[2024] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE P BROOKS P
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2022CV00034

BETWEEN	**DONALD JACKSON**	**APPELLANT**
AND	**HERMINE MCFARLANE**	**RESPONDENT**

Written submissions filed by NEA/LEX for the appellant

Written submissions filed by Miss Jean Williams for the respondent

22 March 2024

Civil Procedure – When appellate court may interfere with discretion exercised by trial judge – Three factors that must be satisfied for order made in absence of a party to be set aside – Requirements for alternative service by electronic means – Whether adequate notice of adjourned hearing given – Civil Procedure Rules 5.13; 6.2; 6.6; 11.11 and 39.6

PROCEDURAL APPEAL

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

BROOKS P

[1] I have read in draft the judgment of D Fraser JA. I agree with his reasoning and conclusion and have nothing to add.

D FRASER JA

Introduction and background

[2] This is an appeal against the refusal by Nembhard J ('the learned judge'), on 17 March 2022, to set aside her order made on 5 April 2019 granting the relief sought in the respondent's claim, in the absence of the appellant or any representative on his behalf.

[3] The appellant Donald Jackson and the respondent Hermine McFarlane are siblings. They are also tenants in common in respect of property located at Lot 12, West Avenue (Camperdown) also known as 1 West Camp Close, Kingston 8 in the parish of Saint Andrew, registered at Volume 1053 Folio 469 of the Register Book of Titles, ('the property'). The respondent by fixed date claim form ('FDCF') with affidavit in support, filed 5 June 2018, claimed against the appellant in the Supreme Court, for a declaration that she held the sole beneficial interest in the property.

[4] On 19 September 2018 the appellant filed an acknowledgement of service in person indicating he had received the FDCF and affidavit. He also filed a handwritten document headed "Defence" bearing his signature.

[5] Three scheduled hearings of the FDCF (7 November 2018, 31 January 2019 and 4 April 2019) were adjourned when, on each occasion, the appellant was absent and unrepresented. Thereafter, on 5 April 2019, the first hearing of the FDCF before the learned judge was treated as the trial of the matter and the respondent was declared the sole beneficial owner of the property. The appellant was again not present at that hearing. On 15 May 2019 the appellant was served with the formal order made on 5 April 2019.

The application to set aside

[6] On 28 May 2019 the appellant filed an application (amended 11 February 2022) to set aside the orders made on 5 April 2019. On 24 February 2022, the learned judge heard the appellant's application. The evidence before the learned judge came from affidavits sworn by the appellant, the respondent and attorneys-at-law Mr Charles Williams and Ms Jean Williams.

<u>The evidence relied on by the appellant</u>

[7] The appellant relied on his affidavit filed 28 May 2019 and his supplemental affidavit filed 11 February 2022. He averred that Mr Charles Williams was his attorney-at-law with whom he had discussed the possibility of the matter being settled. He stated that he was aware of discussions between Mr Williams and the attorney-at-law for the respondent and that there were offers and counter offers made. He also averred that he was not informed by his then attorney-at-law Mr Williams, that he needed to attend court

on 7 November 2018 as "the matter was being settled out of Court". He also indicated that he was not aware, until he reviewed the court file, that Mr Williams had not attended court on that day. He further averred that he was unaware of the dates of 31 January, 4 April 2019 and 5 April 2019.

[8] In response to an affidavit of service filed 5 April 2019 by Ms Williams, counsel for the respondent, whereby she averred that by email on 2 April 2019 she served the appellant with notice of the hearing on 4 April 2019, the appellant stated that having checked his email he did not find it. He, therefore, doubted that he was served with a copy of the formal order filed on 25 March 2019, indicating the next hearing date of 4 April 2019. He also outlined that five minutes before 2:00 pm on 5 April 2019 he received a call from Ms Williams querying whether he was attending court at 2:00 pm, to which he responded that he did not know he had court on that day and he was out of town. He stated that he contacted Mr Williams who told him that he would handle the matter.

[9] The appellant additionally averred that, based on the advice of his current attorney-a-law, he verily believes that, had he attended court when the order was made, the court would likely have extended the time for him to file a defence and make case management orders fixing a timetable for trial. He maintained that he had a good defence with a real prospect of success as the respondent had acknowledged that he had an interest in the property and he believed he was entitled to a greater interest than she suggested. He also indicated that his failure to file a defence was not intentional as he had submitted all the documents relative to his defence to Mr Williams, hoping he would prepare his response to the respondent's affidavit. He further stated that he was led to believe that no court action was necessary, and that Mr Williams was trying to settle the matter out of court.

