EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number**:** **ANUHCV 2014/0391**
BETWEEN:

JAMES H. HERBERT

CLAIMANT

AND

NELISA SPENCER

DEFDENDANT

Appearances:

Ms. Samantha May for the claimant/respondent
John Fuller for the defendant/applicant

2015: December 1
2016: January 26

APPLICATIONS TO SET ASIDE EXTENSION OF TIME TO SERVE CLAIM FORM AND DEFALUT JUDGMENT

[1] **GLASGOW, M:** On July 24, 2011 the claimant (hereinafter the respondent) was driving his vehicle along the Sir George Walter Highway when a collision occurred with the vehicle driven by the defendant (hereinafter the applicant). The respondent's vehicle was damaged and he was injured. Discussions ensued between the applicant's insurance company and the respondent with a view to settling damages to be paid to the respondent for his losses to person and property. The negotiating sides reached consensus in December 2011on the sum to be paid for the damage to the respondent's vehicle and the applicant's insurance company paid the respondent the sums agreed. There seems to be no progress after December 2011 regarding the quantum of damages to be paid for the respondent's injuries. Accordingly, the respondent filed the claim herein on July 15, 2014 seeking special and general damages for his losses.

[2] On January 8, 2015 the respondent applied to this court pursuant to CPR 8.13 for an order extending the time for service of the claim form by a period of 6 months. The respondent apparently had CPR 8.12 in mind on making this application since that rule requires the claim form

to be served within 6 months after the date it was issued[1]. The application was supported by an affidavit sworn by the respondent. The affidavit indicated that since filing the claim, the respondent sought to trace the applicant to effect service of the same on her. His several unsuccessful efforts included contacting the applicant's relatives and a former employer. He went to say that he engaged the applicant's insurance company to ascertain her whereabouts but to no avail. The respondent exhibited a letter dated October 24, 2015 received from the law firm of Hill and Hill which advised that the firm represented the applicant. The letter further informed the respondent that the applicant was interested in *"settling this matter amicably".* The application was heard and granted on February 3, 2015. The court produced and approved a draft order which was handed to counsel for the respondent to settle.

[3] Khalid Shabazz, process server swears an affidavit of service on May 26, 2015 to the effect that the applicant was served on May 20, 2015 with the claim form, notice of application requesting the extension of time to serve the claim form, the respondent's affidavit and a draft order.[2] Mr. Shabazz would state in a later affidavit filed on November 26, 2015 that at the time of serving the applicant with the claim form he also served the "notes". I assume that the "notes" refer to the forms which ought to accompany a claim form when it is being served. Indeed Mr. Shabazz depones that he always ensured that *"the appropriate forms and documents to be served are enclosed"*[3] when he seeks to execute his duties as a process server.

[4] No acknowledgment of service having been filed after service of the claim, the respondent applied for and obtained judgment in default of acknowledgment of service on June 10, 2015. The respondent applied for an assessment of damages on September 18, 2015. Submissions in support of the assessment were also appended to the application. In addition to the application for damages to be assessed, the respondent applied for an order for service of the default judgment, the application, affidavit and submissions in support of the assessment of damages by an alternative method of service. The application for service by an alternative method was granted and it was ordered that the applicant may be served with the said documents by leaving them at her usual or last known place of residence and by publication in 2 local newspapers in Antigua and Barbuda.

[5] An affidavit of service filed by Troy Jarvis on November 9, 2015 disclosed that the applicant was served personally with the default judgment and documents in support of the assessment of damages on October 19, 2015. The applicant insists that she was in fact served with these documents on October 16, 2015 which was also the first time that she received the sealed order of the court extending the time for serving the claim form. On October 19, 2015 the applicant filed 2

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[1] CPR 8.12 (2) stipulates 12 months as the period for the service of a claim form out of the jurisdiction and for the service of an Admiralty claim form in rem. The rule reads – 8.12 (1) the general rule is that a claim form must be served within 6 months after the date when the claim was issued.
(2)The period for –
(a) service of a claim form out of the jurisdiction; or
(b) service of an Admiralty claim form in rem;
is 12 months.

[2] The applicant disputes that she was served on May 20, 2015. She asserts that the documents were received on May 19, 2015. The applicant also explains that the draft order referenced in Mr. Shabazz's affidavit is the draft order approved by the court on February 3, 2015.

[3] Affidavit of Khalid Shabazz filed on November 26, 2015 at paragraph 12

applications seeking (1) an order setting aside the extension of time within which the claim form may be served; and (2) an order setting aside the default judgment.

