[2015] JMCA Civ 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 15/2014

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (Ag)
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (Ag)

BETWEEN	**PERRIE DALEY**	**APPELLANT**
AND	**ATTORNEY GENERAL**	**RESPONDENT**

Written submissions filed by Reitzin & Hernandez for the appellant

23 January and 20 February 2015

PROCEDURAL APPEAL

(Considered by the court on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

BROOKS JA

[1] I have had the pleasure of reading the judgment of my learned sister, McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

McDONALD-BISHOP JA (AG)

[2] This is an appeal brought by Mr Perrie Daley, the appellant (being the claimant in the court below), against an order made by Master Rosemarie Harris (Ag) at pre-trial review held on 26 February 2014. The particular order was in terms that the respondent's questions to the appellant's medical experts filed out of time are permitted to stand (paragraph 4 of the formal order). The learned Master granted leave to the appellant to appeal against that order.

[3] The written questions in dispute are contained in documents headed *"**Questions to Dr A. Wright on behalf of the defendant"*** and ***"Questions to Dr. R. E. Christopher Rose on behalf of the defendant"***. The respondent had filed and served those documents on the appellant on 3 December 2013 for the appellant to submit those questions to his two medical experts, Dr A Wright and Dr R E Rose, and for the experts to give answers to them in writing.

The issue

[4] The broad issue raised by this procedural appeal is whether the questions posed by the respondent are in accordance with rule 32.8 of the Civil Procedure Rules, 2002 ("the CPR") that makes provisions for the putting of questions to expert witnesses and, in particular, whether they went beyond the scope of seeking to clarify the medical reports submitted by the doctors.

The factual background

[5] The appellant sustained gunshot injuries on 26 July 2010 at Antigua Road in the Kingston 11 area. He alleged that he was shot in his left thigh by a member of the Jamaica Constabulary Force, without reasonable or probable cause, while he was fleeing from two assailants who had attacked him in his house. He claimed that the action of the policeman constituted an assault and/or battery upon him or, in the alternative, that the injury he sustained to his thigh was due to the negligence of the police.

[6] The respondent was sued by virtue of section 13 of the Crown Proceedings Act.

[7] The respondent does not admit that the appellant was shot by the police. Alternatively, the respondent alleged that the police were acting in lawful self defence when they had to return fire after they were fired upon by gunmen.

[8] In proof of his case, the appellant obtained medical reports from Dr A Wright and Dr R E Christopher Rose. The reports were attached to the particulars of claim that were filed and served on the respondent on 13 January 2012. At the case management conference held on 11 July 2013, the appellant was granted permission to call the doctors as expert witnesses and/or to put their respective reports into evidence.

[9] On 15 July 2013, the appellant served the medical reports on the respondent as part of a bundle of documents that were attached to a notice of intention to adduce hearsay evidence pursuant to section 31E of the Evidence Act. On 3 December 2013,

the respondent filed and served on the appellant written questions for the doctors. Those written questions would have been out of time.

[10] On 6 December 2013, the respondent filed and served on the appellant a notice requiring the doctors to be called as witnesses.

[11] At the pre-trial review held before Master Harris (Ag), the respondent, upon an oral application, sought an order that the questions to the experts that were out of time, be permitted to stand. The application was successful and the order was granted. It is that order that forms the subject matter of this appeal.

Grounds of appeal

[12] The appellant in setting out the grounds of appeal contended that, in permitting the questions to stand, as a matter of law, the learned Master, failed to appreciate:

> "(i) that the questions were not put "only in order to clarify" the reports and, therefore, were not authorized by the rules;
>
> (ii) that the questions amounted, effectively, to a form of cross-examination by post;
>
> (iii) that conducting a form of cross-examination by post is not permissible;
>
> (iv) that it would be unfair to the appellant to allow the questions to stand since-
>
> (a) the answers would be treated as part of the experts' reports: rule 32.8(3); and yet
>
> (b) the appellant would have no right of cross-examination nor any right to re-examine his medical expert witnesses;

(v) that rule 32.8(2)(b) was "clear and jussive" and that, therefore, neither the overriding objective nor any other rule or law permitted the court to depart from it;

(vi) in order to exercise its discretion in favour of the respondent to extend the time within which the questions were to be put there had to be "some material" upon which the court could exercise its discretion."

