COMMONWEALTH OF THE BAHAMAS **2021**
IN THE SUPREME COURT CLE/Gen/00708
Common Law & Equity Division
BETWEEN:

(1) STEFANIE ANN SCHAFFER
(2) STACEY DEE BENDER
(3) PAUL THOMAS BENDER
(4) BROOKE MARGUERITE SCHAFFER (a minor) by her next friend STACEY BENDER

Plaintiffs

AND

(1) CLAYTON PATTERSON SMITH
(2) FOUR C ADVENTURES
(3) RODERICK WATON
(4) INSURANCE COMPANY OF THE BAHAMAS LTD

Defendants

Before: The Hon. Madam Justice Carla Card-Stubbs
Appearances: Matthew Paton for the Plaintiffs

Whether the Supreme Court Civil Procedure Rules, 2022 apply to interlocutory matters filed prior to March 1, 2023 – Application to extend validity of a writ – Whether court may extend validity of a writ where the application is made after the writ has expired – Whether service on attorney is effective personal service on a defendant without more – Alternative Method of Service

Held:
The Rules of the Supreme Court, 1978 are only applicable to matters filed prior to March 1, 2023 that had a trial date which had been fixed before March 1, 2023 and where the trial date was not adjourned. The Supreme Court Civil Procedure Rules, 2022, as amended ('CPR 2022') which came into effect on March 1, 2023 applies to all other matters, whether or not filed before March 1, 2023, where those matters were not heard prior to March 1, 2023.

There is no jurisdiction under Rule 8.13 CPR 2022 to entertain an application made after a Writ or Claim form has expired. An application for extension of the validity of a Claim form or Writ must be made during the validity of the claim form or Writ.

Unless an attorney is both authorized to accept service of the Claim form on behalf of the named Defendant and has notified the Claimant in writing that he is so authorized, then the Claimant must serve a Claim form on the named Defendant personally "by handing it to or leaving it with the person to be served" (Rule 5. 3), unless a court otherwise orders. This means that the documents to be served must be put in the possession or control of the person to be served.

In making an application for an order in favour of an alternative method of service, a party must demonstrate attempts made to personally serve the Defendant, give evidence as to why it is impracticable to personally serve the Defendant and show how the method of service sought enabled, or is it likely to enable, the defendant to ascertain the contents of the claim form.

RULING

CARD-STUBBS J.

Introduction

1. This is the Plaintiffs' application for several orders concerning the Writ of Summons filed June 28, 2021 which initiated this action. The Application, an ex-parte Summons, was filed on July 29, 2022 pursuant to the now-repealed Rules of the Supreme Court, 1978 ('RSC'). It was listed for hearing, and was heard, subsequent to the coming into force of the Supreme Court Civil Procedure Rules, 2022, as amended ('CPR 2022') which took effect on March 1, 2023.

2. The filed ex-parte Summons sought the following relief:
   I. The Plaintiffs be granted an extension of time in which to serve the Writ of Summons issued 28 June 2021 on the 1st through 3rd Defendants.
   II. The validity of the Writ be extended for twelve months to the 29 June 2023, being the next following that on which the Writ would otherwise have expired.
   III. And/or in the alternative that the Plaintiffs be granted leave to amend the Writ to add certain Defendants to the cause of action.
   IV. The Plaintiffs be granted leave to effect substituted service on the First through Third Defendants by service on the law offices of Murrio Ducille & Co., of #9 The Bayparl Building Parliament Street, Nassau, The Bahamas.

3. Bearing in mind the transition to the CPR 2022 which took place during the time period between the filing of the ex parte summons and its listing for hearing, the Plaintiffs also sought an order from the court under the new rules to treat an attempt at service as an alternative method of service of the Writ. This is a relief provided for under the CPR 2022 but not under the RSC.

4. In this case, it is useful to summarize and reframe the substance of the applications before the court. At the hearing of the application, based on Counsel's oral and written submissions, the Plaintiffs sought:
   1. Leave to treat attempts at service on a firm of lawyers as valid service on the Defendants or,
   2. Alternatively, leave to treat attempts at service on a firm of lawyers as attempts at personal service on the named Defendants;

3. Alternatively, leave to effect substituted service on a firm of lawyers;
4. Leave to extend the validity of the Writ;
5. Leave to amend the Writ; and
6. Leave to add parties, viz 4 intended Defendants, to the action.

5. The application is supported by the filed affidavits of

   i) La Tanya Hamilton dated 25 July 2022

   ii) Jonathon Wallace dated 28 July 2022.

   Counsel was also granted leave to rely on the affidavit of Stacey Dee Bender dated 31 May 2023 which was unfiled at the date of the application.

6. For the reasons set out below, the application in its entirety is dismissed.

Background

7. The current action is a personal injury claim arising out of a 2018 boating accident which is alleged to have taken place "on or about June 30, 2018".

8. The action was started by way of generally-endorsed Writ of Summons ("the Writ") filed on behalf of the Plaintiffs on June 28, 2021 by 5 Stone Buildings.

9. Prior to this, a generally indorsed Writ of Summons ("the old Writ") had been filed by another law firm on behalf of the Plaintiffs. It appears that that action was never pursued and that that Writ was never served on the Defendants.

10. The endorsement on the Writ of Summons filed June 28, 2021 is as follows:

    The Plaintiffs claim:
    1.General Damages for personal injuries, loss and damage
    2. Special Damages
    3. Interest pursuant to the Civil Procedure (Award of Interest) Act 1992: and
    4. Costs

    In respect of injuries, loss and damage sustained in an accident whilst on a commercial watercraft/vessel in The Bahama waters on or about 30 June 2018 and where such commercial watercraft/vessel was owned and/or operated and/or insured by the Defendants, their servants or agents, and where such injury, damage and loss was caused due to the negligence and/or breach of statutory duty of the 1st through 3rd Defendants, their servants or agents.

11. The affidavits serve to detail the extent of the injuries of the Plaintiffs, the attempts at service, the reasons for delay and the culpability of the intended Defendants which would justify their addition as parties to this action.

12. The evidence, by way of affidavit, is that the Plaintiffs instructed process-servers to serve the Writ on the Defendants. The 4th Defendant was served and accepted service on June 28, 2022.

13. In relation to the 1st, 2nd and 3rd Defendants, process servers were instructed to serve the law firm of Murrio Ducille & Co. ("the law firm"). Mr. Ducille, KC of that law firm is said to be the attorney on record for the 1st, 2nd and 3rd Defendants in related criminal proceedings and in civil proceedings brought on behalf of the estate of another victim of the tragic boating accident.

14. The process servers attempted to serve the Writ on June 28, 2022 and again on June 30, 2022 on the law firm. The firm did not accept service of the Writ on behalf of the Defendants.

Issues

15. The substantive issues before this Court are:
    1) Whether the Court ought to treat the attempt at service on the law firm as effective service;
    2) Whether the Court ought to grant an order that service on the law firm is an alternative method of service and therefore effective service;
    3) (i) Whether the Court should grant an extension of time to serve Writ on the Defendants and (ii) Whether the Court ought to extend the validity of the Writ for 12 months;
    4) Whether leave ought to be granted to effect substituted service and
    5) Whether the Court ought to grant leave to the Plaintiffs to amend the Writ and to add new parties.

    There is also a preliminary issue which is whether the Rules of the Supreme Court, 1978 or The Supreme Court Civil Procedure Rules, 2022, as amended, or whether both sets of rules apply to this application.

Preliminary issue: APPLICABLE RULES

Whether the Rules of the Supreme Court, 1978 or The Supreme Court Civil Procedure Rules, 2022, as amended, or whether both sets of rules apply to this application.

16. Counsel for the Plaintiffs made submissions under both the former rules of the Supreme Court (RSC) and the current Civil Procedure Rules (CPR 2022). It is therefore necessary to first address what the applicable code is.

17. The action before the Court was filed under the Rules of the Supreme Court, 1978 ("the RSC"). The application under consideration was filed on July 29, 2022. For reasons advanced by Counsel, the pursuit of a hearing date was delayed pending the outcome of related proceedings. By the time the summons was listed for hearing, and was heard, a new regime was in place.

