

**EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**ANTIGUA AND BARBUDA**

**ANUHCVP2023/0029**

**BETWEEN:**

**CALVIN AYRE**

Appellant

and

**REUTERS NEWS & MEDIA INC**

Respondent

**Before:**

The Hon. Dame Janice M. Pereira, DBE  
The Hon. Mr. Trevor M. Ward  
The Hon. Mr. Gerard St.C Farara

Chief Justice  
Justice of Appeal  
Justice of Appeal [Ag.]

**Appearances:**

Mr. David Joseph, KC and with him Mr. Errol Cort and Ms. Claneisha Gomes for the Appellant  
Mr. John Carrington, KC and with him Ms. Cheryl-Lee Bolton for the Respondent

---

2023: November 22;  
December 22

**Re-Issued 2024: September 20.**

---

*Civil appeal – Electronic Litigation Portal - Civil Procedure Rules 2000 - Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019 (“E-Litigation Rules”) - Service of the authorization code – Authorization code to be served together with the claim form and statement of claim - Rule 13 (3) of E-Litigation Rules - Whether service out on the defendant pursuant to an order of the court requiring personal service, also require the claimant to serve the authorization code with the claim form and statement of claim in the proceedings under rule 13(3)(b) of the E-Litigation Rules – Expiration of validity of claim form – Whether invalid claim form incapable of being served – Substitution of a party - Rule 19.4 of the CPR - Whether it was open to master to make*

*order substituting the respondent as the defendant and for service out of the claim form and statement of claim and other documents in the proceedings on the substituted defendant out of the jurisdiction where service of the claim form and statement of claim on the original defendant was deemed invalid and the validity of the claim form had expired without being extended by order of the court - Whether master had the power to set aside substitution and service out order, which order had not been appealed – Rules 9.7(6) and 7.7 (a) and (c) of the CPR - Whether respondent submitted unequivocally to the jurisdiction of the court*

The appellant, Calvin Ayre, commenced a claim on 28<sup>th</sup> February 2020, against Reuters Limited (“Reuters UK”) on the Electronic Litigation Portal (“E-Litigation Portal”) pursuant to the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019 (“E-Litigation Rules”), for defamation related to an article published on 2<sup>nd</sup> March, 2017 on a website said to be the Reuters website. By order made 22<sup>nd</sup> December 2020 by Master Michel, the appellant (as the claimant) was granted permission to personally serve Reuters UK at its address in London, England with the claim form, statement of claim “and other documents in the proceedings”. Service of the claim form and statement of claim and the service out order was effected on Reuters UK by way of personal service at its address in London on 22<sup>nd</sup> January 2021. However, at the time of the purported service the said documents were not accompanied by service of the authorization code as mandated by Rule 13(3)(b) of the E-Litigation Rules. Pursuant to Rule 13(4), where the authorization code is not served in accordance with sub-rule (3), ‘service shall be deemed not to have been effected.’ At the time of the purported service on Reuters UK, the validity of the claim form under CPR 8.12 had not expired and the prescribed limitation period for the cause of action in defamation under the Defamation Act 2015 had not lapsed.

As matters developed, it was discovered that Reuters UK was not the correct defendant in the claim. Subsequently, pursuant to rule 19.4 of the Civil Procedure Rules 2000 (“CPR”), the appellant sought to substitute Reuters USA as the correct defendant. Master Gardner-Hippolyte, by an order dated 2<sup>nd</sup> December, 2021 substituted the respondent (“Reuters USA”) as the defendant to the claim in place of Reuters UK, and granted permission for the appellant to personally serve the claim form, statement of claim and the other documents in the proceedings on Reuters USA at its address in New York, USA. However, at the time of the substitution and service out application and the making of the said order, the validity of the claim form under CPR 8.12 had expired, and the appellant had not sought an extension under rule 8.13. Furthermore, the 3-year limitation period for commencing a defamation claim prescribed by the Defamation Act 2015 had also expired. The claim form, statement of claim, and order for service out, together with the authorization code, were all subsequently served on the lawyers for Reuters USA in Antigua and Barbuda, who had agreed to accept service on behalf of their client.

The respondent, Reuters USA, filed an acknowledgment of service in the proceedings on 21<sup>st</sup> March 2022 and on 6<sup>th</sup> May 2022, applied to extend the time for filing the defence, citing the need to have further time to consider a settlement proposal received from the appellant at the time of service of the claim. Notably, the respondent’s extension application did not explicitly reserve its right to contend that the court had no jurisdiction in the claim or ought to decline to exercise any jurisdiction which it may have to try the claim. By order made 10<sup>th</sup> May 2022, Master Gardner-Hippolyte granted the respondent’s application to extend the

time for filing its defence to 2<sup>nd</sup> June 2022. On this date, Reuters USA applied pursuant to CPR 9.7 to strike out the claim form, asserting that the court lacked jurisdiction to try the claim due to the ineffective service on the original defendant, Reuters UK, in London, England, and expiration of the claim form's validity and of the limitation period in defamation and, accordingly, that Master Gardner-Hippolyte's service out order ought to be set aside and the claim struck out.

In giving judgment in favour of the respondent, Reuters USA, on its strike out application filed 2<sup>nd</sup> June 2023, Master Michel made the following primary findings: (i) Reuters USA is the proper party to bring the CPR 9.7 application and that it did not waive its right to dispute the court's jurisdiction in the claim; (ii) there has been no effective service of the claim on Reuters UK as there had been no compliance with Rule 13(3) of the E-Litigation Rules and having regard to the deeming provisions of Rule 13(4); (iii) the claim form had not been properly and effectively served on the then named defendant, Reuters UK, within the period of its validity, and no application had been made or order granted extending the validity of the claim form; (iv) the amended claim form served on Reuters USA pursuant to the order of Master Gardner-Hippolyte dated 2<sup>nd</sup> December 2021, was accordingly invalid; (v) the court had no jurisdiction to try the claim; and (vi) it follows that, pursuant to CPR 9.7(6), service of the claim form on Reuters USA should be set aside and the orders made 2<sup>nd</sup> December 2021 (by Master Gardner- Hippolyte) discharged, and the amended statement of claim struck out.

Leave to appeal was granted to the appellant by the court below. The appellant filed a notice of appeal challenging the decision of Master Michel and seeking to have his order set aside, and the respondent's application to strike out the claim pursuant to CPR 9.7 dismissed with costs in the appeal and in the court below. The notice of appeal contains 11 grounds of appeal. The issues which fell to determine by this Court are as follows: (i) whether service out on the defendant pursuant to an order of the court requiring personal service, also require the claimant to serve the authorization code with the claim form and statement of claim in the proceedings under Rule 13(3)(b) of the E-Litigation Rules; (ii) whether it was open to Master Gardner-Hippolyte to make the order on 2<sup>nd</sup> December 2021 substituting Reuters USA as the defendant and for service out of the claim form and statement of claim and other documents in the proceedings on the substituted defendant, where the service of the claim form and statement of claim on the original defendant, Reuters UK, was ineffective and the validity of the claim form had expired and the applicable limitation period had lapsed; (iii) whether Master Michel had the power to set aside Master Gardner-Hippolyte's substitution and service out order, which order had not been appealed; and (iv) whether Reuters USA had by, its application to extend the time for service of the defence, submitted unequivocally to the jurisdiction of the court.

**Held:** dismissing the appeal and ordering costs in the appeal to the respondent, to be paid by the appellant, such cost to not exceed two-thirds of the costs awarded in the court below, that:

1. Service of the authorization code with the originating process is critical to the conduct of civil litigation and is underscored by the fundamental principles of fairness and the overriding objective under the CPR which requires that 'so far as is

practicable, the parties are on an equal footing'. Rule 13 (3) of the E-Litigation Rules stipulates that service must be effected by whatever is the applicable Rules of Court, that is whether the applicable rule provides for personal service or substituted service or service under the Hague Convention or by electronic means or some other authorized means. However, in effecting service by the applicable means, the claimant must, at the same time, serve the authorization code generated by the E-Litigation Portal in Form 1 in Schedule 2 to the said Rules. The effect of this latter provision is that in relation to any matter filed on the E-Litigation Portal, which then automatically generates a distinct authorization code, the filing party must also serve the authorization code with the documents to be served.

**Rule 13(3) of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019.**

2. While it is correct that Master Michel's service out order required the documents to be served personally on Reuters UK, the requirement to serve the authorization code with the claim form and statement of claim was not excluded either by the wording of Master Michel's said order or the provisions of Rule 13 of the E-Litigation Rules. Pursuant to the terms of Master Michel's order, the appellant was required to personally serve on Reuters UK not just the claim form and statement of claim, but also 'the other documents in these proceedings', in addition to a copy of the service out order itself. Second, the authorization code which is to be served pursuant to Rule 13(3)(b) in Form 1 in Schedule 2 is a document in the proceedings to be served according to Rule 13(3)(b) of the E-Litigation Rules. It is a mandatory requirement of Rule 13(3) of the E-Litigation Rules for the code to be served together with the claim form and statement of claim. Accordingly, Rule 13(3)(b) was not complied with by the appellant and the defect is not cured by serving the code separately at a later date. Rule 13(4) expressly provides that where the authorization code is not served on the defendant in accordance with Rule 13(3), 'service shall be deemed not to have been effected'. Accordingly, no service was effected on Reuters UK of the claim form and statement of claim, and the learned Master was correct to so find.

**Flavio Maluf v Durant International Corp and others** BVIHCMAP2021/0025 (delivered 13<sup>th</sup> January 2022, unreported) followed; Rules 13(3)(b), and (4) **Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019** applied.

3. An invalid claim form is incapable of being served, and incapable of being the subject of a Part 19.4 application for substitution of a new defendant in place of an existing defendant, unless the claim form had been effectively served on the existing defendant during the period of its validity prescribed by rule 8.12, or the validity of the claim form had been extended pursuant to rule 8.13 so as to be current when the application and order for substitution and service out had been made by the court. To extend the validity of the period within which a claim form may be served, an application must be made by the claimant under CPR 8.13 and within the current period of the claim form's validity, whether the original period or an extended period.

This invalidity cannot be cured absent an application by the claimant to do so. That application must be made during the current validity of the period for service, unless resort is had by the claimant to the court being requested, pursuant to its powers under CPR 26.1(6), to dispense, in exceptional circumstances, with compliance with the period or periods stipulated at CPR 8.13(a) for doing so; or, also in exceptional circumstance and in an appropriate case, to dispense with service of the claim form pursuant to the court's power to do so under CPR 7.8B. Further, where the validity of a claim form has expired without being extended and the claim form has not been served during the period of its validity, the claimant can resort to refile the claim giving rise to a new period of validity for the purpose of effecting service on the named defendant. Alternatively, having refiled the claim form, the claimant can apply to the court to dispense with its service on the defendant or a particular defendant pursuant to CPR 7.8B if he can demonstrate, to the satisfaction of the court on affidavit evidence, that there are exceptional circumstances why the court ought to make such an order. In this matter, there has been no application to extend the validity period of the claim form pursuant to CPR 8.13, and no application made under rules 26.1(6) or 7.8B, nor any refile of the claim.

Rules 8.13, and 7.8B and 26.1(6) of the **Civil Procedure Rules 2000** applied; **Flavio Maluf v Durant International Corp and others** BVIHCMAP2021/0025 (delivered 13<sup>th</sup> January 2022, unreported) followed; **Jayson Stickings and another v RBC Royal Bank of Canada** ANUHCVP2021/0023 (delivered 6<sup>th</sup> July 2022, unreported) followed; **Abela v Baadarani** [2013] UKSC 44 considered.

4. Rule 19.3(6) of the CPR is nothing more than a power to make certain consequential directions in circumstances where the court has been satisfied that it ought to grant an application for substitution of a party to extant proceedings. Such an order may not be made in circumstances where the validity of the period for serving the claim form has expired without being extended pursuant to CPR 8.13, and the claim form had not been validly and effectively served on the existing defendant during the period of its validity for effecting service. Where the claim form has been validly and effectively served on the existing defendant during the period of its validity, the court's jurisdiction over the claim and the existing defendant would already have been grounded or invoked, as it is by service of a claim form being effected that the court jurisdiction over the matter or cause and the person or persons named as defendants flow.

