

IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
Claim No. 2018/CLE/gen/00672

B E T W E E N

ARLINGTON SAUNDERS

Plaintiff/Appellant

AND

(1) SANDALS RESORT INTERNATIONAL LIMITED

(2) SANDALS RESORT LIMITED

(3) WEST BAY MANAGEMENT CO. LTD.

(4) SANDALS UNLIMITED

(5) SANDALS INTERNATIONAL LTD.

(6) CROMWELL TRUST COMPANY LIMITED

(7) CLEARVIEW MANAGEMENT LIMITED
(T/A SANDALS EMERALD BAY GOLF RESORT & SPA)
(T/A SANDALS ROYAL BAHAMIAN SPA RESORT & OFFSHORE ISLAND)

AND

(8) ICS OF THE BAHAMAS CO. LTD.

Defendants/Respondents

Before: **The Honourable Mr. Justice Neil Brathwaite**

Appearances: Attorney Roushard Martin for the Plaintiff
Attorney Dwight Glinton for the Sixth and Seventh Defendants

Date of Hearings: 26th October 2022; 30th November 2022; 29th January

DECISION

BRATHWAITE, J

INTRODUCTION

- [1.] This is an appeal by the Plaintiff from the decision of the learned Deputy Registrar, Carol Munnings-Misiewicz delivered on 22nd June 2021. By that decision, the learned Deputy Registrar set aside the purported service of the Amended Writ of Summons (the “**Amended Writ**”) on the Sixth and Seventh Defendants on 12th June 2019. She also dismissed as unnecessary, the Summons filed by the Sixth and Seventh Defendants on 27th May 2021 seeking an extension of time for their Conditional Appearance to remain conditional.
- [2.] Upon inquiry from this Court, Counsel for the Sixth and Seventh Defendants submitted, and I accept, that an appeal from a Registrar to a judge in chambers under **Order 58** of the Rules of the Supreme Court, 1978 (“RSC”) proceeds by way of rehearing. The central question is therefore whether, on a rehearing of the applications that were before the learned Deputy Registrar, service of the Amended Writ on the Sixth and Seventh Defendants ought to be set aside.
- [3.] Before turning to that question however, it is necessary to address a further preliminary matter raised by Counsel for the Plaintiff, namely the extent to which this Court should consider a statement alleged to have been made by Counsel for the Sixth and Seventh Defendants during the hearing before the Deputy Registrar. I address both of those matters beginning at [17] below.

BACKGROUND

- [4.] The Plaintiff’s action arises out of an alleged slip and fall accident said to have occurred on 17th June 2015 at Sandals Emerald Bay Resort, Exuma. The Plaintiff alleges that because of the incident he sustained serious injuries, including fractures to his ankle and the upper portion of his foot. He further alleges that he underwent surgical procedures, developed complex regional pain syndrome, and continues to suffer pain, complications, and loss. The claim is advanced on the basis that the Defendants were negligent and/or in breach of contract in that they allegedly failed to provide him with a safe work environment.

- [5.] The Amended Writ was filed on 15th June 2018. Among the named Defendants were Cromwell Trust Company Limited and Clearview Management Limited, the Sixth and Seventh Defendants, respectively.
- [6.] The Sixth and Seventh Defendants contend that the Amended Writ was never duly served on them. Their position is that, on 12th June 2019, the Amended Writ was served on the firm Lennox Paton, which was neither the registered office of either Defendant company, nor authorized by either Defendant company to accept service on its behalf.
- [7.] The affidavits filed on behalf of the Sixth and Seventh Defendants further state that searches conducted at the Companies Registry revealed that the registered office of Cromwell Trust Company Limited was Deltec Bank & Trust Co. Ltd., while the registered office of Clearview Management Limited was Cromwell Trust Company Limited which acted as its registered agent at all material times.
- [8.] In light of the purported service, the Sixth and Seventh Defendants moved promptly to protect their position. On 20th June 2019, they filed an ex parte summons, supported by the Affidavit of Anwar Mitchell, seeking leave to enter a conditional appearance. By order dated 26th July 2019, the then Deputy Registrar, Constance Delancy, granted leave, and on the same date the Sixth and Seventh Defendants entered a conditional appearance by Memorandum of Conditional Appearance. The appearance was entered expressly without prejudice to an application for a declaration that the Amended Writ had not been duly served, pursuant to **Order 10 rule 1** and **Order 61 rule 3** of the RSC and **section 23** of the Companies Act.
- [9.] The note to the Memorandum of Conditional Appearance provided that, unless the Court otherwise ordered, the Conditional Appearance would stand as unconditional unless the Sixth and Seventh Defendants applied within 14 days of [26th July 2019] to set aside the Amended Writ and obtained an order to that effect.
- [10.] Within that 14-day period, the Sixth and Seventh Defendants filed a Summons on 7th August 2019 seeking, *inter alia*, an order that service of the Amended Writ be set aside (the “**First Summons**”). The First Summons was later dismissed on 3rd February 2020 on the technical ground that it did not comply with **Order 2 rule 2** of the RSC, in that it failed to state the grounds of the application. Importantly, the dismissal was not a determination on the merits of the challenge to service.
- [11.] Two days later, on 5th February 2020, the Sixth and Seventh Defendants filed a further Summons seeking to correct that procedural defect and again to set aside service of the Amended Writ (the “**Second Summons**”).

