

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA**

SUPREME COURT CIVIL APPEAL NO COA2022CV00117

BETWEEN	CARRINGTON MORGAN	APPELLANT
AND	MADONNA ANASTASIA WAITE	1ST RESPONDENT
AND	WILLIAM HUTCHINSON	2ND RESPONDENT
AND	INSURANCE COMPANY OF THE WEST INDIES	3RD RESPONDENT

Written submissions filed by DunnCox on behalf of the appellant

No submissions filed on behalf of the 1st and 2nd respondents

Written submissions filed by Miguel C Palmer on behalf of the 3rd respondent

7 November 2025

Civil Procedure – Substituted service or service by specified method – Application by insurer for extension of time to set aside substituted service or service of claim form by specified method – Hearing of preliminary issue concerning validity of claim form – Preliminary issue not mentioned in notice of application – Effect of failure to serve sealed formal order permitting substituted service or service by specified method – Whether service of claim form invalid for failure to serve sealed formal order – Costs following determination of preliminary issue – The parties’ entitlement to costs – Rules 8.15(5)(b), 8.16(1)(d), 11.7, 11.13, 25.1(c), 25.1(d), 26.1(2)(f), 26.1(2)(v), 26.9, 42.2 and 42.8 of the Civil Procedure Rules, 2002

PROCEDURAL APPEAL

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

MCDONALD-BISHOP P

[1] This is an appeal against the decision of Wong-Small J (Ag), as she then was ('the learned judge'), made in the Supreme Court on 28 October 2022. The appellant, Carrington Morgan, appeals against the learned judge's decision to set aside an order made pursuant to rule 5.14 of the Civil Procedure Rules 2002 ('CPR') permitting him to serve a claim form and other documents on the 3rd respondent, the Insurance Company of the West Indies ('ICWI'). Service on ICWI was permitted in lieu of personal service of the claim form on the 1st respondent, Madonna Anastasia Waite ('Ms Waite'), who is the 1st defendant in the court below.

[2] Orders made pursuant to rule 5.14 are referred to in the CPR as orders "for service by specified method". However, these orders are commonly referred to as orders for "substituted service" – the terminology used in the procedural rules that predated the CPR. As the latter expression was used by the parties and in the learned judge's judgment, it is necessary to use both expressions in this judgment.

[3] A detailed examination of the relevant factual and procedural background leading up to the appeal is considered necessary to understand the grounds of appeal and the court's resolution of the arguments presented in relation to them.

The relevant background

[4] The appellant filed a claim form with particulars of claim in the Supreme Court on 2 December 2019, which was subsequently amended on 26 May 2020. Through that claim, the appellant seeks damages for negligence against Ms Waite and the 2nd respondent, William Hutchinson ('Mr Hutchinson'). The claim arises from an alleged motor vehicle collision in Manchester on or about 6 December 2016. Notice of the proceedings was given to ICWI on the same day the claim form was filed. ICWI was Ms Waite's insurer at the time of the alleged collision. ICWI was not named as a party to the claim.

[5] Mr Hutchinson was served with the claim form after it was issued. However, up until at least February 2020, the appellant was unable to locate Ms Waite and therefore could not personally serve the claim on her. This led the appellant to file a without notice application on 5 May 2020.

The without notice application

[6] The without notice application sought three substantive heads of relief: (1) that personal service on Ms Waite of the claim and all supporting and subsequent documents be dispensed with pursuant to rule 5.13(1) and 5.14 of the CPR; (2) permission to effect substituted service of the claim and other documents on ICWI and by publication in the Sunday Gleaner on two consecutive Sundays; and (3) an extension of the validity of the claim form for a period of six months.

[7] On 2 July 2020, the without notice application came before Master Mott Tulloch-Reid (as she then was), who granted the application to extend the validity of the claim form. The validity of the claim form was extended by six months from 31 May 2020 to 1 December 2020. However, the aspects of the application seeking to dispense with personal service and permitting service on ICWI were adjourned.

[8] The without notice application subsequently came before Master Mason on 11 November 2020. Master Mason granted orders dispensing with service and allowing the appellant to serve the claim form on Ms Waite by service on ICWI and/or by publication in the newspaper. Although the application to extend the validity of the claim form had already been disposed of by Master Mott Tulloch-Reid, Master Mason also extended the validity of the claim form for a further period of six months, effective from 4 June 2020 to 3 December 2020. The full text of the orders is necessary:

“1. That personal service on the [1st respondent] of the Claim Form with supporting documents, Particulars of Claim with attachments and all subsequent process and/or applications made to this Honourable Court is dispensed with pursuant to Part 5.13(1) and 5.14(14) of the Civil Procedure Rules, 2002.

2. That the [appellant] is at liberty to effect substituted service of the Claim Form with supporting documents, Particulars of Claim with attachments and all subsequent pleadings and all subsequent processes and/or applications made to the Honourable Court on the [1st respondent] as follows:

I. by service on [ICWI], the insurer of the [1st respondent] at its head office at 2 Saint Lucia Avenue, New Kingston, Kingston 5 in the parish of Saint Andrew; and/or

II. by publication of the Claim Form, Particulars of Claim Form and all subsequent processes by way of Notice of Proceedings published in the Sunday Gleaner newspaper twice on two consecutive Sundays.

III. an Acknowledgement of Service and a Defence must be filed 14 days and 42 days respectively after service on [ICWI] or 14 days and 42 days respectively after the last publication on the Notice of Proceedings published in the Sunday Gleaner Newspaper.

3. The validity of the Claim Form filed on December 2, 2019 is extended for a period of 6 months effective June 4, 2020.

4. Notice of Proceedings must be settled by the Registrar of the Supreme Court.

5. Costs of this Application to be costs in the Claim.

6. The Claimant's attorney-at-law to prepare, file and serve these Orders."

[9] On 17 November 2020, the appellant's attorneys-at-law sent a letter to ICWI ('the service letter'), purporting to serve them with the amended claim form and particulars of claim, along with the prescribed notes to the defendant, acknowledgment of service form, defence form, application to pay by instalments form, and Master Mott-Tulloch Reid's order granting the first extension of the validity of the claim form. A copy of Master Mason's formal order was not attached to the service letter. The letter advised:

"By Order dated November 11, 2020, the Honourable Master P. Mason dispensed with personal service upon your insured, the 1st [respondent], and granted an order for substituted service,

permitting the initiating documents in the instant proceedings to be served upon you on behalf of the 1st [respondent]. In this regard, we are currently in the process of perfecting the Formal Order. Once the Formal Order has been duly executed, you will also be served with the perfected copy.

In accordance with the terms of the said Order, please see enclosed herein the following documents, which are being duly executed on you on behalf of the 1st [respondent]:

1. Amended Claim Form filed on May 26, 2020 with the following documents attached:
 - a) Prescribed Notes for Defendant (Claim Form)
 - b) Acknowledgement of Service to Claim Form
 - c) Form Defence
 - d) Application to Pay by Instalments; and
2. Amended Particulars of Claim (with attachments) filed on May 26, 2020; and
3. Formal Order filed on July 22, 2020.

