

RECENT DEVELOPMENTS IN THE CIVIL PROCEDURE RULES AND THEIR IMPACT ON THE COURT AND PRACTITIONERS*

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Introduction

The Civil Procedure Rules (CPR) is still in its infancy. It was passed on the 16th September 2002. There was a transitional period¹ during which parties were required to comply with the rule that all matters in which trial dates were not fixed or that did not come on for trial by a certain date were to apply for a case management conference. The commencement date was the 1st January 2003.² In 2002, leading up to the commencement date, everyone was excited about the Rules and looked forward to the 2nd January 2003 when they would start to work under the new regime. The excitement gained force because of the overriding objectives and the idea that cases would be judge-managed. Judge-managed cases followed from the underlying philosophy of the rules, the active management of cases. The idea was that the active management of cases could only be realised if the responsibility for advancing cases to trial was in the hands of

¹ Part 73

² Rule 73.1(3)

judges. The judges were expected to apply a flexible, if not robust approach to the resolution of matters taking into account the nature and substance of the case, the circumstances of the parties and the overall administration of justice.

Everywhere there was talk of no more adjournments, earlier trial dates and efficient and speedy disposal of matters. Lawyers immediately came on board, one lawyer reported that he fired his entire staff and hired a new staff complement as he did not want any dinosaurs to slow down his firm's adaptation to the new dispensation. In some cases, they had seminars for their clients and highlighted the positives of the new rules but in many cases, these were really their expectations. Clients were told that trials would come on within a year of the filing of their matters. The public was also interested in hearing about the new rules and what it meant for them. They had lost confidence in the justice system for different reasons probably having nothing to do with the rules in particular.

The new rules were also good news for commercial clients. These clients were discontented with the slow pace of litigation. While it can be said with a degree of certainty that the concept of *lex mercatoria*³ was not at the forefront of their mind, it was clear that they wanted a system that catered to the exigencies of business and commerce. Their hopes were realised by the inclusion of new commercial rules in the CPR⁴ which provided for a judge to be specifically assigned to a commercial division.⁵ There were higher filing fees. The expectation is that the higher fees meant greater efficiencies. In other words, they got their own "court," their own judge and their own list.

³ The law merchant, it evolved as a system of custom and best practice, which was enforced through a system of merchant courts along the main trade routes. It functioned as the international law of commerce.^[1] It emphasised contractual freedom, alienability of property, while shunning legal technicalities and deciding cases *ex aequo et bono*. **A distinct feature was the reliance by merchants on a legal system developed and administered by them.** States or local authorities seldom interfered, and surrendered some of the control over trade within their territory to the merchants. In return, trade flourished under the *lex mercatoria*, increasing tax revenues. [extracted from wikipedia on the 24th October 2009

⁴ Part 71 – Commercial Court Rules

⁵ Rule 71.4

There were also amendments to the form and substance of the rules of procedure. In terms of form, the rules were simplified and litigants were able, if they chose, to respond in person to all matters by filing an acknowledgment of service. This was made possible because of detailed the instructions included on the back the originating claim forms.⁶ Applications were also simplified with a single step procedure, known as the case management conference. Outside of this there is provision for without hearing (paper) applications. There were some initial humps in relation to the substance of some rules but the more troublesome ones were amended in 2006. The amendments to the substance of the rules meant, for some, that there is a new “code” of civil procedure. On that view, the rules were seen as a statute and self-contained. The drafters intended it to be a complete code.

A fair assessment of the rules in the period immediately prior to its passage or coming into effect is that Charles Dickens’ classic title *Great Expectations* was given new life in 2002. It is clear that a great number of persons, be they civil litigators, litigants, the judiciary and court administrators shared in the expectation of great things to come; there was a feeling that things would be *new and different*. The idea that cases would be judge managed played no small part as this is what translated into minimal delays and early trial dates.

In so far as the idea of managing cases was at that time new to Jamaica being an integral part of the new thrust to improve access to justice, the initiative by the Cornwall Bar to take a close look at the progress and success of the rules is a timely one. The topic is expansive. In order to make it more manageable the paper is structured into three broad categories, which are not necessarily considered separately as each one may contain an element of the other. These are the institutional framework for the

implementation and administration of the rules,⁷ the role of or interaction with parties and the substance and form of the rules. The idea is to stimulate discussion around and about the rules so that they can be improved and clarified as necessary.



The Institutional and Administrative Framework

The institutional and administrative framework of the rules are the structures and systems that have been set up or charged with the responsibility for implementing the rules. These are specified in the CPR. Their role and functions are circumscribed by the purpose and objective of the rules which are Part 1 of the CPR.

Purpose of the rules and the Overriding Objective

Any question relating to the application, interpretation, effectiveness or impact of the rules is best considered against the background of the overriding objective. It contextualises and sets the tone of the rules in substance and application. It is in the following terms:

- 1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
- (2) Dealing with cases justly includes –
 - (a) Ensuring, so far as practicable, that the parties are on an equal footing and are not prejudiced by their financial position;
 - (b) Saving expense
 - (c) Dealing with it in ways which take into consideration –
 - i. The amount of money involved;
 - ii. The importance of the case;
 - iii. The complexity of the issues; and
 - iv. The financial position of each party;
 - (d) Ensuring that it is dealt with expeditiously and fairly; and
 - (e) Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

The rules impose on the parties⁸ a duty to further the overriding objective and an obligation on the court⁹ to enforce or give effect to them.

⁷ Meaning “cultural” – in terms of organisational culture

It is the overriding objective that directly engages the public or parties by defining their role in the administration of justice. It is a clear signal that parties can no longer sit by and criticise because this rule ensures that they are a part of the process. Everything is about the overriding objective. The idea was that they created a framework within which the rules could operate as a living document, fulfilling the intention of its drafters. To this end the rules themselves accept that there are flaws and makes it clear that there is scope for improvement once they are identified.¹⁰

The Administration of the Rules

Part Two of the CPR is also important. It also creates context. It creates the blueprint for the rules by defining how they are to be implemented and interpreted. It is here that parties and persons charged with the responsibility for implementation find their roles and functions. The court through the Chief Justice, judges, masters, registrars, administrators and general staff have the primary responsibility for implementing the rules, giving life to it as it were. This fact is evident from the rule that is entitled “*who may exercise the powers of the court*” and is in the following terms:

- 2.5 (1) Except where any enactment, rule, or practice direction provides otherwise the functions of the court may be exercised in accordance with these Rules and any direction made by the Chief Justice by –
 - (a) a single judge of the court;
 - (b) a master; or
 - (c) a registrar
- (2) The Chief Justice may by direction allocate the work of the court between judges, masters and registrars....

⁸ r. 1.3

⁹ r. 1.2

¹⁰ The Honourable Mr. Justice Lensley Wolfe CJ (retired) - Preface to Rules – p. xxxix

This rule is followed by a rule that deals with “Court Staff.” So far as relevant that rule provides as follows:

- 2.6(1) Where these Rules refer to an act being done by the registry or require or permit the performance of an act of a formal or administrative character, that act may be performed by a member of the court staff authorised generally or individually in writing by the Chief Justice.
- (2) Where these rules expressly so provide, any other functions (sic) of the court may be carried out by a member of the court staff authorised in writing by the Chief Justice.
- (3) Where a step may be taken by a member of the court staff –
 - (a) that person may consult a judge, master, or registrar before taking the step; and
 - (b) that step may be taken by a judge, master, or registrar instead of a member of the court staff.