- [12.] While awaiting the hearing of the Second Summons, the Sixth and Seventh Defendants filed a further Summons on 27th May 2021, seeking an extension of time so that the Second Summons filed on 5th February 2020 could be treated as having been filed within time (the “Third Summons”).
- [13.] The Second and Third Summonses were heard together on 22nd June 2021. The learned Deputy Registrar dismissed the Third Summons as unnecessary but granted the Second Summons and set aside service of the Amended Writ.

THE DEPUTY REGISTRAR’S DECISION

- [14.] Following her oral ruling on 22nd June 2021, the learned Deputy Registrar provided written reasons for her decision on 11th November 2021. In those reasons, she held that the change from a conditional appearance to an unconditional appearance occurred “by operation of law”, and not as a result of any voluntary act on the part of the Sixth and Seventh Defendants.
- [15.] Accordingly, she found that the only step taken by the Defendants after the dismissal of the First Summons was the filing of a further summons seeking to set aside the Amended Writ. On that basis, and relying on **Keymer v Reddy [1912] 1 K.B. 215**, she concluded that the Sixth and Seventh Defendants had not waived the irregular service purportedly effected upon them. This finding forms the crux of the dispute between the parties and lies at the heart of the present appeal.
- [16.] Dissatisfied with that decision, the Plaintiff filed a Notice of Appeal on 28th June 2021 seeking an order that the decision be set aside, that the Second Summons be dismissed, and that the Plaintiff be awarded the costs of both the appeal and the application below.

PRELIMINARY ISSUES

Nature of the appeal from the Registrar

- [17.] As mentioned at [2] above, to assist the Court, Counsel for the Sixth and Seventh Defendants submitted that an appeal from a Registrar to a judge in chambers under **Order 58** of the RSC proceeds by way of rehearing. That approach is supported by the authorities cited, including **Butler and others as Representatives of the “Seasoned Advertising Sales Consultants” of the Bahamas Telecommunications Company Limited v Bahamas Telecommunications Company Limited [2012] 2 BHS J No. 103, Evans v**

Bartlam [1937] A.C. 473, Alexandra Henderson v Yamaha Motor Manufacturing Corporation of America and another [2022] 2 BHS J No. 84, and Incorporated Trustees of St. John's Particular Church of Native Baptists in the Bahamas v Freeport Commercial and Industrial Limited and another [2024] 1 BHS J No. 8.

- [18.] I accept that submission. An appeal of this nature requires the Court to exercise its own judgment on the applications that were before the learned Deputy Registrar, while giving appropriate weight to her reasoning. The Court must therefore determine the issues on the basis of the material properly before it.

Whether the Court should consider the alleged statement made before the Deputy Registrar

- [19.] Against that background, at the second hearing of the appeal on 30th November 2022, Counsel for the Plaintiff raised a point concerning an alleged statement said to have been made by Counsel for the Sixth and Seventh Defendants before the learned Deputy Registrar. It was suggested that Counsel had indicated that an extension of time would be required before the application to set aside service could properly proceed. As none was granted, the learned Deputy Registrar having decided that none was needed, the Plaintiff suggests that the Defendants are bound by that concession, and should not be permitted to advance this appeal.
- [20.] Counsel for the Sixth and Seventh Defendants objected to the point being raised and submitted that the appeal ought to be determined on the evidence and arguments properly before this Court, rather than on any alleged *ex tempore* statement made during the hearing below.
- [21.] I accept that submission. In the absence of a transcript or some reliable record of the proceedings below, it would be unsafe to determine any substantive issue in this appeal by reference to an alleged statement or concession made during oral argument. Moreover, the legal effect of the procedural steps taken by the parties is a matter for the Court. Even if such a statement had been made, it could not relieve the Court of its duty, on a rehearing, to determine for itself whether service ought to be set aside. I therefore do not treat that alleged statement as determinative of any issue in this appeal, or as creating an estoppel so that the appeal cannot be heard and determined.

