[2017] JMCA Civ 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 1/2017

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND LEAFORD WASHINGTON NORMAN RESPONDENT

Written submissions filed by the Director of Public Prosecutions for the appellant

Respondent not served and unrepresented

16 June 2017

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

BROOKS JA

[1] I have had the opportunity of reading, in draft, the judgment of my learned sister, Straw JA (Ag). I agree with her conclusion that this court should not disturb the result of the exercise of discretion by Sykes J.

SINCLAIR-HAYNES JA

[2] I have read in draft the judgment of my learned sister, Straw JA (Ag), I agree with her reasoning and conclusion and I have nothing further to add.

STRAW JA (AG)

[3] By way of an amended notice of procedural appeal filed on 14 March 2017, the Director of Public Prosecutions (the appellant) had sought to challenge Sykes J's refusal to order that service effected by publications in the Chicago Tribune constituted good service on Leaford Washington Norman (the respondent), despite not being published in accordance with a court order he had made on 6 December 2015. As the appellant had failed to strictly comply with his order of 6 December 2015, the learned judge also refused to enforce the foreign confiscation order dated 14 March 2003, issued by the Crown Court in the United Kingdom (UK). The appellant is now before us seeking to set aside the decision of the learned judge and vary his order made on 6 December 2015, so that service effected in the Chicago Tribune constituted good service. The appellant is also seeking enforcement of the foreign confiscation order.

Background

[4] On 1 November 2002, the respondent was convicted of possession of heroin and possession of cocaine with intent, contrary to section 5(3) of the Misuse of Drugs Act 1971 in the Crown Court at Sheffield, in the UK and was sentenced to six years imprisonment for both offences. Once convicted of a drug trafficking offence, section 2 of the Drug Trafficking Act 1994 (UK) provides that confiscation proceedings may be held. Such proceedings had been held in relation to the respondent, on 14 March 2003,

in the Crown Court at Sheffield, and a confiscation order was made (which is not subject to appeal) on that date under the Proceeds of Crime Act 2002 (UK). That order required the respondent to pay £21,757.50 on or before 11 April 2003, or in default, to serve 17 months imprisonment (consecutive to any term of custody which he was liable to serve for the substantive offences). At that hearing, it was also determined that the respondent's realisable assets consisted mainly of two Jamaican bank accounts into which money had been transferred.

[5] Having served his sentences for the drug offences, the respondent was released from prison on 23 May 2005. On 26 August 2005, a deportation order was made against the respondent and on 7 May 2006, he was arrested by the UK police in connection with that deportation order. On 28 June 2006, he was sentenced by the Sheffield Magistrates' Court to 17 months imprisonment in default of payment of £21,757.50 under the confiscation order since no payments had been made by 11 April 2003. On 18 October 2006, Bean J, sitting in the High Court of Justice Queen's Bench Division Administrative Court, made a restraint order against the respondent "prohibiting him from removing from England or Wales any of his assets; or in any way disposing of, dealing with or diminishing the value of assets whether in or outside England or Wales, in particular two accounts held at the Jamaica National Building Society".

[6] In an effort to satisfy the sums stipulated in the confiscation order, the UK Central Authority, by letter dated 26 October 2006, sought the appellant's assistance as

the designated Central Authority under the Mutual Assistance in Criminal Matters Act (MACMA) with *inter alia*, the following:

> "(1) to register the external confiscation and restraint orders made against [the respondent].
>
> (2) to enforce the outstanding amount of that confiscation order by the realisation of assets held by [the respondent] in Jamaica namely:
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> a. £18,074.70 (calculated as at 4 September 2002) held in account number RSV 62570564 at the Jamaican [sic] National Building Society, St Ann's Bay Branch, 10 [sic], Bravo Street, St Ann's Bay, St Ann, Jamaica in the name of Mr Leaford Norman.
>
> b. J$136,974.40 (that equates to £2,041.96 calculated as at 25 June 2002) held in account number FLX 10014839 in the Jamaican [sic] National Building Society, St Ann's Bay Branch, 10 [sic] Bravo Street, St Ann's Bay, St Ann, Jamaica in the name of Mr Leaford Norman."