APPLICANT'S ARGUMENTS ON THE APPLICATIONS

Application to set aside the default judgment

[6] In her grounds for making this application, the applicant relies on CPR 8.13(5) which outlines the steps to be taken after an order is made to extend the time to serve a claim form.

[7] The applicant complains that the claim form which was served has no validity since it bore no stamp showing the period for which its validity was extended (CPR8.13(5). Additionally, the respondent did not serve a claim from endorsed with the notice stating that the claim form is of no validity if it is not served within 6 months of the date of issue. The claim form in this case being thus deficient was "dead" for failing to include these formalities. In fact, the applicant's position is that there could not be a response to the claim since no valid claim was in effect at the time that it was served on her.

[8] Compounding matters for the applicant was the fact that she was not served with a sealed copy of the order of the court as required by CPR 8.13(5). She received the draft order produced with the master's signature. The applicant opines that the service of a draft order rather than a sealed copy further demonstrates the respondent's lack of compliance with the mandatory conditions of the rule in question. It is argued for the applicant that the sanction for noncompliance with the mandatory provisions of CPR 8.13(5) is quite evident; the respondent's failure to follow the requirements of the rules meant that the claim "*reverts to its status quo and there is no validity, the Claim Form will have died its natural death."*[4] The applicant submits that, for these reasons, a valid claim was not served. A valid claim must have been served in order for a default judgment to be granted pursuant to CPR 12.4. The respondent's lack of compliance in this regard obligates the court to set aside the default judgment pursuant to CPR 13.2.

[9] CPR 12.4 and 13.2 read

> *12.4 The court office at the request of the claimant must enter judgment for failure to file an acknowledgment of service if –*
> *(a) the claimant proves service of the claim form and statement of claim;*
> *(b) the defendant has not filed –*
> *(i) an acknowledgment of service; or*
> *(ii) a defence to the claim or any part of it;*
> *(c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;*
> *(d) the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;*
> *(e) the period for filing an acknowledgment of service under rule 9.3 has expired; and*

[4] Applicant's submissions filed December 4, 2015

(f) (if necessary) the claimant has the permission of the court to enter judgment.

13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –
(a) a failure to file an acknowledgment of service – any of the conditions in rule 12.4 was not satisfied; or
(b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.
(2) The court may set aside judgment under this rule on or without an application.

Application to set aside the order extending the time to serve the claim form

[10] The applicant relies on CPR 8.13(4) and 11.16(1) in support of the relief sought on this application. Where a claimant seeks an order extending the time for serving the claim form, CPR 8.13(4) outlines the conditions which must be satisfied before an order is made granting the request. The court may only make an order where it is satisfied that the claimant took all reasonable steps to trace the defendant and serve the claim form but has been unable to do so or there is some other special reason for extending the period to serve the claim form. The contention here is that the evidence on the respondent's affidavit in support of the request is meagre and *"woefully below what is sufficient to establish that he had taken not just some steps but all reasonable steps to both trace and serve the Defendant.*[5]*"* It is said that meagre evidence will not suffice[6] and the weaker the reason for not serving the claim before its validity ends, the more likely that the court will refuse an order extending the time to serve[7]. The applicant's view is that the respondent ought to have given greater details of his efforts to locate the applicant including giving the names of the persons claimed to be the applicant's relatives and the former employer whom he sought to serve with the claim form.

[11] The court's attention was drawn to the fact that the applicant is an attorney at law who is known to the respondent. The applicant states that the respondent is aware of her email address which is available not only to the respondent but to the registrar of the court and the bar association. In fact the respondent's previous attorney was on an email thread with the applicant just mere months before the proceedings were issued. The respondent was therefore aware that the applicant could be reached by email but failed to disclose this fact to the court at the time of the application. Having

[5] Paragraph 33 of the applicant's submissions filed on December 4, 2015
[6] The applicant relies on Abela $ Ors v Baadrani [2011] EWCA Civ 1571 at paragraph 31
[7] Uphill v BRB(Residuary Limited) [2005] EWCA Civ 60 is provided as authority for this assertion.

failed to utilize this method of tracing the defendant, the application was not properly made and granted. It should therefore be set aside. There is also no reason why the claimant did not utilize an alternative method of service as was the case when he later sought to serve the default judgment and documents in support of the assessment of damages. The court is asked to set aside the order extending the time for service of the claim form since the respondent had multiple avenues open to him to serve the claim during the original period of validity which he failed to explore. The totality of these arguments is that the court should set aside the order because the respondent failed to take all reasonable steps to trace the applicant, suppressed evidence of the applicant's profession from the court and he did not utilize email access that was available to him.

