EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2017/0029

MARILY JEFFERS NEE WESTE

Appellant

and

[1] THE PERSONAL REPRESENTATIVES OF THE ESTATE OF WYNDHAM WESTE, DECEASED
[2] RUPERT ALEXANDER JOSEPH also known as BENJAMIN JOSEPH
[3] MAUDLYN JOSEPH (also known as MODLYN B. JOSEPH) (now deceased and replaced by RUPERT ALEXANDER JOSEPH as Personal Representatives of the Estate of MODYLN JOSEPH for the purposes of these proceedings only)

Respondents

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearance:

Dr. David Dorsett and Mr. Jarid Hewlett for the Appellant
Mrs. Stacy Richards-Roach for the Respondents

2018: June 13;
2019: January 16.

Civil appeal – Rule 11.10 of Civil Procedure Rules 2000 – Omission of return date – Appellant's failure to attend hearing – Whether appellant satisfies criteria in CPR 11.18 – Status of Children Act – Application to set aside paternity order made pursuant to section 10 – Non-compliance with section 12

The appellant, Marily Jeffers née Weste, filed a paternity claim under section 10 of the Status of Children Act ("the Act"), in which she sought and was granted a declaration that Wyndham Weste was her father (the "Paternity Order"). With this order, the appellant filed a separate claim against Maudlyn Joseph as administratrix of the estate of Wyndham

Weste, deceased, ("the respondent") seeking the revocation of letters of administration of the estate of her deceased father that had been granted to her.

On 25th March 2009 the respondent filed an application for leave pursuant to section 12(2) of the Act to set aside the Paternity Order and for "[d]irections to be given for this matter to be heard on its merits". The application was served on the legal practitioners for the appellant, but it did not have a return date for the hearing of the application. The application was heard by a judge in chambers ("the first judge") who, on 9th July 2009 ordered that the Paternity Order be set aside pursuant to section 12(2) ("the 9th July 2009 Order"). Neither the appellant nor her counsel was present at the hearing.

On 31st July 2009, the appellant applied to set aside the 9th July 2009 Order on the grounds that the order was made in her absence and her absence was not contumelious; the application was made promptly and there was a *bona fide* excuse for the delay; the appellant had a good defence to the claim; and, had the appellant attended the hearing it is likely that another order would have been made.

The appellant filed a second application seeking, among other things, that the application filed on 31st July 2009 be determined and a declaration that the Paternity Order still stands. On 5th July 2016, the appellant filed a third application, this time seeking to set aside the 9th July 2009 Order on the sole ground that there was no notice of the hearing date of 9th July 2009. The applications filed on 31st July 2009 and 5th July 2016 were heard by another judge ("the second judge") who, on 5th December 2017, dismissed the 31st July 2009 application and made no ruling on the 5th July 2016 application. The appellant, being dissatisfied with this order, appealed on grounds related to the non-service of a notice of the date, time and place of the hearing on 9th July 2009 and the appellant's failure to attend the hearing, as well as the respondent's non-compliance with the requirements of section 12 of the Act.

Held: allowing the appeal; setting aside the orders of 9th July 2009 and 5th December 2017; reinstating the Paternity Order; ordering that the respondent's application for leave to set aside the Paternity order be heard *de novo* by another judge of the High Court and making no order as to costs, that:

1. Rule11.10 of the Civil Procedure Rules 2000 ("CPR") states that an application must state the date, time and place when the application is to be heard ("the return date"). The effect of an omission of the return date is that the order made in the absence of the respondent should be set aside and the application be reheard. If, however, the party is entitled to the relief *ex debito justitiae* and a fresh hearing would not place the party, even with notice or on being heard in any better position, then a rehearing need not be ordered.

   Royal Bank of Canada v Lionel Nedwell ANUHCVAP2017/0008 (delivered 14th August 2017, unreported) applied.

2. In this case, service of notice of the hearing of the application for leave to set aside the Paternity Order on the appellant was mandatory. The respondent was

not entitled to an order setting aside the Paternity Order as of right, or at all, on a leave application under section 12(3) of the Act. Alternatively, if the application for leave was being rolled into an application to set aside the Paternity Order, the appellant should have been given notice of the court's intention to treat the leave application in this way.