[10] The appellant further averred that, after obtaining the order on 5 April 2019, the respondent had commenced proceedings in the Corporate Area Parish Court for recovery of possession despite knowing that he had filed an application to set aside the order and she then enforced the order by causing his name to be removed from the title.

The evidence relied on by the respondent

[11] Mr Charles Williams, in his affidavit filed 23 February 2022 in response to the supplemental affidavit of the appellant, indicated that he and the appellant serve as executive members of the St George's College Old Boys Association. He indicated that he has given the appellant legal advice from time to time but has never represented him in any matter. He acknowledged that he was shown by the appellant a letter and FDCF with affidavit attached in relation to this matter, which documents he read. He indicated that he encouraged the appellant to accept the offer in the claim, but he refused. He further indicated that he contacted counsel for the respondent in relation to the matter and he spoke back to the appellant, but he rejected the offer. Mr Williams indicated that he told the appellant that he cannot represent him and he should either accept the offer or try to work it out with his sister. Free legal advice which the appellant rejected.

[12] Mr Williams further averred that, on the afternoon of 7 November 2018, he received a courtesy call from counsel for the respondent who advised him that the appellant had not attended court on that day and that the matter had been adjourned to 31 January 2019. He stated that he contacted the appellant via telephone and advised him of the adjourned date. He denied that he was: 1) the attorney-at-law for the appellant; 2) responsible to prepare the appellant's response to the respondent's affidavit and that he led the appellant to believe that no court action was necessary and he was trying to settle the matter out of court; 3) required to notify the appellant of the date of 7 November 2018; and 4) contacted by the appellant on 4 April 2019 and he told the appellant that he would "handle the matter". He clearly maintained that he had never been retained by the appellant nor received any payment from him.

[13] The respondent relied on her affidavit filed on 5 June 2018 in support of her amended FDCF and her affidavit filed 23 February 2022, in response to the supplemental affidavit of the appellant. Her evidence from those two affidavits is that the appellant and two others surrendered their National Housing Trust ('NHT') points so she could get financing to acquire the property, but it was clearly understood that they would acquire no beneficial interests. She indicated that based on his points the appellant contributed $800,000.00 to the purchase price. Further, when additional funding was required an additional mortgage from Victoria Mutual Building Society ('VMBS') was obtained and the

appellant's name was added to that mortgage which was a requirement for the mortgage to be granted. However, she reiterated that, there was no intention for him to acquire an interest in the property. She also solely obtained a vendor's mortgage.

[14] She indicated that she solely serviced all these mortgages over 14 years until she was migrating, after which she continued to solely service them. She indicated that the appellant made no contribution to the purchase price, but paid $130,000.00 towards the closing costs. The respondent further stated that the appellant initially came on the property as a tenant occupying the small flat for which he paid US$300.00 per month. Then, when she was migrating to the United States of America ('USA') in 2015, she rented to the appellant the main house that she had occupied for $50,000.00 per month commencing 1 September 2015. She indicated that the appellant paid the first month's rent, but none since. The respondent further stated that the appellant then started making a claim to the property and declared that he would pay the mortgage and not rent. However, he had paid neither rent nor mortgage save, one payment made to the NHT since the matter was filed in court.

[15] The respondent in her affidavit also spoke to the appellant declaring in an email to her in October 2015 that he was entitled to a 35% beneficial interest and he wanted to pay out the respondent. The respondent indicated that she reluctantly acquiesced and agreed to him paying out her interest on or before the end of October 2017, as the appellant was in possession and she could not get him out. That did not materialise and, in February 2018, she instructed her attorney-at-law to offer to the appellant a payment of 30% of the value of the property within 30 days of his acceptance, but he rejected that offer.

[16] The respondent further stated that assuming the appellant obtained an interest when he contributed towards the closing costs, he became entitled to no more than 3.1% of the value of the property and maintained that, in all the circumstances, she was entitled to the entire beneficial interest in the property.

[17] However, in her first affidavit the respondent indicated that, by way of mediation, she was prepared to offer the appellant 20% of the interest in the property, less the value of and costs associated with paying out two charging orders endorsed on the title due to

the appellants poor handling of his financial affairs. This was on condition that the appellant would immediately vacate the premises as soon as payment is made.

[18] Concerning the circumstances that led up to the making of the order on 5 April 2019 in the absence of the appellant, the respondent denied the appellant's statement that he was unaware of the court date of 31 January 2019, as she was advised by her attorney-at-law and verily believed that her attorney-at-law served a notice of adjourned hearing on the appellant by registered mail to him at his home at the property.