The orders being sought by the appellant are:

"(i) appeal allowed;

(ii) The order permitting the respondent's questions to the appellant's medical experts to stand is set aside;

(iii) The respondent is to pay the appellant's costs of this appeal as taxed, if not agreed."

The respondent's position on appeal

[13] The respondent has not taken any part in these proceedings and the reason for that may be deduced from correspondence between the parties adduced by way of affidavit evidence. In that correspondence, it was indicated by counsel on behalf of the respondent that they are prepared to withdraw the written questions to the doctors save for one question to Dr Wright, which the appellant's counsel had agreed was a question asked to clarify his report. They indicated too that they would instead ask the doctors to attend court for cross-examination. As such, there is no longer any need for the appellant to contest the Masters' order and so they would not be opposing the appeal. They invited the appellant to withdraw the appeal.

[14] The appellant's counsel was not minded to withdraw the appeal, however, on the basis that the order would still stand on the record and be operative as well as in the light of the conduct of the respondent in refusing to withdraw the questions upon being told as far back as in December 2013, that the questions went far beyond the provisions of the CPR. The appellant, therefore, suggested to the respondent that they should agree to ask the court to grant the orders sought by consent and for him to be permitted to tax his bill of costs forthwith. There is nothing from the respondent evidencing an agreement to this proposal and, therefore, the appeal has come on for hearing with only submissions from the appellant.

[15] Notwithstanding the position that had eventually been taken by the respondent after the filing of the appeal, the issues that arise for consideration do warrant a ruling from this court, not only to formally treat with the propriety or otherwise of the order made by the learned Master that still stands on the record, but also to provide the necessary guidance for future proceedings involving a consideration of the rules that make provision for the putting of questions to expert witnesses.

The appellant's submissions

[16] The appellant's basic contention is that the learned Master's order was not authorised by the CPR and was, in fact, contrary to the rules for the following reasons:

> (i) "A party may put questions to an expert instructed by another party only in order to clarify his report: rule 32.8(2)(b). However, the questions asked of the

appellant's medical experts were not put in order to clarify their reports. Rather, they were put to "significantly expand" the reports and to "conduct a form of cross-examination by post."

(ii) "The Supreme Court (unlike courts in the United Kingdom where the rules are different) has no power, under the Civil Procedure Rules, 2002, to permit a party to put questions which go beyond mere clarification of the expert reports."

(iii) "The granting of permission, if not set aside, would operate unfairly to the appellant since he would not be able to cross- examine (or re-examaine) his own (expert) witnesses and any solution to that problem, for example by (iv) allowing both parties to cross-examine the medical experts would be very expensive and time consuming."

(iv) "Furthermore, the respondent's questions were put late and yet the respondent never sought an extension of time nor did the respondent advance any evidence in support of the application, let alone any which would have justified an extension being granted."

Analysis and findings

[17] Before embarking on an analysis of the case being advanced by the appellant, it should be noted that as a matter of convenience, the grounds of appeal set out by the appellant are condensed and treated as one ground to be determined and that is whether the learned Master erred in law in permitting the questions to the appellant's experts to stand. A resolution of that question evokes the need for this court to consider the relevant rule that sets out the requirements to be satisfied for questions to be put to an opposing party's expert witness.

The applicable law

[18] The CPR, in rule 32.8 provides, in part:

> "32.8 (1) A party may put written questions to an expert witness instructed by another party or jointly about his or her report.
>
> (2) Written questions under paragraph (1) -
>
> (a) may be put once only;
>
> (b) must only be in order to clarify the report; and
>
> (c) must be put within 28 days of service of that expert witness's report, unless -
>
> (i) the court permits; or
>
> (ii) the other party agrees."

A reading of the rule does show clearly that there are three distinct requirements or conditions that must be satisfied (conjunctively) before written questions may properly be put to an opposing party's expert witness. Those requirements relate to the number of times the questions may be put (the frequency), the purpose for which the questions are to be put (purpose) and the time within which the questions are to be put (the 'limitation' period).