Finally, it provides the procedural fabric for implementation, reminiscent of the direction given by senior counsel to young counsel, “*every case must be prepared with a consideration of who, why, what, where, when.*” It is interesting to observe as well that this is also the recommended structure for any well organised essay or composition piece. What these analogies tell us though, is that the CPR was intended to be a structurally sound piece of *legislation* providing a complete code for its administration, implementation and interpretation. With that said, the Part concludes with r. 2.7 entitled, “Court’s discretion as to where, when, and how, it deals with cases.” This is in the following terms:

- 2.7(1) The court may deal with a case at any place and time it considers appropriate.
- (2) In considering what place or time may be appropriate the court must consider the convenience of such place or time to the parties and their Attorneys-at-law and to any witnesses.
- (3) The court may order that any hearing be conducted in whole or in part by means of a telephone conference call, video conference or any other form of electronic communication.
- (4) The court may give directions to facilitate the conduct of a hearing by the use of any electronic or digital means of communication or storage and retrieval of information or any other technology it considers appropriate.

In terms of implementation, however in practical terms the public's interface is with the court staff. If the court staff fails, the perception will be that the whole system fails.



The paper will look at three areas of the rules to see how the different actors stymie or facilitate their implementation and to see whether there are areas that require clarification. It will start by looking at applications. This is chosen because it is the area that generates frequent contact between the court staff and the public. In a sense they make or break implementation or effectiveness of the rules. This can be tested by the fact that no claim, except a fixed date claim is advanced or gets before a court or judge unless an application is filed at the registry. This view is based on the argument that applications are to be filed for case management conferences. There is an alternative view that it is not necessary to file applications for case management conferences. On this view the matter proceeds to mandatory mediation after defence and if mediation breaks down, then the matter is fixed for the case management conference without the necessity of filing an application unless the parties have a specific application. On either view, the point being made is that in order for the matter to advance to trial it must be processed by the registry. Applications are also used for open court applications formerly called motions including contempt of court and interlocutory applications in chambers or before the claim has commenced. Once the application is filed in the registry, it is the duty of the court staff to either deal with it and/or refer it to a judge. A lot of the time and costs saving measures in the rules are centred on applications.

Applications – Time Saving Measure

Applications are dealt with under Part 11 of the rules. Applications replace the summons and motions under the previous rules.¹¹ The general rule is that all applications are to be made in writing and the court has the discretion in appropriate cases to dispense with the writing requirement.¹² The most significant time saving measure is the case management conference. Instead of an application being made for every single interim relief being sought by a party the rule mandates that “*so far as practicable all applications relating to pending proceedings must be listed for hearing at the case management conference.*”¹³ There are sanctions for non-compliance with this rule so that if an application is made other than at the case management conference or the pre-trial review and which could have been made at these hearings, “*the court **must** order the applicant to pay the costs of the application unless there are special circumstances.*”¹⁴ This rule means that applications and cross-applications are heard together either at the case management conference or the pre-trial review or any adjournment thereof. It also means that adjournments and part-heard matters would be minimised because last minute applications at the trial should be a thing of the past. If the rules are applied as anticipated then the days of trials being adjourned because of last minute applications would disappear. It cannot be said with any degree of certainty that they are or are not being applied. However, there is every indication that adjournments of trials are still an issue in so far as by afternoon, the civil courts are empty. In addition to that there is some degree of overbooking judges for trials which has contributed to several adjournments when the judges cannot accommodate the number of matters that are listed before them.

¹¹ The Civil Procedure Code

¹² Rule 11.6

¹³ Rule 11.3(1)

¹⁴ Rule 11.3(2)

Costs Saving Measure

A significant costs saving measure is the introduction of the rule that the applicant “*need not give evidence in support of an application unless it is required by – (a) rule; (b) practice direction; or court order.*”¹⁵ It means that parties are able to save on the costs associated with the preparing of affidavits including the costs of paper. The application must include grounds. This balances the requirement for setting out evidence and removes the element of surprise that may be caused by the lack of evidence. The surprise element is also removed, again with the effect of minimising adjournments to prepare responses, by restricting parties to the reliefs requested in the application unless the court gives permission.¹⁶

The rules also provide that where evidence is required, it must be by way of affidavit unless a rule, practice direction or court order provides otherwise.¹⁷ *This is an area where the rules committee could consider whether witness statements should be included as a form of evidence in interim applications.* This is because witness statements are required to have statements of truth. Statements of truth are a serious matter because a witness can be found liable for contempt if the statements are found to be untrue or that he had no belief in their truth.¹⁸ There is precedent for this in the English rules. The benefit or advantage of this approach is that witness statements are more flexible since they can more easily be adapted for use at the trial. This is because unlike an affidavit the witness statement does not contain statements of information or belief or hearsay although the parties can make use of affidavits already filed in court.

¹⁵ Rule 11.9(1)

¹⁶ Rule 11.13

¹⁷ Rule 11.9(2)

¹⁸ Caribbean Civil Court Practice and Court of Appeal Decision

Saving Costs: Types of Applications



There are several types of applications, all of which are filed on Form 7 save and except proceedings in default under rule 76.12(1) where form MP 7 is used. There are three main categories:

1. Applications made on notice including those that are made at the Case Management Conferences;
2. Applications made without notice but with hearing such as those under Part 17 of the rules;
3. Applications made without notice and without hearing.

Lawyers do not necessarily file applications falling within category one (1) unless they have a specific application for interlocutory relief, for example, to strike out or for summary judgment. Those in category two (2) are frequent enough and require some attention as well having regard to the recent decision in *National Commercial Bank v. Olint PC 61 of 2007*. Although the rules are clear in relation to category three (3), the registry has either been slow to or does not give effect to category three (3). It is easily at once most significant time-saving measures in the rules and *the most disappointing areas of the implementation of the rules*. The rule itself is in keeping with the objectives of the rules as well as Part Two. However, the implementation in this area has been examined, tried, tested and found wanting.

Without Notice and Without Hearing Applications and Proceedings

While the general rule is that all applications must be on notice to each respondent,¹⁹ an application may also be made without notice if a rule or practice direction allows.²⁰ To

¹⁹ Rule 11.8(1)

²⁰ Rule 11.8(2)

achieve this object, the rule provides a complement to this rule. The complementary rule²¹ provides that:

The court may deal with an application without a hearing if –

- (a) No notice of the application is required;
- (b) The parties agree;
- (c) The court considers that the application can be dealt with over the telephone or other means of communication;
- (d) The parties have agreed to the terms of an order –
 - i. Which does not come within rule 27.11(1); and
 - ii. The application (or a copy of the application) is signed by the attorneys-at-law for all the parties to the application; or
- (e) The court does not consider that a hearing would be appropriate.

(Rules 2.7(3) and (4) contain powers to enable the court to deal with applications by electronic means. Rule 42.7 deals with consent orders.)

The combined effect of these rules provides the basis for the hearing of applications without notice and without attendance of the parties.

Without Notice and Without Hearing Application and Proceedings: Breakdown at the Institutional or Administrative Level

It should be recalled that under Part Two the court²² is charged with the responsibility of implementing the rules by applying and interpreting them. The role of parties while important is incidental to this, their duty is to *further* the objectives of the rules. The starting point therefore is that the claim or application must be accepted for filing at the registry.²³ In addition to that the registry or court staff is required to take the appropriate steps including those requested by the parties to accordance with the rules. In other words, the input and co-

²¹ Rule 11.14
²² Through the Court Staff at the Registry
²³ r. 8.1(1) and r. 11.5(1)

operation of the registry is extremely important in advancing the purpose and objective of the rules.