[19] She also denied the appellant's indication that he was unaware of the hearing date of 4 April 2019, as she stated that she saw the unperfected formal order, copy letter and email sent to him by Ms Williams on whose affidavit she also relied, and recognised the email address as being his. Further, she denied that he did not know what happened on 4 April 2019. She outlined that on 4 April 2019, in her presence, her attorney-at-law called the appellant and placed the phone on speaker. She stated that her attorney-at-law asked him why he was not at court and he said that "he could be there in a few minutes".

[20] The respondent additionally denied that the appellant had a good defence with a real prospect of success, and that if the appellant had attended court it is likely she would not have been awarded 100% beneficial interest in the property. She maintained that he had no interest in the property, his name was only placed on the title for convenience, and that he ignored the court dates.

[21] The respondent further averred that she had since paid off the NHT mortgage that was in the appellant's name and that his continued occupation was prejudicing her interests, as the appellant had caused the property to depreciate.

The decision of the learned judge

[22] Having considered the material before her, in her written judgment delivered on 17 March 2022, the learned judge outlined that:

a) The service of the unperfected formal order filed on 7 March 2019 by email advising the appellant of the hearing date of 4 April 2019 was approved by her as an alternative method of service and found to be "sufficient to enable

[the appellant] to ascertain the contents of the unperfected Formal Order, or, at the very least, that it is likely that he would have been able to do so".

b) The appellant had "failed to satisfy two of the three conditions outlined in rule 39.6 of the [Civil Procedure Rules]". This was because he had not demonstrated that i) he had a good reason for his absence on each scheduled hearing date and in particular on 5 April 2019; and ii) had he been present at the hearing on 5 April 2019, it is likely that some other order would have been made.

[23] Accordingly, the appellant's application was refused and he was ordered to pay the respondent's costs. He was, however, granted leave to appeal.

The appeal

[24] Aggrieved by the decision of the learned judge, the appellant lodged this appeal against her refusal to set aside her order made on 5 April 2019 on the following grounds:

> "a) The learned judge erred as a matter of fact and/or law and or wrongly exercised her discretion when she refused to set aside the order made on April 5, 2019 in the absence of the Appellant.
>
> b) The learned judge misdirected herself on the law when she found that service by electronic means could be effected under Rule 5.13 of the CPR. In so finding the learned judge failed to appreciate that:
>
> i. the interplay between Rules 6.2 (a) and 5.13 of the CPR does not permit a method of service which is dependent on the existence of a Practice Direction;
>
> ii. service by electronic means could only be effected by a practice direction, a rule or an order of the Court pursuant to Rule 6.2 (d) of the CPR; and
>
> iii. there is no Practice Direction rule or order of the court, which permitted service by electronic means on the Appellant.
>
> c) The learned judge erred in disregarding or insufficiently regarding and/or demonstrating a misunderstanding of the totality of the Appellant's evidence which caused her to derive

> an erroneous conclusion that the [Appellant] did not have a good reason for failing to attend the hearing.
>
> d) The learned judge erred in law in finding that the Appellant has not satisfied the requirement of Rule 39.6 (3) (b) of the CPR.
>
> e) The learned judge erred in law in assessing the Appellant's credibility solely on affidavit evidence without cross examination."

Submissions

The appellant

[25] Counsel for the appellant noted that as the appeal challenged the exercise of the learned judge's discretion the principles outlined in the case of **Attorney General of Jamaica vs John Mckay** [2012] JMCA App 1 were applicable. He acknowledged that the appeal concerned whether the appellant had satisfied the requirements of rule 39.6 of the Civil Procedure Rules ('CPR') and relied on the case of **David Watson v Adolphus Sylvester Roper** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 42/2005, judgment delivered 18 November 2005, as explanatory of the effect of that rule.

[26] In addressing the question whether the appellant had a good reason for failing to attend the hearing, counsel argued that, in light of the evidence, a retainer held by Mr Williams as attorney-at-law for the appellant could be inferred. Counsel advanced that the belief held by the appellant that Mr Williams appeared for him and that the matter was being settled out of court, coupled with the evidence of the appellant that he was not informed by Mr Williams of the court dates, provided a reasonable explanation for his absences.

[27] Counsel also advanced that, based on the interplay between rules 6.2(a) and 5.13 of the CPR, the appellant was not properly served by email for the hearing date of 4 April 2019, as service was not done pursuant to a practice direction and that method of service could only be approved if there was a response by the appellant to the email showing that it had come to his attention. Further, counsel contended that, even if the service by email was proper, based on the operation of rule 6.6(1) and (2) of the CPR the appellant

had insufficient notice as the deemed date of service would be 4 April 2019, the scheduled date of the hearing.

