

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

ANGUILLA

AXAHCVAP2023/0005

BETWEEN:

TOMAŽ SLIVNIK

Appellant

and

[1] MARTIN DINNING (as Conservator)
[2] HUDSON CARR (as Conservator)
[3] SHAWN WILLIAMS (as Conservator)
[4] ROBERT MILLER (as Conservator)
[5] EASTERN CARIBBEAN CENTRAL BANK
[6] ANGUILLA FINANCIAL SERVICES COMMISSION
[7] ATTORNEY GENERAL OF ANGUILLA
[8] FOREIGN, COMMONWEALTH AND DEVELOPMENT OFFICE
[9] NATIONAL BANK OF ANGUILLA LIMITED (IN RECEIVERSHIP)
[10] CARIBBEAN COMMERCIAL BANK LIMITED (IN RECEIVERSHIP)
[11] GARY MOVING (as Receiver of NBA and CCB)
[12] NATIONAL COMMERCIAL BANK OF ANGUILLA LIMITED

Respondents

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mde. Esco L. Henry
The Hon. Mr. Reginald Armour

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

Appearances:

The Appellant in person
Mr. Paul Dennis, KC with him Ms. Navine Fleming and Mrs. Nadine Whyte Laing for
the 2nd, 3rd, 5th, 9th, 10th and 11th Respondents
Ms. Yanique Stewart for the 6th Respondent
Mr. James Willan, KC with him Mr. William Hare and Mr. Alex Richardson for the
12th Respondent

2025: May 5;
July 23.

Application to adduce fresh evidence – Whether the evidence could not have been obtained with reasonable diligence for use at the trial – Whether the evidence would have an important influence on the result of the case – Whether it is just in all the circumstances for the Court to grant the application – Interlocutory appeal – Appeal against decision of the learned master to set aside the extension order for service of the claim form and striking out the claim with respect to some of the respondents - Whether the learned master erred in the exercise of his discretion by refusing leave to the appellant to effect service on the fourth respondent by substituted service - Whether the learned master erred in the exercise of his discretion by setting aside the Extension Order as against the 2nd, 3rd, 5th, 6th, 7th, 9th, 10th, 11th and 12th respondents – Whether the learned master erred in the exercise of his discretion by refusing the application to amend the claim.

On 22nd February 2022, the appellant and 17 other natural and corporate persons filed a claim in the Anguilla High Court seeking among other reliefs, damages from the respondents for breach of statutory duty, fraudulent preference and/or expropriation of their deposits of US\$14,850,981.22 held at National Bank of Anguilla Limited (in Receivership) ('NBA'), the ninth respondent, and at Caribbean Commercial Bank Limited (in Receivership) ('CCB') the tenth respondent. The claimants had not served the claim on the respondents by 16th August 2022. On that date, without notice to the respondents, the claimants applied for an order extending the time for service of the claim form. The application was granted by court order dated 18th August 2022 (the 'Extension Order') extending the time for service of the claim form until 21st January 2023, a period of 6 months.

The Extension Order was served on the third respondent, Mr. Shawn Williams on 22nd November 2022; on the fifth respondent the Eastern Caribbean Central Bank (ECCB), the seventh respondent the Attorney General of Anguilla, the ninth respondent the NBA, the tenth respondent the CCB and the eleventh respondent, Mr. Gary Moving on 24th November 2022. The second respondent, Mr. Hudson Carr and the sixth respondent, Anguilla Financial Services Commission ('FSC') were served on 14th December 2022.

On 8th December 2022, Mr. Williams, ECCB, NBA, CCB and Mr. Moving filed an application to set aside the Extension Order and for an order striking out the claim against them. Mr. Carr filed a similar application on 30th December 2022 and on 11th January 2023, the FSC filed its own application for identical orders. The respondents grounded their application to set aside in rule 8.13(4) of the Civil Procedure Rules, 2000 ('CPR'). They contended that the appellant's application to extend did not comply with the requirements of that rule.

On 21st November 2022 the claimants filed an application to amend the claim form. On 16th December 2022, they applied for leave to serve the claim out of the jurisdiction on the first respondent Martin Dinning and on 21st December 2022 for an order to substitute personal service on the fourth respondent Robert Miller by service on the ECCB. Finally on 16th February 2023, the appellant applied to extend the validity of the claim form in relation to the first, fourth and eight respondents. The applications were all heard by the learned master on 27th and 28th February 2023.

By written decision delivered on 25th April 2023 (the 'First Decision') the learned master set aside the Extension Order (the 'Setting Aside Order') holding that no good reasons were advanced as to why the claim had not been served on the respondents within the jurisdiction during its validity and no special reason had been given to justify extending the period of validity. Additionally, he found that no evidence was proffered of what if any steps had been taken to trace or serve some of the respondents including the seventh respondent during the claim's validity; and from the evidence a deliberate litigation decision was made not to serve them by reason of a tangential case.

The learned master therefore struck out the claim against the 1st, 2nd, 4th, 6th, 7th, 9th, 10th, 11th and 12th respondents (the 'Strike Out Order'); dismissed the application to amend the claim (the 'Amendment Order') and denied the claimants leave to serve the claim form out of the jurisdiction on the first respondent (the 'Service Out Order') or on the fourth respondent by substituted service (the 'Substituted Service order'). The parties were then ordered to file written submissions on costs within 14 days.

The learned master inadvertently omitted in the First Decision to consider the appellant's application to extend the validity of the claim. Accordingly, by further written decision delivered on 3rd May 2023 (the 'Second Decision'), he determined that application and vacated the orders refusing the application to amend the claim form and striking out the claim against the first respondent. The learned master extended the validity of the claim form against the first and eighth respondents for 45 days and granted the appellant leave to personally serve the claim form on them out of the jurisdiction at their respective addresses. He made various consequential orders.

Dissatisfied with the learned master's decisions, the appellant filed his appeal on 6th June 2023 against the Setting Aside Order, the Strike Out Order, the Amendment Order and the Substituted Service Order. The Court identified the following 3 issues for consideration on the appeal: (1) Whether the learned master erred in the exercise of his discretion by refusing leave to the appellant to effect service on the fourth respondent by substituted service; (2) Whether the learned master erred in the exercise of his discretion by setting aside the Extension Order as against the 2nd, 3rd, 5th, 6th, 7th, 9th, 10th, 11th and 12th respondents; and (3) Whether the learned master erred in the exercise of his discretion by refusing the application to amend the claim.

Prior to the appeal the appellant filed an application on 12th January 2024 for leave to adduce fresh evidence. The fresh evidence sought to be adduced are a medical report of Mariel Lesley Crabtree ('patient 1') prepared by Dr. Jaiyesh Kumar dated 22nd April 2022; a case history form of patient 1 dated 23rd April 2022; a medical report of patient 1 prepared by Rona E. Hodge, dated 25th June 2022; a CT brain scan report on Mr. Walter John Bayer II ('patient 2') prepared by Dr. Nilesh Ingale dated 18th May 2022; a medical report of patient 2 dated 23rd May 2022; the 2023 annual return of C11 evidencing that patient 1 was a director of C11 between 21st February 2022 and 21st August 2022; and the 2023 annual return of C15 evidencing that patient 1 was a director of C15 between 21st February 2022 and 21st August 2022. The grounds of the application were that the fresh evidence could not

have been obtained with reasonable diligence for use in the court below; it is such as to be presumably believed and would have an important influence on the result of the case and it is in the best interest of the overriding objective that the fresh evidence be admitted.

Held: dismissing the application to adduce fresh evidence, allowing the appeal in part, awarding costs to the respondents and making the orders at paragraph [114] of this judgment, that:

1. To succeed on an application to adduce fresh evidence the applicant must satisfy the court firstly, that it was not possible to obtain the evidence with reasonable diligence for use at the trial. Secondly, it must be established that the evidence would likely have an important influence on the outcome of the case but it need not be determinative. Thirdly, while the evidence does not have to be incontrovertible, it must appear to be credible. Where a fresh evidence application arises with respect to an interlocutory appeal the first criterion is to be applied with less rigour. In applying the first limb, it is clear that the medical reports of patient 1 and patient 2, the case history form of patient 1, the CT brain scan report of patient 2 had been available before the claimants filed their evidence in response to the set aside application. Those materials could therefore have been obtained with reasonable diligence by the claimants and presented to the court as part of the evidence. The 2023 annual returns would not have been available until they were filed in June and September 2023. They were therefore not within the applicant's possession or control at the relevant time of submitting evidence. As to whether the medical reports and forms would likely have had an important impact on the outcome of the case, the Court is of the view that they would not. The alleged unavailability of patient 1's spouse and/or patient 2 to contribute to group discussions among the claimants did not prevent the claimants from giving instructions to legal practitioners to lodge the application for an extension of the claim's validity. Further, there is no evidence that the strokes suffered by the patients contributed to lack of service of the claim during the period of validity. In these circumstances the applicant has failed to satisfy the first and third limbs of the test to adduce fresh evidence.

Ladd v Marshall [1954] 1 WLR 1489 applied; **Geminis Investors Limited v Goods Technology Starting International Limited** BVIHCMAP2022/0043 (delivered 23rd August 2023, unreported) followed.

2. The Court retains implicit and inherent jurisdiction to make orders to achieve its objectives of correcting wrong decisions and ensuring public confidence in the administration of justice. Notwithstanding the seventh respondent's initial avowed neutrality to the set aside application, the court settled on the position that by virtue of the common interest among the respondents the determination of the set aside application cannot be fragmented. Furthermore, although the issue of the validity of the claim form with respect to the seventh respondent did not arise as a separate issue for the learned master's consideration during the hearing, he was correct to address his mind to it to ensure that consistency of treatment is maintained and that

no absurd result arises from the court's determination of the set aside application. It was necessary and proper for the learned master to consider it since the seventh respondent made representations to which the appellant responded. The impugned orders setting aside the Extension Order and striking out the claim against the seventh respondent were appropriate.

