged. Not least in this case because the husband will have considered himself successful by reference to the draft, only for the court to reach the opposite conclusion in the judgment handed down. Against this however, … a judge must have the courage and intellectual honesty to admit and

correct and error or omission and, … in doing so is honoring his or her judicial oath. In the circumstances, whilst, as I can attest, it is an uncomfortable exercise for the judge, particularly where the error or omission acts to change the decision handed down in draft, and is disappointing for the litigant who believed they had been successful, a judge is duty bound to correct his or her omission or error. To do otherwise would not be just."

13. Judicial directions for the rendering of judgments or rulings emphasize that after a hearing, the court should make its decision as soon as is practicable and that the court must give written reasons for its decision. It is a matter of established law that judges have jurisdiction to reverse their decisions at any time before the order is drawn up and perfected and should only be exercised in exceptional circumstances, (the Barrell Jurisdiction). In Re K-L (Children) EWCA/Civ/2015/99 the court was sure to point out that a judge can change his/her mind about a judgment even after delivering it even after the order arising from the judgment is sealed, but they must provide reasons for doing so.

14. Following on the Court referenced Baroness Hale in L and B Children:

70. "The Supreme Court held that justice might require the revisiting of a decision for no more reason that the judge had had a carefully considered change of mind, since every case could depend upon the particular circumstances. The Supreme Court held that the power of the judge to change his or her mind had to be exercised judicially and not capriciously.

71. The leading judgment was given by Lady Hale. At paragraph 30, Lady Hale said this:

"As the court pointed out in Re Harrison's Share Under a Settlement [1955] Ch 260, 284, the discretion must be exercised "judicially and not capriciously". This may entail offering the parties the opportunity of addressing the judge on whether she should or should not change her decision. The longer the interval between the two decisions the more likely it is that it would not be fair to do otherwise. In this particular case, however, there had been the usual mass of documentary material, the long drawn out process

of hearing the oral evidence, and very full written submissions after the evidence was completed. It is difficult to see what any further submissions could have done, other than to reiterate what had already been said.

72. Lady Hale went on to discuss what would be the position if the other order made by the judge after the preliminary judgment had been sealed. Lady Hale held that that would have made no difference. The judge would still have been entitled to have a change of mind if there was good reason to do so.

73. At paragraph 46 lady Hill says this;

"As Peter Gibson LJ pointed out in Robinson v Fernsby 2004 WTLR 257, para 120, judicial tergiversation is not to be encouraged. On the other hand, it takes courage and intellectual honesty to admit one's mistake. The best safeguard against having to do so is a fully and properly reason judgment in the first place. I'll probably reason judgment in this case would have addressed the matters raised in counsel's email of the 16 December 2011. It would have identified the opportunities of each parent to inflict each of the injuries by reference to the medical evidence about the nature, manner of infliction and timing of those injuries and to the parents' and other evidence about their movements during the relevant periods. It would have addressed the credibility of the evidence given by each parent, having regard in this case to the problems presented by the mother's mental illness. Had she done this, the judge might well have been able to explain why it was that she concluded that it was the father who had more than once snapped under the tension. But she did not do so, and it is a fair inference that it was the task of properly responding to the questions raised by counsel for the father which caused her to reconsider her decision."

15. <u>Per Surf and Turf Ltd v Deltec Bank Bank and Trust Limited</u>, 2017/CLE/gen/00937 (unreported) the Honorable Madam Justice Indira H. Charles reaffirmed that it is incontrovertible that the court has discretion to vary or reconsider its decision prior to the perfection of an order and the fact that the court has discretion to reconsider its decision prior to the perfection of an order is well established law. Re Barrel's Enterprises and others additionally cemented that this

jurisdiction resulting in the exercise of the court's discretion is not unfettered and limited to exceptional circumstances. The Learned Justice reinforced the Re Barrel Jurisdiction as Bahamian law by providing a thorough consideration of the place of Re L and B in the Bahamian legal landscape.

She opined that Re L and B was a case decided in a jurisdiction where Civil Procedure Rules (CPR) govern, while The Bahamas still operates using Rules of the Supreme Court. She based her conclusion on several Bahamian authorities and particularly RLT v ALD and Others 2013/CLE/gen/2064 where Justice Winder in his consideration of re L and B stated

> **"…having considered these authorities, it appears to me that they are largely based upon environments which have undergone CPR Reforms. The Bahamas, however, has not yet introduced any CPR changes therefore, I find that the Barell Jurisdiction remains the state of our law. This position has been confirmed by Barnett CJ in the case of Re: Petition of Henry Armbrister 2007/CLE/qui/845. I accept therefore that it is only in the most exceptional circumstances that I ought to revisit a decision made by me. Further, that having reduced it to writing I ought to even raise the threshold to which I consider most exceptional."**

16. The Barrell Jurisdiction is the law in The Bahamas. In this instant appeal, there were no exceptional circumstances that should or could have lead to a variation in judgment. The Learned Registrar, in error, relied on L and B, which is not Bahamian law and Moss v Moss which she and the Plaintiff/Respondent submit was on all fours with the instant case.

17. While Moss v Moss is undoubtedly similar to the instant case, it can still be distinguished from this case. In Moss v Moss on 5th December 2014, the Plaintiff filed a Summons seeking an order that the service on the Defendant of a Writ of Summons be treated as a mere irregularity and that the Service of the Writ od Summons be treated as if it were the service of the Notice of the Writ. Additionally, that an order that the Plaintiff's failure to indorse the Writ with a memorandum from the Registrar showing that the Writ has been produced for examination and that two copies had been lodge with her as a mere irregularity.