Rule 19.3(6) of the **Civil Procedure Rules 2000** considered.

5. The Court, having found the claim form in these proceedings was invalid and incapable of being served on the substituted defendant, Reuters USA, and accordingly, that the court did not have jurisdiction to try the claim, the learned Master had the power under CPR 9.7(6) to set aside its service on Reuters USA, discharge Master Gardner-Hippolyte's order dated 2<sup>nd</sup> December 2021 and to strike out the claim. Further, there being no order prior in time extending the validity of the claim form for service, the court had no jurisdiction to try the claim against the substituted defendant, Reuters USA. This accords with the meaning and effect of

rule 9.7(6) and the court's powers thereunder consequent upon making a declaration that the court has no jurisdiction or will decline jurisdiction to try the claim. Further, there was ample power under rule 7.7(2)(a) and (c) where the respondent, having been served out of the jurisdiction, could apply, as it did, to set aside service of the claim form on it, and for Master Michel to set aside such service (including the service out order) having found that service of the claim form whose validity had expired without being extended by the court, is not permitted under the CPR. Accordingly, the High Court does not have jurisdiction to try the claim.

6. Pursuant to CPR 19.3(1) the court has the power to add or substitute a party without an application. However, where the application is made under rule 19.3 to substitute a party where the existing party's interest or liability has passed to the new party (which is not the case here), it may be made without notice. In the instant matter, there was no evidence before the court, that the appellant's application filed 11<sup>th</sup> May 2021 to substitute Reuters USA as the defendant in these proceedings was served on the original defendant Reuters UK. The only evidence is that such an application had been foreshadowed in correspondence from the appellant's lawyers to the lawyers for Reuters UK, who took the stance, as communicated in a letter dated 23<sup>rd</sup> March 2021, that their client was not 'in a position to consent to your proposed application pursuant to Part 19.4 of CPR 2000'. Accordingly, there is no merit in this issue and ground of appeal.

Rules 19.2, 19(3), 19.4 of the **Civil Procedure Rules 2000** considered.

7. The applicable test and legal principles to be considered when determining whether a party has submitted to the jurisdiction of the court or waived its right to challenge jurisdiction is that the act or step taken in the proceedings must be 'wholly unequivocal' of a submission to jurisdiction when viewed through the lens of the 'disinterested bystander with knowledge' of the pertinent factors. When so viewed, it must be capable of or consistent only with one conclusion, that is, submission to jurisdiction. If when so viewed it is capable of two different interpretations, one consistent with a submission to jurisdiction and the other not, then it does not meet the test, and the court must conclude that the defendant has not, by that step or those steps in the litigation, submitted to the court's jurisdiction to try the claim.

**Alexander Katunin and another v JSC VTB Bank** BVIHCMAP2015/ 0004 & 0007 (delivered 20<sup>th</sup> June 2016, unreported) followed; **SMAY Investments Ltd and another v Sachdev and others** [2003] EWHC 474 applied.

8. In this case, notwithstanding the 'difficulty' with the learned Master's use of the words 'it matters not' at paragraph [58] in his judgment, an application by a defendant to extend time to file the defence without an express reservation as to jurisdiction, is one of the factors, and an important relevant factor as demonstrated by the 'modern trend' in the cases, for the court to weigh when applying the test of the 'disinterested bystander with knowledge' in determining whether the defendant has, by the steps he has taken in the litigation, unequivocally, submitted to or waived his right to challenge jurisdiction. The remainder of the Master's statements to the

effect that the absence of an express reservation on jurisdiction does not 'automatically mean that Reuters USA is automatically deemed to have waived its right to dispute jurisdiction', was correct as a matter of general principle.

9. The learned master correctly had regard to the purpose for which the respondent's application for the extension to file the defence had been made as set out in the notice of application and in the supporting Massicot Affidavit. The stated purpose was to facilitate out of court settlement negotiations concerning a proposal made to the respondent by the appellant at the time of effecting service of the claim form and statement of claim on the lawyers for Reuters USA in Antigua and Barbuda. As the affidavit demonstrates, Reuters USA sought the extension to enable its lawyers to receive instructions on this settlement proposal from the respondent, and for discussions and negotiations to have a chance to be completed, which may then obviate the necessity to file a defence. There is no legitimate basis of principle or otherwise upon which it can be said that the Master erred or got this blatantly wrong, such that this Court ought to make a contrary finding and set aside his decision. Settlement talks or negotiations between parties to litigation are to be encouraged by the court, and not strictly circumscribed by the specter of a likely deeming of submission to jurisdiction or waiver of the right to challenge jurisdiction in applying for an extension of the period for filing the defence without an express reservation on jurisdiction. This is an important factor which places the respondent's application in a particular context and which, when viewed objectively through the lens of the 'disinterested bystander with knowledge', can lead to the conclusion that the application absent such reservation was not unequivocally consistent with a submission to jurisdiction. At minimum, this factor is capable of giving rise to two conclusions, one consistent with no intention to submit to the court's jurisdiction and the other supportive of and consistent with such a submission.
10. Furthermore, the basis upon which it has been concluded that the claim form was invalid is the failure to effect proper service of it on the original defendant, Reuters UK, within the period of validity of the claim form, there being no extension of that validity period by a court. Accordingly, at the time of the respondent's application to extend time for filing the defence, the claim form's validity had already expired and no proper service on Reuters USA could be effected. Accordingly, the substituted defendant, Reuters USA could not have submitted to the jurisdiction of the court in relation to an invalid claim form. In such circumstances, the alleged waiver and submission to jurisdiction could not be considered to have met the test, and the decision of the learned Master ought to be upheld on this ground also, albeit one which was raised for the first time before this Court by counsel for the respondent.

## JUDGMENT

- [1] **FARARA JA [AG.]:** This is an interlocutory appeal (leave to appeal having been granted on 18<sup>th</sup> July 2023), from the written judgment of Master Michel dated 31<sup>st</sup>

May 2023 by which the learned Master, after a hearing on 17<sup>th</sup> April and 5<sup>th</sup> May 2023, granted the application filed by the substituted defendant in the proceedings, Reuters News & Media Inc, (“Reuters USA”) pursuant to rule 9.7 of the **Civil Procedure Rules 2000** (“CPR 2000”) to strike out the claim form and statement of claim (as amended). The Master granted the relief sought on the ground that there had been no service of the claim form and statement of claim out of the jurisdiction (albeit permission to serve out had been granted) on the original named defendant, Reuters Limited (“Reuters UK”) in London, England, as the authorization code had not been served with the said originating documents in breach of Rule 13(3)(b) of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019 (“the E-Litigation Rules”). At the time of the purported service out on Reuters UK (the original defendant), the period of the validity of the claim form and the limitation period for the commencement of actions in defamation, had not lapsed.

- [2] The claim was commenced on 28<sup>th</sup> February 2020 by the appellant, Calvin Ayre, (“Mr. Ayres”) against Reuters Limited (“Reuters UK”), the original named defendant, as Claim No. 2020/0053 on the Electronic Litigation Portal (“the E-Litigation Portal”) established and operated pursuant to the E-Litigation Rules. As matters developed, Reuters UK was not the correct defendant in the Claim and the appellant applied subsequently, pursuant to rule 19.4 of the Civil Procedure Rules 2000 for Reuters USA to be substituted as the correct defendant. By order of Master Gardner-Hippolyte dated 2<sup>nd</sup> December 2021, made pursuant to CPR 19.4, Reuters USA was substituted in place of Reuters UK as the sole defendant in the proceedings, and permission granted to the appellant, as claimant, to serve the claim form and statement of claim and other documents in the proceedings personally on Reuters USA at its address at Times Square, New York, USA. However, at the time of the appellant’s application for substitution and permission to serve out on Reuters USA, the validity of the Claim form under CPR 8.12 had lapsed, with no application to extend its validity having been made by the appellant under rule 8.13. Likewise, the

limitation period of 3 years for commencing a claim in defamation pursuant to the Defamation Act 2015, had also expired.

[3] By the claim (in its original and amended form), the appellant seeks certain reliefs against the defendant for defamation in relation to an article published on 2<sup>nd</sup> March 2017 on a website said to be the Reuters website and titled 'Bitcoin's creditor races to patent technology with gambling tycoon' ("the article"). The appellant seeks an injunction restraining the defendant from any further publication of the offending article, a 'correction order' pursuant to section 32 of the Defamation Act 2015 of the Laws of the State of Antigua and Barbuda and, alternatively, damages including aggravated damages for defamation.

[4] In giving judgment in favour of the respondent Reuters USA on its strike out application filed 2<sup>nd</sup> June 2023, Master Michel made the following primary findings:

- (vi) Reuters USA is the proper party to bring the CPR 9.7 application and that did not waive its right to dispute the court's jurisdiction in the claim;
- (ii) there has been no service of the claim on the original defendant (Reuters UK) as there had been no compliance with Rule 13(3) of the E-Litigation Rules and having regard to the deeming provisions of Rule 13(4);
- (iii) the Claim form had not been served on the then named defendant, Reuters UK, within the period of its validity, and no application had been made or order granted extending the validity of the Claim form;
- (iv) the amended Claim form served on Reuters USA, pursuant to the order of Master Gardner-Hippolyte dated 2<sup>nd</sup> December 2021, was accordingly invalid;
- (v) the court had no jurisdiction to try the claim; and
- (vi) it follows that, pursuant to CPR 9.7(6), service of the claim form on Reuters USA should be set aside and the orders made 2<sup>nd</sup>

December 2021 (by Master Gardner- Hippolyte) discharged, and the amended statement of claim struck out. (summarized at para. [60] of the judgment).

[5] Accordingly, Master Michel made the following orders:

- (1) the court has no jurisdiction to try this claim on the basis that the claim form is invalid;
- (2) service of the claim form on Reuters USA is set aside;
- (3) the order dated 2<sup>nd</sup> December 2021 is discharged;
- (4) the claimant's statement of claim is struck out, there being no valid claim form before the court; and
- (5) the claimant shall pay Reuters USA's costs of the application to be assessed if not agreed within 28 days of the date of the order.

### **The procedural background**

[6] The chronological procedural background is as follows:

- (1) The appellant commenced its claim on 28<sup>th</sup> February 2020 against Reuters UK by filling his Claim form and statement of claim on the E-Litigation Portal of the ECSC, as he was required to do pursuant to Rule 3(4) (relating to new proceedings filed on or after the commencement date provided in sub-rule (3)) and also Rule 4(2), of the E-Litigation Rules.
- (2) Two days later, on 2<sup>nd</sup> March 2020, the 3-year limitation period under the Defamation Act 2015 in relation to the article published on the website on 2<sup>nd</sup> March 2017 expired.
- (3) In March 2020, before service of the claim form and statement of claim on Reuters UK, there was an exchange of correspondence between the appellant's lawyers Cort & Cort in Antigua and Reuters UK concerning the claim. Reuters UK by its 'Senior Counsel' responded to

a letter dated 9<sup>th</sup> March 2020 from Cort & Cort by stating, in part, 'This letter is not a full recitation of the facts to this matter and is without prejudice to Reuters' rights, claims and defences, all of which are expressly reserved.'

- (4) On 22<sup>nd</sup> December 2020, Master Michel made an order for service out of 'the claim form and statement of claim and other documents in these proceedings and a copy of this order .... on the defendant [Reuters UK] by means of personal service at the defendant's registered address Five Canada Square, Canary Wharf, London, United Kingdom, E14 5AQ.' By the said service out order, Reuters UK was required to file and serve its acknowledgement of service within 25 days and its defence to the Claim within 56 days after the date of service of the Claim form and statement of claim.
- (5) On 22<sup>nd</sup> January 2021, the appellant served the Claim form and statement of claim on Reuters UK at the address stated in the service out order but did not serve the authorization code generated automatically pursuant Rule 5(3) of the E-Litigation Rules when the appellant registered as a person filing documents on the E-Litigation portal, as required by Rule 13(3)(b).
- (6) Between January and April 2021, correspondence ensued between those representing the appellant and those representing Reuters UK, in which the appellant disputed the requirement that the authorization code must be served with the claim form and statement of claim in order for proper service to be effected. Reuters UK contended that proper service on it had not been effected since the authorization code had not been served on it with the Claim form and statement of claim.
- (7) The authorization code was eventually provided by the appellant's legal practitioners Cort & Cort to Richards & Company, legal practitioners in Antigua representing Reuters UK, by way of a letter from Cort & Cort

dated 8<sup>th</sup> April 2021; and not by serving Form 1 in Schedule 2 to the E-Litigation Rules.