[7] The foreign restraint order dated 18 October 2006, had been successfully registered in the Supreme Court of Judicature of Jamaica (the Supreme Court) on 16 November 2007, pursuant to an order made by Anderson J on the appellant's application. This order had been personally served on the respondent on 22 November 2007, by Detective Sergeant Carl Berry at the Saint Ann's Bay Police Station in the parish of Saint Ann.

[8] In seeking to recover the amount stated in the foreign confiscation order dated 14 March 2003, the appellant filed a fixed date claim form on 15 June 2015, requesting (by virtue of the MACMA provisions), the registration of that order in the Supreme

Court. The matter was heard by Hibbert J who on 18 June 2015, granted an order registering the foreign confiscation order in the Supreme Court and *inter alia*, stipulated that the appellant should serve the respondent with the fixed date claim form, the affidavit of Andrea Martin Swaby filed in support on 15 June 2015, and the formal order of the court.

[9] On 12 November 2015, the appellant filed a notice of application for court orders seeking substituted service on the respondent by publication in the Chicago Tribune and the Gleaner Newspaper, on the basis that all efforts to effect personal service on the respondent proved futile. The affidavit of Sergeant Linval Williams filed 4 November 2015 in support, indicated that attempts were made to locate the respondent at an address he gave to the UK authorities at Salem Runaway Bay, in the parish of Saint Ann without success. Upon receipt of information from the Passport, Immigration and Citizenship Agency, Sergeant Williams deponed that the respondent had changed his name from "Leaford Washington Norman" to "Leaford Washington Carr". He further deponed that the respondent left Jamaica on 20 August 2014, for Chicago in the United States of America, and has not returned since. The application for substituted service was heard by Sykes J on 9 December 2015 who made the following orders:

> "1. The Foreign Confiscation Order made by the Crown Court sitting in Sheffield on 14th day of March 2003 in the United Kingdom Crown Court Case number T02-0650 ('foreign forfeiture order') being an Order made under the Proceeds of Crime Act 2002 [UK] and registered in the Supreme Court of Judicature of Jamaica on the 18th June, 2015 be served on the Respondent by publication in the Chicago Tribune and

Jamaica Gleaner Newspaper in [sic] the North America[n] edition of the Gleaner.

2. To be published three (3) three times in each newspaper, seven (7) days between each publication therefore making a total of nine (9) publications."

[10] On 27 October 2016, the appellant filed a notice of application for court orders seeking enforcement of the foreign confiscation order dated 14 March 2003. The grounds upon which that application was made were that *inter alia*, substituted service had been successfully effected on the respondent in the following publications and on the following dates without response:

(i) The Gleaner Company published on 21 April 2016, 28 April 2016 and 5 May 2016;

(ii) The International Weekly Gleaner published on 28 April 2016 - 4 May 2016, 5 May 2016 - 11 May 2016 and 12 May 2016 - 18 May 2016; and

(iii) The Chicago Tribune published on 23 July 2016, 30 July 2016 and 6 August 2016.

[11] There is no indication that the above application had been heard. However, a second notice of application was filed on the 20 December 2016, requesting a variation of Sykes J's original order dated the 9 December 2015, as an issue arose with regard to the publications in the Chicago Tribune. Pursuant to Sykes J's order on 9 December 2015, publications had first been made in the Chicago Tribune on 21 March 2016, 22 March 2016 and 24 March 2016. These publications were not made in strict compliance with the orders made by Sykes J that there should be a period of seven days between

each publication. In light of this, further publications were done in the Chicago Tribune on 23 July 2016, 30 July 2016 and 6 August 2016 but these publications would have been after the claim form had expired.

[12] In the notice of application for court orders filed on 20 December 2016, the appellant sought: (i) a variation of the order made by Sykes J on 9 December 2015, to allow substituted service by way of publication only in the Jamaica Gleaner newspaper and the North American edition of the Gleaner newspaper, three times, seven days apart; (ii) or in the alternative, that the court accepts the publications in the Chicago Tribune on 21 March 2016, 22 March 2016 and 24 March 2016 as constituting proper service on the respondent; and (iii) enforcement of the foreign confiscation order dated 14 March 2003. This application was made on grounds that: (i) the appellant had exhausted all means to effect service upon the respondent; (ii) to date, the respondent had not demonstrated an intention to defend this claim nor had he filed any response to the publications.

