**[2023] JMCA Civ 31**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE P WILLIAMS JA**
**THE HON MRS JUSTICE FOSTER-PUSEY JA**
**THE HON MISS JUSTICE SIMMONS JA**

**SUPREME COURT CIVIL APPEAL NO COA2022CV00066**

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| **BETWEEN** | **YVONNE VIRGO** | **APPELLANT** |
| **AND** | **GRANVIN GRAHAM** | **1ST DEFENDANT** |
| **AND** | **UTON PAGE** | **2ND DEFENDANT** |
| **AND** | **ADVANTAGE GENERAL INSURANCE COMPANY LIMITED** | **RESPONDENT** |

**Written submissions filed by Oraine Nelson for the appellant**

**Written submissions filed by Ms Racquel Dunbar instructed by Dunbar & Co for the respondent**

**19 May 2023**

**Civil Procedure – Negligence – Motor vehicle collision – Service of originating documents – Order to dispense with personal service – Service by registered post – Default Judgment entered – Procedure for Insurer's application to intervene in proceedings – Whether the learned judge erred in setting aside the default judgment and in granting the insurer's application to intervene in the proceedings below**

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

**P WILIIAMS JA**

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and have nothing further to add.

**FOSTER-PUSEY JA**

## Introduction

[2] On 9 June 2022 the appellant, Ms Yvonne Virgo, filed a notice of appeal in this court to challenge the decision that Tie Powell J ('the learned judge') made on 2 June 2022 in favour of the respondent, Advantage General Insurance Company Limited. The learned judge made the following orders:

> "1. Permission is granted for [the respondent] to be an intervener in this proceeding.
>
> 2. The default judgement [sic] entered on May 31, 2017 (dated the 7th day of July 2016 and filed on February 7, 2017) is set aside.
>
> 3. There is a stay of execution of the Final Judgement [sic] entered on the 16th of January 2016, and filed on the 16th of January 2018.
>
> 4. Costs to [the respondent]
>
> 5. Leave to appeal."

## Proceedings in the court below

[3] In the reasons for her decision, the learned judge outlined the history of the matter in a concise manner, which I will gratefully adopt and supplement as required (see paras. [4] – [7] of her reasons).

[4] The appellant alleged that, on 13 April 2013, she was injured in a motor vehicle accident while travelling in a motor vehicle owned by the 1st defendant, Mr Granvin Graham, and driven by the 2nd defendant, Mr Uton Page. She filed a claim against the defendants in the Supreme Court on 26 February 2014. Her attorney-at-law's efforts to personally serve the defendants failed. As a result, on 16 February 2015, the appellant obtained an order to dispense with personal service, and for service to be effected on the defendants by way of registered post addressed to the 1st defendant at Toll Gate District, Toll Gate in the parish of Clarendon and the 2nd Defendant at Gimme-Mi-Bit District,

Clarendon. The appellant's counsel swore to the affidavit filed on 24 November 2014 in support of the application. One of the exhibits to counsel's affidavit was a signed but unfiled affidavit of Dave Quest, a bailiff at the time serving at the May Pen Resident Magistrates' Court in the parish of Clarendon. Mr Quest stated that on several occasions between June and July 2014he visited the May Pen bus park in search of the defendants, who together operated a public passenger vehicle,. He also visited the post office in the respective communities of Toll Gate and Gimme-Mi-Bit to ascertain information to assist in serving the defendants, however, his efforts proved futile. At para. 2 of his affidavit Mr Quest also stated:

> "That I visited the bus park and the post office as aforesaid because the communities of Toll Gate and Gimme-Mi-Bit in which the defendants reside cover a wide geographical area very general in terms and without any specific lot or street number which impeded my ascertaining the precise whereabouts of the defendants in the respective communities … in the circumstances I verily do believe that personal service of the Claim Form and Particulars of Claim on the defendants isn't practicable …"

[5] The appellant relied on a number of grounds in the application including that:

> "i. The stated addresses were given by the defendants, as their true place of abode, to the police;
>
> ii. The bailiff of the Clarendon Resident Magistrate's Court has attempted to effect service on diverse dates and has been unsuccessful; and
>
> iii. The method of service is likely to enable the defendants to ascertain the contents of the claim form and particulars of claim."

The appellant applied for and, on 16 December 2015, received an extension of time for the service of the originating documents.

[6] On 7 February 2017, counsel for the appellant applied for judgment in default of acknowledgement for service against both defendants. The application was supported by

an affidavit of service sworn by the appellant's counsel and filed 9 June 2016. Counsel exhibited the certificates of posting of registered articles for the letters sent to the defendants in proof of service. Counsel did not mention in the affidavit that the packages had been returned uncollected.

[7] Interlocutory judgment in default of acknowledgement of service was entered on 31 May 2017.

[8] The matter proceeded to an undefended assessment of damages before the learned judge. A formal judgment was entered on 16 January 2016 and filed on 16 January 2018. Damages were awarded as follows:

> "1. General Damages of **$1,900,000.00** is awarded to [the appellant] with interest at 3% per annum from the 20th day of May, 2016 to the 16th day of January, 2018;
>
> 2. Special Damages of **$144,360.00** is awarded to [the appellant] with interest at 3% per annum from the 13th April, 2013 to the 16th day of January, 2018.
>
> 3. Costs to [the appellant] to be agreed or taxed." (Emphasis as in the original)

[9] On 4 October 2019, the respondent filed a notice of application for court orders seeking permission to intervene in the proceeding, for the default judgment and all subsequent proceedings to be set aside and for a stay of execution of the final judgment. The grounds on which the respondent relied were as follows:

> "1. That this application is made pursuant to Rule 9.6 and 13.2 of the Civil Procedure Rules;
>
> 2. [The respondent] seeks to be added subject to Rule 19.3(3) (b) of the Civil Procedure Rules and its right to subrogation under a contract of indemnity between [the respondent] and 1st Defendant.
>
> 3. That the Defendants were not served with the Claim Form & Particulars of Claim as [the appellant's]

Attorney, Oraine Nelson attempted to serve the Defendants with the said documents by registered mail but they were returned to the sender.