THE ISSUE

- [22.] The principal issue on this rehearing is whether service of the Amended Writ of Summons on the attorneys for the Sixth and Seventh Defendants ought to be set aside.

[23.] In determining that issue, several subsidiary questions arise:

- a. Whether service of the Amended Writ on Lennox Paton constituted valid service on the Sixth and Seventh Defendants;
- b. Whether the Sixth and Seventh Defendants waived their right to challenge service following dismissal of the First Summons;
- c. Whether the Conditional Appearance becoming unconditional operated, by virtue of **Order 10 rule 3** of the RSC, to regularize service;
- d. Whether fresh leave was required before the Second Summons could properly be pursued;
- e. Whether the dismissal of the Third Summons was fatal to the Second Summons;
- f. Whether the conduct of the Sixth and Seventh Defendants amounted to delay or an abuse of process; and
- g. What relevance, if any, prejudice to the Plaintiff has in the exercise of the Court's discretion.

THE PLAINTIFF'S SUBMISSIONS

[24.] The Plaintiff submits that the learned Deputy Registrar failed to address, or failed adequately to address, several critical matters arising from the procedural history of the case. In particular, Counsel contended that insufficient consideration was given to:

- a. the effect of the note contained in the Memorandum of Conditional Appearance;
- b. the operation of **Order 10 rule 3** of the RSC;
- c. whether fresh leave was required before the Sixth and Seventh Defendants could pursue a second challenge to service; and
- d. issues of delay, abuse of process, and prejudice to the Plaintiff.

[25.] Developing that submission, Counsel argued that once the First Summons was dismissed, the Conditional Appearance stood as unconditional in accordance with the express terms of the note contained in the Memorandum of Conditional Appearance. As a result, Counsel

submitted that the Sixth and Seventh Defendants became subject to the jurisdiction of the Court.

- [26.] Further, Counsel submitted that, by virtue of **Order 10 rule 3** of the RSC, once the appearance stood as unconditional any irregularity in service of the Amended Writ was cured as a matter of law. In support of that submission, Counsel relied on **Gary Stirling Camm v. Theodore Paul Linder [1982] QSC 660** for the proposition that a Defendant who seeks to challenge service must make a procedural election and cannot, after the failure of the original challenge, continue to pursue alternative procedural avenues to contest jurisdiction.
- [27.] Counsel also argued that the Sixth and Seventh Defendants never sought leave to convert the unconditional appearance back into a conditional appearance. In those circumstances, it was submitted that the Second Summons was procedurally impermissible, since the Defendants had already become subject to the Court's jurisdiction.
- [28.] Counsel further contended that the Third Summons, by which the Sixth and Seventh Defendants sought an extension of time, was essential to the viability of the Second Summons. It followed, Counsel argued, that once the learned Deputy Registrar dismissed the Third Summons, the Second Summons could no longer properly be entertained. According to Counsel, the Sixth and Seventh Defendants' repeated attempts to cure earlier procedural defects amounted to an abuse of the Court's process, effectively giving them "a second bite at the proverbial cherry".
- [29.] Counsel also relied on **Order 2 rule 2(1)** of the RSC and submitted that the delay in pursuing the Second Summons was unreasonable, noting that the Conditional Appearance was entered pursuant to an Order granting leave dated 26th July 2019, and suggesting that the Sixth and Seventh Defendants' attorneys had ample opportunity, before filing the First Summons, to ensure that the application complied with the requirements of the RSC.
- [30.] Counsel argued that the failure to include the grounds in the First Summons was a defect which should have been avoided, particularly by experienced attorneys practicing in this area of law. In those circumstances, Counsel submitted that the delay should properly be viewed as approximately eight months in total and that such delay was unreasonable within the meaning of **Order 2 rule 2** of the RSC.
- [31.] Counsel further submitted that setting aside service at this stage would cause significant prejudice to the Plaintiff, particularly having regard to the serious injuries alleged and the need for the action to proceed without further delay. In support of the proposition that

prejudice is a relevant consideration to the exercise of the Court's discretion, Counsel relied on **Masefield v Alexander (Lump Sum: Extension of Time) [1995] 1 FLR 100**.