- (8) This letter with the authorization code was preceded by a letter dated 23<sup>rd</sup> March 2021 from Richards & Company to Cort & Cort pointing out that proper service had not taken place on Reuters UK because of the failure to serve the authorization code with the Claim form and statement of claim; and that this failure 'bars the [d]efendant access to the claim and denies it the ability to make any representation in the matter which can have prejudicial consequences on the [d]efendant.' In the said letter, Richards & Company pointed directly to and set out in full Rule 13(4) of the E-Litigation Rules, which deems service not effected once the authorization code has not been served with the claim form pursuant to Rule 13(3). More will be said about the correct interpretation and application of these provisions later in this judgment.
- (9) However, by the said letter Reuters UK expressly did not accede to the appellant's request that it consent to the appellant's foreshadowed application, pursuant to CPR 19.4, to substitute Reuters USA as the correct defendant in the proceedings. In doing so, Reuters UK pointed out that the 'claim has no validity since a period of more than 12 months has elapsed without service being effected'. It was also suggested that the claim be reissued. To assist with this suggested course of action being pursued, Reuters UK made it clear that the proper defendant to the Claim for defamation based on the publication of the article on the website, is Reuters USA; and provided to the appellant's lawyers in the said letter, the particulars of the said company's address in Times Square, New York, USA.
- (10) It is to be noted, that Reuters UK did not file an acknowledgement of service of the Claim form and statement of claim on it in London and did not file a defence or take any step or part in the proceedings.

- (11) The 12-month period for service of the claim form stipulated by CPR 8.12(2)(a) expired 1<sup>st</sup> March 2021, without an application being made by the appellant to extend the period of its validity pursuant to CPR 8.13(1) and (3)(a). Moreover, at the time when the authorization code was eventually provided by the appellant's lawyers to the lawyers in Antigua for Reuters UK, the validity of the claim form had lapsed. Accordingly, if it is correct, as Master Michel found, that service had not been effected on Reuters UK on 22<sup>nd</sup> January 2021 because the authorization code had not been served with the Claim form and statement of claim, the validity of the claim form would have expired.
- (12) It must also be pointed out that the appellant has not taken any other permissible step under the CPR to put matters right and to ensure or to extend the continued validity of the Claim form. For example, by applying and invoking the court's powers under CPR 26.6 where, in special circumstances, the court may dispense with compliance with any rule under CPR, including 8.12 and 8.13; or dispensing with service of the Claim form under CPR 7.8B. The reliefs available under each of these rules require an application to be made to the court by the requisite party, in this instance, the appellant, to the proceedings.
- (13) The appellant did not refile the Claim. Most likely because by then the limitation period applicable to a cause of action in defamation had lapsed. Instead, he applied on 11<sup>th</sup> May 2021 for an order under CPR 19.4 that Reuters USA be substituted as the defendant in the claim for Reuters UK, the latter having been sued in error, and for leave to serve the Claim form and statement of claim and other documents in the proceedings personally on Reuters USA at its address in Times Square in New York.
- (14) On 2<sup>nd</sup> December 2021, Master Gardner-Hippolyte granted the appellant's substitution application and made the order granting the reliefs as prayed in the said application. Accordingly, it was ordered

that: (i) the defendant, Reuters UK be substituted with the correct party Reuters USA in the proceedings; (ii) the appellant (as claimant) is granted leave to serve 'the claim form and statement of claim and other documents in these proceedings and a copy of this order out of the jurisdiction on the Substitute Defendant by means of personal service at the [S]ubstitute [D]efendant's registered address'. The Substitute Defendant, Reuters USA, was required to file an acknowledgement of service within 35 days and its defence to the claim within 56 days of service of the Claim form and statement of claim. The Court Office was thereafter to set the matter down for a case management conference.

- (15) The amended Claim form and statement of claim together with the authorization code were served on Reuters USA on 11<sup>th</sup> March 2022 via Reuters USA's lawyers in Antigua & Barbuda who had agreed to accept service on behalf of their client. While this was not service in compliance with Master Gardner-Hippolyte's substitution and service out order, understandably no issue had been made and indeed none can properly or legitimately made, Reuters USA having agreed to accept service through its lawyers in Antigua and Barbuda and having, by its filed acknowledgement of service, indicated that it received the documents on 11<sup>th</sup> March 2022, the very day they were received by its lawyers in Antigua and Barbuda.
- (16) The respondent, Reuters USA, filed an acknowledgement of service in the proceedings on 21<sup>st</sup> March 2022 in which it answered "yes" to the question as to whether it intended to defend the claim, and "no" to the questions as to whether it admitted the claim in whole or in part.
- (17) Pursuant to the substitution and service out order, the period for Reuters USA to file its defence would expire 56 days after 11<sup>th</sup> March 2022, that is, on 9<sup>th</sup> May 2022. On 6<sup>th</sup> May 2022, the respondent filed an application to extend the time for filing the defence. The ground of

the application were, substantively, that at the time of service of the claim the defendant had received a settlement proposal from the claimant and required time for it to be properly considered and instructions given to response to this proposal. Accordingly, 'in keeping with the duty to further the overriding objective, it would be prudent for the [d]efendant to await instructions on the settlement proposal which may remove the need to file a defence altogether.'<sup>1</sup> It was also contended that there was no prejudice to the claimant if the application to extend time for filing the defence is granted, and, "in all the circumstances of the case, it is just to make the order ..."<sup>2</sup>In making its extension application, it is common ground that the respondent did not expressly, whether in the application or in the supporting affidavit or in its written and oral submissions at the hearing, reserve its right to contend that the court had no jurisdiction in the Claim or ought to decline to exercise any jurisdiction which it may have to try the claim.

- (18) The extension application was supported by the affidavit of Shirmain Massicot ("the Massicot Affidavit"). At paragraph 5, Ms. Massicot refers to receipt of the settlement proposal via a letter dated 11<sup>th</sup> March 2022 from the appellant's lawyers and exhibits a copy of the said letter ("SM1"). At paragraph 6, she refers to there being verbal communication between counsel for the respondent and counsel for the appellant "with a view to the possible settlement of the claim on the basis set out in the said letter", which proposal had been passed on to respondent for consideration, but that instructions on same were still pending. Paragraph 7 of the Massicot Affidavit, upon which learned counsel for the appellant has made heavy weather in his written and oral submissions on the question of whether Master Michel

---

<sup>1</sup> (para. 3).

<sup>2</sup> (para. 7).

erred in concluding that there had not been an unequivocal submission to the court's jurisdiction by the respondent, states:-

"7. I am further advised by counsel and verily believe that, in the circumstances, the Applicant [the respondent] wishes to conclude the settlement **discussions and thereafter file its defence, if such a course of action is necessary**. Accordingly, the Applicant seeks an extension of time to do so. (emphasis added)"

(19) By order made 10<sup>th</sup> May 2022, Master Gardner-Hippolyte granted the respondent's application to extend that time for filing its defence. The application was not opposed by the appellant. By her order the time for the respondent to file its defence to the claim was extended to 2<sup>nd</sup> June 2022, an extra period of 23 days.

(20) On 2<sup>nd</sup> June 2022, the respondent filed its application under CPR 9.7 to strike out the Claim form (as amended) essentially on two grounds. It was contending that the court had no jurisdiction to try the claim as service of the Claim form and statement of claim had not been properly effected on the original defendant, Reuters UK, as the authorization code had not been served with the said documents. It was also contended that subsequently the validity of the Claim form had expired, and the limitation period for bringing the claim in defamation had also lapsed. Accordingly, Master Gardner-Hippolyte's service out order ought to be set aside and the Claim ought to be struck out. As stated above, Master Michel in his written judgment delivered on 31<sup>st</sup> May 2023 granted the said application and made the orders at paragraph [62] thereof.

### **The appeal**

[7] Leave to appeal having been granted by Master Michel, the appellant filed his notice of appeal on 4<sup>th</sup> August 2023 challenging the decision of the Master and seeking to have her order set aside and the respondent's application to strike out the Claim pursuant to CPR 9.7 dismissed, with costs in the appeal and in the court below. The notice contains 11 grounds of appeal. There is considerable overlapping between

these grounds. In his oral submissions before this Court, Mr. Joseph KC, counsel for the appellant, helpfully distilled four issues of law or legal propositions to be considered by the Court in disposing of this appeal. They (with some tweaking of the language by me) are: -

“(1) If a claimant serves a Claim form personally out of the jurisdiction on the defendant pursuant to an order of the court requiring personal service, a claimant does not have to also serve the electronic authorization code on the defendant as the E-Litigation Rules have no application in such a case.

(2) Even if the Claim form was not properly served on the original defendant, Reuters UK, it was still available to Master Gardner-Hippolyte to make the order substituting Reuters USA as the correct defendant in the proceedings, as all the requirements of CPR 19.4 for substituting a new party had been met by the appellant in its application.

(3) In any event, Master Michel had no jurisdiction to set aside the order for substitution of and service out on Reuters USA. The only remedy was to appeal this order to the Court of Appeal, which was not done.

(4) In any event, the defendant Reuters USA clearly submitted to the jurisdiction of the High Court in Antigua and Barbuda by applying for an extension of time to file its defence on the merits and not expressly reserving its rights on jurisdiction”.

[8] In his oral submissions, Mr. Carrington KC, having dealt with the four legal issues or propositions posited by counsel for the appellant, advanced for the Court’s consideration, what he coined as the 3 issues of importance in the appeal. These are: -

(i) What is the importance of service of documents in legal proceedings?

(ii) What is the effect of the invalidity of the Claim form?

(iii) Can invalidity of the Claim form be cured?

[9] I will consider each of the issues posited by the parties as arising in the appeal and grounds of appeal. However, the three issues or questions posited by counsel for the respondent can in my view be conveniently subsumed under the appropriate or corresponding issue posited by counsel for the appellant, and the arguments addressed by counsel for both parties during the hearing of the appeal.

**Issue 1 – Does service out on the defendant pursuant to an order of the court requiring personal service, also require the claimant to serve the authorization code with the claim form and statement of claim in the proceedings under Rule 13(3)(b) of the E-Litigation Rules such that if there was a failure to do so, the deeming provisions of Rule 13(4) of the E-Litigation Rules apply?**

[10] As to issue 1, the appellant argued that where, as here, Master Michel's service out order on the original defendant to the claim, Reuters UK, required the Claim form and statement of claim to be served personally on the said defendant at its registered office address in London, England, the provisions of Rule 13 of the E-Litigation Rules were not engaged, as these provisions deal with electronic filing and Master Michel's order did not require the documents to be served on Reuters UK electronically or by electronic means.

[11] Counsel sought to make good this submission by reference to the language of Master Michel's service out order and to the provisions of Rule 13 itself. He posited that the wording of Master Michel's service-out order was clear. It required service of the Claim form and statement of claim by personal service on the defendant out of the jurisdiction. Accordingly, this order did not require or permit service by electronic means such as would engage the provisions of Rule 13. Mr. Joseph KC argued that upon a correct interpretation, Rule 13 deals purely with electronic service or service by electronic means as the heading to Rule 13 states: 'Service of documents by electronic means'. It is counsel's submission that this is also made clear by sub-rule (1), which he contended the learned Master did not consider in reaching his conclusion that sub-rules (3) and (4) were applicable and the appellant was required to serve the authorization code generated by the E-Litigation Portal on the original defendant, Reuters UK at the same time as service of the Claim form and statement of claim. In reaching this erroneous conclusion, the learned Master did not consider sub-rule (1), but only sub-rules (3) and (4). By doing so he erred and, accordingly, his interpretation of and application of these sub-rules were incorrect rendering his decision that sub-rule (3)(b) and (4) applied wrong and liable to be set aside. Counsel submitted that the correct interpretation is that Rule 13 does not apply at all to the circumstances in the instant matter, where service was

to be effected pursuant to an order which required personal service on the original defendant, Reuters UK. On the evidence before the learned Master, the Claim form and statement of claim were served personally on the said defendant at the address in London stated in Master Michel's service out order. Accordingly, proper service on that defendant was effected and the deeming provision of Rule 13(4) did not apply.

