[2021] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CIVIL APPEAL COA2021CV00019

BETWEEN	**JULIETTE WRIGHT**	**APPELLANT**
AND	**ALFRED PALMER**	**1ST RESPONDENT**
AND	**JASON SALMON**	**2ND RESPONDENT**

Written Submission filed by Winsome Marsh for the appellant

5 July 2021

PROCEDURAL APPEAL

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

BROOKS P

[1] I have had the privilege of reading the judgments of my learned sisters, Edwards JA and Brown Beckford JA (Ag), and, in light of the differences in approach between them, it is incumbent on me to set out my own views.

[2] This is a procedural appeal from a refusal by the learned Master in Chambers to grant an application to extend the validity of a claim form, after the relevant limitation period had expired.

[3] It is a classic example of the situation addressed by Harman LJ in **Baker v Bowketts Cakes Ltd** [1966] 1 WLR 861, when he said, in part, at page 867 (adapted for the purposes of this case):

> "…Now it is true that you may wait until the 364th day of the [last year of the limitation period] before issuing your [claim form] and until the [last day of the validity of the claim form] before serving it and you will still be in time. **But if you choose to wait until the last moment like that, you must be very careful to be right, and there is no reason why you should be given any further indulgence. The nearer you get to the last moment, the stricter ought to be the attitude of the court**…" (Emphasis supplied)

The situation that played out in this case was only slightly better than that described by Harman LJ.

[4] Ms Juliette Wright alleged that she was a passenger in a motor vehicle that struck a child pedestrian on 3 December 2013. She asserts that she was injured in that incident.

[5] Ms Wright had six years to file a claim against Messrs Alfred Palmer and Jason Salmon ('the defendants'), the owner and driver, respectively, of the vehicle, before the relevant limitation period expired. She did not file her claim, however, until just under five years and nine months had expired. The claim form that was issued by the court, on 28 August 2019, was valid for six months. It was not served on the defendants, despite efforts to serve them. However, Ms Wright did not apply for an extension of the validity of the claim form until 25 February 2020; three days before the claim form expired. She also applied for permission to serve Mr Palmer's insurance company instead of personally serving the defendants. By the time she had filed that application, the limitation period had already run.

[6] Then, a stroke of bad luck. Within days of filing her application for the extension, the COVID-19 pandemic struck within the island. All activities, including court activities, were severely curtailed. Perhaps because of that situation, the Supreme Court's registry set Ms Wright's application for hearing in January of 2021. The validity of the claim form,

if that application had been granted, would only have been for six months (rule 8.15(2) of the Civil Procedure Rules (CPR)), that is to 28 August 2020. Despite the fact that the hearing date was well beyond the validity period of any possible extension on a single application, Ms Wright's attorneys-at-law did not request an earlier hearing date. They, instead, filed an amended application asking for two extensions of the claim form, in the one application.

[7] When the application was heard, the learned master, before whom it came, refused it. She did so on two main bases. The first is that the limitation period having run, and the validity of the claim form having expired, Ms Wright was not eligible to have the validity extended, as an extension would deprive the defendants of their defence under the Limitation of actions Act. The second basis is that the learned master was not satisfied that all reasonable steps had been taken to serve the defendants.

The appeal

[8] Brown Beckford JA (Ag) has fully set out Ms Wright's numerous grounds of appeal. It is only necessary, here, to state that three broad issues arose from them. They are:

a. the limitation issue;

b. the rule 8.15(2) issue; and

b. the "all reasonable steps to serve" issue.

These will be addressed in turn.

The limitation issue

[9] This issue turns largely on the learned master's interpretation of a portion of the judgment of this court in **Dr C W Thompson v Administrator General for Jamaica (Administrator for the Estate of Carol Morrison, deceased)** (1990) 27 JLR 175. That decision was upheld on an appeal to Her Majesty in Council (see **Dr C W Thompson v Administrator General for Jamaica (Administrator for the Estate of Carol Morrison, deceased)** [1991] UKPC 20). It is, however, Campbell JA's judgment, in this court, which is relevant for these purposes. Campbell JA, in citing the judgment of Lord Brandon in **Kleinwort Benson Ltd v Barbrak Ltd** [1987] 2 All ER 289, identified three

possible categories into which applications for extension of the validity of a writ of summons (the precursor to a claim form) may fall. The categories are:

> "1. Cases where the application for extension is made at a time when the writ is still valid and before the relevant period of limitation has expired.
>
> 2. Cases where the application for the extension is made at a time when the writ is still valid but the relevant period of limitation has expired.
>
> 3. Cases where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired." (See page 179)

[10] The learned master, in evaluating Campbell JA's treatment of these categories, found that Ms Wright's case fell within category three. She so held, on the basis that the important time for considering the validity of the claim form, was the date of the hearing of the application to extend the validity. In making this finding, the learned master was, respectfully, in error. She did not properly take into account the impact of rule 11.4 of the CPR, which states, in part, that applications in writing are deemed made on the date when they are received by the court's registry. The rule states:

> "Where an application must be made within a specified period, it is so made if it is received by the registry or made orally to the court within that period."

The learned master incorrectly dismissed the relevance of the rule by stating, at paragraph [45] of her judgment, that the rule was subject to the Limitation Act and by asserting that Campbell JA stated, in **Thompson v Administrator General**, that the appropriate time for consideration, was the time of the order. The latter reference is a misunderstanding of Campbell JA's reasoning. The learned judge of appeal did not consider that point. In that case, the application was both filed and heard during the currency of the writ of summons.

[11] As stated above, rule 11.4 applies when "an application must be made within a specified period". Rule 8.15(3) of the CPR specifies a period for making applications for extensions of the validity of claim forms. It stipulates, in part, that such applications must be made while the claim form is still valid, or has had its validity extended. The rule states:

> "(3) An application [to extend the period within which the claim form may be served] –
>
> (a) must be made within the period –
>
> (i) for serving the claim form specified by rule 8.14; or
>
> (ii) of any subsequent extension permitted by the court**,** and
>
> (b) may be made without notice but must be supported by evidence on affidavit."

[12] The learned master should have held that the application had been made on 25 February 2020, and therefore, was made at a time when the claim form was still valid.

[13] Although the learned master erred in this regard, and the error would allow this court to review her decision, based on the principles in **Hadmor Productions and others v Hamilton and others** [1982] 1 All ER 1042 at 1046, her decision may yet be upheld. This will become clear in the analysis of the other broad issues.

The rule 8.15(2) issue

[14] It is Ms Wright's amended application for the extension of the validity of the claim form that raises the issue of rule 8.15(2). The relevant part of the amended notice of application states as follows:

> "The Claimant, **Juliette Wright**…seeks the following Orders:
>
> 1. The validity of the Claim form be extended for a period of six (6) months from February 28, 2020 and

> further extended for a further period of six months from August 28, 2020." (Bold type and underlining as in original)

[15] Edwards JA has thoroughly explained that the amended application breaches rule 8.15(2) of the CPR. That rule allows the court to grant an extension of validity for only six months, on any one application. The relevant part of the rule states:

> "(2) The period by which the time for serving the claim form is extended may not be longer than 6 months on any one application."

[16] In normal times, that rule would not pose a difficulty for an applicant. An application, once filed, would most likely be heard within a time, which would allow a period of extension of the validity, to permit service of the claim form. If that extended period is not sufficient, the rules allow for a second extension, if needs be. These were not, however, normal times. As it turned out, the Supreme Court's registry failed to recognise the urgency of Ms Wright's original application, hence the setting of a date beyond six months of 28 February 2020.

[17] The registry's oversight was compounded by the errors of Ms Wright's attorneys-at-law, who, as mentioned above, and explained by Edwards JA, did not file an affidavit of urgency, and filed a defective amended application, instead of a fresh one. The result is that the claim form, having expired, could not have been revived by the learned master and cannot be revived by this court. The learned master's decision to refuse Ms Wright's application is, therefore, correct and should not be set aside. Ms Wright, having waited until almost the last minute to file and attempt to serve her claim, had no room for errors. Errors were made, and Ms Wright suffered the consequences, as were explained in **Baker v Bowketts Cakes Ltd**.

The "all reasonable steps to serve" issue

[18] If an applicant satisfies the basic eligibility for the consideration of a grant of an extension of the validity of a claim form, rule 8.15(4) of the CPR becomes relevant for a court, which is considering the application. The rule states:

> "The court may make an order for extension of validity of the claim form only if it is satisfied that –
>
> (a) the claimant has taken all reasonable steps –
>
> (i) to trace the defendant; and
>
> (ii) to serve the claim form,
>
> but has been unable to do so; or
>
> (b) there is some other special reason for extending the period."

[19] I have also noted the comments of Edwards JA on the issue as to whether "all reasonable steps" were taken in this case to serve the defendants.

[20] As far as the issue of the service on the insurers is concerned, the learned master correctly pointed out that Ms Wright could have, pursuant to rule 5.13 of the CPR, taken such a step herself if she could have satisfied the court that the claim would have been brought to the attention of the defendants.

[21] Those issues are, however, all moot, in light of the finding on the rule 8.15(2) issue. It is to be noted that guidance on the issue of substituted service on an insurer is given in the carefully considered judgment of Morrison JA, as he then was, in **Insurance Company of the West Indies v Shelton Allen and Others** [2011] JMCA Civ 33.

Conclusion

[22] In light of the above analysis, I agree that, despite the error made by the learned master on the limitation issue, her ruling to refuse to extend the validity of the claim form, is correct, and should not be disturbed.

EDWARDS JA

[23] This is an appeal against the decision of Master Orr (Ag), in which she exercised her discretion under the Civil Procedure Rules (2002) ('the CPR') to refuse the appellant's application to extend the validity of a claim form which had expired at the time of the hearing, even though the application had been made shortly before the life of the claim form would have come to an end. Although I have approached the issue differently from Brooks P and Brown Beckford JA (Ag), for reasons which I will endeavour to make clear, I conclude that the master was correct to refuse the appellant's application and I agree that the appeal cannot succeed.

The background

[24] It is necessary at this stage to give a chronology of events leading up to this appeal. On 3 December 2013, there was an accident along the Port Maria to Ocho Rios main road in the parish of Saint Mary. It was alleged that the 2nd respondent was driving a motor car, owned by the 1st respondent, when he negligently drove the car on that day causing it to collide with a minor, resulting in the minor's death. The appellant claimed to have been a passenger in that car and to have suffered injury and loss as a result.