Sykes J's judgment

[13] This application was heard by Sykes J on 20 December 2016. In his reasons for judgment, the learned judge acknowledged that the earlier publications in the Chicago Tribune dated 21 March 2016, 22 March 2016 and 24 March 2016 did not strictly comply with his order that they should be published in each newspaper three times, seven days apart. The learned judge also acknowledged that the publications in the Chicago Tribune on 23 July 2016, 30 July 2016 and 6 August 2016 were irregular as

they would have been published after the claim form had expired in June 2016 and no application had been made for the extension of the life of the claim form.

[14] Accordingly, Sykes J indicated that the main issue in the case before him was whether the March publications in the Chicago Tribune constituted proper service on the respondent, despite the terms contained in his order dated 9 December 2015. The learned judge opined that personal service is to be construed strictly, and substituted service is a departure from personal service and is therefore inferior to it. He acknowledged that the present application was made under the MACMA and indicated that although the Minister of Justice may make regulations governing applications under the MACMA, no regulations and no rules of court have been issued with respect to service under the MACMA. As a consequence, Sykes J stated that in his opinion, being a judge in a Superior Court of Record, he was empowered to exercise his discretion, in absence of procedural rules, to examine existing procedural practices which could include utilization of rules contained in the Civil Procedure Rules, 2002 (CPR) and accepted that part 7 of the CPR could be utilized when effecting service outside the jurisdiction.

[15] The learned judge found that in exercise of the court's authority to make an order for substituted service, there should be strict compliance with the order made. In the instant case, he also found that since the order had not been strictly complied with, substituted service on the respondent was not effective, and the appellant was therefore unable to take further steps to enforce the foreign confiscation order. He relied heavily on **Peters (Winston) v Attorney General and another** (2001) 63

WIR 244, to show that it was indeed permissible for courts to formulate their own criteria for determining whether procedural rules are to be regarded as mandatory, disobedience of which would render void or voidable what has been done, or as directory, disobedience of which will be treated as an irregularity not affecting validity. The learned judge in adopting that view, indicated that in his opinion, effecting proper service is fundamental. Consequently, he refused the application to enforce the foreign confiscation order, refused the application for variation of the order he had made on 9 December 2015, and granted leave to appeal.

The appeal

[16] In the amended procedural notice and grounds of appeal filed on 14 March 2017, the appellant sought: (i) to set aside the order made by Sykes J on 20 December 2016; (ii) to vary the order made by Sykes J on 9 December 2015 so that the publications in the Chicago Tribune on 21 March 2016, 22 March 2016 and 24 March 2016 constituted good service on the respondent; (iii) an order that publications in the Chicago Tribune on 23 July 2016, 30 July 2016 and 6 August 2016 constituted proper service on the respondent; and (iv) the enforcement of the foreign forfeiture order. These orders were sought on the following grounds:

> "1. That the learned Judge failed to consider that the [respondent] has always had Notice of the Foreign Confiscation Order and the Order is not subject to Appeal, and as such the enforcement of the Order should not be hindered due to the deliberate actions of the [respondent] in evading service.
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> 2. That whereas the Learned Judge does have a discretion in developing its practice and procedures in

the absence of rules of court governing the process, the Learned Judge failed to consider that proceedings under the [MACMA] are not civil matters and as such the [CPR] ought not to be applied strictly.

3. That failure to comply with the Order of the Court did not go to the core of the Application thereby rendering it a nullity, as the Central Authority is merely performing an administrative function in accordance with section 27 of the [MACMA]. The ends of justice will not be served by striking out the matter because of an error in the time lapse stipulated regarding the publication in one of three stipulated newspapers."

Submissions

[17] In written submissions filed on the appellant's behalf by Mrs Andrea Martin Swaby, Assistant Deputy Director of Public Prosecutions, Mrs Martin Swaby indicated that under sections 27(1) and 27(3) of the MACMA, the appellant, who is the designated Central Authority, may, at the request of a foreign state, seek to register and enforce certain orders. Counsel posited that while sections 32 and 33 of the MACMA provide that regulations and rules of court are to be made in respect of proceedings under the MACMA, she accepted that no such rules have been formulated, and so the CPR has been used to give effect to procedural aspects under the MACMA.