3. The second judge erred in finding that the appellant did not have good reasons for not attending the hearing on 9th July 2009 and her decision to refuse the application to set aside the 9th July 2009 Order was outside of the generous ambit within which reasonable disagreement is possible, and is plainly wrong. There was a good explanation for the appellant's non-attendance at the hearing in that she had not been served with notice of the hearing and, had she attended, there is a real possibility that a different order would have been made. Thus, the criteria in CPR 11.18 had been satisfied and the appellant is entitled to an order setting aside the 9th July 2009 Order that was made in her absence, and a rehearing of the application to set aside the Paternity Order.

4. The right to apply to set aside a paternity order is a right created by statute and it can only be pursued in accordance with the terms of the statute. Section 12 of the Act contemplates a two-step procedure: the application for leave to apply to set aside the paternity order and, if leave is granted, the hearing of the set-aside application after the court gives directions for the hearing and the relevant persons have been given notice of the application. The procedure in section 12(3) of the Act was not followed in this case. Where the application is pursued without leave, the resulting order is a nullity and the person affected has the right to have it set aside.

   Oliver McDonna v Benjamin Wilson Richardson Anguilla Civil Appeal No. 3 of 2005 (delivered 29th June 2007, unreported) applied.

5. The second judge did not have jurisdiction to deal with the application to set aside the Paternity Order for breach of the procedure in section 12 of the Act. The proper remedy for this breach was an appeal to the Court of Appeal.

   Strachan v Gleaner Company Limited and another [2005] UKPC 33 applied.

JUDGMENT

[1] WEBSTER JA [AG.]: This is an appeal against the judgment of the learned judge dated 5th December 2017 by which she dismissed the appellant's application filed on 31st July 2009 to set aside a prior court order made on 9th July 2009 and did not consider another application by the appellant filed on 5th July 2016 to set aside the court order of 9th July 2009.

Background

[2] The procedural history of this matter provides the background to this appeal and is set out below:

(i) 13th May 2005 – Marily Jeffers née Weste ("the appellant") filed a paternity claim under section 10 of the Status of Children Act[1] ("the Act"), seeking an order that Wyndham Weste, deceased, be lawfully recognised as her father. The claim was assigned the claim number ANUHCV2005/0214.

(ii) 2nd December 2005 – The court found that the relationship of father and daughter existed between Wyndham Weste, deceased, and the appellant, and declared Wyndham Weste, deceased, to be her father ("the Paternity Order").

(iii) 22nd February 2006 – The appellant, armed with the Paternity Order, filed a separate claim against Maudlyn Joseph as administratrix of the estate of Wyndham Weste, deceased, ("the respondent") seeking the revocation of letters of administration of the estate of her deceased father that had been granted to the respondent. This claim was assigned number ANUHCV2006/0100.

(iv) 11th December 2008 – The respondent filed a notice of application for leave to set aside the Paternity Order. The notice does not have a suit number and there is nothing in the record of appeal to say what became of the notice.

(v) 25th March 2009 – The respondent filed an application in claim ANUHCV2005/0214 for leave pursuant to section 12(2) of the Act to set aside the Paternity Order and for "[d]irections to be given for this matter to be heard on its merits". The application states *ex facie* that a draft order is attached, but if it was, it is not a part of the record of appeal. The

[1] Cap 414, Revised Laws of Antigua and Barbuda 1992.

application was supported by the affidavit of the respondent, who has since died. It was served on Lake & Kentish, the legal practitioners on record for the appellant. However, the application did not have a return date for the hearing of the application.

(vi) 9th July 2009 – The respondent's application for leave to set aside the Paternity Order came on for hearing before a judge in chambers ("the first judge") who made the following orders:

(i) The order of paternity granted on 2nd December 2005 be set aside pursuant to section 12(2) of the Act.

(ii) A copy of the said order be served on the Registrar of Births and Deaths.

("the 9th July 2009 Order").

Neither the appellant nor her counsel was present at the hearing and the effect of their absence forms a central part of the Court's decision in this matter.

(vii) 31st July 2009 – The appellant applied to set aside the 9th July 2009 Order on the grounds that the order was made in her absence and her absence was not contumelious; the application was made promptly and there was a *bona fide* excuse for the delay; the appellant had a good defence to the claim; the court did not have jurisdiction to set aside the order because the respondent had not obtained leave to make the application as required by section 12(2) of the Act; and had the appellant attended the hearing it is likely that another order would have been made.