18. The Appellants/Defendants contended that the non-compliance with the RSC was fundamental. The Plaintiff did not obtain leave to issue and serve the Notice of a Writ under Order 11 rule 3. The Plaintiff did not obtain leave to issue a concurrent writ under Order6 rule 5 of the RCS, and the Plaintiff had not complied with the requirements of Order 68 rule 2(2) (b) of the RCS and thereby obtained leave to issue and serve the Writ under or 11 rule 1(1)(a) of the RSC which was not applicable to the case. The Plaintiff should have applied for leave under Order 11 rule 1(1) of the RSC.

19. Milton Evans, held that the mistakes and omissions made by the Plaintiff could be rectified without causing injustice to the Defendant and granted the Plaintiff relief pursuant to Order 2 rule 1(2) and ordered that a new Writ be produced for the Registrar for the appropriate action, and that the service of existing Writ and all proceedings be confirmed as valid.

20. The procedural errors complained of have been listed above. The circumstances of this case can be distinguished from Moss v Moss as proffered by the Appellants/Defendants/ Although the three of the same procedural errors, namely the service of Writ instead of Notice of Writ, the fact that the Writ was not correctly labelled not for service within the jurisdiction and the improper use of Order 11 r1 were similar to Moss v Moss, other fundamental errors committed. Unlike Moss v Moss, and contrary to the Registrar's order of 28 days to enter an appearance, the Writ of Summons in this instant stated 14 days. Additionally, the procedural irregularities in Moss v Moss did not orbit around potential Limitation constraints. It was evident that the Plaintiff in making her claim played it very close to the line.

21. The Rules of the Supreme Court provide specific instructions regarding the form of documents for the service outside the Jurisdiction. Rule 1 (3) of Order 11 provides:

> **"Where a Writ or Notice of a Writ is to be served out of the jurisdiction under paragraph (2, the time to be inserted in the writ or notice within which the Defendant served therewith must enter an appearance shall be limited in accordance with the practice adopted under rule 4(3)."**

Rule 4 (3) states:

> **"An order granting rule 1 or 2 leave to serve a Writ, or Notice of a Writ, out of the jurisdiction must limit a time with which the Defendant to be served must enter an appearance."**

22. Per the order of the Court dated 14th February 2017, the time limited for the return of the Memorandum of Appearance was 28 days after service. The time in the served Writ was as stated in the regular Writs for the Appearance to be entered in 14 days. Within these 14 days, it was further stipulated that should the Defendants enter an appearance, they must also deliver a Defence to the Attorneys for the Plaintiff. The usual practice of the court is to provide the extra-jurisdictional participants a total of 28 days.

23. A fundamental tenet of any sound legal system is the right to a fair trial within a reasonable amount of time along with adequate methods of providing a Defence. The usual allowance of 28 days is considered reasonable time and to misstate the same after an order of the Court is a fundamental breach the Appellants/Defendant right to mount an adequate Defence and they are thereby prejudiced. And as per Roger Ormod in Carmea (sic) Care Ltd v Victor Hasselblad Aktiebolag and Another [1985] 3 WLR 1065

> **"Service of process out of the jurisdiction is an unusal assertion by this court of an extra-territorial jurisdiction which could have international repercussions and so is carefully controlled by the rules of court."**

Consequently, the misstatement of the order of the court is prejudicial to the preparation of an adequate defence and should not be considered a "mere irregularity" and per Stephenson LJ in Leal v Dunlop Bio Process [1884] 1 WLR 874 at 822 "the seriousness of the irregularity could be a basis for not exercising the discretion to cure it." The Court finds this is the case in this instance.

24. The Plaintiff/Respondent asserted that the Appellants/Defendants have no limitation defence. The incident inflicting injuries occurred on 24th February 2013. The Writ od Summons initiating the action was filed 23rd February 2016 and was within the statutory 3-year limitation period. The Order granting leave for service on the Appellants/Defendants was obtained on 14th February 2017 and served on 15th February

2017, all completed within the time before the expiration period of the Writ. All of this is true. However, if the original Writ were to be set aside due to fundamental procedural errors, the limitation period would expire and the Respondent/Plaintiff would be unable to make a new claim.

25. Should the Respondent/Plaintiff's "mere irregularity" errors be cured without the requirement of exceptional circumstances, the Appellants/Defendants will be denied a limitation defence. The Plaintiff/Respondent's reliance on Section 36 of the Limitation Act also seems rather precarious. Section 36 of the Limitation Act provided an extension of the limitation period to a person who is under a disability. Under s2(2-3) of the Limitation Act a disability is defined as "the state of infancy and an unsound mind". AN Extension is in no way automatic as the Plaintiff/Respondent appeared to contend. Additionally, Deputy Registrar, Marilyn Meeres, in Thompson v British Colonial Develoment Company Limited (doing business as British Colonial Hilton Hotel) in her ruling and summing up cited Kleinwort Banson Ltd v Barbrak Ltd, The Myrto (No.3) [1987] HL AC 597 quoted the ruling as follows:

> **"It is the duty of the Plaintiff to serve the Writ promptly. He should not dally… of he does so and gets into difficulties as a result, he will get scant sympathy."**

The application of section 36 is discretionary and not automatic. It would not be in the interest of justice to apply an extension if it will deprive a Defendant of the accrued benefit of a limitation period.