[25] No claim arising out of this accident was made until 2019. In fact, the appellant filed her claim on 29 August 2019, approximately three months before the expiry of the limitation period for bringing personal injury claims, which happens to be six years. The claim form was duly issued from the Supreme Court of Jamaica and an attempt appears to have been made to serve it on one occasion in September 2019 and again in October 2019. Those attempts proved unsuccessful. Meanwhile another related claim was filed on behalf of the minor against the same respondents. Thereafter, three more attempts were made to serve the respondents. According to the affidavit of the process server, Mr Stanley Davis, filed on 28 October 2020 in the latter claim, he attempted to serve the 1st respondent on 30 December 2019, 14 January 2019 and again on 20 January 2019 (the year 2019 in these January dates appear to be an error). The latter three attempts were also not successful. It was his evidence that during one of those five visits he was

informed that the 1st respondent had migrated. The futility in attempting personal service at this address was, therefore, known to the appellant by the latest 20 January 2020.

[26] With the limitation period having expired in December 2019 and the life of the claim form nearing its end, time was of the essence. However, it was only on 25 February 2020, days before the expiry of the claim form that an application was made to the Court for an extension of its validity for six months, from 28 February 2020. That application was set, by the registry, for hearing in January of 2021 and no affidavit of urgency was filed by the appellant to have it heard before then. Not surprisingly, it became patently clear to the appellant's attorney-at-law that a further extension beyond August 2020 would become necessary by the time the application came on for hearing on the date set. Surprisingly, however, no affidavit of urgency was filed, neither was a separate application for an extension of time made. Instead, in August 2020, the appellant filed an amended application for court orders seeking, along with the original extension from February 2020, a further extension for six months from August 2020.

[27] When this amended application came on for hearing before the master on 7 January 2021, this, in summary, was the state of the claim:

(i) the accident out of which the claim arose had occurred on 3 December 2013;

(ii) the claim and particulars of claim had been filed 29 August 2019;

(iii) the limitation period had expired on 3 December 2019;

(iv) the application to extend the validity of the claim form had been filed on 25 February 2020;

(v) the validity of the claim form had expired 29 February 2020; and

(vi) an amended application for extension of the validity of the claim form had been filed 3 August 2020 which, in effect, was requesting a 12 months' extension of the validity of the claim form.

[28] The issues which arose before Master Orr were, therefore, caused by the fact that:

(a) the claim had not been served; and

(b) the validity of the claim form had expired after the application to extend its life had been made and before any order extending its life could be made.

[29] Having heard the application, on 18 February 2021, the master made the following orders:

"1. Application to extend the time to serve the claim form and to serve the 1st Defendant by an alternative method of service (substituted service) is refused.

2. Leave to Appeal granted."

The notice and grounds of appeal

[30] The appellant filed notice and grounds of appeal against the orders of the master, on 24 February 2021. Some 11 grounds of appeal were filed, all of which have been set out in full in the judgment of Brown Beckford JA (Ag). There is, therefore, no need for me to quote them here. These grounds essentially challenged the master's interpretation of the case law cited to her dealing with the exercise of a judge's discretion to extend the validity of a claim form after it has expired where the period of limitation of actions has also expired, and the effect of this on the right to the limitation defence, as well as how the master dealt with the question of whether reasonable efforts had been made to personally serve the respondents.

[31] It was also averred that the master's decision not to grant an extension was unreasonable and was not supported by the evidence and that it was contrary to the overriding objective. The appellant asked this court to set aside the orders made by the master, and to grant the orders which were sought below, with the variation that the validity of the claim form be extended for six months from the date of the order of this court.

[32] Since, in my view, all the grounds of appeal filed are intertwined and raise only one overarching issue, that of whether the master erred in not granting the orders as prayed, my discussion will focus on the relevant principles which ought to have guided her in arriving at her decision. In my view also, since in one sense, the master determined the issue partially based on irrelevant considerations, it is open to this court, based on the guidance given in the cases of **Hadmor Productions Ltd and others v Hamilton** [1982] 1 All ER 1042 at 1046 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, to revisit the issue.

The rules governing the extension of the validity of claim forms

[33] Rule 8.14 of the CPR provides for the time within which a claim form must be served after it has been issued. It states as follows:

> "8.14 (1) The general rule is that a claim form must be served within 6 months after the date when the claim was issued or the claim form ceases to be valid."

[34] Rule 8.15 provides for an extension of time for serving a claim form, however, as it states that:

> "8.15 (1) the claimant may apply for an order extending the period within which the claim form may be served.
>
> (2) **The period by which the time for serving the claim form is extended <u>may not be longer than 6 months on any one application</u>.**
>
> (3) An application under paragraph (1)

(a) must be made within the period—

(i) for serving the claim form specified by rule 8.14 or

(ii) of any subsequent extension permitted by the court, and

(b) may be made without notice but must be supported by evidence on affidavit.

(4) The court may make an order for extension of validity of the claim form only if it is satisfied that —

(a) **the claimant has taken all reasonable steps**—

(i) to trace the defendant; and

(ii) to serve the claim form, but has been unable to do so; or

(b) there is some other special reason for extending the period.

…" (Emphasis added)

[35] From these rules, it is clear, that an applicant who wishes to have the life of a claim form which was issued out of the Supreme Court of Jamaica, extended, must make an application for extension during the validity of the claim form. The court may grant the extension but can only do so for six months in the first instance, and on any one application. The judge or master, in deciding whether to grant the request for an extension, must consider whether the application is good, that is, it was made in accordance with the rules, and must be satisfied that the applicant has taken all reasonable steps to trace and serve the defendant but was unable to do so. Otherwise, the judge or master must be satisfied that there is some other special reason for extending the period.

The applicability of the rules to the appellant's case

[36] At the hearing before the master, there was an "amended" *ex parte* application for court orders for an extension of time and substituted service". Paragraph 1 of the orders sought in that application reads as follows:

> "The validity of the Claim Form be extended for a period of six (6) months from February 28, 2020 and further extended for a further period of six months from August 28, 2020."

[37] Counsel for the appellant, who appeared in the court below, had made written submissions to the master (a copy of which was made available in the bundle filed in this court). At paragraph 10(ii) it was submitted that:

> "**An amended application was subsequently filed, firstly to ensure that upon the hearing of the application, the Court, if so minded, would grant the order to take effect at a time before the original claim form expired and, secondly, to seek a further extension as the time period of extension originally sought, would in all likelihood have expired before a hearing."** (Emphasis added)

[38] The fallacy in this submission made to the master is glaringly obvious, as it was asking the master to do that which she had no discretion under the rules to do. Although the application was made before the expiry of the validity of the claim form, the problem which faced the appellant, and which her counsel was clearly trying to circumvent, was that no single extension of its validity could be made beyond six months. Also, no court can revive the dead, so that any extension the master, in her discretion, could have possibly given, had to relate back to and take effect from a period before the claim form expired. Therefore, when the matter was heard in January 2021, if an extension were to have been granted, it would have had to take effect from 28 February 2020 for a period of six months thereafter. The life of the claim form would then have expired by the 29 August 2020. It was in recognition of this fact, that counsel made the amended application. Unfortunately, that amended application would have been met by rule

8.15(2) and the master would have had no jurisdiction to extend the life of the claim form from 28 August 2020, as this would have been in breach of that rule.

[39] Rule 8.15(2) provides that the period by which the time for serving the claim form is extended may not be longer than six months in any one application. The effect of the applicant's amended notice of application filed August 2020 was to achieve a 12 months' extension in one application.

[40] No consideration was given by the master to rule 8.15(2) and, as a result, she not only placed an over reliance on the principles in the English case law but wholly misunderstood and misinterpreted their import. This caused her to fall into error. The error resulted in her asking herself the wrong question. Instead of asking whether the application to extend the validity of the claim form could be granted where the defence of limitation had accrued, (although in my view the answer would, in any event, be the same, in these circumstances) the master should have asked herself whether this application was one she could hear and determine under the rules, specifically rule 8.15(2). The answer to that question is a resounding no.

[41] On that basis alone, the appellant could not succeed in her application. An extension of the life of the claim form to 28 August 2020 was technically possible but would have been futile as that period had already expired. The master could only have properly granted one extension in that amended application, and there was no other application before her or filed in the court, to extend the claim form beyond 28 August 2020.

[42] The appellant relied on the case of **Glasford Perrin v Donald Cover** [2019] JMCA Civ 28 in support of her application. However, that case could not assist her, as it simply supports the position I have taken that the order to extend must relate back to and take effect from the period before the expiry of the claim form, as the court cannot extend its validity from a period after the claim form has already expired. In that case, an application had been made on 3 June 2015 and amended on 10 July 2015, for an

extension of the validity of the claim form "from the date hereof". The court granted the order but extended the life of the claim form from 13 July 2015, which was a date after the claim form would have already expired, it having been filed on 12 June 2014. The error having been brought to the attention of the judge, she sought to rectify it under the slip rule. The defendant appealed. This court agreed that the order could be rectified to give effect to the intention of the court at the time it was made, which was to extend the life of the claim form from the date of the application, 3 June 2015, which was a date on which the claim form was still valid. This court, therefore, dismissed the appeal and varied the order accordingly.

[43] Pusey JA (Ag), in explaining the court's reason for dismissing the appeal and granting the orders sought, explained at paragraph [37] of the judgment that:

> "Both parties and the judge accepted that the order extending the life of the claim form should take effect on or before the date that the claim form was slated to expire. Therefore, if the order extending the validity of the claim form takes effect after the claim form had expired, the claim would be invalid. This would be the effect of the order if it was left unadjusted."

[44] After explaining why the judge was correct to rectify the error in her order using the tools available to her, he continued at paragraph [42]:

> "It was clear that the words "from the date hereof" in the application meant just that (from the date of the application was made), and not the date of the hearing of the application, which would have been at a time when the claim was invalid, and the order would have been sanctioning service of an invalid claim. That was obviously not what the court intended to do."