4. That subsequently, [the respondent] was served with Final Judgment in June 2018.

5. That the first time [the respondent] became aware of the Judgment against the Defendants was about in June 2018 when they were served with the said Judgment;

6. The said [respondent] instructed Dunbar & Co. Attorneys-at-Law to act for and on behalf of Granvin Graham;

7. That the said Dunbar & Co. attempted to contact the said Granvin Graham by way of telephone but this proved futile and letters sent to the address on record at his insurer, [the respondent] but this proved futile;

8. That subject to Rule 5.1 and 5.2 of the Civil Procedure Rules which speaks to the issue of the service of the Claim Form and Particulars of Claim, it was invalid as personal service was not effected;

9. That there is no order of the court for Alternate service as required by Rule 5.14(2) of the Civil Procedure Rules;

10. That [the respondent] is the party to which [the appellant] will look to pay damages awarded, if any;

11. It is in these circumstances [the respondent] now seek the court's permission to intervene and setting aside the Judgment."

[10] The application was supported by an affidavit of urgency and the affidavit of Ruthann Morrison-Anderson filed on 5 August 2021. Mrs Morrison-Anderson deposed that the respondent was served with the final judgment on or about 25 June 2018. However, a search of the court records revealed that the appellant did not attempt to serve the originating documents until 2016 when she obtained two extensions of time and an order to serve the documents by registered post. She further deposed that checks were made

with the post master general and, a copy of the post master general's letter dated 22 June 2018 was exhibited.

[11] The letter dated 22 June 2018 from the Post and Telecommunications Department revealed useful information that follows. On 29 April 2016, counsel for the appellant posted the documents to the 1st defendant at the address "Toll Gate District, Toll Gate, Clarendon", and to the 2nd defendant at the address "Gimmi-Mi-Bit District, Gimme-Mi-Bit, Clarendon". On 2 May 2016, the registered article addressed to the 1st defendant arrived at the Toll Gate Post Office and the article addressed to the 2nd defendant arrived at May Pen Post Office. Both letters were returned uncollected. Counsel for the appellant retrieved the packages on 12 July 2016 in relation to the 1st defendant, and on 4 October 2016, in respect of the package sent to the 2nd defendant.

[12] On 21 December 2017, another registered article was sent to the 1st defendant at Toll Gate District, Toll Gate, Clarendon. It arrived at the Toll Gate Post Office on 22 December 2017, and a notice was sent to the addressee on the same date. The 1st defendant collected the registered article on 2 January 2018. The registered article sent to the 2nd defendant was not collected and was again returned to counsel for the appellant.

[13] Mrs Morrison-Anderson stated that efforts were made to contact the defendants to obtain their instructions but those efforts proved futile. She also asserted that the respondent should be allowed to intervene and set aside the default judgment and all subsequent proceedings, since it is expected to pay the judgment and will be at great risk of having to pay over the judgment sum or policy limit in circumstances where the default judgment is irregular.

[14] The learned judge heard the application on 24 and 26 May 2022 and, on 2 June 2022, made the orders that are the subject of this appeal.

## The appeal

<u>Application for an extension of time</u>

[15] On 17 November 2022, the respondent who had failed to file its written submissions within the required time, filed a notice of application for an extension of time to comply with rule 2.4 of the Court of Appeal Rules. The respondent urged the court to grant the extension sought on the basis that its failure was not wilful or intentional and it intended to contest the appeal.

[16] After hearing the application, we made the following orders:

> "1. The respondent is granted an extension of time to 17 November 2022 to file his written submissions.
>
> 2. The respondent is permitted to rely on his [sic] written submissions filed 17 November 2022 and written submissions will be considered by the court.
>
> 3. The appellant is permitted to file and serve her response to the authorities relied on by the respondent, if necessary, on or before 2 December 2022.
>
> 4. No order as to costs."

<u>Grounds of appeal</u>

[17] The appellant has relied on the following grounds in support of her appeal:

> "(a) The learned judge erred in finding that [the respondent], to intervene in the case in its own name, was not required to take out originating documents.
>
> (b) The learned judge erred in treating the issue of specified service as indistinguishable from that of alternative service and in finding that any or all of [the appellant's] submissions dealt with alternative service.
>
> (c) The learned judge erred in her finding that for the ratio of Annette Giscombe and ors v Halvard Howe and anor [2021] JMCA Civ 47 to apply in a case of specified

service there must have been a lot number associated with the intended recipient's address.

(d) The learned judge erred in finding that the ratio of Annette Giscombe and ors v Halvard Howe and anor [2021] JMCA Civ 47 does not apply where there is no lot number associated with the intended recipient's address.

(e) The learned judge erred in resting on judicial notice as to whether the intended recipients received the Notices of Arrival of Registered Articles notwithstanding the evidence from the postal services that said notices were sent to the addressee.

(f) The learned judge erred in relying on judicial notice to determine that the Notice of Arrival of Registered Article may not have been dispatched to the intended recipients' addresses but retained at the post office thereby descending into the arena of speculation.

(g) The learned judge erred in finding that the evidence of the postal services that the Notice of Arrival of Registered Article was sent to the addressee is inconsistent with, or insufficient evidence, that said notice being/ was sent to the address of the intended recipient.

(h) The learned judge erred in finding that there was no evidence as to what obtains in the case at bar notwithstanding the evidence from the postal services was clear and unambiguous.

(i) The learned judge erred in finding that there was no satisfactory evidence that the Defendants received the Notice of Arrival of Registered Article.