[18] Counsel indicated that in **Bobette Smalling v Dawn Satterswaite** [2014] JMCA Civ 55, Panton P issued a warning when dealing with the issue of a search warrant issued under the Proceeds of Crime Act (POCA) and the utilisation of the CPR. She contended that he had stated that a criminal investigation (as in the instant case), should not be made subject to rules relating to party and party civil matters governed by the CPR, and that those rules should not be imported to derail the execution of a

warrant issued by a judge of the Supreme Court. Counsel also submitted that in **The Hon Mrs Portia Simpson-Miller and others v The Attorney-General of Jamaica and another** [2013] JMFC Full 4, McDonald-Bishop J (as she then was) opined at paragraph [107] that in the absence of rules of the court under the MACMA, the court would could resort to the existing practices and procedures governing applications, subject of course to the specific requirements of the MACMA, the discretion of the judge hearing the evidence, and what is ultimately required by the interests of justice. As a consequence counsel asserted that there was indeed a recognized distinction between the CPR and proceedings under the MACMA and so, in the interests of justice and in accordance with the overriding objective, there was no need for a rigid application of the rules contained in the CPR to the MACMA proceedings.

[19] While the appellant conceded that Sykes J's order for substituted service had not been strictly complied with in respect to the publications in the Chicago Tribune, she nonetheless indicated that rule 26.9 of the CPR provides a mechanism for courts to remedy errors or procedural irregularities so that non-compliance by a party is not fatal to the proceedings. In reliance on Halsbury's Laws of England, 4th edition, volume 37, paragraph 36; **James Wyllie and others v David West and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 120/2007, judgment delivered 13 August 2008; and **Gladston Watson v Rosedale Fernandez** [2007] CCJ 1 (AJ), counsel submitted that where a procedural irregularity did not prejudice the respondent then it ought to be treated as an irregularity and not be used to nullify proceedings.

Counsel argued that in the instant case, the issue of irregular service did not affect the substratum of the application and so should not render it a nullity.

[20] Counsel also urged this court, in the interests of justice, to consider the fact that the respondent had changed his name, left Jamaica and has not since returned, as an indication of his attempts to evade the order, and urged this court to prevent the respondent from benefitting from his evasive conduct. In all these circumstances, counsel posited that this court ought to grant the orders sought in the amended notice of appeal.

[21] At the time this appeal was being considered, there was no indication that the respondent had been served with the notice and amended notice of procedural appeal, or that any application was made in an attempt to effect substituted service on him. Ultimately, in this appeal, the respondent was unrepresented and no written submissions were filed on his behalf.

Issues

[22] In my view, this appeal raises three main issues:

1. What is the effect of the notice of appeal in the event that it had not been served on the respondent?
2. Whether the publications in the Chicago Tribune dated 23 July 2016, 30 July 2016 and 6 August 2016 constituted good service?

3. Did the learned judge correctly exercise his discretion when he found that where an order for substituted service was made, that order had to be strictly complied with? (grounds 1, 2 and 3)

Discussion and analysis

Issue 1: Service of the procedural notice of appeal

[23] This is a procedural appeal as defined in rule 1.1(8) of Court of Appeal Rules (CAR) as it is "an appeal from a decision of the court below which does not directly decide the substantive issues in a claim...". Rule 1.11(1)(a) of CAR provides that notice of a procedural appeal must be filed within seven days of the date the decision appealed against was made. Rule 2.4(1) of CAR provides that "on a procedural appeal the appellant must file and serve written submissions in support of the appeal with the notice of appeal". While this appeal had been filed within the seven days stipulated in the CAR, as previously indicated, there is no information before us to prove that the notice and amended notice of procedural appeal had been served on the respondent or that steps were taken to obtain an order to effect substituted service.

[24] Where a notice of appeal has been properly filed, the failure to serve that notice within the time specified by the CAR does not invalidate the filing, but renders the notice liable to be struck out. In **National Commercial Bank Jamaica Limited and another v Donovan Foote** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 104/2006, Application No 139/2009, judgment delivered 4 November 2009, the appeal was struck out for failure to serve the notice of appeal. In **Hoip**

Gregory v Vincent Armstrong and another [2012] JMCA App 21, although the appellant had not filed or served his written submissions with the notice of appeal in accordance with the CAR, he was nonetheless granted an extension of time to do so, failing which the appeal would be struck out. Accordingly, in my view, the failure to effect either personal or substituted service on the respondent rendered the appeal liable to be struck out.