Taylor v Lawrence [2002] All ER 353 followed.

3. The learned master's finding that as there was no valid claim form to be served and that it was not necessary to consider the application to amend the claim form cannot stand in regard to the first and eighth respondents, in light of his failure to revisit this ruling in the Second Decision in which he found that a valid claim form existed in relation to them. The appeal on this ground must be allowed and the Amendment Application must be remitted for consideration, limited only to the first and eighth respondents
4. It is clear that the learned master failed to consider relevant material (the evidence of Mr. Liburd and Mr. Byron) as to the fourth respondent's residence and whereabouts when he determined the application for substituted service. As a result, the learned master concluded that the fourth respondent resided within the jurisdiction and by extension that the validity of the claim form had expired in relation to him. By omitting consideration of those two affiants, the learned master erred. It is therefore necessary for the Court to consider the application for substituted service afresh. In considering an application for substituted service the Court must, in accordance with CPR 1.2 have regard to the overriding objective to act justly. It must take into account any prejudice or advantage that would be occasioned to either party by the grant or refusal of the application and it must be satisfied that the claim form is valid and that the proposed method of service would probably enable the defendant to become aware of the contents of the claim. Mr. Byron's evidence introduces significant doubt that the proposed method of service would likely have brought the claim documents to the fourth respondent's attention. While it is accepted that the evidence supports a finding that the fourth respondent lives outside the Federation of Saint Christopher and Nevis and that the claim form was valid, the application should not be granted as service on the ECCB is unlikely to result in the contents of the claim form and statement of claim coming to the fourth respondent's knowledge. This ground of appeal is accordingly dismissed.
5. The CPR dictates that a claim form must generally be served within 6 months of its issuance (Rule 8.12(1)). Rule 8.2(1) provides that a claim form may be issued without the statement of claim or supporting affidavit only where the claim form contains all of the information that rules 8.6, 8.7, 8.9 and 8.10 mandate are to be included or if the court grants permission. A claimant who encounters genuine difficulties serving the claim form within the time limited by rule 8.12 may apply to the court under rule 8.13(1) for an extension of the time within which to serve the claim and the application must be supported by affidavit evidence. The court may in

the exercise of its judicial discretion extend the validity of the claim form pursuant to CPR 8.13(4)(a) or (b) but only if satisfied on the evidence that the claimant has taken all reasonable steps to trace the defendant and serve the claim but has been unable to do so; or that there is some other special reason for extending the period. The special reason gateway is introduced under sub-paragraph (b) of rule 8.13(4). The regime for extension of the validity of a claim form is, as a matter of public policy and public interest, strict and the protocols and rules rigidly observed and applied. The power to extend the validity of a claim is only to be exercised for 'good reason', which would normally involve showing good reason for the failure to serve the claim form during the period of its validity. The court will have a special reason for doing that only if the claimant has previously been precluded or has refrained from effecting service in circumstances which make it unjust that he should not be granted an extension of time within which to effect service.

Rondex Finance Inc v Ministry of Finance of the Czech Republic BVIHCV2010/0069 (delivered 13th May 2011, unreported) followed; **Aktas v Adepta** [2011] QB 894 applied; **Marty Steinberg and others v Swisstor & Co and another** BVIHCVAP2011/012 (delivered 12th March 2012, unreported) followed; Rules 8.12(1) and 8.13(4) of the Civil Procedure Rules, 2000 applied.

6. It is not disputed that the learned master had no medical evidence before him as to the fact of or the timing of the illnesses of the patients. What is clear however is that the existence of the extension application and the affidavit evidence before the learned master reflects that the claimants appeared to encounter no difficulty in obtaining adequate instructions from the patients or their representatives with respect to the filing of that application during the relevant period or, alternatively, with proceeding without such instructions. In addition, the appellant has adduced no evidence to demonstrate how the patients' strokes prevented the service of the claim and no information was set out detailing what, if any, steps were taken regarding service of the claims throughout the six-month period. Further, no evidence probative of the strokes or their alleged effects has been presented to the Court. For these reasons it was perfectly open to the learned master to conclude as he did both on the law and with respect to the evidence.
7. None of the cases cited by the appellant supports his contention that the special reason requirement in CPR rule 8.13(4)(b) is met by a claimant who decides to await review by a legal practitioner of the finalization of particulars of a claim under the English regime. Applying the principles enunciated in **Rondex** or **Steinberg** to the evidence before the court, the claimants and the appellant's decision to await review by a King's Counsel before serving the claim was deliberate, well-considered and intentional and does not meet the threshold of a special reason under CPR rule 8.13(4)(b) to warrant the grant of an extension of the validity of the claim form. Ultimately, the learned master's decision on this aspect of the application was the correct decision although the authority he applied in reaching it did not contain the finding that he said it did.

Leeson v Marsden conjoined with **Glass v Surrendran and Collier v Williams** [2006] EWCA Civ 20 considered; **Hoddinott v Persimmon Homes** [2008] 1 WLR 806 considered; **City & General (Holborn) Ltd v Structure Tone** [2009] EWHC 2139 (TCC) considered; Rule 8.13(4)(b) of the Civil Procedure Rules, 2000 applied.

8. The appellant's reliance on **Aktas v Adepta** and **Firman v Ellis** in the context of lawyer error to constitute a special reason for the purposes of rule 8.13(4)(b) is misguided. **Aktas v Adepta** and **Firman v Ellis** reveal that the pronouncements of the courts that decided those cases are of no applicability in the instant appeal for the simple reason that the issues under consideration are not similar. In **Aktas v Adepta** and **Firman v Ellis** the English Courts were examining section 33 of the UK Limitation Act which empowers the court in personal injury claims to refrain from applying the three-year limitation period as well as the strict approach that is followed in applications for extension of validity of a claim. Although the parties accept that the strictness of the regime is common to the English and Welsh and this jurisdiction, no similar provision to section 33 of the UK Limitation Act is under contemplation in the case at the appeal bar. Accordingly, being guided by case law from this jurisdiction, the learned master was entitled to not find on the law and evidence before him that the behaviour of the claimants' legal practitioners constitute lawyer errors or a special reason under rule 8.13(4)(b).

Aktas v Adepta [2011] QB 894 distinguished; **Firman v Ellis** [1978] QB 886 distinguished.

9. The possibility of a limitation defence is one of the factors that the court must consider when determining an application for the extension of validity of a claim form. It is well-established that an extension of validity of a claim will be set aside if it can be demonstrated that the defendant might be deprived of a limitation defence by the extension of the claim's validity. In exceptional cases, an extension of time may be granted notwithstanding the possibility of a limitation defence. An examination of the Claim Form and Statement of Claim in this case illustrates that the claimants alleged that the respondents conspired and took a series of premeditated steps commencing on 12th August 2013 and earlier, ending with a transfer of assets on 22nd April 2016 from NBA and CCB to NCBA and engaged in certain actions designed and intended to deprive the claimants of property and cause them loss. Additionally, it was pleaded that the fraudulent preference was committed by the signing of the Purchase and Assumption Agreement ('PAA') on 22nd April 2016 and the subsequent transfer of funds belonging to PB&T and CCIB depositors to NCBA. In their subsequent application to amend the claim filed on 24th November 2022 the appellant and the other claimants accepted that the limitation period had expired by that filing date. Against this background, it was open to the learned master in keeping with the principles set out in **Steinberg**, to conclude that the respondents potentially had a limitation defence in relation to the tort of conspiracy to deprive the appellant and other claimants of their property and cause

loss to them. This was a relevant factor which justified setting aside the Extension Order unless exceptional circumstances justified a different outcome.

Marty Steinberg and others v Swisstor & Co and another BVIHCVAP2011/012 (delivered 12th March 2012, unreported) followed.

JUDGMENT

- [1] **HENRY JA:** This appeal explores the parameters of the discretionary power conferred on a court to extend the validity of a claim form under rule 8.13(4) of the **Civil Procedure Rules 2000** ('CPR'). It also interrogates the ambit of the court's discretion to grant leave to amend a statement of claim and reviews a determination to strike out a claim form after the order extending its validity is set aside. An ancillary issue relates to the appropriateness of an *ex parte* order refusing leave to serve a defendant by substituted service where that defendant did not participate in the hearing and was not a party to the application under consideration.

Background

- [2] The factual matrix is not disputed. The appellant Tomaž Slivnik is the sole appellant. On 22nd February 2022, he and seventeen other natural and corporate persons filed a claim in the Anguilla High Court seeking among other reliefs, damages from the respondents for breach of statutory duty, fraudulent preference and/or expropriation of their deposits of US\$14,850,981.22 held at National Bank of Anguilla Limited (in Receivership) ('NBA') the ninth respondent, and at Caribbean Commercial Bank Limited (In Receivership) ('CCB') the tenth respondent. The claimants had not served the claim on the respondents by 16th August 2022. On that date, without notice to the respondents, they applied for an order extending the time for service of the claim form. The application was granted by court order dated 18th August 2022 ('Extension Order') extending the time for service of the claim form until 21st January 2023, a period of six months.