(j) The learned judge erred in applying the same threshold to service by registered post in the context of specified service to service by registered post in the context of 'regular' service.

(k) The insufficiency of the facts found to support the judgement."

[18] Consequently, the appellant is seeking the following orders:

"(a) Judgement [sic] for the Appellant on the appeal

(b) Costs of the appeal and in the claim below to the Appellant, to be taxed if not agreed.

…

(a) To set aside or vary the judgement [sic] made or given by the court below.

(b) To give any judgement [sic] or make any order which, in its opinion, ought to have been made by the court below.

(c) Order the payment of interest between the filing of the appeal and the disposal of same by the court or for any other period during which the recovery of damages/debt is delayed by the appeal."

[19] Although the appellant has outlined over 11 grounds of appeal, there are two main issues that arise for determination in this appeal:

(1) Whether the learned judge erred in finding that the respondent was not required to take out originating documents in order to intervene in the proceeding in its own name (Ground a); and

(2) Whether the learned judge was correct in setting aside the default judgment and the proceedings that followed, on the basis that the deemed service of the originating documents by registered mail had been rebutted (Grounds b - k).

In considering the second broad issue, the following matters raised by the appellant will also be addressed:

i. Whether the learned judge erred in finding that the issue of specified service is indistinguishable from

alternative service and erred in applying the same threshold test for service of registered post in the context of specified service and 'regular' service (Grounds (b) and (j));

ii. Whether the learned judge erred in finding that the case of **Annette Giscombe and ors v Halvard Howe and anor** only applied to specified service where the lot number is associated with the intended recipient's address (Grounds (c) and (d));

iii. Whether the learned judge erred in taking judicial notice of the usual operations of the postal system in rural areas (Grounds (e) and (f)); and

iv. Whether the learned judge erred in finding that there was no satisfactory evidence to suggest that the defendants received the notice of arrival of registered articles (Grounds (g), (h), (i) and (k).

**Issue (1): Whether the learned judge erred in finding that the respondent was not required to take out originating documents in order to intervene in the proceeding in its own name (Ground a)**

Summary of the submissions

*The appellant's submissions*

[20] Mr Nelson, counsel for the appellant, submitted that the respondent relied on **Linton Williams v Jean Wilson, Harris Williams and Insurance Company of the West Indies** (1989) 26 JLR 172 and **Jacques v Harrison** (1883) 12 QBD 136 in the court below, and accepted that it was applying to intervene in the proceedings in its own stead, and not in the stead of the defendants by way of subrogation. He referred to **Windsor v Chalcraft** [1938] 2 All ER 751 in which Greer, LJ referred to and approved

an excerpt from **Jacques v Harrison** where it was stated that an insurer could take out a summons in his own name asking for leave to be at liberty to intervene in the action and, inter alia, set a judgment aside. Counsel submitted that where reference was made to the insurer taking out a summons, it meant the filing of originating process. He submitted that the learned judge erred when she ruled that the taking out of a summons to intervene in the proceedings simply meant that the respondent would have to make an application in its own name. He relied on a number of cases and material in support of his submissions including: Osborn's Concise Law Dictionary (12th edition) – the definition of 'summons' and 'motion', rule 8.1(4) of the Civil Procedure Rule ('CPR'), Halsbury's Laws of England, Volume 37, page 559 (4th edition) and **Re Deadman (deceased) Smith v Garland and others** [1971] 2 All ER 101.

*The respondent's submissions*

[21] Counsel for the respondent commenced her submissions by outlining the oft-cited principles in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John McKay** [2012] JMCA App 1, seminal authorities pertaining to how this court is to approach its review of a judge's exercise of his or her discretion.

[22] Counsel noted that in **Advantage General Insurance Company Limited v Alessandra LaBeach and Anthony Alexander Powell** [2022] JMCA Civ 20, a case of this court in which the court examined the right of the insurer to intervene in matters that directly affect its legal, property or financial rights, reliance was placed on **Gurtner v Circuit & Anor** [1968] 2 QB 587, per Lord Denning, where he stated that the court may exercise its discretion to add a person to a proceeding where a dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill.

[23] Ms Dunbar, in continuing her submissions, contended that the appellant's challenge of the learned judge's decision is unsupported by law as there was nothing in law that prevented the respondent from intervening in proceedings in its own name by

way of a notice of application for court orders. Counsel referred to and again relied on **Advantage General Insurance Company Limited v Alessandra LaBeach and Anthony Alexander Powell** contending that, in that case, this court sanctioned the approach adopted by the respondent. Counsel also submitted that counsel for the appellant was misguided in his belief that "a summons under the CPR was originating process and not in the same category as a notice of application for court orders" (see rule 11 of the CPR).

[24] For these reasons, counsel contended that ground (a) should fail.

*The appellant's response*

[25] Counsel for the appellant submitted that while the insurer in **Alessandra LaBeach v Anthony Alexander Powell and Advantage General Insurance Company Limited** [2021] JMSC Civ 3 proceeded by way of notice of application to intervene in the relevant proceedings, it was misleading for counsel for the respondent to state that this court sanctioned that procedure, as the question as to the appropriate procedure to be followed was never argued before the court.

Discussion

[26] There appears to be no issue that the respondent has a right to intervene in the proceedings. By virtue of section 18 of the Motor Vehicle Insurance (Third Party Risks) Act, the insurer is undoubtedly affected and has the responsibility of paying "to the persons entitled to the benefit of the judgment the amount covered by the policy or the amount of the judgment, whichever is the lower, in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments".

[27] In **Gurtner v Circuit & Anor**, Lord Denning stated that where a dispute will directly affect a third person in his legal rights or in his pocket, in that, he will be bound to foot the bill, the court may exercise its discretion to add the person as an intervener to a proceeding.