26. The Barrel jurisdiction is still the state of the law in The Bahamas. Curing the procedural mistakes of the Plaintiff/Respondent at first instance prejudiced the Appellants/Defendants, providing them with fewer days that the judicial order that is prescribed for the entering of an appearance and defence. Curing the procedural errors would also deprive the appellants/Defendants of a limitation defence.

27. The reliance on Re L and B (Children) was legally unsafe. The Procedural irregularities found in Moss v Moss were less severe than in this instant. The Registrar gave no exceptional circumstances for her change of mind.

28. For these reasons, the appeal should be allowed. The ruling given on 16th April, 2020 shall stand and the Writ action is

hereby struck out. The Appellants/Defendants shall have their costs to be taxed if not agreed."

30. It is to be noted that Registrar Darville Gomez' order only set aside the service of the Writ on Yamaha. It did not strike out the Writ nor did Yamaha in its application sought an order striking out the Writ itself. Counsel for Yamaha accepts that point but Henderson has sought to make that point a ground of the proposed appeal.

31. On the 9 November, 2021 Henderson issued a Summons for leave to appeal the decision of Bowe Darville to this Court of Appeal.

32. Neither the summons, nor the affidavit of Sherrimae Rahming nor the submissions in support of the application for leave made any reference to section 21 of the Court of Appeal Act. No application for certification of a point of law of general public importance was made.

33. Leave to appeal was granted by the judge on 3 December, 2021.

34. On the 21 December, 2021 Henderson applied to this court for leave to appeal out of time.

35. Leave to appeal out of time was granted and Henderson on the 18 February, 2022 filed a Notice of Appeal against the judgment of Bowe Darville J. That Notice of Appeal sought an Order that:

"1. The written ruling of Registrar Darville-Gomez (as she then was) dated 16th day of April, A.D., 2020 shall be restored;

2. The Appellant's failure to include the correct time of 28 days for entering an appearance to the Writ of Summons filed in Supreme Court Action No. 2016/CLE/gen/00242 (hereinafter referred to as "the relevant action") on the 23rd day of February, A.D., 2016 shall be treated as a mere irregularity pursuant to Order 2 of the Rules of the Supreme Court, 1978;

3. The Appellant's failure to state the appropriate sub-paragraph of Order 11, rule 1 of the Rules of the Supreme Court, 1978 in the Summons filed on the 13th day of January, A.D., 2017 be treated as a mere irregularity pursuant to Order 2 of the Rules of the Supreme Court, 1978;

4. The Appellant's failure to serve a Notice of the Writ, as opposed to the said Writ of Summons and the Appellant's failure to mark the said Writ of Summons "Not For Service Within The Jurisdiction" shall not be treated as irregularities at all;

5. The issue and service of the said Writ of Summons on the First and Second Respondents be confirmed as valid,

6. Further or other relief; and

7. An Order that the First and Second Respondents pays the Appellant's costs both in the Court below and in the Court of Appeal."

36. The grounds of the appeal were:-

1. The Learned Judge erred in fact and in law when she concluded that there were no exceptional circumstances that should or could have led to a variation in the judgment of Registrar Camille Darville-Gomez (as she then was),

2. The Learned Judge erred in fact and in law when she concluded that the Appellant acknowledged the failure to serve a Notice of the Writ as opposed to the said Writ of Summons and the failure to mark the said Writ of Summons "Not For Service Within The Jurisdiction" as "mere irregularities",

3. The Learned Judge erred when she concluded that curing the procedural mistakes of the Appellant at first instance prejudiced the Respondents, by providing them with fewer days than the judicial order that is prescribed for entering an appearance and a defence;

4. The Learned Judge erred when she concluded that curing the Appellant's procedural errors would deprive the Respondents of a limitation defence;

5. The Learned Judge erred when she ordered that "the Writ action is hereby struck out", as there was no application before the Court below to strike out the said Writ action;

6. The Learned Judge erred when she ordered the Appellant to pay the Respondents' costs to be taxed if not agreed;

7. Any other ground that arises upon the receipt of the record of the Court below."

37. It appears that the appellant was unmindful of the provisions of section 21 of the Court of Appeal Act. That section provides:

"21. (1) Any person aggrieved by any judgment, order or sentence given or made by the Supreme Court in its appellate or revisional jurisdiction, whether such judgment, order or sentence has been given or made upon appeal or revision <u>from a magistrate or any other court, board, committee or authority exercising judicial powers, and whether or not the proceedings</u>

> **<u>are civil or criminal in nature</u> may, subject to the provisions of the Constitution and of this Act, appeal to the court on any ground of appeal which involves a point of law alone but not upon any question of fact, nor of mixed fact and law nor against severity of sentence:**
>
> **Provided that no such appeal shall be heard by the court unless a Justice of the Supreme Court or of the court shall certify that the point of law is one of general public importance.** [Emphasis added]

38. I have my doubts as to whether a 'Registrar' is "any other court" within the meaning of section 21. It appears to me that there is a credible argument that the words "other court" means other than the Supreme Court and a Registrar is part of the Supreme Court and not "any other court". However, this court has on more than one occasion determined that an appeal to this court from a decision of a judge of the Supreme Court on appeal from a decision of a Registrar falls within section 21. See **Pratt v Kelly SCCivApp No. 39 of 2020. Eric Newbold v Island Hotel Ltd SCCivApp No. 135 of 2020; West Bay Management Ltd v Bahamas Hotel Maintenance and Allied Workers Union SCCivApp No. 164 of 2015.** We are not now at liberty to depart from those decisions.