[12] The applicant also addressed the further affidavit of Mr. Shabazz filed on November 26th 2015 in which he expanded on the specific steps that he employed to find the applicant before the application was made in January 2015. In particular, Mr. Shabazz gave details of the efforts he made to find the applicant through the offices of her former employment at the law firm of Mr. John Fuller. He also outlines the several visits to her home at Renfrew, St. John's and to her mother's place of business. Mr. Shabazz also explained the several conversations held with the applicant's parents both in person and via the telephone. The applicant says that this further evidence is not adequate and should not be accepted since (1) it fails to address why an alternative method of service was not employed; (2) there is no explanation for the failure to disclose to the court that the applicant is an attorney at law and the fact that the respondent was aware of her email address; and (3) the further affidavit cannot be used to retrospectively fix the errors and omissions of the original application. The **Abela**[8] decision is provided as authority for the view that the court cannot take the information given by Mr. Shabazz on his November 26, 2015 affidavit to retrospectively adjust the omissions in the original application.

[13] Finally, the applicant asks that the court further considers that this claim was brought on July 15, 2014 which was about one week and a day before the expiration of the relevant limitation period for bringing a claim in respect of the collision which occurred on July 24, 2011. Relying on the dicta in **Abela**, the applicant contends that where the sole reason for granting an extension of time to serve

[8] [2011] EWCA Civ 1571

the claim from is to preserve a stale claim, this would be a bad reason for exercising the discretion to extend time for service[9].

RESPONDENT'S ARGUMENTS ON THE APPLICATIONS

Application to set aside the default judgment

[14] For the respondent it is submitted that the mandatory requirements of CPR 13.2(a) and 12.4 have not been met by the applicant. The respondent's submission is that the court must determine whether service of the claim form and statement of claim is proven. Where it has been shown that the applicant was served with the claim, if no acknowledgment of service was filed thereafter, then it must be found that the default judgment was rightly entered. At the time the applicant was served, she was fully aware of the purpose of service and her failure to acknowledge service was the reason for the default judgment.

[15] On the question of the failure to serve the sealed order and a copy of the claim form with the official stamp showing that its validity had been extended, the respondent's case is that these are not grounds for the setting aside of the default judgment. While the rules are stated in mandatory terms, there are no sanctions attached for noncompliance. The court is urged to apply the Privy Council decision of **AG of Trinidad and Tobago v Kieron Mathews**[10], where it was explained that "*sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose.[11]"*

[16] The case of **Asia Pacific (HK) Ltd & Ors v Hanjin Shipping Co Ltd**[12] was also cited in support of this view. In that case, a copy of a claim from was forwarded by the claimant's solicitors to the defendant's solicitors by way of fax. The document was marked "claimant's copy", but there was no indication from the claimant's solicitors that the claim was being served by way of the fax. Claimant's solicitor did not forward the forms usually attached to the claim which forms are referred to as the response pack. The defendants sought to argue that, for those reasons, there was no service of the claim form. The court ruled that "***the failure* to *serve* a *response pack was* a**

[9] **Hastroodi i v Hancock** [2004] 1 WLR 3206 was also cited as authority for the applicant's position
[10] [2011] UKPC 38
[11] [2011] UKPC 38 at paragraph 16
[12] [2005] EWHC 2443

failure* to *comply with the rules but* of *itself, it signifies no more than that that which ought to have been done on service was not done. It was* a *procedural irregularity:* a *technical mistake* of *the kind that in Harrigan v Harrigan ... ***was not treated as affecting the real substance* of *the matter. "*[13]*.*** In terms of service of a copy of the claim form rather than the original, it was found that the service of the copy of the claim by fax was service by a method permitted by the rules and there was no indication that it was meant to be transmitted for informational purposes only.

[17] **Posner v Collector for Interstate Destitute Persons**[14] was relied on for the position that a *"distinction could be drawn between those cases where judgment was obtained where the Defendant was not served with the originating process and those in which there was a defect in service but the writ came to the knowledge of the Defendant."* It is only in the former instance that the judgment should be set aside ex debito justitae.

[18] The respondent submits that the purpose of service is to bring the claim to the applicant's attention. It is argued that there is no dispute by the applicant that she was served with the claim. The applicant was put on notice by the draft order that there was an extension of the time within which the claim form could be served. The fact that the applicant is an attorney at law also demonstrates her awareness of the process and the need to respond to the claim. The respondent answered the charge that there was no need to acknowledge service since the failure to serve the sealed order and the stamped copy of the claim made the claim form a nullity by citing the court's ruling in **Anselm v Balthazar and Balthazar**[15] for the view that the nonservice of these documents does not remove the applicant's obligation to file an acknowledgment of service. Finally, the respondent asks the court to find that none of the conditions set out in CPR 13.3 have been met by the applicant.