[28] The learned judge found that she was satisfied that the respondent had a right to intervene in the proceedings. The issue for her consideration was whether the respondent followed the correct procedure in making the application (see para. [14] of the judgment).

[29] The learned judge dealt with this issue at paras. [13] – [23] of her reasons for judgment. After referring to **Linton Williams v Jean Wilson, Harris Williams and Insurance Company of the West Indies** and Bowen LJ in **Jacques v Harrison**, the learned judge noted that there were two modes open by which a stranger to an action, who is injuriously affected by a judgment in default, can seek to set it aside, one of which was taking out a summons in his own name.

[30] After considering the appellant's submission that the taking out of a summons meant that a fresh claim had to be commenced, the learned judge stated at para. [18] of her reasons:

> "I do not find favour with this interpretation of the dicta of Bowen LJ. I do not understand the taking out of a summons to intervene in the proceedings, to mean the commencement of fresh proceedings. A complete reading of the passage belies such a construction. The stranger may … 'take out a summons in his own name at chambers to be served on both the defendant and the plaintiff, asking leave to have the judgment set aside, and to be at liberty either to defend the action for the defendant on such terms of indemnifying the defendant as the judge may consider right, or, at all events to be at liberty to intervene in the action …'. The purpose of taking out a summons is to intervene in the action. It seems to me to be incongruous that the prospective intervener would be required to commence separate proceedings to participate in an existing matter. I am of the view that the taking out of a summons, in our context, simply means that an application would have to be made in the applicant's own name, which is what AGI has done."

[31] The learned judge was correct.

[32] In **Windsor v Chalcraft**, Greer LJ approved the excerpt from Bowen LJ's judgment in **Jacques v Harrison**, to which the learned judge referred concerning the

steps that an insurer may take where it is affected by a judgment entered by default against its insured. At page 753 paras. F - G we see the following:

> "… Or he may, if he is not entitled without further proceedings to use the defendant's name, **take out a summons in his own name at chambers** to be served on both the defendant and plaintiff, asking leave to have the judgment set aside, and to be at liberty either to defend the action for the defendant on such terms of indemnifying the defendant as the judge may consider right, or, at all events, to be at liberty to intervene in the manner pointed out by the Judicature Act, 1873…" (Emphasis supplied)

[33] As the learned judge in the case at bar concluded, the reference to an insurer taking out a summons in its own name in order to intervene in proceedings can only mean, in the context of the excerpt, as well in reference to our CPR, a notice of application for court orders. This is because what the insurer seeks to do is to participate in the particular proceedings, not commence a new claim or matter. Furthermore, in the Civil Procedure Code that was replaced by the CPR there was a clear distinction between a summons and an "originating summons", a notice of motion and an "originating motion". Originating summonses and originating motions were utilized to commence proceedings, while notices of motions and summonses were utilized in pursuit of interlocutory applications. In the case at bar, the insurer was not required to initiate an originating process in order to intervene in the claim. It would indeed be incongruous, as the learned judge commented, for an insurer who wishes to intervene in proceedings to set aside a default judgment to itself take out originating process to commence a claim.

[34] It appears that the above position is well understood, and, although the point was not argued, examples of this approach are evident in the following matters: **Linton Williams v Jean Wilson, Harris Williams and Insurance Company of the West Indies**, **Advantage General Insurance Company Limited v Alessandra LaBeach and Anthony Alexander Powell**, **British Caribbean Insurance Company Limited v Advantage General Insurance Company Limited and Guardian Insurance Brokers Limited** [2010] JMCA Civ 45, **Jamaica International Insurance Company**

**Limited v The Administrator General for Jamaica (Administrator of the Estate of Rohan Wiggins, also called Rhoan Wiggins, (deceased))** [2013] JMCA App 2 and **Nico Richards v Roy Spencer (Jamaica International Insurance Company Limited Intervening)** [2016] JMCA Civ 61, in which the applicants all sought permission from the court to intervene in the proceedings by way of a notice of application for court orders. **Re Deadman(deceased) Smith v Garland and others** to which the appellant referred did not support his submissions. That matter concerned circumstances in which a plaintiff, in the course of proceedings commenced by originating summons, sought leave to amend his claim to include an alternative allegation of fraud. It was held that the court could allow the amendment and order the proceedings to be continued as though they had been commenced by writ. As is evident, that principle is not applicable to the case at bar.

[35] The appellant's ground of appeal (a), therefore, fails.

**Issue (2): Whether the learned judge was correct in setting aside the default judgment and the proceedings that followed, on the basis that the deemed service of the originating documents by registered mail had been rebutted (Grounds b - k)**

The reasons for judgment

[36] The learned judge addressed this issue at paras. [37] – [53] of her reasons. She noted that the determination of the question as to whether the defendants were served by registered mail in accordance with the CPR, depended on whether they were put in a position to ascertain the contents of the claim form and the particulars of claim (see para. [37]). The learned judge stated that when the sender of the claim form establishes that the order for "alternative service" has been complied with, a presumption of service arises pursuant to rule 5.19(1). Referring to section 52 of the Interpretation Act, the learned judge stated that the provision sets out certain parameters for the presumption of deemed service to prevail including that the intended recipient's address should be correct and complete.

[37] The learned judge noted, however, that the "deemed service" was rebuttable and that in **Annette Giscombe and ors v Halvard Howe and anor**, Dunbar Green JA (Ag) (as she then was), stated that the return of documents by the postal authorities is strong evidence of the rebuttal of deemed service. The learned judge observed, however, that Dunbar Green JA went on to state that the return of the documents was not necessarily determinative of the issue, and that where it was established that the registered slip was correctly addressed and sent by registered post, notwithstanding the return of the article unclaimed, the onus would be on the intended recipient or the insurance company to provide evidence that the registered mail was sent to the wrong address, that the registered slip had not been received, and that this was the reason for the return of the registered mail. Dunbar Green JA opined that the issue of whether a claim form is served is not pure law but also a matter of evidence.