[45] The appellant in this case, unfortunately, cannot find safe harbour in any ratio in **Perrin's** case, as the situation in that case was distinguishable, as at the time of the hearing of the amended application for an extension, it was quite possible for the validity of the claim form to be properly extended dating back to a date when the claim form was still valid. In this case, based on the date which had been scheduled for the hearing of

the application to extend the validity of the claim form, it would not only have expired before that hearing date but worse yet, the initial period of six months for its extension would also have expired. The appellant's attorney-at-law faced with this realization, nevertheless failed to file an affidavit of urgency seeking an emergency hearing for the initial extension and also failed to file an additional application for a further extension beyond the initial 6 months, before that period also expired. In the light of rule 8.15 (2) this was fatal.

[46] There is virtue in rule 8.15(2), as it prevents a litigant from circumventing the six months' life of a claim form by applying for more than one extension in the same application and possibly ending up with a claim form with a life of 12 months, at any one time. That would have been the very result if the master had granted the orders as prayed by the appellant in her amended application. The master had no power to do so.

[47] It is to the credit of counsel that she did not seek to lay the blame for the delay at the feet of the registry of the Supreme Court. This is because the registry of the Supreme Court merely performs an administrative function and not a judicial function, in setting down cases for hearing. Section 12 of the Judicature (Supreme Court) Act provides that one of the duties that the registrar of the Supreme Court shall perform is to "examine, copy, enter, **arrange**, index and keep, proceedings and records of proceedings in the Supreme Court". It is, therefore, the function of the registrar to set matters for hearing in the Supreme Court. This is a delegable function by virtue of that section and section 15 of the Act, with the exception of the duties in section 13. Section 13 provides that upon proof of urgency, the registrar may, in the absence of the Supreme Court Judges, make orders which may be made by a Judge in Chambers.

[48] The CPR also makes provisions for the exercise of the powers of the registrar and the registry staff. Rule 2.6 provides that the administrative functions of the registry may be performed by any member of the court staff so authorised by the Chief Justice. Applications to the court are made under Part 11 of the CPR and rule 11.5 provides that, as a general rule, an application must be made to the registry where the claim is issued.

[49] The registry is defined in the CPR as the place where documents are filed and processed and members of the court staff carry out work of a formal or administrative nature. The registry, therefore, in arranging a hearing date, carries out a purely administrative function and will necessarily arrange dates according to availability in the Court's diary and the convenience of counsel, unless otherwise indicated.

[50] In my view, it remains the duty of the party seeking the application, and knowing the urgency of the matter, to take the necessary steps to move it along. This includes filing an affidavit of urgency to indicate to the registry that an earlier date is required or that they will be imperilled if no earlier date is given. That duty is no less established in the case of applications than as in the claim itself. In the case of a claim, the authorities have long established that it is the duty of the claimant to prosecute the claim expeditiously (see **Reggentin v Beecholme Bakeries Ltd** [1968] 1 All ER 566 cited with approval by this court in **MSB Limited and Finsac Limited v Joycelyn Thomas** [2020] JMCA Civ 4.) In the absence of any failure to perform a positive duty, the courts have continuously refused to allow tardy litigants to lay the blame at the feet of the registry. So, for example, in **Spurgeon Reid v Corporal Lobban and the Attorney General for Jamaica** (unreported), Supreme Court, Jamaica, Suit No CL 1989/R- 014, judgment delivered 12 June 2001, the claimant claimed to have written to the registrar to have the matter set down on the cause list under the old rules but did nothing further which resulted in a delay of more than four years. The judge considered that even if a letter had been sent to the registry, as alleged, (which was not borne out in evidence) in that period no enquiry had been made to the registry and no steps had been taken to ensure that the matter had been placed on the cause list and assigned a trial date. Note was also taken of the fact that counsel had been required to apply for an extension of time to set the matter for hearing, which had not been done.

[51] In **Heather Reid v Hendrick Smellie and another**, (unreported) Supreme Court, Jamaica, Claim No 2004 HCV 01625, judgment delivered 26 March 2010, the claimant sought to lay the blame for the delay in prosecuting the case at the feet of the registrar, for failing to set a date for CMC after the original date had been adjourned. The

court concluded that the claimant was responsible for the delay as she had a duty to ensure that the case was dealt with expeditiously and to do what was necessary to set the registry in motion even though the registrar had the responsibility to fix the new date.

[52] In the case of **MSB**, the respondent, who was the claimant in the court below, had delayed prosecuting the case for over 13 years and sought to partially lay the blame at the feet of the registrar for failing to set a case management conference ('CMC') date, as was required by the transitional rules under part 73 of the CPR. A date had been set but the CMC was not held. There was no evidence as to why this was so. This court took into account the fact that the respondent did nothing in the ensuing years to ensure that a CMC was held and found that, even if there had been some administrative inefficiency by the registry (and this was not admitted or accepted to be so), the respondent and her legal representatives had a duty to move the case along. This court pointed to all the steps which were available to the respondent to pursue under the CPR, none of which had been taken.

[53] In **Shaun Baker v O'Brian Brown and another** (unreported), Supreme Court, Jamaica, Claim No 2009 HCV 5631, judgment delivered 3 May 2010, a judgment at first instance, I held the view then, as I do now, that the blame for the delay which resulted in the expiry of the limitation period, before civil proceedings were commenced, could not properly be laid at the feet of the registry. In that case, an affidavit of urgency had been filed and a follow up letter had been sent to the registry but no response had been forthcoming. I said then, that in the face of impending disaster a personal visit or a telephone call to the registry would have been prudent in such circumstances.

[54] These of course, with the exception of **MSB**, are all first instance cases. However, this court was faced with a similar issue in the case of **Sandals Royal Management Limited v Mahoe Bay Company Limited** [2019] JMCA App 12. That case involved an application to dismiss an appeal for want of prosecution. Counsel for the respondent, in that case, sought to blame the registry of the Court of Appeal for a delay of 11 years in prosecuting the appeal. Counsel made the surprising submission that once the notice and

grounds of appeal had been filed in accordance with the rules, the appellant had no duty to do anything else to move the appeal along. This is what Foster-Pusey JA said at paragraph [84] with regard to that:

> "It is not enough for a litigant to file the relevant papers and comply with the procedural rules, then sit back thereafter and allow years to pass with no movement of its appeal saying to himself or herself; 'I have done all I am supposed to do…It is not enough, because litigants are to show an interest in having their matters completed.'"

[55] The learned judge of appeal accepted that the registry of the court is required to carry out its role and take the necessary steps for a matter to proceed but opined that that did not "undermine, contradict or override the duty of a litigant to maintain an active interest in having his or her matter proceed with expedition" (see paragraph [85]).

[56] In **Collier v Williams; Marshall and another v Maggs; Leeson v Marsden and another; Glass v Surrendran** [2006] 1 WLR 1945 (consolidated appeals), the English Court of Appeal opined that where time limits are running out and applications are made late, applications should be dealt with by an urgent hearing, or if not practicable, consideration should be given to hearing such matters by telephone, if not on paper. It was pointed out that the rules provide for such things.

[57] In **Attorney General v Universal Projects** [2011] UKPC 37, an appeal from a decision of the Court of Appeal of Trinidad and Tobago, dealing with an application to set aside a default judgment, the Board considered the actions of counsel in the matter and at paragraph 24 said this:

> "On 20 February the defendant was granted an extension of time of three weeks (until 13 March) for the service of the defence. In these circumstances, it was incumbent on the defendant to do everything that it reasonably could to meet the extended timetable…Even more perplexing was Ms Baptiste-Samuel's failure to seek a further short extension of time for service of the defence. She knew that the defence would not be served in time. Instead of applying for an

> extension of time, she wrote the letter of 13 March 2009 referred to at para 5 above."

[58] This approach by the Board was in keeping with the approach taken by the Court of Appeal, which it approved, which was in essence that a party who knows that it is likely to be in default of a court order must secure further directions to avoid default. The Board pointed out that in so far as the application of the rules may seem draconian, they serve the purpose of improving the efficiency of litigation. It seems to me that, even though the circumstances in that case are entirely different from the case before this court, the principle may be extended to cover it.

[59] That is not to say there may not be occasions where it may be properly recognized that at least some of the fault for the delay lies with the registry, such as, for example, where it loses a file, as in **Norris McLean v Hamilton et al** (unreported) Supreme Court, Jamaica, Suit No CL M 215/1993, judgment delivered 9 April 2002, where it was held by Jones J (Ag), (as he then was), that the fault of the registry could be measured at just below half.

[60] In the instant case, however, I am loath to attribute any blame to the registry in the circumstances where no indication had been made to it that this was a case where an urgent hearing was required.

[61] It is the duty of a litigant, under the CPR, to assist the court in achieving the overriding objective, especially in ensuring that cases are dealt with expeditiously and fairly (rule 1.3). It is entirely the duty of the litigant to ensure that time tables are met, and if there is a danger of time elapsing where the hearing date set by the registry is outside of the limitation period, it is the duty of the litigant to file an affidavit of urgency and request an emergency hearing. Most notable, in this case, is the fact that, during part of the relevant period, notwithstanding the COVID-19 pandemic restrictions in 2020, practice directions were implemented to ensure that emergency hearings could be held (see Practice Directions, Second and Amended Third COVID-19 Emergency Directions for the Supreme Court of Judicature of Jamaica dated 30 April and 4 May 2020, respectively).

It cannot properly be said, therefore, that the registry, in setting the date for the hearing of the application for extension of the validity of the claim form outside of the six months' period, did so in error or as an oversight, when no indication was made to the registry that time was of the essence, and that an earlier date was required. Neither can it be the fault of the registry if between February and August 2020 the appellant made not one single attempt to have the application heard earlier.

Did the appellant satisfy the requirements of CPR 8.15(4)?

[62] Although the above is a complete answer to this appeal, I will consider whether the master ought to have exercised her discretion to extend the claim form for six months from 28 February 2020, since it was technically possible, futile as it would have been. It is my view, that even with regard to the application for extension of the life of the claim form for the period of six months from 28 February 2020, the master's discretion to refuse to grant it should not be disturbed. The master found that the evidence of the process server was insufficient to satisfy her that the appellant took all reasonable steps to trace and serve the defendant. It is the master who must be satisfied and this court ought not to substitute its own view of the matter for that of the master, without good reason.