- [3] The Extension Order was served on the third respondent Mr. Shawn Williams on 22nd November 2022; on the fifth respondent the Eastern Caribbean Central Bank ('ECCB'), the seventh respondent the Attorney General of Anguilla, the ninth respondent the NBA, the tenth respondent CCB and the eleventh respondent, Mr. Gary Moving, on 24th November 2022. The second respondent Mr. Hudson Carr and the sixth respondent Anguilla Financial Services Commission ('FSC') were served on 14th December 2022. The FSC filed an Acknowledgment of Service to the claim.
- [4] On 8th December 2022, Mr. Williams, ECCB, NBA, CCB and Mr. Moving filed an application to set aside the Extension Order and for an order striking out the claim against them. Mr. Carr filed a similar application on 30th December 2022. The FSC filed its own application on 11th January 2023, for identical orders.
- [5] The respondents grounded their applications to set aside the Extension Order in **CPR** rule 8.13(4). They contended that the appellant's application to extend the period of service did not comply with the requirements of rule 8.13(4).
- [6] On 21st November 2022, the claimants filed an application to amend the claim form. On 16th December 2022, they applied for leave to serve the claim out of the jurisdiction on the first respondent Martin Dinning (as conservator); and on December 2022 for an order to substitute personal service on the fourth respondent Robert Miller (as conservator) by service on the ECCB. Finally, on 16th February 2023, the appellant filed an application to extend the validity of the claim form in relation to the first, fourth and eighth respondents. The applications were all heard by the learned master on 27th and 28th February 2023.
- [7] By written decision delivered on 25th April 2023 (the 'First Decision') the learned master set aside the Extension Order (the 'Setting Aside Order') holding that no good reasons were advanced as to why the claim had not been served on the respondents within the jurisdiction during its validity and no special reason had been

given to justify extending the period of validity. In addition, he found that no evidence was proffered of what if any steps had been taken to trace or serve some of the respondents including the seventh respondent during the claim's validity and from the evidence, a deliberate litigation decision was made not to serve them by reason of a tangential case. He struck out the claim against the 1st, 2nd, 4th, 5th, 6th, 7th, 9th, 10th, 11th and 12th respondents (the 'Strike Out Order'); dismissed the application to amend the claim (the 'Amendment Order') and denied the claimants leave to serve the claim form out of the jurisdiction on the 1st respondent (the 'Service Out Order') or on the 4th respondent by substituted service ('the 'Substituted Service Order'). The parties were ordered to file written submissions on costs within 14 days.

[8] The learned master inadvertently omitted in the First Decision to consider the appellant's application to extend the validity of the claim. Accordingly, by a further written decision delivered on 3rd May 2023 (the 'Second Decision'), he determined that application and vacated the orders refusing the application to amend the claim form and striking out the claim against the first respondent. He extended the validity of the claim form against the first and eighth respondents for a period of 45 days and granted the appellant leave to personally serve the claim form on them out of the jurisdiction at their respective addresses in the United Kingdom and London, England.

[9] Consequential directions were issued extending the time for the filing of an acknowledgment of service and defence by the fourth and eighth respondents with liberty to apply to set aside or vary the order. Although he made the order vacating the Amendment Order no express order granting the application to amend the claim form was made. In this judgment, I shall refer to both written decisions of the learned master as 'the decision' unless the context suggests otherwise.

The appeal

[10] Being dissatisfied with the learned master's decision, the appellant filed his appeal on 6th June 2023 against the Setting Aside Order, the Strike Out Order, the

Amendment Order and the Substituted Service Order. Four grounds of appeal were advanced. They are that the learned master erred by:

- 1) dismissing the application to serve the fourth respondent by substituted service and by striking out the claim against the fourth respondent due to his erroneous finding that the fourth respondent did not qualify as a defendant out of the jurisdiction;
- 2) refusing the application to amend the claim form on the ground that no valid claim form existed;
- 3) setting aside the Extension Order in relation to the seventh respondent, because the seventh respondent never filed an application to set it aside and the learned master never proposed to set it aside *sua sponte*; and
- 4) setting aside the Extension Order in relation to the second, fifth, sixth, seventh, ninth, tenth, eleventh and twelfth respondents and striking out the claim against them.

- [11] Save that they expressed no position with respect to the appeal against the Setting Aside Order in relation to the seventh respondent, the 2nd, 3rd, 5th, 6th, 9th, 10th, 11th and 12th respondents oppose the appeal in all other respects. They argued that the appeal is misconceived and should be dismissed.

Fresh evidence application

- [12] The appellant filed an application on 12th January 2024 for leave to adduce fresh evidence in the appeal. It is supported by an affidavit by the appellant/applicant filed on even date. The fresh evidence sought to be adduced are a medical report of Mariel Lesley Crabtree ('patient 1') prepared by Dr. Jaiyesh Kumar dated 22nd April 2022; a case history form of patient 1 dated 23rd April 2022; a medical report of patient 1 prepared by Rona E. Hodge, dated 25th June 2022; a CT brain scan report on Mr. Walter John Bayer II ('patient 2') prepared by Dr. Nilesh Ingale dated 18th May 2022; a medical report of patient 2 dated 23rd May 2022; the 2023 annual return of C11 evidencing that patient 1 was a director of C11 between 21st February 2022

and 21st August 2022; and the 2023 annual return of C15 evidencing that patient 1 was a director of C15 between 21st February 2022 and 21st August 2022. It is not in dispute that the husband of patient 1 served as a representative for eleven of the claimants and that patient 2 was one of the fifth claimants.

- [13] The grounds of the application are that the fresh evidence could not have been obtained with reasonable diligence for use in the court below; it is such as to be presumably believed and would have an important influence on the result of the case and it is in the interest of the overriding objective that the fresh evidence be admitted.
- [14] The appellant's supporting affidavit chronicles the dates when patient 1 and patient 2 suffered haemorrhagic strokes, respectively on 18th March 2022 and 14th May 2022 and the progression of their illnesses. The appellant averred that he first learnt of their strokes respectively on 14th January 2023 and 17th August 2022. He indicated that he received the proposed fresh evidence between 31st October 2023 and 10th January 2024 after learning from the First Decision that he needed to present such information if any reliance was to be placed on it. He averred that patient 1's husband represents eleven claimants which are either companies or estates of deceased persons. The appellant asserted that following their strokes, patient 1's husband and patient 2 did not communicate with him or issue instructions over an extended period. Further, a meeting of the entire group of claimants was necessary to make any decisions, change plans or give directions to their legal practitioners such as instructions regarding service of the claim. He asserted that the group became entirely dysfunctional after around 14th May 2022 and only three of the eighteen claimants had representatives in the group who were not under a severe disability.
- [15] The appellant/applicant submitted that the proposed fresh evidence is credible medical evidence of the two strokes and supports the effect that those strokes had.

Citing **Ladd v Marshall**¹ he submitted that prior to 17th August 2022 and 14th January 2023 he had no idea that the patients had strokes and he could not reasonably have obtained the proposed fresh evidence with reasonable diligence before the hearing in the lower court or the 6th February 2023 deadline for filing evidence in light of the immense pressure of time and lack of knowledge on his part as a litigant in person. He submitted that the material is credible and would probably have an important influence on the result of the case by demonstrating that the claimants had a special reason for seeking an extension of the period of the claim's validity.

- [16] The respondents opposed the application arguing that the proposed fresh evidence could have been obtained with reasonable diligence for use at the trial and will not have any influence on the result of the case. They relied on **Standford v Akers and another**;² **WWRT Limited v Carosan Trading Limited et al**,³ **Siong Beng Seng et al v Caldicott Worldwide Ltd**.⁴ and **Geminis Investors Limited v Goods Technology Starting International Limited**.⁵

Discussion

- [17] The court's decision in **Ladd v Marshall** is the locus classicus on the issue of the criteria governing the admission of fresh evidence. In that case Lord Denning set out the three factors that the court must consider when determining such an application. All three criteria must be satisfied. Firstly, to succeed on such an application, the applicant must satisfy the court it was not possible to obtain the evidence with reasonable diligence for use at the trial. Secondly, it must be established that the evidence would likely have an important influence on the outcome of the case but it need not be determinative. Thirdly, while the evidence does not have to be incontrovertible, it must appear to be credible. These principles

¹ [1954] 1 WLR 1489.

² BVIHCMAP2017/0019 (delivered 12th July 2018, unreported).

³ BVIHCMAP2022/0002 (delivered 20th July 2022, unreported).

⁴ BVIHCMAP2020/0020 (delivered 1st June 2021, unreported).

⁵ BVIHCMAP2022/0043 (delivered 23rd August 2023, unreported).

are now settled in law and have been accepted and applied by this Court repeatedly. It is important to note that the principles are not special rules and ought not to be applied rigidly but instead are to be relaxed and given effect to in furthering the overriding objective of the **CPR** to do justice between parties.

- [18] Where a fresh evidence application arises with respect to an interlocutory appeal the first criterion is to be applied with less rigour, as explained in **Geminis Investors Limited v Goods Technology**. I bring these principles to bear in my evaluation of the instant application.
- [19] As to the first limb of the **Ladd v Marshall** criteria, it is evident that the medical reports of patient 1 and patient 2, the case history form of patient 1, the CT brain scan report on patient 2 had been available from around May 2022 and were therefore in existence before the claimants filed their evidence in response to the set aside application. Those materials could therefore have been obtained with reasonable diligence by the claimants and presented to the court as part of the evidence. The 2023 annual returns in respect of C11 and C15 would not have been available until they were filed respectively on 26th June 2023 and 23rd September 2023. They were therefore not within the claimants'/applicant's possession or control at the relevant times as they did not exist.
- [20] Turning next to the question of whether the contents of the medical reports and the annual returns are credible, that must be answered in the affirmative. As to whether the medical reports and forms would likely have had an important impact on the outcome of the case, I am of the view that they would not. In this regard, it is noted that the alleged unavailability of patient 1's spouse and/or patient 2 to contribute to group discussions among the claimants for part of the validity period of the claim did not prevent the group of claimants from giving instructions to the legal practitioners to lodge the application for extension of the claim's validity. Furthermore, there is no evidence that the strokes suffered by the patients contributed to lack of service or prevented service of the claim during the period of its validity. In all the

circumstances, I am satisfied that the applicant/appellant has failed to satisfy the first and third limbs of the **Ladd v Marshall** criteria. I would therefore refuse to grant his application to adduce the medical reports, related documentation and the annual returns as fresh evidence.