[12] Mr. Carrington KC in responding on this first issue, submitted that this is not a case of electronic service or service of the Claim form and statement of claim by electronic means, but one of personal service as stipulated by Master Michel's service out order. Counsel also submitted that the language of the order which require service personally of 'other documents in the proceedings', must include the authorization code which is to be served in the form of a document, Form 1 of Schedule 2 of the E-Litigation Rules. On that basis alone, the authorization code document had also to be served along with and at the same time as the Claim form and statement of claim. This counsel posited was for very good reasons as it is by the authorization code that the defendant will gain access to these proceedings and be put in the same position as the claimant/appellant.

[13] It is Mr. Carrington's submission that the appellant's interpretation of Rule 13 and its applicability to this matter is misplaced and patently wrong. What is clear from the language of Rule 13(1) is that unless the court or an order provides otherwise, any document required to be served in proceedings may, in addition to any other mode of service sanctioned or permitted by the CPR, be also served by electronic means. Furthermore, sub-rule (3) has two limbs. The first is the service of the document must be effected in accordance with the mode of service provided in the applicable rule of CPR. In the matter, the mode of service for the claim form and statement of claim was by personal service on Reuters USA at its address in Time Square in New York, USA, as stipulated in Master Michel's service out order, but by Reuters USA's lawyers in Antigua and Barbuda accepting service on its behalf. The second limb requires the party effecting service by the specified mode, to at the

same time serve the authorization code generated by the E-Litigation Portal. This the appellant clearly failed to do and accordingly, sub-rule (4) makes clear that in such circumstances 'service shall be deemed not to have been effected'. In this regard, the respondent relies on the dictum in this Court's decision in **Flavio Maluf v Durant International Corp et al.**<sup>3</sup>

### **Discussion and Analysis – Issue 1**

- [14] With the greatest respect, this first point or proposition of law posited by counsel for the appellant is without merit for several reasons. Firstly, while it is correct that Master Michel's service out order required the documents to be served personally on Reuters UK, the requirement to serve the authorization code with the claim form and statement of claim was not excluded either by the wording of Master Michel's said order or the provisions of Rule 13 itself. The appellant's line of argument does not take into account that pursuant to the terms of Master Michel's order the appellant was required to personally serve on Reuters UK not just the claim for and statement of claim, but also 'the other documents in these proceedings', in addition to a copy of the service out order itself. Second, the authorization code which is to be served pursuant to Rule 13(3)(b) in Form 1 in Schedule 2 is a document in the proceedings to be served pursuant to Rule 13(3)(b) of the E-Litigation Rules.
- [15] Indeed, service of the authorization code with the originating process is critical to the conduct of civil litigation in the modern era of open, cards on the table, litigation. It is also crucial to fundamental principles of fairness and to the overriding objective under the CPR. It is the means by which the served defendant gains access electronically to the proceedings filed against him or her, and in as early a time in those proceedings as possible, that is, at the same time when he has been served with the originating documents in the proceedings. These are important principles of the modern structure of civil litigation in these jurisdictions.

---

<sup>3</sup> BVIHCPMAP2021/0025

[16] That this is the case, is demonstrated by the definition of ‘Electronic Litigation Portal’ and how it is intended to facilitate a litigant, especially a defendant to such proceedings, by providing him or her with access and from anywhere in the world where the internet is functional:

“Electronic Litigation Portal” is defined in Rule 2 of the E-Litigation Rules to mean-

‘the web-based application which has been developed and implemented to offer stakeholders in the judicial system of the Eastern Caribbean a single point of access for the electronic litigation filing and management of documents and case files within the Court’s Registry in the Eastern Caribbean Supreme Court in accordance with these Rules.’

[17] It also accords with the overriding objective under CPR to endure, ‘so far as is practicable, that the parties are on an equal footing’. If the argument posited by the appellant on this issue was correct, that where, as here, service is to be effected personally on the defendant in compliance with an order of the court which does not provide also for service by electronic means, service of the authorization code is not required for the service of the claim form and statement of claim to be effected or to be deemed good or proper service, it would mean that a claimant could withhold service of the authorization code from the defendant for some time, and thereby prevent the defendant from gaining access to and use of the Electronic Litigation Portal and hence the court file in the proceedings. This would run contrary to the overriding objective and would put the defendant in an unfair position as far as being disabled from gaining access electronically to the proceedings as filed by the claimant on the E-Litigation Portal.

[18] This would also have the detrimental effect of putting the defendant and his legal advisers in the position where they would not be able to acquaint themselves fully with what is happening in the litigation, so as to be in a position to properly inform the defendant’s litigation strategy and approach to the claim and to defending the claim, whether on the merits or on technical grounds, such as challenging jurisdiction. It also would delay the ability of the defendant to file the acknowledgement of service, at least until the claimant saw fit to provide the

authorization code. By way of example, in the instant matter the claim form and statement of claim were served on the original defendant, Reuters UK, on 22<sup>nd</sup> January 2021 and the authorization code was finally provided to that defendant's lawyers by letter dated 8<sup>th</sup> April 2021, some 2.5 months later.

- [19] Most importantly, the appellant's line of argument under this issue is based on a misinterpretation of the provisions of Rule 13. Rule 13(1) states:

'Unless a rule of the court or an order provides otherwise, a document that is required to be served whether personally or by other means may be served by electronic means. (emphasis added). Properly construed, this provision is merely permitted service of a document in civil proceedings (including a claim form and statement of claim) to also be served personally by electronic means.

- [20] Further, sub-rule (3) provides –

(3) Where proceedings have been commenced –

(a) service must be effected in accordance with the applicable Rules of Court; and

(b) the filing party must at the same time serve the authorization code generated by the Electronic Litigation Portal in Form 1 in Schedule 2 to these rules.

- [21] Sub-rule (3) does not provide for only electronic service of a document in the proceedings, as the appellant contends. To the contrary, it stipulates that service must be effected in accordance with whatever is the applicable Rules of Court, that is whether the applicable rule provides for personal service or substituted service or by the Hague Convention or by electronic means or some other authorized means. However, in effecting service by the applicable means, the filing party must at the same time serve the authorization code generated by the E-Litigation Portal in Form 1 in Schedule 2 to the said Rules. The effect of this latter provision is that in relation to any matter filed on the E-Litigation Portal, which then automatically generates a distinct authorization code, the filing party must also serve the authorization code with the documents so filed.

[22] In this respect, certain other provisions of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019 serve to set out and define the system for the electronic filing and service of documents, and to put matters in their proper context as to how the system is designed to function and to facilitate access by all litigants or parties to causes filed at the 'Court's Registry' - as defined in Rule 2. These include the following provisions: -

"By Rule 3(4) the Rules apply 'without exception, to new proceedings filed on or after the commencement date of the notice provided under sub-rule (3) and must be used to file a document to commence proceedings before the Court through the Electronic Litigation Portal.'

Rule 4(3) is in these terms – 'The Electronic Litigation Portal enables a party to file a document online to commence proceedings or, in the case of ongoing proceedings available on the Electronic Litigation Portal, at any time during or outside normal Court office hours of business including weekends, public holidays and during the Court's vacation.'

Rule 5 stipulates that a party to proceedings shall register on the Electronic Litigation Portal to have access to it. In doing so, the party must provide a valid electronic mail address to the Court's Registry at the time of registering under sub-rule (1). And sub-rule (3) provides that 'On registration, the Court shall provide a party with an account, username and password to be used when accessing the Electronic Litigation Portal.

Rule 8 provides for a party to insert a signature on a document for electronic litigation filing through the Electronic Litigation Portal.

Rule 9 stipulates the hours of a day and days of the week for electronic litigation filing and the effective filing date where a document has been so filed outside the stipulated hours of business or filing days."

[23] In the instant matter, Claim No. ANUHCV 2020/0033 was commenced by filing the claim form and statement of claim through the Electronic Litigation Portal as required by Rule 3(4) and Rule 4(3) for any new proceeding commenced after the relevant date therein stipulated. This is not in dispute. Pursuant to the terms of the service out order of Master Michel, the claim form and statement of claim and other documents filed in the said proceedings, including the said order, were required to be personally served on Reuters UK at its address in London, England. Only the claim form and statement of claim were served, but not the authorization code in

Form 1. It was a mandatory requirement of Rule 13(3) of the E-Litigation Rules for the code to be served together with the claim form and statement of claim. Accordingly, Rule 13(3)(b) was not complied with by the appellant. Rule 13(4) expressly provides that where the authorization code is not served on the defendant in accordance with Rule 13(3), 'service shall be deemed not to have been effected'. Accordingly, no service was effected on Reuters UK of the claim form and statement of claim and the learned Master was correct to so find.

- [24] This procedural defect was never cured. It could have been cured by reserving the claim form and statement of claim together with the authorization code, assuming the validity of the claim form had not by then expired, or had been extended by the court upon application by the appellant. At paragraph [85] of the judgment in **Flavio Maluf v Durant International Corp and others**,<sup>4</sup> I stated –

'The remedy lies squarely in the hands of the party attempting service of the documents.... That remedy is to re-serve the court documents accompanied by the authorization code.'

And at paragraph [87] –

'.... Rule 13(4) provides a consequence of not serving the code with the documents, which is [that] proper service has not been effected. Unless the time for serving the documents has lapsed, as where the validity of the claim form has expired, the claimant is still free to effect service properly and in full compliance with rule 13(4).'

- [25] The defect is not cured by serving the code separately at a later date. That would still run afoul of Rule 13(4) of the E-Litigation Rules rendering service still being deemed ineffective, as I opined at paragraph [86] of **Maluf**. Similarly, the appellant has not made an application to dispense with service of the claim form and statement of claim, albeit, as matters turned out, he had sued the wrong defendant (Reuters UK) in these proceedings.

---

<sup>4</sup> BVIHCMAP2021/0025

- [26] For the reasons above, this first issue and line of argument by the appellant is based on an incorrect interpretation of Rule 13 of the E-Litigation Rules and is accordingly without merit.

**Issue 2 – Even if the service of the claim form and statement of claim on the original defendant, Reuters UK, was invalid, was it still open to Master Gardner-Hippolyte to make the order on 2<sup>nd</sup> December 2021 substituting Reuters USA as the defendant and for service out of the claim form and statement of claim and other documents in the proceedings on the Substituted Defendant, which order was made in full compliance with CPR 19.4?**

- [27] As set out above in the section dealing with the procedural steps in this matter, on 2<sup>nd</sup> December 2021 Master Gardner-Hippolyte granted the appellant's application, made the order substituting Reuters USA as the defendant in the proceedings for Reuters UK, and the order for service out of the jurisdiction on the Substituted Defendant. As also mentioned in the chronology, at the time of filing the application for substitution (11<sup>th</sup> May 2021) the validity of the claim form had expired and the limitation period for the cause of action in defamation had lapsed. The substitution and service out order was made by Master Gardner-Hippolyte pursuant to CPR 19.4 which states:-

“19.4

- (1) This rule applies to a change of parties after the end of a relevant limitation period.
- (2) The court may add or substitute a party only if the-
  - (a) addition or substitution is necessary, and
  - (b) relevant limitation period was current when the proceedings were started.
- (3) The addition or substitution of a party is necessary only if the court is satisfied that-
  - (a) claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant;
  - (b) interest or liability of the former party passed to the new party, or

(c) new party is to be substituted for a party who was named in the claim form in mistake for the new party.”