Please be guided accordingly.”

[10] On 23 December 2020, the appellant filed an affidavit providing proof of service on ICWI in accordance with rule 5.15 of the CPR.

[11] Thereafter, on 21 February 2021, ICWI began making efforts to contact and locate Ms Waite in order to bring the claim form to her attention. However, all its attempts reportedly proved futile.

The set aside application

[12] On 24 February 2022, ICWI filed a notice of application, accompanied by an affidavit in support, seeking to set aside the order for substituted service (‘the set aside application’). The set aside application primarily sought orders for (a) permission for ICWI to intervene in the matter for the purposes of making the application to set aside Master

Mason's order for substituted service; (b) extension of time within which to make the application; (c) setting aside of Master Mason's order granting substituted service; (d) setting aside of the service of the claim with accompanying documents on ICWI; and (e) costs of the application.

[13] By virtue of rule 11.18(1), ICWI was required to make the set aside application within 14 days of service of the court's orders on 16 December 2020. The set aside application was filed almost one year and two months out of time; hence, included in the set-aside application was included an application for an order extending the time within which to make the application.

[14] On 9 September 2022, the appellant and ICWI filed written submissions relative to the application. In its submissions, ICWI identified, as the first issue for the court's determination, "whether the Claim Form had expired when ICWI was served" ('the validity issue'). The validity issue was not expressly mentioned or foreshadowed in any way in the set aside application. Therefore, the validity issue was raised for the first time in ICWI's submissions, and no application was made to amend the notice of application to include this as a ground on which the application was based.

[15] Relying on rule 42.2 of the CPR and the Supreme Court's decision in **Jermaine Edmonds v Owen Marquesse and others** [2020] JMSC Civ 7 ('**Jermaine Edmonds v Owen Marquesse**'), ICWI's position regarding the validity issue was that it was not bound by Master Mason's order until it was served with a sealed copy of the formal order, because it was not represented in the proceedings before Master Mason. Therefore, having not been served with the formal order, ICWI had not been properly served with the claim form and supporting documents. Additionally, the service letter did not effectively serve the claim on ICWI. The validity of the claim form had expired before the formal order was served. As a result, the claim was invalid, and the set aside application could be granted without consideration of its merits.

The proceedings before the learned judge

[16] The learned judge proceeded to consider ICWI's application on 20 September 2022. At the start of the hearing, the appellant's attorneys-at-law raised their concern that the validity issue was not stated as a ground in the set aside application. They sought and obtained an adjournment of the hearing to allow them to file further written submissions specifically responding to that issue. Those submissions were filed on 20 October 2022. Relying on rule 11.13 of the CPR, the appellant's position in his further written submissions was that ICWI should not be allowed to seek "an order" that the claim form was not valid without the permission of the learned judge, which should be refused in this case because of ICWI's delay in making the set aside application and the prejudice which would be caused by hearing the issue.

[17] The matter was again scheduled for hearing before the learned judge on 21 October 2022. However, she postponed the hearing to 28 October 2022 because the appellant's written submissions on the validity issue had not been brought to her attention before the hearing.

The learned judge's decision

[18] On 28 October 2022, the learned judge granted ICWI's application for the substituted service order to be set aside. She orally delivered her reasons for the decision and has not reduced them to writing. Consequently, the appellant filed an agreed transcript of the learned judge's oral reasons for judgment pursuant to rule 2.5(2) of the Court of Appeal Rules 2002 ('CAR'). For convenience, the agreed transcript of the reasons for the decision is referred to in this judgment as 'the judgment'.

[19] The judgment reveals that the learned judge treated the validity issue as a preliminary issue and ruled that she would hear the submissions on it. She opined that the validity issue was an important issue to be resolved because if the claim form was invalid, any subsequent action based on it would fail, rendering the set aside application

unnecessary. In this context, she concluded that it was both necessary and expedient to address and determine the validity issue.

[20] Having so ruled, the learned judge considered and accepted ICWI's submissions on the issue. She determined that the date on which the validity of the claim form expired was 1 December 2020, in keeping with Master Mott-Tulloch Reid's order. She made this finding on the basis that Master Mason's order, extending the validity of the claim form, was an oversight and ought not to have been made. This aspect of the learned judge's ruling is not the subject of appeal, and so nothing more needs to be said about it. The learned judge then agreed with ICWI's argument that the service letter did not constitute valid service of the claim form on ICWI on 17 November 2020 because Master Mason's formal order, granting permission to serve ICWI, was not attached to the service letter. Therefore, the claim form had not been validly served before it expired on 1 December 2020.

[21] Given her conclusion on the validity issue, the learned judge did not consider the merits of the set aside application on the basis that it was unnecessary to do so. Consequently, she made the following orders:

- "1. Application to set aside the order for substituted service as amended is granted on the basis that at the time it was served the claim form had expired.
2. Half-costs to the applicant to be taxed if not agreed.
3. Leave is granted to appeal.
4. Applicant's attorney at law to prepare, serve and file the order herein."

The appeal

[22] The appellant was dissatisfied with the learned judge's decision and filed this procedural appeal, with the leave of the learned judge. The amended notice of appeal

filed on 23 May 2023 advances six grounds of appeal, challenging one finding of fact and several findings of law regarding the learned judge's decision on the issues pertaining to the service and validity of the claim form.

[23] The grounds of appeal are found to raise three broad issues for this court's determination, which are:

- (1) whether the learned judge wrongly exercised her discretion to consider and rule on the validity issue, notwithstanding that it was not foreshadowed in the set aside application (ground 1);
- (2) whether the learned judge erred in granting the set aside application on the basis that the claim form was invalid as it had not been served before it expired (grounds 2, 3, 4 and 5); and
- (3) whether the learned judge erred in awarding ICWI half the costs of the set aside application (ground 6).

Procedural issues arising in the court below

[24] Of critical note is that, although the learned judge entertained submissions by ICWI on the validity issue, she did not expressly consider or grant any order permitting ICWI to intervene in the proceedings for the purpose of making the set aside application, or extending the time for the application to be made. This has not escaped the attention of this court because, as a matter of law, ICWI could only have been properly granted an order setting aside the service of the claim form by first obtaining permission to intervene in the proceedings to which it was not a party and to bring the application out of time. Therefore, the learned judge would have been required to make an order to that end before ruling on ICWI's submissions on the validity issue.

[25] The learned judge's failure to make an order to this end is not the subject of a ground of appeal or any argument by the parties. However, from the record of the proceedings and the orders made, it is implicit that the learned judge accepted ICWI's

standing to make the set aside application and raise the validity issue, and permitted it to intervene in the proceedings to that end. She heard and considered the validity issue despite ICWI being out of time with the application, and no order granting an extension of time was explicitly made. Given that the parties have not challenged the learned judge's failure to expressly permit ICWI's intervention, nor her implied acceptance of ICWI's standing to make the set aside application and raise the validity issue, even though it was out of time, and considering the importance of the questions raised on the appeal to the administration of justice, it is in the interests of justice for this court to treat ICWI as a proper party to the proceedings below and on appeal. I would, therefore, pursuant to the court's power under rule 2.14(b)(b) of the CAR, to make an order permitting ICWI to intervene in the proceedings and for the extension of time to do so, as orders which the court below should have granted based on the course of proceedings before it.

