IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Application No GYCV2024/002
GY Civil Appeal No 60 of 2024

BETWEEN

HARDAT SINGH **APPELLANT**

AND

ANN NARINE **RESPONDENT**

Before: **Mr Justice Anderson**
Mme Justice Rajnauth-Lee
Mr Justice Barrow
Mr Justice Jamadar
Mme Justice Ononaiwu

Date of Reasons: **20 May 2025**

Appearances

Mr Devindra Kissoon and Ms Natasha M Vieira for the Appellant

Ms Jamela Ali SC, Mr Sanjeev Datadin, Mr Khalif Gobin and Ms Mohanie Anganoo for the Respondent

Practice and Procedure – Failure to set aside judgment – Raising defence at appeal stage – Supreme Court (Civil Procedure) Rules 2016 r 39.07.

SUMMARY

By a Fixed Date Application ('FDA') the respondent claimed against the appellant the sum of USD300,000 which the appellant promised to pay in a document claimed to be a

promissory note. In the High Court, the Chief Justice decided the document was not a promissory note but accepted it as evidence of a contract to pay and allowed the respondent to file further evidence and to serve the appellant at his address out of the jurisdiction. Judgment for the respondent was entered at the subsequent hearing at which there was no appearance or defence by the appellant. The matter was appealed to the Full Court and the Court of Appeal which both upheld the judgment.

Before this Court, the appellant filed 21 grounds of appeal, and on the appeal, the issues of service and the appellant's failure to file a defence arose as major issues. In delivering the judgment of the Court, Barrow J held that the appellant erred in failing to apply to set aside the judgment since a trial had been conducted by the High Court and a final judgment had been entered against him. This required the appellant to engage with r 39.07 of the (Civil Procedure) Rules 2016 which deals with setting aside judgments.

By the appellant failing to apply to set aside, he attempted to sidestep the requirement of giving a good reason for his non-appearance when he deliberately did not attend trial and was seeking to avoid the judgment altogether. The Court identified this as an abuse of process. By choosing to appeal rather than applying to set aside, the appellant avoided the filing of evidence on oath and cross-examination as to his non-attendance at trial, and the truth of what happened to the documents that unarguably were served at his foreign address.

The Court examined the interplay between failing to apply to set aside and appealing a judgment and concluded that while it was possible to appeal without applying to set aside, there would have to be unusual facts for a court to permit that course. Even if an appeal was permitted, an appellant would need to explain their failure to attend the trial and defend the case.

The Court emphasised the principle that parties cannot achieve by the backdoor of an appeal that which could not have been achieved, or which they failed to achieve by way of an application to set aside a judgment. In dismissing the appeal, the Court stated it was left unconvinced that the appellant had been forthright in his conduct of this matter.

Cases referred to:

Bank of Scotland v Pereira [2011] 1 WLR 2391; *Mabrouk v Murray* [2022] EWCA Civ 960; *Singh v Narine* (GY CA, 28 June 2024); *Singh v Narine* (GY FC, 14 June 2022); *Sunrise Resources Inc v Blue Star Export Inc* [2025] CCJ 3 (AJ) GY; *Watson v Roper* JM 2005 CA 68 (CARILAW), (18 November 2005).

Legislation referred to:

Guyana - Supreme Court (Civil Procedure) Rules 2016, **United Kingdom -** Civil Procedure Rules 1998.

Other Sources referred to:

Halsbury's Laws of England (5th edn, 2020) vol 11; LexisPSL Dispute Resolution Overviews, 'The Doctrine of Res Judicata - Overview' (Lexis May 2025).

JUDGMENT

Reasons for Judgment:

BARROW J:

Background

[1] In November 2020, the respondent filed a Fixed Date Application ('FDA') in the High Court claiming against the appellant the sum of USD300,000 due under the former business arrangement between the parties whereby the appellant would pay a fee to the respondent on business ventures. It was claimed that the parties in due course agreed to dissolve their business arrangements and settle all payments due to the respondent, and in furtherance of this obligation, the appellant executed a

document promising to pay the stated sum. Upon the appellant's failure to pay, the respondent's attorney-at-law wrote to the appellant demanding payment.