39. Although Henderson obtained leave from Bowe Darville J to appeal the decision, she did not seek nor did she obtain from the judge a certification that the appeal involved a point of law and that the point is one of general public importance. That certification is a requirement to this court jurisdiction to hear this proposed appeal.

40. Bowe Darville has demitted office and has done so without Henderson having made any application to her for certification nor ever making the required certification.

<u>Application to Dispense with the Requirement of Court of Appeal Rule 27(5)</u>

41. Henderson has by a motion dated 28 March, 2022 applied to this court for the requisite certification and that this court dispense with the requirement of Rule 27(5) of the Court of Appeal Rules that the application for certification be made first the Supreme Court judge.

42. There is no dispute that this court has the power to certify that the point of law raised by the appeal is one of general public importance. The section specifically says:

> **"unless a Justice of the Supreme Court <u>or of the court shall certify</u> that the point of law is one of general public importance".**

See also **Fund Haven Ltd v The Executive Director of the Securities Commission of The Bahamas [2021] UKPC 11 at para 49.**

43. Although section 21 empowers this Court to certify a point of law as one of general public importance, Rule 27(5) of the Court of Appeal rules provide:

(5) Wherever under the provisions of the Act or of these Rules an application may be made either to the court below or to the court, it shall be made in the first instance to the court below.

44. Henderson has not applied to the Court below and cannot now apply to Bowe Darville J as she has demitted office. She therefore asks this court to exercise its powers under Rule 9 of the Court of Appeal Rules to direct a departure from the requirement of Rule 27 (5). Rule 9 provides:

> **9. (1) The Court may, on such terms as it thinks just, by order -**
>
> **(a) extend the period prescribed by these Rules for the doing of anything to which these Rules apply;**
>
> **(b) extend the period specified in any judgment, order or direction of the court, or of the court below, for the doing of anything to which the judgment, order or direction relates; or**
>
> **(c) direct a departure from these Rules in any other way <u>where this is required in the interests of justice</u>.**
>
> **(2) The power of the court, under the provisions of paragraph (1), to extend any period so prescribed or specified, is exercisable notwithstanding the expiration of the period so prescribed or specified. [Emphasis added]**

45. In **Fund Haven** (op cit) this court exercised its power to determine whether to certify where no proper certification had been done by the trial judge who had subsequently demitted office. But in that case, an application for certification had been made to the judge before she had demitted office.

46. There is no credible explanation as to why an application for certification was not made to Bowe Darville J. It could have and should have been made on the application for leave. It was not done.

47. Counsel for Henderson proffered this excuse for not complying with Rule 27 (5). In an affidavit her associate said:

> **"3. I make this Affidavit in support of the Notice of Motion filed herein on 19th July, 2022 wherein the Appellant is seeking an order directing a departure from rule 27(5) of the Court of Appeal Rules.**
>
> **4. On 13th July, 2022, Ms. Galanos and I were in the process of preparing submissions for the substantive hearing of this matter, which is scheduled for 27th July, 2022, when Ms. Galanos happened upon the case of Hilda Pratt v Thomas E.**

> **Kelly SCCiv App No. 39 of 2020 while searching for a definition for a "point of law" on the search database, Vlex Justis. Ms. Galanos then immediately printed two copies of the case for us to read and upon doing so, we discussed what was held in the case and she immediately informed me that in the making of the application for certification, she did not comply with rule 27(5), as the matter was already in the Court of Appeal and she took it for granted that because the Court of Appeal had granted leave to appeal out of time on 17" February, AD., 2022, then all applications involving the matter ought to be filed and ventilated in the Court of Appeal. As such, she filed the application for certification on 28th March, 2022 in the Court of Appeal and not in the Supreme Court, as provided by rule 27(5) of the Court of Appeal Rules. I am further informed by Ms. Galanos and I verily believe that on 31 August, 2021, her father passed away and shortly after the filing of the said application, while she was still reeling from the sudden and unexpected loss of her father, on 23rd April, 2022, her mother passed away and as a result of these events, for quite a significant period of time, Ms. Galanos experienced a loss of concentration.**
>
> **5. I am also informed by Ms. Galanos and I verily believe that Madam Justice Bowe- Darville demitted office mere days after she granted the Appellant leave to appeal the interlocutory ruling and the said Judge was certainly no longer hearing any new matters at the time when Ms. Galanos filed the application for certification."**

48. Regrettably, this is not a credible excuse. The summons for leave to appeal was made in November, 2021. The hearing of that summons took place on 3 December, 2021 and leave to appeal was granted by Bowe Darville J on the same day. On the 21 December, 2021 Henderson applied to this court for leave to appeal out of time. Bowe Darville J demitted office at the end of 2021.

49. It is readily apparent that the personal circumstances of counsel for Henderson did not prevent her from making applications in this matter in November, 2021 and December, 2021.

50. The unfortunate fact is that the application for certification was not made because counsel was not aware at that time of the need for certification. Is that a sufficient excuse to warrant a departure from the Rule?