18. The Supreme Court Civil Procedure Rules, 2022, as amended ('CPR 2022') came into effect on March 1, 2023 (the Commencement date). Those rules apply to all civil proceedings commenced on or after the Commencement Date. They also apply to any civil proceeding commenced prior to March 1, 2023 where a date had not been fixed for trial or where a trial date had been fixed but the date was adjourned.

19. The CPR 2022 section on Preliminary matters provides:

PRELIMINARY

1. Citation and commencement.

(1) These Rules may be cited as the Supreme Court Civil Procedure Rules, 2022.

(2) These Rules shall come into operation on such date to be appointed by the Rules Committee by notice published in the Gazette.

2. Application of Rules.

(1) Subject to paragraph (4), these Rules shall —

(a) apply to all civil proceedings commenced in the Court on or after the date of commencement of these Rules;

(b) not apply to civil proceedings commenced in the Court prior to the date of commencement of these Rules except where —

(i) a trial date has not been fixed for those proceedings; or

(ii) a trial date has been fixed for those proceedings and that trial date has been adjourned.

(2) In the case of civil proceedings -

(a) referred to in paragraph (1)(b)(i), the claimant must fix a date, time and place for a case management conference

under Part 27 after a defence has been filed and give all parties at least twenty-eight days' notice of the conference; and

(b) referred to in paragraph (1)(b)(ii), an application to adjourn a trial date is to be treated as a pre-trial review and these Rules apply from the date that such application is heard;

(3) Where in proceedings commenced before the date of commencement of the Rules, the Court has to exercise its discretion, it may take into account the principles set out in these Rules and, in particular Part 1 and Part 25.

(4) These Rules shall not apply to —

(a) bankruptcy and insolvency proceedings, including winding up of companies;

(b) family proceedings except proceedings under the Child Protection Act (Ch. 132);

(c) probate proceedings except contentious probate proceedings as provided for in Part 63;

(d) proceedings in which the Court is acting as a Prize Court;

(e) any other proceedings in the Court instituted under any enactment, in so far as rules made under that enactment regulate those proceedings.

3. Revocation.

The Rules of the Supreme Court (S.I. No. 48 of 1978) are hereby revoked.

4. Savings and transitional.

Notwithstanding rule 3, proceedings commenced in the Court prior to the commencement of these Rules, to which these Rules in accordance with rule 2(1)(b) do not apply, shall continue under the Rules of the Supreme Court (S.I. 48 of 1978).

20. The RSC was repealed by the CPR 2022 (preliminary sections). However, there is a Savings clause which makes the RSC applicable where matters had proceeded to a trial date (Preliminary Section 4, CPR 2022). That section provides that the RSC will apply to matters "to which these Rules in accordance with rule 2(1)(b) do not apply…". That rule makes it clear that the rules of CPR 2022 do not apply to matters commenced prior to March 1, 2023 that had a trial date fixed AND that have kept the trial date i.e. the trial date was not adjourned. Therefore, the RSC is only applicable to pre-March 1, 2023 matters that had a trial date fixed prior to March 1, 2023 where the trial date was not adjourned.

21. Practice Direction 9 of 2023 is instructive and provides clarification as to the application of CPR 2022. It was made pursuant to Rule 4.2 CPR 2022. It directs that for applications issued prior to the Commencement Date *but which had not been heard* by the Court, the parties will not be required to file new applications. It directs that a Court may proceed to hear and determine the application on the documents already filed with the Court.

22. Specifically, Practice Direction 9 of 2023 provides where relevant:

> **3. Interlocutory applications filed prior to the commencement date but which have not been heard by the Court**
>
> 3.1 Where the Rules apply to an application which had been filed with the Court prior to the commencement date but not heard by the Court, the parties will not be required to file new applications and the Court may proceed to determine the applications on the documents already filed with the Court.
>
> 3.2 The Court in managing the hearing of the interlocutory application may permit the parties to file any additional material which may be required for the application to be properly considered where the Rules now apply.

23. Counsel submits that because the Practice Direction "does not say the parties must proceed on the previous application, nor does it say they must proceed under the new rules, but only that the parties "*will not be required*" to file new applications…. in the context of the applications before the Court and in Ps view, [this] allows for submissions to be made under both sets of rules accordingly, without having to elect for each arm of relief sought."

24. The consequence of Counsel's submission would be to allow parties to determine for each relief sought, which set of rules is more advantageous in the circumstances. The result could be that a court, on invitation, would exercise its jurisdiction under the RSC in relation to one application but under the CPR 2022 as it concerns a similar application in another matter. One can readily see that such a result could be chaotic as it would relate to relief being sought within one application or among competing applications and in different actions. It could mean that there could be internal clashes in any one order where different considerations apply to various reliefs that are contingent on each other. The approach advanced by counsel would also result in an inconsistent approach to similar cases, resulting in uncertainty in the law and unfairness to parties. Counsel's interpretation is erroneous. Such an interpretation would, in my opinion, lead to absurd results.

25. Practice Direction 9 of 2023 was passed, in my view, to save litigants the costs and inconvenience and hardship that could occur if they were mandated to refile documents, already filed, in order to meet the requirements of the new rules during the transition period. This does not mean that the new rules do not apply nor that a Court cannot require a party to supplement a document for purposes of proceeding under the CPR 2022. In my view,

Practice Direction 9 of 2023 allows parties to rely on the fact that their applications were filed at a particular time and no more. The time of the filing of an application may have grave implications and consequences. It seems to me that the Practice Direction is aimed at preserving a party's position in that regard. The Practice Direction also lessens the opportunity for technical challenges where the requirements under the new rules (as far as they affect the content of a document) differ from the requirements under the previous rules. A party will not be required to refile an application but may be required to supplement it by the filing of "additional material". This provision serves to enable the application to be considered *under the new rules*. Therefore, the hearing of the application will take place under CPR 2022.

26. The matter now before me is not a matter to which the provisions under the Preliminary Section 4, CPR 2022 are applicable. This is an interlocutory matter and the date was fixed for hearing after the CPR 2022 came into effect. This is a case where the matter was filed prior to March 1, 2023 but was not heard prior to March 1, 2023. Therefore, the CPR 2022 applies in this case.

Issue 1 - SERVICE ON AN ATTORNEY

Whether the Court ought to treat the attempt at service as effective service

27. Counsel submits that the attempted service in this case ought to be deemed proper service.

28. The evidence of attempt at service is found in the affidavit of Jonathon Wallace, process server, dated July 28, 2022. He explains that he was directed to effect service at the chambers of Murrio Ducille & Co. and attempted to do so twice on June 28, 2022. At paragraph 3, he avers as follows:

> 3. During my first visit to Murrio Ducille & Co. I was informed that the firm would not accept service "because the document was filed in 2021 and the service date should match the filing date." After I left Murrio Ducille & Co. I contacted my employer for instructions. After receiving same, I returned to Murrio Ducille & Co. a second time and I explained to a young man who I believe is Mr. Wright that the Writ can be served up to one year from the filing date. Mr. Wright advised that his Supervisor had instructed him not to accept service and he refused service again. Mr. Wright further stated that, "there was no place for them to sign to show service." It was explained to Mr. Wright that the fact he had the document is evidence of service to them and further that while he is not required to sign, he was more than welcome to sign somewhere on the indorsement sheet. However, this notwithstanding, Mr. Wright repeated that his Supervisor instructed him not to accept service."

29. The evidence is that La Tanya Hamilton, process server, also attempted service on the law firm on June 30, 2022 and met a similar fate.