Issue 2: Whether the July and August publications in the Chicago Tribune constituted good service?

[25] In the amended notice of procedural appeal, the appellant is seeking an order indicating that the publications made in the Chicago Tribune on 23 July 2016, 30 July 2016 and 6 August 2016 constituted good service. It is to be noted that this issue was never advanced before Sykes J. Rule 8.14(1) of the CPR provides that "the general rule is that a claim form must be served within 12 months after the date when the claim was issued or the claim form ceases to be valid". Rule 8.14(2)(b) of the CPR provides that the period for service of a claim form out of the jurisdiction is 12 months. Rule 8.15 of the CPR gives claimants an opportunity to apply for an extension of time of the period within which the claim form is to be served and *inter alia* outlines the procedure for making such an application.

[26] Rule 8.14(1) of the CPR stipulates the consequence of not serving a claim form within 12 months, in that, the claim form ceases to be valid. Since in this case the claim form had not been served within 12 months, this breach would not be a mere irregularity but would affect the validity of service, as the claim form had already

expired. In such a case, as Harris JA said at paragraphs [34] and [35] in **Dorothy Vendryes v Dr Richard Keane and another** [2011] JMCA Civ 15, rule 26.9 of the CPR could not be utilized to cure any defects in procedure as that rule could not "be extended to do that which could not have been possible" and once a claim form is deemed to be a nullity, it cannot be restored by an order of the court. While counsel has urged upon this court that the CPR ought not to be applied strictly in proceedings under the MACMA, there must be some measurable order to the rules to be applied. The claim form would have been invalid as at July 2016 and since no application had been made to extend the time period within which the claim form was to be served, the publications made in the Chicago Tribune on 23 July 2016, 30 July 2016 and 6 August 2016 could not constitute good service, and any application to that effect ought to be refused.

Issue 3: Whether Sykes J's exercise of discretion was correct?

[27] Questions have been raised as to whether Sykes J had correctly exercised his discretion to refuse the orders sought by the appellant when he found that service was not effective unless there had been strict compliance with the orders made. In deciding whether to interfere with the exercise of a judge's discretion, regard must be had to the principles enunciated by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, at 1046 where he said:

> "The function of the appellate court is initially one of review only. It [the Court of Appeal] may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not

> exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

[28] This principle has been endorsed and applied by this court in a number of cases including **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, where my learned brother Morrison JA (as he then was) on behalf of the court at paragraphs [19]-[20] stated:

> "[19] It is common ground that the proposed appeal in this case will be an appeal from Anderson J's exercise of the discretion given to him by rule 13.3(1) of the CPR to set aside a default judgment in the circumstances set out in the rule. It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042, 1046 (which, although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):
>
> > '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'

> [20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[29] Accordingly, this court will not lightly interfere with the exercise of a judge's discretion and must not interfere with it on the basis that this court would have exercised its discretion differently. Interference can only be justified where it is proved that the learned judge misunderstood or misapplied the law; misconceived facts; or that there was a change in circumstances sufficient to show that the learned judge in exercise of his discretion was 'demonstrably wrong'.

[30] As indicated, the appellant is pursuing the enforcement of a foreign confiscation order on the UK's behalf in accordance with the MACMA. Under section 27 of the MACMA, the appellant who is the designated Central Authority, may apply for the registration and enforcement of foreign forfeiture orders (called foreign confiscation orders). Section 32 of the MACMA states that the Minister of Justice may make regulations generally for giving effect to the purposes and provisions of the MACMA, and section 33 of MACMA provides that rules of court may be made dealing generally with all matters of practice and procedure in proceedings under the MACMA. To date, no such regulations have been made by the Minister of Justice nor have rules of court been issued with regard to the practice and procedure of matters related the MACMA.

As a consequence, an issue arises as to whether the learned judge correctly exercised his discretion when he utilised procedures under the CPR in the instant case.