The standard of review

[26] Before analysing the issues arising from the grounds of appeal, it must be noted that the learned judge's decision to consider and rule on the validity issue, and to order half-costs to ICWI, were matters within her discretion under the applicable law. Therefore, this court must evaluate the grounds of appeal and arguments related to them under issues (1) and (3), in accordance with the established principles for reviewing and interfering with a lower court's exercise of discretion. These principles are outlined in the well-known case of **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor Productions**') and this court's decision in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 ('**AG v MacKay**'). In summary, as stated in **AG v MacKay** at para. [20], the Court of Appeal should not interfere with a lower court's exercise of discretion unless 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’.”

[27] In contrast, no question of discretion arises under issue (2), as the basis for the learned judge’s decision to grant the set aside application on the preliminary issue involved purely a question of law as to whether the claim form was invalid at the time it was served on ICWI on 17 November 2020. Therefore, this court must simply determine whether her conclusion was correct as a matter of law.

[28] It is with the relevant standard of review in mind that the issues raised in the appeal have been determined, commencing with issue (1).

Issue (1) – whether the learned judge wrongly exercised her discretion to consider and rule on the validity issue notwithstanding that it was not foreshadowed in the set aside application (ground 1)

[29] In deciding whether to consider the validity issue, the learned judge referred to the overriding objective and rule 11.12(4) of the CPR, which, she opined, confer on the court extensive powers to be exercised over the management of proceedings. The learned judge stated that the central question was “whether the [appellant] would be unduly prejudice[d]” if the court were to consider the validity issue. She found that the appellant did not appear to be prejudiced. She noted that the appellant was permitted to file written submissions and had not referred to any prejudice in the hearing of the application.

[30] The appellant’s position is that the learned judge wrongly exercised her discretion in considering and ruling on the validity issue. The appellant argues that the learned judge was incorrect to find there was no prejudice to him, especially when it was prejudicial to the progress of his case and his interests in it. The appellant also complains that the set aside application was out of time, and ICWI provided no substantive reasons for its delay in making this application.

[31] Additionally, the validity issue was an entirely new “order” being sought in ICWI’s written submissions, which was not foreshadowed in the set aside application. This was done without the learned judge’s permission, as required by rule 11.13. Notwithstanding the opportunity given to the appellant to file submissions on the issue, the obligation on ICWI was to apply for permission to amend its application and to afford the appellant an opportunity to present evidence regarding the new issue, if the issue was to be fairly pursued. ICWI had failed to follow the appropriate course. Furthermore, the learned judge failed to consider that consideration of the validity issue would have placed a disproportionate burden on the appellant in circumstances where the appellant acted in compliance with the terms of Master Mason’s order and legitimately presumed that service was validly effected since then.

[32] In reply, ICWI contends that the learned judge correctly exercised her discretion in keeping with the overriding objective by considering the validity issue. The learned judge properly addressed her mind to the relevant considerations, including the timing of the application, the time given to the appellant to file further submissions, and the issue of prejudice. ICWI further submits that any prejudice suffered by the appellant was addressed by the learned judge’s decision to award ICWI half costs. Lastly, ICWI states that the appellant’s claim was not statute-barred when the learned judge made her decision; therefore, he was able to, and, as a matter of fact, did subsequently file a new claim against Ms Waite.

Analysis and conclusion on issue (1)

[33] Given the appellant’s invocation of rule 11.13 of the CPR as a basis for impugning the learned judge’s decision to consider the validity issue, it is necessary to briefly examine the procedural rules and case law which constitute the relevant legal framework for assessing the learned judge’s decision to consider the validity issue.

(i) The legal framework for assessing the learned judge’s decision

[34] The required contents of a notice of application for court orders are outlined in Part 11 of the CPR. Specifically, rule 11.6 provides that an application must be in writing but can be made orally if doing so is permitted by a rule or practice direction or if the court dispenses with the requirement for the application to be in writing. Rule 11.7 of the CPR prescribes what an application must include. Rule 11.7(1) states:

“What application must include

11.7 (1) An application must state-

- (a) what order the applicant is seeking;
- (b) briefly, the grounds on which the applicant is seeking the order; and
- (c) the applicant’s estimate of the likely length of hearing.”

[35] Rule 11.13, is headed **“Consequence of not asking for order in application”** and provides that “[a]n applicant may not ask at any hearing for an order which was not sought in the application unless the court gives permission”. The effect of the rule is that an applicant in interlocutory proceedings must specify, in its notice of application for court orders, all the orders being sought on the application. If an order sought is not included in the notice of application, the applicant cannot request the court to make that order unless the court grants permission. Therefore, there is no absolute prohibition against an applicant seeking an order not listed in the notice of application. However, the applicant’s ability to do so depends on the court’s permission.

[36] Having considered ICWI’s written submissions before the learned judge, it does not appear to me that ICWI was seeking an “order” not contained in the notice of application by advancing arguments in support of the validity issue. There is nothing before this court to suggest, for example, that ICWI sought any declarations that the claim form was invalid or an order striking out the claim form on that basis. The validity issue did not change the orders sought in the set aside application.

Instead, the arguments advanced on the validity issue were in the nature of a preliminary issue upon which the court could set aside Master Mason's order for substituted service. The learned judge evidently treated the validity issue as such, given that she granted the set aside application on the basis that she accepted ICWI's arguments on the validity issue, without having any regard to the arguments advanced in relation to the merits of the set aside application.

[37] Therefore, the appellant's reliance on rule 11.13 is misplaced as it is not relevant to this court's evaluation of the learned judge's decision. The court must look elsewhere to determine the appropriate rules and principles to be applied in determining whether the learned judge erred in considering the validity issue.

[38] The CPR does not specifically address how a party is to raise a preliminary issue, or any specific matters the court is to take into consideration when determining whether to entertain such an issue. The court's general powers of case management under Parts 25 and 26 of the CPR are, therefore, instructive. Those powers are exercisable by the court in applications brought under Part 11 (such as the proceedings before the learned judge) by virtue of rule 11.12(4). This rule provides that the court may exercise any power which it might exercise at a case management conference in relation to the conduct of applications.

[39] Under Parts 25 and 26, the court is vested with a plethora of case management powers. The powers include deciding which issues need full investigation and trial and accordingly disposing of others summarily (rule 25.1(c)); deciding the order in which issues are to be resolved (rule 25.1(d) and 26.1(2)(f)); and, taking "any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective" except where the rules provide otherwise (rule 26.1(2)(v)).

[40] In **GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd and others** [2000] 2 All ER 931, the England and Wales Court of Appeal took the view that the power

to determine that an issue be treated as a preliminary issue is to be exercised having regard to the overriding objective of the civil procedure rules in that jurisdiction, to deal with cases justly, including by saving expense and dealing with cases proportionately, expeditiously and fairly. Given the wording of Parts 25 and 26, and the overriding objective under rule 1.1 of the CPR, I am confident that the same approach applies in this jurisdiction.