This is one of the clearest cases of a breakdown in the implementation the rules at the institutional or administrative level. This remains the case where parties have modified Form 7 to make it clear that the rules support the application being made either without notice or without a hearing.²⁴ In practice parties comply with rule 11.14(a) by reference to rules which specifically provide that no notice is required such as:

- a. An application for permission to serve the Claim Form out of the jurisdiction.²⁵
- b. An application for approval of alternative methods of service.²⁶
- c. An application for default judgment “*where the claim is for some other remedy*”²⁷ that is other than for money or goods.
- d. An application to strike out where no sanction for non-compliance has been imposed.²⁸
- e. An application to enforce an “*order for specific disclosure.*”²⁹

The manifestation of the breakdown is the fact that the registry consistently fixes these applications for hearing. On the 15th October 2009, for example, an attorney was before two different Masters with two applications for permission to serve the claim form out of the jurisdiction for half an hour each and the times were not consecutive.³⁰ What should have occurred in such a case where no notice or hearing is required is that the registry should refer the application to a judge or master and with the exception of rules 12.10(5) and 7.5(1), the judge or master may require a hearing.

²⁴ Appendix 1
²⁵ Rule 7.5(1)
²⁶ Rule 5.13(4) and Rule 5.13(5)
²⁷ Rule 12.10(5)
²⁸ Rule 26.4(2), 26.4(3)
²⁹ Rule 28.14(2) and 28.14(3)
³⁰ 2:00 p. m. and 3:00 p. m.

To the extent that the preferred approach of the registry is to fix these matters for hearing the purpose of the rules is defeated. A party is not given the benefit of a judge or master reviewing an application under these or similar rules as anticipated in Part Two or within the CPR. The judge or master is not given the opportunity to exercise their discretion to manage and streamline their case load or the case load of the courts by filtering the matters that come on for hearing or not and thereby give effect to the overriding objective. The net result is that although there is no empirical data, not that none exists, to support this claim, it is a fact that parties have more or less given up on making these applications so that it is likely that they have become a thing of the past unless urgent measures are taken to sensitise the registry to the effect of these rules.

It would be remiss to suggest that only the registry is at fault. Their response in most cases is that they are unable to find a judge, all of whom already have scheduled listings, to ‘hear’ the matter. If this is a part of the problem, and it is likely, then some attention could be given to capacity building in terms of the institutions and personnel³¹ needed to achieve the desired and intended outcome under the rules.

Matrimonial Proceedings: Without Notice and Without Hearing Applications

The Matrimonial Causes Rules 1989 were repealed in 2002 and new matrimonial rules were incorporated in the CPR. The idea as with everything else in the rules was to simplify matrimonial proceedings. One method of achieving this result was to eliminate hearings for uncontested divorce proceedings. This is done “*by filing an application to dispense with a hearing in form No. MP 7 accompanied by affidavit evidence...*”³² as set in

³¹ Including additional judges and/or masters

³² r. 76.12(1)

rule 76.12. The application must be referred to a judge who has discretion to consider the application on paper and may:

- a. dispense with the hearing of the petition;
- b. grant, defer or refuse the decree nisi;
- c. determine that a hearing, whether of the petition or any claim being pursued, is required and, if so, schedule such hearing; or
- d. issue such directions for future conduct of the proceedings as may seem fit.³³

Seems simple doesn't it? By all indications, it has not been. The problem with this 'simplified' procedure was aptly captured in a Sunday Gleaner article on the 23rd November 2008:

AMENDMENTS TO the Matrimonial Causes Act in September 2006 and the resulting procedural changes have caused a backlog in divorce cases filed in the Supreme Court.

The clogged chamber, **The Sunday Gleaner** understands, is causing great hardships for divorcing Jamaicans, many of whom wish to remarry and sort out their financial affairs, but are unable to do so.

A 42-year-old administrative assistant in Kingston says she filed for divorce 13 months ago and is still waiting for the annulment(sic) to be finalised.

"All I keep hearing is that there is no judge to sign. It's affecting me because I want to move on with my life and my ex-husband wants to move on with his life," the woman says. "My lawyer tells me there is nothing she can do. I was told that after I got the decree *nisi*, I would have to wait another six weeks to get the decree absolute, but it's long overdue. This is also affecting me financially," she adds.

In September 2006, the amendment of the Matrimonial Causes Act, following on the Privy Council ruling in the *Eldemire and Eldemire* case, meant that divorce cases were no longer held in chambers (sic), but were to be granted on the basis of documents presented in the case file.

Opposite happening

The change was intended to make divorce an easier process, but instead, the very opposite has happened, with increasing complaints by those affected.

³³

r. 76.12(3)

"I have been having some delays and my clients are not pleased at all. They have been calling on a regular basis," attorney-at-law Keith Bishop confirms.

Margarette Macaulay, another Kingston-based attorney-at-law says, "Every single lawyer that I know has had problems."

Macaulay believes the cause of the backlog is rooted in the lack of preparation and training in response to the legal change in 2006.

"Basically," says Macaulay, "we have new rules being applied by old minds. People have been, for years, operating under the old rules and all of a sudden, the new rules were just put in place without any notice."

Data from the Statistical Institute of Jamaica (STATIN) indicate that in 2007, divorces plunged in number to 1,140, coming from 1,768 in 2006 and 1,806 in 2005. However, the STATIN researchers note that the smaller number of divorces absolute (sic) does not represent an actual decline, but is due to changes in the Matrimonial Causes rules, which have caused a considerable backlog in divorce petitions.

Some lawyers have suggested to **The Sunday Gleaner** that judges be assigned solely to divorce duties on particular days of the week, otherwise the backlog will not be cleared.

The problem was first reported in December 2007 when Chief Justice Zaila McCalla admitted that something needed to be done. But, one year later, the complaints are only getting louder.

A 32-year-old computer programmer filed for his divorce in November 2006 through the Kingston Legal Aid Clinic.

"I don't get it yet. I went to Legal Aid because I didn't have a lot of money. The lawyers drafted documents and sent them to court," he relates. "Apparently, the documents were misplaced. Most of the times I call, the documents are not in place. This went on months, until a year has passed. Then I had to refile in November 2007. This time, they sent over the documents and I served the papers on my wife. I am now awaiting the signature from the judge. They say there are no judges. It's ridiculous!," he exclaims.

Attorney-at-law Keith Bishop says he can't always say the delays are as a result of the judge not signing, as other problems might lie in the improper preparation of documents.

Another problem notes Macaulay is that the amended rules are being enforced "to the letter rather than being enforced as the law requires, as was decided by the Privy Council in *Eldemire and Eldemire*. One should not impose and apply rules in every case. You look at the needs of a particular case," she says.

Old rules, new rules

Under the old rules, in order to get a decree *nisi*, the petitioner gives evidence in open court and the judge could decide to grant the decree *nisi* or not. Under the new rules, petitioners apply for appearance to be

done away with and for a decree *nisi* to be granted on the basis of the file presented.

Today, documents are filed and petitioners wait to get a response. The requirement for supplemental affidavits also slows down the process.

"You have a requirement that further documents are to be filed to state that the couple has had counselling. This is because the rule states that it should be shown whether they have had counselling. In some cases this is not necessary," says Mccauley.³⁴

Since this article and one year later, not much has changed even though there is evidence that some effort has been made to allocate time to judges to deal with these applications. The fact that the matters were not being placed before judges is only one of the factors highlighted. Another factor which mirrors the thought of the lawyer who took the extreme measure of dismissing his entire staff is that the new rules were imposed on existing staff without the requisite preparedness that could have been achieved through special training to deal with the rules.