Issues

- [21] Three issues arise for consideration on the appeal. They are:
- 1) Whether the learned master erred in the exercise of his discretion by refusing leave to the appellant to effect service on the fourth respondent by substituted service?
 - 2) Whether the learned master erred in the exercise of his discretion by setting aside the Extension Order as against the 2nd, 3rd, 5th, 6th, 7th, 9th, 10th, 11th and 12th respondents?
 - 3) Whether the learned master erred in the exercise of his discretion by refusing the application to amend the claim form?

Appellate court's review of exercise of discretion

- [22] The role of an appellate court when considering an appeal against the exercise of judicial discretion by a lower court is settled in law. The principles that guide the court have been rehearsed numerous times by this Court and were famously enunciated in **Dufour and others v Helenair Corporation Ltd and Others**⁶ by Floissac CJ and by this Court in numerous other cases including **Edy Gay Addari v Enzo Addari**.⁷ An appellate court will be slow to disturb the judicial decision of a lower court in the exercise of its discretionary power. It would interfere with such exercise of discretion only if satisfied that in arriving at the decision the judge erred in principle by having regard to irrelevant factors or not taking into account relevant factors and as a result made a blatantly wrong determination. The appellate court

⁶ (1996) 52 WIR 188.

⁷ British Virgin Islands Civil Appeal No. 2 of 2005 (delivered 27th June 2005, unreported).

as part of its review of the lower court's decision would always be guided by the interest of justice.

- [23] The three rulings against which this appeal is directed all emanate from the exercise of judicial discretion by the learned master. They must accordingly be evaluated in light of the referenced review benchmarks. I bear that firmly in mind in considering the grounds of appeal.

Setting aside Order – Seventh Respondent

- [24] The Honourable Attorney General of Anguilla, the seventh respondent, made no application to set aside the Extension Order and was therefore not a party to the interlocutory hearings in which they were considered. The appellant argued that the learned master correctly found that the validity of the Claim Form can be extended or not extended separately with respect to each defendant. On this, the learned judge remarked:

“[44] The Claimants also submitted that the Defendants are not severable from each other. They submit that it is either the life of the claim form is extended or it is not. The court disagrees. There is no such qualification in the rule that an order extending the validity of the claim form with joint Defendants operates to extend the validity of the claim form against all the Defendants. **Such an interpretation is not supported by there being different validity periods for the service within and out of the jurisdiction.**

[45] The Court agrees with Counsel for the Twelfth Defendant on this issue. **The validity of the claim form can be extended in relation to all or any of the Defendants. It is not a blanket application. Evidence would have to be adduced to show that one of the gateways applies to all or any of the Defendants....**”⁸. (Emphasis added)

- [25] The appellant submitted that it follows that applications to have the Extension Order set aside must be considered separately for each defendant. Consequently, if a defendant files no set aside application, there is no legal basis to set aside the

⁸ Paragraphs [44] and [45] of the First Decision.

Extension Order with respect to that defendant. Furthermore, no other defendant has the requisite standing to apply on behalf of another defendant for the Extension Order to be set aside. Additionally, although the court is empowered by **CPR 26.2** to make an order of its own initiative, under **CPR 26.2(2)**, it must as a pre-condition give the party likely to be affected a reasonable opportunity to make representations and it did not do so in this case. It was submitted that in the circumstances, no legal basis existed for the learned master to set aside the Extension Order in relation to the seventh defendant.

[26] The appellant makes an interesting argument with respect to the seventh respondent. It is trite law that a court will seldom make an order against a non-party for the simple reason that doing so would probably violate fundamental natural justice principles that necessitate that persons who are to be affected by a court order are afforded an opportunity to make representations before such an order is made. This principle is enshrined in **CPR 26.2**.

[27] In the First Decision under the rubric ‘NON-SEVERABILITY’ the learned master noted:

“[40] This issue was not initially raised by the Claimants. This issue was raised by the Attorney General, the Seventh Defendant who has made no application to set aside the impugned order. Although the Attorney General premised his ‘Notice of Disposition’ [Filed on January 13, 2023] by saying he had no definitive position on the application, a position on the severability of the claim was in fact taken. At paragraphs 7 and 8 of the documents the following points were made:

- ‘7. There is community of interest, in that, all Defendants/Applicants are joined in the disposition of the present Applications.**
- 8. Since the Defendants/Applicants are joint in a community of interest in relation to the cause of action alleged against them in the Claim, the extension of the validity of the claim could not be bifurcated; so that, it may properly be extended in relation to some Defendants/Applicants and not the others,**

as all defendants are alleged tortfeasors relative to the same facts.” (Emphasis added)

[28] Quite helpfully, the learned master captured the fact that the Honourable Attorney General not only filed submissions (titled ‘note’),⁹ but also made oral submissions at the hearing. The learned master remarked that although the Honourable Attorney General did not address the issue of non-severability in his submissions, the court raised it at the hearing and the Attorney General denied that it was an issue raised by him. The learned master noted however (at paragraph [41] of the First Decision) that having reviewed the documents, he formed the view that it was an issue first raised by the Honourable Attorney General although not pursued or addressed in the written submissions.

[29] Concluding on this point, the learned master noted¹⁰ that on the issue of non-severability, the appellant in his third affidavit (filed on behalf of the claimants) accepted and commended the Attorney General’s position. In the Affidavit of Tomaž Slivnik filed on 24th February 24th 2023¹¹, the appellant averred:

“Non-Severability

6. The Claimants issued a claim against all the parties we believed to be parties to the conspiracy we allege, including some very difficult to sue parties, because we believed that if any party was omitted, our claim would be vulnerable to the defense that while we had a legitimate complaint, it was the fault of the omitted party, not the defendants. ... Our case would be seriously and perhaps fatally damaged if any Defendant was to be excluded.”¹²

[30] In view of those observations by the learned master, it is evident that the question of non-severability was raised in the written notice by the seventh respondent, even though he had not joined in the set aside application as a party. Further, the

⁹ That document is headed ‘Notice of Party’s Disposition (On behalf of the 7th Defendant); pg. 177 of the Appeal Bundle.

¹⁰ At paragraph [42] of the First Decision, pg. 20 of the Appeal Bundle.

¹¹ Headed/titled ‘FOURTH AFFIDAVIT OF TOMAŽ SLIVNIK’ (On behalf of the 1st Claimant/Respondent), tab 34, pgs. 291 – 306. Ostensibly the affidavit being referenced by the learned master.

¹² At paragraph 6.

appellant engaged with that issue in his affidavit. He also filed written submissions in relation to the set aside application and participated fulsomely in the hearing of the application and was afforded the opportunity to respond to any representations made to the court by the seventh respondent. In such circumstances, the appellant's contention before this Court that he did not have a chance to address the court on the question of non-severability is not borne out by the record. Moreover, the learned master took the appellant's representations into account in arriving at his decision to set aside the Extension Order against the seventh respondent.

- [31] Undoubtedly, the Court retains an implicit and inherent jurisdiction to make orders to achieve its two principal objectives of correcting wrong decisions and ensuring public confidence in the administration of justice.¹³ In this case, notwithstanding the seventh respondent's initial avowed neutrality to the set aside application, he settled on the position that by virtue of the common interest among the respondents the determination on the extension of the claim, the set aside application cannot be fragmented.
- [32] As to the appellant's submission that the learned master found that each application had to be considered separately from the others, this is strictly speaking not accurate. In fact, the learned master noted that the main distinguishing feature that would affect the outcome in each case was whether the defendant/respondent was resident in or outside the Federation and by extension whether the claim form is valid or invalid in respect of those two classes of defendants. Inherent in this recognition is the inescapable logic that a determination that a claim is invalid for purposes of service on a respondent who is resident in the jurisdiction, cannot be deemed to be valid for purposes of service on another respondent who is likewise resident in the jurisdiction. It is a matter of law that such a claim is incapable of being validated through service in the jurisdiction unless an order is made to extend its validity.

¹³ Taylor v Lawrence [2002] 2 All ER 353.

[33] In **Calvin Ayre v Reuters News and Media Inc**¹⁴ this Court held that an invalid claim form is incapable of being served unless its validity was extended under **CPR** 8.13 pursuant to an application for an extension that is made during the period of its validity (i.e. during the current validity of the period for service). In exceptional cases, the court may pursuant to **CPR** 26.1(6) dispense with compliance with the periods within which such an application must be made. No such dispensation was accorded in this case and therefore does not arise for present purposes.

[34] The seventh respondent is one of those who is resident in Anguilla and therefore resident within the jurisdiction where the claim's validity lasts for a period of six months. The learned master applied to the seventh respondent similar treatment as all other respondents from within the jurisdiction primarily for the reasons that the claim form expired after six months for those respondents and no evidence was led by the appellant to discharge the burden of establishing that either gateway under **CPR** 8.13(4) was satisfied in relation to any of those respondents.

[35] Although the issue of the *vires* or validity of the claim form with respect to the seventh respondent did not arise as a separate issue for the learned master's consideration during the hearing in the court below, he was correct to address his mind to it to ensure that consistency of treatment is maintained and that no absurd result arises from the court's determination of the set aside application. It was necessary and proper for the learned master to consider it especially since the seventh respondent made representations to which the appellant responded. In my opinion, the impugned orders setting aside the Extension Order and striking out the claim against the seventh respondent were appropriate and I would affirm them.