[38] At para. [45] of her reasons, the learned judge stated:

> "It seems [sic] me that the rationale of the Court of Appeal therein, relates to the circumstances in which there is a specific address, given that it is premised on the registered slip being correctly addressed. In that case, the intended recipient of the mail had a precise address, with a named street and a particular number. In that case, an error was made as it relates to the address. It is my view that the rationale of that case must be viewed within that context. Certainly, where there is a precise and exact address for the intended recipient, there is a level of confidence that the registered slip will be received, and hence notification of the existence of the mail given, and an opportunity to collect same. In those circumstances, one would be sanguine that the intended recipient would have likely ascertained the contents of the claim form."

[39] The learned judge stated that the above approach could not apply strictly in a scenario where the address in question is general and imprecise as in the case at bar, and each case had to turn on its own unique facts. In proceeding to examine the unique facts in the case at bar, the learned judge noted that the addresses to which the registered mail was addressed were Toll Gate District, Toll Gate in the parish of Clarendon

and Gimme-Mi-Bit District, Gimme-Mi-Bit, in the parish of Clarendon, addresses which were, on their face, very general. The learned judge referred to evidence on affidavit from the bailiff hired by the appellant that he had difficulty locating the defendants as he was not able to find their precise dwelling in the light of the fact that the districts in which they resided covered a wide geographical area without any specific lot or street number.

[40] The learned judge examined the letter from the post master general in which it was stated that when the registered article arrived at the May Pen Office "a notice was sent to the addressee", and not the address, and there was a lack of clarity as to what the post master general meant by those words. The learned judge noted that this was a real concern given the lack of specificity of the defendants' addresses, and took judicial notice that the postal system operates quite differently in some rural areas where mail is received solely at the post office in contrast with certain areas in Kingston, for example, where mail is delivered to individuals at specific addresses. The learned judge stated that there was no evidence as to what obtained in the areas where the defendants resided.

[41] The learned judge reiterated that for the position in **Annette Giscombe and ors v Halvard Howe and anor** to be applied, there should be "a precise address capable of being identifiable [sic], to facilitate delivery of the registered slip to the intended recipient, or other evidence that would satisfy the court that the intended recipient would have been notified of the existence of the mail to be collected" (see para. [50]). She concluded that on the evidence there was nothing on which it could be concluded that either of the defendants received the notices and she could not be satisfied that either of the defendants was put in a position that would likely enable them to ascertain the contents of the claim form.

[42] The learned judge made it clear that she did not find that the 1st defendant's subsequent collection of other documents sent to him by registered post cured the defect as regards service of the originating documents. This was because, in her view, the subsequent collection of documents could not mean that the 1st defendant was likely to

ascertain the contents of the document sent on a previous occasion, given that there was no satisfactory evidence that he was notified of the fact of mail to be collected.

[43] The learned judge concluded by stating that she was satisfied that the return of the documents by the postal agency had rebutted the presumption of deemed service and that accordingly the judgment was wrongly entered and had to be set aside.

oSummary of the submissions

*The appellant's submissions*

[44] Counsel for the appellant submitted that the learned judge, in error, referred to alternative service, which is governed by rule 5.13 of the CPR, and conflated it with specified service which is governed by rule 5.14. Counsel submitted that while rule 5.13(6) clearly sets out that the court may set aside an order for alternative service on good cause being shown, rule 5.14 had no such stipulation. He argued that where the court made an order for specified service, the court had already satisfied itself that the method was good, and orders obtained in compliance with an order for specified service could only be set aside if cogent reasons are put before the court.

[45] Counsel submitted that the learned judge erred in her interpretation of the ratio in **Annette Giscombe and ors v Halvard Howe and anor** [2021] JMCA Civ 47, when she stated that the rationale in that case applied to circumstances in which there was a specific address. Counsel reiterated that when the court made the order for specified service in the case at bar, it was satisfied that registered post, in the absence of a lot number, was a valid method of specified service.

[46] Mr Nelson further submitted that the learned judge erred when she took judicial notice of the fact that the postal system operated differently in some rural areas when compared to areas in Kingston, as such a fact was not notorious or readily demonstrable by reference to proper sources or by statute. Counsel also stated that the learned judge erred in relying on judicial notice to determine that notice of arrival of registered article may not have been dispatched to the intended recipients' addresses but retained at the

post office, and she thereby descended into speculation. He also argued that the learned judge erred in finding that the evidence from the postal services that the notice of arrival of registered article was sent to the addressees is insufficient evidence that the notices were sent to the addresses of the intended recipients.

[47] Counsel also took issue with the learned judge's finding that there was no evidence as to what obtained in the areas where the defendants reside, and submitted that the learned judge also erred in finding that there was no satisfactory evidence that the defendants received the notice of arrival of registered article. Counsel suggested that the learned judge erroneously applied the threshold for registered post in the context of specified service, to service by registered post in the context of "regular service". He submitted that in the context of specified service, the non-delivery of the originating process does not vitiate the service except in the most cogent of circumstances.

[48] Finally, counsel submitted that there were insufficient facts to support the learned judge's decision. In particular, he criticized the learned judge's comment that there was nothing to suggest that either defendant was being recalcitrant. Counsel highlighted the fact that the 1st defendant was proved to have collected articles sent to him by registered mail, subsequent to the sending of the originating process, yet he took no steps to visit the court or inform his insurers so that he could know what steps to take.

