[2021] JMCA Civ 51

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00034

BETWEEN	**RACHAEL GRAHAM**	**APPELLANT**
AND	**ERICA GRAHAM**	**1ST RESPONDENT**
AND	**WINNIFRED XAVIER**	**2ND RESPONDENT**

Written submissions filed by Livingston, Alexander & Levy for the appellant

Written submissions filed by Lambie-Thomas & Co

10 December 2021

PROCEDURAL APPEAL

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

F WILLIAMS JA

[1] I have read in draft the judgment of G Fraser JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

V HARRIS JA

[2] I, too, have read in draft the judgment of G Fraser JA (Ag) and agree with her reasoning and conclusion. There is nothing I could usefully add.

G FRASER JA (AG)

[3] On 12 June 2019, Ms Rachael Graham ('the appellant'), claimant in the court below, filed a without notice application for court orders in the Supreme Court where she sought the following orders:

> "1. That the Claimant/Applicant be granted leave to effect service of the Fixed Date Claim Form and Affidavit of Rachael Graham in support along with exhibits and all subsequent process filed in the Registry of the Supreme Court on the Defendants, **ERICA GRAHAM and WINNIFRED XAVIER** by substituting personal service by service on Lambie-Thomas & Co, Attorneys-at-Law of suite 4 &5, 11 Barrett Street, Spanish Town, Saint Catherine.
>
> 2. Alternatively, that the Claimant /Applicant be granted leave to serve the Fixed Date Claim Form and the Affidavit of Rachael Graham along with exhibits on the 2nd Defendant in London, England."

[4] The grounds on which the appellant relied were that pursuant to rule 5.14(2) of the Civil Procedure Rules 2002 ('CPR'), the court is empowered to make an order permitting service by a specified method that is likely to bring the contents of the documents to the attention of the defendants. Further, pursuant to rule 7.5 of the CPR, the court is empowered to grant permission to serve the claim form out of the jurisdiction.

[5] On 19 July 2019, Master Hart-Hines (as she then was) ('the learned Master') heard the application. The learned Master made an order permitting the appellant to effect service on the defendants of the fixed date claim form, supporting affidavit, exhibits and all subsequent process filed in the registry of the Supreme Court, by way of service on Lambie-Thomas & Co.

[6] On 14 August 2019, Lambie-Thomas & Co filed an application in the Supreme Court to set aside the orders of the learned Master and the service of the fixed date claim form and supporting affidavit previously served on them. The grounds of the application were that: (1) the appellant had not established that personal service on the defendants

is not possible; and (2) the orders as granted are not in compliance with the CPR and/or the law generally.

[7] The notice of application to set aside court orders was heard on 9 October 2019, by Brown J ('the learned judge') who granted the application, thus setting aside the orders of the learned Master made on 19 March 2019.

[8] The appellant applied for, and was granted, leave by the court below to appeal against the decision of the learned judge and accordingly, on 6 May 2020, filed a notice of appeal seeking, an order to set aside the order of the learned judge and for the orders made by the learned Master to be re-instated. The grounds, as stated in the notice of appeal, are as follows:

> "a. The learned judge erred in finding that an Attorney-at-Law can only be served, alternative to personally serving a defendant, under the of [sic] Rule 5.6 and that Rule 5.14 does not permit alternative or substituted service on Attorneys-at-Law. The learned judge misdirected himself, since Rule 5.6 applies to service on attorneys where they have received authorization from their client to accept same. That rule does not stipulate that this is the only method by substituted service on an attorney-at-law is permissible [sic].
>
> b. The learned judge failed to consider that Rule 5.14 of the CPR permits the court to sanction service by an alternative method of service where it is shown on affidavit evidence that the claim form is likely to come to the attention of the defendant by the method of service chosen. The rule is satisfied by a demonstration of the likelihood of the contents of the documents coming to the attention of the defendant. All that is required of a party on whom documents are served pursuant to an order for alternative service is to make reasonable efforts to bring the contents of the documents to the attention of the Defendants.
>
> c. The learned judge erred in focusing on the fact that Lambie-Thomas & Co is a firm of Attorneys-at-Law. Lambie-Thomas & Co were not being served qua attorneys-at-law; in fact, they were served as a person or means by which the

contents of the documents could be brought to the Defendants' attention. This was satisfied by the Respondent's affidavit evidence, which confirmed that the Defendants are their clients who they represent in a related matter in the Parish Court. It has further been confirmed that Lambie-Thomas & Co is in or has been in contact with at least the 1st Defendant and has specifically had contact with the 1st Defendant about the Fixed Date Claim Form and Supporting Affidavit filed herein. Lambie-Thomas & Co, is therefore in a position to bring the contents of the documents to the attention of the Defendants.