[28] Additionally, counsel advanced that the appellant had no proper or any notice at all of the hearing held the following day on 5 April 2019. Therefore, the matter should have been adjourned on 4 April 2019 and notice given to the appellant of the new date. He relied on the case of **Patrick Allen v Theresa Allen** [2018] JMCA Civ 16 for the submission that the reason given by the appellant for not being aware of the court date of 5 April 2019 was in fact a good one. Counsel complained that in finding that the appellant had no good reason for his failure to attend the hearings the learned judge erred by disregarding or having insufficient regard for the totality of the appellant's evidence.

[29] In respect of whether some other order might have been made if the appellant had attended the hearing on 4 or 5 April 2019, counsel submitted that the learned judge erroneously conducted a mini trial by focusing on the merits of the appellant's defence as set out in his affidavits. Had the appellant been present counsel argued that the learned judge may likely have either extended time for the appellant to regularize the document he filed/file a defence; allowed him time to settle his legal representation; or even made an unless order requiring him to file an affidavit by a specified date, failing which judgment would be entered for the respondent. He argued that it is not likely the court would have granted the orders made. Counsel further submitted that the respondent was not entitled to the orders she sought on her claim, as her evidence acknowledged that the appellant might have an interest in the property, however small.

[30] Counsel further maintained that this concession alone by the respondent, showed that the appellant had a real prospect of success at trial. It was noteworthy, he submitted, that the appellant had acted with alacrity once the order had been served on him. Counsel argued that the respondent would not be prejudiced as she would have her claim determined on the merits, whereas the appellant would be prejudiced if the orders were not set aside as he would be deprived of an interest in the property, which the respondent conceded he had.

The respondent

[31] Counsel for the respondent highlighted the evidence that the respondent acquired the subject property in January 2001 with the assistance of the appellant and two friends giving up their NHT benefits, each in the sum of $800,000.00. Counsel further outlined that the respondent obtained additional funding through a mortgage from VMBS, co-signed by the appellant, as also from a vendor's mortgage. Counsel indicated that the appellant's name was included on the title due to the condition stipulated by VMBS that another name had to be so endorsed.

[32] Counsel maintained that it was agreed and understood that none of the NHT contributors would have a beneficial interest in the property and that the respondent would be solely responsible for the mortgages. Counsel submitted that the history of the use of the property was that the respondent lived at and also rented part of the premises to assist with servicing the mortgages. Then, after 13 years, in 2014 the appellant became a tenant of the respondent for the sum of US$300.00 per month. Counsel further outlined that, in 2015, the appellant stated he would no longer pay the agreed rent (which had increased to $50,000.00 per month due to his move to the larger house on the property after the respondent migrated) but would pay the mortgage instead. However, after paying the first month's rent he neither paid rent nor mortgage, save for one month's mortgage since the matter came before the court. This, counsel indicated, had led to two charging orders being registered against the title for the property in respect of debts owed by the appellant.

[33] Counsel submitted that an email sent by the appellant to the respondent on 10 October 2015 confirmed the contention of the respondent, that, at the time of acquisition of the property, there was no common intention for the appellant to have any interest in the property. Rather, his intent then was to make provision for their mother when she was in Jamaica. Counsel maintained that the email went on to show that the appellant only began claiming an interest in the property in August 2015 when the respondent was migrating to the USA and indicated that she intended to sell the property and purchase a house in the USA. Therefore, although the appellant had given up his NHT entitlement and signed the VMBS mortgage he was not entitled to a share in the property. Counsel relied on section 3 of both the Partition and Limitation Acts, as well as the cases of

Thomas v Fuller-Brown [1988] 1 F.L.R. 237; **Lloyds Bank Plc v Rossett**; **Cecillia Mitchell Davy v Riley Adolphus Davy** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 19/2014, judgment delivered 30 March 2007; **Barrington Sterling v Zelta Gayle Sterling** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 69/2006, judgment delivered 22 February 2008; and **Horace Boswell v Jennifer Johnson** [2019] JMSC Civ 17.

[34] Turning specifically to the orders made on 5 April 2019, counsel noted that in breach of rule 10.4(1) of the CPR the defence filed by the appellant was not served on the respondent. Counsel submitted that the appellant had ignored all efforts to get him to attend court. Counsel pointed out that the appellant was aware of the date of 7 November 2018. Regarding the date of 31 January 2019, a notice of adjourned hearing was filed and served, and the evidence of Mr Williams attorney-at-law was that he had advised the appellant of that court date. Counsel maintained that the appellant was properly served with the hearing date of 4 April 2019 by virtue of service on him of the unperfected formal order filed on 7 March 2019 by email, to an email address the appellant has not denied is his.