[41] From the language of the rules and the applicability of the overriding objective, it is clear that the decision to entertain a preliminary issue is entirely discretionary. Therefore, this court should only interfere with it if satisfied that the learned judge was wrong in the sense described by **Hadmor Productions** and **AG v MacKay**. Against that background, the question to be answered is whether the learned judge was correct to exercise her discretion, in keeping with the overriding objective, to consider and rule on the validity issue in the circumstances of this case.

(ii) Application of the law to the facts

[42] When the critical aspects of the learned judge's judgment are considered against the background of the relevant procedural rules, it cannot be said that the learned judge wrongly exercised her discretion to consider and rule on the validity issue.

[43] In exercising her discretion, the learned judge correctly recognised that the validity of the claim form was a critical issue which, when raised, required investigation. She was correct to identify the validity issue as one of crucial importance because failing to serve a claim within the time limit specified by the CPR for service (or any court orders extending the time for service) would have rendered the claim form invalid. Accordingly, the proceedings and any step taken in pursuance of the claim would have been null and void. This would be the inevitable result, as a matter of law, regardless of the time at which the objection as to the validity of a claim form was made, because a nullity, unlike an irregularity, cannot be waived (see **The Gniezno; Owners of the Motor Vessel Popi v Owners of Steamship or Vessel Gniezno** [1967] 2 All ER 738). That fact alone

would have constituted a sufficient basis to grant an extension of time for the application to be made and to set aside the substituted service order (see **Rayan Hunter v Shantell Richards and another** [2020] JMCA Civ 17 ('**Rayan Hunter**') at para. [46]).

[44] It follows that once a complaint was raised that the claim form was invalid, the learned judge was required to investigate it. This course was required by the overriding objective under rule 1.1 of the CPR to prevent the parties from incurring any future expenses if the claim form had, in fact, expired and the proceedings were a nullity.

[45] Given that the outcome of the validity issue could have determined the court's jurisdiction to entertain the claim, it was irrelevant to the learned judge's decision to consider the argument that it was raised belatedly in the proceedings and was not mentioned in the set aside application. It was also irrelevant to her decision that a determination in ICWI's favour would have been prejudicial to the appellant.

[46] Against this background, the learned judge cannot be said to have improperly exercised her discretion to consider the validity issue. The learned judge correctly exercised her case management powers pursuant to rules 25.1(c) to determine that the validity issue required full investigation and to determine it as a preliminary issue pursuant to rules 25.1(d) and 26.1(2)(f).

[47] Having decided to entertain the arguments of ICWI on the validity issue, it was for the learned judge to ensure that the appellant was not prejudiced in the hearing of the issue. This is a matter which the learned judge expressly considered. In doing so, the learned judge formed the view that no prejudice arose on the appellant's part in the hearing of the application. I agree with the learned judge's ruling on this matter for reasons that will now be outlined.

[48] ICWI's intention to pursue the validity issue was signalled by its inclusion in the written submissions filed in support of the set aside application. The appellant, therefore, had notice that the validity issue would have been pursued before the learned judge.

After the appellant complained that the issue had not been foreshadowed in ICWI's notice of application, the learned judge afforded the appellant an opportunity to make submissions in writing to mitigate any prejudice that might have arisen from her decision to consider the validity issue. Given the importance of the validity issue, this was a necessary step the learned judge was entitled to take by virtue of rule 26.1(2)(v) of the CPR toward safeguarding the fairness of the proceedings, managing the case and furthering the overriding objective.

[49] The appellant took full advantage of the opportunity granted by the learned judge by filing further written submissions on 20 October 2022. According to the judgment, counsel for the appellant "confirmed that the additional submissions were succinct and in keeping with the previous oral submissions for the most part". The learned judge expressly indicated that she made her "best efforts" to take into account the information provided in the further submissions, and there is no complaint that she did not take them into account.

[50] Moreover, there is no indication that the appellant ever made an application to the learned judge to file evidence in opposition to the validity issue. Neither is there any indication in the appellant's written submissions, filed in response to the validity issue, that the appellant was desirous of filing evidence in response. Furthermore, the appellant has not indicated what evidence he wished to but did not have the opportunity to present, and there is no fresh evidence application before this court seeking to admit any such evidence. Therefore, the complaint that the learned judge failed to properly exercise her discretion, having regard to the prejudice to the appellant, must be rejected.

[51] I conclude that, for all the foregoing reasons, the learned judge's decision to consider and rule on the validity issue, before the other issues on the set aside application, was not an improper exercise of her discretion. Therefore, having been guided by the standard which this court is required to apply in reviewing the exercise of the learned judge's discretion, and having paid due regard to the relevant rules of procedure which

regulate the application before the learned judge, I am satisfied that the learned judge's decision to permit argument on the validity issue cannot be disturbed.

[52] The appeal accordingly fails on issue (1).

[53] The issue of greater importance is the learned judge's decision on the validity issue and her ultimate treatment of the application to set aside the substituted service, having permitted the arguments to be advanced without prior notice of the ground in the notice of application. The learned judge's acceptance of ICWI's submissions on the validity issue was the fulcrum of her decision to grant the set aside application and is the subject of consideration under issue (2), which is discussed immediately below.

Issue (2) – whether the learned judge erred in granting the set aside application on the basis that the claim form was invalid as it had not been served before it expired (grounds 2, 3, 4 and 5)

[54] Based on ICWI's submission on the validity issue, the question identified for resolution by the learned judge was "whether service was effected by having the letter served giving notice of the order of Master Mason attached with the claim form and particulars served with the formal order of July 2, 2020 extending the validity of the claim form on November 17, 2020". The learned judge accepted ICWI's position and reasoned that the failure to serve the formal order permitting substituted service rendered the attempt to serve ICWI with the claim, by sending the service letter on 17 November 2020, ineffective. The learned judge stated:

"It is admitted that the perfected formal order in relation to the November 11, 2020 hearing was not served until after the Claim Form expired and in my view the notification of the order was not sufficient. Having considered that the validity of the claim form expired on December 1, 2020, and the order was served on December 16, 2020, there is no need to consider the order made by Master Mason as the claim ceased to be valid."

The appellant's submissions

[55] The appellant contends that the learned judge was wrong to grant the set aside application on the basis that the claim form had expired before it was validly served. The appellant challenges the basis of the learned judge's decision and contends that she erred when she concluded that sending the service letter to ICWI on 17 November 2020 did not validly serve the claim form on ICWI. The appellant complied with the requirements for service by a specified method on ICWI, including providing an affidavit outlining that the claim form was served on ICWI's registered office in accordance with rules 5.7, 5.13, 5.14 and 5.15 of the CPR. Those rules, respectively, provide for service on a limited liability company, alternative methods of service, service by a specified method, and proof of service by a specified method.