d. The learned trial judge erred in failing to apply the correct test in considering the Respondent's application to set aside the order for substituted service. The grounds on which an order for alternative service can be set aside are:

    a. the Order was obtained because the respondent concealed something important from the Court

    b. it was based on a misunderstanding of the law;

    c. it was based on a misunderstanding of the evidence before the judge or it was based on an inference that particular facts existed or did not exist which can be shown to be demonstrably wrong

    d. it is not in contact with the defendant.

e. Had the learned trial judge applied the correct principles, he would have refused the Respondent's application, given that Lambie-Thomas & Co. did not show that they have made all reasonable efforts to bring the contents of the Fixed Date Claim Form and Affidavit in Support to the attention of the Defendants but have been unable to do so and therefore substituted service on them should be set aside.

f. The learned judge erred ruling that an Attorney-at-Law cannot be compelled to bring statement of case served on them under Rule 5. 14 to the attention of the Defendants if they are not retained in the said matter. The issue is not whether Lambie-Thomas & Co. was or will be retained to act for the Defendants in this lawsuit. What is relevant is that Lambie-Thomas & Co as the Defendants' attorneys-at-

> law in a related matter and being in contact with the Defendants is in a position to bring the contents of the said documents to their attention, as is required by Rule 5.14 of the CPR."

[9] The grounds as filed are somewhat concentric, and they overlap considerably and so, for ease of reference, I have condensed these grounds into three main issues:

(1) whether the learned judge erred in finding that rule 5.14 of the CPR does not permit alternative service of a claim form on an attorney-at-law and that such service is permitted only by rule 5.6 of the CPR (grounds a., c., and f.);

(2) whether the appellant had satisfied the test for service by specified method to be permitted under rule 5.14 of the CPR (ground b.); and

(3) whether the learned judge failed to apply the correct test in setting aside an order for alternative service (grounds d. and e.).

[10] It is perhaps helpful to note at this point that although the defendants in the court below are cited as respondents herein, they are not parties to this appeal and are not represented by Lambie-Thomas & Co in relation to this matter. My understanding of the dynamics involved in this appeal is that the submissions filed by Lambie-Thomas & Co are filed solely on its behalf as it was the party who sought and obtained the orders made by the learned judge in the court below.

Issue (1) – Whether the learned judge erred in finding that rule 5.14 of the CPR does not permit alternative service of a claim form on an attorney-at-law and that such service is permitted only by rule 5.6 of the CPR (grounds a., c. and f.)

[11] Before addressing the issues arising on this appeal, it is important to register the court's appreciation of the appellate function in a case of this kind. An order arising from a decision by the learned judge below, in relation to the provisions of rule 5.14 of the

CPR, is discretionary and based upon an interpretative analysis of relevant facts. Therefore, in deciding whether to interfere with the exercise of the learned judge's discretion, this court must have regard to the principles enunciated in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor Productions Ltd**') where, at page 1046, Lord Diplock stated that:

> "…the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It 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. The function of the appellate court is initially one of review only. It 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…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…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."

[12] This principle has been applied in several decisions of this court, including **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, where Morrison JA (as he then was), after referring to the "well-known caution in **Hadmor Productions Ltd v Hamilton**", stated at para. [20] that:

> "[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'."

[13] Accordingly, this court will only interfere with the learned judge's discretion if it is satisfied that the learned judge misunderstood the law or the evidence before him; misconceived the facts before him which can be shown to be demonstrably wrong; or that he arrived at a decision that no judge having regard to his duty to act judicially could have arrived at.

[14] Counsel for the appellant submitted that rule 5.6 of the CPR does not preclude alternative service of a claim form on an attorney-at-law under rule 5.14 of the CPR. Rule 5.6, it was conceded, "allows for the forbearance of personal service where the defendant is represented by counsel who has been so authorized to accept service and has communicated same to the claimant" while, on the other hand, rule 5.14 "allows for the forbearance of personal service and for service on **any person** provided that said service is likely to bring the contents of the documents served to the defendant's attention" (emphasis as in the original). Counsel contended that "the fact that rule 5.6 is inapplicable in these circumstances does not preclude service on attorneys under rule 5.14 of the CPR" as "whether the [defendants in the court below] chose to retain [Lambie-Thomas & Co] in this matter is of no moment and is irrelevant to the operation of the Rule 5.14 [sic] of the CPR".