[35] Counsel further highlighted that, on 4 April 2019, the evidence on behalf of the respondent was that the respondent's attorney-at-law called the appellant who did not say he was unaware of the court date, but that he could be there in a few minutes. Counsel also pointed out that while on that date an oral application was made pursuant to rule 6.8 of the CPR for the court to dispense with service, the learned judge instructed that an affidavit of service be filed, which order was complied with, by the filing on 5 April 2019 of the affidavit of service via email. The appellant never having attended court on either 4 or 5 April 2019, counsel argued that the learned judge correctly relied on the case of **Sean Greaves v Calvin Chung** [2019] JMCA Civ 45 in treating with the issue of service by email. Counsel also relied on the affidavit of Mr Williams in which he denied the assertions of the appellant that he was retained by the appellant and that he told the appellant that he need not attend court. This in a context where the appellant had filed an acknowledgement of service and defence in his personal capacity. Counsel also advanced that the appellant could not rely on bald assertions that he believed the matter

was being settled, when there was no evidence of discussions between the parties towards settlement after the claim was filed.

[36] Counsel accepted that the case of **David Watson v Adolphus Sylvester Roper** addressed relevant issues for the consideration of the learned judge in keeping with which, she submitted, the learned judge found that the appellant's absence from court was deliberate and not accidental or by mistake. Counsel also argued that, based on what was put before the court, the learned judge was correct to conclude that the appellant had no real prospect of success and therefore it was not likely that had the appellant attended court, some other order might have been made. Counsel additionally relied in this regard on the case of **Christopher Ogunsalu v Keith Gardener** [2022] JMCA Civ 12.

[37] Counsel advanced that the balance of prejudice favoured the respondent as the appellant was a tenant in possession who was neither paying rent nor mortgage and the respondent continued to suffer severe hardship.

The issue for determination

[38] The central issue for determination is whether the learned judge erred in the exercise of her discretion when she refused to set aside the orders made on 5 April 2019 in the absence of the appellant?

[39] The determination of this issue is dependent on the resolution of the following two questions and attendant sub-issues:

a) Was the learned judge correct in proceeding to hear the matter on 5 April 2019 in light of:

   i) the nature and time of service for the hearing date of 4 April 2019; and

   ii) the absence of notice given to the appellant of the hearing date of 5 April 2019

b) Did the learned judge err in finding that the appellant had failed to satisfy two of the three requirements of rule 39.6 of the CPR, that is —

i) Did the learned judge err in law by assessing the appellant's credibility solely on affidavit evidence without cross examination and erroneously concluding that the appellant did not have a good reason for failing to attend the first hearing?

ii) Did the learned judge err in determining that it was not likely that had the appellant attended, some other judgment or order might have been given or made?

Analysis

Issues a and b (i)

[40] Following the principles outlined in **Attorney General of Jamaica v John Mckay** and subsequent cases which have adopted its learning, this court should only interfere with the exercise of discretion by a judge in the court below where that exercise was demonstrably wrong based on a manifest error of law or fact. Conversely, this court should not intervene merely on the basis that we would have exercised the discretion differently. Those principles are the backdrop against which the ensuing analysis proceeds.

[41] Given the way the learned judge reasoned to her conclusion it is useful to consider firstly the propriety of the learned judge proceeding to hear the matter on 5 April 2019, together with whether she erroneously concluded that the appellant did not have a good reason for failing to attend the first hearing.

[42] The eventual hearing on 5 April 2019 cannot be divorced from what led up to the hearing date of 4 April 2019. If the appellant was not properly served by email to attend court on 4 April 2019, then, as service was not waived by the court, any hearing that proceeded in the absence of proper service is subject to effective challenge on the basis that the matter was, unfairly, not determined on the merits.

[43] The relevant rules of the CPR for consideration are 5.13, 6.2, 6.6 and 11.11.

[44] Rule 5.13, which deals with alternative methods of service of a claim form, provides as follows:

"(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) …

(5) …

(6) …"

[45] Rule 6.2, which addresses method of service, provides:

"Where these Rules require a document other than a claim form to be served on any person it may be served by any of the following methods –

(a) any means of service in accordance with Part 5.

…

(d) other means of electronic communication if this is permitted by a relevant practice direction, unless a rule otherwise provides or the court orders otherwise."