(viii) 8th October 2009 – The 9th July 2009 Order was received by a clerk in the office of the appellant's then attorney.

(ix) 9th October 2009 – The respondent filed an affidavit in claim ANUHCV2005/02014 opposing the appellant's set aside application filed on 31st July 2009. The files in both claims (2005/02014 and 2006/0100) were in a very unsatisfactory state and there was no clear record whether the appellant's application to set aside the 9th July 2009 Order had been heard and determined. The files were referred to the Chief Justice in 2015 for directions. On or about 27th July 2015, the Chief Justice advised that the set-aside application be heard *de novo*.

(x) 30th May 2016 – the appellant filed an application seeking the following orders:

i. that the application filed on 31st July 2009 be determined and judgment rendered accordingly;
ii. a declaration that the Paternity Order made on 2nd December 2005 in claim number ANUHCV2005/0214 still stands;
iii. any further orders to resolve the matters in dispute; and
iv. costs.

(xi) 5th July 2016 – The appellant filed a third application, this time seeking to set aside the 9th July 2009 Order on the sole ground that there was no notice of the hearing date of 9th July 2009.

(xii) 23rd July 2016 – The applications filed on 31st July 2009 and 5th July 2016 were heard by another judge in chambers ("the second judge").

(xiii) 5th December 2017 – the second judge dismissed the application filed on 31st July 2009 and made no ruling on the application filed on 5th July 2016. This is the order being appealed.

The **learned judge's decision**

[3] The learned judge's reasons for her decision are set out in her written judgment delivered on 5th December 2017. The judge decided firstly that, notwithstanding the various applications that were before the court, the one that she should consider *de novo* was the appellant's application filed on 31st July 2009 seeking to set aside the 9th July 2009 Order.[2] She went on to find that the 9th July 2009 Order was a final order that determined the question of whether the relationship of father and daughter existed between the appellant and Wyndham Weste, deceased. The order was drawn up and perfected and the court did not have jurisdiction to set it aside. Any challenge to the order had to be by way of an appeal to the Court of Appeal. Alternatively, even if the High Court had jurisdiction to set aside the order, this was not a proper case to exercise that discretion in favour of the appellant because she did not provide a good reason for not attending the hearing on 9th July 2009 when the order was made. The learned judge did not go on to consider any other grounds on which the appellant had applied to set aside the 9th July 2009 Order and did not adjudicate on the application filed by the appellant on 5th July 2016. She dismissed the appellant's application to set aside the 9th July 2009 Order and ordered the parties to bear their own costs.

The appeal

[4] The appellant appealed on four grounds, namely:

(i) The learned judge erred when she found that she did not have jurisdiction to entertain the application filed on 31st July 2009 which sought to set aside the 9th July 2009 Order which was made in breach of the rules of natural justice in that the appellant was not given notice of the hearing date of 9th July 2009.

[2] Paragraph 17 of the judgment of the lower court.

(ii) The judge erred in failing to set aside the 9th July 2009 Order when the said order was made without leave (being granted on the application for leave) and was accordingly a nullity.

(iii) The judge erred in applying the criteria dictated by rule 11.18 of the Civil Procedure Rules 2000 ("CPR") in dismissing the application of 31st July 2009 when the 9th July 2009 Order was never served on the appellant.

(iv) The judge erred in failing to adjudicate upon the application filed by the appellant on 5th July 2016 when she was under a duty to do so.

[5] Grounds of appeal (i), (iii) and (iv) overlap and it is convenient to deal with them together. They relate in varying degrees to the non-service of a notice of the date, time and place of the hearing on 9th July 2009, and the appellant's failure to attend the hearing. Ground (ii) involves a consideration of section 12 of the Act and I will deal with it separately although there are references to section 12 in my analysis of the other grounds.

Grounds (i), (iii) and (iv) – Failure to give notice of the 9th July 2009 hearing and the effect of the appellant not attending the hearing

[6] The starting point in dealing with grounds (i), (iii) and (iv) is CPR 11.7 which states that an application must state briefly the grounds on which the applicant is seeking an order and what order the applicant is seeking. The respondent's application to set aside the Paternity Order is headed "Application for Leave" and states in the body of the application that it is "for leave to set aside an order granted in (*sic*) pursuant to section 12(2) of the Status of Children Act Cap 414" and that "[d]irections be given for this matter to be heard on its merits". The grounds of the application are essentially the facts on which the respondent relies in making the application for leave. The respondent's affidavit in support of the application repeats and expands the facts set out in

the application as the grounds and goes on to state in the final paragraph that "I humbly crave that this Honourable Court will grant the leave sought and will set aside the order entered on the 5th December 2005". This is undoubtably an application for leave to bring an application under section 12(2) of the Act[3] to set aside the Paternity Order on the grounds set out in the application, and for directions for hearing the substantive application on the merits, and not the actual application to set aside the Paternity Order. The significance of this will be become apparent later in this judgment.