[28] The appellant’s application for substitution and service out on Reuters USA was grounded in CPR 19.4(2)(a) and (b) and (3)(c) on the basis that the substitution was necessary for the claim to be properly carried out, and Reuters UK had been named as the original defendant in the claim form in mistake (ground 1.d). The application was supported by the second affidavit of the appellant. The order recited the grounds for the appellant’s application as also including that the relevant limitation period was current when the proceedings were started, and that Antigua and Barbuda is the appropriate jurisdiction for the proceedings. The order also recited that the Master considered that where the relevant limitation period had lapsed at the time of the substitution application two prerequisites must be satisfied. These are: (1) the substitution is necessary being that (i) the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant; and (ii) the interest or liability of the former party has passed to the new party; or (iii) the new party is to be substituted for a party who was named in the claim form in mistake for the new party; and (2) the relevant limitation period was current when the proceedings were started.

[29] The order for substitution also recites that Master Gardner-Hippolyte was satisfied that the appellant/applicant had met the requirements of CPR 19.4 for permission to substitute a party after the end of the relevant limitation period; that the claim falls within the two gateways for service out (respectively) at CPR 7.3(2)(b) and CPR 7.3(4); and that the appellant/applicant had also met the requirements of CPR 7.5(1) for permission to serve the claim form out of the jurisdiction.

[30] There is no dispute that the application for substituted service did satisfy the requirements for such an order to be made stipulated at CPR 19.4. There is also no dispute that the claim form and statement of claim, together with a copy of the substitution and service out order and the authorization code, were served on Reuters USA by service on its lawyers in Antigua and Barbuda, who were instructed

to accept service and did accept service on behalf of Reuters USA. It is also not in dispute that Reuters USA filed an acknowledgment of service of the amended claim form and statement of claim in these proceedings on 21<sup>st</sup> March 2022 in which it was confirmed that service had been effected on it on 11<sup>th</sup> March 2022, and that it intended to defend the claim and did not admit the claim in whole or in part.

[31] In relation to Issue 2, the appellant relies on several grounds. The first is that pursuant to CPR 19.4 Master Gardner Hippolyte had the power to make the substitution and service out order on Reuters USA as all the stipulated requirements of CPR 19.4 for making the order has been satisfied by the appellant/applicant, as the Master found. Second, it is not a requirement of CPR 19.4 that the period for service of the claim form is then valid or was extended upon application by a claimant.

[32] Third, in any event, a claim form still has validity after the period for service has lapsed without service having been effected. In relation to this third point, it is the appellant's submission that a claim form which has not been served during the period of its validity stipulated in CPR 8.12, and which validity period has not been extended pursuant to an order of the court made under CPR 8.13, is not a nullity, as Master Michel found. To the contrary, the correct status is that it still has some "validity" as it is effectively in 'limbo'. Furthermore, it can only be considered to be a 'nullity' upon the filing of a notice of discontinuance of the action or upon an order being made to strike it out. In support of this proposition, the appellant cites the decision of the English Court of Appeal in *Aktas v Adepta* [2011] QB 894. At paragraph 18, Rix LJ states: 'In such as case the action appears to go in limbo, although it can of course be discontinued.'

[33] The fourth proposition relied on by the appellant in relation to this issue, is that by Master Gardner-Hippolyte making the substitution and service out order, the requirements of CPR 19.4 having clearly been satisfied by the appellant in its

substitution application, this breathe fresh life into the claim form in this matter and a new period of its validity would start to run from the date of the said order, that is, 2<sup>nd</sup> December 2021. This is a novel and quite surprising submission. It is one with respect to which no authority in support was cited by the appellant. Instead, learned counsel for the appellant sought to hinge this point to CPR 19.3(6)(b) whereby a court making a substitution order has the power to also make consequential directions. CPR 19.3(6)(b) states –

"(6) If the court makes an order for the removal, addition or substitution of a party, it must consider whether to give consequential directions about –  
(a) filing and serving the claim form and any statements of case on any new defendant;  
(b) serving relevant documents on the new party, and  
(c) the management of the proceedings,  
and subject to such directions rule 19.2(2) applies."

- [34] The fifth proposition relied on by the appellant in support of this Issue 2, is that this matter is an Anderton Category 2 case, and therefore the claim form continues to be 'valid' until it is either discontinued by the appellant/claimant or struck out by the court on application being made by either party to the proceedings. In support of this submission, the appellant relied on the dicta at paragraph [115] of *Maluf*, where I stated:

"In my judgment, the instant matter is an Anderton Category 2 case, that is one where 'the ground of the application is that the defendant does not dispute that he or his legal adviser has in fact received, and had his attention drawn to, the claim form by a permitted method of service' **within the period of the validity of the claim form**. It is accepted that in such cases the court can retrospectively dispense with service notwithstanding the expiration of the claim form." (emphasis added)

- [35] The appellant also submits, as his sixth proposition, that in this matter the respondent is relying on purely technical points to defeat the appellant's claim, and the justice of the case requires that Master Michel ought not to have acceded to the respondent's application to strike out the claim on such technical grounds where, as here, it is not in dispute that the original defendant, Reuters UK, had been served with the claim form and statement of claim in these proceedings in compliance with Master Michel's service out order; and in circumstances where it was not a

requirement of that order or of CPR19.4 that the authorization code must have been served on Reuters UK at the same time as service of the claim form and statement of claim has been effected. Accordingly, as this argument goes, the fundamental purpose of service of court documents on a party had been achieved and Reuters UK had by such service been made fully aware of the claim it had to face, and with the full ability to respond to the claim since, ultimately, the authorization code was in fact made available to it by the appellant's lawyers.

[36] In response to the appellant's submissions on issue 2, the respondent accepts that Master Gardner-Hippolyte's substitution and service out order may have complied fully with the requirements of CPR 19.4, in so far as it satisfied the necessary requirement, that the appellant's application was on the basis that he had, by mistake, sued the wrong defendant and now wished to substitute the correct person as the defendant; and, further, that the order was made in circumstances where the relevant limitation period had expired. However, the respondent countered that in making the said order Master Gardner-Hippolyte did not address or consider the then validity of the claim form in these proceedings, that its validity had in fact expired and had not been extended, or that no application had been made pursuant to CPR 26.1(6) to dispense with compliance with CPR 8.13, or that the attempted service of the claim form and other documents on the original defendant, Reuters UK, was ineffective pursuant to Rule 13(3)(b) and (4) of the E-Litigation Rules. It is the respondent's submission that the claim form was at the time of the application for substitution and service out on Reuters USA, invalid and therefore incapable of being served on anyone, including the respondent.

[37] In answer specifically to the appellant's argument that the claim form was not a nullity but was at the time of making the substitution and service out order in 'limbo', counsel for the respondent submitted that the appellant's reliance on the English Court of Appeal's case of **Aklas v Adepta** was misplaced, as that decision was based on the English CPR rule 11 which is not on all fours with the EC CPR rule 8.13. Fundamentally, the English rule 7.6(3) permits an application to extend the

validity of a claim form to be made after the period of its validity has expired, that is, retrospectively, whereas the ECSC corresponding provision, rule 8.13, stipulates that an application to extend the period of the validity of a claim form must be made within the period of its validity or any extension of that period previously granted by the court.

- [38] This fundamental distinction between the corresponding English and ECSC rules was highlighted at paragraph [110] of **Maluf** and does not need to be repeated here. It is the respondent's submission that in **Maluf** the Court of Appeal found that where the validity of a claim form had expired, the claim form was 'invalid' and cannot therefore be served on a defendant to the proceedings. This decision is binding on the High Court and on this Court. In this regard, reliance was placed on the dicta at paragraphs [111] of **Maluf** where I stated (in material part) –

“[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 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.”

- [39] In response to the appellant's submission with regard to the purely technical points raised by the respondent with regard to service and the invalidity of the claim form, and what the justice of this matter requires, the respondent placed considerable reliance on a letter dated 23<sup>rd</sup> March 2021 from Richards & Company, lawyers for Reuters UK,<sup>5</sup> sent prior to the appellant filing its application for substitution and service out on Reuters USA. Specifically, the appellant refers to the penultimate and last paragraphs of the said letter by which the appellant was appraised of Reuters UK's position that it had not been served with the proceedings, and that the validity of the Claim form had expired. These two paragraphs read –

---

<sup>5</sup> (B1, p.440).

'We are not in a position to consent to your application pursuant to Part 19.4 of CPR 2000 since (1) We are yet to be served in these proceedings and (2) The claim has no validity since a period of more than 12 months has elapsed without service being effected.'

'We would suggest that the claim be re-issued. To assist with this course of action, the proper Defendant to your claim is: Reuters News & Media Inc. of 3 Times Square, New York, NY, 1—36, United States.'

## **Discussion and Analysis – Issue 2**

[40] In my considered judgment, there is no merit in this Issue 2 posited by the appellant. While it can be said that the requirements under CPR 19.4 for a court to make an order to substitute a new defendant for an existing defendant had been met by the appellant's application as granted by the order made by Master Gardner-Hippolyte, it is clear that the important position with regard to the then invalidity of the Claim form and the issue as to whether service on the existing defendant, Reuters UK, had been effected in London, had not been brought to the attention of Master Gardner-Hippolyte by the appellant as the applicant for the substitution and service out order. This was so notwithstanding that Reuters UK had brought these important issues to the attention of the appellant and its lawyers by the letter dated 23<sup>rd</sup> March 2020 from Richards & Company, sent to the appellant's lawyers Cort & Cort well-prior to the filing of the appellant's application for substitution and service out. Accordingly, Master Gardner-Hippolyte did not take these matters into account when considering whether to make the substitution and service out order on Reuters USA. This much is pellucid from the order of Master Gardner-Hippolyte. In light of this the Master did not address her mind to what if any steps could be taken to rectify this defect in the appellant's application and more fundamentally in the proceedings themselves.

[41] In my considered view, the operation of CPR 19.4 must be predicated on the existing claim form in the extant proceedings being valid. Respectfully, I do not accept the submission of Mr. Joseph KC to the contrary. In my opinion, an invalid claim form is, as counsel for the respondent submits, incapable of being served, and furthermore, incapable of being the subject of a Part 19.4 application for substitution

of a new defendant in place of an existing defendant unless the claim form had been validly or effectively served on the existing defendant or, alternatively, the validity of the claim form has not expired or has been extended so as to be current when the application and order for substitution and service and the order and consequential directions thereon made by the court.

[42] These conclusions are based on the provisions and operation of ECSC CPR 8.12 and 13. Under rule 18.12, a claim form must be served within the stipulated period. Generally, that is 6 months, but where the claim form is to be served out of the jurisdiction, as here, or in an Admiralty claim in rem, it is 12 months. Under CPR 8.13, to extend the validity of the period within which a claim form may be served, an application must be made by the claimant and within the current period of the claim form's validity, whether the original period or an extended period. Such an application may be made without notice but must be supported by evidence on affidavit. (r.8.13(3)) Unless the period for service of the claim form has been extended by court order, it follows logically that the claim form is invalid for service on a named defendant. This invalidity cannot be cured absent an application by the claimant to do so. That application must be made during the current validity of the period for service, unless resort is had by the claimant to the court being requested, pursuant to its powers under CPR 26.1(6), to dispense with compliance with the period or periods stipulated at CPR 8.13(a) for doing so in exceptional circumstances or, also in exceptional circumstance and in an appropriate case, to dispense with service of the claim form pursuant to the court's power to do so under CPR 7.8B. In this matter, there has been no application to extend the validity period of the Claim form pursuant to CPR 8.13 and no application made under rules 26.1(6) or 7.8B.

[43] In this regard, the dicta of Rix LJ at paragraph 18 of **Aktas v Adepta** is inapplicable to the situation under ECSC CPR 8.13. As I observed at paragraphs [110] and [111] in **Maluf** there are important differences in the provisions of the English CPR 7.6(3) and the ECSC 8.13. Accordingly, much reliance cannot be placed on the dicta at

the end of paragraph 18 in **Aktas v Adepta** to a claim form being in 'limbo' in circumstances where it had not been served within the stipulated period. This deduction is understandable and stands to reason where the applicable English rule permits for an application to extend the period for service to be made retrospectively. It loses that kind of logical force and is misplaced and does not apply in the context of ECSC CPR 8.13 where only prospective applications to extend are permitted. Under the ECSC CPR, where the validity of a claim form has expired without being extended and the claim form has not been served during the period of its validity, the claim form remains invalid and incapable of being served on a defendant. In such circumstances, the claimant can resort to refileing the claim giving rise to a new period of validity for the purpose of effecting service on the named defendant. Alternatively, having refiled the claim form, the claimant can apply to the court to dispense with its service on the defendant or on a particular defendant pursuant to CPR 7.8B if he can demonstrate, to the satisfaction of the court on affidavit evidence, that there are exceptional circumstances why the court ought to make such an order.