THE SIXTH AND SEVENTH DEFENDANTS' SUBMISSIONS

- [32.] On behalf of the Sixth and Seventh Defendants, it was submitted by their Counsel that they never waived their right to challenge service and had consistently protested the validity of the service of the Amended Writ.
- [33.] Counsel emphasized that the First Summons was filed on 7th August 2019, which was within the 14-day period required by the Memorandum of Conditional Appearance. That period would have expired on 9th August 2019. Accordingly, Counsel submitted that the Sixth and Seventh Defendants had complied with the procedural requirement to bring their challenge within time.
- [34.] Counsel further explained that the hearing of the First Summons was initially fixed for 14th January 2020, but was subsequently adjourned to 3rd February 2020, when the matter came before the learned Deputy Registrar, Constance Delancy. Counsel submitted that these adjournments were a matter of the Court's listing process and were not attributable to any delay on the part of the Sixth and Seventh Defendants.
- [35.] Counsel acknowledged that the First Summons was ultimately dismissed for non-compliance with the Rules of the Supreme Court because the grounds of the application had not been stated. However, Counsel emphasized that the dismissal was based solely on that procedural defect and did not involve any determination of the substantive challenge to service.
- [36.] Counsel submitted that following the dismissal of the First Summons, the Sixth and Seventh Defendants moved promptly to correct the defect by filing the Second Summons on 5th February 2020, just two days after the earlier summons had been dismissed.
- [37.] Counsel further explained that while awaiting the hearing of the Second Summons, the Sixth and Seventh Defendants subsequently filed a further summons on 27th May 2021 seeking an extension of time out of an abundance of caution, as they were uncertain whether such an extension might be required to permit the substantive application to be heard.
- [38.] Counsel relied on **Keymer v Reddy [1912] 1 K.B. 215** for the principle that a defendant may continue to protest service provided that he has not taken steps amounting to a waiver or voluntary submission to the jurisdiction of the Court. Counsel further submitted that the

Court retains a discretion to enlarge any time fixed by the Rules of the Court where justice requires, relying in that regard on **Masefield v Alexander** (supra).

[39.] Counsel also relied on the concept of “operation of the law” as defined in **Black’s Law Dictionary revised Fourth Edition**, together with the decision in **Tamara Bullard v Miya Bahamas Limited IT/No. NP2020-3** to support his contention that the Conditional Appearance became unconditional solely by operation of law, and not as a result of any voluntary action by the Sixth and Seventh Defendants. Accordingly, Counsel argued that the change in status did not, by itself, amount to a waiver of their right to challenge service.

[40.] Counsel also sought to distinguish the details in **Keymer v Reddy [1912] 1 K.B. 215**. In that case, the Master had fixed a period of eight weeks within which an application to set aside the writ was to be made, and the defendant’s attorney failed to act within that period due to being on vacation. Counsel submitted that the present case is materially different, as the Sixth and Seventh Defendants filed their initial application within the time specified by the Court.

[41.] Counsel referred in particular to the passage in **Keymer** where Fletcher Moulton L.J. observed:

“Here the Master fixed eight weeks as the period within which the application was to be made. Now it happens here that through one of the ordinary mistakes which occur in life no application to set aside the service was made within the period fixed by the Master. The respondent contends that in that case the appearance became unconditional...and that it is beyond the power of this Court to set it aside. In my opinion that contention is wholly untenable.”

[42.] Counsel also relied on the subsequent passage in the same judgment where Fletcher Moulton L.J. stated:

“Therefore if he has entered an appearance under protest, whether the time fixed by the Master for applying to set aside the writ has expired or not...[if] the Court is of the opinion that the delay in making that application does not shew an intention to abandon the protest, or an improper attempt to impede the administration of justice, it has the fullest power to give effect to that protest and to set aside the writ or the service”.

[43.] In those circumstances, Counsel submitted that the Sixth and Seventh Defendants had consistently maintained their protest to the service of the Amended Writ and had taken steps before the Court to have that service set aside. It was therefore submitted that the service of the Amended Writ ought to be set aside and that the Order of the learned Deputy Registrar should be affirmed.