51. Rule 9 permits this court to permit departure from the rules "where this is required in the interests of justice". This give the court a discretion and the exercise of which is very much fact sensitive. In **Flowers v Scavella** SCCivApp. No. 101 of 2020 this court said:

"However, it is settled law that the failure on the part of an appellant's lawyer may be relied upon as a basis for an extension of time. In Gatti v Shoosmith [1939] Ch 841 Sir Wilfred Greene MR at page 845 said:

> **"On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the Court in exercising its discretion…"**

14. In Vidale v Mayor, Aldermen and Citizens of Port-of-Spain (1968) 13 WIR 299 Fraser JA said at page 304:

> **"…a mistake of a solicitor may be a good reason for making an application for leave to a appeal out of time and the court in considering the facts will have to determine whether in a particular case the delay was due substantially to the mistake and if so, whether, having regard to all the circumstances of the case, the court in the exercise of its discretion ought to make it an exception to the rule…"**

15. Both cases were referred to with approval by this Court in Antonio v Insurance Company of The Bahamas [2012] 2 BHS J No 53".

52. Although the Rules of this court must be complied with by litigants, I am satisfied that it would be wrong to shut Henderson out because of the mistake of her lawyer in not applying to the court below for the required certification.

53. I am prepared to exercise this court's power to determine whether the proposed grounds are points of law of general public importance which require the consideration by this court in this proposed appeal.

The application for certification of a point of law of general public importance

54. It must be emphasized that Henderson can only appeal on (a) a point of law alone and not on any question of fact nor on any question of mixed fact and law; and (b) a point of law that is of general public importance.

55. In short the jurisdiction of this court on appeal from a judge exercising appellate jurisdiction is limited not only to points of law alone but points of law that are of general public importance.

56. In the revised proposed grounds of appeal, Henderson has identified four grounds which she contends are simply points of law and that the points are of general public importance.

57. They are:

> **"1. The Learned Judge erred in law when she concluded that a Registrar/Judge cannot, on its own motion and in the absence of exceptional circumstances, reconsider an ex-tempore, oral ruling, which has not been drawn and perfected;**
>
> **2. The Learned Judge erred in law when she conclude that the failure to serve a Notice of the Writ as opposed to the said Writ of Summons and the failure to mark the said Writ of Summons "Not for Service within the Jurisdiction" were irregularities in service outside of the jurisdiction pursuant to Order 11 of the Rules of the Supreme Court;**
>
> **3. The Learned Judge erred in law when she struck out the writ action in its entirety upon the motion of two Defendants seeking to set aside service of the relevant Writ of Summons upon them when there were other Defendants remaining on the said writ action who made no application or complaints in this regard;**
>
> **4. The Learned Judge erred in law when she concluded that the Respondents will be or was prejudiced by the doing of a thing where the Respondents led no evidence of prejudice or even asserted that they would be prejudiced in any way."**

58. What are points of law of general public importance has been the subject decisions of this court in several matters. It is usually considered in applications for leave to appeal to the Privy Council which are not appeals of right.

> **"10. It is settled law that we should not exercise our discretion to grant leave unless the appeal involves a point of general or public legal importance. This point was made by this court in Callenders & Co (a firm) v The Comptroller of H.M Customs SCCivApp No. 63 of 2012and in Responsible Development for Abaco (RDA) Ltd. v The Rt. Hon. Perry Christie et.al. SCCivApp. No. 248 of 2017.**
>
> **11. In that latter case, I referred to two recent decisions which were helpful in determining the issue of general or public legal importance.**

12. In Renaissance Ventures Ltd v Comodo Holdings [2018] ECSC J1008-3 (decided on 8 October 2018) the Court of Appeal of the Eastern Caribbean said:

> **"Where there is no dispute on the applicable principles of law underlying the question which the appellant wishes to pursue on his or her proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellant court or by longevity of application. Where the principle is one established by this Court but is either unsettled, in the sense that there are differing views or conflicting dicta, or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given to harsh consequences, of for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek guidance of their Lordships' Board. Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance." [Emphasis added]**

13. More recently the Court of Appeal of Bermuda in Siddiqui and others v Athene Holding Limited (2019) 95 WIR 342 said:

> **"51. Persuasive attempts at a more compendious explanation of what is meant by a "question of great or public importance" have been made in the case law.**
>
> **52. It will be apparent that leave should not be given where there is, on proper analysis, no genuine dispute as to the applicable principles of law. This is especially important to emphasize in**

> **the present case in light of the Appellants' arguments to be examined below, where, as will be discussed, there appears to be a confusion between a dispute as to the applicable principles of law and a dispute as to the applicability of settled principles of law to the facts of the case in dispute."**

59. Despite the valiant efforts by counsel for Henderson to persuade us that this appeal raised points of law of general public importance, we are not persuaded. Moreover, even if they were points of points of law of general public importance we are not satisfied that the grounds could be a basis for setting aside the decision of Bowe Darville J.

Ground One

The Learned Judge erred in law when she concluded that a Registrar/Judge cannot, on its own motion and in the absence of exceptional circumstances, reconsider an ex-tempore, oral ruling, which has not been drawn and perfected.

60. I begin by noting that this is an appeal from the decision of Bowe Darville J. It is not an appeal from the ruling of the Deputy Registrar. The appeal to Bowe Darville J was a complete rehearing. It is the exercise of Justice Bowe Darville's discretion that is the subject of this appeal.