Attorneys currently complain of lack of consistency and uniformity in the application of the rules to their matters or of practices at the registry which cause the matter to be more prolonged than if the matter were heard in court. In some cases it is alleged that a requirement based on the registry's interpretation of the rules changes after an application is properly filed. In all such cases the registry requires that the applicant re-file every single document that does not conform to the new procedure. The attorneys interviewed, are of the view that this contributes to the backlog both in the registry and their offices because time is spent 'bouncing' and correcting the bounced applications. One attorney expressed concern about the problem caused by the fact that there is no hearing. This problem has two main consequences. In the first instance the applicant is not given an opportunity to explain or make submissions, for example, if the facts disclose that he lives in the same house with his wife but they are separated. In the second instance the court has been declining to grant the

³⁴

Avia Collinder "Divorce Cases Clog the Judicial System

decree nisi where matters in relation to the children remain unresolved instead of the usual reservation for hearing in chambers taking into account the fact that those are *the best arrangements that can be made in the circumstances*.



The registry is not all to be blamed for the existing state of affairs. The available evidence suggests that attorneys have departed from ‘core principles’ in divorce matters. It appears that the view is taken that *oh it is just family law or a family matter*. The result is that insufficient attention is paid to details. Attorneys, as an example, file a marriage certificate in German with no translation. This application would be delayed because the translation is required. Affidavits are also not in keeping with the requirements of the Part 30 of the rules. A big problem that would not necessarily be seen by individual practitioners is an increase in the number of applications for dissolution of marriages in some cases barely three years of marriage. It is simply too much.

It is also the case that some aspects of the rules are unclear. Under the old matrimonial rules, it was clear that an Affidavit of Search is required. The new rules do not identify or clearly state that it requires such a document. Nevertheless it is a requirement and parties only know because their application is bounced. It is suggested that this requirement is based on the rule that an application to dispense with a hearing in form MP 7 accompanied by affidavit evidence of “*the failure to acknowledge service or file and answer...*”³⁵ If these are rules are a new code of civil procedure, it is difficult to see why this interpretation is being given to the rule. It is suggested that the affidavit accompanying the application could set out the statement of facts in similar terms to the requirement for an Affidavit of Search. The argument against this is that, the statement of the applicant to that effect would be based on information and belief in the face of what is technically an application for a final order.

³⁵ r. 76.12(1)

This uncertainty certainly needs to be resolved whether by way of practice direction or some other communication parties.

Whether one accepts the parties' views or the registry's view, the fact is that there are serious delays in the processing of divorces under a system that was intended to simplify the proceedings. One cannot ignore the arguments that the sheer load is overwhelming. It seems that there is need for additional personnel to be assigned to divorces as well as a separate registry. There is also the need for communication, uniformity and consistency. The complaints are not unreasonable.

Consent Orders or Hearing Not Appropriate: Breakdown at the Institutional or Administrative Level

The registry does not give effect to this provision either. They insist that the consent judgment or order must be signed by a judge or registrar and refuse to accept it for sealing notwithstanding the clear terms of the rules which provides:

Where this rule applies the order must be –

- (a) Drawn in the terms agreed;
- (b) Expressed to be “By Consent”;
- (c) Signed by the attorney-at-law acting for each party to whom the order relates; and
- (d) Filed at the registry for sealing.

By way of example a Tomlin Order, that is “*an order for the stay of proceedings on terms which are attached as a schedule to the order but which are otherwise a part of it...*” is also a form of consent order, nevertheless judges have been bothered to give effect to it by signing. Invariably, and this is also the case where a hearing is not appropriate, neither the litigant nor a judge gets an opportunity to consider whether the matter is appropriate for a hearing. The matters are just given a date by the registry and they insist on doing so.

The Parties' Role in Saving Costs: The Parties Agree or Electronic Means

It has just been seen how three different but related sections of the rules break down at the administrative or institutional level and how the parties contribute in one respect to that breakdown by failing to take care. This section will review another area in which the parties and their attorneys could do more to further the overriding objective. Rule 11.14(b) and 11.14(c) prescribe that applications may be dealt with, without a hearing if the parties agree or the court considers that it is a matter that can be dealt with over the telephone or other electronic means.

These rules challenge the parties and their attorneys to do the unfamiliar. It allows for paper hearings or hearings by electronic means. This is tantamount to heresy and understandably so. There is a fear of paper hearings in substantial matters. Parties and their legal representatives tend to shy away from them. While the fear is appreciated, it flies in the face of the rules in terms of doing justice between the parties. This is because even in cases where lengthy submissions have been ordered the parties request anywhere from a day to three days hearing at which they appear and read the submissions. This takes up a lot of time and defeat the purpose of these rules. In some cases this produces unjust results. A party with the benefit of ex parte injunctions gets up to six (6) months in some cases before the matter is heard on the basis that the attorneys are unavailable, the desired three hours, one day or three days are unavailable. This is even where full submissions have been ordered and filed.

The recommended solution is two-fold. The fear of paper hearings may be one of confidence as to whether the court or judge will be fully seised of the matter or how the judge will clarify any issue arising on the submissions. Parties assume that the judge will not understand unless they are in a position to read what they have already written. This fear is

encouraged by the adversarial system of our jurisprudence which enables the parties to present arguments and counter arguments and seeing in many cases a judge gaining greater clarity because counsel was present to defend an argument or respond to a judge's inquiry. It is a system built on oral advocacy. The fear is therefore neither unreasonable nor ill-founded. The question is how to move forward in order to ensure that justice is done as between the parties.

One way forward is to use a combined approach depending on the nature of the application. The judge can fix, as they do now, a time table for written submissions and authorities which is now the norm. The judge should also fix a time for the parties to attend, not to read their submissions but, to give a summary of the application and respond to questions that the judge may have, having read the file and submissions in preparation for the hearing. This places a burden on both judge and counsel – both must be prepared and this is an absolute necessity in order to pass on that confidence to clients who have grown accustomed to hearing lawyers talk or the perception that only a person who talks a lot can be a good lawyer. It is a classic application of the principle of *justice must not only be done but must be manifestly seen to be done*.

Judges have been prepared to deal with hearings on paper only, however substantial the matter. In one instance where this occurred,³⁶ the judge at the invitation of counsel and the agreement by opposing counsel, gave directions and heard an entire application for freezing orders on paper. In so far as the rules provide that a further hearing must be fixed in before it makes a final order³⁷ the applicant is entitled to a hearing. However, this approach is useful where as in that particular case, the convenience of counsel and the availability of the judge and a trial date were simply not coinciding. This type of case required urgent

³⁶ Quick Signs v. E Z Cash Loans & Ors 2009 HCV 01134

³⁷ Rule 17.4(5)(a)

intervention in so far as the other parties' assets were frozen. The result was an economical use of judicial time and an example of a judge giving "*effect to the overriding objective when ...exercising any powers under,*"³⁸ of counsel acting in accordance with their "*duty to help the court to further the overriding objectives*"³⁹ and of justice being done between the parties.

Judges have also shown a willingness to hear applications, or applicants or parties by electronic means. There have been cases where counsel is running late for court and instead of delaying the matter the court has allowed counsel to participate in the matter by telephone. In other instances, where a witness either forgets the date or is unable to attend court, judges have facilitated the hearing by telephone. These rules were not in the previous procedural code. There is no evidence to suggest that these rules are being abused by the parties and judges have been taking advantage of the flexibility provided by the rules. These measures mean that an adjournment was averted. There is at least one case, a trial,⁴⁰ in which the evidence was taken by video link where the witness alleged that he feared for his safety if he were to attend the hearing in Jamaica.