- [44] Equally misplaced, in my view, is the appellant's reliance on CPR 19.3(6)(b) as justification for the submission that the substitution order of Master Gardner-Hippolyte effectively breathes new life into the Claim form in these proceedings, which validity for service had expired without being extended, and in respect of which service could not be effected on any defendant, whether existing or substituted. As stated above, this proposition is unsupported by any authority cited to this Court by counsel for the appellant. This perhaps is unsurprising as, in my respectful view, there is no merit to this submission. Sub-rule (6) of Rule 19.3 is nothing more than a power to make certain consequential directions in circumstances where the court has been satisfied that it ought to grant an application for substitution of a party to extant proceedings where there is no legitimate question as to the validity of the period for serving the claim form, or where the claim form had been validly and effectively served on the existing defendant during the period of its validity for effecting service. In those circumstances, the

court's jurisdiction over the claim and the existing defendant would already have been grounded or invoked, as it is by service of a claim form being effected that the court's jurisdiction over the matter or cause and the person served flows. In **Barton v Wright Hassall LLP**,<sup>6</sup> a decision of the United Kingdom's Supreme Court, it was stated at paragraph 28 –

‘.... It is important that the communication of the contents of the document is by way of service, rather than for example just information. This is because service is that which engages the court's jurisdiction over the recipient and because important time consequences flow from the date of service....’

- [45] The importance of effecting service of originating processes to our system of justice and to the jurisdiction and power of the court over proceeding and parties, was also considered by this Court in **Jayson Stickings and another v RBC Royal Bank of Canada**.<sup>7</sup> In **Stickings**, Baptiste JA reviewed the relevant authorities of the English courts on the importance of service at paragraphs [27] to [38], including the dictum of Lord Clarke in **Abela v Baadarani**<sup>8</sup> and of Lord Sumption in **Barton v Wright Hassall LLP**, which learning collectively underscores that the first purpose of service is to ground jurisdiction in the court, and the secondary general purpose is to notify the recipient of the claim so as to engage the court's jurisdiction over that recipient giving rise to important time consequences flowing from the date of service. Baptiste JA at paragraph [39] surmised: -

“The authorities cited above contain principles of general applicability with respect to the importance of service of a claim form. In summary, the importance of service is evident both from a jurisdictional standpoint, and to bring to the attention of the defendant that a claim has actually commenced against him and on a particular day, as important time consequences flow from the date of service. From a jurisdictional standpoint, as a general rule, service of the claim form is the act by which the defendant is subjected to the court's jurisdiction. Although the court may grant interim relief before the proceedings have been served or even issued, that is an emergency jurisdiction which is both provisional and strictly confidential. Whether an originating process has been validly served goes to the root of the court's jurisdiction. Valid service of the claim form founds the court's jurisdiction.”

---

<sup>6</sup> [2018] UKSC

<sup>7</sup> ANUHCVP2021/0023 (delivered 6<sup>th</sup> July 2022, unreported).

<sup>8</sup> [2013] UKSC 44.

[46] In my view, in the instant matter, the necessary steps towards rectifying the clear ineffectiveness of the service on Reuters UK, the wrong defendant in the cause, and so as to ensure that the correct defendant, Reuters USA, is served with the claim in defamation, was for the appellant to file a new claim form and to apply either for a service out order on the new defendant, Reuters USA, or to dispense with service pursuant to an application showing exceptional circumstances under CPR 7.8B. The appellant failed to take any of these steps, and to do so timeously having regard to the impending expiration of the relevant limitation period for the cause of action. Instead, he resorted to filing in May 2021 an application for substitution and service out, by which time the relevant limitation period had expired. However, this did not necessarily prevent the claimant from filing a new claim, as limitation is not a bar to commencing an action, but a defence to the claim if raised or relied on by the defendant who has been validly served with the proceedings. The appellant chose the path which he did, no doubt based on legal advice. Unfortunately, he must live with the consequences of his decision in circumstances where he had not commenced the claim until just a few days before the relevant limitation period was due to expire, and where the Claim form and statement of claim had not been effectively served on the original defendant, Reuters UK, and its validity for service had expired without having been extended. Also, in circumstances where these latter two factors had been brought to the appellant's attention by the 23<sup>rd</sup> March 2021 letter from Richards & Company (referred to above), prior to filing his application for substitution and service out.

[47] The appellant submits that this is an **Anderton Category 2** case. In support of this he relies on the dicta at paragraph [115] in **Maluf**. With respect, this submission is also misplaced and incorrect. From the extract of paragraph [115] referred to above, it is clear that there are important differences and distinctions between this case and **Maluf**, such that would render this case not an Anderton Category 2 case. First and foremost, **Maluf** concerned an appeal from the order of a judge below dispensing with service of the claim form and statement of claim under CPR 7.8B in

circumstances where the claim had been brought to the attention of the named defendant, albeit not properly served in compliance with the mode of service permitted under and order for service out of the jurisdiction.

- [48] In the instant matter, there has been no application to dispense with service on the original defendant, Reuters UK, in circumstances where the authorization code had not been served with the claim form and statement of claim as required by Rule 13(3) of the E-Litigation Rules, rendering such service ineffective pursuant to Rule 13(4) of the said rules. It was certainly open to the appellant in these proceedings to make such an application and to do so on an urgent basis bearing in mind the validity period of the Claim form for service and the urgency created by the impending expiration of the relevant limitation period. Such an application could have been made on the basis that the Claim form and statement of claim had been brought to the attention of the original defendant who was therefore well-aware of the claim he had to meet and to answer, and no purpose would be served by re-serving the said originating documents on the said defendant. In **Maluf** there was no question as to the incorrect defendant being named as in the proceedings, and of service having been effected on an incorrect defendant. However, this would not have mattered in the instant matter had service of the Claim form and statement of claim been properly effected on the original defendant, Reuters UK, albeit the incorrect defendant to the Claim, for the purposes of an application to dispense with service on the basis that this was an Anderton Category 2 case. However, no such application was made to the court by the appellant and Master Gardner-Hippolyte was not required to consider such an application before considering and being invited to make the substitution and service out order on Reuters USA. In the instant matter, by the time of making the substitution and service out order the validity of the Claim form had expired, and the subsequent substitution order did not have the effect of rendering an invalid claim form for the purposes of service capable of being served on the substituted defendant, Reuters USA.

[49] Finally, on the appellant's point about the respondent raising purely technical points or issues and what the justice of the case requires the court to do, this has, in my view, been completely answered by the letter dated 23<sup>rd</sup> March 2021, in particular, the penultimate and last paragraph thereof. Furthermore, as stated above, the appellant faced with the issue of its service on the original defendant, Reuters UK, being ineffective or likely ineffective because of his failure to serve the authorization code on Reuters UK with the Claim form and statement of claim, had open to him several avenues whereby he could seek to cure such defect. However, regrettably, he failed to act and to act timeously to do so. I need not say anything more about this issue.

**Issue 3- Did Master Michel have the power to set aside Master Gardner-Hippolyte's substitution and service out Order, which order had not been appealed?**

[50] This issue is ground 8 of the appellant's notice of appeal. The appellant's submissions on ground 8 are to be found in his written submissions in the appeal. Not much, if any thing more, was said by counsel for the appellant about this ground during his oral presentation before this Court. This was most likely because of his management of the time allotted for completion of his submissions on behalf of the appellant. In any event, this ground was not abandoned by the appellant.

[51] The gravamen of this third issue and ground 8, is that Master Michel in his judgment 'was wrong to overturn the decision of a Master of equivalent jurisdiction', who was aware that the period of validity of the Claim form had expired when she made the substitution and service out order on 2<sup>nd</sup> December 2021, which order has not been appealed either by the original defendant, Reuters UK, or the Substituted Defendant, Reuters USA. Accordingly, in purporting to set aside the said order, the learned Master, in effect, assumed the role of an appellate court which he had no jurisdiction to do. Furthermore, Master Michel ought, in any event, to have found that 'in continuing with the proceedings notwithstanding this alleged defect [failure to serve the authorization code with the Claim form], the defendant(s) elected to

waive it.’ It is also the appellant’s case under this ground or issue that the power under CPR 9.7(6)(a) to discharge an order made before the claim was commenced or before the claim form was served, ‘did not provide any basis for the learned Master to make an order discharging the earlier order of Master Gardner-Hippolyte of 2<sup>nd</sup> December 2021, as the power in CPR 9.7(6)(a) is not intended to address the situation (as here) where (a) the previous order raised significant and substantial issues of law, and (b) the issues which form the basis of the extant application were raised before the court on the previous application.’ (para. 21 appellant’s notice of appeal)

[52] The appellant also submitted that CPR 9.7(6)(a) ‘is intended to deal with straightforward situations in which (a) previous orders must clearly be set aside as a result of the court concluding that it does not have jurisdiction in respect of a particular matter (emphasis added), and/or (b) the issues which form the basis of extant application were not raised before the court on the previous application.’ (para. 103 appellant’s submissions) I observe at this junction, that the appellant has cited no authority in support of this construction of and limitation on the court’s power under CPR 9.7(6). This provision contains three types of orders which the court may make consequent upon making an order or declaration that the court does not have jurisdiction or will decline to exercise its jurisdiction in a particular matter. One such consequential order is to set aside the claim form. This power must include the discharging of an order for service out of the claim form. There is no language in CPR 9.7 which limits or circumscribes the exercise by the court of its undoubted power to make any or all of the three consequential orders at sub-rule (6) upon making a finding of lack of jurisdiction, and certainly not in the two ways suggested by the appellant. In any event, as summarized at (a) above, the appellant seems to have accepted that the Master had the power under CPR 9.7(6)(a) to discharge Master Gardner-Hippolyte’s substitution and service out order having concluded that the court did not have jurisdiction to try the Claim, subject to the correctness of this conclusion. CPR 9.7(6) states: -

(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;

I strike out a statement of claim.

[53] The appellant submits further, that there is no direct equivalent in the ECSC CPR of the power contained in the English CPR 3.1(7): 'A power of the court under these Rules to make an order includes a power to vary or revoke the order'. While strictly speaking there is no special or equivalent provision in the ECSC CPR, it is certainly arguable that the High Courts of the member states and territories of the ECSC do have, in this respect, the same jurisdiction and power as the English High Courts. This is because, pursuant to section 11 of the Supreme Court Act, where there is no special or equivalent provision in the statutes, other laws and rule of court in the particular member country of the ECSC, the High Court of that member country have, as part of their statutory jurisdiction, 'the law and practice administered for the time being in the High Court of Justice in England'. By this provision, there being no special provision is contained in the statutes, any other law in operation and rules of Antigua and Barbuda, the High Court shall exercise such jurisdiction 'as nearly as may be in conformity with the law and practice for the time being in the High Court of Justice in England.' It is therefore more than arguable that, absent such a provision in the ECSC CPR, the provision of the English CPR 3.1(7) is applicable as part of the jurisdiction of the High Court of Justice in Antigua and Barbuda exercisable by a judge or Master of the court. Further or alternatively, a judge or master of the High Court does have, as one of the case management powers under Part 26, the power to 'take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective.' (emphasis added)

[54] In response to this issue and ground of appeal, the respondent, in its written submissions, argued that the power to set aside service of a claim form is clearly provided under CPR 7.7(2)(a), which provision was satisfied. (para. 34) Rule 7.7 states in material part-

“(1) Any person on whom a claim form has been served put of the jurisdiction under rule 7.3 may apply to set aside service of the claim form.  
(2) The court may set aside service under this rule if –

- (a) service out of the jurisdiction is not permitted under the rules;
- (b) the claimant does not have a good cause of action; or
- (c) the case is not a proper one for the court’s jurisdiction.”