THE LAW

[44.] The starting point is the requirement that a writ be duly served upon a defendant. **Order 10 rule 1** of the RSC provides, so far as material that:

(1) Subject to the provisions of any Act and these Rules, a writ must be served personally on each defendant by the plaintiff or his agent;

(2) Where a defendant's attorney indorses on the writ a statement that he accepts service of the writ on behalf of that defendant, the writ shall be deemed to have been duly served on that defendant and to have been so served on the date on which the indorsement was made; and

(3) Where a writ is not duly served on a defendant but he enters an unconditional appearance in the action begun by the writ, the writ shall be deemed to have been duly served on him and to have been so served on the date on which he entered the appearance.

[45.] The rules therefore contemplate three principal methods by which service may be treated as effective. Those are personal service on the defendant, acceptance of service by the defendant's attorney, or the defendant's entry of an unconditional appearance. The third of these provisions reflects the principle that a defendant who voluntarily submits to the jurisdiction of the Court cannot thereafter complain of defects in service.

[46.] Where the defendant is a body corporate, the Rules must be read together with the statutory provisions governing service upon companies. **Order 61 rule 3** of the RSC provides that personal service on a body corporate may be effected by serving the document on the president of the body corporate, or the secretary, treasurer or other similar officer thereof.

[47.] In addition, **Section 23** of the Companies Act provides:

"23. Any writ, notice, order or other document required to be served upon a company may be served by leaving the same, or sending it through the post in a prepaid letter, addressed to the company at its registered office."

[48.] These provisions establish the recognized methods by which service may properly be effected on a company. Where service is not effected in accordance with those requirements, the resulting defect constitutes an irregularity capable of being challenged before the Court.

Procedural Irregularities and the Court's discretion

- [49.] The Rules also recognize that failure to comply with procedural requirements do not necessarily render proceedings void. **Order 1 rule 1** of the RSC provides that a failure to comply with the Rules is to be treated as an irregularity and does not automatically nullify the proceedings or any step taken in them. Instead, the Court retains a discretion to set aside the relevant step or grant such relief as it considers just.
- [50.] However, the exercise of that discretion is subject to certain limitations. **Order 2 rule 2** provides that an application to set aside proceedings or any step in the proceedings for irregularity will not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step in the proceedings after becoming aware of the irregularity. The rule further requires that the grounds of objection be stated in the summons or notice of motion by which the application is made.
- [51.] The principles governing such applications were summarized by Winder J (as he then was) in **Family Guardian Insurance Company Limited v Dixon [2014] 1 BHS J No. 39**, where the Court stated that, in order to succeed on an application to set aside for irregularity under **Order 2 rule 2**, a defendant must demonstrate:
- a. the occurrence of the irregularity;
 - b. identification of the irregularity in the summons;
 - c. prompt action by the applicant; and
 - d. no next steps prior to applying for the setting aside.
- [52.] The question of what constitutes a “reasonable time” in this context will depend upon the circumstances of the particular case. In **Major v The Attorney General [2012] 1 BHS J No. 5**, the Court held that, in the circumstances there under consideration, a period of six months was not too long for an application to set aside a writ for irregularity.

Applications to set aside service

- [53.] The procedural mechanism by which a defendant challenges the validity of service is provided by **Order 12 rule 7** of the RSC. That rule permits a defendant to apply to set aside the writ or service of the writ before entering an appearance or, where a conditional appearance has been entered, within 14 days after entering the appearance. The application must be made by summons.
- [54.] The purpose of a conditional appearance is to enable a defendant to challenge the Court’s jurisdiction or the validity of service without thereby submitting to the jurisdiction of the Court. The defendant must, however, pursue that challenge promptly and must avoid taking steps that are inconsistent with the maintenance of the protest.

[55.] The question whether a defendant has lost the right to challenge service depends not merely upon the technical operation of the Rules but upon the conduct of the defendant in the proceedings.

[56.] In **Keymer v Reddy [1912] 1 K.B. 215**, Fletcher Moulton L.J. explained that the expiry of time fixed for challenging service does not necessarily deprive the Court of power to give effect to a protest. Where a defendant has entered an appearance under protest and later applies to set aside the writ, the Court may still grant relief provided that the delay does not demonstrate an intention to abandon the protest or an attempt improperly to impede the administration of justice. Accordingly, the critical inquiry is whether the conduct of the defendant demonstrates a voluntary submission to the jurisdiction of the Court or a waiver of the objection to service.