30. The unfiled affidavit of Stephanie Bender, one of the Plaintiffs, dated May 31, 2023 was also relied on by the Plaintiffs. After explaining that the Plaintiffs had been making attempts to get further information to bolster their case, and that Counsel for the Plaintiffs was out of country recovering from surgery and scheduled to undergo further surgery, Stephanie Bender avers:

> 80. On this basis Mr. Paton engaged the services of the Bahamian Company situated in Old Fort Bay Shopping Centre, Legally Bound Ltd. ("LBL") to effect service on the Defendants in Nassau. In the case of Mr. Smith, 4 C's, and Mr. Watson, as they did not reside in Nassau, New Providence, however had instructed local counsel in respect of the Criminal Action, the instructions were for LBL to effect service on DAC accordingly. Each Defendant took steps to intentionally avoid being served, giving excuses on what appear to be highly irregular grounds. A copy of those instructions to LBL and the email summary from LBL to Mr. Paton is at pages 193 to 196 and reads as follows:
>
> *With respect to service:*
>
> *(a) Murrio Ducille & Co. refused service. JW has advised us that one of the Supervisors at the firm told him that the firm would not accept service because the document was filed in 2021 and that the service date should match the filing date. After we learnt this, we instructed JW to return to their office and to inform them that the Writ can be served up to a year later. JW did so, however they still refused service, on the basis that "there was no place for them to sign to show service".*
>
> *I spoke with Mr. Wright (he appeared to be a very junior member of staff and I explained that the fact that he had the document is evidence of service to them; I explained further that while he is not required to sign, he is more than welcome to sign somewhere on the indorsement sheet if that would take care of the 'problem'. Mr. Wright told me that his supervisor still said no. I asked to speak to her, however we were disconnected apparently."*

31. At paragraph 82 of her affidavit, Stephanie Bender produces what is represented to be email correspondence sent from Counsel for the Plaintiffs to Mr. Ducille, KC, said to be counsel for the Defendants. The email was sent on July 6, 2022 and reads in part:

"You/your firm are on the record as representing Mr. Clayton Patterson Smith (trading as 4C's Adventures) and Mr. Roderick Watson in respect of the following two claims pertaining to the Accident:

- Criminal Action CRI/VBI/261/11/2018 R v Clayton Patterson Smith and Roderick Watson
- Civil Action CLE/gen/00598 of 2020 Tiran Levar Jackson et al. v Clinton Patterson Smith et al.

Your firm is therefore unequivocally able, and indeed duty bound, to accept service on behalf of these individuals within the Islands of The Bahamas…

……

For completeness (which explains the delay in the sending of this email) I was admitted to hospital on 30 June and not discharged until 2 July. As such I have only returned to my desk today. I therefore now invite you to confirm that your firm was properly served, and is deemed to have been served, with the Writ on 28 June 2022. Should you not agree and/or continue to instruct employees of your firm to refuse service I am instructed to file an application for an extension of time to serve the Writ, relying on the above evidence, and will seek the costs of that application as against your firm, and you personally.

Please provide me with your (rather than your clients') position by close of business on Friday 8 July 2022."

32. The evidence is that there was no response from the Mr. Ducille KC, or from the firm, to Counsel's email.

33. The case of *Smith v Probyn and PGA European Tower Ltd.* [2000] EWHC (QB) 136 is instructive in the matter of service on an attorney. That case is cited in the guidance notes to the CPR 2022, viz, The Civil Procedure Rules 2022 Practice Guide, January 2024. In that case, the Claimants engaged attorneys who had responded to a pre-action letter on behalf of the Defendant. The Claimants subsequently purported to serve a Claim Form on the said attorneys. The attorneys returned the Claim Forms etc and responded, "At no stage whatsoever have we informed you that we have instructions to accept service of any proceedings upon behalf of our clients." There, the judge found that there was nothing in the exchange prior to the service of the Claim Form that could have misled the attorneys for the Claimant that the law firm was authorised to accept service. Morland J, at paragraphs 30 to 31 noted:

> 30 A Solicitor does not generally have implied authority to accept service of a claim form on behalf of a client. If he does so, he is in breach of his professional duty to his client in the absence of express authority.

31 This is underlined by C.P.R. 6.4. - (1) A document to be served may be served personally, except as provided in paragraph (2).

34. That rule reviewed in the judgment, UK CPR 6.4, is in terms similar to Rule 5.6, CPR 2022 in this jurisdiction. UK C.P.R. 6.4. provides:

> (1) A document to be served may be served personally, except as provided in paragraph (2).
>
> (2) where a Solicitor
>
> (a) is authorised to accept service on behalf of a party; and
>
> (b) has notified the party serving the document in writing that he is so authorised, a document must be served on the Solicitor"

35. Rule 5.6, CPR 2022, as amended, reads:

> 5.6 Service on attorney.
> The claim form must be served on an attorney where that attorney —
> (a) is authorised to accept service of the claim form on behalf of a party; and
> (b) has notified the claimant in writing that he is so authorised.

36. Counsel's submission is that because the first 3 named Defendants were in Exuma and because the Plaintiffs' attorney was in the UK and because the law firm had represented the 3 named Defendants in other matters, "there was absolutely no good reason for [the law firm] to have refused service, except in D1 – D3 wishing to avoid proper service and facing yet another court action."

37. The scheme of Rule 5.6, CPR 2022 is that unless an attorney is *both* authorised to accept service of the claim form on behalf of the named Defendant *and* has notified the Claimant in writing that he is so authorized, then the Claimant must serve the named Defendant personally "by handing it to or leaving it with the person to be served" (Rule 5. 3). It seems to me that a Claimant cannot choose to serve a Claim form on an attorney who has acted for a party in the past or who acts for a party in a different matter. The relationship of attorney-client is a contractual one and that relationship is governed by strict rules given the fiduciary nature of the relationship. It would be a dangerous precedent for a Claimant to be allowed to fix a Defendant with notice that a new action has been brought against him, merely by choosing to serve an attorney that acted/acts in another matter for that client. If the attorney or client chooses to accept service that way, it is a matter for them. However, there can be no obligation on an attorney acting for a client in one matter, to also act for the client in other matters. There is no rule that would force a client to instruct the same attorney in relation to several, albeit related, matters. There are many reasons why

an attorney may act for a client in one matter and may not act for the same client in a similar or related matter. Absence of a retainer and lack of instructions for the newly-filed action are at the top of the list of many good reasons. A party is at liberty to determine his/her legal representation and, until they do so, the rules require that they must be personally served, unless a court otherwise orders. This means that the documents to be served must be put in the possession or control of the person to be served.

38. In this case, the Claimant's case is that the attorneys expressly refused service. Despite an email from Counsel for the Plaintiffs to Murrio Ducille & Co, no response was received. While it may be that the attorneys could have responded with "we are not authorized to accept service" or some such message, it appears to me that their conduct should have made it clear to Counsel for the Plaintiffs that service on the named Defendants was to be effected by another means. There is nothing before me from which the attorney for the Plaintiffs could have inferred that the firm of Murrio Ducille & Co was authorized to accept service. And there is no evidence before me that Counsel for the Plaintiffs was notified that the firm of Murrio Ducille & Co was authorized to accept service.

39. I find that there was no effective service of the Writ on the Defendants on June 28, 2022 or on June 30, 2022.

40. Further, as a result of the conclusion reached below in relation to Issue 3, I find that at the time of attempted service, the Writ had already expired and therefore, in the circumstances, there could be no proper service.

Issue 2: ALTERNATIVE METHOD OF SERVICE

Whether the Court ought to grant an order that service on the law firm is an alternative method of service and therefore effective service.

41. The Plaintiffs further sought an order under Rule 5. 14 CPR 2022, as amended. Rules 5.13 and 5.14 provide as follows:

> **5.13 Alternative methods of service.**
>
> (1) A party may choose an alternative method of service after taking reasonable steps to personally serve the claim form.
>
> (2) Where a party —
>
> (a) chooses an alternative method of service; and
>
> (b) the Court is asked to take any step, including the filing of a default judgment, on the basis that the claim form has been served, the party who

served the claim form must file evidence on affidavit proving that it was impracticable to personally serve the defendant and that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form.

(3) An affidavit under paragraph (2) must —

(a) exhibit a copy of the documents served;

(b) give details of the attempts made to personally serve the defendant;

(c) give details of the alternative method of service used;

(d) show that —

(i) the person intended to be served was able to ascertain the contents of the documents; or

(ii) it is likely that he would have been able to do so; and

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

(4) The attorney for the claimant must immediately refer any affidavit filed under paragraph (2) to the Listing Office for a hearing on the papers before a judge or registrar who must —

(a) consider the evidence; and

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

(5) If the Court is not satisfied that it was impracticable to personally serve the defendant or that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the court office must fix a date, time and place to consider making an order under rule 5.14 and give at least seven days' notice to the claimant or the claimant's attorney.

5.14 Power of Court to deem alternative method of service to be good service.

(1) The Court may direct that a claim form served by a method specified in the court's order be deemed to be good service.

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

(a) showing that it is impracticable to personally serve the defendant;

(b) specifying the method of service proposed; and

(c) showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and statement of claim.

42. Pre-requisites of the exercise of the court's power and discretion under this rule are for the party to "give details of the attempts made to personally serve the defendant" *and* to show that "the method of service was sufficient to enable the defendant to ascertain the contents of the claim form." Rule 5.13 (2)(b) and Rule 5.14 CPR 2022 also provide that the party who served the claim form must file evidence on affidavit proving that it was

"impracticable to personally serve the defendant" and that the method of service "likely to enable the person to be served to ascertain the contents of the claim form".

43. Counsel's case is set out in his submissions. In relation to this point, his submissions are:

    1. In applying the facts - the delay in not serving until the second to last day before expiry of validity was not to prejudice the defendant or avoid having to effect personal service. Rather, it was in an effort to ensure that the Ps had a claim worth pursuing in every sense. This meant that: they were suitably funded; had proper and reliable legal advice; and could meet an order for security for costs; and there was a sufficient quantum that was able of satisfaction; good likelihood of recovery; and that there were sufficient further elements to assist with risk mitigation and adverse costs exposure. It was therefore impracticable to effect personal service until such time as:

        a) Cigna agreed to a percentage reduction on recovery
        b) Cigna agreed to partially fund the litigation
        c) Cigna agreed that they would meet security for costs, or otherwise that security for costs was an unrealistic probability
        d) Counsel advised that there were cogent grounds to do so in all the circumstances

    2. These facts were not known until 24 hrs before the expiration of validity. Furthermore, they might still not have seen the P's pursue the claim without more. It was only these factors, as well as the existence of the Jackson Claim, the Criminal Claim, and the potential claim against the MoT that then led to the P's making the momentous decision to move forward on the Writ.

    3. Upon concluding that there was sufficient merit in pursuing the Claim, it was considered that given Smith, Watson and 4 C's lived and operated in Barraterre, Exuma (where Smith had moved house and "sold" 4 C's), as well as MP having to be in the UK and with 24 hrs before going into hospital to have surgery, it was not possible to take any steps, let alone reasonable steps, or otherwise practically impossible, to serve D1 – D3 personally within the remaining timeframe.

    4. Those same circumstances were considered a very good reason for service on DAC/MDKC as D1 – D3, as the attorney within the jurisdiction who already represented the defendants in two other actions. Further, in properly serving DAC/MDKC in time, the reason they refused service and did not indorse the Writ was not that it was irregular, or that personal service had not been attempted, or was

required to be effected, but that the Writ had been filed in 2021 and they considered it required to be dated the same day, and then upon return, that there was nowhere to sign i.e., the objection was technical, not substantive, and in any event plain wrong.

5. The defendants would have known the content of the Writ as soon as service was attempted, and a copy of the Writ left at the DAC/MDKC office. The Writ was also subsequently emailed to DAC/MDKC. The defendants will therefore not be unduly prejudiced by the Court now ordering that the alternative method of service was good service (in the Bahamian CPRs the affidavit being endorsed as satisfactorily proving service) in these circumstances. This is especially so when there are two continuing clams existing on the same set of facts."

44. Counsel for the Plaintiffs relied on the case of *Abela and others v Baardarani* [2013] UKSC 44. The facts of that case are materially different from the present. *Abela and others v Baardarani* dealt with service of a Claim form abroad and the issue was whether steps taken by the Claimant constituted good service on the respondent. The evidence in that case was that there were several attempts at service at what was believed to be the residence of the respondent, a resident of Beirut. The respondent could not be located there and the documents were then delivered to the address of his Lebanese lawyer in Beirut who signed for the documents and who sent the documents on to the respondent's English solicitors who subsequently issued correspondence concerning same. The relevance of that correspondence is that it became clear that the respondent had knowledge of the contents of the claim form. The respondent later objected to the mode of service. The lawyers for the respondent also refused to provide a personal address of service for the respondent. It was in those circumstances that Lord Clarke SCJ delivered the judgment of the UK Appellate Court, after reviewing the evidence and declared at paragraphs 35 to 38:

> **[35]** As stated above, in a case of this kind the court should simply ask itself whether, in all the circumstances of the particular case, there is a good reason to make the order sought. It should not be necessary for the court to spend undue time analysing decisions of judges in previous cases which have depended upon their own facts.
>
> **[36]** The mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under r 6.15(2). On the other hand, the wording of the rule shows that it is a critical factor. As the editors of *Civil Procedure* (White Book) (2013) vol 1, para 6.15.5, note, r 6.15(2) was designed to remedy what were thought to be defects as matters stood before 1 October 2008. The Court of Appeal had held in *Elmes v Hygrade Food*

Products plc [2001] EWCA Civ 121 that the court had no jurisdiction to order retrospectively that an erroneous method of service already adopted should be allowed to stand as service by an alternative method permitted by the court. The editors of the White Book add that the particular significance of r 6.15(2) is that it may enable a claimant to escape the serious consequences that would normally ensue where there has been mis-service and, not only has the period for service of the claim form fixed by CPR 7.5 run, but also the relevant limitation period has expired.

[37] Service has a number of purposes but the most important is to my mind to ensure that the contents of the document served, here the claim form, is communicated to the defendant. In *Olafsson v Gissurarson (No 2)* [2008] EWCA Civ 152 at [55], [2008] 1 All ER (Comm) 1106 at [55], [2008] 1 WLR 2016, I said, in a not dissimilar context, that—

> 'the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case: see eg *Barclays Bank of Swaziland Ltd v Hahn* [1989] 2 All ER 398 at 402, [1989] 1 WLR 506 at 511per Lord Brightman and the definition of "Service" in the glossary to the Civil Procedure Rules, which describes it as "Steps required … to bring documents used in court proceedings to a person's attention".'

I adhere to that view.

[38] It is plain from [2011] EWHC 116 (Ch) at [73] quoted above that the judge took account of a series of factors. He said that, most importantly, it was clear that the respondent, through his advisers was fully apprised of the nature of the claim being brought. That was because, as the judge had made clear (at [60]), the respondent must have been fully aware of the contents of the claim form as a result of it and the other documents having been delivered to his lawyers on 22 October in Beirut and communicated to his London solicitors and to him. As Lewison J said (at [4] (see [25], above)):

> 'The purpose of service of proceedings, quite obviously, is to bring proceedings to the notice of a defendant. It is not about playing technical games. There is no doubt on the evidence that the defendant is fully aware of the proceedings which are sought to be brought against him, of the nature of the claims made against him and of the seriousness of the allegations.'

I agree.

45. In *Abela and others v Baardarani,* a clear statement of the law is that it is not sufficient for a Plaintiff to show that "the defendant learned of the existence and content of the claim form" without more. It is important that the method of service chosen is effective to "inform the defendant of the contents of the claim form and the nature of the claimant's case". The case of *Abela and others v Baardarani* is distinctly different from the present case where there was no attempt at personal service on the Defendants and there is no evidence that the contents of the Writ came to the attention of the Defendants.

46. There are certain pre-requisites/pre-conditions undergirding both Rule 5.13 (2)(b) and Rule 5.14 CPR 2022. One may say that there is a 3-limb test when a party makes an application for an order in favour of an alternative method of service:

    1. Did the party seeking the order demonstrate attempts made to personally serve the defendant and
    2. Is it impracticable to personally serve the defendant and
    3. Will/did the method of service sought enable, or is it likely to enable, the defendant to ascertain the contents of the claim form?

47. In this case, I have found that there was no attempt to personally serve any of the Defendants. The evidence offered to show that it was impractical to personally serve the First, Second and Third Defendants does not rise to a standard of impracticability. Firstly, there was admittedly no attempt to serve the Defendants themselves. The instructions from Counsel for the Plaintiffs to the process servers were to serve a law firm. The gist of the reasons given is that it was the 11th hour, decisions were not made until the 11th hour, Counsel for the Plaintiff was in the UK and the Defendants were in Exuma. There is no reason offered as to why the process servers were not directed to attempt service in Exuma and this court will not speculate.

48. In short, there is no satisfactory reason before this court that explains why personal service of the Writ during its 12 months term was not attempted and why personal service was therefore impractical. The rule does not provide that personal service must be shown to be impossible – merely that it is impractical. Impractical to my mind is something akin to "futile". The best evidence of futility of personal service is to demonstrate failed attempts at personal service. That was not done in this case.

49. Further, the mere attempt to serve attorneys who refused to accept service of the documents and who did not engage with Counsel for the Plaintiffs on the matter cannot be construed as a method of service that enabled the Defendants to ascertain the contents of the claim form. Such a finding on the evidence before me would require this Court to find that not only did the law firm receive the Writ but that they communicated its contents to the named Defendants. There is no indication from the affidavits that the attorneys had sight, or acknowledged having sight, of the Writ. Counsel submits that "the defendants would have known the content of the Writ as soon as service was attempted, and a copy of the Writ left at the [office of the law firm]. The Writ was also subsequently emailed to [the law firm]". The affidavit evidence is that all attempts at service were refused. There is no evidence that the Writ was left at the law firm. The evidence is that the Writ was emailed to the law firm on July 6, 2022. Counsel for the Plaintiffs never spoke with the purported lawyers for the Defendants and never received any communication from them nor any response to the email sent.

50. There is no evidence that satisfies the 3-limb test imposed by either Rule 5.13 (2)(b) or Rule 5.14 CPR 2022.

51. Further, as a result of the conclusion that I reach below in relation to Issue 3, I find that at the time of attempted service, the Writ had already expired and therefore, in the circumstances, there could be no proper service to treat as an alternative method of service.

Issue 3: EXTENSION OF VALIDITY OF WRIT (i) Whether the Court should grant an extension of time to serve Writ on the Defendants and (ii) Whether the Court ought to extend the validity of the Writ for 12 months.

52. I now turn to the question of the extension of the validity of the Writ. On this issue, all of the other issues turn. For the Writ to be served on the named Defendants, it must be valid and, in this case, for the Writ to be valid, it must be renewed. For parties to be added and served, the Writ must be valid.

53. This court must first determine when the Writ expired.

54. In this case, there are 2 sub-issues that arise:
    1. Whether the application to extend the validity of the writ was made during its validity
    2. Whether the court has a discretion to extend time within which to serve the Writ, or to extend the validity of the Writ, where the application was made after the writ expired.

Issue 3.1: COMPUTATION OF TIME

Whether the application to grant an extension of time within which to serve or to extend the validity of the Writ was made during its validity.

55. The Writ was issued under the RSC. Therefore one must turn to those rules to determine the validity of the Writ for any action taken prior to March 1, 2023. The extent of the life of a Writ is set out in Order 6, Rule 7. Rule 7 provides:

> **7.** (1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for twelve months beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.
>
> (2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.
>
> (3) Before a writ, the validity of which has been extended under this rule, is served, it must be marked with an official stamp showing the period for which the validity of the writ has been so extended.
>
> (4) Where the validity of a writ is extended by order made under this rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served so as to extend the validity of that other writ until the expiration of the period specified in the order.

56. Order 6, Rule 7(1) provides, as is relevant, "*For the purpose of service*, a writ (other than a concurrent writ) is valid in the first instance for twelve months *beginning with the date of its issue*…" (emphasis supplied). This rule provides that as far as service is concerned, the writ is valid for 12 months, in the first instance. Its validity may be extended by court order. If its validity is extended, it must show the period of the extension by way of an official stamp, before being served. The Writ must therefore be served while valid.

57. On construction of the plain language of that rule, the date of reckoning/calculating the period of 12 months begins with and includes the date of issue of the Writ of summons. This means that the twelve months period expires at the end of 12 months following its issue. On the 12-month anniversary of its issue, a new period begins. So, for example, a writ of summons issued on January 3, 2020 would expire on January 2, 2021. January 3, 2021 is the start of a new period of reckoning. Therefore, any action taken after January 2, 2021 would be action taken on an expired writ.

58. Counsel in his submissions in this case proceeds on the basis that both the attempted service and the application for a renewal were made during the validity of the Writ. He submits: "Furthermore, the Writ expired on 29 June 2022. Service was attempted twice on the 28 June, and once on 29 June. The Summons was filed 29 July 2022." The facts are that the Writ was filed on June 28, 2021. It expired 12 months from that date "beginning with the date of its issue". On construction of the plain language of that rule, the date of reckoning the period of 12 months begins with and includes the date of issue of the writ of summons. Therefore, on this court's reckoning, a Writ of summons issued on June 28, 2021 expired on June 27, 2022. The Application to extend its validity was made on July 29, 2022.

59. According to the affidavits relied on, attempts at service were made on June 28, 2022 and June 30, 2022. These attempts were made subsequent to the expiry of the Writ of summons. Proper service of this Writ ought to have taken place during its validity. That did not happen in this case.

60. The application to extend the life of the Writ was made on July 29, 2022. That application was made after the Writ had already expired. I now go on to consider whether this court has jurisdiction to entertain an application made after the writ had expired.

Issue 3.2. COURT'S POWER TO EXTEND TIME OF SERVICE OF WRIT OR THE VALIDITY OF THE WRIT

Whether the court has a discretion to extend time within which to serve the Writ, or to extend the validity of the Writ, where the application was made after the writ expired.

61. Under the Current rules, the CPR 2022, as amended, Rule 8.13 is the governing rule on the extension of time in this scenario. The rule provides for the extension of time within which to serve the claim form (R 8.13(1) by way of extending the validity of the claim form (R 8.13(5). The CPR 2022 replaced the Writ of Summons with a Claim Form. Rule 8.13 provides:

8.13. Extension of time for serving a claim form

(1) The claimant may apply for an order extending the period within which a claim form may be served.
(2) The period by which the time for serving a claim form is extended may not be longer than six months on any one application.
(3) An application under paragraph (1) –
  (a) must be made within the period –
    i. for serving a claim form specified by rule 8.12; 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 under paragraph (1) only if it is satisfied that –
  (a) the claimant has taken all reasonable steps to –
    i. trace the defendant; and
    ii. serve the claim form;
  (b) there is some other special reason for extending the period.
(5) If an order is made extending the validity of the claim form for the purposes of service –
  (a) the claim form must be marked with an official stamp or endorsement by the court office showing the period for which its validity has been extended; and
  (b) a sealed copy of any order made must be served with the claim form.
(6) No more than one extension maybe allowed unless the court is satisfied that –
  (a) the defendant is deliberately avoiding service; or
  (b) there is some other compelling reason for so doing.

62. As noted above, the previous rule which governed practice and procedure in this jurisdiction is the former Order 6, rule 7 RSC. The rule provides for the extension of the validity of the Writ for the purpose of extending time within which to serve it [Order 6, rule 7(2)]. Order 6, rule 7 reads:

7. (1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for twelve months beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

(2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.

(3) Before a writ, the validity of which has been extended under this rule, is served, it must be marked with an official stamp showing the period for which the validity of the writ has been so extended.

(4) Where the validity of a writ is extended by order made under this rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served so as to extend the validity of that other writ until the expiration of the period specified in the order.

63. So for cases to which the RSC still applies, Order 6, rule 7 RSC is the applicable rule.

64. Counsel relied on the case of *Hashtroodi v Hancock* [2004] 3 All ER 530 for the principles of interpreting the equivalent UK rules and for the principles governing the exercise of this Court's power and discretion to extend the validity of the Writ.

65. In *Hashtroodi v Hancock*, the UK Court of Appeal considered the nature of the exercise of the Court's discretion to extend the period for service of a claim form. The court reviewed the nature of the exercise of the court's discretion under the UK Rules of Supreme Court that preceded the Civil Procedure Rules as well as the UK Civil Procedure Rules.

66. UK Rule 7.6 provides:

(1) The claimant may apply for an order extending the period within which the claim form may be served.

(2) The general rule is that an application to extend the time for service must be made—(a) within the period for serving the claim form specified by rule 7.5; or (b) where an order had been made under this rule, within the period for service specified by that order.

(3) If the claimant applies for an order to extend the time for service of the claim form after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if—(a) the court has been unable to serve the claim form; or (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and (c) in either case, the claimant has acted promptly in making the application.

67. In delivering the judgment of the court *in Hashtroodi v Hancock*, Dyson LJ opined at pages 533 - 537:

> In 1962, the previous Ord 8, r 1 was replaced by a new Ord 6, r 8 which remained until the CPR came into force. Ord 6, r 8 provided that a writ was valid in the first instance for 12 months beginning with the date of its issue, and—
>
> '(2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time … as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.'
>
> It was no longer a condition of allowing an extension of the validity of the writ that the court should be satisfied that reasonable efforts had been made to serve, or that there was some other good reason for granting an extension of time.
>
> Order 6, r 8 generated a great deal of litigation. In what circumstances should the court extend the time for service of a writ? The authorities and principles were reviewed by the House of Lords in *Kleinwort Benson Ltd v Barbrak Ltd* [1987] 2 All ER 289, [1987] AC 597. Their Lordships decided that Ord 6, r 8 had to be construed against the background of the earlier rule, and that ([1987] 2 All ER 289 at 299, [1987] AC 597 at 622per Lord Brandon of Oakbrook) 'there must be implied in the new rule, as a matter of construction, a condition that the power to extend shall only be exercised for good reason'.
>
> As for what could properly be regarded as amounting to a 'good reason', Lord Brandon said ([1987] 2 All ER 289 at 300, [1987] AC 597 at 622–623) that it was not possible to define or circumscribe the scope of that expression:
>
> 'Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge …'

He added that the decision whether an extension should be allowed or disallowed was a discretionary one, and that, in exercising the discretion, the judge was entitled to have regard to the balance of hardship. In *Waddon v Whitecroft-Scovill Ltd* [1988] 1 All ER 996, [1988] 1 WLR 309, the House of Lords said that normally the showing of good reason for failure to serve the writ during the original period of its validity would be a necessary step to establishing good reason for the grant of an extension (see [1988] 1 All ER 996 at 1000–1001, [1988] 1 WLR 309 at 314per Lord Brandon).

……

The CPR ushered in a new era in which, in significant respects, the previous approach to civil litigation and former practices (much of it enshrined in case law) were abandoned.

Moreover, there are reasons internal to r 7.6 itself which show that it was not intended to impose any threshold condition on the right to apply for an extension of time under r 7.6(2). The contrast between r 7.6(2) and (3) is striking. Rule 7.6(3) empowers the court to grant an extension of time to a claimant who applies after the end of the specified period only if the conditions stated in paras (a) or (b) and (c) are satisfied. The reference to conditions in r 7.6(3), and the absence of any such reference in r 7.6(2) must have been deliberate. Against the background of the case law on Ord 6, r 8, and in view of the introduction of new and stringent conditions in r 7.6(3), it cannot have been intended that r 7.6(2) should be construed as being subject to a condition that a 'good reason' must be shown for failure to serve within the specified period, or indeed subject to any implied condition.

In the absence of any such condition, therefore, the power must be exercised in accordance with the overriding objective (see CPR 1.2(b)). What does that mean in practice? We have no doubt that it will always be *relevant* for the court to determine and evaluate the reason why the claimant did not serve the claim form within the specified period. This has nothing to do with the fact that under the former procedural code, the threshold requirement was that the plaintiff should show good reason. It is because the overriding objective is that of enabling the court to deal with cases 'justly', and it is not possible to deal with an application for an extension of time under r 7.6(2) justly without knowing why the claimant has failed to serve the claim form within the specified period. As a matter of common sense, the court will always want to know why the claim form was not served within the specified period. As Mr Zuckerman says (p 180 (para 4.121)) (see [10], above):

> 'For it is only fair to ask whether the applicant is seeking the court's help to overcome a genuine problem that he has encountered in carrying out service or whether he is seeking relief from the consequences of his own neglect. A claimant who has experienced difficulty should normally be entitled to the court's help, but an applicant who has merely left service too late is not entitled to as much consideration. Whether the limitation period has expired is also of considerable importance. If an extension is sought beyond four months after the expiry of the limitation period, the claimant is effectively asking the court to disturb a defendant who is by now entitled to assume that his rights can no longer be disputed.'

Whereas, under the previous law, a plaintiff who was unable to show a good reason for not serving in time failed at the threshold, under the CPR, a more calibrated approach is to be adopted. If there is a very good reason for the failure to serve the claim form within the specified period, then an extension of time will usually be granted. Thus, where the court has been unable to serve the claim form or the claimant has taken all reasonable steps to serve the claim form, but has been unable to do so (the r 7.6(3) conditions), the court will have no difficulty in deciding that there is a very good reason for the failure to serve. The weaker the reason, the more likely the court will be to refuse to grant the extension.

If the reason why the claimant has not served the claim form within the specified period is that he (or his legal representative) simply overlooked the matter, that will be a strong reason for the court refusing to grant an extension of time for service. One of the important aims of the Woolf reforms was to introduce more discipline into the conduct of civil litigation. One of the ways of achieving this is to insist that time limits be adhered to unless there is good reason for a departure. In *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934 at 940, [1999] 1 WLR 1926 at 1933, Lord Woolf MR said:

> 'If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant.'

It is easy enough to take the view that justice requires a short extension of time to be granted even where the reason for the failure to serve is the incompetence of the claimant's solicitor, especially if the claim is substantial. But it should not be overlooked that there is a three-year limitation period for personal injury claims, and a claimant has four months in which to serve his or her claim form. Moreover, the claim form does not have to contain full details of the claim. All that is required is a concise statement of the nature of the claim (see CPR 16.2(1)(a)). These are

generous time limits. As May LJ said in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 at 790(para 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. Criticism of Mr Vinos' solicitors in this case may be muted and limited to one error capable of being represented as small; but there 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 and do not satisfy the conditions in r 7.6(3), your claim is lost and a new claim will be statute-barred. You have had three years and four months to get things in order.'
>
> In view of the importance of this appeal, we have considered whether we should try to give some guidance as to how the discretion should be exercised beyond merely saying that it should be exercised in accordance with the overriding objective, and that the reason for the failure to serve within the specified period is a highly material factor…

68. Lord Brandon, in his decision, referred to the case of **Vinos v Mark & Spencer plc [2001] 3 All ER 784,** 790 para 20:

> *"If you then look up the wording of the rules in 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…"*

69. Having reviewed the foregoing, I find the applicable rules and law to be the following:

> 1. The previous rule which governed practice and procedure in this jurisdiction, the former Order 6, rule 7 RSC, is similar to the renewed UK Ord 6, r 8 referred to in Lord Justice Dyson's judgment. Under Order 6, rule 7(2), a court may consider an application made before or after the Writ expires. Implied in that rule is the condition that a Court will only exercise the power to extend if there is good reason calling for the exercise of that power. Good reason depends on the circumstances

of the case. A judge is entitled to have regard to the "balance of hardship" as between the parties.

2. In this jurisdiction, as of March 1, 2023, Rule 8.13 of CPR 2022, became the governing rule on the extension of time in this scenario.

3. The UK Rule 7.6(3) empowers that court to grant an extension of time to a claimant who applies after the end of the specified period only if the conditions stated in paras (a) or (b) and (c) are satisfied. There is no such fetter on the discretion of a court acting under the previous Order 6, rule 7(2) in this jurisdiction. In the local Order 6, rule 7, there is no equivalent to the UK Rule 7.6(3).

4. In our jurisdiction and in Rule 8.13, CPR 2022, there is no equivalent to the UK Rule 7.6(3), i.e. there is no provision for a court to make an order for the extension of time after the claim form has expired. The application *must* be made *either* within the period for serving a claim form specified by rule 8.12 (6 months) *or* within the period of any subsequent extension permitted by the court.

5. In our jurisdiction and in Rule 8.13, there is no equivalent to the UK Rule 7.6(2) to the extent that the court may exercise an unfettered discretion in determining an application under Rule 8.13. Rule 8.13 CPR 2022 lays down the "stringent conditions" to be met before a court can exercise its discretion to extend the validity of the claim form. These conditions are that the claimant has satisfied the court by evidence on affidavit that (1) it has taken all reasonable steps to trace the defendant *and* (2) it has taken all reasonable steps to serve the claim form. Otherwise, a court may exercise its discretion if it is satisfied by evidence on affidavit of some other special reason for extending the period. Further, a court is not to grant more than one extension unless the court is satisfied by evidence on affidavit that the defendant is deliberately avoiding service or that there is some other compelling reason for granting more than one extension.

6. CPR 2022 Part 1 provides:

> (1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.
> (2) Dealing justly with a case includes, so far as is practicable:
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;

(c) dealing with the case in ways which are proportionate to —
(i) the amount of money involved;
(ii) the importance of the case;
(iii) the complexity of the issues; and
(iv) the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders.

It is my opinion, that in the exercise of its discretion, limited by the conditions set out in the rules, a court must have regard to the overriding objective. This is especially so where a court must consider whether there exists some other special reason for extending the period or whether there is some other compelling reason for granting more than one extension. What is a special reason or a compelling reason must be determined on a case-by-case basis. However, it is my view that in considering how to deal with cases justly and at proportionate cost pursuant to the overriding objective, a court must necessarily consider, and weigh in the balance, the reason for the failure to serve within the specified period and the "balance of hardship". This is especially true in the case where to grant an extension after a limitation period has expired would deprive a defendant of the opportunity to rely on the relevant statutory position. Of course, in such a case, the court can, for example, look at the conduct of the defendant and see whether there was any inducement held out to the Claimant to cause a claimant to believe that pursuit of a suit would not be necessary. That is one example. In essence, what it boils down to is that court in determining whether there exists some other special reason for extending the period or whether there is some other compelling reason for granting more than one extension, ought to have regard to the reason for the delay of the party in acting on the filed claim form. The Court should also consider where the balance of justice, fairness and expedition lies. Under the new regime of the CPR 2022, a court is also concerned with enforcing compliance with rules, practice directions and orders and with ensuring that parties respect the relevant time periods set out in the rules and that parties do not flagrantly disregard same, thereby causing delay in proceedings.

68. In the current case, Counsel proceeds on the basis that both the attempted service and the application for a renewal were made during the validity of the Writ. I have found that the Writ expired on June 27, 2022. The Application was made on July 29, 2022. The application was made after the Writ expired.

69. I have already determined that the applicable rules in this matter are the rules of the CPR 2022. There is, in my view, no jurisdiction under Rule 8.13 CPR 2022 to entertain this application given that it was filed after the Writ had expired. That rule provides that the application must be made during the validity of the claim form (initiating document) in its initial period or during a period of extension by court order. I interpret that rule to mean that the application must be made during the validity of the initiating document, which in this case is the Writ, in its initial period or during a period of extension by court order.

70. The application is denied.

71. Counsel has spent considerable time offering up reasons as to why this court ought to exercise its discretion in favour of the Plaintiffs. My view of the law is that this court, under the CPR 2022 as amended, cannot entertain an application made after the writ has expired and therefore there is no need to examine the reasons offered in this instance. Further, this court is limited to the conditions expressed in Rule 8.13. Reasons take on significance in the instance where a court is not exercising its discretion on the basis that the Claimant has taken all reasonable steps to trace the defendant *and* (2) it has taken all reasonable steps to serve the claim form. Reasons take on significance when the court is being asked to exercise its discretion on the basis of some "other special reason for extending the period". However, in each instance the application must be made during the validity of the document. Those circumstances do not apply here, because, again, the application was filed out of time.

Delay, Good Reasons and the RSC

72. If reasons were to have any place in this case, it would be to consider them under the regime of the RSC. The Plaintiffs would have had to provide good reasons if this Court were exercising a discretion under Order 6, Rule 7, of the RSC. I appreciate that this action was initiated under the RSC and that those rules allowed a court to entertain an application after the expiration of the writ of summons. In this ongoing transition to the new rules, I also appreciate that both litigants and attorneys are grappling with the new rules and it must be a rude awakening that these applications must now be made prior to the expiration of the time periods set by the rules. Having noted that, it is also my opinion that even were the CPR 2022 not to apply to this matter, this would not be a fit case for the exercise of the Court's discretion under the RSC. For this reason, I therefore set about to consider what the position would have been had the Plaintiffs' application been considered under the old rules.

73. Under the old rules, a Plaintiff must give evidence of good reason calling for leave to renew the writ. A court will also consider the "balance of hardship" as between the parties.

74. The affidavits of the Plaintiffs, in summary, show that the Plaintiffs were dealing with various health challenges, financial difficulties, stalled representation by a US law firm, failure of government agencies and others to respond to request for information, stalled representation by a local law firm, negotiations with the health insurer to bear part of the costs of litigation, failed attempts to obtain medical records and communication with a prior attorney before they could instruct this attorney to institute the matter just in time to beat the limitation period. The Plaintiffs' counsel was abroad and since the Defendants were in Exuma (where the accident occurred) and since the Defendants were being represented by the law firm, the decision was made to serve the law firm. In relation to the delay in service, the affidavits also show, inter alia, that current Counsel suffered his own health challenges, was away from the jurisdiction and that service was not accepted by the law firm on whom service of the documents were attempted.

75. In relation to the delay in the filing of this application, the affidavit evidence relied on shows that Counsel for the Plaintiffs underwent a series of personal challenges and was, at times, out of the jurisdiction. Counsel also sought more information from the clients and sought to make a determination to add more Defendants. In the meantime, the criminal trial against the Defendants commenced. When it concluded, Counsel for the Plaintiffs then sought to get a date for the current application before the court.

76. Although the current application was filed several weeks after the expiry of the Writ, Counsel also relies on affidavit evidence to show the difficulty of getting a listing date for hearing of the matter as one of the reasons for the delay in the court hearing the matter. At this point, I wish to make the distinction between a delay in securing a hearing date and a delay in filing the current application. Securing a date for a hearing is a different matter from a party taking the steps to bring a matter before the court i.e. filing the relevant application and supporting evidence. In this case, the application was not filed until July 29, 2022.

77. The Plaintiffs cited the House of Lords case of *In Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No 3)* [1987] AC 597. The matter before the House of Lords concerned the appropriate principles to be applied on an application for the extension of validity of writ and on an application made after a limitation period had expired. In that case, a bank filed a writ against 164 defendants. The Writ was not served initially and 2 extensions of its validity were granted before the Defendants were finally served. The evidence before the judge at first instance was that the bank's reason for delay included the saving of expense for the defendants given the voluminous nature of receipts and records. The Court accepted

the findings of the judge at first instance that the plan followed by the bank was designed to save, and did save, legal costs, that the respondents knew of the possibility of claims being made against them and that none of the respondents had been prejudiced by the delay in service of the writ. In the circumstances, those were exceptional circumstances that justified the extension of the validity of the Writ.

78. In *Kleinwort Benson Ltd v Barbrak Ltd, The Myrto*, Lord Brandon stated at pages 612 - 622

> My Lords, there are three main categories of cases in which, on an application for extension of the validity of a writ, questions of limitation of action may arise, all being cases in which the writ has been issued before the relevant period of limitation, that is to say the period applicable to the cause of action on which the claim made by the writ is founded, has expired. Category (1) cases are 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. Category (2) cases are where the application for extension is made at a time when the writ is still valid but the relevant period of limitation has expired. Category (3) cases are 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. 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 (1) cases, but not category (2) 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 properly be said that, at the time when the application for extension 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.

79. And again at pages 622 – 623:

> "I think on the whole that it has been unhelpful to put the condition for extension as high as 'exceptional circumstances', an expression which conveys to my mind at any rate a large degree of stringency. The old rule in force until 1962 referred to 'any other good reason', and I think that the new rule should be interpreted as requiring 'good reason' and no more.

> The question then arises as to what kind of matters can properly be regarded as amounting to 'good reason'. The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case and must therefore be left to the judgment of the judge who deals either with an ex parte application by a plaintiff for the grant of an extension, or with an inter partes application by a defendant to set aside an extension previously granted ex parte.
>
> Good reason is necessary for an extension in both category (2) cases and category (3) d cases. But in category (3) cases the applicant for an extension has an extra difficulty to overcome, in that he must also give a satisfactory explanation for his failure to apply for extension before the validity of the writ expired.
>
> The decision whether an extension should be allowed or disallowed is a discretionary one for the judge who deals with the relevant application. Jones v Jones shows that, in exercising that discretion, the judge is entitled to have regard to the balance of hardship. In doing so, he may well need to consider whether allowing an extension will cause prejudice to the defendant in all the circumstances of the case. Once a judge has exercised his discretion, it is only on very limited grounds, too well known for it to be necessary for me to set them out here, that an appellate court will be justified in interfering with his decision."

80. In the exercise of its discretion, a court must be satisfied that there are good reasons to grant the extension and, as part of this, a party must show good reason as to why the Writ was not served during the period of its validity. In this case, the parties must show why the Writ of summons was not served for over a period of 12 months.

81. The affidavit evidence detailed a litany of challenges ranging from health challenges to financial challenges to the absence of the party's attorney from the jurisdiction. The only real attempt to serve the writ was made after its expiry and there was no attempt to serve the Defendants personally because their given location was in Exuma. The further delay in filing the current application was beset by the same sort of issues that are said to have beset the Plaintiffs in their attempts to file and serve the Writ.

82. As grave as the Plaintiffs' injuries are said to be, and as unfortunate as the accident is and while the court acknowledges the challenges of communicating with persons with medical issues, especially those who reside overseas, none of those reasons, separately or together would be sufficient to convince me to exercise a discretion in favour of the Plaintiffs in this instance. Having crossed the detailed hurdles to institute suit and file the Writ, there

was nothing which prevented the Plaintiffs from serving the Writ of Summons while the case was being worked on. Counsel was retained and had carriage of the matter. It seems to me that service was delayed until the 11th hour at which point Counsel was overseas and service became urgent. On the affidavit evidence, it appears that the accident happened in the waters of Exuma. That the Defendants were located in Exuma and could not be served readily as a presumed agent in New Providence, is not a good reason. It ought not to have been a surprise to Counsel that the Defendants resided outside of New Providence. Having faced the delay in attempted service and the non-acceptance of service, it seems to me that the Plaintiffs would act quickly to rectify matters – which would be to file the application expeditiously. Yet, the summons was filed on July 29, 2022.

83. There is also the matter of the Limitation period. In *Kleinwort Benson Ltd v Barbrak Ltd, The Myrto* such a case is referred to as "a Category 3 case" - *"... in category (3) cases the applicant for an extension has an extra difficulty to overcome, in that he must also give a satisfactory explanation for his failure to apply for extension before the validity of the writ expired."*

84. The evidence is that a family resident in the United States travelled to The Bahamas for vacation. It ended in tragedy that will undoubtedly mar the family for life. This is regrettable. Counsel made strong arguments as to the merits of this case. He also acknowledged that the limitation period has already run for the bringing of a new action against a Defendant. The consequence of this is that without an extension of the validity of the Writ, the Plaintiffs are hamstrung in pursuing a remedy. On the other hand, since the limitation period has passed, the Defendants, and any other intended Defendants, will be deprived of that "limitation defence" if the period of validity is extended and would now have to set about to attempt to defend themselves in relation to an accident that occurred in 2018. The Defendants would be doing so while the Plaintiffs, on the Plaintiff's own evidence, are still putting their case together.

85. I find that the reasons for the delay were of the parties' own making. That they had to make enquiries for information and that these enquiries did not meet with success does not explain while a pleading, already filed, was not served within a 12 months span. That more information became available did not prevent the Plaintiffs from serving the Writ. Indeed, the Plaintiffs had the options of amending the unserved Writ and serving an amended writ or of serving the writ and then seeking to amend it. Nothing in the reasons given amount to more than the usual pursuit and receipt of instructions in the course of a case. It was submitted that the Plaintiffs were awaiting a commitment for funding of the litigation which commitment was said to have been received at the last minute. It seems to me that having made the decision to file the suit and bearing in mind that the limitation period had already passed, the Plaintiffs must also have borne in mind the consequences of the failure

to serve the Writ during its period of validity if funding were not received. Having received funding, when the Plaintiffs did take a step, it was not a step that was in compliance with the rules of court. Nor was it a step that sought to regularize matters by application to bring this action in compliance with the then prevailing rules. The real reasons for the delay in service and for the subsequent filing of this application out of time were not attributable to matters beyond the Plaintiffs' control or to matters that took them by surprise. The Plaintiffs took a risk to wait until the anniversary of the Writ to act. Unfortunately, by then the Writ had expired and there was no obligation on lawyers who had represented the Defendants in other matters to accept service of an expired Writ. In those circumstances, if this Court were to determine the application pursuant to the RSC, I would find that there are not good and sufficient reasons for the Court to exercise its discretion in this case to grant the extension sought.

86. The application is denied.

Issues 4 AND 5: SUBSTITUTED SERVICE AND ADDITION OF PARTIES

1) Whether leave ought to be granted to effect substituted service and
2) Whether the Court ought to grant leave to the Plaintiffs to amend the Writ and to add new parties.

87. The Plaintiffs also seek an order for substituted service and for the addition of parties to the Writ. The finding of this Court is that the Writ expired on June 27, 2022 and that, under the CPR 2022, the application for the renewal of the Writ cannot be made after its expiry. I have also determined that were the RSC to apply, that this would not be a case fit for the exercise of the Court's discretion under the RSC. In the circumstances, there is no valid Writ to be made the subject of substituted service and there is no valid Writ commencing an action to which parties may be added.

88. The application for substituted service is dismissed.

89. The application to add parties is dismissed.

CONCLUSION

90. This is an interlocutory matter and the date was fixed for hearing after the CPR 2022 came into effect. CPR 2022 applies in this case.

91. I find that there was no effective service of the Writ on the Defendants on June 28, 2022 or on June 30, 2022 when there were several attempts at service on the law firm which the Plaintiffs allege represented the Defendants in other related actions. The rules require

personal service on the named Defendants. This was not done. There is no evidence before me that Counsel for the Plaintiffs was notified that the firm of Murrio Ducille & Co was authorized to accept service.

92. Further, in this case, the Writ had already expired when the Plaintiffs attempted service. Therefore, service would have been ineffective.

93. The Writ had already expired when the Plaintiffs applied to extend the life of the Writ. There is no jurisdiction under the CPR 2022 to entertain an application made after a Writ or Claim form has expired. An application for extension of the validity of a Claim form or Writ must be made during the validity of the Claim form or Writ.

94. In this case there was no attempt to personally serve any of the Defendants. There is no satisfactory reason before this Court that explains why personal service of the Writ during its 12 months term was not attempted and why personal service was therefore impractical.

95. Under the RSC, a Plaintiff must give evidence of good reason calling for leave to renew the writ. Having considered the reasons offered for the failure to serve the Defendants before the Writ expired and having considered the reasons offered for the delay in filing the application for extending the life of the Writ, I find that there are no good reasons that would cause this to be an appropriate case for the exercise of the Court's discretion in favour of the Plaintiffs under the RSC were the rules of the RSC to apply to this application.

96. The Writ having expired, there is no valid Writ to be made the subject of substituted service and there is no valid Writ commencing an action to which parties may be added.

ORDER

97. The order and directions of this Court are as follow:
    a. The Plaintiffs' several applications made by way of the ex parte summons filed July 29, 2022 are dismissed.
    b. No Order as to cost.

Dated this 18th day of June 2024

Carla D. Card-Stubbs J