[63] The judgment of the master refers to an affidavit of service of Mr Stanley Davis, who was the bailiff for the parish of Saint Mary, filed 17 June 2020 which was relied on by the appellant in support of the application to extend the validity of the claim form. I have not seen that affidavit in the papers before this court. The affidavit of the appellant's attorney-at-law refers to it as an exhibit but it is not attached to the affidavit, neither is it amongst the bundle of papers filed in this court. However, the master notes at paragraph [9] of her judgment, that the 'bailiff' indicated in his affidavit, that he made five visits to the home of the 1st respondent between September and October 2019 and January 2020, and that during one of those visits, he was informed by the 1st respondent's neighbour, who was also his cousin, that the 1st respondent had migrated. This court was provided with his affidavit filed 28 October 2020 in support of the application to extend the validity of the claim form on the 1st respondent issued in the related claim. In

that affidavit, with respect to his attempts to serve the 1st respondent, he stated, *inter alia*, as follows;

> "2. That on the following dates and times: - the 30th December 2019 at 10:00 a.m., 14th January 2019 at 3:20 p.m., and 20th January 2019, between the hours of 9:00 & 10:00 a.m., I attended at the residence of the 1st defendant **ALFRED PALMER** at Lot 500 Boscobel Heights, in the parish of St. Mary with a sealed copy of the **Claim Form with prescribed notes for the Defendants, Form of Defence and Form of Acknowledgement of Service along with the Particulars of Claim, both filed on the 28th day of November 2019** which appeared to me to have been regularly issued out of and under the seal of this Honourable Court to effect service of the aforementioned documents on the said Defendant.
>
> 3. That upon my visits to the Defendant's residence on the dates aforementioned I did not see anyone at the material times. However, on one of my said visits I was told by the 1st Defendant's neighbor [sic] that he now lives overseas but they could not give me any further information and I have not yet been able to verify the neighbour's information."

[64] As I said, this affidavit was filed 28 October 2020. Two things are notable about this affidavit. Firstly, it is clear that there is an error in the dates of attempted service by the process server. The dates of January 2019 ought to have been January 2020 as the first attempt was in December 2019, and that claim was only filed 28 November 2019. It is also clear that, of the five attempts to serve the 1st respondent, the two earlier attempts were with regard to this appellant's case, the remaining three dates were with regard, it can be assumed, to both related claims.

[65] The other notable feature of the process server's evidence is that it had become known that the 1st respondent had migrated by the latest January 2020. Nothing was done, thereafter, to trace and serve or for an alternative method of service to be effected.

Worse yet, there was still time to do something between January 2020 and the expiry of the claim form in February 2020, yet nothing was done to trace and serve.

[66] The master considered this issue to be relevant. She pointed out that no effort was made to trace the 1st respondent's whereabouts through any other avenue even though the process server had indicated that he had known him for 10 years. The master also considered that no effort was made to serve on another person who may have been in contact with the 1st respondent. She was not required to make any assessment with regard to service on the 2nd respondent, as there was no evidence before her in that regard, and based on the fact that an application for substituted service had been made in regard to the 1st respondent only, it may be assumed that the entire application was only with regard to him.

[67] The master also pointed out, with a sense of irony, I believe, that the appellant was now applying for substituted service when both the claim form and the limitation period had expired, when the rules provided a similar avenue to a litigant and the appellant had failed to make use of it earlier. This, even though it was known that the 1st respondent had migrated long before the expiry of the claim. I, therefore, cannot fault the master for taking the approach she did in her assessment of whether reasonable steps had been taken to trace the 1st respondent. In my view, it is in fact a reasonable conclusion to arrive at.

[68] The master's approach was also not a novel one. The English Court of Appeal, in **Drury v British Broadcasting Corporation and another** [2007] All ER (D) 384 ('**Drury v the BBC**') per Smith LJ made similar observations in determining whether all reasonable steps had been taken to serve the claim form within the time limit. That case was admittedly decided pursuant to an application made under the English CPR 7.6(3) which provides for retrospective extension, which is undoubtedly not applicable to this jurisdiction, but the approach taken by the court in determining whether all reasonable steps were taken to serve the claim form, is instructive, in my view. Smith LJ (at paragraph 37 of the judgment) determined that the question of what was reasonable was

based on objective criteria, in that it was not a question of whether the applicant thought that what he had done was reasonable, but whether what he had done was objectively reasonable in all the prevailing circumstances. In overturning the first instance decision in the claimant's favour, Smith LJ (at paragraph 36) accepted that the judge had wrongly taken account of attempts to serve the defendant after the expiry period, as that was an irrelevant consideration, and that the only one attempt to serve the defendant had been made one day before the expiry date. In holding that the steps taken to serve were not all that could reasonably have been expected, Smith LJ said at paragraph 38 that:

> "Here, the steps taken were not in my view all that could reasonably have been expected of the claimant. He did nothing until the very last available day. He knew that he did not have Mr Carnegie's residential address. **He must have known that without it, he would have to rely on other methods of service."**
>
> **...They could have applied for an extension of time or for an order permitting service on Mr Carnegie at the BBC. Such applications can be made quickly and without notice**." (Emphasis added)

[69] A similar approach was taken in the consolidated case of **Marshall and another v Maggs** at page 1981, paragraph 104, where the court, in considering whether the judge below was wrong to find that the claimants had not shown that they had taken all reasonable steps to serve the defendant and in not extending the time for service of the claim form, considered, as did the master in this case, that there were other steps the claimants could have undertaken to effect service on the defendant which they failed to take, having sought to serve him at the wrong address. The appeal against the judge's decision not to extend time was dismissed.

[70] In **Glass v Surrendran** it was sought to blame the court's lack of "expedition" for the failure to dispose of an application for an extension of time to serve the claim form before it had expired. The Court of Appeal held that this was of no assistance to the claimant, as the claimant's attorneys knew at the time they made the application that the time for service of the claim form would expire on the particular date. The court held that

up to that date they could have served the claim form, so that the fact that there was an outstanding application for extension of time to serve it, was irrelevant (see paragraph 152).

[71] In **Leeson v Marsden** at 1981, counsel made an urgent application to the court for an extension of time to serve the claim form. That application was made just over two weeks before the expiry of the period for service. Two days before the expiry of the validity of the claim form counsel telephoned the court to make enquiries on the progress of the application. Based on what she was told she refiled the application with a notation of the date on which the period for service would expire. On the same day an ineffective attempt was made to serve the claim on the defendant's solicitors who had not given notice that they were authorised to accept service on the defendant's behalf. In the meantime the application was dealt with, on paper, by a judge who extended the time for service of the particulars of claim but refused to extend time for service of the claim form, one day before the expiry period. A further entreaty to the court resulted in a different judge extending the time for service of the claim form. A second extension was further given by yet another judge. The defendants appealed. The Court of Appeal held that no extensions ought to have been granted as, inter alia, the claimant had not shown any good reason why the claim form had not been served in time.

[72] In the instant case, on any objective view of the circumstances, once it became known that the 1st respondent had migrated, it was reasonable to expect the appellant to seek other avenues of service, and, in light of the fact that the claim form had a life which would soon come to an end, and the fact that the limitation period had expired, to do so with some despatch. It was, therefore, a relevant consideration for the master, that in those circumstances, the appellant made no earlier attempt to employ an alternative method of service.

[73] It can also not be stressed enough, that nowhere in the rules does it provide for an application for substituted service to be made. Rule 5.13 provides for an alternative method of service, other than personal service, to be chosen and employed by a claimant.

Therefore, as in this case, if personal service cannot be effected in time, a litigant may utilize an alternative method of service, without any prior application, but that method must be one where it can be shown, when called upon to do so, that it was sufficient to enable the defendant to ascertain the contents of the claim form or that it was likely he or she would have been able to do so. Morrison P in the case of the **Insurance Company of the West Indies Ltd v Shelton Allen (Administrator of the Estate of Harland Allen) and others** [2011] JMCA Civ 33 was at pains to point out this fact at paragraph [36] of his judgment after discussing the rule and its implications at paragraphs [32] to [35]. Rule 5.14 allows for an application to be made for an order to effect service of the claim form by a specified method. The application must be accompanied by an affidavit specifying the proposed method of service and showing that the chosen method is likely to enable the person to be served to ascertain the contents of the claim form.

[74] Counsel for the appellant, in this appeal, relied on the Privy Council decision in **Dr C W Thompson v Administrator General for Jamaica (Administrator for Estate Carol Morrison, deceased)** [1991] UKPC 20, for the proposition that what was done in that case was similar to the steps taken in this case and amounted to reasonable steps being taken to trace and serve. That case was decided on the basis of section 30 of the Judicature (Civil Procedure Code) Law, which had also required the court to be satisfied that reasonable efforts had been made to serve the defendant, before extending the life of a writ. However, in my view, the only similarity between that case and this one is that they were both claims which were filed late in the limitation period. In that case, which involved a claim of medical negligence against a hospital and two doctors it had employed, several attempts were made to trace the doctors, after information was received that they were no longer working at the hospital. The process server not only went to their place of employment and made enquiries of different persons as to their possible whereabouts, but he also followed up on leads which led him to another hospital. There he made discreet enquiries in order to gain information as to their whereabouts. Even then, the Board seemed hesitant to say definitively that they accepted that reasonable steps were taken to trace and serve the defendants, in that case. In fact, the

Board declined to make a ruling on that aspect of the case as it said, the finding that it was reasonable was at the discretion of the judge and they would hesitate to trouble such a finding especially since the Court of Appeal had agreed with that finding.

[75] This is the way the Board put it, at page 4 of their judgment:

> "**The appellant's counsel criticised the evidence and suggested that further and more effective efforts should have been made before the judge would have been justified in ordering an extension of the writ. But this was essentially a matter for the exercise of the judge's discretion and it would be wrong for an appellate court to interfere merely because they might on the facts have come to a different decision…**
>
> [T]heir Lordships are satisfied that no grounds exist which would justify them in interfering with the exercise of the judge's discretion, particularly when it has already been upheld by the Court of Appeal." (Emphasis added)

[76] It is my view that there is no basis for interfering with the master's finding that she was not satisfied that all reasonable steps were taken to trace and serve. It is she who the appellant was required to satisfy. There is no basis on which this court could properly interfere with the failure to exercise her discretion in the appellant's favour on the basis that the affidavits did not satisfy her that all reasonable steps were taken, just because this court would have come to a different conclusion, unless it can be shown that the master acted irrationally.