[49] Counsel relied on a number of cases in support of his submissions including: **Commonwealth Shipping Representative v Peninsular and Oriental Branch Service** [1923] AC 191 and **Van Omeron v Dowick** (1809) 2 Camp 42. He sought to distinguish the following cases on which the respondent had relied: **Frank I Lee Distributors Limited v Mullings & Company (A Firm)** [2016] JMCA Civ 9, **Ann Thomas v Guardsman Limited v NMIA Airports Limited** [2018] JMSC Civ 4 and **A C E Betting Company Limited v Horseracing Promotion Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 70 and 71, judgment delivered 17 December 1990. Counsel submitted that the circumstances in the cases on which the respondent relied were different, as the defendants were companies who could be served

normally by registered post as provided by the CPR or the Companies Act. Counsel suggested that this was in contrast with the case at bar where an individual was served using the specified method of registered mail.

*The respondent's submissions*

[50] Ms Dunbar submitted that the learned judge properly addressed her mind to the law governing alternative and/or substituted service of originating process. Counsel submitted that the learned judge considered **Annette Giscombe and ors v Halvard Howe and anor** and applied it to the facts of the case at bar. Counsel noted that the learned judge considered evidence that the appellant herself had placed before the court from the bailiff, that the districts in which the defendants lived covered a wide geographical area and he could not find their houses when he tried to personally serve them as there were no street numbers and addresses allowing for the defendants' homes to be individually identified. The learned judge, counsel submitted, was correct to identify such circumstances as distinguishing from those in **Annette Giscombe and ors v Halvard Howe and anor**.

[51] Counsel submitted that it was appropriate for the learned judge to take judicial notice regarding the manner in which mail is delivered and collected in our jurisdiction, as this was notorious and a matter with which men of ordinary intelligence are acquainted in their ordinary human affairs. Ms Dunbar referred to **Leon Barrett v R** [2015] JMCA Crim 29 and **Charles Francis v Columbus Communications Jamaica Limited and Jamaica Public Service Company Limited** [2016] JMSC Civ 218 in support of this aspect of her submissions.

[52] Ms Dunbar submitted that it was common knowledge that in rural communities, citizens collect mail at the post office or postal agency and there is no postman going from house to house to deliver mail. Counsel argued that the learned judge, having taken judicial notice of this fact with which men of ordinary intelligence are acquainted, found as a fact that the registered mail would not have been delivered to the defendants, as it would have been necessary for the defendants to actually collect same from the post

office. Counsel argued that consequently, the learned judge correctly found that the defendants were never notified that there were any documents awaiting them at the post office. Counsel noted that the fact that the registered articles were returned to the appellant's counsel buttressed this finding of fact.

[53] Counsel argued that the learned judge was therefore correct in finding that, on the basis of the evidence before her, the defendants had never been served and the deemed service by registered mail was rebutted. Counsel reiterated that as a consequence, the default judgment and all subsequent proceedings were set aside as of right and it would be difficult to show any error in the learned judge's application of the law, or any misunderstanding of the law, or that her decision was one to which no reasonable judge could have arrived on the facts.

Discussion

[54] Ms Dunbar correctly referred to the principles set out by this court in **The Attorney General of Jamaica v John Mackay** where Morrison JA (as he was then), examined the principles surrounding an appeal from the exercise of a judge's discretion. It is emphasized that this court must defer to the judge's exercise of discretion on an interlocutory application, and should only set it aside if it was based on a misunderstanding by the judge of the law or the evidence before him, or on an inference that particular facts existed or did not exist, which can be shown to 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 (see para [20]).

[55] In the case at bar, the respondent applied to set aside the default judgment pursuant to rules 9.6 and 13.2. Rule 13.2 provides that the court must set aside a judgment entered for failure to file an acknowledgment of service if any of the conditions outlined in rule 12.4 was not satisfied. Among the matters to be established to secure a judgment for failure to file acknowledgment of service, is proof that the defendant was served with the claim form and particulars of claim, and that the period for filing acknowledgment of service has expired.

[56] In this appeal, the appellant challenges the learned judge's exercise of discretion when, upon a review of the facts outlined before her, she concluded that the originating documents, that is, the claim form and particulars of claim, had not been served on the defendants.

[57] In my view, the appellant has not demonstrated that the learned judge erred in the law or on the facts in this matter for the reasons outlined below.

[58] After careful consideration and having reviewed the judgment of the learned judge in its entirety, I am not convinced that the learned judge conflated specified service and alternative service. It seems to me that the learned judge used the phrase "alternative service" in its general sense, meaning service other than personal service, and not in reference to rule 5.13 and the procedure that is required when a party chooses an alternative method of service. I do not believe that ground (b) has any merit.

[59] A reading of paras. [34] and [38] of the judgment supports this point because it is only by virtue of rule 5.14 that a court order may be granted for specified service. As regards specified service, rule 5.14 states:

> "(1) The court may direct that service of a claim form by a method specified in the court's order be deemed to be good service.
>
> (2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit –
>
> (a) specifying the method of service proposed; and
>
> (b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim."

[60] Further, at para. [4] of the judgment, the learned judge demonstrated that she was cognizant that the appellant had obtained an order for service to be effected on the defendants by way of registered post. It is also to be noted that at para. [47] of the

judgment the learned judge referred to the appellant's application for permission to effect service by registered mail.

[61] The learned judge was clearly aware that the issue for resolution was whether, in the circumstances of the matter before her, the specified service, that of service by registered mail, was to be deemed effective.

[62] Where a court makes an order for service by registered mail, the authorities have established that proving that the documents have been sent to the address that counsel provided to the court as being that of the intended recipient is not the end of the matter. See **Annette Giscombe and ors v Halvard Howe and anor** at para [69]. Deemed service can be rebutted. Rebutting the presumption does not mean that the order for specified service has been set aside or declared invalid. Rather, rebutting the presumption involves demonstrating to the court that although the documents were sent by registered mail, the evidence shows that the intended recipient did not receive the notice, and, as a consequence, was not put in a position to ascertain the contents of the documents that were sent.