The above instances of under or non-implementation of the rules are significant. This is because they demonstrate the need for a change in attitude on the part of court administrators, counsel and the court if the rules are to work effectively. The chilling effect on the operation of the rules cannot be overstated. Consideration must also be given to the time it takes for applications to lie in the registry for a date to be fixed or where counsel or their clerks sit in the registry so that a date can be fixed. The time spent by counsel and judge to facilitate and attend a hearing for a procedural application to be heard or an application that could be dealt with by consent to be fixed for hearing and heard. There are also the costs to the client or the parties for the attorneys to prepare for and attend the hearing.

³⁸ Rule 1.2

³⁹ Rule 1.3

⁴⁰ Paul Chen Young; Rule 29.3

If it can be accepted and recognised that applications are the primary method of interfacing with the courts, these institutional obstacles need to be addressed.

Enforcement of Judgments: Justice for whom – the creditor or the debtor?

This section of the paper is confined to the enforcement of money judgments by committal. The application is made using a Judgment Summons under Part 52. Part 52 deals with “*applications to commit a judgment debtor for non payment of a debt where this is not prohibited by the Debtors Act.*”⁴¹ The application is made in form 22 that is, by way of a judgment summons. If the judge at the hearing of the judgment summons is satisfied that “*that the judgment debtor has had, since the making of the judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects to pay same (i) commit the judgment debtor to prison for a term not exceeding six weeks or until the judgment debt or order is sooner satisfied...*”⁴² This is where things get hazy. How is the committal order executed? Should the committal order be served on the defaulting party?

Service of Committal Order – A Condition precedent to Warrant of Commitment? No Procedure for Issuing Warrant of Commitment – Similar to Old Rules – Maybe English Procedure – s. 676.

There is no procedure in the CPR for this. Interestingly there were no provisions in the old rules either. Although there were no provisions in the old rules, the procedure was incorporated by reference. Section 686 of the Civil Procedure Code provides that “[w]here no other provision is expressly made by Law or by Rules of Court the procedure and practice

⁴¹ r. 52.1

⁴² r. 52.4(c)(i)

for the time being of the Supreme Court of Judicature of England shall, so far as applicable, be followed, and the forms prescribed shall, with such variations as circumstances may require, be used." The relevant English provision was Order 45 Rule 5⁴³ where subject to the provisions of the Debtors Act 1869 and 1878⁴⁴ a person can be committed to prison for failing to pay a money judgment. In addition to the powers of enforcement under the Debtors Act, enforcement can be by way of committal for contempt of court under Order 52.⁴⁵ There is a distinction between the Debtors Act procedure and committal under Order 52.⁴⁶ Under the Debtors Act procedure the order for committal may be made on a judgment debtor summons in chambers and becomes effective depending on the terms of the order as soon as the judgment debtor fails to pay. In other words, there is no further requirement to apply for a committal order. Committal proceedings under the Order 52 are made on motion⁴⁷ in open court.

The order requiring the person to do the act must be served on the judgment debtor and must have a penal notice. The documents which must be served as a condition of committal are:

- a. In the case of a judgment or order to do an act
 - i. a copy of that judgment whether or not it specifies the time within which the required act is to be done; and
 - ii. if an order is made extending or abridging time for the required act to be done ...
 - iii. if an order was subsequently made, whether or not the original judgment or order specified the time within which such act is to be done under r. 6 or r. 5(3) a copy of that order also...⁴⁸

⁴³ Supreme Court Practice 1995

⁴⁴ 1872 Jamaica

⁴⁵ Part 53 of the CPR.

⁴⁶ Part 53

⁴⁷ On application in new rules

⁴⁸ Order 45

The court has jurisdiction to dispense with service of these documents. It is the disobedience of this original order whether it is an order made because of the Debtors Act or the order to pay money by a specified time that gives rise to the committal proceedings.

What happens after the committal order is granted?

The “*order for committal...is a process under which the offender’s person is seized, under order of the Court, by a court official (normally the tipstaff or his deputy, or, if a tipstaff is not available, an usher) or by a police officer acting as his assistant, and taken to prison.*”⁴⁹ The general form of the warrant was set out in the English rules. The warrant is to be signed by the judge. This form was never in the CPC but it was adapted to be signed by the Registrar. In short the committal order grounds the warrant. There was no requirement to serve the order. The order is necessary for issuing the warrant.⁵⁰ Support for this approach is to be found in the old RSC O. 45 r. 7.⁵¹ It is interesting to note that a condition precedent to the enforcement of the order by committal is that a penal notice is to be displayed prominently on the front of the order. This is similar to the requirements under Part 53 of the CPR, committal for contempt of court and other proceedings.

The history of enforcement of orders by committal is necessary because both under the CPC and the CPR, the registry adopted a practice which is not authorised by the rules either by incorporation or at all. The practice is to require the order for committal to be served on the debtor as a condition precedent to the issuing of the warrant. The result has been that there are several orders that are currently not enforced because the registry and/or the registrar will not process or sign the warrants unless the committal order is served. In fact the procedure in the Resident Magistrate’s court is more certain and more consistent with the

⁴⁹ Order 52/1/3

⁵⁰ Warrants of Commitment are no longer issued generally in England. They are issued in Matrimonial Proceedings.

⁵¹ Service of the judgment or order “requiring the person to do or refrain from doing an act.” Not the committal order. This rule sets out the conditions precedent for enforcing the Order.

Resident Magistrate Court’s rules. The provision in the CPR needs urgent attention. The revision must be communicated to the court staff that have responsibility for processing the warrants of commitment. It is an area in which there is significant injustice.

The Commercial Division

This division was introduced under the CPR to deal with “**commercial claims**” which “*includes any case arising out of trade and commerce in general*” as well as some specifically identified areas that are enumerated in the rules.⁵² It was intended to facilitate the speedy resolution of commercial claims. This division has higher fees and it is presumed that this was intended to achieve the objects of the division and the rules for speedier resolution. The fees are graduated as follows:⁵³

(a) Claim for 2 Million Dollars or less or Claims for non-monetary relief	\$2,000
(b) claims for more than 2 Million Dollars but less than 10 Million Dollars	\$10,000
(c) claims for more than 10 Million Dollars but less than 50 Million Dollars	\$20,000
(d) Claims for more than 50 Million Dollars	\$30,000

These commercial division rules came into effect on the 21st January 2003. In accordance with the rules the Chief Justice has assigned one judge to that division.

⁵² Rule 71.3

⁵³ The Judicature (Rules of Court) Act. The Supreme Court (Commercial Division) Fees Rules 2002: Proclamations, Rules and Regulations – January 7, 2003

Regrettably, the division is underutilised. The reason for this is unclear, unsaid or probably, more accurately simply not articulated. Nevertheless, a number of reasons can be advanced for the underutilisation of this division. These reasons include the following:

1. Attorneys either do not know or recall that it exists. There was no official or other introduction of this division.
2. There is a lack of confidence. There is a view among attorneys that it will not make a difference in terms of the time that the matters come on trial. This is driven by the idea that the division does not have sufficient capacity to expedite matters over and above what normally occurs.
3. The costs are too high.
4. It is not mandatory for commercial matters to be filed in the commercial division.

It is reported that a recent attempt to file an action in the commercial registry was frustrated because the deputy registrar for the commercial court was at a seminar. On inquiries being made in the general registry, no one knew what the fees were or how to handle the filing of the commercial claim. The matter simply could not wait until the deputy registrar returned the following week and so it was filed in the civil division.

The statistics confirm the underutilisation of this division. The statistics as at June 2009 show that between 2003 and 2009 only thirty (30) out of a possible Four Hundred and Eighty Three (483) cases were filed in the Commercial Division. The other Four Hundred and Fifty Three (453) commercial cases were filed in the civil division between January and June 2009. This is not good.