[77] Having filed the claim in 2019, almost six years after the cause of action accrued, it was incumbent on the appellant to move with due expedition. Whilst there is no law or rule against a claimant waiting until the last minute of the limitation period to file a claim, or even waiting until the last possible moment to serve it, as all the authorities on this issue have been at pains to point out, they do so at their peril and must stand the consequence of that decision with fortitude (see for instance the dictum of Smith LJ in **Drury v the BBC** at paragraph 40).

[78] In this case, with the clocks winding down and having filed a claim just under the wire, the appellant had six months in which to serve it. There is no evidence of any attempts to serve between 20 January and 28 February 2020 when the life was draining from the claim form and it was known that the 1st respondent had migrated. With the clock still ticking, nothing further was done to locate and serve the 1st respondent, knowing full well he could not by then be served personally at his known address. No serious argument could be made that the appellant made reasonable efforts to locate and serve the respondents, in those circumstances. The master's finding that the process server's evidence of efforts to serve was insufficient is unassailable, in my view, in the light of the knowledge gained by the process server, at least from January 2020.

[79] Curiously too, the limitation period having expired and the claim form having been rendered invalid, along with an extension of its validity, the appellant also sought substituted service on the 1st respondent's insurance company on the basis that she was sure it "will come to the attention of the 1st respondent". The master did not deal with this issue as, obviously having refused the application to extend the validity of the claim form, there was no necessity for her to consider an order for substituted service.

[80] Although it is not strictly necessary to comment on this aspect of the application, I will say that the prejudice to the 1st respondent and the insurance company of such an order at this stage, if this application is to be granted, is glaring. For having filed a late claim and having allowed the claim form to expire, the appellant now requires a court order extending the validity of the claim form for an unallowable period of 12 months in a single application, and an order permitting her to serve it on the insurers, so that it becomes their duty to find the respondents. I can only question the efficacy and fairness in such a move since, if it is already known that the 1st respondent lives overseas, how is the court to accept that service on the insurance company will bring the matter to the attention of these respondents? There is no evidence that the 1st respondent still does business with the insurance company and that the insurance company has any greater knowledge of his whereabouts. In **Insurance Company of the West Indies Ltd v Shelton Allen (Administrator of the Estate of Harland Allen) and others**,

Morrison JA (as he then was) expressly held that in order for a court to sanction an alternative method of service of the claim form adopted by a claimant, pursuant to rule 5.13, it must be clearly shown on affidavit and the court must be satisfied that the document is likely to reach the defendant or come to his knowledge by that method. In so doing, this court expressly held that the decision of Mangatal J (Ag) as she then was) in **Lincoln Watson v Paula Nelson** (unreported) Supreme Court, Jamaica, Suit No CL 2002/W-062, judgment delivered 9 December 2003, and Sykes J (as he then was) in the consolidated decision of **Egon Baker v Novelette Malcolm and Another; Egon Baker v Guyan Carr**, (unreported) Supreme Court, Jamaica**,** Suit Nos. CL 1999/B 055 and CL 2001/B 098, judgment delivered 1 June 2006 (both of which were decided under the provisions of the Judicature (Civil Procedure Code) Act), to be inapplicable to cases decided under CPR rule 5.13.

[81] Similarly, an order for service by a specified method under rule 5.14 can only properly be made where there is affidavit evidence showing that the method of service proposed is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim.

The limitation point

[82] Having found that there was no possibility of the appellant getting the orders she sought in the amended application for court orders, as to grant them would be in breach of the rules, and having found that, in any event, it was within the master's discretion not to grant the initial extension sought, it is not strictly necessary to go any further in this appeal. However, a great portion of the master's decision, counsel's submissions and Brown Beckford's JA's judgment is taken up with what I will call the limitation point, and therefore, it behoves me to say something about it.

[83] The appellant relied on this court's decision in **Dr C W Thompson v Administrator-General for Jamaica (Administrator for Estate Carol Morrison Dec'd)** (1990) 27 JLR 175, in arguing that the master erred in her application to the appellant's case, the principles regarding the extension of the life of a claim after the

limitation period has expired. The principle, largely established in the English cases under their old rules, was that where an application to extend the validity of a writ was made after its expiry date, consideration ought to be given to the question whether time should be enlarged where to do so would deprive a defendant of an accrued defence under the statute of limitation. That principle existed in jurisdictions which had the power to enlarge the life of the original writ (under order 64 rule 7), thus enlarging the currency of the writ after it had expired so that an application to extend its life could be made under order 8, rule 1, which required the application to be made before the expiry of the validity of the writ. In enlarging the currency of the writ, it could then be deemed to be alive at the time the application for its extension was made and it could thereby be extended thereafter under order 8, rule 1.

[84] English case law on the limitation point arose as a result of these provisions where the issue whether it was fair to enlarge the currency of the writ where the limitation period had expired, arose. The rule which replaced order 8, rule 1 in the English jurisdiction in 1962, which was RSC order 6, rule 8(2), allowed a writ to be extended during its life or after its expiry without resort to any deeming provision. The question then arose whether those earlier cases decided under order 8, rule 1 were still applicable. However, because an application to extend the life of the writ could be made on any later day after its expiry "as the court may allow" under order 6, rule 8(2), the case law on the point remained persuasive in the English courts. Therefore, the question whether an extension to the life of the writ ought to be granted when the application was made after it had expired and after the limitation period had expired and the defence had accrued to the defendant, remained a relevant one after the passing of RSC order 6, rule 8(2).

[85] In **Baker v Bowketts Cakes Ltd** [1966] 1 WLR 861, which was decided under RSC order 6, rule 8(2), the issue involved the failure to serve a writ within the time allotted to do so, in a stale claim. Denning LJ, with whom Harman LJ agreed, gave a scathing description of the attitude of the plaintiff and his solicitors in their delay in serving the writ, and determined that in those circumstances, where the statute of limitations had run in favour of the defendants, no extension of the time for service of the writ ought to

be granted, in fairness to the defendant. In that case, the application had been made four days before the writ expired. Harman LJ took the view that although the plaintiff had the right to wait until the last day to file a writ, the closer it was to the 'last moment', the stricter the attitude of the court ought to be. With that I agree.

[86] As an aside, Winn LJ dissented on the basis that since the writ had not expired at the date of the application, the court ought to have confined itself to the question of whether all reasonable steps had been taken to serve the defendant. This position is in keeping with that taken in **Kleinwort Benson Ltd v Barbrak Ltd and other appeals;the Myrto (No 3)** [1987] 2 ALL ER 289, and **Baker's** case would have fallen into category 2, as set out in the former case and which is reproduced below.

[87] The case of **Kleinwort Benson Ltd v Barbrak Ltd** sought (at page 294) to bring some clarity to the principles in the English cases by setting out three categories of cases in which the question of limitation of action may arise in an application to extend the life of a writ (claim form). These are:

1. Cases where the application for extension is made at a time when the writ is still valid and before the relevant period of limitation has expired.

2. Cases where the application for the extension is made at a time when the writ is still valid but the relevant period of limitation has expired.

3. Cases where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired.

[88] However, as noted by Campbell JA in **Dr Thompson's** case, the cases which rely on the principle regarding the extension of the life of the writ after its expiry and the expiry of the limitation period, lay down no principle with regard to cases where the

application was made before the expiry of the writ or claim form (see page 179). Campbell JA rightly pointed out, that, in any event, the case before him fell within category 2. However, even though he accepted that this was so, it was not necessary for him to decide the case on any limitation point as he recognised that the only basis on which the decision could have been made whether to extend the writ was under section 30 of the Civil Procedure Code. Under that section, the court had to be satisfied that reasonable efforts to serve had been made. The only question for the appellate court, therefore, was whether the judge below had erred in finding that reasonable efforts to serve the defendants had been made so that the decision in that case was clearly not made on any limitation point.

[89] When the case went on appeal to the Privy Council (as cited above in paragraph [74] of this judgment), their Lordships declared themselves satisfied that the appellate court was aware that the consideration of its decision lay in section 30 of the Civil Procedure Code. After referencing the relevant portions of Campbell JA's judgment, at page 288 their Lordships said the following:

> "These abstracts taken together with the judgment as a whole satisfy their Lordships that the Court of Appeal was, as their Lordships would expect, fully seized of the terms of section 30 and well aware that a judge must be satisfied that reasonable efforts have been made to serve the defendant, or that some other good reason exists, before ordering the renewal of a writ, regardless of any question of limitation."

[90] Therefore, the approach of the courts in England under their RSC order 64, rule 7, order 8, rule 1, and order 6, rule 8(2) was never applicable to this jurisdiction, where the court had no power to entertain an application to extend the life of a writ or a claim form after it had expired, under section 30 of the old Civil Procedure Code or now under the rule 8.15 of the CPR.

[91] In the case of **Vinos v Marks & Spencer plc** [2001] 3 All ER 784, decided under rule 7 of the English CPR, the claimant served the claim form after it had expired and after the limitation period had also expired. He applied for an extension of time for service

of the claim form and the defendant applied for the service to be set aside. Rule 7.5 provides that the claim form must be served within four months after the date of issue. Under rule 7.6(1), the claimant may apply for an extension of that period for service. Rule 7.6(2) provides, as a general rule, that such an application must be made within the validity of the claim form. Rule 7.6(3) provides for an exception to the general rule, in that, it allows the court to make an order if the application is made after the time for service has expired, if one of three circumstances in the rule is found to exist. These are if the court was unable to serve, if the claimant took all reasonable steps to serve and was unable to do so, and in either case, if the claimant acted promptly in making the application.

[92] This shows that even under the English CPR there is no longer any necessity to resort to the old principles involving applications after the limitation period has expired, and the effect of that on the limitation defence. As May LJ said, at paragraph 17 of the judgment in **Vinos v Marks & Spencer**, in rejecting submissions made on what the position would have been under the former RSC, the new procedural code stands "untrammelled by the weight of authority that accumulated under the former rules". This is in keeping with earlier statements made in the cases in the post CPR era, that the earlier authorities are no longer of any general relevance where the CPR applies and should not be referred to in seeking to interpret the CPR (see **Biguzzi v Rank Leisure plc** [1999] 1 WLR 1926 at page 1934 and later in **Godwin v Swindon Borough Council** [2002] 1 WLR 997 at page 1011, paragraph 42). There are, however, other cases which refer to circumstances where old authorities may have considerable persuasive force).