[7] CPR 11.10 states that the application must state the date, time and place when the application is to be heard ("the return date"). In this case, the respondent's application for leave was filed on 25th March 2009 and was returned by the Registry to the respondent's attorneys and served on the appellant's attorneys without a return date. By returning the filed application to the attorneys without a return date, the Registry failed to comply with the requirement in CPR 11.10. There was no attempt to remedy the situation by serving a notice of the date, time and place of the hearing on the attorneys for the appellant. This Court commented on this failure to comply with CPR 11.10 in RBC Royal Bank of Canada v Lionel Nedwell,[4] a case with similar facts on the issue of serving the respondent with a notice of application without a return date. The unanimous judgment of the Court was delivered by the learned Chief Justice, Dame Janice Pereira, who said at paragraph 11:

> "Counsel for the Bank complains that the judge had regard solely to CPR 11.10 which provides that the notice of application must state the date, time and place when the application is to be heard. I observe that this is a continued failing in many court offices across the Court's jurisdiction where there is a failure to insert a hearing date before returning filed copies to the parties for service on other parties, but relying instead on general listing notices which are then later circulated to all legal practitioners."

[3] Section 12 of the Act is set out in paragraph 16 below.
[4] ANUHCVAP2017/0008 (delivered 14th August 2017, unreported).

This passage highlights the need to serve the application with a return date, and nothing short of such service, or at least a separate notice with details of the date, time and place of the hearing, will suffice. A circular sent to all firms by the Registrar is not enough.

[8] The failure to include the return date in the respondent's application, though improper, could have been cured if there was evidence that a notice of the date, time and place of the hearing was subsequently served on the appellant's attorneys by the court office. There is no evidence that this was done. It appears from the affidavit of Juliette L. Dunnah, a clerk in the employ of Messrs. Lake and Kentish, the attorneys who then represented the appellant, filed on 31st July 2009 in support of the appellant's first set-aside application, that some form of notification came to her attention. She explained in her affidavit that the absence of counsel for the respondent on 9th July 2009 was due to inadvertence because the matter was not entered in counsel's diary. The issue is whether this is enough to satisfy the requirement in CPR 11.10 for service of the notice of application with a return date. For the reasons below, I do not think that it was.

[9] The Nedwell case is instructive in resolving this issue. The facts are that Mr. Nedwell filed a claim against the Royal Bank of Canada ("the Bank") seeking various declarations and an account. The Bank did not file a defence in a timely manner and a default judgment was entered against it. It applied to set aside the default judgment. The application was duly served on Mr. Nedwell's attorneys. The court office listed the application on its circulated hearing list for a hearing on 19th July 2016. Neither Mr. Nedwell nor his attorneys attended the hearing. The master set aside the default judgment on the ground that it was irregularly entered in that it was entered for a specific sum of money when there was no such claim. Having disposed of the application on that ground, the master did not have to deal with the issue of Mr. Nedwell's non-appearance at the hearing. Mr. Nedwell applied to set

aside the master's order primarily on the ground that neither he nor his attorneys were given notice of the hearing of 19th July 2016 and they were not present. The learned judge set aside the master's order setting aside the default judgment on the ground that there appeared to be no evidence that the bank had been given notice of the date fixed for the hearing on 19th July 2016. The Bank appealed against the judge's decision.