[19] There is no issue taken with the first of the requirements as to frequency as it is clear that the questions were being put for the first time. The dispute arises in relation to the purpose of the questions which is the second requirement to be satisfied and the limitation period, that being, the time within which they should have been put. The contention of the appellant in relation to the second requirement is that in the instant

case, the questions being put by the respondent were not asked only in order to clarify the reports of the experts as required by rule 32.8(2)(b) but have gone further and as such are not authorized by the CPR. In relation to the third requirement, the contention is that the respondent was out of time and had not made an application for extension of time within which to file and serve the questions.

Whether questions were "in order to clarify the reports"

[20] The CPR have not defined or explained what is meant by "to clarify". Learned counsel for the appellant, however, helpfully pointed out the meaning of the word "clarification" within the context of similar (but not identical) English rules as suggested by the learned authors of the Civil Procedure White Book 2007 at paragraph 35.6.1. There it is stated:

> "The meaning of "clarification" is not explained in the Rule or Practice Direction. However, it would seem that questions should not be used to require an expert to carry out new investigations or tests, to expand significantly on his/her report, or to conduct a form of cross-examination by post, including on the expert's credibility unless the court gives express permission. In ***Mutch v Allen*** *[2001] All E.R. D 121, CA,* a medical expert in a personal injury claim was asked by the defendant whether the claimant's injuries would have [been] less severe if he had been wearing a seat belt. At first instance it was accepted this was outside the scope of his instructions and report and was not therefore "clarification". The Court of Appeal said that the expert answering the question would assist "the just disposal of the dispute", but either the expert should be called to give evidence and be cross-examined by both parties at trial. Or [sic] the parties could apply to the court for permission to obtain further expert evidence on this point."

[21] It is convenient and necessary to consider, at this juncture, the English provision that the learned authors of the White Book sought to explain by reference to **Mutch v Allen**. This is in order to appreciate the extent to which the English authorities on the subject may be useful in considering and applying rule 32.8(2).

[22] The English rule 35.6, to which the learned authors of the White Book referred, provided thus:

> "Written questions to experts
>
> 35.6
>
> (1) A party may put written questions about an expert's report (which must be proportionate) to –
>
> (a) an expert instructed by another party; or
>
> (b) a single joint expert appointed under rule 35.7.
>
> (2) **Written questions under paragraph (1) –**
>
> **(a) may be put once only;**
>
> **(b) must be put within 28 days of service of the expert's report; and**
>
> **(c) must be for the purpose only of clarification of the report, *unless in any case* –**
>
> ***(i) the court gives permission; or***
>
> ***(ii) the other party agrees."***
>
> (Emphasis added)

[23] Counsel for the appellant, quite painstakingly, pointed to the important differences between the wording of the English rules and our rule 32.8(2)(1). The critical portions to note are emphasized in the extract above and the differences between those provisions and rule 32.8(2)(1) are self-evident. It is enough to state for

emphasis that in the English rule 35.6(2), there is the added phrase ***"unless in any case the court gives permission or the party agrees"*** (Emphasis added).

[24] I do accept that those words, ***"unless in any case"***, in the English rule do modify or govern the matters set out in the three preceding paragraphs that set out the requirements to be met for the questions to be put to the expert. It means, in effect, that the questions may be put notwithstanding the non- fulfilment of any one of the three requirements, if the court gives permission or the other party agrees. Under the English rule, therefore, the court has the power to permit questions to be asked more than once, that go beyond mere clarification and which are also outside the prescribed limitation period. The other party may also agree for the questions to be put although all the requirements are not met.

[25] The Jamaican rule, on the other hand, is, evidently, different in that fundamental respect. As can be clearly seen, the last requirement noted is the limitation period and it is to that requirement that the phrase *"**unless the court gives permission or the other party agrees**"* is appended. The words "***in any case***" in the English rule are omitted from our rule. The omission of these words from our rule does lead to the logical conclusion that there was no intention on the part of the framers to subject all three requirements to the "unless provision".