The recommended solution is to publicise the division and highlight the benefits. Matters in that division should be fast-tracked. This can be achieved by having a separate registry, registrar and diaries which would give effect to the commercial list. In order to give this a push start the court or judge in the civil division could be more robust by transferring matters to the commercial list utilising its powers to make orders of its own initiative as

opposed to mandating by legislation that parties must file claims in the commercial division. Parties could also be encouraged to transfer their existing matters to the commercial division.

Substantive Procedural Reforms

Fixed Date Claim Form⁵⁴

The Fixed Date Claim Form replaced the originating summons as the method for starting proceedings in matters that can be heard summarily. Where the respondent or defendant failed to *appear* to the originating summons, within the time prescribed the plaintiff/applicant “*may apply to the Court or Judge for an appointment for the hearing of such summons and upon a certificate that no appearance has been entered the Court or Judge shall appoint a time for the hearing of such summons upon such conditions (if any) as they or he shall think fit.*”⁵⁵

This provision was not adapted into the new rules. In fact the rules make it very clear that “[*a*] claimant may not obtain default judgment where the claim is a fixed date claim.”⁵⁶ There is no clear explanation as to why this is so. However, it could be because the judge has an option under Rule 27.2(8) of treating the first hearing of the trial of the claim “*if it is not defended or if the court considers that the claim can be dealt with summarily.*”⁵⁷ It is suggested that this is a better approach since it removes a step which was often fraught with delays that existed under the old rules. The originating summons did not have a date. The date was fixed by notice which was sealed by the court only after an appearance was entered.⁵⁸ The notice had to be filed and the claimant waits on the registry to fix a date. The

⁵⁴ Rule 12.10(5)

⁵⁵ Section 533C of the Civil Procedure Code

⁵⁶ Rule 12.2(a)

⁵⁷ Rule 27.2(8)

⁵⁸ Section 533B

new rules introduced a single step. The date is fixed and served on the defendant and if the defendant fails to attend, the court treats the hearing as a trial. In this case matters can be disposed of within approximately six (6) weeks of filing the claim assuming that it was served shortly after it was filed.

Amendments to the Statement of Case after end of the relevant limitation period⁵⁹

A provision dealing specifically with amendments after the end of a relevant limitation period was introduced into the rules of procedure for the first time under the CPR. There is a view among practitioners that it causes some confusion. Prior to the CPR, amendments after the limitation period were dealt with in accordance with common law principles taking into account the Limitations of Actions Law where relevant. The court under s. 259, 264 and 270 of the CPC was given wide discretion to amend “*in such manner and on such terms as may be just*”⁶⁰ and “*upon such terms as to costs or otherwise as may be just.*”⁶¹

It is against the background of the old rules that the new rule causes some confusion in so far as the CPR seems to specify the circumstances in which the court can exercise its discretion. These seem to be more limited than under the CPC. The rule reads as follows:

20.6 (1) - *This rule applies to an amendment in a statement of case after the end of the relevant limitation period.*

(2) - *The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was –*

(a) *Genuine; and*

(b) *Not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question.*

⁵⁹

r. 20.6

⁶⁰

s. 259

⁶¹

s. 264 and s. 270

The confusion is caused by the statement of purpose of the rule in r. 20.6(1) which states without more that the “*rule applies to an amendment of the statement of case after the end of the relevant limitation period...*” The rule then goes on to stipulate a circumstance in which the court can allow amendments in r. 20.6(2).

One argument is that a party can only amend after the expiry of the limitation period in the circumstances set out in r. 20.6(2) and r. 19.4. Rule 19.4 sets out “*[s]pecial prohibitions about adding or substituting parties after the end of the relevant limitation period.*” It deals with the circumstances in which parties may be added or substituted after the limitation period has expired. The other argument based on a true construction of the provision is that apart from the circumstances in r. 20.6(2) and r. 19.4, a party can amend without constraints after the limitation period. This second interpretation came about because the rule does not go on to specify the circumstances in which amendments after the expiry of the limitation period can or will be allowed.

It has been suggested in at least one case that the wide discretion conferred on the court in the CPC has been replaced in the new rules by the amended r. 20.4⁶² which is to be applied by taking into account the overriding objective. Rule 20.4 deals with the time at which amendments to the statement of case can be made with permission. The argument runs that this is the appropriate approach for the exercise of the court’s discretion since no precondition is laid down in the rules.⁶³ This approach is not likely to resolve the issue. On a close reading of r. 20.4 it only states the place or time at which an application for permission is to be made. It does not provide guidance as to the circumstances in which the court may exercise its discretion such as to close the lacunae in that Part. Resort to the overriding objectives in these circumstances is likely to cause further questions as to whether it can

⁶² Amended on the 18th September 2006

⁶³ Peter Salmon v. Master Blend Feeds Limited Claim No. C. L. 1991/S 163 decision delivered on the 26th October 2007 at paragraph 22 per Sykes J.

properly be applied where there are no preconditions in the rules for its exercise. The authorities that deal with the application of the overriding objectives are consistent in this regard. This statement of principle was adopted by the Honourable Mr. Justice Adrian Saunders (Acting Chief Justice) in the case of *Treasure Isles etc. v. Aubudon Holdings Ltd* [BVI] Civil Appeal No. 22 of 2003 (20 September 2004):

Although I have distinguished the cases of **Vinos** and **Godwin**, this is not to say that those cases do not contain very helpful statements on the approach that should be taken with respect to the relationship between the overriding objective and specific provisions of the rules. In particular it must not be assumed that a litigant can intentionally flout the rules and then ask the court's mercy by flouting the overriding objective...the overriding objective does not in or of itself empower the Court to do anything or grant to the Court any discretion. It is a statement of principle to which the Court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the Court must be found not in the overriding objective but in the specific provision itself. As May LJ said in **Vinos**, 'Interpretation to achieve the overriding objective does not enable the Court to say that provisions which are quite plain means what they do not mean nor that the plain meaning should be ignored'.⁶⁴

In Jamaica, Sykes J. also took the same approach to the pre-amended 20.4 in the case of *Campbell v. National Fuels and Lubricants Ltd.* (C. L. 1999/C. 262 where he said:

I cannot ignore the unambiguous terms of rule 20.4. For better or worse, the rules committee have decided that amendments should be granted in limited circumstances. They have decided that justice, in the context of an application to the statement of case after the first case management conference should take place in the manner prescribed by the rules. Rule 26.1(2)(c) does not assist for the simple reason that it only applies where there is no express rule covering this particular subject matter. Rule 20.4 applies to the specific issue here and so I am not at liberty to ignore the express provision of the rule. The procedural rules are designed to assist the court to deliver and the litigants to receive practical justice according to the text of the rules.