[56] Additionally, the appellant maintains that Master Mason's order permitting service on ICWI was not contingent on the concurrent service of the formal order. Relying on rule 42.8 of the CPR, the appellant maintains that a judgment or order takes effect from the day that it is given or made. The order of Master Mason took effect when it was made on 11 November 2020, and as such, there was no requirement to serve a formal order to give the master's orders judicial force.

[57] The appellant also argues, in the alternative, that if there is a requirement in law to serve the formal order, the lengthy period of time that it takes for formal orders to be perfected would have effectually caused the appellant to suffer prejudice if he had waited on the formal order to serve along with the claim form and other documents. In any event, the contents of Master Mason's order were provided to ICWI in the service letter. ICWI was, therefore, put on notice that the formal order would have been forthcoming.

[58] Additionally, the appellant complains that the learned judge erred in making her decision to set aside the substituted service as she did not indicate any consideration in her reasoning to the prejudice occasioned to the appellant, as the appellant had acted in

compliance with the orders of Master Mason and was of the view that service had been effected.

ICWI's submissions

[59] ICWI contends that the learned judge exercised her discretion judicially in granting the set aside application, because service of the claim form without the formal order was improper and in contravention of the CPR. ICWI submits that the without notice application was heard in its absence, notwithstanding that its rights were affected by the application and the subsequent orders. That being the case, the appellant was required to serve the without notice application and evidence in support on ICWI pursuant to rule 11.15 of the CPR and to endorse Master Mason's order with a statement informing ICWI of its right to make an application to set aside or vary the order, pursuant to rule 11.16. The appellant failed to do so.

[60] ICWI also submits that the contents of the service letter could not replace or serve as a substitute for the formal order, and therefore, its delivery ought not to be considered effective service of the claim form. Furthermore, the contents of the service letter lacked the relevant details concerning the filing of an acknowledgement of service and or defence if the claim form was brought to the attention of Ms Waite. By omitting critical information, the letter was inadequate to properly convey the court's order and should not have been considered as effective service of the claim form before its validity had expired.

[61] Moreover, relying on rule 42.2 of the CPR, ICWI submits that an order made in the absence of a party cannot bind that party until the party is properly notified of the court's order. Therefore, if a party is absent when an order is made, that party cannot be bound unless it had been served with the order of the court. Such an order must be prepared, filed and sealed and must comply with the requirements of rule 42.4 of the CPR before it is served. If those formalities had not been complied with, the order cannot be enforced.

[62] ICWI further maintains that Master Mason's order required that the formal order should have been properly prepared, filed and served together with the claim form. There was also a breach of rule 42.12 of the CPR, which enables the court to direct that a copy of a judgment or order be served on any person who is not a party to the claim. Additionally, Master Mason's order also extended the life of the claim form. Therefore, it should have been served along with the claim form pursuant to rule 8.15 of the CPR. In any event, service of the claim form, without the formal order, was improper and in contravention of the CPR. Having found that the claim form had expired before it was served on ICWI, the learned judge was correct to conclude that it was unnecessary to make any subsequent orders relating to the proceedings against Ms Waite. For all those reasons, ICWI submits that the learned judge exercised her discretion judicially.

Analysis and conclusions

[63] As previously stated, the appeal on this issue raises a question of law, which is whether the delivery of the service letter, without a copy of Master Mason's formal order, constituted effective service of the claim form on ICWI. The learned judge's reasoning clearly demonstrates her view that the failure to serve Master Mason's order with the claim form automatically rendered the service of the claim invalid. The approach to analysing this issue necessarily entails an examination of the relevant rules of procedure and case law surrounding the issue of service, to determine whether the learned judge's decision is correct in law.

[64] Two sub-issues must be resolved in order to evaluate the correctness of the learned judge's conclusion: (i) whether there was a requirement to serve the formal order along with the claim form; and (ii) if such a requirement existed, whether the service of the claim form on ICWI was invalid because the formal order was not served with it.

Sub-issue (i) – whether there was a requirement for service of the formal order along with the claim form

[65] The consideration of this sub-issue is critically important. If there was no requirement in law for service of the formal order along with the claim form, that would be a sufficient basis to find that the learned judge was wrong to conclude that the claim form was not validly served and its validity had expired.

[66] Contrary to ICWI's submissions, there is nothing in Master Mason's order to suggest that the validity of service on ICWI was conditional upon the service of the formal order. Therefore, there is no merit in ICWI's assertion that the terms of Master Mason's order could support the learned judge's conclusion. The appropriate starting point, therefore, must be to assess the relevant procedural rules to determine whether such an obligation to serve the formal order with the claim form existed.

[67] Rule 8.16 of the CPR sets out the documents required to be served with a claim form. The text of the rule is as follows:

"Defence form etc., must be served with claim form

8.16 (1) When a claim form is served on a defendant, it must be accompanied by -

- (a) a form of acknowledgment of service (form 3 or 4);
- (b) a form of defence (form 5);
- (c) the prescribed notes for defendants (form 1A or 2A);
- (d) a copy of any order made under rules 8.2 or 8.13; and,
- (e) if the claim is for money and the defendant is an individual, a form of application to pay by instalments (form 6);

(2) There must be inserted on each form -

- (a) the address of the registry to which the defendant is to return the forms;
- (b) the title of the claim; and
- (c) the reference number of the claim.

(3) Where there is a standard defence form appropriate to the particular case set out in a practice direction, the form sent to the defendant must be in a standard form of that type.”

[68] As can be observed from the above text, rules 8.16(a), (b), (c) and (e) expressly prescribe standard forms that must be served with the claim form, while rule 8.16(1)(d) refers to “a copy of any order made under rules 8.2 and 8.13”. An in-depth consideration of rules 8.2 and 8.13 is, accordingly, required.

[69] Under rule 8.2, the court is empowered to make orders permitting a claim to be issued and served without the particulars of claim, an affidavit, or any other supporting document giving details of the claim. No such order was made in this case. Therefore, rule 8.2 is irrelevant, and there would have been no need in this case for the appellant to serve any order made under that rule.

[70] Rule 8.13 provides:

“Service of claim form

8.13 After the claim form has been issued, it may be served on the defendant in accordance with Part 5 (service of the claim form) or Part 7 (service outside the jurisdiction).”

It is evident that Master Mason’s order permitting service of the claim on ICWI was made pursuant to rule 5.14 and was, accordingly, an order for the claim form to be “served on the defendant in accordance with Part 5”. Master Mason’s order was an order made under rule 8.13. Accordingly, by virtue of rule 8.16(1)(d), the appellant was required to serve Master Mason’s order along with the claim form.

[71] Rule 8.16(1)(d) does not provide the only basis for concluding that the appellant was required to serve Master Mason's order along with the claim form. Rule 8.15(5)(b) provides that "a sealed copy" of any order extending the validity of the claim form "must be served with the claim form". Master Mason's order purported to extend the life of the claim form. Therefore, rule 8.15(5)(b) also required the order to be served along with the claim form.