[63] Contrary to the appellant's submissions, there is no basis in law to differentiate between service by registered post in the context of specified service, as against service by registered post in what counsel described as "regular service". Where required, the court examines the circumstances before it to determine whether deemed service is rebutted whether the registered mail was sent to a company or to an individual. Non-delivery of the registered mail can, but will not always be seen as, rebutting the presumption of deemed service. This is reflected in the provisions of rule 5.14 which require the applicant for an order to serve documents by a specified manner to show "that that method of service is likely to enable the person to be served to ascertain the contents" of the originating documents. Implicit in the wording of the rule is the fact that there is no presumption that the mode of service will in fact enable the person to be served to ascertain the contents of the originating documents. In my view, ground (j) should also fail in light of the above discussion of the issue.

[64] The appellant has insisted that the learned judge erred in her understanding and application of the ratio in **Annette Giscombe and ors v Halvard Howe and anor** case. A proper consideration of her submissions on this point requires a close review of that case. In **Annette Giscombe and ors v Halvard Howe and anor** the insurers of the owner of a vehicle involved in a fatal accident applied by notice of application for court orders to intervene in the claim and set aside a judgment in default of acknowledgment and defence. Some history of the matter is useful. The claimants did not succeed in their attempts to serve the owner of the vehicle personally, and, as a consequence, secured an order from the court permitting them to effect service of the claim form and particulars of claim on the owner by registered post at the owner's "last known address".

[65] When the claimants' attorneys-at-law filed an affidavit in proof of service by registered mail, the affiant did not make any reference to the owner's address, however the registered slip exhibited indicated that the letter was sent to "D 35 Flintstone Close" Eltham Park P O, Saint Catherine. This was different from 1035 Flintstone Close, the address that the claimants' process server deposed was the ascertained and correct last known address for the owner.

[66] The registered mail containing the originating documents was returned unclaimed to the claimants' then attorney-at-law, who subsequently removed his name from the record. The claimants' new attorneys-at-law obtained the default judgment and damages were assessed.

[67] Dunbar Green JA noted that when the claimants applied for default judgment they stated that the owner was served at his "lawful address Apt. 73 Campview Apts" and that there was nothing to show that the registrar who entered judgment in default was aware that the claim form and particulars of claim had been returned unclaimed or that the claimant's new attorneys-at-law were aware of that fact.

[68] The judge at first instance granted the insurance company's application to intervene in the claim and set aside the default judgment and all proceedings flowing from it on the basis that counsel had evidence that the documents were not delivered or served on the owner of the vehicle. The claimants appealed.

[69] Dunbar Green JA made a number of observations on the applicable law and the relevant facts in the matter including the following:

i. A defendant should be served at what is his last known or current address and the claimant should provide evidence of how he ascertained this address (see para. [52]);

ii. There was no evidence that D35 Flintstone Close remained the owner's address at the point at which the registered mail with the claim form and particulars of claim were posted some 10 years later. In fact, there was evidence that the claimants had ascertained that the owner was residing at 1035 Flintstone Close. It could, therefore, not be said with any certainty that the owner was served at his last known address, and on that basis alone, service could be found irregular (see paras. [54] - [56]);

iii. For the presumption of deemed service by registered mail to prevail, the document to be posted must be properly addressed - the address must be "correct and complete" (see para. [67]);

iv. The presumption of service may be rebutted. What constitutes a rebuttal is a matter of evidence (see paras. [69] and [70]);

v. The return of documents by the postal authorities is strong evidence of rebuttal of deemed service, but is not necessarily determinative of the issue of service (see para. [83]);

vi. While there was no direct evidence before the court as to how service by registered post was effected, it could be deduced from the letter by the postal authority that it involved the following steps: on receipt of the article, the post office sends a notice (registered slip) to the intended recipient. This registered slip alerts the recipient to the existence of a registered article at the post office for collection, and the recipient is expected to collect the article from the post office. Once it is proved that the registered slip was properly addressed, stamped, the fee paid and it was sent to the correct address, service is deemed to have been effected at a particular date; however this is rebuttable (see para. [85]; and

vii. If the article is returned unclaimed, the onus would be on the insurance company seeking to set aside the judgment to provide evidence that the registered mail was sent to the wrong address and the owner did not receive the registered slip and this was the reason for the return of the registered mail (see para. [87]).

[70] Dunbar Green JA concluded that in that case there could be no deemed service as there was no certainty that D35 Flintstone Close was the correct address to which the claim form should have been posted, thus the court was not able to determine with any certainty that the owner was served at his last known address. She stated further that

the return of the letter containing the claim form and particulars of claim, to the sender, unclaimed, was additional and relevant evidence to rebut the presumption of deemed service (see paras. [88] and [89]).

[71] Returning to the reasons given by the learned judge in the case at bar, I see no error in her view that the rationale of **Annette Giscombe and ors v Halvard Howe and anor** is premised on the registered slip being correctly addressed with a precise address, a named street and a particular number. Those were the facts in that particular case. The point of general application is that the address should be correct and specific. Clearly, not every address in Jamaica includes a named street and a particular lot number. Importantly, the learned judge went on to analyse the evidence before her and noted that the addresses utilized for service on the defendants by registered mail in the case at bar, Toll Gate District, Toll Gate, in the parish of Clarendon and Gimme-Mi-Bit District, in the parish of Clarendon were very general descriptions. This was a finding open to her on the facts. This meant that the addresses utilized to send the registered mail could not be regarded as complete, and the registered slips could not be regarded as having been properly addressed. The learned judge took into account affidavit evidence from the appellant that the bailiff had problems locating the defendants due to the wide geographical area involved and the inability to locate their specific dwellings. It is noticeable that neither of the addresses utilized referred to a particular post office.