[15] Counsel further submitted that if rule 5.14 could "be defeated by the absence of instructions to the party being served in the alternative to accept service then defendants would be able to easily evade service and many matters would not be able to proceed".

[16] In response, counsel on behalf of Lambie-Thomas & Co submitted that the learned judge was correct in finding that an attorney-at-law can only be served pursuant to rule 5.6 of the CPR and that rule 5.14 is not applicable. Counsel contended that "the attorney-at-law and client relationship is one established by contract and is of a special nature", and that an attorney-at-law "cannot act beyond the scope of his retainer". On this premise, counsel submitted that "the framers of the [CPR] recognized the special nature of the relationship between an Attorney-at-Law and his client and consequently framed the rules relating to service to be consistent with these principles". Counsel argued that "[b]y making a specific rule as to when an Attorney-at-Law can be served with a claim, the framers of the rules have taken service on an Attorney-at-Law outside of the general provisions of the rules relating to service".

[17] Counsel also expressed concern that "Attorneys-at-Law will incur costs in having to bring such documents to the attention of the relevant persons with no possibility of being reimbursed and could find themselves engaging in actions which they have been specifically instructed by their clients not to do (as was the circumstances of this case)".

[18] Service of a claim form is the procedure used by a claimant in the Supreme Court to give legal notice to a defendant of a court's exercise of its jurisdiction over him, hence enabling the defendant to respond to the proceedings before the court. Therefore, service is essential to the proceedings, and a claimant is obliged to provide to the court's satisfaction proof of said service before any other procedural steps can be taken.

[19] Part 5 of the CPR deals with the service of a claim form. It is to be noted that it does not apply to the service of other documents, including other statements of case, except where rule 5.2 of the CPR applies. The provision sets out the framework for service of claim forms and other related documents on defendants within Jamaica. Therefore, it does not apply to service outside the jurisdiction. It explains the rules which determine whether the claim can be served with or without the court's approval and the procedure for effecting service under the different regimes that apply.

[20] Pursuant to rule 5.1(1) of the CPR, "[t]he general rule is that a claim form must be served personally on each defendant". This means "handing it to or leaving it with the person to be served" (see rule 5.3 of the CPR).

[21] When confronted by difficulties in effecting personal service of the claim form on a defendant, within the jurisdiction, the claimant may enlist the court's assistance and, instead of personal service, may choose an alternative method of service pursuant to rule 5.13 of the CPR or apply for an order for service by a specified method pursuant to rule 5.14 of the CPR.

[22] Rule 5.13 of the CPR states that:

> "**Alternative methods of service**
>
> 5.13 (1) Instead of personal service a party may choose an alternative method of service.
>
> (2) Where a party -
>
> (a) chooses an alternative method of service; and
>
> (b) the court is asked to take any step on the basis that the claim form has been served, the party who served the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form.
>
> (3) An affidavit under paragraph (2) must -
>
> (a) give details of the method of service used;
>
> (b) show that -
>
> (i) the person intended to be served was able to ascertain the contents of the documents; or
>
> (ii) it is likely that he or she would have been able to do so;

(c) state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents; and

(d) exhibit a copy of the documents served.

(4) The registry must immediately refer any affidavit filed under paragraph (2) to a judge, master or registrar who must -

(a) consider the evidence; and

(b) endorse on the affidavit whether it satisfactorily proves service.

(5) Where the court is not satisfied that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the registry must fix a date, time and place to consider making an order under rule 5.14 and give at least 7 days notice to the claimant.

(6) An endorsement made pursuant to 5.13(4) may be set aside on good cause being shown."

[23] Rule 5.14 of the CPR, which deals with the power of the court to make an order for service by specified method, states that:

"**Power of court to make order for service by specified method**

5.14 (1) 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.

(2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit -

(a) specifying the method of service proposed; and

(b) showing that that method of service is likely to enable the person to be served to

> ascertain the contents of the claim form and particulars of claim."