[2] The High Court entered judgment for the respondent on 20 April 2021, the Full Court dismissed the appeal on 14 June 2022, the Court of Appeal dismissed the further appeal on 28 June 2024 and on 18 October 2024, this Court granted special leave to appeal. In the Full Court the appellant filed 16 grounds of appeal, in the Court of Appeal, he advanced 12 grounds and before this Court he filed 21 grounds. At the end of the argument before this Court, what was left to be considered was (i) how the trial judge dealt with this FDA under r 8.04(5)(b)(ii) of the (Civil Procedure) Rules 2016 ('CPR') which provided for converting the proceedings as if commenced by way of Statement of Claim; ii) setting aside a judgment entered when no defence had been filed; iii) appealing and reviewing the decision of the judge on the evidence without the judgment having been set aside; and iv) judicial non-compliance with the Rules.

Procedural History

[3] Much turns on the procedural history of this matter and the following chronology of events will be helpful.

Date	Document Filed
11 November 2020	FDA filed
16 November 2020	CJ decides document not a promissory note; directs filing of supplementary affidavit
15 January 2021	Application for substituted service
20 January 2021	Order for service abroad
31 March 2021	Affidavit of service on appellant
20 April 2021	Judgment of George CJ for respondent
14 June 2022	Delivery of judgment of the Full Court dismissing Appeal
28 June 2024	Delivery of oral judgment of Court of Appeal dismissing Appeal
11 December 2024	Notice of Application for special leave and stay of execution of judgment filed in Caribbean Court of Justice.

[4] As appears on the High Court 'flysheet' of these proceedings, the FDA came on before George CJ (Ag) for a telephone hearing on 16 November 2020, with counsel for the respondent participating. This was less than a week after it was filed and before it was served on the appellant. The flysheet records the judge noting that the document was not a promissory note and granting permission to the applicant to file a supplementary affidavit properly exhibiting documents relied on as well as to file an application for substituted service. Both orders specified compliance on or before 15 January 2021.

[5] The flysheet reveals that on 18 January 2021, the supplementary affidavit of the respondent was filed and an application made without notice was filed and attached. The next note on the flysheet is that on 20 January 2021, George CJ (Ag) granted an application to serve the appellant at an overseas address with the usual proof of service as well as at a local address, with notice of a hearing on 15 April 2021 at 10 am and ordering a remote hearing notice to be served with the application.

[6] An order was entered on 26 January 2021 dispensing with personal service of the relevant documents and instead permitting service of same upon the appellant outside of the jurisdiction, by sending the documents via FedEx, a courier service, addressed to the appellant at a fully specified address in New York, United States of America. It was also ordered that an affidavit of service sworn by the attorneys-at-law for the respondent, with copies of the FedEx receipts exhibited thereto shall be deemed good and sufficient service. The next note is that on 6 April 2021, an affidavit of service filed 31 March 2021, was attached.

[7] The flysheet entry for 15 April 2021 notes that on the court's re-reading of the order for substituted service, it was seen that it stated a hearing date of 18 April which was a Sunday, while the flysheet had 15 April 2021. The flysheet noted that 18 April being a Sunday, this meant that the hearing would be held on the Monday, in case the appellant filed a defence that day or the following day.

[8] The entry for 19 April 2021 records the holding of a video hearing at which no one appeared for the appellant. Counsel for the applicant stated that the application was served and the affidavit of service filed. The court noted this, accepted service and it deemed the respondent to have been served. The Chief Justice then observed that the document was not a promissory note and in response, Mr Datadin, counsel for the respondent, acknowledged that while this could be so, the document could also be proof of a simple contract debt. The court then observed that the document did not have a time frame and counsel responded that on 5 June 2019, as shown in an exhibit, a letter was sent by the respondent's lawyers demanding payment. Counsel argued that where a document does not state the timeframe, a demand would make the payment due. The letter gave the appellant seven days to pay. The court then entered judgment for the applicant for the sum of USD300,000 or its equivalent in Guyana dollars, with interest and costs.

Appeal Versus Setting Aside

[9] The appellant appealed on 17 May 2021 to the Full Court of the High Court against the judgment. That appeal was dismissed and so was his subsequent appeal to the Court of Appeal. It is, to me, significant that the appellant did not apply pursuant to CPR r 39.07 to set aside the judgment entered by the High Court although, without referring to the rule, he has purported to address matters stated in it. The rule states:

> **39.07 Application to Set Aside Judgment Given in Party's Absence**
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> (1) A party who was not present at a trial at which Judgment was given or an order made may make an application to set aside that Judgment or order, which application must be made within 28 days of being served with the Judgment or order.
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> (2) In considering an application to set aside under this Rule, the Court must be satisfied that,
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> (c) the Applicant had a good reason for failing to attend the hearing; and

(d) it is likely that, had the Applicant attended at the hearing, some other Judgment or order might have been given or made.