[46] Rule 6.6, which outlines the deemed date of service in different circumstances, provides:

> "(1) A document which is served within the jurisdiction in accordance with these Rules shall be deemed to be served on the day shown in the following table -
>
> | **Method of Service** | **Deemed date of service** |
> |---|---|
> | … | … |
> | FAX | (a) if it is transmitted on a business day before 4 pm: the day of transmission; or
(b) in any other case, the business day after the day of transmission. |
> | Other electronic method | the business day after transmission. |
>
> (2) Any document served after 4 p.m. on a business day or at any time on a day other than a business day is treated as having been served on the next business day."

[47] Rule 11.11 which deals with service of notice of application provides that:

> "(1) The general rule is that a notice of application must be served -
>
> (a) as soon as practicable after the day on which it is issued; and
>
> (b) at least 7 days before the court is to deal with the application.
>
> (2) However the period in paragraph (1)(b) does not apply where any rule or practice direction specifies some other period for service.
>
> (3) Where –
>
> (a) notice of an application has been given, but
>
> (b) **the period of notice is shorter than the period required, the court may nevertheless direct that, in all**

the circumstances of the case, sufficient notice has been given and may accordingly deal with the application.

(4) …

(5) The notice must be served in accordance with Part 6 unless any respondent is not a party, in which case the notice must be served in accordance with Part 5." (Emphasis supplied)

[48] The learned judge relied on the learning in **Sean Greaves v Calvin Chung** that "[a]lthough rule 6.2(a) of the CPR permits other documents to be served by any means of service in accordance with Part 5 of the CPR, the validity of service via email, as an alternative method of service under rules 5.13 and 5.14 of the CPR would be dependent on the approval of the court". It appears to this court, however, that there was no requirement to consider the need for approval of the court under rules 5.13 and 5.14 as the notice of adjourned hearing was not being served under rule 6.2(a) but rather rule 6.2(d). However, the value of rule 5.13 to the analysis is that, in the absence of similar provisions in Part 6 of the CPR, the principles used to assess the validity of alternative service of claim forms are, with any necessary modifications, used to assess the adequacy of alternative service of other documents permitted by that part.

[49] It is common ground that there is no practice direction as contemplated by rule 6.2(d) of the CPR, permitting service of documents other than a claim form by electronic means such as an email. The approval of that method by the court, also contemplated by that rule was therefore required. The appellant's complaint is twofold. Firstly, that the approval by the learned judge was bad as there was no confirmation that the email had come to the appellant's attention. Secondly, that even if the service was proper (which I take to mean even if confirmation was unnecessary) the service was short. The first contention is not persuasive, as the hallmark of valid alternative service under the CPR is that a method other than personal service is used because it is thought it will *or it likely will* bring the contents of the documents to the attention of the party to be served. Only likelihood is necessary. There was, therefore, no requirement that there must be confirmation of actual receipt of the information by the party to be served, before the learned judge could properly place her stamp of approval on the method utilised. The unchallenged evidence that the email address to

which the notice of adjourned hearing and accompanying documents was sent is the email address of the appellant, and that he had received documents from the respondent's counsel at that email address before, made that approval eminently reasonable. His evidence that he searched his email and did not find it, does not in any way invalidate the approval granted by the learned judge.

[50] The second contention bears more scrutiny. Rule 11.11(1)(b) of the CPR stipulates that, as a general rule, at least seven days before an application is to be heard, notice of that hearing should be served. Rule 11.11(3) of the CPR provides some flexibility and discretion for a judge to hold a hearing even when the notice period is shorter than required, where the judge considers that "in all the circumstances of the case, sufficient notice has been given".

[51] By rule 6.6(1) of the CPR a document served by electronic means (email) is deemed to be served the business day after transmission. There is no indicated difference in the deemed date of service depending on the time of transmission. This is in contrast to what the same rule states for service by fax. Where documents are faxed before 4:00 pm on a business day that is the deemed date of service. If they are faxed after 4:00 pm, the next business day is the deemed date of service. Rule 6.6(2) of the CPR also makes it clear that "Any document served after 4 p.m. on a business day or at any time on a day other than a business day is treated as having been served on the next business day". Other methods of service apart from by fax and electronic method (not reflected in the extract outlined above) such as post, registered post, courier delivery and leaving document at registered address are included in rule 6.6(1). The sum effect is that while for other methods of service if documents served arrive before 4:00 pm on a business day that is the deemed date of service, peculiarly, where service is accomplished by email, regardless of the time of transmission the deemed date of service is always the business day after transmission. (Of passing interest is that the affidavit evidence from Ms Williams shows that the email was sent at 6:27 pm on 2 April 2019.)