The Court's power to regulate procedure

[57.] Finally, it is well established that the Court retains a broad discretion to regulate its own procedure and to enlarge time fixed by the Rules where justice so requires. That principle was reaffirmed in **Masefield v Alexander (Lump Sum: Extension of Time) [1995] 1 FLR 100**, where the Court recognized that procedural rules exist to facilitate the administration of justice rather than to defeat it. It is against this statutory and jurisprudential framework that the issues arising in the present appeal must be considered.

ANALYSIS & DISCUSSION

[58.] The central task on this rehearing is to determine whether service of the Amended Writ should be set aside as against the Sixth and Seventh Defendants. This requires an independent assessment of both the validity of the purported service and the subsequent conduct of the Sixth and Seventh Defendants after becoming aware of the alleged irregularity.

[59.] It is therefore convenient to address, in turn (i) the validity of the service effected, (ii) waiver of the irregularity, (iii) the effect of the appearance becoming unconditional, (iv) whether fresh leave was required, (v) the effect of the dismissal of the Third Summons, (vi) delay and abuse of process, and (viii) prejudice.

Validity of Service on Lennox Paton

- [60.] The uncontradicted affidavit evidence of Anwar Mitchell and McFalloughn Bowleg establishes that on 12th June 2019, the Amended Writ was served on Lennox Paton, which was neither the registered office of either the Sixth or Seventh Defendant nor authorized to accept service on their behalf.
- [61.] There is no evidence that Lennox Paton endorsed the Writ as accepting service on behalf of either company, nor that service was effected at the companies' registered offices or on an officer of either company, as contemplated by **Order 61 rule 3** of the RSC and **section 23** of the Companies Act.
- [62.] I am satisfied that service on Lennox Paton did not constitute due service on the Sixth and Seventh Defendants. There was therefore an irregularity capable of supporting an application under **Order 2 rules 1 and 2** and **Order 12 rule 7** of the RSC.

Waiver of the Irregularity

- [63.] The next question is whether the Sixth and Seventh Defendants' conduct amounted to a waiver of the irregularity or submission to the Court's jurisdiction.
- [64.] It is well established that a defendant who wishes to challenge service must do so promptly and without taking steps amounting to voluntary submission (**Keymer v Reddy**). Waiver is assessed objectively, by reference to whether the defendant's conduct demonstrates an intention to abandon the protest against service.
- [65.] In this case, the Sixth and Seventh Defendants entered a conditional appearance expressly to challenge service and filed the First Summons within the 14-day period specified in the note to the Memorandum of Conditional Appearance. Although the First Summons was dismissed for procedural defect, the Sixth and Seventh Defendants promptly filed the Second Summons two days later to correct the defect. They also sought an extension of time as a precaution, while awaiting the hearing of the Second Summons. These steps are, in my judgment, consistent with a continuing protest rather than acquiescence.
- [66.] The Plaintiff submitted that, by virtue of the Conditional Appearance becoming unconditional under **Order 10 rule 3 RSC**, any irregularity in service was cured, and that the Second Summons was therefore procedurally impermissible. It was further contended that the repeated attempts to correct procedural defects amounted to an abuse of process.
- [67.] I am unable to accept those submissions. The dismissal of the First Summons was not a determination on the merits of the challenge to service. The Second Summons was filed almost immediately thereafter and sought, in substance, to continue the same protest, now

in proper form. No intervening step was taken by the Sixth and Seventh Defendants that could objectively be characterized as a voluntary submission to the Court's jurisdiction. In those circumstances, their conduct does not disclose waiver or abuse of process.

Effect of the appearance becoming unconditional

- [68.] The Plaintiff submitted that once the First Summons was dismissed, the Conditional Appearance became unconditional under the terms of the Memorandum, and thereby cured any irregularity in service as a matter of law. I accept that the appearance became unconditional by operation of law. I do not, however, accept that this conclusion necessarily determined the matter against the Sixth and Seventh Defendants.
- [69.] The effect of **Order 10 rule 3 RSC** must be considered together with the authorities concerning waiver by conduct, including **Keymer v Reddy [1912] 1 K.B. 215**. The critical question is not merely whether the appearance became unconditional as a procedural consequence, but whether, viewed objectively, the conduct of the Sixth and Seventh Defendants demonstrated a voluntary submission to the jurisdiction or an intention to abandon their protest.
- [70.] In the present case, the unconditional appearance arose automatically, rather than by any deliberate election on the part of the Sixth and Seventh Defendants. Their subsequent conduct, particularly the filing of the Second Summons two days after the dismissal of the First Summons, shows that they continued to maintain their objection to service. In my judgment, the mere fact that the appearance became unconditional by operation of law did not, in these circumstances, deprive the Court of power to examine whether the protest had in substance been maintained. On the facts of this case, I am satisfied that it had.