[10] The Full Court judgment stated, at [15], that counsel for the respondent had submitted that the appellant was required to make an application under CPR r 39 for a rehearing since judgment was entered in his absence. The judgment stated the court did not find that CPR r 39 had any application to proceedings commenced by FDA, which are not continued as if they had been commenced by way of Statement of Claim as the rule, by its very wording, applies to matters proceeding under the Statement of Claim regime. It is observed that the court was here referring to CPR r 8.04(5)(b)(ii) which provides for converting proceedings commenced by FDA, found to be unsuitable for that procedure, as if commenced by way of Statement of Claim and dealing with the claim according to the regime applicable to such a claim. While the Full Court did not consider that the Chief Justice had done so, it may be that the Chief Justice did exactly that, in a summary way and without formality for which there was no need, as the claim was uncontested. There was no notation on the flysheet that this is what the Chief Justice did but, implicitly and on a tentative view, this seems to be how the Chief Justice decided to proceed as it was only by doing so that the claim could have been heard rather than dismissed for having been impermissibly brought as an FDA.

[11] The Full Court concluded the discussion of CPR r 39 by stating it was satisfied it had jurisdiction. That statement indicated, as it seems to me, that the court was considering the rule by way of dealing with a challenge to its jurisdiction to hear an appeal and the consideration it gave to the rule was so directed. Having decided it had jurisdiction, the court proceeded to consider and dismiss the many grounds of appeal. But before it proceeded to do so, the court observed[1] that the appellant's submissions were littered with evidential matters which were not before the court and that submissions were not the place for evidence.

[1] *Singh v Narine* (GY FC, 14 June 2022) at [17].

[12] In the Court of Appeal, it was twice commented[2] that the appellant failed to apply to set aside service, with the court citing CPR r 7.09. That rule provides sundry grounds for a person who has been served or deemed to have been served with a document to apply to set aside service. The difficulty with the reference to CPR r 7.09 is that it speaks to setting aside service, but the appellant needed to apply, pursuant to CPR r 39.07, to set aside a final *judgment* that was entered against him. However, the court's concern about the absence of an application to set aside puts it in the vicinity of my concern, which is with allowing a party to get away with deliberately not appearing at a hearing, with no good reason for failing to attend and yet seeking to avoid the court's judgment. The conduct of litigation demands that it is on a hearing before a trial court that the court deals with all the issues concerning the claim including defences to it and, therefore, a party is not permitted to decide they will choose the appellate stage as the point at which they will dispute the claim.

[13] The failure of the appellant to address CPR r 39.07 as applicable resulted in there being no consideration of the operation of the rule and its premises. That rule reflects the fundamental principle that a judgment is a solemn act which determines the claim that was filed, with the verb 'determine' meaning, along with deciding the outcome, that it brings the claim to an end. The claim that came before the court for a determination merges in the judgment.[3] The judgment creates, in relation to the issues that it decided an *issue estoppel*[4] which is the situation in law where an issue such as liability for a debt having been decided or concluded upon, a party is precluded or estopped from litigating the issue again. This applies equally to the claim that was brought and to any defence to that claim that may have existed and been capable of being advanced. The defence can no longer be of any avail because the defendant allowed the time and opportunity for availing himself of a defence to pass.

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[2] *Singh v Narine* (GY CA, 28 June 2024) at [30], [41].
[3] LexisPSL Dispute Resolution Overviews, 'The Doctrine of Res Judicata—Overview' (May 2025).
[4] *Halsbury's Laws of England* (5th edn, 2020) vol 11, para 1-496.

[14] It is fundamental to the administration of justice and the conduct of trials that a party must be given an opportunity to defend a claim and to ensure he has that opportunity, he must be served with notice of a hearing so that he can attend and assert a defence. But a party having failed to attend and defend, with no good reason for that failure, will not later be allowed to assert that defence because that would be an abuse of the process of the court.[5] The rejection by the Full Court[6] of the evidential matters that littered counsel's submissions was a good pointer to the abuse of process that attends the attempt to advance a defence for the first time at the appellate stage.

Setting Aside

[15] A final judgment is, of course, subject to appeal and to being set aside in accordance with clear rules governing those courses. In *Bank of Scotland v Pereira*[7] the English Court of Appeal considered the interplay between applying, pursuant to r 39.3 of their Civil Procedure Rules (UK), to which our r 39.07 corresponds, to set aside a judgment pronounced against a defendant who failed to attend, and appealing the judgment. In a close consideration and with a view to providing guidance for future cases, the court stated:

> 37 First, where the defendant is seeking a new trial on the ground that she did not attend the trial, then, even though she may have other possible grounds of appeal, she should normally proceed under CPR r 39.3, provided she reasonably believes that she can satisfy the three requirements of CPR r 39.3… If a defendant seeks to appeal without first making a CPR r 39.3 application, when she could have made such an application, *the appellate court could still entertain her appeal, although particularly following our judgments in this case, it will normally require unusual facts before it should do so* (emphasis added).