[72] The foregoing examination of the rules has led to the indisputable conclusion that the formal order was required to be served with the claim form. It is established, also beyond dispute, that the formal order was not attached to the service letter and served with the claim form. As such, there was a breach of both rules 8.15(5)(b) and 8.16(1)(d). Sub-issue (i) is, therefore, answered in the affirmative in favour of ICWI. However, the pertinent question that now follows for consideration, under sub-issue (ii), is whether the failure to serve Master Mason's order with the claim form rendered the service of the claim form invalid.

Sub-issue (ii): whether the service of the claim form on ICWI was invalid because the formal order was not served with it

[73] Having considered the relevant rules of procedure, I am of the view that there is no basis in law to conclude that the service of the claim form on ICWI was invalid because the formal order was not served with it. The reasons for my conclusion will now be given.

(a) The applicability and impact of rule 26.9

[74] Firstly, the CPR does not specifically provide any consequences or sanctions for non-compliance with rules 8.15(5)(b) and 8.16(1)(d). Therefore, it is for the court to determine the impact of the non-compliance within the framework of the court's case management powers under the CPR (see, generally, **Bupa Insurance Limited v Roger Hunter** [2017] JMCA Civ 3 ('**Bupa Insurance**') and **Apple Inc v Swatch AG (Swatch SA) Swatch Ltd** [2019] JMCA Civ 29 ('**Apple Inc**'). Of immediate relevance is that the

court has the power under rule 26.9 to excuse procedural errors and rectify matters in certain circumstances. That rule provides:

“General power of the court to rectify matters where there has been a procedural error

26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party.”

[75] As this court stated in **Bupa Insurance** (at paras. [55] – [59]) and **Apple Inc** (at paras. [41] and [42]), the effect of rule 26.9 is that non-compliance with a rule, practice direction or order will not invalidate steps taken in proceedings unless the rule, practice direction or order says that it does, or unless the court so orders. Once the consequence for non-compliance with a rule, practice direction or court order is not stated, the court should determine the impact of the non-compliance and consider whether to exercise its discretion to rectify the error, and “put matters right”. The court’s discretion under rule 26.9 is wide and should be exercised in keeping with the overriding objective of the CPR to deal with cases justly. However, it cannot be exercised where the consequence of the error is specified by a rule, practice direction or court order. Lastly, whether the court should exercise its discretion to rectify a procedural error is a question for the court to determine in all the circumstances of the case.

[76] When rule 26.9 of the CPR is applied to the circumstances of this case, the impact is that the failure to serve Master Mason's formal order along with the claim form, in breach of rules 8.15(5)(b) and 8.16(1)(d), did not automatically invalidate service of the claim on ICWI.

[77] No court had ordered or declared that the service on ICWI was invalid before the claim form expired in December 2020. Indeed, no question of the invalidity of the service of the claim arose prior to ICWI's written submissions in support of the set aside application. The learned judge's orders on the set aside application had the effect of invalidating the service of the claim form, but those orders were not made until long after the claim form would have expired and ICWI would have been served with both the claim form and formal order. Rule 26.9(2), accordingly, preserved the validity of the service of the claim form on ICWI, notwithstanding that the formal order was not served along with the claim form. Therefore, the claim form remained validly served up until the date the learned judge made her orders granting the set aside application.

[78] It follows that the learned judge would have erred in law when she reasoned that the failure to serve Master Mason's order, along with the claim form, rendered the service of the claim on ICWI automatically invalid. It stands to reason that the learned judge would have also erred in concluding that the claim form had not been validly served on 17 November 2020 when the claim form and other documents were delivered to ICWI. This is simply because the non-service of the formal order with the claim form did not invalidate the service of the claim on ICWI, which was a step taken in the proceedings, in keeping with rule 26.9(2), and at the time of the service, the claim form had not yet expired.

[79] ICWI has drawn attention to rules 11.15, 11.16(3) and 42.12 of the CPR and highlighted that these rules were also breached by the appellant in the court below. Rule 11.5 provides that after the court has disposed of an application made without notice, the applicant must serve a copy of the application and evidence in support on all other

parties. Rule 11.16(3), for its part, provides that an order made on a without notice application must contain a statement telling the respondent to the application of the right to make an application to set aside or vary the without notice application. Finally, rule 42.12 makes provision for service of judgments and orders on a person who is not a party to the claim. ICWI's assertion that there were breaches of these rules does not advance its position on the validity issue or its defence of the learned judge's judgment. Like rules 8.15(5)(b) and 8.16(1)(d), none of these rules provide, as a sanction for breaching them, that service of a claim or any other step taken thereafter is necessarily invalidated. Therefore, rule 26.9(2) would have also applied with equal force to the breaches of these rules relied on by ICWI. In effect, this means that none of those breaches would have invalidated the service of the claim as a step taken in the proceedings without a prior order from a judge to that effect, before the formal order was served, and ICWI proceeded to act on it.

(b) ICWI's conduct after being served

[80] Secondly, in keeping with the authorities from this court, the breach of rules 8.15(5)(b) and 8.16(1)(d) of the CPR, at best, rendered the service on ICWI procedurally irregular and liable to be set aside in the event the irregularity was not waived (see, for example, **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2 and **Rayan Hunter**).

[81] Whether a procedural irregularity has been waived is essentially a question of the parties' conduct in treating with the irregularity. If a party, by its conduct, disregards the irregularity or fails to object to the irregularity within a reasonable time, there may be a basis to suggest that the procedural irregularity has been waived (see, generally, **Rayan Hunter** and, by analogy, **Hoddinott v Persimmon Homes (Wessex) Ltd** [2007] EWCA Civ 1203).

[82] In this case, ICWI acted upon the service of the claim by taking steps to contact and locate Ms Waite in February and March 2021, but took no steps to have the service

set aside until it filed the set aside application in February 2022. ICWI acted consistently with the irregularly served claim and did not take any steps to object to the service before the period for the service of the claim had expired or within a reasonable time. On any view, the conclusion is ineluctable that ICWI, by its conduct, would have waived any entitlement it had to object to the irregularity in service of the claim form.

[83] Accordingly, even if the learned judge were minded to invalidate the service because rules 8.15(5)(b) and 8.16(1)(d) were breached, she would have had no proper basis upon which to do so, given ICWI's conduct, which amounted to a waiver of the irregularity in service.

[84] In any event, the claim form would have been validly served before its validity had expired by operation of rule 26.9 of the CPR because at the time it was served, ICWI had not received a court order invalidating the service that was in contravention of the CPR. The claim form was, therefore, valid when it was served on ICWI.

(c) The applicability and impact of rules 42.2 and 42.8 of the CPR

[85] ICWI has relied on rule 42.2 of the CPR in support of the learned judge's conclusion. However, a close examination of the rule, along with rule 42.8, reveals that the rule does not assist ICWI's defence of the learned judge's decision.