[24] Therefore, a party is permitted under rule 5.13 of the CPR to serve a claim form and any other document allowed under rule 5.2 of the CPR, within the jurisdiction on a defendant by utilizing a method other than personal service. This is referred to in rule 5.13 of the CPR as an "alternative method of service". Although I have seen several references by counsel to the phrase "substituted service", this phrase does not appear within Part 5 of the CPR.

[25] A party who chooses to employ an alternative method of service, pursuant to rule 5.13 of the CPR, does not require the prior permission of the court. However, where a party employs an alternative method of service and wishes for the court to take any step on the basis that the claim form has been served, that party must file evidence on affidavit proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form (see rule 5.13(2) of the CPR). In other words, where the court is dealing with service of proceedings within the jurisdiction, the court also has the power to declare that steps already taken to bring the proceedings to the notice of a defendant should count as good service. So, for example, if a claimant was desirous of obtaining a default judgment and needed to establish effective service, this would be a practical way of having the court validate the alternative method of service already utilized.

[26] Where the court is not satisfied that the alternative method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the registry must fix a date, time and place to facilitate the court making an order under rule 5.14 (see rule 5.13(5) of the CPR). It is on this basis that rule 5.14(1) of the CPR empowers the court to "direct that service of a claim form by a method specified in the court's order be deemed to be good service". The court is, therefore, empowered under rule 5.14(1) of the CPR to validate that steps already taken by a party to enable the contents of the claim form to be ascertained by the defendant, by an alternative method, be deemed to

be good service. In this sense the court is giving its permission retrospectively ("retrospective validation").

[27] Alternative service under rule 5.14 is however twofold, where the court may make an order permitting service by a method or at a place not otherwise permitted under Part 5 of the CPR. So that, upon a party's direct application to the court, rule 5.14(2) of the CPR empowers the court to make an order prospectively permitting service by a specified method. Such an order, if granted, also enables a claimant to effect service on a defendant by an alternative method. Accordingly, orders made pursuant to rules 5.14(1) or 5.14(2) of the CPR are really orders that an alternative method of service specified in a court order be deemed to be good service.

[28] In the case of an application for alternative service, the onus is on the claimant to persuade the court that there is good reason for the order. The question is whether there is good reason for the court to validate the mode of service elected, not whether the claimant had good reasons to choose that mode, and not merely what is convenient to claimants. What amounts to good reason will involve the judge considering all the circumstances of the case. Such consideration would include, but is not limited to, any previous efforts made by the claimant to effect personal service, whether service within the jurisdiction is feasible and knowledge of a defendant's whereabouts.

[29] In the instant case, the without notice application for court orders, made before the learned Master, was made by the appellant pursuant to rule 5.14(2), on the grounds that said specified method was "likely to enable the party to be served to ascertain the contents of the documents". The party to be served being the defendants in the claim as filed. The question is whether this rule contemplated service upon attorneys-at-law or indeed "any person" at large.

[30] Rule 5.6 of the CPR states that:

> "**Service on attorney-at-law**
>
> 5.6 (1) Where an attorney-at-law -

(a) is authorised to accept service of the claim form on behalf of a party; and

(b) has notified the claimant in writing that he or she is so authorised, the claim form **must** be served on that attorney-at-law and **personal service is not required**.

(2) Where a claim form is sent to a party's attorney-at-law who certifies that he or she accepts service on behalf of the defendant, the claim is deemed to have been served on the date on which the attorney-at-law certifies that he or she accepts service.

(3) Where an attorney-at-law -

(a) has given notice to the claimant under paragraph (1)(b) of this rule;

(b) has been duly served with the claim form; and

(c) fails to file an acknowledgment of service within the time limited by rule 9.3,

the claim form is deemed to have been served on the defendant on the date of which that defendant's attorney-at-law was served." (Emphasis added)

[31] An examination of rule 5.6 of the CPR shows that this rule specifically provides for an alternative method of service of a claim form on attorneys-at-law within the jurisdiction. Rule 5.6 of the CPR dispenses with the requirement for personal service and mandates service upon an attorney-at-law where that attorney-at-law is authorized to accept service of a claim form on behalf of a party and has notified the claimant in writing that he or she is so authorized. This is made clear in rule 5.6(1)(b) of the CPR, where it states, "…the claim form must be served on that attorney-at-law and personal service is not required". Therefore, service on an attorney-at-law pursuant to rule 5.6 of the CPR is not akin to personal service upon a defendant, and accordingly, is an alternative method of service.