Amendment

[36] The appellant pointed out that the Amendment Order was premised on the finding by the learned master that in view of the ruling that there was no valid claim form to

¹⁴ ANUHCVP2023/0029 (delivered on 22nd December 2023 and re-issued on 20th September 2024).

be served, it was not necessary to consider the application to amend the claim form. It was submitted that the learned master erred by failing to revisit this ruling in the Second Decision in which he held that a valid claim form existed in relation to the first and eighth respondents. This error he argued, was compounded by the failure to consider the application to amend the claim form.

- [37] Those contentions by the appellant are unassailable. Having concluded that the claim form was valid with respect to the first and eight respondents, the learned master was required to consider the application for amendment of the claim form as it related to them. He erred by not doing so. I would therefore allow the appeal on this ground and remit consideration of the application for amendment limited to the first and eighth respondents, to another master.

Substituted service – fourth respondent

- [38] In relation to the Substituted Service Order, the appellant submitted that the learned master erred in two respects. Firstly, it was submitted that he did not consider pertinent evidence that the fourth respondent resides out of the jurisdiction. In this regard, the affidavit account¹⁵ of Mr. Andrew Liburd senior High Court bailiff was highlighted in which he averred that in his attempts¹⁶ to serve the fourth respondent with the claim form and supporting documents, he learnt from the second respondent that the fourth respondent was not in the Federation of Saint Kitts and Nevis and resides in the USA. Similarly, the affidavit of Kennedy Byron,¹⁷ an employee of the fifth respondent was referenced. In it, Mr. Byron indicated that Mr. Miller was an independent contractor appointed by the ECCB as conservator from 13th August 2013 to October 2013 and was a consultant recommended by the International Monetary Fund ('IMF') who left Anguilla and the Eastern Caribbean after his sojourn.

¹⁵ Contained in the affidavit filed on 12th December 2022 in support of the Application for substituted Service, pgs. 106-107 of Appeal Bundle.

¹⁶ On 15th December 2022.

¹⁷ Filed on 13th January 2023 in Opposition to the application for Substituted Service, pgs. 110 – 114 of the Appeal Bundle.

- [39] It was submitted that the second error made by the learned master in refusing the application for substituted service, was that he ruled incorrectly that the validity of the claim form in relation to the fourth respondent had expired and no application had been made to extend its validity. The appellant contended that by reason of these errors the learned master dismissed the application for substituted service without a hearing and without considering its substance. He stated that the evidence supports a finding that the fourth respondent resides out of the jurisdiction and had the learned master realized this he would have granted the application.

Discussion

- [40] Paragraphs [62] and [65] of the First Decision contain the learned master's conclusions on the expiry of the claim form relative to respondents who reside out of the jurisdiction and the refusal of the application for substituted service. He stated:

“[62] The court notes that from the evidence, the First Defendant is resident out of the jurisdiction. The time for the service of the claim on him would have been twelve months. This expired on February 21, 2023. ...

[65] By this application the Claimants seek an order to substitute personal service on the Fourth Claimant (sic). This evidence falls by the wayside as the validity of the claim form has not be (sic) extended.”

- [41] From the foregoing, it is evident that the learned master did not consider the evidence of Mr. Liburd and Mr. Byron as to the fourth respondent's residence and whereabouts when he determined the application for substituted service. Not only did he not mention those two affiants, he hinged the outcome of the substituted service application on the testimony supplied in relation to and his determination of the set aside application. This is understandable considering the chronology of the different applications especially since the extension and set aside applications seemed to have been premised on the understanding that the fourth respondent resides in the jurisdiction. The affidavit evidence advanced in support of and in opposition to the set aside application did not address the fourth respondent's residence as did the later affidavits of Mr. Liburd and Mr. Byron. Consequently, the

learned master concluded that the fourth respondent resided within the jurisdiction and by extension that the validity of the claim form had expired in relation to him.

[42] By omitting consideration of Mr. Liburd's and Mr. Byron's affidavit testimonies the learned master failed to consider relevant material and he thereby erred. It is therefore necessary for this Court to consider the application for substituted service afresh.

[43] The application for substituted service was made pursuant to **CPR** 5.14(2) and 11.8(2). Rule 5.14(2) empowers the court to direct that a claim form served by a specified method be deemed good service. A claimant seeking such an order must provide affidavit evidence of the proposed method of service showing that such method is likely to enable the person to be served to ascertain the contents of the claim form and statement of claim. Rule 11.8(2) permits an applicant to make such an application without notice to the opposite party.

[44] Among the grounds on which the application¹⁸ was anchored were that: a) the fourth respondent acted as conservator of CCB and/or NBA during the conservancy of the ECCB; b) the senior bailiff was unsuccessful in serving the claim form and supporting documentation on him on 15th December 2022; and c) the ECCB's management is likely to be able to bring the claim to his attention. Mr. Liburd's affidavit was the only affidavit filed in support of the application. On 13th December 2022. He was contacted and retained by Mrs. Janelle Brooks of SAGIS LP to attempt to locate the fourth respondent and serve him with the referenced documents. His attempts to get information from the ECCB as to the fourth respondent's whereabouts or means of contacting him were unsuccessful. He formed the opinion that the fourth respondent no longer lives in the Federation of Saint Christopher and Nevis.

¹⁸ See pgs. 100 – 102 of the Appeal Bundle.

- [45] In response, Mr. Byron asserted on the ECCB's behalf that he is the Senior Project Specialist in the ECCB's Governor's Office. He averred that the appellant's assertion that the ECCB is likely to know the fourth respondent's whereabouts and would therefore be able to bring the contents of the claim documents to his attention is incorrect for several reasons. Firstly, the fourth respondent was not employed by the ECCB and was an independent contractor recommended by the IMF, he has since left Anguilla and the ECCB; the ECCB has had no contact or communication with him since that time and the ECCB does not know his whereabouts or where or how he may be contacted. The ECCB would be in no position to bring the contents of the claim documents to his attention.
- [46] In considering an application for substituted service the court must, in accordance with **CPR 1.2**, have regard to the overriding objective to act justly. It must act judicially and take into account any prejudice or advantage that would be occasioned to either party by the grant or refusal of the application. Importantly, it must be satisfied that the claim form is valid and that the proposed method of service would probably enable the defendant to become aware of the contents of the claim form and statement of claim.
- [47] Mr. Byron's evidence introduces significant doubt that the proposed method of service would likely have brought the claim documents to the fourth respondent's attention. This single factor militates against the grant of the order for substituted service for the simple reason that the objective of notifying the fourth respondent of the existence of the claim would likely not have been realized. While I accept that the evidence supports a finding that the fourth respondent lives outside the Federation and that the claim form was valid, I would not grant the application for substituted service because I am not persuaded that service on the ECCB would likely result in the contents of the claim form and statement of claim coming to the fourth respondent's knowledge. I would accordingly dismiss this ground of appeal.

[48] The evidence considered on this application and this determination raise questions as to how to proceed in relation to service of the claim on the fourth respondent, it being noted that he does not reside in the jurisdiction. There is no pending application before the lower court or this Court in relation to such concerns. It is however fitting and just to reserve to the appellant liberty to apply for consequential orders if he deems it necessary to do so.

Setting aside order – (2nd, 3rd, 5th, 6th, 9th, 10th, 11th and 12th) Domestic respondents

Appellant's submissions

[49] I turn next to the appeal against the Setting Aside Order. Mr. Slivnik levelled several criticisms against the learned master in respect of his decision to set aside the service as against the domestic respondents. He argued that even before the set aside determination was made he was prejudiced because he had recently lost his legal representation, was not afforded adequate time to retain new counsel and had to represent himself and the other claimants with some difficulty as a pro se litigant, being unfamiliar with the rules of court and procedures although he had drawn those challenges to the learned master's attention repeatedly. He stated that he laboured at a significant disadvantage particularly since he had insufficient time within which to read the **CPR** and the case file, acquaint himself with the applicable law, prepare and file affidavits and written submissions and review¹⁹ the written submissions from the opposing parties. He had to accomplish all of this between 31st January 2023 and 13th February 2023.

[50] It was submitted that the learned master erred by dismissing as an important consideration, the claimants' assertions that they had not served the claim form on the domestic respondents because they were hampered in arriving at a consensus due to the illness of one of the claimants and the illness of a spouse of another

¹⁹ Between 14th February 2023 and 24th February 2023.

claimant who could not be contacted for an extended period to give instructions regarding service. Mr. Slivnik contended that the consequences of the strokes suffered by those persons ('the patients') adversely affected the claimants' ability to act as a group in issuing instructions as to service of the claim and this constituted a special reason under **CPR** 8.13(4)(b) that merited an extension of the claim's validity. He argued that the learned master erred by giving consideration and weight to the fact that the group was represented by legal counsel when the first application was filed to extend the claim's validity, because when the application was filed on 16th August 2022 neither the legal practitioners nor he knew anything regarding the strokes suffered by the patients.

[51] The appellant claimed that he learnt of the strokes respectively on 14th January 2023 and 17th August 2022. As the claimants' representative he had a unique perspective on the effect the strokes had on the claimants' ability to act at all. It was submitted that those claimants who shared the same solicitors were able to act only through unanimous consent, and the appellant as the claimants' representative was the only one contractually obligated to attempt to co-ordinate all the claimants and ensure that consensual instructions could be reached for transmission to the claimants' solicitors. The appellant argued that his lack of legal representation when he learnt of the strokes was involuntary and resulted in him being prejudiced. He stressed that the learned master therefore erred by attaching any weight or consideration to the fact that the claimants had legal representation at the time of the first application to extend the validity of the claim form. It was submitted that the medical records are private and sensitive, were not in the appellant's possession or under his control, he had no right to possess them and was therefore unable to present them to the court at that earlier time.