The better view is that there is a gap in the rules. This view is supported by an examination of the equivalent provision in the English CPR. It is self-contained. All the possible circumstances in which an amendment is permissible are set out in this part,⁶⁵ Part 17 of their rules. In the English rules after setting out the circumstances in which

⁶⁴ Paragraph 24

⁶⁵ Except Part 19.5 which deals with Group Litigation

amendments are allowed which are similar to those set out in Rules 20.1 to 20.5, continues:

17.4 Amendments to Statements of Case after the end of a Relevant Limitation Period

- (1) This rule applies where –
 - a. a party applies to amend his statement of case *in one of the ways mentioned in this rule, and*
 - b. a period of limitation has expired under –
 - i. the Limitation Act 1980;
 - ii. the Foreign Limitation Periods Act 1984; or
 - iii. any other enactment which allows such an amendment, or under which such an amendment is allowed.
- (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.⁶⁶
- (3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not which would cause reasonable doubt as to the identity of the party in question.
- (4) The court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started *or has since acquired.*

(Rule 19.5 specifies the circumstances in which the court may allow a new party to be added or substituted after the end of the relevant limitation period) [emphases added]

The amendment to deal with this gap is necessary in so far as the rules are a *new procedural code*.⁶⁷ The code should therefore include all of the provisions necessary for its application. This recommendation is important when one considers not only the difference between the CPR and the former rules but also that if the rules do not make provision for something to be done then the overriding objectives cannot or should not be used to fill the gap. The missing link seems to be the provision in the English rules that links the ‘limitation provisions’ with the rest of the Part that is making it clear that the rule is not limited to the provisions in r. 20.6(2) but also in *one of the ways mentioned in [the] rule.* Even if it is not accepted that this provision is the appropriate replacement or solution this provision needs to be looked at.

⁶⁶ This is only possible because of the provisions of the English Limitations of Actions Act 1980 . It is not the law in Jamaica see Judith Godmar v. Ciboney Group Limited Decision date April 11, 2003 (CA).

⁶⁷ r. 1.1 (1)

CPR: Is there a concept of an Irregularly Obtained Default Judgment?



It is quite common for applications to be made to set aside default judgments. Under the CPC the court had wide discretion to set aside default judgments. Section 258 provides that “[a]ny judgment by default, whether under this title or any other provisions of this Law, may be set aside by the Court or Judge upon such terms as to costs or otherwise as such Court or Judge may think fit.”⁶⁸ In practice, the court’s treated with default judgments as being either irregularly or regularly obtained. Irregular judgments were set aside as a matter of justice. The circumstances include where it has been proven to the satisfaction of the court that the writ of summons was not served on the party seeking to set aside the judgment. In a situation where the judgment was properly entered, a regular judgment, the applicant was required to show that it had a real prospect of successfully defending the claim. The Applicant also had to show that the application was made as soon as the applicant became aware of the claim and the reason for allowing judgment to be entered in default.

Attorneys are concerned that based on r. 13.2 the concept of an irregularly obtained default judgment as it was previously known is a thing of the past. Rule 13.2 provides as follows:

13.2 (1) The court must set aside a judgment obtained under Part 12 if judgment was wrongly entered because –

(a) in the case of a failure to file an acknowledgment of service, any of the conditions of rule 12.4 was not satisfied;

(b) in the case of a failure to file a defence any of the conditions in rule 12.5 have not been satisfied;

(c) the whole of the claim was satisfied before judgment was entered.

In order to test the concern raised by attorneys it will be useful to look at the conditions in r. 12.4 and 12.5:

⁶⁸

Section 258

Conditions to be satisfied – judgment for failure to file acknowledgment of service

12.4 The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if –

- a. the claimant proves service of the claim form and particulars of claim on that defendant;
- b. the period for filing an acknowledgment of service under rule 9.3 has expired;
- c. that defendant has not filed –
 - a. (i) an acknowledgment of service; or
 - b. (ii) a defence to the claim or any part of it;
- d. where the only claim is for a specified sum of money apart from the costs and interest, that defendant has not filed an admission of liability to pay all the money claimed together with a request for time to pay it;
- e. that the defendant has not satisfied in full the claim on which the claimant seeks judgment; and
- f. (where necessary) the claimant has permission to enter judgment.

(Rules 5.5, 5.11, 5.12 and 5.15 deal with how to prove service of the claim form and particulars of claim...)

Conditions to be satisfied – judgment for failure to defend

12.5 The registry at the request of the claimant must enter judgment against a defendant for failure to defend, if –

- a. the claimant proves service of the claim form and particulars of claim on that defendant; or
- b. an acknowledgment of service has been filed by the defendant against whom judgment is sought; or
- c. the period for filing any a defence and extension agreed by the parties or ordered by the court has expired;
- d. the defendant has not -
 - i. filed a defence within time to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under rule 22.2(6));
 - ii. where the only claim is for a specified sum of money, filed or served on the claimant an admission of liability to pay all of the money claimed, together with request for time to pay it;
 - iii. satisfied the claim on which the claimant seeks judgment; and

- e. there is no pending application for extension of time to file the defence.
- f. where the only claim is for a specified sum of money apart from the costs and interest, that defendant has not filed an admission of liability to pay all the money claimed together with a request for time to pay it;
- g. that the defendant has not satisfied in full the claim on which the claimant seeks judgment; and
- h. (where necessary) the claimant has permitted to enter judgment.

One issue that would normally have given rise to an application to set aside on the basis of irregularity is the defendant's averment that it has not been served. The Defendant was able to make this averment even if an affidavit of service is filed. The affidavit of service is the primary if not the only method of proving service. It appears that in the CPR once this has been filed there is no provision that allows a defendant to allege that the Claim form was not properly served even if that is the case. Further it used to be that a judgment entered for too much was an irregular judgment, it appears that this has also been put to rest by the CPR.

This theory can be tested by an examination of the equivalent English Rule. As in the CPR the "phrase 'entered wrongly'⁶⁹ is precisely defined under the rules."⁷⁰ The equivalent rule is rule 13.2(a) to (c) in the following terms:

- (a) The time for acknowledging service, or for serving defence (as the case may be) had not expired by the time the default judgment was entered;
- (b) A summary judgment or application to strike out the claim made by the defendant was pending when the default judgment was entered;
- (c) The defendant had satisfied the whole claim or, on a money claim, filed an admission and a request for time to pay at the time the judgment was entered.

Paragraph 13.2(a) of the English rules is similar to the CPR 12.4(b). A judgment was set aside under 13.2(a) as of right in the case of *Credit Agricole Indosuez v. Unicof Ltd. [2003] EWHC (Comm)*. The court ruled:

⁶⁹ In CPR "wrongly entered"

⁷⁰ Blackstone's Civil Practice 2009 at paragraph 20.11

On the facts, the default judgment had been entered on a false basis as to service of the proceedings, since K had never been served personally in the manner stated in the documents. There was no doubt that W and his principals had determined to serve personally on an officer of the ninth defendant. It followed that the proceedings had not been served and, in consequence the judgment should be set aside. It would have been set aside in any event on the grounds of the ninth defendant having reasonable grounds of successfully defending the claim, and further would have been set aside on the exercise of the court's discretion under CPR 13.3.⁷¹

Although r. 13.2(a) is similar to CPR r. 12.4(b) an application to set aside may very well produce the same result, it can be argued that such a result would be an anomaly having regard to the clear terms of r. 12.4(a). The grounds are in the alternative. If therefore the court finds that service is proved under r. 12.4(a) at the time of filing the request for judgment, can it thereafter say that the claim form was not served as a basis for setting aside the judgment under r. 12.4(b)? It should be noted that there is no equivalent of 12.4(a) in the English rules so that this anomaly does not arise. Should Jamaica do away with r. 12.4(a) or can r. 12.4(a) and r. 12.4(b) coexist?

Miscellaneous Provisions

Reply to Amended Claim served before the filing of the Defence

This is another area in the new rules that requires some certainty. Rule 20.3 permits a defendant, who has been served with an amended particulars of claim or a claimant who is served with an amended counterclaim to amend the defence once without permission within 28 days of service of the amended claim or counterclaim. The confusion relates to what is to happen in cases where the Defendant is served with an amended claim before the defence is due and before the defence has been served. Does it have the effect of extending the time for filing the Defence by 28 days or is the defendant obliged to plead to the amended particulars within the time limited for the defence.