61. The editors of The Supreme Court Practice, 1979 (The White Book) summarize the law at note 59/1/2 as follows:

> **"An appeal from the Master or District Judge to the Judge in Chambers is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the Judge treats the matter as though it came before him for the first time, save that the party appealing, even though the original application was not by him but against him, has the right as well as the obligation to open the appeal. The Judge "will of course give the weight it deserves to the previous decision of the Master; but he is in no way bound by it". The Judge in Chambers is in no way fettered by the previous exercise of the Master's discretion, and on appeal from the Judge in Chambers, the Court of Appeal will treat the substantial discretion as that of the judge, and not of the Master.**
>
> **A Judge hearing an appeal from the Master or District Judge, however, is entitled, if he thinks fit, to adopt the Master's or District Judge's reasoning in his own judgment without setting out the reasoning himself; by so doing the Judge does not fail to exercise the discretion conferred on him.** [Emphasis added]

> Notwithstanding the judge's criticism of the Registrar's reliance on **L and B (children)** [2013] UKSC 8 in changing her decision, a careful review of the Judge's decision shows that she was quite properly exercising her own discretion. After considering the facts she determined that the judge's original oral decision was the correct one and she made an order in similar terms. This is clear from paragraphs 18 to 26 of the judgment. The judge was not in any way bound by the decision of Evans J in **Moss**.

62. The issue of whether **L and B** represents the law of The Bahamas is for the purposes of this appeal an academic one. There is no doubt that prior to the CPR an English judge had to power to revisit his decisions prior to it being perfected.

63. In **Stewart v Engel** [2000] 1 W.L.R. 2268 the English Court of Appeal noted:

> **"For many years it has been accepted that a judge who has given judgment has the power to reconsider his conclusion and in effect reverse his own decision provided that the order recording his earlier decision has not yet been formally completed. A number of the authorities illustrating this principle were collated by Neuberger J. in Charlesworth v. Relay Roads Ltd. [2000] 1 W.L.R. 230. Another leading case in which the existence of this jurisdiction was accepted, by the Court of Appeal, is In re Barrell Enterprises [1973] 1 W.L.R. 19 which was apparently not cited to Neuberger J. in the Charlesworth case.**
>
> **However, it appears that there is no authority binding on this court which establishes that this jurisdiction ("the Barrell jurisdiction") has survived the introduction of the Civil Procedure Rules, which, as stated in rule 1.1(1), are a "new procedural code with the overriding objective of enabling the court to deal with cases justly."**

64. The Court concluded:

> **"I am satisfied that there is nothing in the Civil Procedure Rules which obliges us to hold that it was so ab-rogated and that we should not reach any such conclusion. On the contrary, the jurisdiction, if very cau-tiously and sparingly exercised, in my judgment serves a useful purpose, fully in accord with the overriding objective of enabling the court to deal with cases "justly," as particularised in C.P.R., r. 1.1(1).**

65. The court then went on to refer to the comments of Neuberger J (as he then was) in **Re Blenheim Leisure (Restaurants) Ltd. (No. 3),** The Times, 9 November 1999:

"Neuberger J. in In re Blenheim Leisure (Restaurants) Ltd. (No. 3), The Times, 9 November 1999 gave some helpful examples of cases where the jurisdiction might justifiably be invoked before the order in question was drawn up:

> **"a plain mistake on the part of the court; a failure of the parties to draw to the court's attention a fact or point of law that was plainly relevant; or discovery of new facts subsequent to the judgment being given. Another good reason was if the applicant could argue that he was taken by surprise by a particular application from which the court ruled adversely to him and that he did not have a fair opportunity to consider."**

It is to be observed that in all these instances, if the court had no power to reconsider its order before it was drawn up, the only remedy open to the party prejudiced would be by way of appeal from the order. Though on such hypothetical facts an appeal would itself have a good chance of success, common sense suggests that in such cases the judge who made the order should himself have the power to vary it before the appeal procedure has to be set in motion, with the likelihood of exposing all parties to far greater expense and delay than an application to the court of first instance. Consistently with the existence of the Barrell jurisdiction, R.S.C., Ord. 59, r. 4(1) provides that the time for appeal from a decision of the High Court begins to run from "the date on which the judgment or order of the court below was sealed or otherwise perfected." Up to that date, in my judgment, the Barrell jurisdiction continues to subsist, though, as I will explain later, the discretion thereby conferred on the court is in my judgment severely restricted."

66. Whether or not the Registrar's reliance on **L and B** was correct, there is no doubt that she had the jurisdiction to revisit her decision prior to it being perfected. Whether she should have done so in the circumstances of any case is fact sensitive. What amounts to exceptional circumstances is also fact sensitive. The fact that the Deputy Registrar herself changed her mind would certainly be an exceptional circumstance. But there is no doubt that the jurisdiction exists and there is no credible dispute on the point of law. There is no dispute between the parties that a judge (or Registrar) has the jurisdiction to revisit an order made before it is perfected. Whether she should do it after inviting the parties to be heard is a matter of prudence and fairness, but it is not an issue of jurisdiction.

67. In the present case, the Supreme Court judge exercised her own discretion and determined that the Registrar's original decision was correct for the reasons the judge stated.

68. This is not a point of law of general public importance that warrants consideration in this matter. The law is settled. In any event it would not be a basis for this court overturning the decision of Bowe Darville J.