[10] The Court of Appeal allowed the Bank's appeal, set aside the judge's order, and restored the master's order setting aside the default judgment. The Court found that the learned master was correct in finding that the default judgment was irregular and must be set aside *ex debito justitiae* pursuant to CPR 13.2 because it was for a specific amount when no such amount was claimed, and also because the claim was for an account which was not susceptible to the default judgment procedure. In dealing with the Bank's complaint that it was not present when the order was made, the learned Chief Justice criticised the fact that the application to set aside the master's order was served without a return date and continued:

> "Be that as it may, the omission of a fixed date, time and place in the notice was not sufficient to allow the judge to set aside the master's order having regard to the nature of the application on which the master's order was made. Having made the order under CPR 13.2, which could have been made with or without notice, the learned judge was required, as counsel for the Bank contends, to have regard to CPR 11.18."[5]

The Chief Justice noted further at paragraph 13:

> "Although I need not deal with the Bank's second complaint in order to dispose of this appeal, for the sake of completeness I make the observation that where the learned judge had set aside the master's order due to the party's lack of notice and absence at the hearing, it would have merely and properly have had the effect of restoring the application to set aside to be heard afresh on its merits. Having concluded, however, that this appeal ought to be allowed and that the order of the learned judge be set aside, this restores the order of the master setting aside the default judgment which, in my view, he was right to do for the reasons he gave. A

[5] At para. 11.

> fresh hearing in any event would not place the respondent, even with notice or on being heard, in any better position. The default judgment entered is simply irregular and was wrongly entered. It cannot stand."(underlining added)

This passage, and in particular the words underlined, show that the effect of not giving proper notice of the return date is that the order made in the absence of the respondent to the application should be set aside and the application be reheard. However, the Court of Appeal did not order a rehearing in the Nedwell case because it would not have made a difference. The default judgment was irregular, and the Bank was entitled to have it set aside *ex debito justitiae* under CPR 13.2. The instant appeal is different. The respondent was not entitled to an order setting aside the Paternity Order as of right, or at all, on a leave application under section 12(3) of the Act. Service of notice of the hearing of the application for leave on the appellant was mandatory. Alternatively, if the application for leave was being rolled into an application to set aside the Paternity Order, the appellant should have been given notice of the court's intention to treat the leave application in this way.[6]

[11] The absence of the appellant from the hearing on 9th July 2009 brings CPR 11.18 into play. The rule states that:

> "(1) A party who was not present when an order was made may apply to set aside or vary the order.
> (2) The application must be made not more than 14 days after the date on which the order was served on the applicant.
> (3) The application to set aside the order must be supported by evidence on affidavit showing-
> (a) a good reason for failing to attend the hearing; and
> (b) that it is likely that had the applicant attended some other order might have been made."

The second judge treated the application of 9th July 2009 as an application under CPR 11.18 and found that the appellant had not satisfied the condition in sub-rule (3)(a) because she had not provided a good reason for not attending the hearing

[6] I deal with the so-called rolled up application in paragraph 18 below.

on 9th July 2009. She therefore dismissed the application. The appellant complains in ground (iii) that the second judge should not have applied the criteria in CPR 11.18 because the 9th July 2009 order was never served on her or her attorneys. I do not accept this submission. A person against whom an adverse order has been made in his or her absence does not have to wait to be served with the order to challenge it. In fact, the person is bound by the order once he or she becomes aware of it and can take steps immediately to challenge it.

[12] The 31st July 2009 application does not state the rule or authority under which it was made but some of the grounds of the application suggest that the appellant was attempting to comply with the requirements of CPR 11.18 for setting aside an order made in her absence, in particular the two criteria in sub-paragraphs (a) and (b) of rule 11.18(3).[7] As stated above in sub-paragraph 2(vii), the grounds of the application included that it was made in her absence and that her absence was not contumelious; the application was made promptly and there was a *bona fide* excuse for the delay; the appellant had a good defence to the claim; and, had she or her attorney attended the hearing it is likely that some other order would have been made. These are criteria that an applicant must fulfil when applying under CPR 11.18 to set aside an order made in his or her absence and the second judge was correct in treating the application as being made under the rule, a finding that inures to the benefit of the appellant as appears below.

[13] The appellant also complains that the second judge erred in treating the appellant as not having a good reason for not attending the hearing. This is a finding of fact by the second judge with which, based on the authorities, this Court should not lightly interfere. However, it is a finding based on the written evidence that is not disputed, and this Court is in as good a position as the learned judge to assess the evidence and depart from her finding if it finds that it is plainly wrong.[8] In my opinion, the learned judge erred by restricting her consideration of the reasons for

[7] CPR 11.18 is set out in full in paragraph 11 above.
[8] Beacon Insurance Co. Ltd. V Maharaj Bookstore Ltd. [2014] UKPC 21 at paragraph 17.

the appellant's non-appearance at the hearing to the affidavit of Ms. Dunnah. She should have taken a more holistic approach to the issue and considered all the circumstances of the case including the following:

(a) The 9th July 2009 Order was made approximately three and one-half years after the appellant's status as the child of the deceased had been declared by order of the first judge on 2nd December 2005.