[31] In **Olive Casey Jaundoo v Attorney-General of Guyana** (1971) 16 WIR 141, an issue was whether the appellant ought to have filed a writ of summons or notice of motion in order to seek constitutional redress in the absence of provisions made by Parliament under paragraph 6 article 19 of the Constitution of Guyana. The Judicial Committee of the Privy Council held that the absence of rules by Parliament should not hinder the right of anyone to access the High Court in order to seek constitutional redress. In **Public Prosecutor v Suppiah** [1986] LRC (Crim) 904, the Supreme Court of Malaysia ruled that the absence of rules of court did not prevent a Magistrate from holding contempt proceedings once the court acted in accordance with the principles of natural justice. Indeed, McDonald-Bishop J noted at paragraphs [108]-[109] in **The Hon Mrs Portia Simpson-Miller and Others v The Attorney General of Jamaica** that:

> "[108] The only general procedural regime governing civil matters in these courts is the CPR and there is no provision under those Rules, specifically, concerning the MACMA proceedings. Similarly, there are no criminal procedural rules or code dealing with this question. It is my view that the specific rules governing proceedings under the MACMA are needed so as to avoid controversy like this in the future. The special procedural regime is imperative because it is not a common occurrence within our jurisdiction that witnesses or potential witnesses in criminal matters are required to give witness statements on oath to a judicial officer. Clear guidance is, therefore, required.
>
> [109] It seems to me that in the absence of the Rules of Court for the conduct of proceedings under the MACMA,

> resort would have to be had, for the time being, to the existing practice and procedures governing applications to the Supreme Court for court orders coupled with the procedures relative to the taking of evidence from witnesses within the context of the general law of evidence. All this would be subject, of course, to the specific requirements of the MACMA; the discretion of the judge hearing the evidence; and what is ultimately required in the interest of justice. The judge taking the evidence would have to be guided by his own professional judgment as to what is necessarily required to meet the ends of justice and, at the same time, to fulfil the mandate of the statute to give effect to the intention of Parliament."

Sykes J adopted and recognized this principle with reference to the judgment of the Trinidad and Tobago Court of Appeal in **Peters (Winston) v Attorney General**.

[32] In light of the principles gleaned from these cases, it is indeed clear that the learned judge had a discretion, in the absence of rules of court and regulations with regard to the MACMA proceedings, to utilise proceedings under the CPR and to make decisions as to the applicability of the provisions contained therein in accordance with requirements under the MACMA. Panton P's warning in **Bobette Smalling v Dawn Satterswaite** ought to be viewed within the context of the circumstances of that case, wherein an issue arose as to whether a search warrant granted under the POCA was defective because it did not meet all the procedural requirements that existed under the CPR. Those circumstances can be distinguished from the case at bar which concerns the failure to effect substituted service on the respondent in accordance with terms stipulated in a court order. Indeed, in commencing the action as a fixed date claim, pursuant to the CPR, it is the appellant who has chosen to subject herself to the provisions of the regime established by the CPR. However, it is her complaint that Sykes

J applied the provisions of the CPR too strictly, and so this court must now consider whether Sykes J erred when he found that there should be strict compliance with an order for substituted service under the MACMA.

[33] Service is indeed a fundamental aspect in any court proceeding as it is the means by which the interested party is informed that a proceeding has been initiated and the materials used in support of that proceeding. Rule 5.1(1) of the CPR makes it clear that the preferred method of service is personal service as it provides that "the general rule is that a claim form must be served personally on each defendant". However, rule 5.13 of the CPR provides that an alternative method of service may be utilised in certain instances by an order of the court. Rule 5.14(1) of the CPR states that where an alternative method of service is utilized "the court may direct that service of a claim form by a method specified in the court's order be deemed to be good service". Rule 5.15 of the CPR provides that where an alternative method of service is utilised, "service is proved by an affidavit made by the person who served the document showing that the terms of the order have been carried out".

[34] From an examination of these rules, Sykes J was indeed correct to find that substituted service is inferior to personal service. Where substituted service is effected, unless the defendant files a response or appears, there is no evidence that the court proceedings had been brought to his attention. Accordingly, the terms of the orders made by Sykes J on 9 December 2009, had to be strictly complied with if the appellant intended that the publications in the Chicago Tribune in March 2016, constituted good service. Since these publications had been made one to two days apart, rather than

seven days apart, as stipulated in the order, service had not been proved and was irregular.

[35] The issue that next arises therefore is whether the failure to prove service was an irregularity curable under rule 26.9 of the CPR, which provides that:

> "(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.
>
> (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.
>
> (4) The court may make such an order on or without an application by a party."