[26] Accordingly, I would hold, in agreement with the submissions made on behalf of the appellant, that the words, ***"unless the court permits or the other party***

agrees" used in rule 32.8(2)(c), apply exclusively to the last requirement as to the limitation period. Therefore, the second requirement that the purpose must be only in order to clarify the report is not modified in any way to give the court the discretion to allow questions outside that purpose. The parties also are not permitted to agree to the questions if they are not being put in order to clarify the reports. The English cases on this issue should, therefore, be followed with caution in the light of the differences in the rules.

[27] This leads to the conclusion, then, that it is a mandatory requirement under rule 32.8(2) that the questions to be put to the experts must only be in order to clarify the report and there is no power in the court to waive that requirement. Therefore, the learned Master could not properly have permitted the questions to be put for any other purpose than to clarify the expert reports in question.

[28] The question that arises from this conclusion is whether the questions that the respondent sought to put to the expert were only for the purpose of clarifying the report. In applying some of the dictionary meanings of the word "clarify", to the question to be resolved it would mean that the questions should be to make the report more comprehensible, lucid, simpler, intelligible, less ambiguous or confusing. Furthermore, it may be said, in endorsement of the view suggested in the extract taken from the 2010 White Book (paragraph [22] above), that rule 32.8(2)(b) should not be used to require an expert to expand significantly on his or her report, or to conduct a form of cross-examination by post, including on the expert's credibility. I would expand

on that to say further that neither should the rule be used to elicit information on new matters totally unrelated to matters contained in the expert report.

[29] It is against this background that the questions in issue have been examined.

Questions to Dr A Wright on behalf of the defendant:

"The Defendant requests answers to the following questions.

1. In your Medical Report dated the 21st of March, 2011, you indicated that upon examination of Mr. Daley there was normal range of motion. Please confirm whether there was normal range of motion of Mr. Daley's left thigh.

2. On what date was Mr. Daley discharged from the Kingston Public Hospital?

3. Did Mr. Daley experience any physical restrictions/limitations in relation to his left thigh upon his discharge from the Kingston Public Hospital? If so, please give details of same.

4. Was Mr. Daley discharged from the Kingston Public Hospital with the use of crutches? If so, how long was Mr. Daley advised to use crutches for?

5. Was Mr. Daley given any instructions concerning the treatment or use of his left thigh upon his discharge from the Kingston Public Hospital? If so, please indicate these instructions."

Questions to Dr R E Christopher Rose on behalf of the defendant:

"The Defence requests answers to the following:

1. In your Medical Report dated December 16, 2011, you indicated that there was restriction of internal rotation of Mr. Daley's left hip. From your experience,

what is the expected normal range of internal rotation of a hip?

2. Was Mr. Daley subjected to any physical tests/exercises to confirm his complaints of physical restriction? If so, please provide the details and results of these tests/exercises.

3. Did you prescribe Mr. Daley any medication or provide him with a course of treatment? If so, please indicate what medication was prescribed and what course of treatment was provided.

4. At the time of your examination of Mr. Daley on June 22, 2011, was Mr. Daley at maximum recovery?

5. If Mr. Daley was not at maximum recovery at the time of your examination, is it expected that Mr. Daley's restriction of internal rotation of his left hip will improve overtime?

6. Since your examination of Mr. Daley on June 22, 2011, did Mr. Daley return to you for follow-up treatment? If so, please provide the date(s) on which Mr. Daley returned and the details of the treatment provided."

[30] Having conducted an assessment of those questions against the background of the respective medical reports, I am firmly of the view that the questions, for the most part, went far beyond mere clarification. Indeed, with the exception of question number one in the questions to Dr Wright, none of them is to clarify the reports. They are geared at eliciting information on matters not raised in the reports. Indeed, the nature of the questioning is in the form of "out of court cross-examination" or, as stated in the

English authorities, "cross-examination by post", on matters that fall outside the scope and content of the reports.

[31] It is clear that the questions that the respondents sought to put to the experts and which were permitted to stand by the learned Master are not in order to clarify the report in keeping with rule 32.8(2)(b). It is, therefore, not surprising that the respondent has decided to withdraw them except for one and not to contest the appeal.