[16] The court added that where a party appeals directly against an order without applying to set aside under CPR 39.3, the appellate court should apply the criteria

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[5] *Sunrise Resources Inc v Blue Star Export Inc* [2025] CCJ 3 (AJ) GY at [3]-[5].
[6] *Singh* (n 1) at [17].
[7] [2011] 1 WLR 2391.

laid down under the rule to the appeal.[8] A broad guiding principle governing the relationship between an appeal and an application under CPR 39.3(3) was that an applicant cannot achieve by the backdoor of an appeal that which could not have been achieved or which the applicant failed to achieve by way of an application under CPR 39.3(3).[9] It was also observed that while a party who failed on an application pursuant to CPR 39.3(3) may nonetheless be entitled to appeal and their position ought to be no different in principle from any other litigant, there may well be acute practical difficulty in introducing new arguments or evidence which could have been advanced or adduced at the trial which the applicant failed to attend.[10]

[17] It seems clear that it was the duty of the appellant in the instant case to have been aware of r 39.07 and to have satisfied the Full Court that he had met the requirements stated in the rule. The rule does not stipulate, as does the English Rule 39.3(4), that he must file a supporting affidavit but that seems inescapable given the requirement to satisfy the court that he had a good reason for not attending the trial, under CPR r 39.07(2)(c), and that it is likely that some other judgment or order might have been given or made had he attended the trial, under CPR r 39.07(2)(d). As the authorities have noted[11], there is no longer an open discretion given to the courts to set aside judgments now that the Rules provide that an application to set aside *must* satisfy the stated requirements. Two comments made in *Bank of Scotland* bear repeating: the 'normal course' should be to apply to set aside under the rule, even if there are independent grounds of appeal[12]; and an applicant cannot achieve by the backdoor what he could not have achieved under the equivalent of our CPR r 39.07.[13]

[18] The principles enunciated in *Bank of Scotland* were seamlessly applied in *Mabrouk v Murray*[14] where the English Court of Appeal dismissed the appellant's application

[8] ibid at [80].
[9] ibid at [117].
[10] ibid at [45].
[11] ibid at [24].
[12] ibid at [37], [78].
[13] ibid at [117].
[14] [2022] EWCA Civ 960.

for permission to appeal against a decision of the first instance court made in his absence. That court had decided that as a former senior official in the Libyan embassy, the appellant had been liable in tort for his part in the facilitation of a plan to fire on protesters outside the embassy when a police officer was killed. First, the Court of Appeal held that while he had not made a formal application under the UK CPR 39.3, as in *Bank of Scotland*[15] the appellant had to satisfy the criteria in UK CPR 39.3(5). As such, the court held that (i) the appellant had failed to act promptly in accordance with UK CPR 39.3(5)(a); (ii) in relation to CPR 39.5(b) although the appellant had been absent abroad he had not been genuinely unable to participate in the trial, and (iii) given the lack of a detailed defence, the appellant had failed to show a reasonable prospect of success at a retrial.

[19] In *Mabrouk*[16] the Court of Appeal dismissed the application for permission to appeal on the ground that the applicant had applied for leave out of time but indicated the other factors would also have operated against him. In the instant case, the time factor does not operate but the appellant still very much needed to satisfy the requirement of showing that he had a good reason for failing to attend.

[20] In this regard, mention may be made of the Jamaican case, *Watson v Roper*[17] where the Court of Appeal held that the predominant consideration for the court in setting aside a judgment given after a trial in the absence of the applicant is not whether there is a defence on the merits but the reason why the applicant had absented himself from the trial. If the absence was deliberate and not due to accident or mistake the court would be unlikely to allow a rehearing.

Good Reason for Non-Attendance

[21] In counsel's written submissions to the Full Court, the appellant (impermissibly)[18] makes the representation that the affidavit of service of the court papers upon the

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[15] *Bank of Scotland* (n 7).
[16] *Mabrouk* (n 14).
[17] JM 2005 CA 68 (CARILAW), (18 November 2005) at 8.
[18] See the disapproval by the Full Court of this course in *Singh* (n 1) at [17].

appellant by FedEx was erroneous because the affidavit stated that the person who signed, N Singh, on receipt of the papers was the appellant's sister but the appellant did not have a sister, N Singh. The appellant did not swear an affidavit to this effect so there was no evidence before the Full Court as to the alleged non-receipt of court papers by the appellant. Nonetheless, this attempt is notable in demonstrating the appellant's recognition at the outset that he needed to provide a reason for failing to attend, even though he was not applying to set aside the judgment.