[13] [2005] EWHC 2443 at paragraph 36
[14] (1946)74 CLR 461
[15] DOMHCV 2013/0201

[19] The respondent makes the point that that the applicant is, in essence, seeking the rehearing of this application almost 5 months after the order extending the time to serve the claim form was served on her. For this posture, the respondent cites CPR 11.16 (1) and (2) which read

> *11.16 (1) A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.*
> *(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.*

[20] The court is asked to consider that this is a claim in which liability had been previously accepted and part of the respondent's claim had been paid by the applicant's insurance company, the respondent and the applicant's insurance company continued active discussions for some time on settling the balance of his losses, an offer had been made by previous counsel to enter discussions with the respondent's counsel on settling the balance of the losses claimed by the respondent, the applicant presented difficulties with service in that she left the jurisdiction with no means of contacting her, the claim and all other relevant documents have been served and the applicant is now seeking a rehearing of the application to extend the time to serve the claim form. The respondent's view is that, in light of these facts, the requested rehearing is inconsistent with the overriding objective of the rules to deal with cases justly.

[21] In respect of the specific assertion that there were no reasonable grounds set out in the application requesting the extension of time to serve the claim, the respondent rejoins that his application satisfies both limbs of CPR 8.13(4) in that he showed that he took all reasonable steps to trace the applicant and that there were special reasons why the time to serve should be extended. In respect of the former reason, the respondent pleaded that he took steps to contact the applicant's relatives, her insurance representatives and a former employer. In fact he points out that the applicant verifies this assertion in her reply where she conforms that the applicant did try to find her through her parents. The respondent also relies on the pleadings of his efforts to contact the applicant through her insurance company. He further relies on the letter received from Hill & Hill which letter indicated that the applicant was interested in settling the issue of damages and requested a

'*breakdown of quantum'*. The letter, argues the respondent, amounted to an admission of liability and supplied a special reason why the court extended time to serve the claim. The respondent urges the court to apply the Privy Council decision in **Mathews** to these facts with the result that there are no sanctions set out in CPR 8.13 and as such none should apply in this instance. The respondent further contends that even if the respondent did not have a good reason for failing to serve within the 6 month period, the court would exceptionally exercise its discretion. Reliance is placed on dicta in the case of **Hoddinot and others v Persimmon Homes (Wessex) Ltd**[16] for this latter submission.

DISCUSSIONS AND CONCLUSION

Application to set aside default judgment

[22] The application to set aside has been brought pursuant to CPR 13.2.(1)(a). The request prays that the default judgment is set aside because of the respondent's failure to comply with the dictates of CPR 12.4 and 8.13(5). The applicant says that the respondent cannot prove service of the claim form as required by CPR 12.4 due to the fact that she was not served with (1) a stamped copy of the claim form showing that its validity had been extended; (2) the sealed order of the court granting the extension of time; and (3) the part of the notice to the defendant stating that the claim form was not valid if it was not served within 6 months of the date of issue or an order extending its validity.

[23] The present application exposes for discourse the rules for service of a claim form on a defendant within the jurisdiction. The rules provide that where a claim form is issued it must be served within 6 months of its issue date (CPR 8.12(1))[17]. A claim must be served personally by handing it to or leaving it with the person to be served (CPR5.1(1)) . CPR 5 also permits service by electronic, alternative or specified means. It suffices to say that the rules on serving a claim form on a defendant within the jurisdiction are quite extensive and allow for great latitude in serving the same.

[16] [2007] EWHC Civ 1203

[17] Where the claim form is issued in proceedings which are to be served out of the jurisdiction or the claim is in respect of admiralty claim on rem, the time for service is 12 months from the date of issue (CPR8.12(2))

[24] Where the claimant encounters difficulty locating the defendant to effect personal service, one of the avenues available to the claimant is to apply to the court for an order extending the time for serving the claim form, in essence, extending the validity of the claim form (CPR 8.13). CPR 8.13 states –