[93] I would take the point even further to state categorically that no case interpreting rule 7.6 of the English CPR can be of any assistance in this jurisdiction, in interpreting rule 8.15, since the provisions are wholly different, other than perhaps in a limited way, on the question of what may or may not amount to all reasonable efforts to serve. Whereas the English CPR provides for the court to consider whether all reasonable efforts have been made to serve the claim form, this factor is only relevant in applications made after the expiry of the claim form. There is no such provision for applications after the

expiry of the validity of the claim form in our rules. Rule 7.6(2) of the English CPR requiring applications to be made before the expiry of the claim form, gives an unfettered discretion to the English courts, whilst rule 8.15(4) of our CPR provides the factors which the court must consider. If the court is not satisfied of these conditions, and if no other good reason is shown, the court has no jurisdiction to grant the extension, even where the application is properly made. Rule 8.15 of the CPR provides the only basis upon which an extension of the claim form can be made. It is not necessary to resort to any further principle regarding the expiry of the limitation period under the Statute of Limitation as applied in the old English authorities. In any event, if the case fell into category 3, as described in **Klienwort Benson**, then no application could properly be made under rule 8.15 to extend the claim form, as it would have expired before the application was made and no extension could be granted. Cases in category 1 and 2 are captured by rule 8.15 (3)(a)(ii) and (ii). Therefore, the master ought to have been fully seized of the provisions of rule 8.15 of the CPR, and ought to have known that the only basis for consideration whether to grant the extension was whether the application was properly made before the claim form had expired and whether all reasonable steps were taken to trace and serve the respondents. I agree with Brooks P that the issue is now moot. This is because at the time the application was heard, the life of the claim form had expired well past the six months within which any discretion to grant an extension on any one application, could have been exercised. Therefore, no separate application having been filed for an additional six months' period of extension, the claim form would have expired without any chance of renewal, thereafter.

[94] The master was faced with an amended application which contained an application to extend from August 2020, a claim form which ought to have been extended from February 2020. Even if an extension had been granted from 28 February 2020, it still would have expired on 28 August 2020. Faced with no new application to extend the claim form from 28 August 2020, the master had no choice but to dismiss the application under the rules. There was no necessity to resort to decisions which were applicable to old rules and not relevant to the powers exercisable under the CPR.

Was there any other good reason shown why the validity of the claim form should have been extended?

[95] The appellant also relied on the fact that the other claimant in the related claim had received an extension of the validity of that claim form and argued that it would be unfair if this appellant was shut out. That claimant also filed the claim late, having only filed it on 28 November 2019. The application for extension of the validity of that claim form was filed 19 May 2020. The application was heard 21 October 2020, a week before the validity of the claim form would have expired, and an order was made extending the validity of the claim form for six months, effective 27 May 2020 and permitting service on the insurance company in respect of the 1st respondent. That claimant, therefore, was given a small window of opportunity within the six months extension to serve on the insurance company before expiry of the validity of the claim form on 28 October 2020.

[96] In the instant case, by the time the application was heard, the six months' window for any period of extension to be given, had already expired.

[97] I could not help but notice that in the related claim, it appears from a draft and unsigned order on application for court orders filed 20 November 2020, that despite having been given the extension of the validity of the claim form, and despite an order specifying service on the insurance company, and with a full month within which to do so, that claimant still did not serve the claim form in time, and had to apply for a further extension of the validity of the claim form. In my view, this is unacceptable and should not be held up as any example, to guide this court in making a determination in relation to the appellant.

[98] With respect to this appellant, on 25 February 2020 when she applied for an extension of the validity of the claim form, there were three days remaining before it would expire. No affidavit of urgency was filed to have the matter heard and determined with any urgency. Instead, the appellant filed an amended application seeking two extensions in one application. This cannot be done. By virtue of rule 8.15(2) the master could only have extended the validity of the claim form for six months to 28 February

2020, a period which had already marched on by the time the application was heard. The claim is, therefore, now dead, in any event.

Is the master's decision unreasonable in light of the evidence and contrary to the overriding objective?

[99] The fact that the appellant will be shut out of access to the court or will be deprived of a claim because a fresh claim will be met by the defence of limitation of actions cannot be a basis for allowing the appeal. The framers of the rules would have recognised this as a possibility and that it is a necessary consequence of a litigants' failure to follow the rules. If it were intended that applicants were not to suffer the consequences of failing to move with due expedition in the face of strict time limits, then there would be no need for those rules. The reasons for laws and rules are obvious. The administration of justice must be certain, and justice and fairness are not only for one party. In stale claims, witnesses die or cannot be found, memories fade, and paperwork becomes lost. Defendants are entitled to know within a definite period whether or not they will have to answer a claim.

[100] The situation becomes even more egregious in claims arising out of motor vehicle accidents, where claimants have developed a practice, which has almost become a settled practice, of applying to serve a defendant's insurance company by way of substituted service, and where the insurance company may be in no better position to locate a defendant, than the claimant is. Inevitably the insurance company, in such instance, is not in a position to defend the claim in court.

[101] It is to be recalled that the validity of a claim form was once 12 months. The framers of the rule thought it best to shorten the period, to ensure that claims are dealt with speedily after they are issued. It serves no purpose for the courts to lend itself to support indolence and idleness when what is required is alacrity and alertness. Achieving the overriding objective does not mean that the court can ignore the plain meaning of the rules so as to interpret them to mean what they do not mean in favour of a litigant. The merits of a particular case are entirely irrelevant to this issue. One of the clear

intentions of the CPR is that cases are to proceed in the courts with due expedition. The court cannot continue to mouth the importance of observing time limits while acting in a manner which may call into question the seriousness of such statements. The court does the administration of justice no good if it interprets the rules too leniently, or interprets them to mean what they do not mean in order to extricate a tardy litigant from the grip of the consequences of a failure to act with alacrity.

[102] In the case of **Vinos v Marks & Spencer**, May LJ said, at page 790 paragraph 20:

> "If you then look up from the wording of the rules and at a broader horizon, one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with proper expedition …
>
> [T]here are statutory limitation periods for bringing proceedings. It is unsatisfactory with a personal injury claim to allow almost three years to elapse and to start proceedings at the very last moment. If you do, it is in my judgment generally in accordance with the overriding objective that you should be required to progress the proceedings speedily and within time limits. Four months is in most cases more than adequate for serving a claim form. There is nothing unjust in a system which says that, if you leave issuing proceedings to the last moment and then do not comply with this particular time requirement- … -your claim is lost and a new claim will be statute-barred."

Conclusion

[103] This case clearly shows that there continues to be some confusion regarding the relevant principles. The CPR is a discreet set of rules and, once applicable, there is no need to resort to historical cases. Under and by virtue of rule 8.15, no application to extend time after the expiry of the validity of the claim form can be made. Where an applicant seeks an order for extension of the validity of the claim form, the application must not only be made before the validity of the claim form expires, but the order, if granted, so as to be effective, has to relate back to a date before the expiry of the original claim form. In this case the claim form would have expired on 28 February 2020. The

application for extension could have only been granted, in the first instance, for six months, in any one application. That would have caused the claim form to be valid to 28 August 2020. That period having passed before the order was made, no further orders could be made on that application. The amended application for court orders filed on 3 August 2020 seeking two separate periods of extension of the validity of the claim form could not be granted, by virtue of rule 8.15(2). That rule provides that only one extension may be granted in any single application. There effectively being no application to extend the claim form beyond August 2020, this meant that by January 2021 the claim form had expired. No further application for extension can, therefore, now be made and the claim is now dead. The master, therefore, had no jurisdiction to make any order on the application before her and neither does this court. No blame can properly be placed at the feet of the registry of the court in setting the date for the hearing of the application, as the registry performs only an administrative function and it is the duty of the litigant or his representative to file an affidavit of urgency or apply for an emergency hearing, if the limitation period is about to expire.

[104] In any event, the decision of the master made by virtue of rule 8.15(4) that she was not satisfied that all reasonable efforts were made to trace and serve the respondents, was a matter for her, and there is no basis for this court to interfere with that discretion to refuse the application on that ground.

[105] Although I have taken a somewhat different approach than that taken by the master, I have reached the same conclusion and for all the reasons I have given, the appeal must fail.

BROWN BECKFORD (AG)

Background

[106] The appellant was a passenger in a motor vehicle owned by the 1st respondent and driven by the 2nd respondent. She was injured when the motor vehicle was involved

in an accident. She sued both respondents for damages. The claim form being about to expire without being served, she filed an application for court orders seeking to extend the validity of the claim form and to serve the 1st respondent by substituted service. The application was refused by Master Orr (Ag). The appellant now appeals against that order mainly on the ground that the learned master exercised her discretion on a wrong interpretation of the law.

The grounds of appeal

[107] The appellant challenges the orders made by the learned master on the following grounds:

> "1. The Learned Master erred in finding that the effect of granting the orders sought would be to enable the Claimant to extend the time to serve her claim form after both the claim form and the limitation period have expired since the Claim Form, by operation of law, could have been served after the limitation period expired long before any application to extend time had been made.
>
> 2. The Learned Master erred in finding that the effect of granting the orders sought would be to deprive a Defendant of a statutory defence since no Defence available to the Defendant on the day before the Claimant's application was made would be removed from the Defendant by the granting of the said Application.
>
> 3. The Learned Master erred in finding that the provisions of Rule 11.4 of the CPR were subject to the provisions of the Limitation Act. The Rule that an Application is made at the time it is filed is not subject to any Statue that may give a Defendant a Defence to the original suit or to the Application itself.
>
> 4. The Learned Master erred in her analysis of the case of **Dr. C.W. Thompson v Administrator General for Jamaica (Administrator for Estate Carol Morrison, deceased)** (1990) 27 JLR 175 and in particular her conclusion that 'Campbell, J.A [in that case] said the relevant consideration for the statutory defence was when the order was being

made, not when the application was made' when in fact no such finding or statement by Campbell J.A. was made in that case.

5. The Learned Master erred in proceeding on a fundamental misunderstanding of the decision and reasoning in the case of **Dr. C.W. Thompson v Administrator General for Jamaica (Administrator for Estate Carol Morrison, deceased)** (1990) 27 JLR 175 and in particular in concluding that the decision of the Court of Appeal meant that the time when the Order extending the time to serve the claim was to be made by the Court was 'the relevant time to consider whether the statutory defence accrued to the Defendant.'