[32] In my view, the learned Master, regrettably, fell into error when she permitted the questions put by the respondent to the appellant's experts to stand in contravention of rule 32.8(2)(b) as she has no power to grant permission in respect of questions which go beyond clarification of the reports.

Whether the learned Master erred by permitting the questions to stand when they were out of time

[33] As already indicated, the third requirement of rule 32.8(2) is that the questions to be put to the expert must be put within 28 days of service of that expert witness report, unless the court permits or the other party agrees.

[34] The chronology of the proceedings provided by the appellant reveals that the medical reports in question were attached to the particulars of claim served on 13 January 2012. Following permission granted to the appellant to rely on the reports, the appellant served the reports under section 31E of the Evidence Act on 15 July 2013. The respondents did not file and serve the questions until 3 December 2013 and the

respondent never delivered them to the doctors. The questions were out of time, up to the date of the pre-trial review in February 2014. That would have been roughly six months outside the limitation period.

[35] Although the questions were out of time, however, the complaint of the appellant is that the respondent had filed no application for an extension of time within which to file the questions. There was just an oral application for them to stand. Furthermore, they filed no evidence to support the application for the Master to exercise her discretion to extend time and to allow the questions to stand. The complaint of the appellant in this regard is that the learned Master ought not to have allowed the questions to stand in such circumstances.

[36] It is accepted that part of the general case management powers of a judge conferred by the CPR is to extend or shorten time limits for compliance with any rule, practice direction, court order or direction and may grant such order retrospectively, that is to say, after the time for compliance had passed: See CPR, rule 26.1(2)(c); the 2010 White Book paragraph 3.1.2.

[37] It is expected, however, that when the court is being asked to exercise its discretion, especially for extension of time within which an act should be done when the prescribed time in the rules for doing so has passed, that an application would be made for that. The general rule is that an application must be in writing: rule 11.6(1). However, an application may be made orally if the rule or practice direction permits it or

the court dispenses with the requirement of the application to be made in writing: rule 11.6(2). It means that an oral application could have been permitted by the learned Master within the ambit of the rules. The complaint, however, is that no application was made for extension of time, neither orally or in writing. The respondent having failed to respond to the appeal and there being nothing from the learned Master on the record of appeal explaining her reasons for permitting the questions to stand, then the contention of the appellant stands unrefuted that no application was made for extension of time.

[38] The other aspect of the complaint is that apart from the application not having been made, the respondent had not placed any evidence before the learned Master in order to provide a basis for the exercise of her discretion. This assertion stands undisputed on the record. Rule 11.9 states that an applicant need not give evidence in support of an application unless it is required by a rule, a practice direction or court order. It means then that even if an application were made, the rule does not make it mandatory that there should be evidence. Such evidence would have been required by rule 11.9(2) to be contained in an affidavit.

[39] Although rule 11.9 does not make it mandatory that there be evidence in support of an application in all cases, case law has, however established that where the court is being asked to exercise its discretion to extend time within which to comply with a procedural rule, some material is required to be put before the court to justify it doing so. The appellant has prayed in aid the case of ***Ratnam v Cumarasamy*** [1964] UKPC

50, in advancing the argument that the respondent was required to place some material before the learned Master when asking her to allow the questions that were out of time to stand. The instructive dicta of their Lordships have guided these deliberations and which ought to have guided the learned Master in treating with the oral application made by the respondent for the questions to stand.

[40] In that case, Lord Guest, in delivering the advice of the Board, stated:

> "The Rules of Court must *prima facie* be obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken there must be some material upon which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged and that his reason for this delay was that he hoped for a compromise. Their Lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material upon which they could exercise their discretion in favour of the appellant. In the circumstances their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle."

[41] This court in **Peter Haddad v Donald Silvera** SCCA No 31/2003, delivered 31 July 2007, examined several older authorities within the context of the new procedural code created by the CPR and endorsed the reasoning of their Lordships in ***Ratnam v Cumarasamy*** (a pre-CPR case) as being applicable under the new rules. Smith JA in speaking on behalf of this court noted at page 11:

> "The overriding objective principle of Part 1 of the Civil Procedure Rules (CPR) applies to rules of this Court – see Rule 1.1 (10) (a) of the Rules. Generally speaking the rules of the Court must be obeyed. The authorities show that in order to justify a court in extending time during which to carry out a procedural step, there must be some material on which the court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the rules."