(b) The application was made promptly after finding out about the order and, in fact, before time had started to run for making the application by the service of the 9th July 2009 Order on the appellant. The order was received by a clerk in the office of the appellant's attorneys on 9th October 2009.

(c) Notice of the hearing had not been served on the appellant or her attorneys and the appellant herself was not in any way responsible for her absence from the hearing.

(d) The respondent's application was not for setting aside the Paternity Order but for leave to apply to set aside the Paternity Order and for directions for the hearing of the set-aside application on its merits.[9]

(e) Had the appellant attended the hearing, it is likely that a different order would have been made, for example, directions could have been given for the hearing of the set-aside application on its merits (as requested by the respondent in the application).

(f) Lastly, and most fundamentally, the order resulted in the appellant losing her status as the child of the deceased and her right to be a part of and share in his estate.

[9] This issue is discussed in paragraphs 16-23 below.

[14] For these reasons, I find that the second judge erred in finding that the appellant did not have good reasons for not attending the hearing on 9th July 2009. Her decision to refuse the application to set aside the 9th July 2009 Order was outside of the generous ambit within which reasonable disagreement is possible, and is plainly wrong. There was a good explanation for the appellant's non-attendance at the hearing in that she had not been served with notice of the hearing, and, had she attended, there is a real possibility that a different order would have been made. She has satisfied the criteria in CPR 11.18 for setting aside the 9th July 2009 Order that was made in her absence and I would therefore order that the said order, as well as the second judge's order made on 5th December 2017, be set aside, and that the respondent's application for leave to set aside the Paternity Order be heard *de novo* by another judge of the High Court.

[15] This finding is sufficient to dispose of the appeal. However, we were addressed both orally and in writing by counsel for the parties on the jurisdiction of the High Court to hear an application to set aside an order made in breach of the Act, and also in breach of the appellant's natural justice rights. I will deal with those issues briefly.

Ground (ii) – The Status of Children Act

[16] Ground (ii) concerns the respondent's non-compliance with the provisions of section 12 of the Act. Sections 10 and 11 of the Act set out the procedure for applying for a paternity order and then section 12 provides:

> "12.(1) A paternity order remains in force until it is set aside under this section.
> (2) An application to set aside a paternity order may be made with leave of the Court to the Court by which the order was made.
> (3) Notice of the application shall be given to the person specified in section 11.
> (4) The Court may confirm the order or set it aside."

As stated above, the respondent filed an application under section 12(2) of the Act for leave to set aside the Paternity Order. The application complied with section 12(2) in that it was for leave to bring proceedings to set aside the Paternity Order, and for directions to be given for the application "to be heard on its merits". The application was not served on the appellant or her attorneys with a return date.

[17] Section 12 clearly contemplates a two-step procedure: the application for leave to apply to set aside the paternity order and, if leave is granted, the hearing of the set-aside application after the court gives directions for the hearing and the relevant persons have been given notice of the application.

[18] If I am wrong, and a judge hearing a section 12(2) application can deal with both the leave and the set-aside applications in one hearing, it would be incumbent on the judge to ensure that notice of the rolled-up application is given to the persons specified in section 11 (which would include a person in the appellant's position), and that the resulting order is for leave to proceed and for setting aside the Paternity Order. In this case, there is no evidence that notice of the hearing of the application for leave was served on the appellant or her attorneys, and there was no separate order stating that the first judge granted leave to proceed and proceeded to deal with the set-aside application.

[19] On any view, the procedure in section 12(3) of the Act for setting aside a paternity order was not followed. Counsel for the appellant, Dr. David Dorsett, submitted that the resulting order is a nullity. He relied on the decision of this Court in Oliver McDonna v Benjamin Wilson Richardson[10] where the Court had to consider the status of an appeal that was filed without leave where leave was required under CPR 62.2. The Court decided that the notice of appeal was a nullity and struck it out. Barrow, JA stated at paragraph 28 of the judgment:

> "The Court of Appeal is a creature of statute and an appeal to this court may be made only where statute confers the right to appeal. An appeal

[10] Anguilla Civil Appeal No. 3 of 2005 (delivered 29th June 2007, unreported).