[52] The appellant contended that the learned master erred in finding that the strokes and consequences of the strokes did not constitute a special reason under **CPR**

8.13(4)(b). He submitted that they did and invited this Court to find that they meet the threshold of a special reason.

[53] Another argument advanced by the appellant relates to the learned master's finding that the potential loss of a limitation defence was a factor he needed to consider in determining the application. The appellant submitted that not only did the learned master fail to provide a reason as to why he thought that the respondents would lose the benefit of a limitation defence, he also did not supply the date that he considered to be the date when the limitation defence would arise and thereby erred. It was submitted that the respondents had suggested that the limitation date could be 6 years after 22nd February 2016, 22nd April 2016, 25th April 2016 or 28th June 2016 all of which were rebutted by the appellant in relation to his claim.

[54] The appellant noted that he is a depositor of NBA (the 9th respondent) and not of NBA Private Bank & Trust. As such, 22nd February 2016, being the date that the Offshore Banks were placed into liquidation is not relevant to him. He argued that as averred in his affidavit,²⁰ NBA communicated to him on 15th March 2016 and 8th April 2016 through his solicitor and proposed sending him all his funds immediately subject to conditions. He submitted that he had not yet suffered damage, had no notice of having suffered damage and had not yet accrued a cause of action, or arguably had not by the dates referenced by the respondents.

[55] Further, the respondents had not advanced any plausible or arguable grounds as to why the cause of action could arguably have accrued to him by those dates. Furthermore, even if the cause of action accrued on 28th June 2016, the respondents would not have been deprived of a limitation defence having been all served by 22nd December 2022, within six months of the limitation date of 28th June 2022. He maintained that the learned master did not address any of the arguments advanced by him with respect to the prospects of a limitation defence and therefore

²⁰ 4th Affidavit of Tomaž Slivnik at paragraphs 9-12.

erred when he found that the respondents might be deprived of a limitation defence. The appellant cited **Hashtroodi v Hancock**²¹ and **Cecil v Bayat**²² as authority for the proposition that the validity of a claim form may be extended up to four months after the expiry of the limitation period to assist a claimant who has encountered a genuine problem or difficulty in effecting service but not one who is merely seeking relief from the consequences of his own neglect.

[56] The appellant denied that the claimants' reason for not seeking an extension of the claim's validity had to do with the fact that they were seeking a review of the statement of claim by a King's Counsel ('KC') before serving it. He acknowledged that they did seek review of the claim by a KC and said that the KC proposed amendments to the statement of claim on 14th August 2022, seven days before the claim form expired. He maintained that the strokes contributed to the delay in obtaining KC's review of the statement of claim and this led to the delay in applying for an extension of the claim's validity. He added that by the time the claimants were able to secure legal practitioners who were willing to represent them, because of the complexity and value of the claim, such representation was expressly conditioned on review and amendment of the statement of claim by a KC before the claim form could be served. It was submitted that the claimants had no choice but to agree those terms and await review by the KC which they also desired.

[57] Once the KC's review was completed it was intended that the claim form was to be served because the solicitors had been under clear instructions to effect service as soon as the review was concluded. However, service during the remainder of the period of the claim's validity was frustrated by the inability to get instructions from the clients impacted by the strokes. The appellant submitted that the learned master erred by dismissing the fact of the KC's review as being at least a contributing factor

²¹ [2004] EWCA Civ 652.

²² [2011] EWCA Civ 135 at 102.

to the delayed service and the resultant finding that it did not qualify as a special reason for purposes of **CPR 8.13(4)**.

[58] Noting that the practice in England and Wales as to service of the claim form separately from the statement of claim is not allowed under the **CPR** in the Eastern Caribbean jurisdictions, the appellant submitted that for this reason the learned master should have accorded more weight to authorities from the Eastern Caribbean unless precedents from England and Wales are applied, in which case both sets of authorities should be applied. It was submitted that the learned master erred in considering only English and Welsh authorities as to what constitutes a justifiable reason to delay serving a claim form and by not considering authorities from those jurisdictions with respect to what amounts to a justifiable reason to delay service of the claim form. He cited **Collier v Williams**,²³ **Hoddinott v Persimmon Homes (Wessex) Ltd**²⁴ and **City & General (Holborn) Ltd v Structure Tone**²⁵ which all concerned applications for extension of the validity of the claim form as distinct from the statement of claim and in some instances applications for extension of time to serve the particulars of claim.

[59] The appellant argued that as demonstrated by the cited cases, if a good reason for seeking an extension of time is that more time is needed to finalize the statement of claim, it provides just as good a reason to justify extending the time to finalize the statement of claim during the period of validity of the claim form.

[60] It was submitted that the learned master erred by finding (at paragraphs 17, 18, 24, 33, 53 and 55-56 of the First Decision) that non-service of the claim form and statement of claim was partially attributable to the claimants' inactivity and or their and/or their solicitors' deliberate decision. The appellant contended that those were not the reasons for non-service of the claim form and statement of claim and that

²³ [2006] EWCA Civ 20.

²⁴ [2007] EWCA Civ 1203.

²⁵ [2009] EWHC 2139 (TCC).

the claimants had good and sufficient reasons for such failure. Although the claimants were incompetent to act as a group for long periods of time due to the patients' illnesses and the consequential inability to achieve unanimity as to service of the claim forms, this did not represent inactivity although it may appear so to a bystander.

[61] The appellant argued further that despite stating that it was not for him to make findings regarding lawyer errors, this conclusion was to such effect. In the final analysis, as exemplified in **Aktas v Adepta**,²⁶ **Firman v Ellis**²⁷ and **Hashtroodi v Hancock**, the authorities do not support a position that lawyer errors or incompetence would inevitably result in denial of an extension of the validity of a claim form, especially where errors by legal practitioners are merely a secondary contributory factor to the inability to serve.

[62] The appellant invoked the European Convention on Human Rights as another relevant consideration. He submitted that if a court exercises a discretion in a way that prevents a party from pursuing a domestic remedy for violation of a convention right under article 13 of the **European Convention on Human Rights ('ECHR')**²⁸ the article imposes an obligation on the court to at least consider as a factor whether by so doing the court is depriving that party of a practical and effective domestic remedy. In this regard, it was argued that whereas in England and Wales legal practitioners are required by law to carry professional indemnity insurance, there is no such requirement in Anguilla. Therefore, for this and other related reasons if the court finds fault on the part of the claimants' solicitors as it appears to have done in the First Decision, it was and is not in the interest of justice to exercise its discretion against the claimants on a balance of probabilities.

²⁶ [2011] QB 894.

²⁷ [1978] QB 886.

²⁸ Which requires High Contracting Parties to the Convention and territories to which the Convention has been extended (such as Anguilla) to provide an effective domestic remedy for convention Rights violations which must be 'practical and effective, rather than theoretical and illusory' as demonstrated in *Mamatkulov and Askarov v Turkey* (2005) ECtHR applications no. 46827/99 and 46951/99.

Respondents' submissions in common

- [63] For the most part, the respondents' submissions were similar and to that extent are set out together. Where the submissions differ, they are captured separately in the succeeding paragraphs. The respondents contended that the learned master did not err in making his determination and it is correct for all the reasons articulated by him. It was submitted that there was no impediment to serving the domestic respondents during the claim's period of validity, as rightly found by the learned master and the claimants had taken a calculated litigation decision due to the existence of separate proceedings initiated by a different claimant. In arriving at this conclusion, the learned master properly relied on the claimants' own evidence that the main reason for the extension application was that the claimants had discovered after filing their claim that there was a live matter with tangentially similar issues before the court and they took a decision not to serve the claim form and even after the appellant's solicitors told the appellant that they could not serve some of the respondents, the claimants discussed serving those whom they were in a position to serve.
- [64] It was submitted that the claimants' difficulties with securing leading King's Counsel to review the claim form was irrelevant and simply a litigation decision since this did not preclude service and the subsequent amendment of the claim form if amendments were deemed necessary. Further, the claimants' reliance on illness as a reason for the non-service was not supported by evidence and they were represented by counsel at the material times.
- [65] In relation to the limitation defence arguments, the respondents submitted that the learned master did not have to decide that such a defence was open to the respondents, only that it may have been. On the authority of **Marty Steinberg (In his capacity as Receiver of Lancer Offshore, Inc. and The Omnifund, Limited appointed by the United States District Court for the Southern District of**

Florida) and others v Swisstor & Co and another,²⁹ it was enough for him to conclude that granting the extension of time would potentially deprive the respondents of a limitation defence. Additionally, the fact that a limitation period has expired since the issuance of the claim form is an important and possibly a determinative factor.

[66] **Hoddinott v Persimmon Homes (Wessex) Ltd**³⁰ was relied on in support of the contention that if there is doubt about whether the claim has become statute-barred, that becomes a factor of considerable importance and further, limitation as a factor would cease to weigh against the appellant only if it is clear that an extension beyond the six-month period would extend the time to a date when the claim has become statute-barred. It was argued that the respondents could all have been easily served with the claim form by leaving it at their corporate offices or other address within the jurisdiction, none of which would have taken more than a few minutes in any case. Instead, the claimants made the calculated decision not to serve the claim form within the time limited by the **CPR** and this afforded a strong reason not to extend the time for service, especially since doing so would deprive the respondents of a limitation defence.

[67] Citing **Rondex Finance Inc v Ministry of Finance of the Czech Republic**³¹ the respondents contended that while an applicant may succeed in an application for extension of time under **CPR** 8.13(4)(a) if it has been unable to serve the claim form despite taking all reasonable steps; to succeed under sub-paragraph (b) a special reason must be made out at a particularly demanding standard, examples of which include 'a standstill agreement which was repudiated at the last minute' or where an act of service during the initial period of validity proved subsequently to have been ineffective, through no fault of the claimant's. The respondents adopted the learned

²⁹ BVIHCVAP2011/012 (delivered 12th March 2012, unreported).