[72] The court may take judicial notice of matters that are "so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary". The facts in question should be so "generally known as to give the presumption that all persons are aware of it". Judges and juries may use "their general information and … knowledge of the common affairs of life which men of ordinary intelligence possess". Judicial notice may also be taken of matters with which "men of ordinary intelligence are acquainted, whether in human affairs, including the way in which business is carried on, or human nature or in relation to natural phenomena". However, it is not proper for judges or juries to act on their own private knowledge or belief regarding the facts of a particular case. When the

court takes judicial notice of a fact, the court declares that it will find that the fact exists although the existence of the fact has not been established by evidence (see **Leon Barrett v R** at para. [26]). In **Commonwealth Shipping Representative v Peninsular and Oriental Branch Service**, a decision of the House of Lords, their Lordships found that while a court could take judicial notice of the existence of a state of war between England and another country, it could not take judicial notice of the date of any particular military movement in the course of the war.

[73] In my view, it was clearly open to the learned judge to take judicial notice of the difference in the operation of the postal system in rural areas and to, thereafter, use these well known facts to conclude that the notice of arrival of registered article may not have been despatched to the addresses of the intended recipients, but was, in all likelihood, retained at the post office for collection. If that were not done, it could have resulted in a result that was inconsistent with the realities of rural life. The facts of which the learned judge took judicial notice are generally known. It is common knowledge that the postal system in Jamaica operates differently in the rural areas in contrast with, for example, certain parts of the Corporate Area. It was not untenable for the learned judge to take judicial notice that in the rural areas citizens visit the postal offices or agencies to collect mail, while a mail man delivers mail in parts of the Corporate Area. This understanding of the operations of the postal system in rural areas, was consistent with the position taken by the learned judge, that the reference to a notice of arrival being sent to the addressee, was not sufficient evidence that it was actually sent to their address. In light of this, it is my considered view that the learned judge did not err in her reliance on judicial notice in the case at bar.

[74] In continuing to analyse the evidence, the learned judge noted that there was no evidence as to what obtained in the areas where the defendants lived. A review of para. [51] of her reasons for judgment suggests that the learned judge was referring to evidence concerning the operations of the postal system. Contrary to the appellant's submissions, it is not correct that there was clear and unambiguous evidence from the

postal services as to what obtained in the case at bar. The record demonstrates that the learned judge was correct.

[75] The learned judge gave specific consideration to the fact that the 1st defendant subsequently received and collected other court documents that were sent to the same address utilized to send the originating documents. She stated that the 1st defendant's subsequent collection of other court documents did not cure the defect as regards service of the originating documents, as this could not mean that the 1st defendant was likely to ascertain the contents of the documents sent on a previous occasion, given that the evidence was not satisfactory that he was notified of the fact that there was mail to be collected. This was a matter for the assessment of the learned judge. In my view, it was open to the learned judge, having reviewed the evidence, to arrive at this position and to further state that she was not convinced that either defendant was being recalcitrant. Indeed, the 1st defendant's subsequent collection of other documents could well suggest that had he been aware of the mail with the originating documents, he may well have collected it.

[76] In addition, the learned judge stated that there was nothing on the evidence on which she could conclude that the defendants received the notice or on which she could be satisfied that either of the defendants was put in a position to ascertain the contents of the claim form. This finding was also open to her upon a review of the evidence.

[77] The learned judge stated that she was satisfied that the return of the documents by the postal agency rebutted the presumption of deemed service. In my view, it was open to the learned judge to arrive at that conclusion. As **Annette Giscombe and ors v Halvard Howe and anor** indicates, the presumption of service may be rebutted by evidence. It is the judge hearing the application who assesses the evidence and exercises her discretion to determine whether she is satisfied that the presumption is rebutted. In the case at bar not only did the respondent demonstrate that the addresses to which the letters were sent were general and lacking in specificity, the evidence from the appellant's own affidavits, supported this fact. Added to the lack of specificity of the addresses, was

the return of the documents sent by registered mail, unclaimed. As the learned judge acknowledged, each case will turn on its own facts.

[78] In reviewing the decision to which the learned judge arrived, this court examines what was before the learned judge to determine whether the learned judge misunderstood or misapplied the law, misinterpreted the evidence, drew an inference where no such inference could be drawn, or arrived at a conclusion to which no reasonable judge mindful of the law and facts before her could have arrived. Contrary to the submissions made by the appellant, it is clear that the learned judge had sufficient facts on which she based her decision. It has also not been demonstrated that the learned judge erred in law or on the facts or that she arrived at a decision to which no judge mindful of her judicial duty could have arrived.

[79] I would dismiss the appeal with costs to the respondent. Based on the foregoing reasons, I find that there is no merit in the arguments proffered by counsel for the appellant in support of grounds c, d, e, f, g, h, i and k. I note that the respondent, in its application to intervene, requested "that the default judgment <u>and all subsequent proceedings be set aside</u>" (emphasis added). However, the learned judge limited her order to setting aside the default judgment. The judge below could have set aside the final judgment (see **Leymon Strachan v The Gleaner Company and Adrian Stokes** [2005] UKPC 33). Rule 2.15 of the Court of Appeal Rules provides that, in hearing an appeal, this court may "give any judgment or make any order which, in its opinion, ought to have been made by the court". I propose that this court order that all proceedings that follow the default judgment including the final judgment are also set aside, that the stay of execution is rescinded and that the decision of Tie Powell J dated 2 June 2022 be varied as indicated with costs in this court to the respondent to be agreed or taxed.

**SIMMONS JA**

[80] I too have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and there is nothing that I wish to add.

**P WILLIAMS JA**

**ORDER**

(1) The appeal is dismissed.

(2) The decision of Tie Powell J dated 2 June 2022 is varied so that order number 2 shall read instead that the default judgment entered on 31 May 2017 and all subsequent proceedings including the final judgment are set aside. Order number 3 is rescinded.

(3) Costs in this court to the respondent to be agreed or taxed.