[36] This rule has been interpreted by Morrison JA in **Hon Gordon Stewart OJ v Senator Noel Sloley Sr and others** [2011] JMCA Civ 28, at paragraph [47] where he said:

> "[47] ... rule 26.9(3) provides that the court may 'put matters right', where there has been any error of procedure or failure to comply with a rule, practice direction or even a court order. I naturally accept, as the rules themselves state and as the authorities relied on by the appellant confirm, that it is the duty of the court to seek to give effect to the overriding objective when interpreting the rules or exercising any powers under these rules..."

[37] McDonald-Bishop JA in **Bupa Insurance Limited v Roger Hunter** [2017] JMCA Civ 3, interpreted the rules in a similar manner. In describing rule 26.9 of the CPR at paragraph [58] of the judgment, she said:

> "...that rule gives the court an unfettered discretion to determine how a breach of a rule of procedure (which was involved in the case before him) should affect the proceedings, having regard to all the circumstances and the clear dictates of the overriding objective in the interpretation and operation of the rules."

I could do no more justice to the interpretation accorded to rule 26.9 of the CPR by Morrison JA and McDonald-Bishop JA and so I would adopt their views in that regard.

[38] In **Bupa Insurance Limited v Roger Hunter**, McDonald-Bishop JA referred to the distinction highlighted by the Privy Council in **Strachan v Gleaner Co Ltd and Another** [2005] UKPC 33, between an 'irregularity' which can be waived or rectified and a 'nullity' which cannot be so corrected. In the instant case, in the light of rule 5.14(1) of the CPR which states that alternative service can only be deemed good service if it complies with the method specified in the court's order, until there has been proof of service of the claim form in accordance with the court's order, no further steps in the proceedings can be taken. The failure to comply with the method of service specified in the court's order is an irregularity that may be waived or corrected. However, in light of rule 26.9 of the CPR, McDonald-Bishop JA in **Bupa Insurance Limited v Roger Hunter** at paragraph [55] indicated that:

> "...that the framers of the CPR did not intend for every breach of the rules to be taken as invalidating the proceedings and that would be so whether or not the

> particular rule that is engaged is stated in mandatory terms. Once the consequence for breach of the rule is not provided for by the CPR or otherwise, then consideration must be given to the provisions of rule 26.9 in determining the way forward in the proceedings."

[39] In light of the foregoing, Sykes J certainly had a discretion as to whether to correct an irregularity in service in accordance with rule 26.9 of the CPR. In the exercise of that discretion, he directed himself having regard to the factors to be considered when the court formulates its own criteria for determining procedural rules, in the absence of rules and regulations governing a particular enactment, as stated in **Peters (Winston) v Attorney General and Another** at pages 306-307 which include:

1. the significance of the enactment as a protection of individual rights;
2. the relative value that is attached to the rights that may be adversely effected by the decision;
3. the importance of the procedural requirement in the overall administrative scheme established by the statute;
4. the particular circumstances of the case in hand; and
5. whether the breach of the terms of the Act is trivial in nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the

> court is for any reason disinclined to interfere with the act or decision that is impugned.

Sykes J also directed himself in accordance the provisions stipulated in the CPR and in my view, had correctly concluded proper service on the respondent was fundamental.

[40] Although it can be safely be said that the respondent was well aware of the intention to initiate the confiscation proceedings in Jamaica, in light of the learned judge's finding that substituted service is inferior to personal service, and his consideration of the factors above, I am of the view that his decision to refuse to grant the orders sought by the appellant was not demonstrably wrong. He clearly did not consider the breach to be of such a trivial nature, so as to utilise the powers given to him by virtue of rule 26.9 of the CPR to correct that error.

Conclusion

[41] The appeal as filed is irregular because it has not been served on the respondent. Nonetheless, in addressing the merits of this appeal, I found no instance in which it could be said that the learned judge's exercise of his discretion to refuse to vary the 9 December 2015 order was demonstrably wrong. Accordingly, his decision to refuse enforcement of the foreign confiscation order on the basis that it had not been properly served on the respondent was not demonstrably wrong. In all these circumstances, it is my view, that the appeal against his decision made on 20 December 2016, ought to be dismissed.

BROOKS JA

ORDER

Appeal against the decision of Sykes J made on 20 December 2016 is dismissed.