[86] Rule 42.2 states that "a party who is present whether in person or by attorney-at-law when the judgment given or order was made is bound by the terms of a judgment or order whether or not the judgment or order is served". Rule 42.2 has not been the subject of any significant judicial discussion in this or other jurisdictions. There appears to have been limited discussion of the rule, in different contexts, for example, by Brooks JA (as he then was) in **Cole's Farm Store Ltd v China Motors Ltd** [2012] JMCA App 8 ('**Cole's Farm Store Ltd**'); F Williams J (Ag) (as he then was) in **R v The Commissioner of the Taxpayers Audit and Assessment Department/Commissioner of Inland Revenue, Ex Parte Andrew Willis**, (unreported), Supreme Court, Jamaica, Claim No 2006HCV5719, judgment delivered 29

January 2009; Wint-Blair J in **Marlyn Daniel and another v Webster Grant and another** [2023] JMCC Comm 20; and Wallbank J (Ag) in **Renova Industries Ltd v Emmerson International Corporation**, (unreported), Eastern Caribbean Supreme Court (High Court), British Virgin Islands, BVIHCM2013/00160, judgment delivered 27 July 2020.

[87] Notwithstanding the apparent paucity of binding or persuasive precedent interpreting the rule, its meaning and impact are evident from its words. The rule prescribes the point in time at which a party is bound by a judgment or order of the court. If a party is present or represented by an attorney when a judgment is given or order made, the party is bound by the terms of the order immediately, regardless of whether or not the judgment or order is served on the party. Conversely, therefore, when a judgment is given or an order is made in the absence of a party or its attorney, the absent party is not bound by the terms of the order until the judgment or order is served on them.

[88] When rule 42.2 of the CPR is applied to the circumstances of this case, its effect is two-fold: first, as it relates to the appellant and secondly, as it relates to ICWI. Regarding the first effect, the appellant, who sought and received the permission for a specified method of service, was bound to serve Ms Waite either by service on ICWI and/or by publication in the newspaper, within the scope of the permission granted by the order. The appellant was bound by its terms to proceed to effect service, having been represented by counsel in the without notice proceedings before Master Mason. In accordance with the clear wording of rule 42.2 of the CPR, the appellant's power to serve ICWI or advertise in the newspaper, was not contingent upon any factor other than his or his attorneys' presence in court when the order was made.

[89] The second operation of rule 42.2, as it relates to ICWI, meant that because ICWI was not present or represented by an attorney at the without notice hearing before Master Mason, it was not bound to act or do anything pursuant to Master Mason's order

until it was served with the order. Therefore, any obligations on ICWI to make attempts to locate Ms Waite for the claim to be brought to her attention and for her to file an acknowledgement of service would not have arisen until 16 December 2020, when ICWI was served with the order. This, however, does not have any bearing on the appellant's lawful authority pursuant to the order to serve the claim form on ICWI, which was done, or to advertise in the newspaper.

[90] The upshot of the foregoing is that rule 42.2 of the CPR has no impact on the propriety of the steps taken by the appellant to serve ICWI with the claim form, pursuant to the order, because he was empowered to do so. Therefore, rule 42.2 could not have formed any basis for ICWI's submission and the learned judge's conclusion that the appellant's service of the claim form on ICWI without a copy of Master Mason's formal order was ineffective.

[91] My conclusion on the impact of rule 42.2 of the CPR is bolstered by rule 42.8, which was relied on by the appellant before both the learned judge and this court. Rule 42.8 provides that "[a] judgment or order takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date". Rule 42.8 embodies the long-established principle that a judgment or order, when pronounced orally, is effective on the date it is pronounced and is binding and capable of enforcement even though it had not been memorialised in a perfected formal order (see **Preston Banking Co v Allsup** [1895] 1 Ch 1441, **Re Harrison's Share Under a Settlement** [1955] 1 All ER 185 ('**Re Harrison's Share**') and **Re Barrell Enterprises** [1973] 1 WLR 19).

[92] Brooks JA, sitting as a single judge in chambers in **Cole's Farm Store Ltd**, relied on **Re Harrison's Share** and explained the impact of this principle in the context of Part 42 of the CPR. The learned judge of appeal said:

"The CPR does not provide a penalty for failing to draw up and to file a judgment or order for perfecting. The only provision in that regard is rule 42.5(3), which allows another party to have the order perfected and served in the event that the party, bearing

the primary obligation to do so, fails or refuses so to do. **The judgment remains a judgment of the court despite the fact that it has not been perfected. It is effective from the date on which it is pronounced, although the court may amend it at any time before it is perfected.**" (Emphasis added)

[93] The effect of rule 42.8 in this case is identical to that of rule 42.2. It is that Master Mason's order giving permission to serve ICWI was effective at the time it was pronounced, notwithstanding that the order had not been perfected. Therefore, the appellant was imbued with the lawful authority to serve the claim form on ICWI in accordance with the terms of the order at the moment Master Mason granted permission to do so. The power to serve ICWI in accordance with the terms of the order was not contingent upon service of the formal order upon ICWI. In other words, the permission granted by the court for the appellant to serve ICWI was not activated on the date on which the formal order was served on ICWI, or even on the date it was signed, but on the date the permission was granted.

[94] The logical consequence is that the appellant's delivery of the claim form and its attachments to ICWI was not invalidated by the fact that Master Mason's formal order was not attached to the service letter. Furthermore, ICWI's submission that Master Mason's order had not been sealed and perfected, and was therefore unenforceable, is inconsequential and does not advance the appeal.

[95] Accordingly, the learned judge would have erred in law by relying on rule 42.2 of the CPR to hold that service of the claim form was invalid because the formal order was not served with the claim form, or at any time before the claim form would have expired.

*(d) The case of **Jermaine Edmonds v Owen Marquesse***

[96] For completeness, it is noted that ICWI relied on the case of **Jermaine Edmonds v Owen Marquesse** both before the learned judge and before this court. However, the case does not support ICWI's submission and the learned judge's conclusion. In that case, the claimant sought an order pursuant to rule 5.13 of the CPR to deem the service

of a notice of proceedings on the defendants' insurance company sufficient to enable the defendants to ascertain the contents of the claim form. Therefore, the claimants in that case, had only served the notice of proceedings on the insurance company without the claim form. The issues considered by the court were, therefore, completely different from those under consideration by the learned judge and this court. The case, therefore, does not provide any proper basis for the learned judge's decision.

Conclusion on issue (2)

[97] In conclusion, the learned judge erred in law in finding that the claim form was not served before it had expired. Service of the claim form and other documents by way of the service letter on 17 November 2020, without a copy of Master Mason's formal order attached, was, at most, an error in procedure in breach of rule 8.16(1)(d). However, because no sanction is prescribed by the CPR, a practice direction or court order for non-compliance with that rule, rule 26.9 of the CPR becomes applicable. Under rule 26.9(2), the service of the claim form on ICWI before it had expired (as a step taken in the proceedings) was effective and was not invalidated by the failure to serve the formal order with it, unless a judge so ordered. A judge did not so order, as ICWI took no steps to invalidate the service during the life of the claim form or before the formal order was received. Therefore, the service would have remained valid pending the appellant's rectification of the failure to serve the formal order. Upon the service of that order, ICWI started to take steps to bring the claim to the attention of Ms Waite. Therefore, any irregularity in service would have been waived by then, as no step was taken by ICWI to have the service without the formal order invalidated by a judge.