6. The Learned Master erred in relying on certain cases in the Written Reasons for Judgement which were introduced at the stage of Judgment by the Learned Master when Counsel did not have an opportunity to address the Court on them and involved situations in which new causes of action or parties whether by amendment or otherwise were sought after the expiration of the Statue of Limitations and accordingly were irrelevant to the issues before the court.

7. The Learned Master erred in not considering the decision of the Privy Council in the case of **Dr. C.W. Thompson v Administrator General for Jamaica (Administrator for Estate Carol Morrison, deceased)**.

8. The Learned Master erred in finding that the un-contradicted and uncontested evidence before her of the efforts made to serve the Defendant was insufficient because the Bailiff gave 'no indication that he sought to ascertain the whereabouts of the 1st Defendant from anyone else…' That finding was unreasonable in light of the fact the Bailiff testified, as the Learned Master recorded, that he had ascertained from a neighbour that the Defendant was overseas.

9. The Learned Master erred in law in using the Claimant's application for alternative service after exhausting several attempts at personal service to say that alternative service should have been tried before when the CPR states clearly that the Court must be satisfied that the Claimant made reasonable efforts to trace the Defendant and to serve the Claim Form not to serve it on someone else other than the

Defendant when the general rule is that a Claim Form must be served personally so alternative service, which is a complex and uncertain option, should only be taken after attempts at personal service have proven futile.

10. The decision of the Learned Master to refuse the orders sought was unreasonable in light of the evidence.

11. The decision of the Learned Master in Chambers is contrary to the over-riding objective and failed to deliver justice to all parties."

[108] The applicant consequently sought the following relief:

"i. The Order of the Learned Master be set aside.

ii. The validity of the Claim Form be extended for six months from the date of the Order of this Honourable Court.

iii. The time within which to serve the Claim Form, Particulars of Claim and all supporting documentation be extended for six months from the date of the Order of this Honourable Court.

iv. Personal service of the Claim Form and Particulars of Claim on the 1st Defendant be dispended with.

v. In respect of the 1st Defendant, the Claimant be permitted to effect service of the Claim Form and Particulars of Claim and other subsequent documents by serving Advantage General Insurance Company Limited.

vi. The time for filing and [sic] Acknowledgement of Service be within fourteen (14) days of the date of service.

vii. The time for filing a Defence, if any, be within forty-two (42) days from the date of service.

viii. Such further or other relief as the Honourable Court deems just."

Decision of the learned master

[109] The central issue that the learned master considered was whether the court could grant an order extending the validity of the claim form, when at the hearing of the application, both the claim form and the limitation period had expired. She contemplated

that such an order would have the effect of allowing the appellant (then the claimant) to pursue a claim that was statute barred pursuant to the Limitation of Actions Act (the Limitation Act) and consequently deprive the respondents of a defence under the Limitation Act.

[110] In support of her position, the appellant had relied on the case of **Glasford Perrin v Donald Cover** [2019] JMCA Civ 28 ('**Glasford**') for the position that the court could grant an order extending the life of the claim form where the limitation period had expired at the time the order was made. The learned master disagreed that this court set down any precedent that the validity of the claim form could be extended where a statutory defence had accrued under the Limitation Act. In her view, the main issue with which this court was concerned in **Glasford**, was the ability of a judge to correct an order to give effect to the intention of the court. From her analysis, the court was not tasked to resolve the issue of whether an order could be made after the limitation period had expired and did not consider the relevant authorities on this point of law. She further stated that the issue of the defendant being prejudiced by the possible loss of a limitation defence was dealt with only briefly by the court.

[111] It was her position that the Civil Procedure Rules, 2002 (CPR) cannot be interpreted to extend the limitation period under the Limitation Act. She found support in the judgment of this court in **Tikal Limited & Wayne Chen v Everley Walker** [2020] JMCA Civ 33 ('**Tikal**') which considered whether rule 19.4 of the CPR, allowed for a party to be added after the limitation period has expired. This court in **Tikal** concluded that this provision could not have the effect of overriding the Limitation Act and that the CPR must necessarily be subject to its application as subsidiary legislation. In the circumstances this court found that the judge in the court below could not have relied on this provision to make an order to add a party after the limitation period had expired.

[112] Whilst accepting that she was bound by a decision of this court, she decided that **Glasford** did not establish that the court could extend the validity of the claim form after the limitation period had expired.

[113] She found that such an order would have the effect of extending the limitation period. She found support in the case of **Battersby & Others v Anglo American Oil Company Limited** [1945] KB 23 ('**Battersby**') which considered an application to extend the validity of a writ where the application was made after the writ had expired. At paragraph [34] of her judgement, she relied on the dictum of Goddard LG that "In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order".

[114] In treating with how to approach an application to extend the validity of the claim form, the learned master found support in **Dr C W Thompson v Administrator General for Jamaica (Administrator for Estate Carol Morrison, deceased)** (1990) 27 JLR 175 ('**Thompson**'). She noted the three categories set out by the House of Lords in **Kleinwort Benson Limited v Barbrak Limited** [1987] 2 All ER 289 ('**Kleinwort**') and cited with approval in **Thompson** by Campbell JA. She noted at paragraph [39] that:

> "[39] [Campbell JA] classified these cases as follows: ' 1. Cases where the application for extension is made at a time when the writ is still valid and before the relevant period of limitation has expired. 2. Cases where the application for extension is made at a time when the writ is still valid but the relevant limitation period has expired. 3. Cases where the application for extension is made at a time when the writ has ceased to be valid and the relevant limitation period has expired.'"

[115] She noted that he went on to quote from Lord Brandon's judgment in **Kleinwort** at page 294:

> "In both category (1) cases and category (2) cases, it is still possible for the plaintiff (subject to any difficulties of service which there may be) to serve the writ before its validity expires, and, if he does so the defendant will not be able to rely on a defence of limitation. In category (2) cases but not category (1) cases it is also possible for the plaintiff before

> the original writ ceases to be valid to issue a fresh writ which will remain valid for a further 12 months. In neither category (1) cases nor category (2) cases therefore, can it be properly said that at the time when the application for extension of time is made, a defendant who has not been served has an accrued right of limitation. In category (3) cases, however, it is not possible for the plaintiff to serve the writ effectively unless its validity is first retrospectively extended. In category (3) cases, therefore, it can properly be said that, at the time when the application for extension is made, a defendant on whom the writ has not been served has an accrued right of limitation."

[116] At paragraph [41] of her judgment, the learned master further noted that in dismissing the appeal Campbell JA said:

> "**Neither at the time of the issue of the writ nor at the date of renewal of the writ made by Ellis, J, was there an accrued right of limitation**. If the renewal had been refused it is possible that the appellant could still have been served with the original writ before its expiry and no defence under the Act could be raised."
>
> "**In conclusion when the application for renewal came before Ellis, J he could not properly consider any prejudice to the appellant based on an accrual of a defence under the Public Authorities Protection Act as the defence had not then accrued**." (Emphasis as in the original)

[117] From this she extrapolated at paragraph [42] that "a consideration of the court on any application to extend the time to serve the claim form must therefore be whether the Defendant will suffer any prejudice based on any accrued defence under the Statute of Limitations". She further went on to find that Campbell JA was not concerned with the time when the application was made, but rather when the order extending time was made. This latter period she found, at paragraph [43], was "the relevant time to consider whether the statutory defence had accrued to the Defendant".

[118] She noted that, in considering whether to grant the relief, she then needed to consider: (i) the likely prejudice that the respondents would suffer based on any accrued

defence under the Limitation Act and (ii) that in determining whether any defence had accrued the relevant date was when the order would be made and not when the application was filed. She acknowledged that rule 11.4 of the CPR provided that an application was deemed to be made on the date that it was filed in court but determined that this rule had to be subject to the Limitation Act.

[119] The learned master concluded that at the time the application was heard the respondents would have had the benefit of an accrued defence under the Limitation Act. To grant the relief sought would therefore be to deprive them of such defence.

Appellant's submissions

[120] It is not my intention to disregard any of the submissions of counsel by limiting this summary to the central issue. I have read the submissions and authorities carefully.

[121] It was submitted on behalf of the appellant, that the learned master erred in refusing to grant the relief sought as the *ex-parte* notice of application was filed when the claim form was still valid in keeping with rule 8.15(3)(a)(i) of the CPR. In these circumstances it was not relevant that at the time the application was filed the limitation period had already expired. It was the appellant's position that the learned master had misunderstood the law in relation to the relevance of the limitation period arising upon an application for an extension of the validity of the claim form.

[122] It was submitted that in both **Glasford** and **Thompson**, the court granted the application extending the validity of the claim form and writ respectively, even though the limitation period had expired at the time of hearing the application. It was further noted that in **Thompson**, the application for extension was filed whilst the writ was still valid, however the application to extend its validity would have been heard after the expiry of the limitation period. These cases showed that the learned master should only have been concerned with whether the application was made before the claim form expired and not whether the limitation period had expired at the date of the hearing of the application.

[123] It was further submitted that the learned master erred in finding that at the date of the hearing of the application any statutory defence available to the respondents had accrued. This finding was not in keeping with the three categories set out by Campbell JA in **Thompson**. The appellant's case fell in category two as the application for an extension was made at the time claim form was valid but the relevant limitation period had expired. It was noted that for category two cases the statutory defence would not yet have accrued so as to deprive the respondents of a limitation defence at the time the application was made.

[124] It was also submitted that the other cases relied on by the learned master were not relevant to determining the issues before her as those cases dealt with situations where new causes of action or parties were sought after the expiration of the limitation period. Moreover, these cases were introduced by the learned master at the stage of judgement when counsel did not have an opportunity to address them.

[125] Counsel further submitted that the learned master misinterpreted **Glasford**. It was counsel's position that this court in fact refused to set aside an order extending the validity of the claim form where at the hearing of the application the limitation period had expired. It was therefore wrong to assert that granting such relief would amount to extending the limitation period as the application was filed before the claim became statute barred.

[126] Finally, counsel submitted that the learned master was in error in her finding that rule 11.4 of the CPR was subject to the Limitation Act so as to find that any statutory defence accrues before the claim form has expired when the limitation period had expired. The correct position is that an application is made at the time it is filed, which is not subject to any statute that may provide a possible defence to a defendant.