³⁰ [2008] 1 WLR 806.

³¹ BVIHCV2010/0069 (delivered 13th May 2011, unreported)

judge's reasoning in **Rondex**, that "what cannot ... be a special reason for extending the time within which a claim form may be served, is ... a unilateral decision on the part of the claimant not to comply with the rules, irrespective of how admirable might be his motives". Reliance was also placed on **Williams v Chang**.³²

- [68] The respondents submitted that the fact of the claimants' deliberate decision not to serve the claim cannot, no matter how well-intentioned, constitute a good reason to extend the time for serving the claim form. They pointed out that this finding by the learned master was not challenged on appeal and stands. Therefore, the appeal fails and must be dismissed.
- [69] In relation to the appellant's complaint that the claimants were not afforded enough time to prepare affidavits and submissions, the respondents stated that this contention is without merit because the appellant did not appeal the decision arising from his application for an extension of time to file and serve evidence and did not seek an adjournment of the hearing on 27th February 2023 to allow him more time to prepare. Further, the appellant had a full and fair opportunity to file evidence and submissions and his evidence in support of the original application for extension of time had been prepared by his legal practitioners. Additionally, the appellant subsequently filed two lengthy affidavits (on 6th February 2023 and 24th February 2023) with substantial exhibits having applied for and received more time to prepare his evidence. I agree with this submission.
- [70] The respondents argued that the appellant had a total of 11 weeks from the set aside application filing date to respond with evidence. Furthermore, the appellant filed a detailed skeleton argument, made oral submissions and received a full and fair hearing. In addition, the appellant enjoyed the additional benefit of a qualified lawyer presenting arguments against the set aside application on behalf of other

³² NEVHCV2010/0153 (delivered 10th October 2012, unreported).

claimants who had an interest similar to his. The appellant therefore can make no legitimate challenge to the learned master's decisions in relation to those matters.

[71] Regarding the 'illness' submissions, it was submitted that there was no sufficient or any evidence before the learned master of the alleged strokes or how they impacted the claimants' ability to serve the claim form. In fact, in the affidavit in support of the extension application no mention was made of illness or alluded to any difficulties obtaining instructions from any of the claimants and this might have fatally undermined any later assertion that illness affected the claimants' decision as to service of the claim form, particularly since the subsequent affidavit of David Barfield³³ opposing the set aside application was similarly bereft of any reference to illness. Moreover, in both affidavits it was asserted on the claimants' behalf that a positive decision was taken not to serve the claim form for reasons related to unavailability of counsel to review the claim form and the existence of related litigation.

[72] It was noted further that in the appellant's affidavit filed on 6th February 2023, he mentioned that two persons had suffered strokes but did not name them nor indicate that their illnesses had impacted the conduct of litigation or service of the claim form. Significantly, the appellant averred in that affidavit that the claimants' legal practitioners had been instructed to serve the claim form after obtaining leave to amend.³⁴ It was submitted that the claimants' ability to give such instructions is inconsistent with the appellant's contentions that the claimants could not give instructions regarding service due to illness of some claimants and/or representatives. Similar inconsistency emerges from the appellant's assertions³⁵ that the claimants discussed and made a decision not to serve only some of the respondents after receiving information from their lawyers that they were able to serve some respondents and not others; and by the fact that the lawyers obviously

³³ Filed on 13th February 2023.

³⁴ At paragraph 35 of the affidavit.

³⁵ At paragraph 6 to 7 of the appellant's affidavit filed on 1st February 2023.

were instructed to and did file an application for extension of time on 16th August 2022. They reasoned that accordingly, dismissal of the extension application was therefore justified on the law and the evidence.

[73] As to the relevant limitation period, it was submitted that under section 3(1)(a) of the **Limitation Act**³⁶ the six-year period started to run on 22nd April 2016 and expired on 22nd April 2022 (being after the claim but before the extended date of service). Therefore, the learned master was plainly right to treat this case as one where it was arguable that the extension went beyond the limitation period and he did not feel the need to conduct extensive analysis of the point. In any event, the claimants had conceded this point in their Amendment Application by acknowledging that the limitation period had already expired well before the delayed service date of 24th November 2022.

[74] In relation to the appellant's contention that the claim did not accrue on 22nd April 2016, because he could not know that he had suffered a loss having been assured about the Resolution Plan, it was submitted that as a matter of law, knowledge and discoverability are not relevant to the accrual of the cause of action and the relevant question is when the loss was in fact suffered. On the claimants' pleaded case this took place on 22nd April 2016 when the domestic banks (NBA and CCB) transferred their assets to the 12th respondent under the Purchase and Assumption Agreements ('PAA') without their accounts also being transferred. The respondents argued that an attempt is now being made to suggest that the loss was suffered only when assets were allegedly transferred to the 12th respondent under vesting orders made on 26th February 2020 or sometime after. However, in reality these proceedings have nothing to do with the Banking Business Vesting Orders which are legislative acts that the Minister of Finance undertook in June 2020 and were not even mentioned in the statement of claim.

³⁶ R.S.A. 2000 c. L60.

- [75] Rather, the claim expressly relates to an alleged conspiracy between the respondents which took place between August 2013 and April 2016 said to have culminated with the transfer of assets to the 12th respondent under the PAAs in April 2016. Accordingly, whether that claim is time-barred must be determined by reference to some entirely different set of facts that were not pleaded and that are inconsistent with the pleaded case.
- [76] The respondents agreed with the learned master's conclusion that the claimants' decision to await review by a KC before serving the claim form was a conscious and intentional litigation decision which does not afford a good or special reason to warrant extending the validity of the claim form. **Williams v Chang** was put forward as authority for the proposition that a claimant is expected to consider the validity of the claim form before and not after issuing it. Furthermore, it would be contrary to the regime of **CPR 8.2** and impermissible to allow claimants significant extensions to review and amend their statements of claim before service to deal with case management issues and would render the limitation period elastic at a claimant's whim. This is particularly so in view of **CPR 20.1** which permits amendments to the claim form and statement of claim without leave of the court before the first case management conference.
- [77] With respect to any assertions that the lawyer's errors contributed to the non-service of the claim form, it was submitted that even if there were such errors, they did not constitute a special reason under **CPR 8.13(4)(b)** and instead is a powerful reason for refusing the application for an extension of time as illustrated by **Hashtroodi and Cecil v Bayat**.³⁷ Additionally, the respondents argued that the learned master quite rightly rejected the appellant's contentions that a different approach should be applied to errors by Anguillan legal practitioners because they do not carry professional indemnity insurance and properly concluded that it was not a material factor.

³⁷ [2011] 1 WLR 3086.

[78] Regarding the **ECHR** arguments advanced by the appellant, the respondents countered that no basis exists to support the contentions that the claimants did not have available an effective domestic remedy for an alleged breach of the protected rights. Not only could they bring such proceedings, there was nothing theoretical or illusory about their ability to do so and nothing in the **ECHR** jurisprudence which requires a court to save a claimant from its own errors and/or accept a unilateral decision by a claimant not to serve proceedings within the prescribed time to enable it to claim that an effective remedy is available to the claimant.

Additional submissions by 2nd, 3rd, 5th, 9th, 10th and 11th respondents

[79] Learned King's Counsel referred to the 2nd, 3rd, 5th, 9th, 10th and 11th respondents as the Libran respondents. For convenience and brevity, I take the liberty of doing likewise at this juncture. It was submitted on their behalf that in relation to the ground of appeal dealing with alleged lawyer errors, the passages from **Aktas v Adepta** and **Firman v Ellis** relied on by the appellant are not applicable to the instant appeal. Learned King's Counsel argued that in both cases, the issue on appeal was the tension between the strictness with which mere failure to serve on time is regarded by procedural rules and the court on the one hand, and on the other hand, section 33 of the UK Limitation Act which empowers the English courts to disapply the limitation period of three years for a personal injury claim in the circumstances described in that provision. He pointed out that in those cases the court was concerned with whether to exercise its discretion to disapply the limitation period and allow a second writ or claim to be issued after the limitation period had expired where the first writ had not been properly served within the prescribed four-month period of service which is quite dissimilar from considerations of whether to extend time for service of the first claim, the situation under consideration in the appeal at bar.

[80] The Libran respondents adopted as their own the submissions made by Learned King's Counsel for the 12th respondent in relation to the **ECHR** arguments advanced

by the appellant. They submitted that there is no factual or legal basis on which the Court may properly interfere with the learned master's determination and the appeal should therefore be dismissed.

Additional submissions by the 6th respondent

- [81] Learned counsel Ms. Stewart argued on the sixth respondent's behalf that the court did not deprive the appellant and other claimants of a remedy against their former solicitors by setting aside the Extension Order. It was submitted that to the contrary the learned master sought to separate the issue of lawyer errors from those relating to extension of validity of the claim. Further, a claimant who is aggrieved by professional misconduct of a legal practitioner may seek redress by filing a complaint with the Disciplinary Tribunal pursuant to the **Legal Profession Act**³⁸. The Tribunal has at its disposal a raft of remedies including making an award of compensation and/or reimbursement and/or further sum in respect of expenses incidental to the hearing of the complaint.

Additional submissions by the 12th respondent

- [82] As to the appellant's reliance on Article 1 Protocol 1 and Article 13 of the **ECHR**, the twelfth respondent submitted simply that those provisions are not applicable to it because it is not a public authority. Therefore, the referenced rights are not engaged in a suit against it.