[98] The learned judge's decision on the validity issue was the basis of her decision to grant the set aside application. That was not a correct basis upon which to grant the application. Therefore, the appellant succeeds in his challenge to the learned judge's decision in this regard, and, so, the appeal succeeds on issue (2).

The resolution of the set aside application

[99] This, however, is not the end of the matter. In his notice of appeal, the appellant has requested that this court make the orders the learned judge ought to have made and dismiss the set aside application with costs. Then, rule 2.14(b)(b) of the CAR expressly gives the court hearing a civil appeal the power to “give any judgment or make any order which, in its opinion, ought to have been made by the court below”.

[100] As previously stated, the learned judge, upon deciding to considering the validity issue as a ground on which to terminate the application, ought to have made orders permitting ICWI to intervene in the proceedings for the purpose of making the set aside application, and granting an extension of time do so. The only other orders the learned judge ought to have made regarding the issue she considered, and which I am prepared to make in accordance with rule 2.14(b)(b) of the CAR, is that the preliminary issue raised by ICWI as to the validity of the claim form be dismissed, along with an appropriate costs order. The learned judge considered the validity issue only as a preliminary matter and based her decision solely on it. She did not go further to investigate the merits of the application to set aside the substituted service. Having not heard the application on the merits, the learned judge made no orders in relation to it.

[101] In my view, since the application to set aside the service on ICWI was neither heard nor determined on its merits in the court below, it should be remitted to that court for a hearing of the application to take place. Accordingly, I would not grant the appellant’s request to grant an order dismissing the set aside application on its merits. The substantive application must first be ventilated in the court below, and I would order that the matter be remitted to the Supreme Court for that to be done.

Issue (3) – whether the learned judge erred in awarding ICWI half the costs of the set aside application (ground 6)

[102] Given the disposition of the application in the court below, the learned judge decided that the appropriate costs order was that ICWI would be entitled to half-costs of

the application. The appellant contends that the learned judge erred in exercising her discretion by ordering the appellant to pay half of ICWI's costs, as she failed to properly consider the extensive delay by ICWI in filing the application in the court below.

[103] I have already concluded that the learned judge was wrong to dismiss the application for the reason she did. The learned judge's costs order would have been based on her erroneous ruling on the application. Consequently, the costs order made by her falls away.

[104] It, therefore, falls to this court to exercise afresh the discretion as to the award of costs in the court below. Had the learned judge ruled correctly on the application and dismissed the preliminary issue raised by ICWI, the appellant would have been the successful party on that issue. Given that the appellant also had to obtain an adjournment to respond in writing to the preliminary issue raised by ICWI, and ICWI would have needed an order granting an extension of time for it to raise the preliminary point as a ground in the application, justice demands, in all the circumstances, that the costs of the hearing on the preliminary issue be the appellant's, in any event.

[105] The appellant, therefore, succeeds on issue (3).

Conclusion

[106] In summary, I conclude that the learned judge upon deciding to entertain the hearing of the preliminary issue was required, but failed, to first grant an order permitting ICWI to intervene in the proceedings and extending time for ICWI to do so. This notwithstanding, the learned judge properly exercised her discretion to consider and rule on the validity issue. However, she erred in accepting ICWI's submissions that the claim form had expired and was no longer valid when the formal order permitting substituted service was served because, at the time the claim was served with the service letter, the formal order did not accompany it. The learned judge did not consider that any defect in service of the claim form on ICWI did not invalidate the claim form (which had not yet expired at the time it was served) or the service (a step taken in the proceedings), since

there was no rule, practice direction, or court order stipulating the consequence of non-compliance with rule 8.16(1)(d) of the CPR, which required the formal order to be served with the claim form. In such circumstances, rule 26.9(2) of the CPR would have operated to preserve the validity of the service of the claim form when it was served without the formal order until and unless a court ordered otherwise. Therefore, since ICWI took no action to have the service invalidated by court order before complying with the order, ICWI would have waived any irregularity in service prior to the application to set it aside, which was made over a year later.

[107] Accordingly, for the foregoing reasons, the learned judge erred in granting the application to set aside the substituted service on the basis that the claim form had expired and was, therefore, invalid at the time the formal order permitting substituted service was served on ICWI.

[108] Regarding costs, the appellant should have been the successful party on the preliminary issue in the court below and, as such, would have been entitled to recover the costs of that hearing, in keeping with the general rule that costs follow the event. There is no reason in the circumstances to depart from the general rule, especially where an order extending time would have been required for the application to be made by ICWI. The appellant is, therefore, entitled to the costs of the hearing of the preliminary issue in the court below.

[109] Accordingly, I would propose that the following orders be made the final orders of this court:

1. Permission is granted to the Insurance Company of the West Indies ('ICWI') to intervene in the proceedings for the purpose of its application filed on 24 February 2022 to set aside substituted service.

2. ICWI is granted an extension of time to 24 February 2022 to file the application to set aside substituted service.
3. The appeal is allowed.
4. The preliminary issue raised by ICWI that the substituted service should be set aside due to the invalidity of the claim form is dismissed.
5. The order made by Wong-Small J (Ag) on 28 October 2022 setting aside substituted service on ICWI on the basis that the claim form was invalid is set aside.
6. The notice of application filed by ICWI on 24 February 2022 is remitted to the Supreme Court for the determination of the substantive issue concerning the setting aside of the order for substituted service on ICWI by a different judge on a date to be fixed by the Registrar of the Supreme Court after consultation with the parties.
7. Costs of the hearing of the preliminary issue in the Supreme Court shall be the appellant's, against ICWI, in any event, to be agreed or taxed.
8. Costs of the appeal to the appellant, against ICWI, to be agreed or taxed.

SIMMONS JA

[110] I have read, in draft, the judgment of McDonald-Bishop P. I agree with her reasoning and conclusion, and there is nothing I could usefully add.

V HARRIS JA

[111] I, too, have read the comprehensive draft judgment of my learned sister McDonald-Bishop P. I agree with her reasoning and conclusion, and I have nothing useful to add.

MCDONALD-BISHOP P**ORDER**

1. Permission is granted to the Insurance Company of the West Indies ('ICWI') to intervene in the proceedings for the purpose of its application filed on 24 February 2022 to set aside substituted service.
2. ICWI is granted an extension of time to 24 February 2022 to file the application to set aside substituted service.
3. The appeal is allowed.
4. The preliminary issue raised by ICWI that the substituted service should be set aside due to the invalidity of the claim form is dismissed.
5. The order made by Wong-Small J (Ag) on 28 October 2022 setting aside substituted service on ICWI on the basis that the claim form was invalid is set aside.
6. The notice of application filed by ICWI on 24 February 2022 is remitted to the Supreme Court for the determination of the substantive issue concerning the setting aside of the order for substituted service on ICWI by a different judge on a date to be fixed by the Registrar of the Supreme Court after consultation with the parties.

7. Costs of the hearing of the preliminary issue in the Supreme Court shall be the appellant's, against ICWI, in any event, to be agreed or taxed.
8. Costs of the appeal to the appellant, against ICWI, to be agreed or taxed.