[32] The practical effect here is the existence of a specific provision for alternative method of service of a claim form on attorneys-at-law within the jurisdiction under rule 5.6 of the CPR competing with the general provisions for alternative methods of service under rules 5.13 and 5.14 of the CPR.

[33] It is an accepted principle of statutory interpretation that where two provisions apply to the same subject matter, the more specific will prevail over the more general provision. This is the operation of the well-known maxim *lex specialis derogat legi generali*. In **R (on the application of Hallam) v Secretary of State for Justice** [2019] UKSC 2, Lord Reed DP, in referring to the application of the maxim, stated that:

> "[144] …where a legal issue falls within the ambit of a provision framed in general terms, but is also specifically addressed by another provision, the specific provision overrides the more general one…"

[34] It is pellucid in rule 5.14 that the court may make directions about alternative methods of service, but these are quite general provisions. It seems to me, that would ordinarily mean the court would make directions which did not involve one of the other prescribed methods of service already dealt with by rules 5.3 through to 5.10.

[35] It would stand to reason, therefore, that the general provision for alternative methods of service, expressed in rules 5.13 and 5.14 of the CPR, was not meant to apply to "any person" at large nor indeed attorneys-at-law, as this category of persons are already specifically addressed in rule 5.6 of the CPR with respect to alternative service being effected upon them. Accordingly, operation of the general provision for alternative methods of service under rules 5.13 and 5.14 of the CPR must, therefore, be with respect to persons/entities which were not otherwise specifically addressed by the rules.

[36] I must also note that the cases of **Insurance Company of the West Indies Ltd v Shelton Allen and others** [2011] JMCA Civ 33 ('**ICWI v Shelton Allen**'), **Nico Richards v Roy Spencer** [2016] JMCA Civ 61, and **Jephtah Davis v Roy Marshall** [2017] JMSC Civ 161, relied on by counsel for the appellant, are all cases having to do

with alternative service of a claim form on an insurance company. Unlike the instant case, there is no provision in the CPR that specifically provides for alternative service of a claim form on insurance companies, and so the general provisions for alternative service under rules 5.13 and 5.14 may apply to insurance companies in such circumstances. One may also wish to consider the special rules of subrogation and the rights of an insurer to take over and stand in the shoe of the insured. Moreover, in the instant case, there is a specific provision under rule 5.6 of the CPR for alternative service of a claim form on attorneys-at-law. Unlike the relationship that obtains between an insurer and its insured, an attorney-at-law is a creature of instructions and is not permitted to act outside of a client's instructions. This may have been why the drafters of the CPR, in their wisdom, specified in rule 5.6 that defendants must authorize an attorney-at-law to accept service on their behalf. Therefore, the cases on which counsel relied regarding the application of rule 5.14 are distinguishable from the present case.

[37] Consequently, I do not find that the learned judge erred when he found that rule 5.14 of the CPR does not permit alternative service of a claim form on an attorney-at-law and that such service is permitted only by rule 5.6 of the CPR.

Issue (2) – whether the appellant had satisfied the test for service by specified method to be permitted under rule 5.14 of the CPR (ground b.)

[38] Having concluded that rule 5.14 of the CPR does not permit alternative service of a claim form on an attorney-at-law, it is not consequential whether the appellant had satisfied the test for service by specified method to be permitted under rule 5.14 of the CPR. Nonetheless, I have sought to address this issue, as it was argued by both counsel.

[39] Counsel for the appellant submitted that rules 5.13 and 5.14 of the CPR "are subject to the requirement that the method of alternative service chosen is likely to bring notice of the documents to the defendant". In support of this argument, counsel relied on para. [37] of the decision in **ICWI v Shelton Allen**, and para. [31] of **Nico Richards v Roy Spencer**.

[40] Counsel for Lambie-Thomas & Co submitted that the "first thing that an applicant under rule 5.14 must establish is that personal service of the claim cannot be effected". This counsel argues is clear from rule 5.1(1), which states that the general rule is that a claim form must be served personally on each defendant. Counsel submitted that in an application under rule 5.14, "the applicant is seeking to have the court waive this general rule and permit service by a specified method. For the court to waive personal service it must first be established that same is not possible". Counsel relied on the dicta at para. [12] of **ICWI v Shelton Allen** in support of this submission and concluded that the appellant had not established that personal service was not possible. Counsel submitted that, in fact, the contrary was shown on the evidence as the appellant in support of her application seeking an order for service by specified method had averred that personal service was possible because she sought in the alternative an order to service the defendants outside the jurisdiction and provided overseas addresses for both defendants.