[55] The respondent also submitted that the actual order made by Master Michel was to discharge the order made by Master Gardner-Hippolyte, and this was made on the basis of Master Michel’s findings at paragraph [33] of his judgment that at the date of Master Gardner-Hippolyte’s order the Claim form had become invalid under CPR 8.12. Moreover, it follows ineluctably from that conclusion that Master Gardner-Hippolyte’s order cannot stand, and the proceedings were automatically discharged as the court never had jurisdiction over the defendant, Reuter USA - jurisdiction being the consequence of service of the claim form. (paras. 36 and 37) Accordingly, Master Michel’s discharge of the order dated 2<sup>nd</sup> December 2021 was merely stating the obvious.

### **Discussion and Analysis – Issue 3**

[56] These points and counterpoints may conveniently be dealt with in brief as there is little or no merit in the appellant’s construction of the relevant provisions of the ECSC CPR. The respondent’s application filed 2<sup>nd</sup> June 2022 was for a declaration that the court has no jurisdiction to try the Claim (as amended), and for orders under rule 9.7(6)(c) to set aside the order of Master Gardner-Hippolyte dated 2<sup>nd</sup> December 2021, under rule 9.7(6)(b) to strike out the amended Claim form, and for costs. The declaration as to no jurisdiction was made, as were the orders setting aside of service of the Claim form on Reuters USA, discharging Master Gardner-Hippolyte substitution and service out order, and striking out the Claim, there being no valid claim form before the court.<sup>9</sup>

---

<sup>9</sup> (para. [82] judgment).

[57] In my considered view, having found the Claim form in these proceedings was invalid and incapable of being served on the Substituted Defendant, Reuters USA, and accordingly, that the court did not have jurisdiction to try the Claim, the learned Master had the power under and pursuant to CPR 9.7(6) to set aside its service on Reuters USA, discharge Master Gardner-Hippolyte's order dated 2<sup>nd</sup> December 2021, and to strike out the claim. These were permitted consequential orders which flow from the primary finding that the court, in the particular circumstances, did not have jurisdiction to try the Claim. This was on the basis that there had been no effective service of the claim form on the original defendant, Reuters UK, during the period of the validity of the Claim form and, as a result, the court did not become fixed with jurisdiction over the Claim and Reuters UK. There being no order prior in time to Master Gardner-Hippolyte's said order, extending the validity of the Claim form for service, the court had no jurisdiction to try the claim against the Substituted Defendant, Reuters USA.

[58] In my view, this accords with the meaning and effect of rule 9.7(6) and the court's powers thereunder consequent upon making a declaration that the court has no jurisdiction or will decline jurisdiction over to try the Claim. Further, there was ample power under rule 7.7(a) and (c) where the respondent, having been served out of the jurisdiction, could apply, as it did, to set aside service of the Claim form on it, and for Master Michel to set aside such service (including the service out order) having found that service of the claim form whose validity had expired without being extended by the court, is not permitted under the CPR and, accordingly, the court does not have jurisdiction to try the claim. As sub-rule (3) states, the court's powers under rule 7.7 to make those orders do not limit its powers under rule 9.7 (procedure for disputing the court's jurisdiction).

[59] The respondent cited CPR 11.16 which deals specifically with applications to set aside or to vary orders made without notice. Pursuant to CPR 19.3(1) the court has the power to add or substitute a party without an application. However, where the application is made under rule 19.2(5) to substitute a party where the existing party's interest or liability has passed to the new party (which is not the case here), it may

be made without notice.<sup>10</sup> In the instant matter, there is no evidence before this Court in the appeal record, that the appellant's application filed 11<sup>th</sup> May 2021 to substitute Reuters USA as the defendant in these proceedings was served on the existing defendant Reuters UK. The only evidence is that such an application had been foreshadowed in correspondence from the appellant's lawyers to the lawyers for Reuters UK, who took the stance, as communicated in a letter dated 23<sup>rd</sup> March 2021, that their client was not 'in a position to consent to your proposed application pursuant to Part 19.4 of CPR 2000'. This was for the reasons stated in the said letter (as already set out above). This letter was sent well before the substitution application was filed. The upshot is that there was no service of the said application which proceeded to be heard by Master Gardner-Hippolyte on a without notice. Indeed, the resulting order of the Master does not record that notice of the application was given to Reuters UK or that any counsel appeared at the hearing on its behalf. Furthermore, there is no requirement under Part 19 for notice of a substitution application to be given to the person to be substituted or for them to consent to be substituted as a defendant in the extant proceedings. Such orders are usually made on the application of the claimant which is then to be served with the claim form and other documents on the new defendant, who may elect, if service is effected out of the jurisdiction, to apply under rule 7.7 to set aside service, and under rule 9.7 to challenge jurisdiction.

[60] Accordingly, for the reasons set out above, I find no merit in this issue and ground of appeal.

**Issue 4 – Did Reuters USA submit unequivocally to the jurisdiction of the court?**

[61] This is the appellant's best point and ground of appeal. In support of this issue and grounds 9,10 and 11 (which may conveniently be dealt with together), the appellant placed much reliance on the fact that the respondent, Reuters USA, having been served with the Claim form and statement of claim (along with the authorization

---

<sup>10</sup> (CPR 19.3(3)).

code), filed an acknowledgement of service on 21<sup>st</sup> March 2022 in which it did not make any reservation of its right to challenge jurisdiction; and subsequently filed an application on 6<sup>th</sup> May 2022 for an order to extend the time to file its defence, again without expressly reserving its right to challenge jurisdiction. In its application to extend the period for filing its defence and in the supporting affidavit of Shirmain Massicot filed the same day (the Massicot Affidavit), the appellant ground its application on the fact that its lawyers had received a settlement proposal from the appellant, upon which they were yet to receive its instructions, and needed more time to obtain said instructions and conclude the settlement discussions/negotiations, and “thereafter to file its defence, if such a course of action is necessary.”<sup>11</sup> It was also stated at paragraph 8 of the Massicot Affidavit, that in granting the application to extend time for filing the defence “the court would be acting in furtherance of the overriding objective to manage cases justly.”

[62] Before this Court, counsel for the appellant submitted that this evidence demonstrated a clear and unequivocal submission by the respondent to the court’s jurisdiction to try the Claim, and the learned master erred in finding, on the materials before him, that there had been no such submission to jurisdiction. In support of this contention, much reliance was placed on the applicable test and principles of law as reviewed in the decision of this Court in **Alexander Katunin and another v JSC VTB Bank**.<sup>12</sup> In **Katunin**, this Court applied with approval the test and principles as formulated in the decision of the English court in **SMAY Investments Ltd and another v Sachdev and others**.<sup>13</sup> At paragraph [18] of the judgment of this Court in **Katunin**, Thom JA, having reviewed the authorities, opined –

“In my view, the correct test is the test outlined at paragraph 41 in **SMAY Investment**. The conduct that is said to amount to submission to jurisdiction must be wholly unequivocal. The conduct must not simply be consistent with submission to jurisdiction, but there must be no other explanation for it. In determining whether conduct is unequivocal the court is required to look at the circumstances of the case. While the judge did not use the same words as in **SMAY Investment**, the language of the learned judge had the

---

<sup>11</sup> (para. 7 Massicot Affidavit).

<sup>12</sup> BVIHCMAP2015/ 0004 & 0007 (delivered 20<sup>th</sup> June 2016, unreported).

<sup>13</sup> [2003] EWHC 474.

same effect. Indeed the language used by the learned judge is quite similar to the language used in Blackstone's Civil Practice 2013 The Commentary where the learned authors stated, "In the absence of any express agreement to submit to the jurisdiction, it is a question of whether the defendant's conduct, when viewed objectively in the context of all the circumstances of the case, is inconsistent with maintaining an objection to the jurisdiction of the court."

[63] In applying the 'wholly unequivocal' test, it must be borne in mind that each case must be decided on its own facts. Thus, in determining whether that high bar has been established, such that it can be stated that the defendant's steps taken in the litigation were consistent only with him having accepted the jurisdiction of the court to try the claim brought against him or, put another way, he has waived his right to challenge jurisdiction, a court must look at all the circumstances of the case.<sup>14</sup> While one factor may carry more weight in making a determination of submission to jurisdiction, it will not singularly be decisive or determinative but must be considered against other factors and the circumstances of the case.

[64] In **Katunin**, the appellant had expressly reserved in his application for extension of time to file the defence his right to challenge jurisdiction, and the time for doing so under the applicable rule 9.7(3) of CPR, had not expired.<sup>15</sup> In the instant matter, learned counsel for the appellant stressed that no such reservation was made by the respondent in its application to extend the time to file its defence. It was submitted by the appellant that this amounted to an unequivocal submission to the court's jurisdiction, as being the clearest evidence of such, especially when the grounds for the said application and the statements at paragraphs 5, 7 and 8 of the Massicot Affidavit are taken into account. It was also submitted that these statements in the Massicot Affidavit, when viewed objectively, amount to a clear intention to defend the claim on its merits and, therefore, to submit to the court's jurisdiction. In short, the appellant submits that these matters, when viewed by a court objectively through the lens of the 'disinterested bystander with knowledge of

---

<sup>14</sup> BVIHCMAP2015/ 0004 & 0007 (delivered 20<sup>th</sup> June 2016, unreported) para. [26].

<sup>15</sup> Ibid paras. [20] & [24].

the case', are inconsistent with maintaining an objection to jurisdiction, and consistent only with one interpretation or explanation, that is, an intention to submit to jurisdiction and to defend the claim on its merits.

[65] Reliance was placed also on this extract from Dicey, Morris and Collins on the Conflict of Laws 14<sup>th</sup> ed, Sweet & Maxwell, 2006 para. 11-1345 cited at paragraph [21] in **Katunin**-

'The clear trend of the modern authorities is that the defendant will not be regarded as having submitted by making an application in the proceedings provided that he has specifically reserved his objection to the jurisdiction.'

[66] This passage speaks to what is seen as the modern trend. It does not establish a hard and fast rule that absent an express reservation on or objection to jurisdiction in the defendant's application to extend the time for filing a defence to the claim, the defendant will be taken to have wholly unequivocally accepted the court's jurisdiction in the matter. The court must still consider this factor (an application to extend time to file a defence) in its proper context and purpose, and in light of all the circumstances of the case in determining, objectively, whether there was a wholly unequivocal submission to jurisdiction by the defendant applicant. This principle is consistent with what Thom JA stated at paragraph [23] in **Katunin**:-

"[23] While I agree that an application for an extension of time to file a defence is per se consistent with submission to the jurisdiction, having regard to the circumstances of this case, I am of the view that it was not. The purpose of making the application was not solely for the extension of time to file a defence, but it was also for the purpose of allowing Mr. Kathnin to file his challenge to jurisdiction."

[67] Counsel for the appellant also took the Court to the reasoning and analysis at paragraph [26] of **Katunin**. There, Thom JA emphasized that while the filing of an affidavit in response to a summary application can be considered a submission to jurisdiction, the legal authorities such as **SMAY Investment and Sage v Double A Hydraulics Ltd**<sup>16</sup> 'emphasize that in determining whether a party has submitted to

---

<sup>16</sup> [1992] Times Law Reports 165.

jurisdiction, the court must look at all the circumstances of the case.’ The Court went on to stress that –

‘...from the very first step of filing the acknowledgement of service, Mr. Katunin made clear that he intended to challenge the jurisdiction of the court. Mr. Katunin maintained this position in various correspondence from his counsel. He included a reservation in the application for extension of time and in the affidavit.’ In the end this Court found that ‘it cannot be said that the only possible explanation for the filing of the affidavit [in response to the Bank’s application for summary judgment] was the intention of Mr. Katunin to have the claim tried by the court, when in the very affidavit Mr. Katunin made it clear that he intended to challenge the jurisdiction of the court, and he followed up his reservation with the filing of the challenge to jurisdiction within the time prescribed by CPR 2000. In my view, when all the circumstances are taken into account, the steps taken by Mr. Kathunin did not amount to a wholly unequivocal submission to the jurisdiction of the court.’