Requirement for Fresh Leave

- [71.] I also reject the submission that the Sixth and Seventh Defendants required fresh leave before filing the Second Summons. The First Summons had been filed within time and pursuant to the leave already granted to enter a conditional appearance and challenge service. Its dismissal was technical only, but a prompt attempt was made to cure the formal defect in the original application and continue the same protest. In those circumstances, no fresh leave was required.

Dismissal of the Third Summons

- [72.] Similarly, the dismissal of the Third Summons, by which the Sixth and Seventh Defendants sought an extension of time out of caution, was not fatal to the Second Summons. While

such applications may be made out of caution, they do not transform the extension into a legal prerequisite for the substantive relief. The Second Summons remained capable of determination on its merits.

Delay and Abuse of Process

- [73.] Turning then to the matter of delay and abuse of process, I do not consider that the conduct of the Sixth and Seventh Defendants amounted to delay or abuse of process. The First Summons was brought in time, and the Second Summons was filed two days after dismissal of the first, and there is no evidence of manipulation or an attempt to relitigate an issue already determined on the merits. The procedural history instead reflects a continued effort to correct a defect in form while maintaining a substantive objection that had been raised from the outset.
- [74.] While some time elapsed before the applications were ultimately heard, much of that elapsed time is explained by the Court's own listing process. In any event, the question of reasonableness is fact-sensitive: see **Major v The Attorney General [2010] 1 BHS J No. 5**. In the circumstances of this case therefore, I am not satisfied that the delay was such as to demonstrate abandonment of the protest or to justify refusal of relief.

Prejudice

- [75.] Finally, I turn to prejudice. The Plaintiff contends that delay may cause hardship, particularly having regard to the injuries alleged and the age of the proceedings. However, while prejudice is a relevant consideration in the exercise of the Court's discretion, it cannot, by itself, amount to waiver or validate service where the protest to service has been maintained.
- [76.] In the present case, the decisive consideration is that the Sixth and Seventh Defendants did not voluntarily submit to the jurisdiction of the Court and did not abandon their challenge to service. The prejudice relied on by the Plaintiff does not alter that conclusion.

CONCLUSION

- [77.] Having considered the written and oral submissions of Counsel, the affidavit evidence, and the authorities cited, I am satisfied that service of the Amended Writ of Summons on the Sixth and Seventh Defendants ought to be set aside.
- [78.] Service on Lennox Paton was not shown to constitute regular service on either Defendant company under the applicable Rules or the Companies Act. The Sixth and Seventh

Defendants entered a conditional appearance under protest and filed the First Summons within the prescribed time. Although that summons was dismissed for a defect in form, they promptly filed the Second Summons to continue the same challenge.

- [79.] The fact that the appearance subsequently became unconditional by operation of law did not, in the circumstances of this case, amount to waiver of the irregularity or preclude the Court from granting relief. In fact, I also note that the note to the Conditional Appearance itself says that the appearance shall stand as unconditional “unless the court shall otherwise order.” The note itself therefore appears to contemplate that the Court may make some other order, other than to simply permit the appearance to stand as unconditional.
- [80.] I further find that fresh leave was not required to file the Second Summons, that the dismissal of the Third Summons was not fatal to it, and that the conduct of the Sixth and Seventh Defendants did not amount to delay or an abuse of process.
- [81.] For those reasons, I reach the same conclusion as the learned Deputy Registrar that service of the Amended Writ of Summons ought to be set aside.
- [82.] Accordingly, it is hereby ordered that:
- a. The appeal is dismissed and the Order of the learned Deputy Registrar pronounced orally on 22nd June 2021 is affirmed; and
 - b. Costs of the appeal are awarded to the Sixth and Seventh Defendants, to be taxed if not agreed.

Dated this 23rd day of April , A.D. 2026



Neil Brathwaite

Justice