Ground Two

The Learned Judge erred in law when she conclude that the failure to serve a Notice of the Writ as opposed to the said Writ of Summons and the failure to mark the said Writ of Summons "Not for Service within the Jurisdiction" were irregularities in service outside of the jurisdiction pursuant to Order 11 of the Rules of the Supreme Court;

69. It is difficult to apprehend what the point of law is. Clearly those failures were in breach of the Rules and were irregularities. In her summonses referred to earlier, Henderson acknowledged that they were irregularities. They were not the only irregularities. The failure to notify Yamaha that it had 28 days and not 14 days to enter the Appearance is also an irregularity. The failure of the affidavit in support of the application for leave to serve out of the jurisdiction to identify the ground under Order 11 Rule 1 is also an irregularity.

70. There is no point of law in dispute. A judge has the power to set aside service of a Writ on the ground of irregularity. The issue is whether those irregularities warranted the setting aside of the service of the Writ on Yamaha. That is wholly within the discretion of the Supreme Court judge. This is an appellate court. This court could not say that it was wrong or unreasonable for the judge to set aside the service on Yamaha because of the irregularities. The whole process in instituting this action manifested non-compliance with the Rules. Even if we would have exercised our discretion differently, it was not unreasonable for the judge to decide that Henderson should get it right and set aside the service on Yamaha. The point was made in **Camera Care Ltd v Victor Hasselblad** [1986] 1 F.T.L.R 348;

> **"However, service of process out of the jurisdiction is an unusual assertion by this Court of an extra-territorial jurisdiction which could have international repercussions, and so is carefully controlled by the Rules of Court. It is consequently very important to ensure compliance with the rules. So, irregularities should be cured only in exceptional cases. I do not think that this is a case in which it would be a proper exercise of the discretion for the Court to put right the egregious mistakes of the plaintiff's solicitors so as to bring a foreign party before this Court and, incidentally but not insignificantly, deprive him of a limitation defence."**

71. This ground does not raise a point of law of general public importance which this court needs to consider. Even if it were, we would not have set aside the decision of Bowe Darville on that ground.

Ground Three

The Learned Judge erred in law when she struck out the Writ action in its entirety upon the motion of two Defendants seeking to set aside service of the relevant Writ of Summons upon them when there were other Defendants remaining on the said Writ action who made no application or complaints in this regard.

72. This is a not a serious point. As pointed out before, that part of the order setting aside the Writ was clearly a mistake as the court simply intended to make the same decision the Registrar intended to make in her original oral ruling. That was simply to set aside the service of the Writ and not the Writ itself. That was all that Yamaha asked for in its summons.

73. An appeal on that ground is unnecessary as it was an obvious mistake which counsel for Yamaha acknowledge and could have been corrected without the need for an appeal.

74. It is not a point of law. It is an issue of what the judge actually intended to rule. This ground does not warrant certification.

Ground Four

The Learned Judge erred in law when she concluded that the Respondents will be or was prejudiced by the doing of a thing where the Respondents led no evidence of prejudice or even asserted that they would be prejudiced in any way.

75. This is not a point of law that is unsettled and requires consideration by this court.

76. It is not the law that the existence of prejudice is necessary before a court will set aside service of a Writ outside the jurisdiction on the ground of irregularity.

77. Whilst prejudice to a party is an important factor in the exercise of any discretion under Order 2 on how to deal with an irregularity, it is only a factor in a very wide discretion. Rules of the court cannot be ignored. Their non-compliance cannot be dismissed or excused simply because the other side had not proven any prejudice. Parties, as well as the court, are entitled to have the Rules of the court complied with by litigants. This is especially so where a plaintiff seeks to invoke the long arm jurisdiction of the court and require a party not otherwise subject to the court's jurisdiction to submit to the jurisdiction of the court.

78. The decision in **Executors of Evans and another v Metropolitan Police Authority** [1992] IRLR 570 is of little assistance. In that case the court was considering the power of an Industrial Tribunal to dismiss a matter for want of prosecution. In that case the court held that a Tribunal should follow the principles in **Birkett vs. James** [1977] 2 All ER 801. That case had nothing to do with irregularity and non-compliance with the Rules.

79. Courts must be scrupulous in ensuring the rules with respect to the issue of a Writ and notice of it out of the jurisdiction are complied with by litigants. The point has been made on numerous occasions. In **Leal v Dunlop Bio-Processes International Ltd** [1984] 1 WLR 874 the English Court of Appeal said:

> **"the procedure for which Order 11 provides is an exceptional enlargement of our courts' jurisdiction: see, e.g. Tyne Improvement Commissioners v. Armement Anversois S.A. (The Brabo) [1949] A.C. 326, 338, per Lord Porter. The court's restraining hand is an important restriction on the misuse of the procedure, and rule 4(2) underlines its importance."**

80. It should be recalled that Order 11 Rule 4(2) states:

> **"(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."**

81. This recognizes the need for compliance with the Order 11. The inadequacy of the affidavit of Sherrimae Rahming made in support of the application for leave made under Order 11 is but one example.

82. This ground that the judge erred in making her order on the basis of the existence of prejudice when no prejudice was alleged or proved is in my judgment not a point of law of general public importance which warrants the attention of this court. In any event, it has no merit and would not be a basis for setting aside the judge's ruling.