[41] In **ICWI v Shelton Allen**, Morrison JA (as he then was) considered rules 5.13 and 5.14 of the CPR and, at para. [12], cited with approval the dictum of Lord Reading CJ in **Porter v Freudenberg** [1915] 1 KB 857. At pages 887 – 888, Lord Reading CJ stated that:

> "[a Defendant] is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him.... In order that substituted service may be permitted, **it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the Defendant or to come to his knowledge** if the method of substituted service which is asked for by the plaintiff is adopted." (Emphasis added)

[42] I find it hard to resist the submissions of counsel for Lambie-Thomas & Co that the applicant utilizing rule 5.14 of the CPR must, as a criterion *ante*, establish that she was unable to effect personal service of the claim forms. This is the principle stated in **Porter v Freudenberg** and applied in **ICWI v Shelton Allen**. The general rule, pursuant to rule 5.1(1) of the CPR, is that a claim form must be served personally on each defendant. There are obvious exceptions to this general rule as alternative methods

of service are permitted by the CPR. It is my view, however, that to fall within these exceptions, an effort must first be made by the claimant to comply with the general rule for personal service and that alternative methods of service under rules 5.13 and 5.14 of the CPR should be permitted where the claimant has shown that he or she is unable to effect personal service on the defendant, in addition to satisfying the other requirements stated in the rules.

[43] A perusal of the affidavit filed in support of the appellant's application in the court below for an order for service by specified method does not reveal that the appellant attempted to effect personal service on the defendants or that she sought firstly to obtain an order from the court for personal service to be effected outside of the jurisdiction. An order for service outside the jurisdiction was sought in the court below only as an alternative to the order for service by specified method. The appellant's application in the court below also stated as a ground that she had been "reliably informed that the 1st defendant is currently resident in the Spain [sic]" and went on to state an address in Spain but further stated that she does not know if that address was still current. She also stated an address for the 2nd defendant in London, England, and an address in Montego Bay, Saint James. Therefore, the appellant had the viable option to have at least attempted personal service on the defendants at the addresses she was "reliably informed" that the defendants resided. This could have been facilitated by an order for service out of the jurisdiction under Part 7 of the CPR.

[44] In the circumstances indicated on the evidence, the claimant could not be said to have taken reasonable steps or any prior steps to serve the claim form in accordance with the rules. She had not taken any steps to serve the claim form personally, as is the default position. There is also no evidence that she had attempted to post it to a known mailing address within the jurisdiction or, indeed, known addresses outside of the jurisdiction.

[45] It is my view that the court must adopt a strict approach to the rules governing service of the claim form. The need for a "bright line rule" identifying the exact point at

which service takes place means that the court will not validate a method of service not contemplated by the CPR simply because it can be shown that the alternative method of service utilized by a claimant brought the contents of the claim to a defendant's attention.

[46] As the CPR in this jurisdiction are similar to those of the United Kingdom, it is helpful to cite the latter's relevant rules and the interpretation thereof in the discussion of this issue. Rule 6.15 of the Civil Procedure Rules of the United Kingdom ('UK CPR') states:

> "6.15 Service of the claim form by an alternative method or at an alternative place
>
> (1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

[47] The ambit of rule 6.15 of the UK CPR and the principles to be applied to applications in service of a claim form were considered by the United Kingdom Supreme Court in **Barton v Wright Hassall LLP**, [2018] UKSC 12. Referencing to the decision in **Abela and others v Baadarani**, [2013] 1 WLR 2043, the court took the opportunity to set out the principles that apply to an application for the court to validate alternative service retrospectively under rule 6.15 of the UK CPR (the equivalent of our rule 5.14). The relevant factors identified by that court were: (a) whether the claimant had taken reasonable steps to effect service in accordance with the rules; (b) whether the defendant was aware of the contents of the claim form within the time limit for service; and (c) whether the defendant would suffer prejudice by retrospective validation.