[42] Smith JA further cited with approval the dictum of Lord Edmund Davies LJ **Revici v Prentice Hall Inc.** [1969] 1 All ER 772, which I do endorse, that:

> "...the Rules of the Supreme Court are there to be observed; and if there is non-compliance (other than of a minimal kind), that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted..."

[43] The foregoing authorities have said it all and clearly so, and so there would be no need for this court to expand in anyway on the guidance they have provided. It is, therefore, left for the principles to be applied to the instant case. In applying the principles, it may be concluded that the respondent did not have an unqualified right to an extension of time within which to put the questions to the experts. The questions were approximately six months out of time. On the unrefuted assertion of the appellant, there was no material placed before the learned Master to explain the failure to comply with the rule. The late questions were permitted to stand without the concurrence of the appellant.

[44] Even if an oral application had been made, the respondent would have been obliged to place material before the learned Master for her to exercise her discretion to extend time within which to obey the rules of court. Some explanation for the failure to comply with rule 32.8(2) within the time prescribed was warranted. The fact that they have elected not to contest the appeal would leave this court with no alternative but to accept, on the record of appeal, that they had failed to do so. As such, the basis on which the learned Master would have allowed the questions to stand in such circumstances is not explained or demonstrated for the benefit of this court in order for it to properly find that she had exercised her discretion judicially and, so, was correct in allowing the questions to stand.

[45] This court cannot condone such an approach to the conduct of litigation. The rules of court, as the relevant authorities have established, must, *prima facie,* be obeyed, and where this is not done, then, some explanation for the disobedience, failure to comply or default must be forthcoming from the party in default, especially where the application is being opposed. The other party must be informed as to the reason for the delay in the interests of fairness. For the court to insist on any less would, certainly, be a regressive step to the days of litigant-driven conduct of litigation rather than the court-driven litigation which the new procedural code is geared at promoting. Indeed, as their Lordships noted in ***Ratnam v Cumarasamy***, if the court were to allow such conduct, it would defeat the whole purpose of the rules to provide a time - table for the conduct of litigation. This would not be in keeping with the

overriding objective, a component of which is to deal with cases expeditiously and fairly.

[46] As this court had already noted in **Peter Haddad**, in following the lead of the English Court of Appeal in **Hashtroodi v Hancock** [2004] 3 All ER (D) 530, that since the overriding objective is to enable the court to deal with cases "justly", then, it is not possible to deal with an application for an extension of time under the CPR justly without knowing why the party in default had failed to comply with the rule or to act promptly. We would re-emphasize that position and remind litigants that they (and by extension their legal representatives) do have a responsibility to help the court to further the overriding objective.

[47] I agree with the unchallenged submissions made on behalf of the appellant that the learned Master, having had no material placed before her on which to exercise her discretion, erred in law in permitting the questions to stand in the absence of an application for extension of time and material placed before her in support of it.

Conclusion

[48] I find that the appellant has successfully established that the learned Master failed to ensure compliance with rule 32.8(2) for the putting of questions to the appellant's expert witnesses. That is to say, firstly, that she erred in law by permitting questions that were not being put to the experts in order to clarify their reports to stand. Secondly, she erred in law in permitting the questions, filed outside the period

limited by the rule, to stand in the absence of a proper application made for extension of time. There is thus merit in the appeal.

[49] Accordingly, I would allow the appeal and grant the orders sought by the appellant setting aside the respondent's questions to the doctors that were permitted to stand by the learned Master with costs in the terms as prayed.

SINCLAIR-HAYNES JA (Ag)

[50] I have read in draft the judgment of my learned sister, McDonald – Bishop JA (Ag). I agree with her reasoning and conclusion and I have nothing useful to add.

BROOKS JA

ORDER

1. The appeal is allowed.
2. The order of the Master made herein on 26 February 2014 is set aside.
3. Costs to the appellant to be taxed, if not agreed.