[68] In concluding, counsel for the appellant posited that there were only two ways in which or by which the respondent could have not submitted to the jurisdiction of the court when making its application to extend the time for filing its defence to the Claim. These are: (a) by filing an application within the original period for filing the defence, challenging the jurisdiction; and (b) making an express reservation of its right to challenge the jurisdiction of the court when making the application to extend time to file its defence. Neither of these steps having been taken, and when these factors in particular paragraphs 7 and 8 of the Massicot Affidavit, are viewed objectively through the lens of the disinterested bystander with knowledge in light, the evidence is clear and unequivocal, that the appellant by filing the said application submitted to the court’s jurisdiction and intended to defend the claim on its merits. Such steps were inconsistent with a reservation of its right to challenge jurisdiction, and consistent only with an intention to submit to or accept the court jurisdiction and defend the claim on its merits. Accordingly, it is submitted that the learned Master erred in this important respect in relation to his evaluation of the evidence and application of the test. In those circumstances, his decision ought to be set aside and the respondent’s application disputing jurisdiction and to set aside service and strike out the Claim ought to be dismissed.

[69] In response to this issue and the appellant's submissions, Counsel for the respondent argued that pursuant to CPR 9.7 a defendant who intends to challenge jurisdiction may apply to extend the time for filing its defence. Accordingly, it submitted, this is entirely neutral or equivocal. In my view, this is an entirely reasonable and pragmatic way to view sub-paragraph (3) of rule 9.7. This is why, in those circumstances, the test is that the court must be satisfied that the step taken in the proceedings said to amount to a waiver of that right, must be 'wholly unequivocal' (SMAY Investments at paragraph 41). Rule 9.7(3) states –

(3) An application under paragraph (1) of this rule must be made within the period for filing a defence; the period for making the 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.

[70] Mr. Carrington's next point in response is that on a proper reading the Massicot Affidavit does not talk about the respondent putting in a defence on or to the merits of the claim, if the settlement negotiations do not bear fruit. As mentioned above, paragraph 7 of the said affidavit states "thereafter file its defence, if such a course of action is necessary." This point, while not the respondent's strongest, does have some merit when considered in the context of the court being required to look at all the circumstances of the case. This includes the purpose for which the application to extend time for filing the defence was made. The court must also determine whether that statement at paragraph 7 of the Massicot Affidavit is wholly unequivocal and consistent only with an acceptance of jurisdiction and intention to defend the claim on its merits, as the appellant contends. While this statement in the Massicot Affidavit does not expressly state that the respondent would defend the claim on its merits, it is capable of such an interpretation. However, the use of the words "if necessary" may also be said reasonably to be indicative of some reservation as whether filing a defence on the merits would be necessary, even where the settlement negotiations prove unsuccessful in resolving the claim between the parties. Having said this, in my considered judgment the statement at

paragraph 7 is capable of two reasonable interpretations, one declaratory of the respondent's intention to defend the claim on its merits and the other not.

- [71] Counsel for the respondent submitted that the more important point is: 'How can a party submit to the jurisdiction when the Claim form is invalid. Parties cannot agree to confer jurisdiction on the court. Parties cannot waive matters so as to confer a jurisdiction on the court which it does not otherwise have.' In his reply, learned counsel for the appellant submitted that the respondent, Reuters USA was served with the Claim form and statement of claim and authorization code. Accordingly, there was no active invalidity in the proceedings or Claim, such as would render any step taken by it in the proceedings, such as filing an application to extend time to file its defence without expressly reserving its right to challenge jurisdiction of the court, incapable of amounting to a submission to jurisdiction.

### **Discussion and Analysis**

- [72] I have above sought to address and to analyze to some extent the various points relied on by both sides in relation to this fourth issue. There is no dispute between the parties over the applicable test and legal principles to be considered when determining whether a party has submitted to the jurisdiction of the court or waived its right to challenge jurisdiction. The test is that the act or step taken in the proceedings must be 'wholly unequivocal' of a submission to jurisdiction. That is, it must when viewed through the lens of the 'disinterested bystander with knowledge' of the pertinent factors. When so viewed, it must be capable of or consistent only with one conclusion, that is, submission to jurisdiction. If so viewed it is capable of two interpretations, one consistent with a submission to jurisdiction and the other not, then it does not meet the test, and the court must conclude that the defendant has not by that step or steps in the litigation submitted to the court's jurisdiction to try the claim.
- [73] This issue of waiver was dealt with by Master Michel at paragraphs [53] to [59] of his judgment. He correctly set out the test and applicable legal principles from the

authoritative cases. This is not in dispute. At paragraph [53] he correctly set out the three actions taken by the respondent which the appellant relied on to invite him to conclude amounts to a waiver of its right to challenge jurisdiction. At paragraphs [56] and [57], the learned Master in reasoning to the conclusion that the test of 'wholly unequivocal' had not been satisfied, relied on the provisions of CPR 9.7 which permit a defendant to apply to extend the time to file its defence (or to seek and obtain the consent of the claimant to an extension), and in doing so, to still maintain his right to challenge the court's jurisdiction to try the Claim. In my view, as mentioned above, this is at minimum neutral and equivocal. It cannot follow that where a defendant has sought and obtained either an order of the court or the consent of the claimant to an extension of the period for filing its defence to the claim, that automatically the defendant must be considered to have submitted to the court's jurisdiction to try the claim. Something more must occur in the litigation to render such an application wholly unequivocal when viewed objectively and in the context of all the circumstances of the case.

- [74] However, I do not understand that to be the submission of the appellant before this Court. The appellant's point is that by not expressly reserving in its application to the court to extend time, its right to challenge the court's jurisdiction, the respondent has unequivocally submitted to the jurisdiction as the modern trend in cases is to so find unless there was an express reservation of jurisdiction as, for example, in Katunin. On the failure to expressly reserve its right to challenge jurisdiction, the learned Master concluded as follows: -

"[58] In my view, it matters not that Reuters US did not explicitly say in its application for an extension of time that it reserved its right to challenge the Court's jurisdiction(sic). Whilst doing so may have left the matter without doubt, to my mind, the absence of such a statement does not mean that Reuters US is then automatically deemed as waiving its right to dispute the jurisdiction of the Court. The rules clearly provide for the period within which an application can be made to dispute the jurisdiction to include 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." (emphasis added)

[75] I must confess some difficulty with the Master's use of the words 'it matters not', in the passage above. To my mind, this is either incorrect or an overstatement of the position. An application to extend time to file the defence, without such express reservation on jurisdiction, is one of the relevant factors, and an important one, for the court to weigh when applying the test of the 'disinterested bystander with knowledge.' The more correct way to view such a factor is that the absence of such an express reservation is but one factor, indeed one of some strength, in the court considering whether, looked at objectively, through the lens of the disinterested bystander, and considering all the relevant circumstances, it can be concluded that the application in the particular matter without the reservation on jurisdiction, is a wholly unequivocal waiver, being consistent only with a submission to jurisdiction. That said, I agree with and approve of the remainder of the Master's statements in the same passage to the effect that the absence of the reservation on jurisdiction does not 'automatically mean that Reuters USA is automatically deemed to have waived its right to dispute jurisdiction.'

[76] Likewise, I do not interpret the statement in Dicey, Morris and Collins on the Conflict of Laws concerning the 'modern trend' in the cases, to mean that absent an express reservation being made by a defendant when making an application in the proceedings within the time for filing a defence, the defendant will or must be considered by the court to have unequivocally submitted to the court's jurisdiction, or waived his right to challenge jurisdiction within the period for filing the defence.

[77] The second factor considered by Master Michel, concerns the statements in the respondent's notice of application and in the Massicot Affidavit regarding the settlement proposal, and requiring further time for instructions thereon from the respondent, for the discussions and negotiations to have a chance to be completed, and which may then obviate the necessity to file a defence. The learned Master concluded on this issue at paragraph [56] –

"To my mind, in the circumstances of this case, engaging in settlement discussions after being served with the claim is not a wholly unequivocal waiver of the right to dispute the court's jurisdiction."

- [78] I can see no legitimate basis of principle or otherwise upon which it can be said that the Master erred or got this blatantly wrong, such that this Court ought to make a contrary finding and set aside his decision. Settlement talks or negotiations are to be encouraged and not strictly circumscribed by the specter of a likely submission to jurisdiction or waiver of the right to challenge jurisdiction. Furthermore, settlement talks may cover a range of issues pertinent to the litigation and the parties thereto, including whether the claim has any proper jurisdictional underpinning. As the learned Master opined at paragraph [57]: 'There can be a number of reasons why a party wishes to have a matter settled outside of court rather than have it adjudicated upon in some way by the court.'
- [79] However, in my view, this aspect raises another important consideration. It is the stated purpose for making the application to extend the time to file the defence was to facilitate the proper advancement and conclusion of the settlement negotiations, an offer of settlement having been conveyed in writing by the appellant to the respondent. This is an important factor which places the respondent's said application in a particular context and which, when viewed objectively through the lens of the 'disinterested bystander' may lead to the conclusion that the application was not consistent only with a submission to jurisdiction, albeit made without an express reservation of jurisdiction. At minimum, this factor is capable of giving rise to two conclusions, one consistent with no intention to submit to the court's jurisdiction and the other supportive of and consistent with such a submission.
- [80] This factor was addressed by the learned Master at paragraph [57] where he considered the dicta of Thom JA at paragraph [23] in **Katunin** that an application to extend time to file a defence 'being per se consistent with submission to jurisdiction.'<sup>17</sup> However, the learned Master concluded –

---

<sup>17</sup> see para. [23] of *Alexander Katunin and another v JSC VTB Bank BVIHCMAP2015/ 0004 & 0007* (delivered 20<sup>th</sup> June 2016, unreported).

'I am of the view that having regard to the circumstances of this case, the extension of time was also being sought so that Reuters US could have out of court settlement discussions with the claimant. The only steps that Reuters US took after this was then to file its application to dispute the jurisdiction of the court on the last day to which time was extended for filing its defence.'

[81] The question of whether, in any event, the respondent could, by filing its application to extend the time for filing the defence, be said wholly unequivocally to have waived its right to dispute jurisdiction in circumstances where, as here, the claim form in the proceedings was then invalid and incapable of being served on the respondent, was not canvassed before the learned Master. It was raised before this Court by counsel for the respondent in his oral submissions and responded to by counsel for the appellant. In my view, this is an important point. The basis upon which it has been concluded that the Claim form was invalid is the failure to effect service of it on the original defendant, Reuters UK, within the period of validity of the claim form for service; there being no subsequent extension of that validity period by a court. The claim form's invalidity continued up to and including when it was purportedly served on the respondent, Reuters USA. As dealt with above, this was not cured by the substitution and service out order of Master Gardner-Hippolyte, who was not requested by the appellant to determine or to pronounce on the effectiveness of the purported service of the Claim form and statement of claim on the original defendant, Reuters UK, in London England, absent compliance with Rule 13(3)(b) of the E-Litigation Rules, which service was deemed ineffective by Rule 13(4).

[82] It is my conclusion that in these circumstances there could be no service whilst the invalidity of the Claim form exists. This was so notwithstanding Master Gardner-Hippolyte's substitution and service out order. In those circumstances, there could be no effective submission to jurisdiction by Reuters USA by the filing of its application to extend the period for filing the defence. In short, the alleged waiver and submission to jurisdiction could not be considered to have met the test in *SMAY Investment*, as further illuminated in **Kathunin**. Accordingly, for this additional reason the decision of the learned Master ought to be upheld.

### **Disposition**

[83] For the reasons stated above, I do not agree with any of the four issues or propositions of law upon which the appellant has argued his appeal. In effect, I do not agree with and would reject all 11 grounds of appeal as set out in his notice of appeal filed 4<sup>th</sup> August 2023.

### **Orders**

[84] Accordingly, I would make the following orders: -

(1) the appeal is dismissed;

(2) cost in the appeal to the respondent, Reuters News & Media Inc., to be paid by the appellant, Calvin Ayre, such cost to not exceed two-thirds of the costs awarded in the court below.

[85] I thank counsel for both parties for their helpful submissions.

I concur.

**Dame Janice M. Pereira, DBE**  
Chief Justice

I concur.

**Trevor Ward**  
Justice of Appeal

**By the Court**

**Chief Registrar**