> *(1) The claimant may apply for an order extending the period within which a claim form may be served.*
> *(2) The period by which the time for serving a claim form is extended may not be longer than 6 months on any one application.*
> *(3) An application under paragraph (1) –*
> *(a)must be made within the period –*
> *(i) for serving a claim form specified by rule 8.12; or*
> *(ii) of any subsequent extension permitted by the court; and*
> *(b) may be made without notice but must be supported by evidence on affidavit.*
> *(4) The court may make an order under paragraph (1) only if it is satisfied that –*
> *(a) the claimant has taken all reasonable steps to –*
> *(i) trace the defendant; and*
> *(ii) serve the claim form;*
> *but has been unable to do so; or*
> *(b) there is some other special reason for extending the period.*
> *(5) If an order is made extending the validity of the claim form –*
> *(a) the claim form must be marked with an official stamp showing the period for which its validity has been extended; and*
> *(b) a sealed copy of any order made must be served with the claim form.*
> *(6) No more than one extension maybe allowed unless the court is satisfied that –*
> *(a) the defendant is deliberately avoiding service; or*
> *(b) there is some other compelling reason for so doing.*

[25] Where the time to serve a defendant within the jurisdiction has been extended and the defendant has been served, the rules then stipulate the steps to be taken if the defendant wishes to defend

the claim. The defendant may either file an acknowledgment of service or a defence within the period allowed. CPR 9.1 to 9.3 set out the procedure to be followed –

> *9.1 (1) This Part deals with the procedure to be used by a defendant who wishes to contest proceedings and avoid a default judgment being entered.*
>
> *(2) The defendant does so –*
>
> *(a) by filing –*
>
> *(i) a defence in accordance with Part 10; and*
>
> *(ii) an acknowledgment of service in Form 3 or 4 containing a notice of intention to defend within the time limit under rule 9.3;or*
>
> *(b) by filing a defence in accordance with Part 10 within the time limit under rule 9.3.*
>
> *(3) The filing of an acknowledgment of service is to be treated as the entry of an appearance for the purpose of any enactment referring to the entry of such an appearance.*
>
> ***Filing acknowledgment of service and consequence of not doing so***
>
> *9.2 (1) A defendant who wishes to –*
>
> *(a) dispute the claim; or*
>
> *(b) dispute the court's jurisdiction;*
>
> *must file at the court office at which the claim form was issued an acknowledgment of service in Form 4 or 4(A) containing a notice of intention to defend.*
>
> *(2) A defendant files an acknowledgment of service by completing the form of acknowledgment of service and handing it in at, or sending it by post or FAX to the court office.*
>
> *(3) An acknowledgment of service has no effect until it is received at the court office.*
>
> *(4) A defendant need not file an acknowledgment of service if a defence is filed within the period specified in rule 9.3.*
>
> *(5) If a defendant fails to file an acknowledgement of service or a defence, judgment may be entered if Part 12 allows it.*
>
> ***The period for filing acknowledgment of service***
>
> *9.3 (1) The general rule is that the period for filing an acknowledgment of service is the period of 14 days after the date of service of the claim form.*

(2) If a claim form is issued in one Member State, Territory or circuit and served in another the period is 28 days after the date of service of the claim form.

(3) If permission has been given under rule 8.2 for a claim form to be served without a statement of claim, the period for filing an acknowledgment of service is to be calculated from the date when the statement of claim is served.

(4) A defendant may file an acknowledgment of service at any time before a request for default judgment is received at the court office out of which the claim form was issued.

[26] It is seen from the foregoing extract of the rules that the defendant who is served must, at the very least, serve an acknowledgment of service or, if the defendant so desires, a defence within the period limited by the rules. Inaction by the defendant may result in a default judgment being entered (CPR 9.2(5)). The latter rule refers to CPR 12. According to CPR 12.4 the court must enter a default judgment in defined circumstances including the instances where the claimant proves service of the claim, the defendant has not filed an acknowledgment of service or defence and the time to file either document has expired.

[27] The applicant's case is that the conjoint reading of CPR 8.13(5) and CPR 12.4 would require a claimant who has applied for an extension of time to serve the claim form to take additional steps in order to serve a valid claim. In this regard it is said that the respondent was under a duty to serve a stamped copy of the claim form showing the period for which its validity had been extended and a sealed copy of the order permitting the extension of the time to serve the same. The failure to so act meant that the applicant was not served with a valid claim form. The applicant was not obliged to respond to what is termed "a dead claim" by filing an acknowledgment of service. The fact that the rules provide no sanction for the failure to comply with the requirement to serve a stamped copy of the claim and a sealed order does not aid the respondent since the effect of the noncompliance is evident from the rule itself. The failure to comply with CPR 8.13(5) means that the claim reverts to the status quo ante and would have died a natural death.