Analysis

[127] In order for the appellant to succeed she will need to demonstrate that the learned master exercised her discretion upon an error in law or fact. I am cautioned by the well-

known authority of **Hadmor Productions v Hamilton** [1982] 1 All ER 1042 at 1046 (**Hadmor**), that the function of the appellate court initially is one of review only. Morrison JA (as he then was) in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 summarised the principles set out in **Hadmor**:

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

If the court finds that the judge's exercise of discretion was based on such an error, then it becomes entitled to exercise an original discretion of its own.

[128] A timeline of the events leading to the appellant's *ex-parte* notice of application for court orders to extend the validity of the claim form is set out below:

(i) The claim form and particulars of claim was filed 29 August 2019;

(ii) The limitation period expired 2 December 2019;

(iii) The ex-parte notice of application was filed 25 February 2020;

(iv) The claim form expired 28 February 2020;

(v) An amended ex-parte notice of application was filed 3 August 2020; and

(vi) The hearing of the original and the amended ex-parte notice of application was heard on 7 January 2021.

[129] With due respect to the appellant's 11 grounds of appeal, the main issues to be resolved by this appeal are firstly whether the learned master was correct in law that an order to extend the validity of the claim form should not be made where at the hearing date both the claim form and the limitation period had expired as this would deprive the respondents of an accrued defence of limitation. Secondly, whether the relevant date for

the purposes of the accrual of a limitation defence was the date of application or the date of hearing.

[130] As recognized by the learned master, rule 11.4 of the CPR sets out that an application is deemed to be made when it is filed in court. This means that when the appellant filed its application on 25 February 2020, it was within the validity period as specified by rule 8.15(3)(a)(i) of the CPR.

[131] I will firstly review the learned master's analysis of the case of **Glasford**. The facts are that the claimant had filed a claim form for injuries arising from a motor vehicle accident which took place on 1 July 2008. The claim form was filed on 12 June 2014. On 2 June 2015 (at that time a claim form was valid for 12 months), he filed a notice of application seeking to extend the validity of the claim form and to dispense with personal service and on 10 July 2015 he filed an amended application.

[132] The application was heard and granted on 13 July 2015. Notably, at the time the application was filed, the claim form was still valid but the limitation period had expired. The order made by the court was ineffective as it was stated to take effect on a date after the claim form had expired. On an application, the court corrected its order to reflect its true intention that the order extending the validity of the claim form was to take effect from the date of expiration. The appellant then applied to the court for a declaration that the court had no jurisdiction to try the claim as the claim form had expired and therefore invalid and that the order purporting to extend the life of the claim form be set aside. The application was refused.

[133] On appeal to this court, the central issue was the jurisdiction of the lower court to correct its order. This court however also found at paragraphs [49] and [50] that there was no merit to the argument of possible prejudice to be faced by the appellant by extending the claim form after the period of limitation had expired. In his judgment, with which the rest of the panel agreed, Pusey JA (Ag) stated:

> "[49] I have considered the appellant's argument that he would be deprived of the benefit of a defence under the Limitation of Actions Act, in circumstances where the respondent initiated proceedings close to the expiration of the limitation period. Further, he complains that the respondent did not act carefully in proceeding with the claim, and that if the order is modified in any way to reinstate or validate the claim, it would be extremely prejudicial to him.
>
> [50] These submissions did not find favour with the court below and were not persuasive in this court either."

[134] The learned master therefore is not on good ground when she said at paragraph [26] of her judgement that:

> "[26] I accept that I am bound by the decisions of the Court of Appeal, but I do not agree that the decision in **Glasford Perrin** (supra) can be used as an authority to enable a Claimant to extend the time to serve her claim form after both the claim form and the limitation period have expired. To do so would be to extend the limitation period using the provisions of the CPR particularly where our courts have rarely treated it as just to deprive a Defendant of a statutory defence."

[135] This was based on her contention that the issue of the statutory defence of limitation was not being treated with by the court and additionally, that this court did not examine the authorities on this issue. I disagree with her understanding of the case. It is clear that this argument was properly before the court to consider and treat with. This court, in agreeing with the lower court, did not find it necessary to repeat the arguments but stated its agreement. Before Lindo J it was argued that, where the application is made before the claim form has expired, such an order can be granted even after the expiry of the claim form where the requirements of rule 8.15 of the CPR have been satisfied. Lindo J accepted and agreed that this position was consistent with case law. She expressly found that this was so even in circumstances where the application is made after the limitation period has expired. This aspect of her finding was live to this court as it is referenced in the court's reiteration of the decision of Lindo J.

[136] This understanding of Lindo J's decision was consistent with the position of the court as set out in **Thompson**. The learned master purported to find support for her decision in **Thompson** but in my view it was misinterpreted and misapplied by her. In that case, this court considered an application to extend the validity of a writ when at the time the application was made the writ was valid and the limitation period had expired.

[137] The learned master fell into error as she failed to recognise that the case before her fell squarely into category two as defined by Campbell JA. Had she so categorized it, she would have realized that, as the claim form was valid at the date of the filing of the application for the extension, no defence of limitation had accrued. It is noted that rule 8.15 of the CPR now precludes category three cases; that is an extension where the time within which to serve the claim form has expired.

[138] The learned master also fell into error in her interpretation of **Thompson** when firstly, she found at paragraph [43] that Campbell JA "was not concerned with the time when the application was made, but rather when the order extending the time to serve the claim was to be made by the court". Secondly, that "…[t]his latter period was the relevant time to consider whether the statutory defence accrued to the Defendant". The learned master further erred in that she focussed on the date the order was made rather than when the application was filed. She found at paragraph [45] that "[i]n any event as Campbell, JA said the relevant consideration for the statutory defence was when the order was being made, not when the application was made".

[139] I am unable to agree with this interpretation of the judgment of Campbell JA by the learned master. Campbell JA, in dismissing the appeal, stated that "[n]either at the time of the issue of the writ nor at the date of renewal was there an accrued right of limitation". He was then addressing the ground of appeal filed which was to the effect that the order made for the renewal of the writ deprived the defendant of the applicable one-year limitation period.

[140] The learned Master's finding at paragraph [44] was that "[i]n the instant case, at the time the application (both the original and the amended application) was heard on January 7, 2021, the 1st Defendant would have by that time had the benefit of an accrued statutory defence of limitation which arose on December 3, 2019". Her conclusion that to extend the time to serve the claim form under rule 8.15 of the CPR would deprive the 1st defendant of his statutory defence of limitation was therefore based on a wrong interpretation of the law. It follows that it was an error of law for the learned Master to have considered any possible prejudice to the respondents by virtue of an accrued limitation defence.

The exercise of discretion

[141] The appellant having satisfied me that the learned master exercised her discretion on an error of law, in keeping with the principles laid down in **Hadmor**, this court is now entitled to exercise its own discretion as to whether the application should be granted. I will not then consider the additional issues raised in this appeal.

[142] As set out by rule 8.15 of the CPR, there is a two-fold requirement to satisfy the court on an application to extend the validity of the claim form. These are: (i) the application must be made during the currency of the life of the claim form and (ii) it must be proved that all reasonable steps were taken to trace and serve the respondent(s) with the claim form and it was unable to do so or that there is some other compelling reason for extending the period.

[143] The application having been filed before the claim form expired the first criteria is satisfied.

[144] The application was supported by an affidavit from counsel and also an affidavit from the bailiff for the parish Saint Mary, Mr Stanley Davis. Mr Davis' affidavit did not form a part of the bundle before us but was referenced in the decision of the learned Master. He outlined that he made five visits to the 1st respondent's home in September and October 2019 and January 2020. He further stated that on each occasion no one was

present. On one such visit, he spoke with the 1st respondent's neighbour who is also his cousin and he learnt that the 1st respondent was overseas. He went on to say that he has known the 1st respondent for 10 years and therefore wished to make a further attempt to serve him with the claim form.

[145] There was no reference in the decision of the learned master of the Bailiff's efforts to locate the 2nd defendant.

[146] Generally, what will amount to reasonable steps will depend of the circumstances of the particular case. The claim was filed on 29 August 2019 and was set to expire on 28 February 2020. The bailiff did make several attempts between September and January to serve the 1st respondent personally once the claim form was issued. While he was not located, his efforts did elicit further information to assist him to locate him. It could not be said he waited until the last minute to try to serve this respondent.

[147] The failure by the master to examine the position of the 2nd respondent independently of the 1st respondent in itself would have been a basis for this court to review her decision as against the 2nd respondent.

[148] The question however arises whether a reasonable step to take was (i) to have served the respondents by an alternative method of service pursuant to rule 5.13 of the CPR or (ii) seek earlier an order of the court for service by a specified method under rule 5.14 of the CPR. This would have obviated the need for an extension of the validity of the claim form that would effectively extend the limitation period.

[149] While this could be said to have been a course of prudence, both steps are subject to a court being satisfied that the respondents were able to ascertain the contents of the claim form and particulars of claim. It was perhaps a course of greater prudence, as submitted by counsel, to seek to extend the validity of the claim form and make further attempts to serve them personally even as an order was sought for service by a specified method. Further, this court in **Glasford** dismissed the argument that the appellant/defendant would be deprived of the benefit of a limitation defence by extending

the validity of the claim form in circumstances where the claimant initiated proceedings close to the limitation period and that the claimant did not act carefully in proceeding with the claim.

[150] Whether in all the circumstances the appellant had taken all reasonable steps to trace and serve the respondents is however now moot. I have had the benefit of reading the decisions of Brooks P and Edwards JA. I am constrained to agree that the appellant's amended application is undone by rule 8.15(2) of the CPR. For the reasons set out in the judgment of my sister Edwards JA, the claim form, having expired, could not have been revived by the court and cannot be revived by this court.

[151] I am agreed with Brooks P that the registry's failure to fix the matter for hearing before the first extension would have expired, together with the appellant's dilatory conduct in the prosecution of her claim have intersected to bring about this result.

Conclusion

[152] Though this court could review the decision of the learned master as she fell into error on the question of the accrual of a limitation defence, her refusal to extend the validity of the claim form on the amended application was correct and should not be interfered with. This appeal must therefore fail.

BROOKS P

ORDER

1. The appeal, filed herein on 24 February 2021, from the decision of Master Orr, made on 18 February 2021 is refused.

2. The order of the learned master refusing an application to extend the time to serve the claim form herein is affirmed.