[48] There was no dispute that the claimant's actions, in that case, had brought the existence and contents of the claim to the defendant's attention before the service deadline. However, the court noted that such a factor will usually be a necessary but not sufficient condition to justify a departure from the rules. The court enunciated that service of originating process ought to be distinguished from other procedural steps because it is the act by which the defendant is subjected to the court's jurisdiction. For that reason, one of the purposes of the rules is to set a "bright line" identifying the exact point at which service takes effect. This is especially relevant to when time stops running within any limitation period and the timeline for subsequent steps to be taken in the proceedings. The UK Supreme Court emphasized that, otherwise, any unauthorized mode of service would be acceptable, even if it did not fulfil any of the other purposes of serving originating process.

[49] In the instant case, there is no dispute between the parties that the claimant's action by serving the firm Lambie-Thomas & Co, attorneys-at-law, had brought the existence and contents of the claim to the 1st defendant's attention. However, this court notes that that factor although a necessary condition under rule 5.14, is not a sufficient condition to justify a departure from the proper application/operation of the rules. The service of originating process, such as a claim form, must be distinguished from other procedural steps because it is the act by which a defendant is made subjugated to the court's jurisdiction. It is from the date of service that important time consequences flow. In particular, this will be relevant to the timeline for subsequent steps in the proceedings, for example, when time starts to run for the defendant's response, failing which the claimant may, in appropriate cases, obtain default judgment. Therefore, service and the deemed time of service are critical stages in civil procedure with potentially dire consequences. For those reasons, I wish to adopt and apply a "bright line" identifying the permitted methods by which service can be effected.

[50] The UK Court of Appeal previously held in **Elmes v Hygrade Food Products plc** [2001] EWCA Civ 121, that the court had no jurisdiction to order retrospectively that an

erroneous method of service already adopted should be allowed to stand as service by an alternative method permitted by the court. In the circumstances of this appeal, I would state that notwithstanding the fact that the respondents herein had had discussions with the 1st defendant in the claim and were instructed not to accept service, this does not in any way relieve the appellant of her obligation to ensure service of the claim form in a manner and by a method approved by the CPR. To say otherwise would mean that the court would be enabling claimants to escape the serious consequences that would usually ensue where there has been mis-service. Counsel for the appellant had adamantly insisted that the obligation of the appellant in securing an order pursuant to rule 5.14(2) was to convince the Master that the contents of the fixed date claim form and other documents would likely come to the attention of the defendants. Even though the wording of rule 5.14 shows that knowledge is a critical factor, the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 5.14(2).

[51] In my judgment, the appellant has not satisfied the test for service by specified method to be permitted under rule 5.14 of the CPR as she failed to show that she was unable to effect personal service on the defendants. Therefore, an order for service by specified method under rule 5.14 of the CPR ought not to have been granted and was rightly set aside.

Issue (3) – whether the learned judge failed to apply the correct test in setting aside an order for alternative service (grounds d. and e.)

[52] Counsel for the appellant submitted that at para. [16] of the case of **Damion Welch v Roxneil Thompson and another** [2018] JMSC Civ 59 ('**Damion Welch**'), the court held that in order to succeed on an application to set aside an order for service by an alternative method, the person upon whom service has been ordered to be substituted must show that:

i. the order was obtained because the defendant concealed something important from the court;

ii. it was based on a misunderstanding of the law;

iii. it was based on a misunderstanding of the evidence before the judge or it was based on an inference that particular facts existed or did not exist which can be shown to be demonstrably wrong; or

iv. it is not in contact with the defendant.

[53] Counsel contended that Lambie-Thomas & Co failed to satisfy any of the grounds required to set aside an order for substituted service, and as a result, the order for service by alternative method was not properly set aside. Counsel argued that Lambie-Thomas & Co failed to show that there was a misunderstanding of the evidence before the court below or a misunderstanding of law. Counsel also contended that Lambie-Thomas & Co confirmed in affidavits filed on its behalf that the defendants in the court below are their clients who they represent in a related matter in the Parish Court. Counsel further argued that Lambie-Thomas & Co has had contact with the 1st defendant about the fixed date claim form and affidavit in support and, therefore, has been in a position to bring the contents of the documents to the attention of the defendants in the court below.