⁷¹

Fixed Time Table for Trial

It is not uncommon to see three matters fixed before a judge as follows:

Actions

Coram: Judge The Honourable Mr. Justice P

Week of November 30 2009 –

X v. Y jack:jill (three days)

A v. B. John:doe (five days)

C v. D cat:mouse (one day)

It is not difficult to see that one or two of these matters will be adjourned either by the court and one of the attorneys hoping that it is their matter. This is a frequent occurrence and defeats the overriding objective of the rules to ensure that matters be dealt with expeditiously.

Mediation – Notice to Approve Mediation Settlement

Mediation has received mixed blessings in terms of the resolution of matters. Based on past statistics however, it appears that mediation is a success.⁷² There are however some kinks in the system that need to be ironed out. The referrals are not taking place in a timely manner. In some cases even after a year there is still no referral even though follow up letters have been done. In one instance the reason was that the judge had the file for the purpose of writing a judgment on an interlocutory application. There is no evidence that the interlocutory application had anything to do with the mediation continuing, in fact the interim application was for an injunction. The matter could have progressed to mediation while the judge is considering his ruling in the particular matter.

⁷² The current statistics were requested since September 2009 however at the time of writing they were not yet delivered.

Recently the practice has commenced whereby parties are being asked to attend court for the court to approve the mediation settlement.⁷³ However, this defeats the purpose and intent of the rules and of mediation resolving the matters. A mediation settlement is not finalised by attendance on the court or judge. It is finalised by a consent judgment or order in accordance with r. 42.7. Time did not permit verifying the basis for sending out the Notice of Appointment to Approve Mediation Settlement but it could be that the registry feels it necessary to send out the Notice because attorneys are not complying with the r. 42.7. On the other hand, r. 42.7 is one of the orders that the registry is refusing to give effect to unless it is signed by a judge or the registrar even though this is not necessary. It seems then that a joint effort is required on the part of both the court and parties in order to render settlements by mediation effective. It should not however be by adding another layer of paper work where none is required.



Balancing Justice – Ex Parte Injunctions and Emergency Hearings

No paper would be complete without reference to the fall out caused by Lord Hoffman's opinion in the Privy Council decision of *National Commercial Bank Jamaica Limited v. Olint PC. 61 of 2008*:

13. First, there appears to have been no reason why the application for an injunction should have been made *ex parte*, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, *audi alterem partem* is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none.

It is the general view of attorneys, while accepting at least for the moment that the law is as set out in that paragraph, that it is being applied with a certain degree of rigidity and inflexibility that has been causing hardship or injustice to their clients. In some cases attorneys are being asked to give notice even in relation to *mareva* injunctions. The registry staff have been reluctant in some cases to fix matters for ex parte hearings on the basis of the *Olint* decision. In one situation, on an application for stay of execution, where notice was given to an attorney-at-law, he promptly moved up the date for execution to a time that coincided with the date of the hearing at court. It is true that one may wish to frown on such conduct but a real live question is how the courts and parties will balance justice in such situations? Will the court be prepared to restore the status quo in such circumstances and as another matter, will parties be allowed to put their case to the judge so that the judge can make a decision as to whether the case falls within the prohibited category or not. The purpose of this final paragraph is therefore to urge a revisiting of the approach to or the circumstances in which paragraph 13 will apply. This is especially so since it appears that attorneys have been doing their part. There has been a noticeable change in the attitude of attorneys and there has in recent times an increase in the number of inter partes applications for injunctions.

Conclusion

This is by no means all that can be said about the rules and its impact on the court and practitioners. The thoughts and ideas are not intended to be dogmatic. They are intended to stimulate thinking, discussion, clarity and improvement where necessary on different aspects of the rules. A number of areas were chosen for review and although in some cases, they demonstrate that the expectations of the drafters or attorneys were not realised, things are in fact *new and different*. There is more paper, the pace of things has picked up and there is a

move towards greater efficiency. It is also clear that all persons who interact with the rules are interested in the improvements. But there are problems. In some cases the institutions need to be modernised and given the appropriate capacity to give effect to the rules. In other instances the attitude, thinking or philosophy of the various actors need to change. By all indications the changes will continue. As envisaged by the rules it is hoped that the commitment to ongoing review and amendments where necessary will continue. This is only a part of that process.

Appendix I

Modified Form 11

Without Notice and Without Hearing Application



APPLICATION FOR COURT ORDERS WITHOUT NOTICE AND WITHOUT A HEARING TO SERVE
CLAIM FORM OUT OF THE JURISDICTION

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007/H.C.V. 00000

BETWEEN **DONNA CAMERON** **CLAIMANT/APPLICANT**

A N D **HORACE CAMPBELL** **DEFENDANT/RESPONDENT**



The Claimant/Applicant, **DONNA CAMERON** of Lot 335 Cowper Drive, Pepper Bello Heights, Montego Bay P.O., in the parish of St. James, seeks the following Orders:

1. That leave be granted to the Claimant to serve the Claim Form and all subsequent processes out of the Jurisdiction on the Defendant **HORACE CAMPBELL** by registered mail at 5471 Niagra Falls, San Antonio, Texas 78240-1589, United States of America.
2. That costs of the Application be costs in the claim.
3. Such further and/or other relief as this Honourable Court Deems just.

The grounds on which the Applicant is seeking the orders are as follows:

- (1) Pursuant to Parts 7.5 (1) and 11.14(a) of the Civil Procedure Rules, 2002 the Court may determine this application without a hearing.
- (2) Pursuant to Part 7.3 (1) of the Civil Procedure Rules 2002, the court may permit a Claim Form to be served out of the jurisdiction.
- (3) Pursuant to Part 7.3 (6) (c) (ii) of the Civil Procedure Rules 2002 such permission may be granted where the Claim is made to assert, declare or determine rights in or over land located within the jurisdiction.

This application will be heard by a judge in Chambers as a paper application.

NOTICE

This Application will be heard by the Master or a Judge in Chambers on the **day of** , **2007** at the Supreme Court, King Street, Kingston at

o'clock in the fore/after noon. If you do not attend this hearing personally or by an Attorney-at-Law, an Order may be made in your absence.

IT IS NOT INTENDED TO GIVE NOTICE OF THIS APPLICATION PURSUANT TO PARTS 7.5 (1) AND 11.8 (2) (a).

Dated the day of 2007

CAMERON CAMERON CAMERON

PER: _____
ATTORNEYS-AT-LAW FOR APPLICANT

The Registry of the Court is situate at King Street, Kingston telephone numbers (876) 922-8300 - 9, fax (876) 967-0669. The office is open between 9:00 a.m. and 4:00 p.m. Mondays to Thursdays and 9:00 a.m. to 3:00 p.m. on Fridays except on Public Holidays. When corresponding with the Court, please address forms or letters to the Registrar and quote the claim number.

Filed by Cameron Cameron Cameron, Attorneys-at-Law of 24 Irwin Road, Kingston 10 in the parish of Saint Catherine and on behalf of the Claimant/Applicant herein.

Notice of Appointment to Approve Mediation Settlement

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 00000

BETWEEN	DONNA CAMERON	CLAIMANT
AND	HORACE CAMPBELL	DEFENDANT

PLEASE NOTE that an appointment for Mediation Settlement is scheduled in this matter for the _____ day of _____, 2007 at _____ for 10 minutes.

DATED _____ DAY OF _____ 2009

.....

REGISTRAR

TO: The Claimant

C/o Cameron Cameron Cameron
Attorneys-at-Law
24 Irwin Road,

TO: The Defendant

C/o Stewart, Clarke & Associates
Attorneys-at-Law
65 Cherry Close.

Kingston 10.

Kingston 10.