[28] There are a plethora of reasons as to why I find the applicant's position to be unsustainable and difficult to accept. For one thing, the process of extending the time within a claim is to be served is court controlled. In this context the rules state that the claimant is to make an application to the

court for the grant of an order. Before the court grants an order extending the time to serve the claim form, it must be satisfied that the claimant took reasonable steps to trace the defendant and serve him or her with the claim form or that other special conditions exist to propel the court to make the requested order. An order of the court takes effect from the date it is made unless the court specifies that it is to take effect on a different date (CPR42.8). This means that once the court is satisfied of the matters set out in CPR 8.13(4) and makes an order, the time to serve the claim form is immediately extended. The steps to be taken by the claimant pursuant to CPR 8.13(5) have nothing to do with the validity of the claim form since the extension of its validity takes effect from the time the order is made.

[29] Following the making of an order in accordance with CPR 8.13(4), CPR 8.13(5) states the steps to be taken by the claimant. The reason for the mandatory provisions of CPR 8.13(5) is to inform the defendant, once he or she is served with the claim form, that the same has been served with the permission of the court. A party who has been thus notified may take several steps including applying immediately to have the order set aside or varied (CPR11.16 (1)) or he or she may file an acknowledgment of service and dispute the court's jurisdiction to hear the claim (CPR 9.2(1)(b)). It does not appear to me from reading rule 8.13(5) that the respondent's failure to serve a duly stamped copy of the claim form or a sealed copy of the order of the court affects the validity of the order extending the time to the serve the same. It merely suggests to me that the respondent did not take the steps he ought to have taken in accordance with rule 8.13(5) [18]. The rule, while written in imperative terms, has not prescribed any consequences for a lack of conformity. I would agree with the respondent that this is sort of situation which received comment of the Privy Council in the case of **Mathews**. It is precisely the kind of nonadherence spoken of in the **Asia Pacific** authority. As I previously stated, the rules are to govern the conduct of all parties and no party is permitted to cherry pick which rule to obey[19]. But the rules are a self-contained code which specifies, in some instances, specific consequences for disobedience with their dictates. The Privy Council has stated in **Mathews**, that in cases where no specific sanction is specified, none should be implied. There is no sanction for the nonadherence to CPR 8.13(5) and as such none should be implied.

[18] I would add that this reasoning equally applies to the applicant's complaint in respect of the respondent's failure to serve the complete standard accompanying forms

[19] **ABI Bank v Mitchell Stuart** ANUHCV 2013/0733

[30] There are added elements which compel me to dismiss the application. In this regard, it is quite evident that the applicant was in receipt of the claim form and a signed order from the court. While both documents were not in the form required by CPR 8.13(5), the object of service is that the claim should be brought to the attention of the party to be served. The applicant was under no misapprehension as to the situation that was brought to her attention by service. That the notes to the defendant did not say that the claim form should be served in 6 months is inconsequential. The notes that were served on her gave sufficient information as to what was before her and the steps to be taken if she wished to respond.

[31] My assessment of these facts is by no means an endorsement of the shoddy manner in which the respondent proceeded once he had received the order of the court extending the time to serve the claim form. He ought to have ensured that he served a duly stamped copy of the claim form, the full notes to the defendant and the sealed order of the court granting the extension of time to serve the claim form. Dire consequences can flow in a fitting case where sloppy compliance or lack of compliance may be found to amount to no service.[20] However this is not such a case. In these proceedings, the applicant received the claim form (albeit not stamped), the notes to defendant informing her that she ought to take certain actions if she wished to answer the claim and a signed copy of the order of the court. In my view, it was not proper for her to sit back and do nothing. I do not believe it assists the applicant in this case that she is an attorney at law who ought to be more conversant with the rules. The reason for the entry of the default judgment against the applicant was her flawed deliberation that she was not served with a valid claim form due to the nonservice of a duly stamped copy, the full notes to the defendant and the sealed order. I have stated how this disposition was, unfortunately, very mistaken. The default judgment was properly entered against her and cannot be removed for the reasons stated on the application.

[20] See for instance the discourse in **Posner v Collector for Interstate Destitute Persons** (1946)74 CLR 461 on the distinction between the instances where it can be said that the defendant was not served with the originating process at all and cases where there is a defect in service. It is only in the former instance that the claim may be set aside ex debito justitate, that is to say, the court would act in the interest of justice to set aside service where what was done could not amount to service of the originating process at all. See also **Strachan v AG** [2005] UKPC 33 at paragraph 25 et seq for some further discussion of the distinction.

The application to set aside the order extending time to serve the claim form

[32] The extension application is grounded in CPR .8.13(4) and 11.16(1) both of which rules have been set out above in this judgment. CPR 11.16(1) in particular instructs that the respondent to a without notice application, as in this case, can apply for the order to be set aside or varied and for the application to be dealt with again. The court of appeal in **Steinberg et al v Swisstor & Co et al**[21] noted that in cases of this nature the application to set aside should be treated as a re-hearing of the original application. The court is to treat the application as one that is before the court for hearing de novo.