83. I close by citing with approval the following part of the judgment of Sir Roger Omerod in **Camera Care case (op cit);**

> **"[40] On the issue of irregularity, it is plain that the plaintiff's solicitor made a series of blunders, one of which (his omission to serve the writ on the second defendants before applying for leave to serve the first defendants out of the jurisdiction) precluded him from basing his application on sub-paragraph (j) of Order 11 rule 1(1) , which would have been open to him, had he served the second defendants before applying for leave to serve the first defendants out of the jurisdiction. It is unnecessary to catalogue these blunders in detail. The real issue is whether the Court should exercise its discretion under Order 2 rule 1 so as to `cure' the consequent irregularities which occurred in obtaining leave to serve the first defendants out of the jurisdiction, and in serving the writ in these proceedings on them.**
>
> **[41] <u>This is, of course, primarily a discretion to be exercised by a Master or, on appeal, by the Judge in Chambers, and not by this Court, unless it can be shown that the Judge failed to exercise his discretion 'judicially'—that is, in accordance with accepted principles.</u> With respect to the learned Judge in this case, I think that he misdirected himself on an important point.**

[42] He was referred to the recent case in this Court of Leal v. Bio-Processes International Ltd. but distinguished it on the ground that it was concerned only with an application to renew the validity of a writ which had not been served within the year from its issue, and held that it had no application to the present case. On the contrary, it was also concerned with the exercise of the discretion under Order 2(1) to validate the purported and irregular service of process out of the jurisdiction. It was, therefore, directly relevant to the question which was before him, and some of the observations made by the members of the Court in that case are pertinent to the decision in this case. Accordingly, it is open to us to reconsider the position and exercise our discretion as we think fit.

[43] The authorities to which we have been referred, taken as a whole, show that Order 2(1) should be applied liberally in order, so far as is reasonable and proper, to prevent injustice being caused to one party by mindless adherence to the technicalities in the rules of procedure, leading to the dismissal of an otherwise good cause of action (or defense). 'The tenor of the Order shows that it is directed to the curing of that which is capable of cure, to saving rather than destroying' (per Holroyd Pearce L.J., in Pontin v. Wood 8). That case was one of a familiar type in which every effort is made by the defendant to take advantage of technicalities to manipulate to his advantage the limitation period. We were referred to a number of similar cases, in most of which the Court has exercised its discretion to cure irregularities in order, inter alia, to prevent a defendant taking an unfair advantage of the expiry of a limitation period. See, for example, Tsai v. Woodworth 9 and Softness v. DSB Properties (Essex) Ltd.

[44] However, there is another line of authority in which can be discerned a different and much less liberal approach. Heaven v. Road & Rail Wagons Ltd., per Megaw J., is a typical example. In that case it was held that to justify the exercise of the discretion to extend the validity of a writ so as to deprive a defendant of a defence under the Statute of Limitations, there must be exceptional circumstances. Megaw J. indicated that exceptional circumstances would, or might, include some at least of the manæuvres or manipulations adopted in some cases by defendants. In other words, where the plaintiff is wholly at fault, the Court will be reluctant to deprive the defendant of his

defense under the statute, but less so where the defendant has, in one way or another, contributed to the plaintiff's mistake.

[45] The case of Leal v. Dunlop Bio-Processes is an illustration of another situation in which the Court will also adopt a less liberal attitude, namely, where service out of the jurisdiction has been effected irregularly. The effect of that case is conveniently stated in the last paragraph of Slade L.J.'s judgment where he said:

> **`Finally, and more generally, I would specifically express my agreement with May L.J.'s view that only in the exceptional case should the court, in the exercise of the discretion which we have held to exist, validate, after the event, the purported service in a foreign country without leave of process issued by an English court. In most cases breaches of the requirements of Order 6 rule 7 or Order 11 rule 1, relating to the leave of the court, are not in my opinion likely to be breaches which can be lightly disregarded.'**

I respectfully adopt and agree with this statement of the law.

[46] I of course appreciate that in Leal's case no attempt at all was made to obtain leave to serve out; the writ was simply served on the defendants in Jersey. In the present case leave was obtained, but in an irregular manner. However, service of process out of the jurisdiction is an unusual assertion by this Court of an extraterritorial jurisdiction which could have international repercussions, and so is carefully controlled by the Rules of Court. It is consequently very important to ensure compliance with the rules. So, irregularities should be cured only in exceptional cases. I do not think that this is a case in which it would be a proper exercise of the discretion for the Court to put right the egregious mistakes of the plaintiff's solicitors so as to bring a foreign party before this Court and, incidentally but not insignificantly, deprive him of a limitation defense. [Emphasis added]

84. In my judgment there is no basis upon which this appellate court could set aside the exercise of the discretion of Bowe-Darville J. The Writ served on Yamaha was inconsistent with the order made by the court granting leave to serve Yamaha in Georgia. The Order of the Court gave Yamaha 28 days to enter an Appearance and the Writ served on Yamaha only gave then 14 days. The judge considered that sufficiently egregious to set aside the service of the Writ. But that was not the only breach of the Rules. Even if we may have been minded to exercise our discretion differently, it cannot be said that the exercise by the judge was unreasonable.

It is significant that this was also the original view of the Deputy Registrar that the service of the Writ should be set aside.

85. In the circumstances I would refuse the application for certification. In the result the decision of Bowe Darville J will stand. The record should however reflect that the order of the judge was to set aside the service of the writ on Yamaha and not to set aside the writ itself.

86. The application to dispense with Order 27 (5) is granted and the application for certification is refused. Cost on both applications are the respondents to be taxed if not agreed.

The Honourable Sir Michael Barnett, P

87. I agree.

The Honourable Mr. Justice Evans, JA

88. I also agree.

The Honourable Madam Justice Bethell, JA