> cannot exist unless a statute permits it to be brought. It is for this reason that the notice of appeal filed in this case is a nullity. A nullity cannot be cured or retrospectively validated. The Belize Court of Appeal in Henderson Archilla expressed the proposition thus:
>
> > '…no appeal proceedings can be commenced until leave is granted. Any notice which may have been filed without leave being first obtained is of no effect and is completely valueless and void. It cannot be granted by the subsequent grant of leave.'"

[20] The instant appeal is not about a notice of appeal filed without leave, but the principle in McDonna v Richardson applies with equal force. The right to apply to set aside a paternity order is a right created by statute and it can only be pursued in accordance with the terms of the statute, in this case by applying for and getting leave to proceed. Where the application is pursued without leave the resulting order is a nullity and the person affected has the right to have it set aside *ex debito justitiae*.

[21] The appellant did not appeal against the set-aside order dated 31st July 2009, choosing instead to apply on the High Court under its inherent jurisdiction to set it aside. The issue then is whether she followed the right procedure in applying to the High Court or should she have appealed to this Court.

[22] Counsel for the respondent, Mrs. Stacy Richards-Roach, referred us to the case of Raja v Van Hoogstraten (No) 9[11] which stands for the proposition that where rules of court (or a statute) provide a procedure for making an application, the intended applicant must follow that procedure and not rely on the court's inherent jurisdiction.[12] That principle does not apply in this case. Although the Act creates the right to apply to set aside a paternity order, it does not prescribe the procedure for so doing. The applicant must therefore rely on the court's inherent jurisdiction for setting aside an order that should not have been made. This would suggest

[11] [2009] 1 WLR 1143.

[12] Raja v Van Hoogstraten was approved on this point by the Privy Council in Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited [2009] UKPC 46 at paragraph 57 on appeal from a decision by this Court.

that a judge of co-ordinate jurisdiction would have jurisdiction to set aside the order. However, the matter does not end there.

[23] Mrs. Richards-Roach also relied in the Privy Council decision in Strachan v Gleaner Company Limited and another,[13] an appeal from the Court of Appeal in Jamaica which is highly persuasive. Their Lordships decided that where a judge makes an order, he must be taken to have decided implicitly that he had jurisdiction to make the order. If it turns out he was mistaken and exceeded his jurisdiction, the remedy is by way of an appeal to the Court of Appeal and not to a judge of co-ordinate jurisdiction. The advice of the Board was given by Lord Millett who put the matter this way:

> "The Supreme Court of Jamaica [read Antigua and Barbuda], like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case), his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the Padstow case), he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it."[14](underlining added)

Applying this principle to this case, when the first judge made the order setting aside the Paternity Order on 9th July 2009 she must be taken to have decided implicitly that she had jurisdiction, and if, as I have found, she did not have jurisdiction to make the order, the error could have been corrected by the Court of Appeal, and not by a judge of co-ordinate jurisdiction. The 9th July 2009 Order was not appealed. In the circumstances, I find that the second judge did not have jurisdiction to deal with the application to set aside the Paternity Order on the

[13] [2005] UKPC 33.
[14] Ibid paragraph 32.

ground that the respondent did not get leave under section 12(3) of the Act to apply for the order. The proper remedy for this breach was an appeal to the Court of Appeal and there was no such appeal.

[24] I would dismiss this ground of appeal.

Natural Justice

[25] Finally, Dr. Dorsett submitted that his client's natural justice rights were infringed by the making of the 9th July 2009 Order in her absence, and that the order can be set aside under the inherent jurisdiction of the court. This issue is academic because of the finding that the High Court has jurisdiction under CPR 11.18 to set aside the order. In any case, I do not agree with the submission because the alleged breach can be and was addressed under CPR 11.18. The issue is therefore covered by the rule in Raja v Van Hoogstraten and the appellant did not have to resort to the court's inherent jurisdiction.

Orders

[26] I would make the following orders:

(1) The appeal is allowed.

(2) The orders of 9th July 2009 and 5th December 2017 are set aside.

(3) The Paternity Order dated 2nd December 2005 is reinstated.

(4) The respondent's application for leave to set aside the Paternity Order shall be heard *de novo* by another judge of the High Court.

(5) No order as to costs.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar