IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 2023/CLE/gen/00514

IN THE MATTER OF Section 35(1)(d)(ii) of the *Arbitration Act, 2009*,

AND IN THE MATTER OF an Arbitration between Vernes Holding Ltd. and Lyford Holdings NV.

BETWEEN:

VERNES HOLDING LIMITED

Claimant

AND

BARRY LEON

First Defendant

AND

LYFORD HOLDINGS N.V.

Second Defendant

Before:	The Honourable Mr. Justice Leif Farquharson
Appearances:	Dawson Malone and Ebonesse Bain for the Claimant No appearance by or on behalf of the First Defendant John Wilson, KC and Berchel Wilson for the Second Defendant
Hearing dates:	18 February 2025 and 11 June 2025. Further written submissions received from the Claimant on 26 June 2025, with a supplement dated 4 July 2025. Written submissions received from the Second Defendant on 4 July 2025.

RULING

The Applications Before the Court

1. This matter raises a number of procedural issues in relation to service of process under the *Supreme Court Civil Procedure Rules, 2022* (the ***"CPR"***). According to the Amended

Claim Form filed on 18 August 2023, the current action arises out of an arbitration between the Claimant, Vernes Holding Limited, and the Second Defendant, Lyford Holdings N.V. The First Defendant, The Hon. Barry Leon, a mediator, arbitrator and former Presiding Judge of the British Virgin Islands Commercial Court, was appointed the sole arbitrator in the proceedings. As a result of certain circumstances which have allegedly arisen in the arbitration (and which it is not necessary for me to address in great detail at this juncture), the Claimant seeks orders for the removal of the First Defendant as arbitrator, the setting aside of a partial award rendered by him, costs and other consequential relief and/or directions.

2. The Claimant now advances two applications, both of which are moved by Notice of Application filed on 18 October 2024. As against the First Defendant, the Claimant seeks (in the main) an Order pursuant to CPR 5.1, 5.13, 5.16 and 7.12 confirming that service of the Claim Form and Amended Claim Form filed in the action and certain other court filings *"ha[ve] been effected by an alternative method, namely via email communication to the 1st Defendant at bleon@arbitrationplace.com"*. Secondly, and in the alternative, an Order pursuant to CPR 7.13 that the Court dispenses with service of the Claim Form and Amended Claim Form. Thirdly, an Order pursuant to CPR 7.12 that all future documents filed in the action or relied upon in the proceedings may be effected via email to the aforementioned email address and/or to b.leon@33bedfordrow.co.uk. In each instance, the Claimant also invokes the inherent jurisdiction of the Court to justify the grant of relief. The application for relief is also expressly stated to be without prejudice to the Claimant's fundamental position that email service was perfectly valid pursuant to the terms of an Arbitration Agreement concluded between the parties, whereby they all *"agreed, and it was ordered, that all written communications and documents shall be by email, without delivery of hard copies"*.

3. The Claimant seeks similar relief against the Second Defendant, save that the third-mentioned prayer concerning service of future documents to be filed in the action or relied upon in the proceedings was, perhaps by oversight, omitted from its Notice of Application. The Claimant also seeks an Order that the Second Defendant's Notice of Application filed on 22 September 2023 (which, in turn, sought an Order setting aside service of the Amended Claim Form filed on 18 August 2023) be dismissed. Once again, the Claimant invoked the inherent jurisdiction of the Court as a further or alternative basis for the grant of relief. Likewise, the application for relief is also stated to be without prejudice to the Claimant's fundamental position as outlined above.

4. As alluded to, the Second Defendant also filed an application seeking to set aside service of the Claimant's Amended Claim Form pursuant to CPR 9.7(1) and (6).

Factual Background and Procedural History

5. The Claimant's applications are supported by two affidavits sworn to by Ebonesse Bain, a counsel and attorney-at-law in the firm representing the Claimant, both of which were filed on 18 October 2024. One affidavit (the ***"First Bain Affidavit"***) is intended to provide necessary evidence to support the application for relief as against the First Defendant and the other (the ***"Second Bain Affidavit"***) is intended to provide such evidence to obtain relief as against the Second Defendant. The Second Bain Affidavit also purports to respond to the Second Defendant's application to set aside service of the Amended Claim Form. More will be said of the Second Defendant's application later.

6. As the Claimant's two applications raise issues which are highly fact-sensitive, it is worth setting out the contents of its affidavit evidence in some detail. In this regard, the First Bain Affidavit materially states as follows:

> *"5. The Claim concerns a commercial arbitration being conducted under the Laws of the Commonwealth of The Bahamas and under UNCITRAL Rules whereby the 1st Defendant was the Sole Arbitrator (the "Arbitration Agreement"). A copy of the Arbitration Agreement is at Exh/p [1] to Exh/p [12].*
>
> *6. I am advised and verily believe that the 1st Defendant is not ordinarily resident in The Bahamas, but frequently visits The Bahamas for work opportunities.*
>
> *7. I am also advised and verily believe that as a part of the said Arbitration Agreement, the parties (including the sole arbitrator), who are also parties to this Claim, agreed, and it was ordered, that all written communications and documents shall be emailed, without delivery of hard copies.*
>
> *8. Therefore, as this Claim relates to the said Arbitration Agreement, whereby the parties specified how proceedings under the Arbitration shall be made, I am advised and verily believe that* (sic) *Claimant was of the view that it was permitted to serve documents on the 1st Defendant via the email used in the Arbitration Agreement, which is bleon@arbitrationplace.com. I am advised and verily believe this service is in accordance with the Arbitration Agreement and permitted by Part 5.16 (2) of the Civil Practice and Procedure Rules 2022 ("CPR"), which states: "A Claim form containing a claim in respect of a contract may be served by any method permitted by that contract."*
>
> *9. Furthermore, in any event, electronic means of communication, including e-mail, is a valid form of service under Part 5.1 and Part 5.12 of the CPR.*
>
> *10. Accordingly, I am advised and verily believe that the Claimant's former attorneys, served the Claim Form filed on 4 July 2023 and Affidavit of Marnique Knowles filed on 4 July 2023 on the 1st Defendant on 2 August 2023 via email to bleon@arbitrationplace.com in accordance with the Arbitration Agreement. A copy of the email is at Exh/p [16] to Exh/p [17].*
>
> *11. I am also advised and verily believe that the Claimant's former attorneys served the Amended Claim Form filed on 18 August 2023 on the First Defendant on 18 August 2023 via email to bleon@arbitrationplace.com in accordance with the Arbitration Agreement. A copy of the email is at Exh/p [13].*
>
> *12. On 7 February 2024, the Claimant engaged Callenders & Co. to represent it in the present proceedings in place of its former attorneys, Scott & Co.*
>
> *....*
>
> *14. In an effort to personally serve the Notice of Change of Attorney on the 1st Defendant, Callenders carried out searches to ascertain the exact whereabouts of the 1st Defendant and was unable to verify such whereabouts.*
>
> *15. As a result of the unsuccessful attempts of verifying the address of the 1st Defendant, the Claimant advised Callenders that all communication and service of documents were done via email in accordance with the said Arbitration Agreement. And the Claimant communicated with the 1st Defendant via his email address, which is bleon@arbitrationplace.com pursuant to the Arbitration Agreement.*

16. *After confirming the 1st Defendant's identity with the Claimant, I visited the website connected to the aforementioned email address provided at https://www.arbitrationplace.com/arbitrator/barry-leon and saw that the 1st Defendant was listed as an Arbitrator and his email address was listed as "bleon@arbitrationplace.com". A copy of the webpage is at page Exh/p [18] to Exh/p [20].*

17. *Following this, I contacted the Arbitration Place via the telephone contact stated on its website and the receptionist confirmed that "bleon@arbitrationplace.com" is the email address of Barry Leon, the 1st Defendant.*

18. *As a result of the foregoing, on Tuesday, 5 March 2024, I attempted to effect service on Barry Leon, the 1st Defendant, of the Notice of the Change of Attorney filed on 4 March 2024 via email to bleon@arbitrationplace.com. A copy of my email is at Exh/p [21].*

19. *In response, I received the following message via email:*

> *"Your email couldn't be forwarded from bleon@arbitrationplace.com to another email address. bleon@arbitrationplace.com (bleon@arbitrationplace.com) Your message wasn't delivered because the recipient's email Provider rejected it. BN1NAM02FT055.mail.protection.outlook.com gave this error: Access denied, sending domain [CALLENDERS-LAW.COM] does not pass DMARC verification and has a DMARC policy of reject. [LV2PR19MB5912.namprd19.prod.outlook.com 2024-03-05T14:44:16.039Z 08DC3CC020E3BED6] [BN0PR04CA0177.namprd04.prod.outlook.com 2024-03-05T14:44:16.050Z 08DC3C43EE2BC7AF] [BN1NAM02FT055.eop~nam02.prod.protection.outlook.com 2024-03-05T14:44:16.045Z 08DC3C98E514EB07].*

A copy of the response is at Exh/p [22] Exh/p [25]

....

20. *On 2 May 2024, in an attempt to further verify the 1st Defendant's email address, I requested the 1st Defendant's email address from Ms. Berchel Wilson of McKinney, Bancroft and Hughes, the counsel and attorneys for the 2nd Defendant herein. Ms. Berchel responded that "we have used the following email address without any issues. bleon@arbitrationplace.com" A copy of the email thread is at Exh/p[26].*

....

....

23. *As a result of the previous inabilities to serve the 1st Defendant via email, as previously agreed upon by the parties, and ordered in the Arbitration Agreement, Callenders underwent online research and found that the 1st*

Defendant is listed on the Vancouver International Arbitration Centre website at https://vaniac.org/panelist/hon-barry-a-leon-fciarb/ as a panelist and his email address is listed as b.leon@33bedfordrow.co.uk. A copy of the (sic.) *is at pages Exh/p [27] to Exh/p [30]."*

24. *Therefore, on 20 August 2024, I served the following documents on the 1st Defendant via email to bleon@arbitrationplace.com and b.leon@33bedfordrow.co.uk in accordance with the Arbitration Agreement:*
    - 24.1. *Claim Form filed on 4 July 2023, a copy of which is at Exh/p[32] to Exh/p[38];*
    - 24.2. *Affidavit of Marnique Knowles filed on 4 July 2023, a copy of which is at Exh/p[39] to Exh/p[42];*
    - 24.3. *Amended Claim Form filed on 18 August 2023, a copy of which is at Exh/p[43] to Exh/p[49];*
    - 24.4. *2nd Affidavit of Marnique Knowles filed on 18 August 2023, a copy of which is at Exh/p[50] to Exh/p[61];*
    - 24.5. *Notice of Application for Case Management Conference filed on 21 September 2023, a copy of which is at Exh/p[62] to Exh/p[66]; and*
    - 24.6. *Notice of Change of Attorney filed on 4 March 2024, a copy of which is at Exh/p[67] to Exh/p[69]. (the "Relevant Documents")*

25. *I am further advised and verily believe that the Claimant cannot personally serve the 1st Defendant with the Relevant Documents because the Claimant is unable to verify where the 1st Defendant is ordinately* (sic) *resident in order to effect or attempt to effect personal service of the Relevant Documents on him in accordance with the CPR."*

(Underlining supplied)

7. It is noteworthy that the *"Arbitration Agreement"* referred to and exhibited in the First and Second Bain Affidavits does not appear to be an agreement by which the Claimant and the Second Defendant agreed to submit all or certain disputes which have arisen or may arise between them in a defined legal relationship to arbitration (see s.2 *Arbitration Act, 2009*). Instead, it appears to be an agreement by which the Claimant, the First Defendant and the Second Defendant agreed to be bound by various terms and conditions of the British Virgin Islands International Arbitration Centre (BVI IAC) relating to the holding and disbursement of any funds deposited with it. The Agreement is entitled *"BVI International Arbitration Centre – Fundholding Services Agreement"* and contains a BVI governing law clause, BVI arbitration clause and makes reference to the seat of any arbitration for the resolution of disputes arising under the Agreement being the BVI. For the sake of convenience, I shall nonetheless continue referring to the said Agreement as the *"Arbitration Agreement"*, as the Claimant has done throughout its affidavits and submissions.

8. Succinctly stated, the Second Bain Affidavit reiterates that the Claimant and the Second Defendant were parties to the referenced arbitration. The deponent confirms that the Second Defendant was represented *"in the Arbitration Agreement"* by Mr. John Wilson KC of Messrs. McKinney, Bancroft & Hughes (***"MBH"***), who was authorised to accept service on behalf of the Second Defendant. Upon information and belief, the deponent further states that as part of the Arbitration Agreement, the parties *"agreed, and it was also ordered, that all written communications and documents shall be by email to Counsel, without delivery of hard copies"*. The deponent confirms that the Claimant held the view that as the claim in the current action related to the Arbitration Agreement, it was permitted

under CPR 5.16(2) to serve documents in accordance with the Agreement. It is also asserted that further, and in any event, electronic means of communication, including email, is a valid form of service under CPR 5.1 and 5.12. The Second Bain Affidavit subsequently confirms that the Claim Form and Amended Claim Form in the action were served on Mr. Wilson KC by email on 2 August 2023 and 18 August 2023, respectively, and were obviously received as the Second Defendant filed an application to set aside or challenge service on 22 September 2023.

9. It is also noteworthy that the Arbitration Agreement itself, on a close reading, contains no provision speaking to service of court process arising out of the arbitration being effected by email. This was candidly admitted by counsel for the Claimant, who subsequently indicated that he was relying on an *"unperfected procedural order"* issued in the arbitration proceedings to justify service of court process by email. The date and precise terms of the procedural order were not known to learned counsel for the Claimant as, he said, this predated his engagement and his files were incomplete.

10. No affidavit evidence was filed by either Defendant in direct opposition to the Claimant's Notices of Application. In the case of the First Defendant, he has not acknowledged service or receipt of the Claim Form, Amended Claim Form or any other document, by e-mail or otherwise, and has not participated in the proceedings at all. The Second Defendant's position is more nuanced. An Acknowledgement of Service was filed on its behalf by MBH on 8 September 2023. Therein, the Second Defendant confirmed its receipt of the Claim Form on 18 August 2023.

11. Nevertheless, on 22 September 2023 the Second Defendant filed a Notice of Application seeking an Order pursuant to CPR 9.7(1) and (6) that service of the Claimant's Amended Claim Form filed on 18 August 2023 be set aside. This was supported by an Affidavit of Devaughn Rolle, a counsel and attorney at MBH, also filed on 22 September 2023. The thrust of the Second Defendant's application emerges from a series of exchanges between the Claimant's former counsel and Mr. Wilson KC, which are described thus in Mr. Rolle's affidavit:

> 5. *On 2nd August, 2023, Counsel for the Claimant, Ms. Marnique Knowles sent an email to Mr. John Fritzgerald Wilson, KC of Messrs. McKinney, Bancroft & Hughes attaching the Claim Form and the Affidavit of Marnique Knowles filed on 4th July, 2023. The body of the email stated: "Please see attached for your immediate attention". The email contained no inquiry on behalf of Counsel as to whether Mr. Wilson, KC was authorised to accept service in this Action. There is now produced and shown to me a true copy of the email dated 2nd August, 2023 attached hereto and marked "DFAR.1".*
>
> 6. *On 16th August, 2023, Mr. Wilson, KC responded to the email with the following statement:*
>
> > *"Please be advised that, to the extent you are purporting to serve Lyford Holdings via email we have no instructions to accept service of any proceedings on behalf of Lyford Holdings NV. Nor in any event have we agreed to service via email, as required by the CPR had we been so authorised. Accordingly, to the extent it is Vernes Holdings intention to proceed with this claim notwithstanding that the Partial Award in this matter has already been delivered you should seek to serve Lyford Holdings NV outside the jurisdiction in the normal course."*

There is now produced and shown to me a true copy of the email dated 2nd August, 2023 attached hereto and marked "DFAR.2".

7. *Counsel for the Claimant responded via email on 17th August, 2023 stating:*

> *"The claim is pursuant to the Arbitration Act 2009 which gives the court supervisory powers over the above Bahamian arbitration in which your firm expressly (along with everybody else) agreed that email service was good service. The arbitration is not yet concluded and the Claimant is seeking relief in the arbitration from the court under the Act. We are therefore of the opinion that Lyford Holdings has been correctly served and will proceed accordingly."*

There is now produced and shown to me a true copy of the email dated 17th August, 2023 attached hereto and marked "DFAR.3".

8. *On 18th August, 2023, Counsel for Claimant sent a further email to Mr. Wilson, KC attaching an Amended Claim Form filed 18th August, 2023. Again, there was no inquiry made by Counsel for the Claimant as to whether Mr. Wilson, KC was authorized to accept service of behalf of Lyford or in this Action. There is now produced and shown to me a true copy of the email dated 18th August, 2023 attached hereto and marked "DFAR.4".*

9. *I am advised and verily believe that Messrs. McKinney, Bancroft Hughes and/or Mr. John Wilson, KC have not been authorized or instructed to accept service in this Action.*

10. *I am further advised and verily believe that the register* (sic) *office of Lyford is located at Landhuis Groot Kwartier, Groot Kwartierweg 12, Willemstad, Curacao. I have also been advised and verily believe that the registered office of Lyford has not been served with the Amended Claim Form.*

11. *In light of the forgoing* (sic)*, it is Lyford's position that it has not been properly served with the Amended Claim Form and therefore it has not submitted to the jurisdiction of the Bahamian Court in this Action.*

12. *In accordance with the procedure set by Part 9.7 (2) of the CPR, an Acknowledgment of Service was filed herein on behalf of Lyford on 8th September, 2023 on a conditional basis."*

(Underlining supplied)

12. At the hearing, Mr. Wilson KC restated that his client had not actually submitted to the jurisdiction of the Court. He further suggested that the hearing, which only concerned the Claimant's Notices of Application, was in the nature of *"an opposed ex parte hearing"*. There appeared, however, to be a slight shift in this stance when counsel for the Claimant contended that having filed an Acknowledgement of Service on 8 September 2023 confirming receipt of the Claim Form on 18 August 2023, any application by the Second Defendant to challenge jurisdiction ought to have been made within 28 days of service, which would have been by 18 September 2023 at the very latest. As such, the Claimant submitted that the Second Defendant's Notice of Application, having been filed on 22 September 2023, was out of time and the Second Defendant was to be treated as having accepted that the Court had jurisdiction (see CPR 9.7(5)).

13. As this particular point was only raised by the Claimant in an email just before the start of the hearing, Mr. Wilson KC responded by email of his own later that day. In doing so, he

outlined some of the steps taken by him to secure a fixture for the hearing of his Notice of Application to set aside service, enclosing copies of correspondence with the Listing Office, the clerk of the Judge who previously had carriage of this matter and Mr. Malone. These various communications, according to Mr. Wilson, dispelled any suggestion that the Second Defendant was not diligently seeking to have its Notice of Application set down for hearing. Mr. Wilson further pointed out that an 18 March 2024 fixture for the hearing of his application was actually adjourned as a professional courtesy to Mr. Malone, who had shortly prior thereto confirmed his engagement to act for the Claimant and requested Mr. Wilson's favourable consideration to an adjournment of the proceedings by consent, to essentially enable him to come up to speed on Mr. Wilson's application.

14. During the hearing, it emerged that the Claimant had not made any effort at all to physically serve the First Defendant, such as by utilising the services of a foreign process-server. This was so notwithstanding the fact that the First Defendant appeared to be a prominent figure in the field of international arbitration and mediation in Canada, and a former judge.

15. Likewise, the Claimant confirmed that it had not taken any steps to physically serve the Second Defendant at its registered office in Curaçao. No reason was proffered as to why this was not done, other than to simply assert that it was not required.

16. Although the point was not raised by either counsel, the Claim Form in the present action was issued on 4 July 2023. It follows that the period of validity for service, whether within or outside the jurisdiction, would have expired on or about 3 January 2024 (see CPR 8.12).

17. It should also be noted that when this matter was transferred to me, only the Claimant's Notices of Application had been set down for hearing. Subsequent to the hearing, I deemed it appropriate to address the Second Defendant's application to set aside service of the Amended Claim Form as part of my overall disposition of the matter. This was for two main reasons: first, the Second Defendant's Notice of Application purported to raise jurisdictional objections; second, the Second Defendant's application, properly construed, was essentially the counterpart of the Claimant's application, albeit from the standpoint of a defendant disputing service. In exercise of my case management powers, I therefore invited the Claimant and the Second Defendant to lay over written submissions addressing the Second Defendant's Notice of Application, which they did. I also invited both sides to lay over written submissions addressing the Claimant's objection to the Second Defendant's Notice of Application based on Rule 9.7(5), which as indicated had only been raised by email minutes before the hearing.

18. It has also very recently come to my attention that in a related action, Charles J. (as she then was) issued an interim mandatory injunction against the Claimant compelling it to sell its minority interest in Lyford International Bank, a Bahamian company, to a third party purchaser pursuant to the terms of a shareholders agreement it had earlier entered into with the Second Defendant as majority shareholder. That matter was unsuccessfully appealed to the Court of Appeal in SCCivApp No.210 of 2018. I merely take cogisance of the Court of Appeal's judgment insofar as both counsel confirmed that it provides further background to the underlying dispute between the Claimant and the Second Defendant, which culminated in the arbitration proceedings forming the subject-matter of the current action. Given that the *"Arbitration Agreement"* referred to and exhibited in the First and Second Bain Affidavits contained a BVI governing law clause, BVI arbitration clause and made reference to the seat of any arbitration for the resolution of disputes arising under the Agreement being the BVI, the Court of Appeal's judgment also shed further light on the basis upon which the *Arbitration Act, 2009* was seemingly invoked.

19. In response to a request from the Court, counsel also recently provided a copy of the shareholders agreement referred to in the Court of Appeal's said judgment. This was not relied on during the hearing of the current applications and was not exhibited in any of the affidavits. I have not considered the same in reaching my decision on the applications before me. I merely note that this agreement contained a Bahamian governing law clause and arbitration clause and made reference to The Bahamas being the seat of any such arbitration, again providing insight as to the basis upon which the *Arbitration Act, 2009* was seemingly engaged.

20. The partial award of the First Defendant referred to in the Amended Claim Form was also recently provided to the Court. This was not relied on during the hearing and was not exhibited in any of the affidavits. At this stage, I simply note that if these proceedings survive, the issuance of the award may become a material consideration in determining whether the relief sought in the Amended Claim Form in the form of an order removing the First Defendant as arbitrator for failing to use reasonable despatch is still appropriate. The other criticisms of the award as outlined in the Amended Claim Form, which appear to be quite generalised and lacking in detail, may also raise questions in the future.

The Rival Arguments

The Claimant's Submissions

21. In summary, Mr. Malone's argument on behalf of the Claimant proceeded as follows. First, while the normal method of service of a claim is by way of personal service, the CPR permits service by alternative means, including by email (see CPR 5.1(2) and 5.12).

22. Secondly, by virtue of the Arbitration Agreement, to which the Claimant and both Defendants were parties, they all agreed that written communications and documents could be transmitted by email. This was also mandated by the *"unperfected procedural order"*. This was all perfectly permissible under CPR Part 5.16 and is a good reason to validate service; *a fortiori,* having regard to the fact that the Court's supervisory powers under the *Arbitration Act, 2009* are being invoked.

23. Thirdly, having regard to the above, the Claimant was at liberty to serve the Claim Form and other documents on both Defendants by electronic means, without the need for leave under CPR Part 7. This was because (i) the claim in the present action concerns and is, ultimately, an extension of the Arbitration Agreement, which is a commercial arbitration being conducted under the laws of The Bahamas and under the UNCITRAL Arbitration Rules, and (ii) the subject-matter of the claim relates to the conduct and affairs of the Claimant, which is a Bahamian company, thereby satisfying CPR Part 7.2(p).

24. Fourthly, the Claimant took reasonable steps to serve the Claim Form and other documents on the First Defendant, who is ordinarily resident outside of the jurisdiction and whose whereabouts are unknown. Specifically, the Claim Form and other documents were sent to the email address identified by the First Defendant in the Arbitration Agreement (i.e. bleon@arbitrationplace.com). Moreover, the documents were also sent to another email address associated with the First Defendant; namely, b.leon@33bedfordrow.co.uk. In the circumstances, the alternative service method used was sufficient to bring the contents of the documents to the attention of the First Defendant.

25. Similarly, in the case of the Second Defendant, the Claim Form and other documents were sent to the email address identified by it in the Arbitration Agreement (i.e. the email address of Mr. Wilson KC). The Second Defendant's receipt of the documents by email has never been in dispute, as evidenced by MBH's filing of an Acknowledgement of Service on 8 September 2023 confirming receipt of the Claim Form on 18 August 2023.

26. Fifthly, as a fallback argument, the Court has power in exceptional circumstances to dispense with personal service of the Claim Form (see CPR Part 7.13(1)). This is an appropriate case in which to invoke the jurisdiction to do so. As it relates to the First Defendant, the Claim Form and other documents were served within the time limit by a method allowed by the CPR; this was done in accordance with the Arbitration Agreement; the First Defendant, by not responding to multiple emails sent to him, is effectively attempting to avoid service. As it relates to the Second Defendant, the Claim Form and other documents were emailed to its counsel of record in the arbitration; receipt of the documents is confirmed by the Acknowledgement of Service filed by MBH; the primary purpose of service (which is to ensure that court proceedings are brought to the attention of a defendant) has been fulfilled; the Court should not therefore be drawn into *"arid and technical points"* regarding the method of service and should instead carry on with the substantive matter.

27. Sixthly, as indicated earlier, Mr. Malone submitted that the Second Defendant was out of time in mounting a challenge to jurisdiction by operation of CPR 9.7(5).

The Second Defendant's Submissions

28. As mentioned, the First Defendant has not participated in the present action to date. Mr. Wilson KC's position, briefly, was that his client has not been properly served. As such, he has no instructions in relation to the action. His position in this regard was clearly communicated to former counsel for the Claimant in his email of 16 August 2023 referred to earlier. Subject to this caveat, he emphasised that his client is a corporate entity; its registered address in Curaçao is well-known to the Claimant and it cannot avoid service; and the Claimant could have simply served a copy of the Claim Form at its registered office in the usual way when proceedings are commenced against a corporate entity. He asserted that this is no mere technical objection, but relates to substantive jurisdiction.

29. Mr. Wilson further pointed out that the Arbitration Agreement itself (which the Claimant cites in its Notice of Application to justify the grant of relief) does not actually contain an agreement by the parties to accept service of substantive proceedings by way of email. On the contrary, it merely serves to administer the arbitration between the parties. The evidence of the *"procedural order"* referred to by Mr. Malone is also deficient and is only obliquely addressed in the Second Bain Affidavit. Moreover, the Arbitration Agreement is governed by BVI law and there is no evidence before the Court that BVI law permits service of a claim arising out of the arbitration by email. Mr. Wilson also submitted that the Acknowledgement of Service filed by his firm was not unconditional and did not operate so as to confer jurisdiction. In the end result, he maintained that there is no jurisdiction under the CPR to grant the relief sought and to thereby subject these foreign defendants to a jurisdiction to which they are not subject.

30. As it relates to his outstanding application to set aside service, Mr. Wilson reiterated that the purported service upon the Second Defendant did not comply with the CPR, specifically Rule 5.9 addressing service on a body corporate other than a limited liability

company. He also maintained that any previous agreement relative to service of documents within the confines of the arbitration cannot absolve the Claimant of its responsibility to comply with the CPR in prosecuting the claim in this action. Relying on the affidavit of Devaughn Rolle, he pointed out that the Claimant proceeded in seeking to effect service upon the Second Defendant by emailing him over his explicit protestations that he was not instructed to accept service of the claim and had not agreed to do so. He also emphasised that the Arbitration Agreement contains no provision providing for its terms to extend beyond the arbitration itself, and therefore has no bearing on this action.

31. Mr. Wilson cited the decision of Card-Stubbs J. in *Schaffer v. Smith and Anor.* [2024] 1 BHS J. No.162 as support for a number of the propositions advanced, including that the Claimant ought not to be allowed to fix the Second Defendant with notice of the current proceedings by service upon the attorneys who acted for it in the arbitration. He also relied on Practice Direction No.2 of 2023 for the requirements to be satisfied for valid service to be effected by email, which he says were not met by the Claimant. He also asserted that the Claimant's objection that the Second Defendant was out of time in seeking to dispute jurisdiction by operation of CPR 9.7(5) was without merit as the Second Defendant, being a foreign company, would have been entitled to 30 working days within which to file a defence if properly served, which it was not (see CPR 7.11). Time therefore never started to run.

The Claimant's Reply

32. In reply, Mr. Malone restated that the CPR provides for service of a claim form in a manner provided for in an agreement. He rejected any assertion that the evidence of the *"procedural order"* was wanting, pointing out that applications of this nature could be made on hearsay and that Ms. Bain's affidavit evidence had not been contradicted. He contended that the underlying action, which seeks the removal of the First Defendant as arbitrator, falls within the confines of the Arbitration Agreement or the procedural order. Lastly, he stated that the CPR removed concepts of 'conditional' and 'unconditional' appearances and maintained that the time period for the Second Defendant to challenge jurisdiction had expired on any possible calculation.

Analysis

33. Having considered the affidavit evidence, the oral and written submissions of the Claimant and the Second Defendant and the other documents filed in this action in their entirety, I now turn to the principal issues I have identified as arising.

Issue 1: Whether the Claim Form and/or Amended Claim Form were served upon the Defendants by a contractually agreed method

34. Central to the determination of this issue are CPR 5.16, 7.2(k) and 7.2(p). These respectively provide:

> ***"5.16 Service of claim form by contractually agreed method.***
> *(1) This rule applies where a contract contains a term specifying how any proceedings under the contract should be served.*
> *(2) A claim form containing a claim in respect of a contract may be served by any method permitted by that contract.*

(3) If the claim form is served within the jurisdiction in accordance with the contract, it is to be treated as having been served on the defendant.

(4) If the claim form is served out of the jurisdiction in accordance with the contract, it is not to be treated as having been served on the defendant unless service out of the jurisdiction is permitted under Part 7."

*"**7.2 When service allowed without leave.***

A claim form may be served out of The Bahamas without leave in the following cases —

....

(k) if the claim is one in respect of which an enactment expressly confers jurisdiction on the Court over persons outside The Bahamas, in which case any requirements of the enactment relating to service must be complied with;

....

(p) when the subject matter of a claim relates to the constitution, administration, management or conduct of the affairs or the ownership or control of a company incorporated, continued or registered within the jurisdiction".

(Emphasis supplied)

35. As indicated earlier, notwithstanding the repeated references in the Notices of Application and the First and Second Bain Affidavits to the *"Arbitration Agreement"* authorising service of the Claim Form and Amended Claim Form upon the Defendants by e-mail, Mr. Malone conceded that there is in fact no such provision in the Agreement permitting the same. This concession, in my view, was rightly made.

36. For completeness, I would merely add that the only provision in the Agreement which conceivably could have been relied on to support the Claimant's previously stated position was Clause 13 of the General Conditions found in Appendix C, which provides: *"Notices. Any notice or other communication required under this Agreement shall be in writing and may be hand delivered or sent by email to the duly authorised representatives of each party at the addresses provided with their signatures."* It is impossible to accept that this was intended to allow for service of an originating process in a newly instituted claim, issued out of a foreign court nonetheless, to be effected upon the Defendants (one of whom is the arbitrator) by email. As discussed earlier, the Agreement is simply an agreement by which the parties agreed to be bound by various terms and conditions of the BVI IAC relating to the holding and disbursement of funds deposited with it.

37. This is not the end of the matter. Mr. Malone also placed reliance on what he described as an *"unperfected procedural order"* authorising such service. With all due respect, I again have great difficulty accepting this argument. First, there is no reliable evidence before the Court as to the precise terms of the Order in question, such as a transcript, recording or even a note made by counsel in attendance at the hearing at which it was purportedly pronounced. Even the date of any such Order is unknown. In fact, the main evidence relied on by the Claimant to establish the existence and terms of the said Order was a singular statement contained in paragraph 7 of the First Bain Affidavit and paragraph 9 of the Second Bain Affidavit, where the deponent indicated (upon information and belief, and without the specific source(s) being identified) that *"as a part of the said Arbitration Agreement"*, the parties to the present claim agreed, *"and it was ordered, that all written communications and documents shall be by email, without delivery of the hard*

copies." In short, I do not accept that this bare assertion is sufficient to establish factually that service of the Claim Form and Amended Claim Form *in the current action* was effected by a contractually agreed method.

38. Given that the Claimant purported to effect service outside of the jurisdiction, I initially had concerns as to whether service of the Claim Form without leave was even permitted under CPR Part 7, so as to satisfy the requirements of CPR Rule 5.16(4)). The Claimant relied on the provisions of CPR 7.2(k) and (p), both of which allow for service of a claim form outside of the jurisdiction, without leave, when the claim meets certain criteria. As stated earlier, the details of the underlying dispute which led to the arbitration proceedings had not been addressed in either the First or the Second Bain Affidavit. Equally, the Claim Form and Amended Claim Form were silent as to the details of the underlying dispute. However, after reviewing the factual background outlined in SCCivApp No.210 of 2018, it would appear that the claim in the current action would likely engage the jurisdictional gateway provided for in Rule 7.2(k) and/or (p). I also note that no objection to the contrary has been raised in the Second Defendant's Notice of Application or submissions.

39. In any event, for the reasons stated in paragraphs 35-37 hereof, I do not accept that the service purportedly effected upon the First and Second Defendants was undertaken by a contractually agreed method so as to comply with CPR Rule 5.16.

40. The shareholders agreement referred to in SCCivApp No.210 of 2018 was not relied on by the Claimant and no submissions were made thereon. Accordingly, I make no findings with respect thereto. I merely note in passing that this would not appear to provide for service of the Claim Form and Amended Claim Form *in the current action* to be effected by email either.

Issue 2: Whether the Claim Form and/or Amended Claim Form were validly served upon the Defendants by electronic means

41. CPR 5.1, 5.9 and 5.12 provide as follows:

> ***"5.1 Service of claim form – normal method.***
> *(1) A claim form must be served personally on each defendant.*
> *(2) Notwithstanding any other provisions of this Part, the Chief Justice may by practice direction, authorise the use of electronic means of communication, including e-mail, for service of a claim form under this Part."*
>
> ***"5.9 Service on body corporate***
> *(1) Service of the claim form on a body corporate, other than a limited company, may be effected —*
> *(a) by leaving the claim form at the principal office of the body corporate;*
> *(b) by serving the claim form personally on any principal officer of the body corporate; or*
> *(c) in any other way allowed by any enactment.*
> *(2) In this rule, "principal officer" means the chairman or president of the body, or the chief executive officer, secretary, treasurer or other similar officer of the body."*
>
> ***"5.12 Proof of service by electronic means.***

(1) Service by electronic means of a claim form is proved by an affidavit of service by the person responsible for transmitting the claim form to the person to be served.

(2) The affidavit must exhibit a copy of —

(a) the document served;

(b) any cover sheet or email to that document;

(c) the transmission record; and

(d) proof of electronic service of the document, and must state the —

(i) electronic means by which the document was served;

(ii) e-mail address to which the document was transmitted; and

(iii) date and time of the transmission.

(3) Electronic confirmation of delivery may be treated as proof of service for a document that is served electronically and may include a written e-mail response or a read receipt."

(Emphasis supplied)

42. CPR 7.8, which addresses service outside the jurisdiction, provides:

"Service outside The Bahamas.

(1) Subject to paragraph (3) and (4),[1] a claim form permitted under these rules to be served outside The Bahamas may be served by a method —

(a) specified in Part 5; or

(b) permitted by the law of the country in which it is to be served; or

(c) provided for in rules 7.9 and 7.10.[2]

(2) When a convention relating to service of process is in force between The Bahamas and the country where service is to be effected, service must be effected in accordance with a method provided for, or permitted by, that convention.

(3) No service outside The Bahamas is valid if effected contrary to the law of the country where service is effected."

(Emphasis supplied)

43. Rule 5.1(1) expresses the general rule that a claim form must be served personally on a defendant. Consistent with the previous practice under the former *Rules of the Supreme Court*, personal service of a claim form upon an individual entails handing or leaving it with the person to be served (see Rule 5.3). Rule 5.1(2), however, contains an innovation of sorts, allowing a claimant, at his option, to effect service of a claim form by electronic means, including email, where authorised to do so by practice direction issued by the Chief Justice.

44. Rule 5.9 is self-explanatory. This likewise appears to expand the range of options for effecting service upon a body corporate, other than a limited liability company. For present purposes, the significance of Rule 7.8 is that it seemingly allows for service of a claim form by the various methods prescribed in Part 5 when effected outside The Bahamas.

45. Practice Direction No.2 of 2023 (***"PD 2 of 2023"***) was issued for the specific purpose of regulating service of a claim form by electronic means. This came into effect on 1 March 2023 and is expressly stated to supplement CPR Part 5. It is applicable to all claim forms

[1] There is no paragraph (4) as stated.

[2] Rule 7.9 addresses service through official channels and Rule 7.10 addresses service in countries with whom The Bahamas has entered into a convention relating to service of court documents.

dispatched or transmitted after its commencement date, which would necessarily include the Claim Form and Amended Claim Form in the present case. It also, importantly, includes various preconditions which must be satisfied before service of a claim form may be effected by electronic means. For immediate purposes, the most important of these are contained in paragraphs 2.1 – 2.3, which are reproduced in full below:

> *"**2. Service by electronic means***
> *2.1 Where a party intends to serve a claim form by electronic means that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received).*
> *2.2 The party who is to be served or the attorney acting for that party must previously have indicated in writing to the party serving-*
> *(a) that the party to be served or the attorney is willing to accept service by electronic means; and*
> *(b) the e-mail address or other electronic identification to which it must be sent.*
> *2.3 The following are to be taken as sufficient written indications for the purposes of paragraph 2.2 (b)-*
> *(a) an e-mail address set out on the letterhead of the attorney acting for the party to be served where it is stated that the e-mail address may be used for service; or*
> *(b) an e-mail address or electronic identification set out on a statement of case or a response to a claim filed with the court."*
>
> (Emphasis supplied)

46. In the instant case, there is no evidence that the First Defendant or his attorney (of which there is none on record) previously indicated *"in writing"* to the Claimant a willingness to accept service of the Claim Form and/or Amended Claim Form by electronic means, and the email address or other electronic identification to which the documents must be sent (see PD 2 of 2023, para.2.2). In my view, this is fatal to any argument that the First Defendant was validly served by electronic means in accordance with CPR 5.1. I would also add there is no evidence that the Claimant even made any enquiry as envisaged under paragraph 2.1 of PD 2 of 2023.

47. In the case of the Second Defendant, Mr. Wilson KC's email of 16 August 2023 to the Claimant's former attorneys could hardly have been clearer in disavowing both his authority and his willingness to accept service of *"any proceedings"* by email. Once again, there is no evidence of the Claimant's compliance with PD 2 of 2023. As such, I similarly hold the view that there has been no valid service of the Claim Form or Amended Claim Form upon the Second Defendant by electronic means.

48. Although the point was not argued before me, I have proceeded on the assumption that the CPR provisions addressing service by electronic means are equally applicable in cases involving service out of the jurisdiction. CPR 7.8(1)(a) quoted earlier appears to support this view.

Issue 3: If the Claim Form and/or Amended Claim Form were not validly served upon the Defendants, whether the purported service ought nonetheless to be retrospectively approved as good service by an alternative method

49. CPR 5.16 and 5.1 are not dispositive of the issue of service or non-service. As indicated, the Claimant has also placed reliance on Rule 5.13, essentially seeking to have the Court give its imprimatur to the alternative method of purported service already employed. Once again, this represents an innovation in the procedural regime governing service in this jurisdiction, albeit the concept of retrospective approval of alternative methods of service is well established in other jurisdictions.

50. CPR 5.13 and 5.14 provide as follows:

> *"**5.13 Alternative methods of service.***
> *(1) A party[3] 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*

[3] Amended by S.I. 61 of 2023.

(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.
(Emphasis supplied)

51. In support of its argument in relation to the alternative method of service being deemed good, the Claimant relied on the following passage in the judgment of the UK Supreme Court in *Abela and Others v. Baadarani* [2013] UKSC 44, at paras. 33 and 35:

> *"[33] The question is whether the judge was entitled to hold that there was a good reason to order that the delivery of the documents to Mr Azoury on 22 October 2009 was to be treated as good service. Whether there was good reason is essentially a matter of fact. I do not think that it is appropriate to add a gloss to the test by saying that there will only be a good reason in exceptional circumstances. Under CPR 6.16, the court can only dispense with service of the claim form 'in exceptional circumstances'. Rule 6.15(1) and, by implication, also 6.15(2) require only a 'good reason'. It seems to me that in the future, under r 6.15(2), in a case not involving the Hague Service Convention or a bilateral service treaty, the court should simply ask whether, in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service.*
>
> *....*
>
> *[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."*
>
> (My emphasis)

52. Mr. Malone also commended to the Court the decision of the Jamaican Supreme Court of Judicature in *MacFarlane v. Jackson* [2022] JMSC Civ. 33. In that case, the question arose whether an order which had been communicated to the defendant by email from the claimant's counsel had been validly served, so as to bring the adjourned hearing date referred to therein to his attention. In rejecting the defendant's argument that he had not been properly served, the Court summarised its position thus:

> *"[45] To this end, Ms Williams avers that she received Mr Jackson's email address from Ms McFarlane and that that was the address to which the unperfected Formal Order, which was filed on 7 March 2019, was sent. Ms Williams avers that Ms McFarlane communicated with Mr Jackson on prior occasions by means of the same email address. Ms Williams maintains that she has also communicated with Mr Jackson on previous occasions using the same email address.*
>
> *[46] In this regard, the evidence of Mr Jackson does not inspire confidence. The Court accepts the evidence of Ms Williams and finds that the method of service she utilised is an 'alternative method of service', as contemplated by rule 5.13(1) of the CPR. The Court also finds that that alternative method of service was sufficient to enable Mr. Jackson to ascertain the contents of the unperfected Formal Order, or, at the very least, that it is likely that he would have been able to do so."*
>
> (My emphasis)

53. Whilst I accept that previous authorities, which invariably turn on their own individual facts, offer limited assistance in the resolution of this issue, it is worthwhile to make a few brief observations about the two authorities cited by the Claimant. In the case of *Abela*, it is observed that the English rule addressing validation of service by alternative means (i.e. Rule 6.15[4]) is differently worded than Rule 5.13 of the Bahamian CPR, which is arguably more prescriptive. Flowing from this, the court in *Abela* indicated that the *"only"* consideration in an application for validation of service by alternative means is whether there exists *"a good reason"* to make the order sought (see Judgment, paras.23, 33 and 35). I suspect that in reaching a determination on this question, an English court (as was the case in *Abela*) will often look at matters such as the reasonableness of the steps taken by the claimant to effect personal service, the practicability of effecting personal service and the sufficiency of the chosen alternative method in enabling the defendant to ascertain the contents of the claim form (see e.g. *Barton v. Wright Hassall LLP* [2018] UKSC 12, at para.10). In The Bahamas, however, each of these factors has been given express recognition in Rule 5.13, making it mandatory that the Court addresses its mind to them.

54. It is also noteworthy that in *Abela* there was evidence before the court showing that the claimant had made multiple attempts to effect personal service upon the respondent at an address believed to be his home address in Beirut; that the defendant was unwilling to cooperate with service of the proceedings, having instructed his lawyers to refuse to disclose his address in Lebanon where he resided; that the claim form was delivered to defendant's Lebanese attorneys during the initial six-month period of its validity; that the contents of the claim had also been communicated to the defendant's London solicitors; and that the defendant had been fully apprised of the nature of the claim being brought. A further critical reason behind the court's decision to validate service was that there were no subsisting convention or treaty arrangements between the United Kingdom and Lebanon (such as those existing under the Hague Service Convention), and that service through diplomatic channels in Lebanon had otherwise proved impractical and would lead to unacceptable delay and expense. The court also pointed out that the mere fact that a defendant learns of the existence and content of a claim form cannot, without more, constitute good reason to validate service (see Judgment, at para.36).

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[4] *"6.15.—(1) Where it appears to the court that there is* ***a good reason*** *to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.*

(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.

(3) An application for an order under this rule—

(a) must be supported by evidence; and

(b) may be made without notice.

(4) An order under this rule must specify—

(a) the method or place of service;

(b) the date on which the claim form is deemed served; and

(c) the period for—

(i) filing an acknowledgment of service;

(ii) filing an admission; or

(iii) filing a defence."

55. The Jamaican rule addressing alternative methods of service is quoted in paragraph 18 of *McFarlane*.[5] This is also differently worded than Rule 5.13 of the Bahamian CPR, with the applicant seemingly only being required to show that the alternative method of service employed was *"sufficient to enable the defendant to ascertain the contents of the claim"*. This conclusion appears to be borne out in paragraphs 43 and 46 of the ruling of Nembhard J. Although not raised before me, I also note that the first instance decision in *MacFarlane* was actually overturned on appeal,[6] albeit the court's conclusions on the issue of alternative service do not appear to have been disturbed.

56. Coming back to the matter at hand, I have set out the wording of Rule 5.13 of the Bahamian CPR already. In order to engage the Court's jurisdiction to validate service by alternative means, it is incumbent upon the Claimant to establish that it has taken *"reasonable steps to personally serve the claim form"* (Rule 5.13(1)). Relatedly, the Claimant is required to prove by way of affidavit evidence that it was *"impracticable to personally serve"* the Defendants and that the method of alternative service (in this case, email) was *"sufficient to enable the* [Defendants] *to ascertain the contents of the claim"* (Rule 5.13(2)). The affidavit must also specifically address each of the factors listed in Rule 5.13(3). In *Schaffer and Ors. v. Smith and Ors.* [2024] 1 BHS J No.162, in a passage with which I broadly agree, Card-Stubbs J. explained the position thus (at para.46):

> *"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?"*

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[5] This provides:

"5.13 (1) Instead of personal service a party may choose an alternative method of service.
(2) Where a party-
(a) chooses an alternative method of service; and
(b) the court is asked to take any step on the basis that the claim form has been served, the party who served the claim form must file evidence on affidavit ***proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form.***
(3) An affidavit under paragraph (2) must-
(a) give details of the method of service used;
(b) show that-
(i) the person intended to be served was able to ascertain the contents of the documents; or
(ii) it is likely that he or she would have been able to do so;
(c) state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents; and
(d) exhibit a copy of the documents served.
(4) The registry must immediately refer any affidavit filed under paragraph (2) to a judge, master or registrar who must-
(a) consider the evidence; and
(b) endorse on the affidavit whether it satisfactorily proves service.
(5) Where the court is not satisfied that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the registry must fix a date, time and place to consider making an order under rule 5.14 and give at least 7 days' notice to the claimant.
(6) An endorsement made pursuant to 5.13(4) may be set aside on good cause being shown."

[6] See 2024 JMCA Civ 18

57. For the sake of convenience, I have addressed the alternative service methods employed by the Claimant by reference to two discrete stages in the litigation: first, the service purportedly effected by the Claimant's former attorneys by email on 2 August and 18 August 2023; and second, the service purportedly effected by the Claimant's current attorneys by email on 5 March and 20 August 2024.

Service purportedly effected by the Claimant's former attorneys on 2 August and 18 August 2023

58. I do not accept that the Claimant took *"reasonable steps to personally serve"* the Claim Form or Amended Claim Form on either Defendant prior to the period of validity for service expiring on or about 3 January 2024. The First and Second Bain Affidavits disclose that on 2 August 2023, the Claimant's former attorneys sent an email with a caption referring to the action number and the parties to the First Defendant, Mr. Wilson KC and other persons seemingly connected with the extant arbitration. This email simply stated:

> *"Dear All,*
> *Please see attached for your immediate attention.*
> *Kind regards,*
> *..."* (See *First Bain Affidavit, Exhibit EAB1, page 16*; *Second Bain Affidavit, Exhibit EAB1, page 16*)

The actual attachment(s) referred to do not appear to be included in the copy of the email that was exhibited to the affidavits. This raises concerns as to the affidavits' technical compliance with the requirements of Rule 5.13(3)(a).

59. More fundamentally, there is no evidence to show that the said email was preceded by *any* attempt(s) at effecting personal service on either Defendant. The Claimant's former attorneys did not enquire as to the First Defendant's whereabouts or his residential address for the purposes of effecting personal service. They did not enquire as to either Defendant's willingness to accept service by email, and in Mr. Wilson's case whether he was even authorised to do so. In the case of the Second Defendant, there is also considerable force in Mr. Wilson's observation that his client is a company with a registered address, which presumably would have been well known to the Claimant from the arbitration proceedings. There was thus no obvious obstacle to prevent the Claimant from simply sending a copy of the Claim Form to Curaçao for service upon it in the usual way. No proper answer has been provided in the First and Second Bain Affidavits as to why this was not done.

60. Mr. Wilson's response to this email on 16 August 2023, and, in turn, the Claimant's former attorneys' riposte of 17 August 2023 are reproduced in paragraph 11 of this Ruling. These suggest that the Claimant's former attorneys formed the opinion (erroneously, in my view) that they could effect service of the Claim Form by email pursuant to the terms of the arbitration, and they were not prepared to entertain any views to the contrary. If there were any doubts as to their position, the final sentence of the email of 17 August 2023 effectively removed them, when the former attorneys wrote: *"....We are therefore of the opinion that Lyford Holdings has been correctly served and will proceed accordingly"*. (See *First Bain Affidavit, Exhibit EAB1, page 14*; *Second Bain Affidavit, Exhibit EAB1, page 14*)

61. Service of the Amended Claim Form by the Claimant's former attorneys by email on 18 August 2023 proceeded in the same fashion. My earlier observations about service of the Claim Form purportedly effected on 2 August 2023 thus apply equally to this.

62. In this state of affairs, I am unable to accept that it would be an appropriate exercise of my discretion to validate service of the Claim Form and Amended Claim Form purportedly effected upon the Defendants on 2 August and 18 August 2023. Simply put, there is no evidence that the Claimant took *any* steps, much less *"reasonable"* steps, to effect personal service before resorting to email. A mistaken belief that the Arbitration Agreement authorised service to be effected in this manner cannot obviate the need to satisfy the requirements of Rule 5.13. Moreover, having made no attempts or enquiries at the time with a view to effecting personal service, I am unable to accept that it was *"impracticable"* for the Claimant to personally serve the Defendants. And in the case of the Second Defendant, as indicated, there was no obvious obstacle to prevent service at the registered office.

Service purportedly effected by the Claimant's current attorneys on 5 March and 20 August 2024

63. Service at this stage was only undertaken in relation to the First Defendant, the Claimant seemingly being content that the Second Defendant had already been validly served or not otherwise being in a position to complain about service.

64. It is significant that by the time of Callenders & Co.'s emails of 5 March 2024 and 20 August 2024, the six-month period for service of the Claim Form[7] had long expired. In fact, it expired even prior to the filing of their Notice of Change of Attorney on 7 February 2024. To date, there has been no formal application for an extension of time for service of the Claim Form pursuant to CPR 8.13. Leaving aside the merits (or otherwise) of such an application, I suspect that this may not have been done because the CPR contemplates such an application being moved *"within"* the six-month period for service or the period of any operative extension.

65. It is also worth mentioning that the provisions of Rule 8.13 of the Bahamian CPR differ from the equivalent provision of the English CPR (i.e. Rule 7.6)[8], with the latter expressly permitting applications for extensions of the period for effecting service of a claim form to be made, in very limited circumstances, after expiry of the initial period of validity or any operative extension. Rule 8.13 of the Bahamian CPR contains no such exceptions, which strongly suggests that the framers of our Rules intended that service (whether by a prescribed method or an alternative method) was always to be effected at a time when the claim form was still current.

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[7] See CPR 8.12(2)(a)

[8] ***"Extension of time for serving a claim form***

7.6 (1) The claimant may apply for an order extending the period for compliance with rule 7.5.

(2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –

(a) within the period specified by rule 7.5; or

(b) where an order has 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 compliance 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 failed to serve the claim form; or

(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and

(c) in either case, the claimant has acted promptly in making the application.

(4) An application for an order extending the time for compliance with rule 7.5 –

(a) must be supported by evidence; and

(b) may be made without notice."

66. The expiry of the six-month period for service is, in my view, fatal to the Claimant's application to validate any service purportedly effected on the First Defendant on 5 March 2024 and 20 August 2024. It would seem to be a misuse of the powers conferred by Rule 5.13 to retrospectively validate service by an inferior mode which occurred *after* expiry of the prescribed six-month period, and thereby obviate the need for a claimant in such circumstances to seek an extension pursuant to CPR 8.13.

67. Even if I am wrong on this, it would still seem that any alternative method of service employed falls to be evaluated primarily by reference to the six-month period of the claim form's validity. Otherwise, the time limit for effecting service and the necessity of making an application for an extension would be otiose. As indicated earlier, I do not accept that the Claimant took *"reasonable steps"* to effect personal service upon the First Defendant during this period. On the contrary, on the evidence before me the Claimant's former attorneys seemingly just sent the Claim Form and Amended Claim to the First Defendant by email.

68. The Claimant's request to retrospectively validate service of the Notice of Change of Attorney sent to the First Defendant by email transmission to bleon@arbitrationplace.com on 5 March 2024 is problematic. First, I take the view that valid service of the claim form – which commences proceedings under the CPR – ought logically be effected before validation of a subsequent document issued in the proceedings may be countenanced. Secondly, the First Bain Affidavit indicates that the email by Callenders transmitting the Notice of Change of Attorney generated an automatic response stating in material part: *"Your message wasn't' delivered because the recipient's email provider rejected it"*. On the facts, the requirements of Rule 5.13(3)(d) would not seemingly therefore be satisfied.

69. The request to validate service purportedly effected by Callenders' emails to bleon@arbitrationplace.com and b.leon@33bedfordrow.co.uk on 20 August 2024 is also problematic. By the time of these two emails, the Claim Form had been issued over 13 months ago and the Amended Claim Form had been issued over 12 months ago. The import of this has already been discussed. Separate and apart from both documents having expired unserved, I would not regard this as a suitable case for the exercise of the Court's remedial powers under Rule 5.13.

70. I begin by reminding myself, as was stated in *Abela* (at para.36), that it cannot be enough that the alternative mode of service successfully brought the claim form to the attention of a defendant. The Court must still be satisfied that the other requirements of the rule are satisfied. In addition, provided a defendant has done nothing to put obstacles in the way of a claimant, a potential defendant is under no obligation to give any positive assistance to the claimant to serve. In the recent case of *R. (Good Law Project) v. Secretary of State for Health and Social Care* [2023] 1 All ER 821, Carr LJ provided an instructive explanation of the operation of the English rule. In doing so, she explained (at para.57):

> *"[57] Provided that a defendant has done nothing to put obstacles in the claimant's way, a potential defendant is under no obligation to give any positive assistance to the claimant to serve. The potential defendant can sit back and await developments (see, albeit in the context of CPR 7.6, Sodastream Ltd (in liq) v Coates [2009] EWHC 1936 (Ch), [2009] All ER (D) 22 (Aug) (at [50](9))). Thus, there is no duty on a defendant to warn a claimant that valid service of a claim form has not been effected (see Barton at [22] and Woodward at [44] to [47])."*

71. At the outset, there is nothing before the Court to suggest that the First Defendant has done anything to obstruct personal service. Beyond this, a somewhat perplexing feature of this case is that the First Defendant appears to have been a very prominent legal practitioner in the field of mediation and arbitration for decades, having held a number of significant posts in the private sector and on professional bodies (see *First Bain Affidavit*, pages 28-29 and 37-38). He is also a retired judge, albeit he appears to have only served in this capacity for a relatively short period and this was in the BVI. His apparent ties to Canada seem obvious. Notwithstanding this, counsel for Claimant candidly indicated that they made no effort to locate a physical address for the First Defendant in Canada through the use of a foreign process-server or similar person, as is commonly done in the prosecution of international commercial disputes. Indeed, no enquiries along these lines were even made by the Claimant. If such a course was deemed to be cost-prohibitive, even this is not stated in the evidence. Relatedly, the evidence as to the exact nature of the searches undertaken by the Claimant to ascertain the First Defendant's whereabouts is meagre and lacking in detail (see *First Bain Affidavit*, para.14).

72. In conclusion, given the paucity of the information placed before me, I am unable to conclude that the Claimant took *"reasonable steps to personally serve the claim form"* (see Rule 5.13(1)) prior to Callenders' email to the First Defendant of 20 August 2024. On this further basis, even if the Claim Form and Amended Claim Form had not expired unserved, I would not have been minded to retrospectively validate service.

73. The Claimant's reliance on the Court's inherent jurisdiction in its Notices of Application does not take the matter any further. Rule 5.13 constitutes an express framework governing the issue of validation of alternative methods of service. It would therefore be wrong, in my view, to allow the requirements of the rule to be circumvented by recourse to the Court's inherent jurisdiction (*Belgravia International Bank & Trust Co. Ltd. v. Sigma and Anor.* [2022] 2 BHS J. No. 114 (CA), at para.62). This, of course, equally applies to other aspects of the Claimant's applications where the relief sought is subject to an express provision in the CPR.

Issue 4: Whether the Court should dispense with service of the Claim Form and Amended Claim Form

74. CPR 7.13 provides:

> *"(1) The Court may dispense with service of a claim form in exceptional circumstances.*
> *(3) An application for an order to dispense with service may be made without notice at any time and must be supported by evidence on affidavit."*
>
> (Emphasis supplied)

75. The above provision is virtually identical to the current Rule 6.16 of the English CPR. The exercise of the discretion to dispense with service of a claim form was considered by the English Court of Appeal in *Godwin v. Swindon BC* [2001] EWCA Civ 1478, a case cited by the Claimant. The facts of that case bear no similarity to the present case and centred on the deemed date of service of a claim form, which was physically delivered to the defendant on the last day for service stipulated in an extension order (a Friday), but which was only 'deemed' to have been served three days later (the following Monday). By this time the limitation period had long passed. The Court of Appeal in upholding the first

instance judge refused to dispense with service under Rule 6.9, the predecessor of Rule 6.16. In doing so, May LJ observed (at para.50):

> *"In my judgment Mr. Regan was initially correct in not seeking in the alternative to recover his client's position by applying for an order dispensing with service under rr 6.1 or 6.9. In short, I would resolve the palpable disagreement between Douglas Brown J in Infantino's case and McCombe J in Anderton's case in favour of McCombe J essentially for the reasons which he gave. The heart of the matter, in my view, is that a person who has by mistake failed to serve the claim form within the time period permitted by r 7.5(2) in substance needs an extension of time to do so. If an application for an extension is not made before the current time period has expired, r 7.6(3) prescribes the only circumstances in which the court has power to grant such an extension. Just as Vinos's case decides that the general words of r 3.10 cannot extend to enable the court to do what r 7.6(3) specifically forbids, I do not consider that r 6.1(b) or r 6.9 can extend to enable the court to dispense with service when what would be done is in substance that which r 7.6(3) forbids. If r 6.9 did so extend, it would be tantamount to giving the court a discretionary power to dispense with statutory limitation provisions. I also agree with McCombe J that the whole sense of this court's decision in Elmes's case is that what was there decided to be the effect of r 6.8 also applies to r 6.9. I am not sure that an order under r 6.9, as distinct from one under r 6.8, always has to be prospective. But I do consider that r 6.9 does not extend to extricate a claimant from the consequences of late service of the claim form where limitation is critical and r 7.6(3) does not avail the claimant. There will be plenty of commonplace circumstances in which formal service or re-service of a document may be pointless and where it will be sensible and economic for the court to dispense with it."*
>
> (Emphasis supplied)

76. The exercise of the power to dispense with service of a claim form was further elucidated in *Anderton v. Clwyd County Council and Ors.* [2002] 3 All ER 813, another decision of the English Court of Appeal, involving five conjoined appeals in which various service-related issues arose for consideration. Having acknowledged the importance of the general principle stated in *Godwin* to the effect that the jurisdiction to dispense with service ought not be invoked where this would result in the claimant obtaining an extension of his claim form which he would not otherwise be entitled to, the Court distinguished between two classes of case. The first is where the applicant seeking an order to dispense with service has not even attempted to serve a claim form in time by one of the permitted methods. The second is where the applicant has made an ineffective attempt to serve by one of the permitted methods during the period of the claim form's validity, and the defendant has in fact received notice of the claim. The Court suggested that cases falling within the first category will invariably be caught by the principle in *Godwin*, as the claimant still needs to serve the claim form in order to comply with the rules and bring it to the attention of the defendant. However, in the second category the claimant does not need to serve the claim form on the defendant in order to bring it to his attention, but rather seeks to be excused altogether from the need to prove service of the claim form in accordance with the rules. The Court further indicated that in the exercise of the dispensing discretion, it may also be legitimate to take into account other relevant circumstances, such as the explanation for late service, whether any criticism could be made of the claimant or his advisers in their conduct of the proceedings and any possible prejudice to the defendant on dispensing with service of the claim form.

77. Although not binding, the Eastern Caribbean (EC) Court of Appeal's judgment in *Maluf v. Durant International Corp.* BVIHCMAP 2021/0025 also sheds much light on this subject. The case is also significant because the operative provisions of the EC CPR addressing the power to dispense with service, extensions of time for service and the power to wholly disapply the timelines in the CPR were materially identical to the equivalent provisions in the Bahamian CPR. Briefly stated, the claim arose out of a liquidation before the BVI Commercial Court. The liquidators commenced proceedings against the appellant, a former director of the insolvent company, seeking recovery of a large sum allegedly paid to him by the company by way of an improper loan. The appellant was said to reside in Brazil and hence it was necessary to serve him out of the jurisdiction. Permission was granted to serve the claim form and other documents upon him in Brazil. By letters rogatory the BVI court requested the assistance of the Brazil superior court in effecting service upon the appellant. The documents were never physically served on the appellant; however, his lawyers in Brazil were afforded full access to the superior court's file and it was never disputed that the claim form and other documents were brought to his attention. The appellant nonetheless challenged the jurisdiction of the BVI court on the basis (*inter alia*) that service had not been validly effected upon him in Brazil. At first instance, the appellant's challenge was dismissed and the judge made an order dispensing with service of the claim form and other court documents. The appellant then appealed.

78. In dismissing the appeal, the EC Court of Appeal found that the judge below fell into grave error in failing to consider or address the invalidity of the claim form. The Court further found: the judge erred in concluding that there was good service under Brazilian law; the letters rogatory procedure followed did not comply with the CPR; and service as effected did not comply with the EC's E-Litigation Portal Rules, as the authorisation code to facilitate electronic access to the court file was not provided to the appellant at the time of service as required. The Court nevertheless found on the evidence that an attempt had been made to effect service by a permitted mode (in this case, under the Hague Service Convention), and that the claim form and other court documents had been received by the appellant's legal advisers and brought to his attention before validity of the claim form expired. This was therefore an *"Anderton Category 2"* case. Having considered the circumstances as a whole, the Court of Appeal concluded that the judge's decision to dispense with service was ultimately correct.

79. The liquidators' failure to apply for an extension of time for service of the claim form during the period of its validity was addressed by recourse to the Court's dispensing powers under Rule 26.1(6) of the EC CPR, which is identical to Rule 26.1(6) of the Bahamian CPR. In this regard, the Court explained as follows:

> *"[107] ….The simple point is that where the time for service of the claim form has lapsed without it being served on the defendant, and without the period for service to be effected being extended by the court upon a prospective application, the claim form is no longer valid and cannot be served, unless the court makes an order retrospectively to disapply the timelines in CPR 8.13 pursuant to its discretionary power under CPR 26.1(6). This invalidity in the claim form cannot, in my view, be cured simply by an order dispensing with service being made subsequent to the expiration of the time for service of the claim form, as a court cannot dispense with the service of something which, at the time of the making of the order, cannot possibly be achieved, absent an order to disapply the provisions*

of CPR 8.13. However, the invalidity of the claim form is not incurable. One may apply under CPR 26.1(6), on the basis of special circumstances, to dispense with compliance with the timelines stipulated by rule 8.13(a)(i), that is, to wholly disapply the timelines specified therein within which to apply to obtain an extension of time for service of a claim form. Secondly, on the basis of exceptional circumstances having been made out, that application may include an application pursuant to CPR 7.8B for the court to dispense with service of the then revalidated claim form on the defendant."

...

[110] ECSC CPR 8.13 expressly provides that an application to extend the time for service of a claim form must be made prospectively, that is, prior to expiration of the original period of validity for service of the claim form or any extended period granted by the court upon application. There is no provision to apply retrospectively to extend the time for service of a claim form, and it has been held that the court cannot utilise its discretion under CPR 26.1(2)(k) to extend time retrospectively. Furthermore, a court can only extend the time under CPR 8.13 if it is satisfied that the claimant has taken all reasonable steps to trace the defendant and serve the claim form.

[111] In my view, the provisions of CPR 8.13, limiting applications to prospective ones and providing for the invalidity of a claim form whose time for service has expired, is more stringent than the English CPR 7.6(3), which permits of retrospective applications to extend the validity of a claim form. The stringency of the limitation provisions in CPR 8.13 must be taken into account by a court when exercising its discretionary powers under CPR 26.1(6) to disapply those limitations in special circumstances. Accordingly, the limitation on the exercise of discretion set out in Godwin v Swindon to dispense with service in circumstances where the validity of the claim form has expired, is of even greater force and significance to the court's exercise of discretion under CPR 26.1(6) where special circumstances must be shown to disapply those timelines in CPR 8.13. The simple point is that, where the validity of a claim form has expired, unless the court, upon application, exercises its powers and discretion under CPR 26.1(6) to dispense with the timelines in CPR 8.13 relating to an extension of time for service of a claim, the invalidity of the claim form continues unless and until validated by such an order."
(Emphasis supplied)

80. In reaching its conclusion, the Court also importantly found that the prevailing Covid pandemic had greatly impacted the procedures for effecting service through normal diplomatic channels pursuant to the Hague Service Convention.

81. Based on the authorities referred to, it is my understanding that an applicant seeking an order dispensing with service of a claim form in this jurisdiction must establish the existence of *"exceptional circumstances"* (see CPR 7.13(1)). Secondly, while such an order will normally be made prospectively, the Court possesses the jurisdiction to do so on a retrospective basis. Although this last point was not argued before me, the express wording of Rule 7.13(2) (*"An application for an order to dispense with service may be made...at any time..."*) appears to bear this out. This is also consistent with the prevailing practice in England and the Eastern Caribbean, both of which similarly have CPR provisions which allow applications to dispense with service to be made *"at any time"* (see

Rule 6.16 in England; EC Rule 7.8B; *Maluf*, para.94). Thirdly, and very importantly, such an application should not be used as a means of circumventing the requirement for a claim form to be served during the period of its validity, whether the initial six-month period or any extension thereof (*Godwin*, para.50). In the Bahamian context, this restriction takes on heightened importance because, unlike England, our CPR do not provide for applications for extensions of time for serving a claim form to be made after the claim form's validity has expired (see CPR 8.13(3); *Maluf*, para.111). Fourthly, following the reasoning of the EC Court of Appeal in *Maluf*, the Court may nonetheless disapply the timelines in CPR 8.13 in *"special circumstances"* (see CPR 26.1(6)). The ability to exercise this residual power, in very limited circumstances, would appear to be in keeping with the overriding objective of dealing with cases justly. If no such power existed, there would also appear to be a lacuna in our CPR. Fifthly, when it comes to the exercise of the discretion to dispense with service retrospectively, there is a clear distinction to be drawn between *"Anderton Category 1"* and *"Anderton Category 2"* cases. The former will usually be caught by the restriction identified in *Godwin* preventing such applications being used as a means of circumventing the prohibition contained in Rule 8.13. The latter will more readily engage the dispensing powers of the Court, the defendant already having received notice of the claim form by a permitted method during the period of its validity (*Anderton*, paras.57-58). Sixthly, in the exercise of its discretion to dispense with service, the Court may take into account all relevant circumstances (*Anderton*, para.59; *Maluf*). Finally, it is trite that the principal purpose of service is to ensure that the contents of the document served is communicated to the defendant (*Abela*, para.37).

82. Guided by the principles discussed, I am not minded to dispense with service of the Claim Form and other documents upon the First Defendant. Whilst the expression *"exceptional circumstances"* appearing in Rule 7.13 is not defined, I struggle to see the facts of this case in relation to him as falling within its ambit. As mentioned earlier, the First Defendant has not acknowledged service or receipt of the Claim Form, Amended Claim Form or any other document, by e-mail or otherwise, and has not participated in these proceedings at all. Delivery of the Claimant's former attorneys' emails of 2 August and 18 August 2023 to him was not proved by a read receipt or conclusively confirmed by some similar means. The First Bain Affidavit is also non-compliant with CPR 5.12 insofar as it is not made by the sender of the emails of 2 August and 18 August 2023.

83. By the time of Callenders & Co.'s emails of 5 March and 20 August 2024, the six-month period for service of the Claim Form had long expired with no application for an extension ever being made. The Claimant would thus require an order disapplying the timelines in CPR 8.13 and retrospectively dispensing with service under Rule 7.13. Simply put, the factual circumstances already outlined are not sufficiently *"exceptional"* and *"special"* to warrant invoking the residual jurisdiction of the Court to cure the invalidity as it relates the First Defendant.

84. The application to dispense with service upon the Second Defendant is more finely balanced. The factors pointing in favour of the exercise of the Court's discretion include, non-exhaustively, the Second Defendant's receipt of the Amended Claim Form on 18 August 2023, which was well within the six-month period for effecting service. This is confirmed by its Acknowledgement of Service filed on 8 September 2023. The principal objective of service has thus been achieved. And whilst service upon the Second Defendant did not comply with the technical requirements of PD 2 of 2023, service by email is a permissible method of service under the CPR. The situation in relation to the Second Defendant, in my view, therefore falls into the Anderton 2 category.

85. Relatedly, if permission to dispense with service is refused, the Claimant will be unable to obtain an extension of time for service of the expired Claim Form. Such refusal may (and I put it no higher than that at this stage) impact the right of the Claimant to pursue its challenge or appeal under the *Arbitration Act, 2009*. I am also mindful that the present action arises out of a commercial arbitration between the Claimant and the Second Defendant and the Claimant seeks to invoke the supervisory jurisdiction of the Court as part of this overall process.

86. Against this, there was considerable delay on the part of the Claimant in moving the current application. In this regard, the period of validity for service of the Claim Form and Amended Claim Form expired at the beginning of 2024. The application to dispense with service and for other relief, however, was not filed until 18 October 2024. The necessity for the application also arose in circumstances where the Claimant's former attorneys simply transmitted the Claim Form and Amended Claim Form to the Second Defendant's attorneys in the arbitration by email, without making any attempt at effecting personal service on the Second Defendant beforehand. Even after receipt of Mr. Wilson KC's email of 16 August 2023 confirming that he was *not* authorised to accept service of legal proceedings on behalf of the Second Defendant, they still made no effort to effect proper service. This is so notwithstanding that the Second Defendant is a company with a registered office. As indicated earlier, their response to Mr. Wilson on 17 August 2023, in my view, gave considerable insight into their thinking at the time. On the evidence before the Court, they also failed to make any enquiries with a view to effecting proper service by electronic means (in compliance with PD 2 of 2023). Needless to say, there were also no exigent circumstances such as the Covid pandemic which created any challenges in effecting proper service (cf. *Maluf*).

87. For all of the reasons stated, I am not satisfied that the circumstances of the case are sufficiently *"exceptional"* and *"special"* so as to warrant disapplying the requirements of Rule 8.13(3) and dispensing with service of the Claim Form and Amended Claim Form upon the Second Defendant pursuant to Rule 7.13.

88. I would have regarded the factors discussed by themselves as sufficient to dispose of the Claimant's application to dispense with service upon the Second Defendant. Whilst the point was not raised, if permission to dispense with service and disapply the timelines in Rule 8.13 is granted, this may also possibly (and, again, I put it no higher than that at this stage) have some impact on the Second Defendant's ability to raise objection based on the 28-day general time limit for bringing challenges or appeals referred to in Section 92 of the *Arbitration Act, 2009*. However, I do note that certain time limits in the Act may in specified circumstances be extended. I nonetheless consider this as a possible ground of prejudice or disadvantage.

89. I am also mindful that the substantive relief claimed in the present action includes orders pursuant to Section 35(1)(d)(ii) and Section 90 of the *Arbitration Act, 2009* (see *Amended Claim Form*). Both sections include an express requirement for the arbitrator concerned to be given notice of the proceedings. The Act provides that whilst the parties are free to agree on the manner of service of any notice or other document required or authorised to be given or served in pursuance of an arbitration agreement or for the purposes of the arbitral proceedings, *"this…does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court"* (see Section 97(1) and (5)). Section 101, insofar as material, adds:

> *"References in this Act to an application, appeal or other step in relation to legal proceedings being taken "upon notice" to the other parties to the arbitral proceedings, or to the tribunal, are to such notice of the originating process as is required by rules of court and do not impose any separate requirement."* (Emphasis supplied)

CPR Rule 60.1(2) and (3) further provides that every application to the Court pursuant to the *Arbitration Act, 2009* under (*inter alia*) Section 90 shall be made by fixed date claim, which *"shall be served on the arbitrator"*.

90. On the basis of the foregoing, it is my understanding that in the prosecution of legal proceedings arising out of an arbitration a claimant must comply with the Act and the applicable rules of court governing the same. This would seemingly include the statutory provisions and rules as it relates to service of any originating process. Albeit obiter, the following comments of the English Court of Appeal in relation to proceedings brought pursuant to section 24 of the *Arbitration Act, 1996* (which is similar to section 35 of the Bahamian Act of 2009) in *Miller Construction Ltd. v. James Moore Earthmoving* [2001] EWCA Civ 654, at para.7, appear to support this view:

> *"...It was not appropriate to make a finding of misconduct without at least giving the arbitrator notice of the ground upon which such a finding would or might be based. In this regard the following paragraph appears in Mustill & Boyd on Commercial Arbitrations, 2nd Edn, 553:*
>
> > *"Whenever an application is made to the court to set aside or remit an award on grounds of misconduct, 'technical' or otherwise, the notice of motion should be served on the arbitrator or umpire concerned. He may then either (a) take an active part in the proceedings or (b) file an affidavit for the assistance of the court or (c) take no action."*
>
> *We entirely agree. It follows that the arbitrator should have been given notice of the new ground on which it was suggested that he might have been guilty of misconduct."* (Emphasis supplied) (Cited with approval in *Russell on Arbitration* (23rd ed.), 2007, para.7-111)

91. In the present case, the arbitrator has actually been named as a defendant in the proceedings. I have already found that the purported service upon him was defective. I am not prepared to invoke any remedial or dispensing powers to cure the defects at this juncture; indeed, I do not believe that the circumstances in relation to him warrant this. In light of the statutory requirement for an arbitrator to be given notice of any proceedings brought pursuant to Section 35 and Section 90 of the Act in compliance with the applicable rules of court, I also have concerns as to the utility of dispensing with service of the Claim Form and Amended Claim Form upon the Second Defendant.

Issue 5: Whether service of the Amended Claim Form upon the Second Defendant was improper or defective (see Second Defendant's Notice of Application)

Issue 6: Whether the Second Defendant is precluded from objecting to the validity of service by virtue of its Notice of Application to dispute jurisdiction being filed out of time

92. Issue 5 can be addressed quite briefly. For the reasons stated earlier, I do not accept that the Claim Form or Amended Claim Form was served upon the Second Defendant in accordance with a contractually agreed method. Likewise, the Second Defendant was not served in accordance with any of the methods prescribed in Rule 5.9 for service upon a body corporate other than a limited liability company. There was also no valid and effective service by electronic means. The correct procedure for effecting service upon an attorney for a party was not followed (Rule 5.6). I have also decided against retrospectively approving the purported service upon the Second Defendant as good service by an alternative method. Finally, I have decided against dispensing with service of the Claim Form and Amended Claim Form.

93. In the premises, I would have been minded to conclude that service on the Second Defendant was defective. However, as pointed out earlier, in reliance on CPR 9.7(5), Mr. Malone argued that the Second Defendant was out of time in mounting its challenge pursuant to Rule 9.7(1) and (6).

94. Given its importance to the resolution of this issue, I have set out CPR 9.7 in full below:

> *"**9.7 Procedure for disputing Court's jurisdiction etc.***
> *(1) A defendant who disputes the Court's jurisdiction to try the claim may apply to the Court for a declaration to that effect.*
> *(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.*
> *(3) An application under paragraph (1), must be made within the period for filing a defence; the period for making an application under this rule includes any period by which the time for filing a defence has been extended where the Court has made an order, or the parties have agreed, to extend the time for filing a defence.*
> *(4) An application under this rule must be supported by evidence on affidavit.*
> *(5) A defendant who —*
> *(a) files an acknowledgement of service; and*
> *(b) does not make an application under this rule within the period for filing a defence, is treated as having accepted that the Court has jurisdiction to try the claim.*
> *(6) An order under this rule may also —*
> *(a) discharge an order made before the claim was commenced or the claim form served;*
> *(b) set aside service of the claim form; and*
> *(c) strike out a statement of claim.*
> *(7) If on application under this rule the Court does not make a declaration, it —*
> *(a) may —*
> *(i) fix a date for a case management conference; or*
> *(ii) treat the hearing of the application as a case management conference; and*
> *(b) must make an order as to the period for filing a defence.*
> *(8) Where a defendant makes an application under this rule, the period for filing a defence is extended until the time specified by the Court under paragraph (7)(b) and such period may be extended only by an order of the Court.*
> (Emphasis supplied)

95. In a nutshell, the Claimant contended that based on the Second Defendant's Acknowledgement of Service, the Claim Form was received on 18 August 2023. They thus had 28 days thereafter to file their Defence (see Rule 10.3(1)), or until 18 September 2023 at the latest. The application to set aside service was in fact filed on 22 September 2023. By virtue of Rule 9.7(5), the Second Defendant was accordingly deemed to have accepted that the Court has jurisdiction to try the claim and was out of time in seeking to set aside service.

96. The Second Defendant's written submissions stated the following by way of response:

> *"Any argument by the Claimant that this application was made out of time is plainly wrong and should be disregarded. As Lyford is a foreign company, proper service outside of the jurisdiction would have required a defence to be filed within 30 working days of the purported service in accordance with Part 7.11 [Tab 1] of the CPR. Furthermore, as Lyford was never served the time within which to file a defence had not started to run."* (*Second Defendant's Written Submissions, para.17*)
>
> (Emphasis supplied)

97. In reply, the Claimant simply asserted that even if the referenced 30-day period for filing a defence was applicable, the Second Defendant's application to set aside service was still out of time. No indication of the cut-off date by reference to the provisions of Rule 7.11 was provided.

98. I must confess to initially finding Mr. Malone's argument on this issue to be very persuasive. Paragraph 5 of Rule 9.7 appears to be unqualified, with the defendant being *"treated as having accepted that the Court has jurisdiction to try the claim"* if the conditions stated in sub-paragraphs (a) and (b) are satisfied. Those conditions include that the defendant has filed an acknowledgment of service and has not made an application to dispute jurisdiction under the Rule *"within the period for filing a defence"*. This objection, if upheld, would in my view likely have overtaken a number of the earlier issues identified relating to improper service (see e.g. *Hoddinott v. Persimmon Homes (Wessex) Ltd.* [2007] EWCA Civ 1203, para.29; *Ned Nwoko Solicitors v. Oyo State Government and Anor.* [2014] EWHC 3123 (Comm), para.25). However, on closer analysis I do not believe the argument to be sustainable.

99. CPR 7.11 provides:

> ***"Time for filing defence.***
> *Except when the Court otherwise orders, a defendant who has been served out of The Bahamas must file a statement of defence or acknowledgment of service within 30 working days from the date of service."*
>
> (Emphasis supplied)

100. The expression "*working days*" does not appear to be defined in the CPR. However, its meaning is hardly unknown. As a matter of ordinary speech in this jurisdiction, and in particular in the context of the operations of the courts, this typically refers to days of the week when businesses operate (i.e. Monday to Friday), excluding weekends and public holidays. Applying this yardstick, *"30 working days from the date of service"* would have expired on or about 29 September 2023. On this basis, the Second Defendant's application, having been filed on 22 September 2023, would have been well within the time for filing its defence.

Disposition

101. For the reasons set out above, I order that the Claimant's two Notices of Application be dismissed. I also order that the purported service of the Claim Form and Amended Claim Form upon the Second Defendant be set aside. I will hear the Claimant and the Second Defendant further in relation to the issue of costs.

L. Farquharson

FARQUHARSON, J.
5 August 2025