[22] On the application to the Court of Appeal for leave to appeal to that court, the appellant swore an affidavit in support of the application, deposing that he had not received the papers. In that affidavit, the appellant references the affidavit of service of the court papers at his New York address in which it was stated that the documents were served by handing them to his sister, N Singh. The appellant stated in his affidavit in support, 'I do not have a sister bearing the name N Singh and I have not yet received the fixed date application and supplementary affidavit.' After referring to the entry of judgment against him, the appellant deposed that he received from a friend a screenshot of the notice of the FDA and the supplementary affidavit of the respondent and stated that he sent the same to his counsel in Guyana, who investigated and found out about the court action. He said that without any delay he caused his counsel to file the Notice of Appeal against the decision which had been obtained without his knowledge and based on untruthful information.

[23] It is significant that the appellant chose to make this claim of non-receipt of papers on oath for the first time at the stage of a second appeal. It is significant that the appellant chose the route of an appeal because the nature of an appeal is that it is a review and not a rehearing. On an appeal (or application for leave to appeal) the usual practice is that the court does not receive evidence and there is no cross-examination of a deponent. In this way, the appellant avoided what may have been obvious questions such as what became of the papers that were served at his address and received by a person there. No doubt counsel may have relished asking whether there was a person at his address who was N Singh (some family member, perhaps);

whether anyone at his address informed him they had received papers from FedEx; whether he deliberately avoided reading or acquiring knowledge of the contents of the paper; and whether it was deliberate that while he maintained he did not receive the papers he did not say he had no knowledge of the court proceedings. There were many other questions that begged to be asked of the appellant, including in the form of the suggestion that having received a demand letter from the respondent's lawyer for payment of USD300,000 he was well aware that his refusal to pay would be followed, as the demand letter stated, by a claim in court and that he used this foreknowledge to craft his strategy for dealing with the impending claim, including scheming to evade personal service.

[24] There is no need for this Court to reach a conclusion as to what the truth was regarding the appellant's non-receipt of the papers. Even if what the appellant said about non-receipt was true, the discussion and conclusion by the Court of Appeal[19] of cases where papers were properly left at an address for service and genuinely did not come to the attention of a party, but the service was held to be valid, would dispose of a properly made claim of non-receipt. The determination of this appeal, in my view, lies in the undisputed fact that the papers were left with someone at the appellant's address. Counsel for the appellant sensibly declined to challenge this fact at the hearing. It must, therefore, be decided that the appellant has failed to show good reason why he did not attend the hearing.

[25] That conclusion is strengthened by the accompanying reality that the appellant chose to appeal rather than apply to set aside and, thereby, avoid giving oral evidence as to what was the whole truth regarding service of the papers and of his knowledge of the claim against him. Where a party applies to the court for relief from a consequence and seeks the exercise of its discretion in his favour, he carries the burden of being forthright and telling the whole truth. It is fundamental to the integrity of the adjudication process that there must be full disclosure where a party

[19] *Singh* (n 4) at [33] – [37].

is applying to the court to grant relief in the exercise of the judicial discretion, when the issue is no longer a contest between adversaries, and to behave otherwise would be an abuse of the process of the court. Ultimately, the appellant has left the Court unconvinced that he has been forthright about what occurred, deliberately choosing the procedure that enabled him to state only the facts he selected. I would dismiss the appeal.

Conclusion

[26] On the hearing of the appellant's application for leave to appeal to this Court on 17 December 2024, the Court granted a stay of execution of the judgment in the face of an imminent sale of the appellant's real property. The fact that this Court did so should provide the guidance that counsel thought was needed as to the ability of a court to grant an urgent stay of execution at the stage when leave to appeal has been sought, but not yet granted.

Disposition

[27] It follows from my view that the appeal should be dismissed that I would also lift the stay of execution. I would award standard costs to the respondent.

/s/ W Anderson

Mr Justice Anderson

/s/ M Rajnauth-Lee

Mme Rajnauth-Lee

/s/ D Barrow

Mr Justice Barrow

/s/ P Jamadar

Mr Justice Jamadar

/s/ C Ononaiwu

Mme Justice Ononaiwu