[52] By that analysis the notice of hearing sent via email by Ms Williams on behalf of the respondent was deemed served on 3 April 2019, the day before the hearing

date of 4 April 2019. Pursuant to rule 11.11(3)(b) of the CPR, where less than the usual notice period of seven days is given, the court may find that in all the circumstances of the case sufficient notice has been given and proceed to deal with the application.

[53] The learned judge did not refer to rule 11.11 or specifically indicate that she determined sufficient notice had been given. That is, however, the clear import of her conclusion after examining the four dates the matter came before the court, on all of which the appellant was absent. The learned judge found that the appellant had displayed a "pattern of conduct of being absent from the court proceedings that were scheduled" and "demonstrated scant regard for the court and its processes…".

[54] One of the complaints raised on behalf of the appellant is that the learned judge assessed the appellant's credibility solely on the affidavit evidence without cross-examination. The appellant largely sought to justify his absences by indicating that he believed Mr Charles Williams to be his attorney-at-law and that the matter was being handled out of court. Mr Williams in his affidavit evidence stoutly rebutted that he led the appellant to believe he was acting in that capacity and would deal with the matter out of court. He also denied that the appellant called him on 4 April 2019, and he said he would "handle the matter". There is evidence in support of both positions. It is admitted by Mr Charles Williams that he entered discussions with counsel for the respondent on the appellant's behalf concerning an offer which the appellant rejected. He also disclosed that he received a courtesy call from counsel for the respondent on 7 November 2018 after which he telephoned the appellant and told him of the new date of 31 January 2019. The appellant, however, denied receiving any such call from him. On the appellant's part his affidavit evidence spoke to discussions he had with Mr Williams concerning settling the matter. The activity surrounding and stemming from their discussions clearly forming the basis of the appellant's assertion that Mr Williams was acting for him.

[55] The learned judge, however, accepted and relied on the unchallenged evidence from Mr Williams that he was never retained by the appellant, his name was never entered on the record of the court as representing the appellant and he had not filed

any acknowledgment of service on his behalf. The learned judge also found that had the appellant been made to understand that the matter was to be settled out of court it was reasonable to expect that he would have sought to liaise with Mr Williams who he contended was his attorney-at-law, concerning the progress of the matter and the details of any possible settlement agreement. Against that background the learned judge considered that the appellant having been notified by the FDCF of the hearing date of 7 November 2018, confirmed by his filing of an acknowledgment of service and notified by registered mail of the adjourned date of 31 January 2019, there was no good reason for his absences from those hearing dates. On that evidence, it cannot be said that the learned judge was palpably wrong in arriving at those conclusions.

[56] The evidence in support of the notification of the appellant for the critical dates of 4 and 5 April 2019 is, however, not as compelling. The learned judge found that the appellant had adequate notice of the hearing on 4 April 2019 as documents had been served on the appellant by the respondent at that email address before and he had not denied that it was his. She was, therefore, satisfied that method of service was sufficient to enable the appellant to ascertain the contents of the unperfected formal order, or, at the very least, that it is likely that he would have been able to do so. The learned judge also relied on the fact that there was unchallenged evidence from the respondent that while waiting for the matter to be heard on 4 April 2019, Ms Williams called the appellant who said "he could be there in a few minutes" in response to Ms Williams querying his whereabouts. Actually, it should be noted, there was an implicit challenge to that evidence from the respondent, as the appellant in his evidence did not acknowledge receiving any call on 4 April 2019. Rather he stated that he did, "not know what happened at Court on April 4, 2019".

[57] Regarding the hearing on 5 April 2019 the learned judge was unimpressed by the argument that it was insufficient for the appellant to have been contacted five minutes prior to the commencement of the hearing. Referring to what had happened on 4 April 2019 and the fact that the matter had been adjourned to 5 April 2019 to facilitate the filing of the affidavit of service, the learned judge found that the appellant "has failed to demonstrate that he has a good reason for his absence on each date for which the first hearing was scheduled and, in particular, on 5 April 2019".

[58] Disaggregating the issues for a moment, on the face of it, pursuant to rule 11.11(1)(b) service one day before a hearing is short service. The learned judge, however, determined from the evidence that the appellant's absences were deliberate, indicative of a lack of respect for the proceedings of the court. From that perspective the short service seemed to have paled into insignificance on the basis that the appellant had no intention of attending in any event. However, the matter was not heard on 4 April 2019. It was adjourned to 5 April 2019 for the respondent to file an affidavit of service. There is no indication that on 4 April 2019 the court ordered that the appellant should have been notified to appear on 5 April 2019. There is also no evidence that the appellant was notified before five minutes to the scheduled time of the hearing on 5 April 2019, when the learned judge made the orders. It is somewhat curious that he was called at that time. While that action discloses an appreciation of the importance of the appellant being notified of all hearings, unless he had been fortuitously in the precincts of the court, he would not have been available to attend. In fact, his evidence is that he was out of town at the time. Though the learned judge was of the view that the appellant had consistently disregarded the proceedings of the court, it was necessary for the appellant to have been given sufficient notification of the hearing date on which the orders extinguishing any interest he may have had in the property, were made. On the evidence it was the case that the appellant was unaware of the date prior to just before the time of the hearing. The case of **Patrick Allen v Theresa Allen** provides support for the view that that is a good reason for absence. It was, therefore, a stretch and erroneous for the learned judge to conclude that the appellant had "failed to demonstrate that he has a good reason for his absence…in particular on 5 April 2019".