[54] Counsel also relied on **Jephtah Davis v Roy Marshall** [2017] JMSC Civ 161 in submitting that "it is only where it is established that the party on whom service has been effected, in this case, Lambie-Thomas & Co, has made reasonable efforts to bring the contents of the Claim Form and Particulars of Claim of Fixed Date Claim Form and Affidavit in Support to the attention of the Claimant and failed, then and only then should the alternative service be set aside, having failed, and a further alternative would need to be explored". Counsel submitted that Lambie-Thomas & Co has failed to prove that it has been unable to locate the defendants and bring the said documents to their attention. On the contrary, the appellant contended that the evidence showed that Lambie-Thomas & Co had, in fact, brought the documents to the 1st defendant's attention and had discussed at least the existence of the claim with her.

[55] In response, counsel for Lambie-Thomas & Co submitted that the learned judge applied the correct test in considering the application to set aside the order for service by specified method. Counsel contended that the learned judge found that the order was made based on a misunderstanding of the law as rule 5.6 of the CPR was the applicable rule when service is being done on an attorney-at-law.

[56] Counsel further submitted that Lambie-Thomas & Co did not have to show that it made all reasonable efforts to bring the contents of the fixed date claim to the defendants in the court below and that such efforts were unsuccessful. Accordingly, once the learned judge accepted that the applicable rule of the CPR was rule 5.6 and not 5.14, then the order could be properly set aside. Counsel further submitted that even if rule 5.14 was the applicable rule, the order by the learned Master could be properly set aside on the basis that the appellants had failed to show that personal service was not possible.

[57] In the case of **Damion Welch**, Master Hart-Hines (Ag) (as she then was) at para. [16] stated the following:

> "[16] A review of the cases which gave consideration to similar applications to set aside Orders made pursuant to the Court's powers under **Rule 5.14(1)** and **5.14(2)** of the **CPR**, reveal that an earlier ex parte order may be disturbed in some instances. Some examples where the order may be set aside include:
>
> i. Where the Order was obtained because the Respondent concealed something important from the Court, such as the fact that the relationship between insurer and a Defendant had ceased and that the insurers were not notified of the accident until three years after the expiration of the policy (see **ICWI v Shelton Allen (Administrator of the estate of Harland Allen**) **and others** [2011] JMCA Civ 33; or
>
> ii. Where it was based on a misunderstanding of the law; or
>
> iii. Where it was based on a misunderstanding of the evidence before the judge or it was based on an

inference that particular facts existed or did not exist which can be shown to be demonstrably wrong; or

iv. An insurer may have an Order for service by a specified method set aside if it is not in contact with its insured (see **ICWI v Shelton Allen**). However, the Applicant should demonstrate that despite reasonable efforts, it was unable to locate the Defendant. Making 'reasonable efforts' does not mean that the steps of enquiry ought to be 'so onerous that it becomes unrealistic for the insurance company to achieve', per Master Bertam-Linton [sic] (as she then was) in **Moranda Clarke v Dion Marie Godson and Donald Ranger** [2015] JMSC Civ 48 at para 37."

[58] It is clear that the four circumstances outlined by Master Hart-Hines in **Damion Welch** were, as she stated, "examples where the order may be set aside" and was not meant to be treated as exhaustive. Counsel for the appellant, therefore, were ill-advised when they submitted that the court in **Damion Welch** held that these were the grounds to be satisfied in order to succeed on an application to set aside an order for service by an alternative method.

[59] In considering whether to set aside the order for service by specified method, the learned judge would have been bound by the principle not to interfere with the exercise of the learned Master's discretion unless he was satisfied that she misunderstood the law or the evidence before her; misconceived the facts before her which can be shown to be demonstrably wrong; or that she arrived at a decision that no judge having regard to his duty to act judicially could have arrived at (see **The Attorney General of Jamaica v John MacKay**).

[60] It is my view that the learned judge correctly found that the order for service by specified method was made based on a misunderstanding of the law, in that the applicable rule of the CPR when alternative service is being effected on an attorney-at-law is rule 5.6 and not rule 5.14. Therefore, the learned judge in setting aside the order of the learned Master would have been acting in accordance with the principles, as set

out in **Hadmor Productions Ltd** which has been accepted and applied in this jurisdiction.

[61] Accordingly, I do not find that the learned judge failed to apply the correct test in setting aside the order for alternative service by way of specified method.

[62] In the circumstances, I would propose that the appeal be dismissed with costs to Lambie-Thomas & Co to be taxed, if not agreed.

F WILLIAMS JA

ORDER

1. The appeal is dismissed.
2. Costs of the appeal to Lambie-Thomas & Co to be taxed if not agreed.