[33] Adopting the approach outlined in the cases of **Hoddinot v Persimmon Homes**[22] **and Hastroodi v Hancock**[23]**,** the court of appeal has instructed in **Steinberg** that the "*power in CPR 8.13" is only to be exercised for "good reason" for the failure to serve the claim form during the period of its validity."* The issue before this court is whether the respondent has presented a good reason for the request to extend time to serve the claim form. The exercise of this discretion is not delimited by stipulated conditions. It might serve well for these purposes to quote extensively the guidance given in in **Hastroodi** –

> *We have no doubt that it will always be relevant for the court to determine and evaluate the reason why the claimant did not serve the claim form within the specified period. This has nothing to do with the fact that under the former procedural code, the threshold requirement was that the plaintiff should show good reason. It is because the overriding objective is that of enabling the court to deal with cases 'justly', and it is not possible to deal with an application for an extension of time under r 7.6(2) justly without knowing why the claimant has failed to serve the claim form within the specified period. As a matter of common sense, the court will always want to know why the claim form was not served within the specified period. As Mr Zuckerman says …*
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> *'For it is only fair to ask whether the applicant is seeking the court's help to overcome a genuine problem that he has encountered in carrying out service or whether he is seeking*

[21] BVIHCVAP 2011/0012
[22] [2007] EWHC Civ 1203
[23] [2004] 1 WLR 3206

relief from the consequences of his own neglect. A claimant who has experienced difficulty should normally be entitled to the court's help, but an applicant who has merely left service too late is not entitled to as much consideration. Whether the limitation period has expired is also of considerable importance. If an extension is sought beyond four months after the expiry of the limitation period, the claimant is effectively asking the court to disturb a defendant who is by now entitled to assume that his rights can no longer be disputed.'

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

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

[34] Importantly, thought was given in **Hashtroodi** to the connection between the limitation period for the commencement of claims and the time for serving the claim after it issued. While the dicta in

Hastroodi relate to 3 year limitation period within which a personal injury claim ought to be filed, the ruling in that respect is quite relevant in all cases. The court opined that

It is easy enough to take the view that justice requires a short extension of time to be granted even where the reason for the failure to serve is the incompetence of the claimant's solicitor, especially if the claim is substantial. But it should not be overlooked that there is a three-year limitation period for personal injury claims, and a claimant has four months in which to serve his or her claim form. Moreover, the claim form does not have to contain full details of the claim. All that is required is a concise statement of the nature of the claim (see CPR 16.2(1)(a)). These are generous time limits. As May LJ said in Vinos v Marks & Spencer plc [2001] 3 All ER 784 at 790 (para 20):

'If you then look up from the wording of the rules and at a broader horizon, one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with proper expedition. Criticism of Mr Vinos' solicitors in this case may be muted and limited to one error capable of being represented as small; but there are statutory limitation periods for bringing proceedings. It is unsatisfactory with a personal injury claim to allow almost three years to elapse and to start proceedings at the very last moment. If you do, it is in my judgment generally in accordance with the overriding objective that you should be required to progress the proceedings speedily and within time limits. Four months is in most cases more than adequate for serving a claim form. There is nothing unjust in a system which says that, if you leave issuing proceedings to the last moment and then do not comply with this particular time requirement and do not satisfy the conditions in r 7.6(3), your claim is lost and a new claim will be statute-barred. You have had three years and four months to get things in order.'

[35] Approaching matters the way the court of appeal has advised in **Steinberg** and gleaning from the learning in **Hashtroodi**, I cannot see how I can accede to the applicant's request for the setting aside of the order to extend time to serve the claim form. The respondent's evidence was that he faced considerable difficulty locating the applicant. He stated that he contacted her relatives, a former employer and her insurance company. I would agree that it would have been entirely more helpful to the court if, when the application was originally presented, he had outlined the details of his efforts to locate the applicant in much the same way as his efforts were detailed in the

November 26, 2015 affidavit. Nonetheless it would be incredibly difficult to find the statements in the original affidavit to be inadequate or failing to amount to good reason when it was stated that the respondent made efforts to find the defendant which efforts included contacting relatives, a former employer and her insurance representatives. That being said, this is a rehearing and it is clear to me that there is sufficient evidence presented that the respondent took reasonable steps to find the applicant to serve her personally. His efforts having proven futile, he applied for further time to deploy the resources to locate her. This is not one of the cases, in my view, that the respondent waited for the last minute to act then sought the court's imprimatur as a cover for dilatory conduct.