[59] Accordingly, contrary to the learned judge's finding, I conclude that the appellant had a good reason for his absence on 5 April 2019, the hearing date on which the orders were made. No court order was made that he should have been notified of that date and he was not notified of it in sufficient time.

Issue b (ii)

[60] The learned judge held that there was a dearth of evidence demonstrating that the appellant had a defence with a real prospect of success. Was that correct? The

learned judge highlighted that the appellant said that he "believes" he is "entitled" to a beneficial interest. However, on the affidavit evidence there was more than just the appellant's belief. The respondent in her affidavit, filed on 5 Jun 2018 in support of her application under the Partition Act, to which the learned judge referred, indicated the appellant's i) $800,000.00 NHT contribution towards the purchase of the property, together with ii) the placement of his name on the title based on a requirement stipulated by VMBS to secure its funding and iii) his payment of $130,000.00 towards closing costs. Though in that affidavit she maintained that despite those facts there was no intention that he should have a beneficial interest in the property, she also admitted that he could possibly have obtained an interest of 3.1% based on his contribution to the closing costs and, as recently as February 2018, she had offered to pay him as much as 30% of the value of the property; an offer which he rejected as he claimed he was entitled to more. The NHT loan statements exhibited to the respondent's affidavit also disclosed that the appellant's annual NHT refunds were being applied to the loan on the property. In the email from the appellant to the respondent, dated 10 October 2015, also exhibited to her affidavit, the appellant highlighted this fact to the respondent as he claimed 35% interest in the property plus whatever refunds NHT had applied to the account.

[61] Given that evidence coming from the respondent herself, contrary to the holding of the learned judge, it is in fact likely that had the appellant attended the hearing on 5 April 2019 some other order would have been made. In light of the appellant's manifest legal interest based on his name being on the title, evidence of his contribution (initial and through his annual NHT refunds), evidence of the respondent's offer to him and there being a clear dispute concerning whether he had any, and, if so, the extent of his beneficial interest, it is very likely that had he attended a different order or orders would have been made. Orders in line with the suggestions made by counsel for the appellant. These included an extension of time to either or both settle his legal representation and regularise his defence or even an unless order requiring the appellant to file an affidavit within a specified time failing which judgment would be entered for the respondent. It is likely one or more of those orders would

have been made rather than the order which was made extinguishing any beneficial interest the appellant may have had.

[62] Accordingly, in the circumstances the learned judge erred in her finding that it was unlikely that a different order would have been made had the appellant attended the hearing on 5 April 2019.

Conclusion

[63] The analysis conducted has disclosed that the learned judge erred in her conclusions that the appellant had no good reason for being absent on 5 April 2019 when the order was made and that if he had been present it was not likely that a different order would have resulted. Those errors led to the wrong exercise of her discretion as it has now been shown that the appellant has in fact satisfied all three preconditions identified in the case of **David Watson v Adolphus Sylvester Roper**, thus entitling him to have the orders made by the learned judge on 5 April 2019 and 17 March 2022 set aside.

[64] It remains for me to apologise to the parties and counsel for the delay in the delivery of this judgment.

LAING JA (AG)

[65] I, too, have read in draft the judgment of D Fraser JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS P

ORDER

1. The appeal is allowed.

2. The orders made on 5 April 2019 and 17 March 2022 by Nembhard J are set aside.

3. The Registrar of the Supreme Court shall set the fixed date claim form filed on 5 June 2018 for a case management conference as soon as is practically possible.

4. The costs of the appeal and in the court below are awarded to the appellant to be agreed or taxed.

5. Should either party be of the view that some other order as to costs should be made, that party is at liberty to file and serve written submissions in that regard on or before 19 April 2024, failing which the order as to costs shall stand.

6. If such submissions are filed, the other party shall file and serve written submissions in response on or before 3 May 2024.

7. The court will, thereafter, consider the written submissions and render its decision on them.