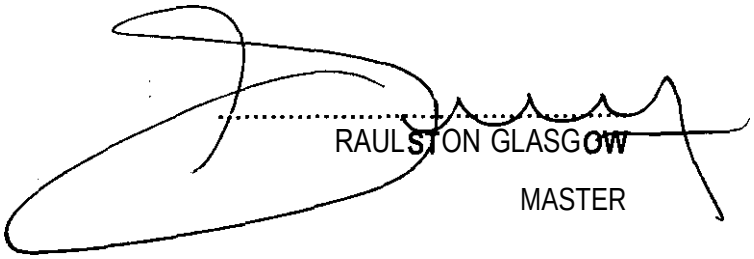
[36] I am aware that the refusal to set aside the order would deprive the applicant of a limitation defence. However the facts do not demonstrate that this is one of the cases where a claimant simply waited until the last minute to file suit. I am satisfied that when all the facts are measured, this is not the sort of case where the application to extend the time to serve the claim form is made at the last minute solely to preserve a stale claim. The facts are that the parties were engaged in negotiations, the applicant's insurance representatives settled part of the claim and then there was silence on the negotiations from the applicant's insurance representatives. The respondent's then attorney sought to engage the insurance company to no avail. It was not until 2014 that Hill and Hill informed the respondent that they represented the applicant. It has emerged that Hill and Hill in fact represented the applicant's insurance company. But the distinction is unimportant for this discourse. The important point is that the respondent was left with the impression for quite some time that this claim was being settled. His evidence is that he was engaging with the insurance company. Having received part settlement from the insurance company he was entitled to feel that he could keep pursuing them for the balance of his losses. When this was not forthcoming he filed claim against the applicant who is the only person he could sue. While the claim could have been filed in a timelier manner, I am not convinced on the facts that the delay was due to a deliberate wasting of time or negligence by either the respondent or his present or past counsel.

[37] In respect of the complaint that the respondent failed to put before this court the fact that the applicant is an attorney at law who could be reached by email and the criticism that the respondent did not utilize an alternative method of service, I do not see how these arguments assist the

applicant in the face of the finding that the respondent had good reasons for seeking the extension of time to serve. I would agree that the respondent was perilously close to losing his right to bring this claim at the time of its filing. That may be entirely the reason he may have been limited in his options to serve the same. However I have found that he was not negligent in the manner he sought to pursue the claim. Having filed the claim, he should not be faulted for seeking to find the applicant to serve the claim personally before considering alternative means of service. It is indeed a telling fact in this case that the respondent was not made aware of the fact that the applicant was out of the jurisdiction until he received a letter dated March 20, 2015 from Hill & Hill indicating that firm's difficulty locating her. I do not find that the respondent, who up until that letter was of the view that the applicant was in state, acted unreasonably by first trying to locate her to serve her personally. His efforts to serve personally having proven futile, it was not unreasonable for him to approach the court to seek to extend the time to serve the claim and to pursue service of the same on her. In fact, the order having been granted to extend the claim, the respondent continued his efforts to find the applicant to effect personal service which efforts prove successful in May 2015. For those reasons I must refuse the application to set aside the application to extend the time to serve the claim form and it is so ordered.

[38] Before departing from this judgment, I must comment on the respondent's argument that he presented special reasons for the grant of the order extending the time to serve the claim form pursuant to CPR 8.13(4) (b). CPR 8.13(4)(b) permits the exercise of a broad discretion since it does not outline any guidelines as what would suffice as special reasons.. Reading the whole of CPR 8.13(4) suggests to me that the reasons to be presented under sub rule 8.13(4) (b) must expose circumstances beyond the type of good reasons presented in accordance with CPR 8.13(4)(a), that is to say, something exceptional or out of the ordinary that would prompt the court to extend the time in the absence of good reasons. If this is the correct approach to CPR 8.13(4)(b), I cannot agree with the respondent that the now disputed admission of liability in the letter received from Hill & Hill would suffice as a special reason for extending time to serve the claim form. The fact that a defendant in a pre- action context expresses a desire to settle a claim has little or no correlation with the claimant's obligation to ensure that the defendant is properly served in a timely manner. A court should not act to essentially preserve a claim merely because the defendant could settle the same if he or she is eventually served with proceedings.

[39] The respondent having been successful on both applications, I award costs of $500.00 on each application making a total of $1000.00. I am grateful for counsel's assistance.



RAULSTON GLASGOW

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