Discussion

- [83] The **CPR** prescribes the timelines for service of a claim form within and outside of the jurisdiction in which it is filed. Rule 8.12(1) sets out the general rule that a claim form must be served within 6 months of the date on which it is issued. Importantly, rule 8.2(1) provides that a claim form may be issued without the statement of claim or supporting affidavit only where the claim form contains all of the information that

³⁸ Legal Profession Act, 2016.

rules 8.6, 8.7, 8.9 and 8.10 mandates to be included or if the court grants permission.

[84] A claimant who encounters genuine difficulties serving the claim form within the time limited by rule 8.12 may apply to the court under rule 8.13(1) for an extension of the time within which to serve the claim and the application must be supported by affidavit evidence. The court may in the exercise of its judicial discretion extend the validity of the claim form pursuant to **CPR** 8.13(4)(a) or (b) but only if satisfied on the evidence that the claimant has taken all reasonable steps to trace the defendant and serve the claim but has been unable to do so; or that there is some other special reason for extending the period. The special reason gateway is introduced under paragraph (b) of rule 8.13(4).

[85] It is settled law and now accepted that the regime for extension of the validity of a claim form is, as a matter of public policy and public interest, strict and the protocols and rules rigidly observed and applied. As a matter of public policy, it is recognized that any extension of the validity of a claim form has the effect potentially of extending the limitation period and this is discouraged for obvious reasons. As explained by Rix J in **Aktas v Adepta** and followed in **Rondex Finance Inc v Ministry of Finance of the Czech Republic**:

“... it is important therefore that the courts strictly regulate the period granted for service. If it were otherwise, the statutory limitation period could be made elastic at the whim or sloppiness of the claimant or his solicitors. For the same reason, the argument that if late service were not permitted, the claimant would lose his claim, because it would become time-barred, becomes a barren service is excuse. But even where the claimant is well within the limitation period despite his delay in serving, there is a clear public interest in the rules and the courts curtailing the efficacy of a claim form which, because it has not been served, is not vet),' different from an unposted letter. Therefore, the strictness with which the time for supervised has entirely valid public interest underpinnings which are quite separate from the doctrine of abuse of process. It is sufficient for the rules to provide for service within a specified time and for the courts to require claimants to

adhere strictly to that time limit or else timeously provide a good reason for some dispensation.”³⁹

- [86] The court’s approach to such applications in this jurisdiction was elucidated in **Marty Steinberg v Swisstor & Co.** by Mitchell JA (Ag). He opined:

“I am satisfied that ... the power in CPR 8.13 to extend the validity of the claim form was only to be exercised for "good reason" for the failure to serve the claim during the period of its validity. The failure of the appellants to show that they had taken any steps at all to serve the claim form ... within the initial twelve (12) month period, or to give any explanation as to why they had failed to do so or what they had been doing, entitled the learned trial judge to set aside his earlier order extending time for service out of the jurisdiction by a further six (6) months and to set aside the subsequent service on the respondents as a matter of discretion. **The power to extend the validity of a claim is only to be exercised for 'good reason', which would normally involve showing good reason for the failure to serve the writ during the period of its validity.**”⁴⁰ (Emphasis added)

- [87] The case at the appeal bar involves circumstances that the appellant contends satisfies the ‘special reason’ gateway under rule 8.13(4)(b). In **Rondex**, Wallbank J. considered what is contemplated by that avenue. He stated:

“The language of sub-rule 4(b) is perfectly general, but in context the special reason must, in my judgment, be a special reason for extending the time within which the claim form may be served. In other words, sub rule 4(b) is designed to permit the Court, where there is a special reason for doing so, to extend time in order to enable the claimant to effect service. **In my judgment, the Court will only have a special reason for doing that if the claimant has previously been precluded or refrained from effecting service in circumstances which make it unjust that he should not be granted an extension of time within which to effect service.**” (Emphasis added)

- [88] Wallbank J put forward two examples of what might qualify as special reasons under rule 8.13(4)(b) stating that a special standstill agreement that the prospective defendant has repudiated at the last moment or a situation in which what was initially considered to be good service within the initial 6 month service period, is later

³⁹ [2011] QB 894 at 929, paragraph 91.

⁴⁰ At paragraph 71.

discovered not to have been good service necessitating that proper service be effected during an extended period. It is recognized that those examples are not exhaustive. The foregoing pronouncements by Rix J, Mitchell JA (Ag.) and Wallbank J. capture the applicable legal principles and find favour with me. I therefore apply them in consideration of the appeal.

- [89] As reflected in the submissions summarized earlier, the appellant's challenges to the learned master's decision fit under four main umbrellas, viz. illness of a party and a party representative which allegedly militated against the claimants arriving at a consensus as to service; review of the claim by a King's Counsel, 'lawyer errors' and the limitation defence. I propose to take each in turn.

Illness

- [90] As I understand it, the appellant submits that the learned master erred by rejecting his contention that the strokes suffered by the fifth claimant and the wife of an individual who served as the representatives for eleven of the claimants⁴¹ and the consequences of those illnesses did not meet the special reason requirement of rule 8.13(4)(b). He argues that the patients took ill within the period of validity of the claim which prevented the claimants from being able to consolidate their position regarding whether or not to instruct their lawyers to serve the claim form during that time. This was compounded by the inability of the other claimants, in particular the appellant, to obtain medical reports or other supporting documentation to put before the learned master for his consideration. On this aspect of the case, the learned master ruled succinctly:

“... the issue of illness of the claimants need only be stated to be put to rest. This is an asserted fact with no supporting medical report or corroborating documents. It also lacks particularity.”⁴²

⁴¹ The 7th – 15th, 17th and 18th claimants.

⁴² At paragraph 37 of the First Decision.

[91] It is not disputed that the learned master had no medical evidence before him as to the fact of or the timing of the illnesses of the patients. What is clear however is that the existence of the extension application and the affidavit evidence before the learned master reflects that the claimants appeared to encounter no difficulty in obtaining adequate instructions from the patients or their representatives with respect to the filing of that application during the relevant period or, alternatively, with proceeding without such instructions. In addition, the appellant has adduced no evidence to demonstrate how the strokes prevented the service of the claim and no information was set out detailing what if any steps were taken regarding service of the claims throughout the six-month period. Most fundamentally, no evidence probative of the strokes or their alleged effects has been presented to the court. For these several reasons, in my opinion, it was perfectly open to the learned master to conclude as he did both on the law and with respect to the evidence. I would not disturb his findings on the facts or the law.

KC review

[92] The learned master addressed the KC review reason at paragraph 50 of the First Decision as follows:

“King’s Counsel (KC) review of a pleadings was hardly a good far less special reason for extend (sic) the validity of a claim form. If this principle does need the support of an authority, support is found in the case of *Cecil v Bayat* where the Court therein made it clear that a desire to take advice from counsel does not provide a special reason to delay serving a claim form.”

[93] The respondents properly conceded that **Cecil v Bayat** on which the learned master relied, did not involve questions of delay or difficulties in the completion of a claim form but rather an application for an extension of time, grounded in the claimant’s inability to fund the proceedings through to conclusion because they did not have a conditional fee agreement. The court held in that case that this did not constitute a good reason not to serve. It reasoned that the claimants ought instead to have served the claim and then applied for a stay or an extension of time to take

procedural steps and this would have given the court an opportunity to make such orders as would ensure that they were not unduly prejudiced.

[94] It is accepted by the respondents that the learned master erred in holding that **Cecil v Bayat** was concerned with delay and timelines for preparing the claim. In addressing this aspect of the appeal, this Court must ask whether the claimants' desire to have King's Counsel review the claim prior to service amounts to a special reason for the non-service during the claim's initial period of validity. The appellant has invited this court to find that **Lesson v Marsden**, **Collier v Williams**, **Hoddinott v Persimmon Homes**, **City & General v Structure Tone** and **Glass v Surrendran** are supportive of his position that KC review constitutes a special reason for purposes of **CPR 81.3(4)(b)**.

[95] Without condescending to minutiae relative to the factual circumstances in each of those cases, it suffices to note that in **Lesson v Marsden**⁴³ the court was dealing with a scenario in which service of a claim form under the English CPR could be done separately from service of the particulars of claim.⁴⁴ The court noted (obiter) that the failure of a defendant to respond to a letter of claim might have been sufficient reason for applying for an extension of time to serve the particulars of claim but he did not have to make that decision since no application was before him.

[96] It is noteworthy that the court stopped short of saying that it would have been sufficient reason. Another distinguishing feature is that the application was made under rule 7.6(2) of the English CPR which is dissimilar to the Eastern Caribbean CPR rule 8.13(4)(b) under consideration, in that the latter contains conditions that must be satisfied before an extension is approved while the former does not. In any event, there is no binding or persuasive authority on that point. Accordingly, that case is of no assistance to the appellant.

⁴³ Which was heard together with *Collier v Williams*.

⁴⁴ The equivalent of the statement of claim in this jurisdiction.

[97] Similarly, **Glass v Surrendran** and **Hoddinott** take the appellant's case no further. In **Glass v Surrendran**, the reason put forward to justify an extension of time was the impending completion of the accountant's report; and in **Hoddinott** the claimant sought an extension of time to serve the claim form because they had been unable to serve the particulars of claim in time. In the former, the court found that the decision to await the accountant's report before service was not a good reason for delayed service. In **Hoddinott**, the ratio decidendi does not support the appellant's argument that a delay in completing the particulars of claim would be a good reason for non-service of the claim within the prescribed time. Likewise, in **City & General** the court's decision that non-service of the pending delivery of the arbitrator's award was not a good reason as such concerns or matters could be the subject of a case management order. The common theme in the cases cited by the appellant is that an extension of validity of a claim is not usually granted on the basis that it was delayed pending completion of the particulars of claim however legitimate the reasons for such delay.

[98] In the final analysis, none of the cases cited by the appellant supports his contention that the special reason requirement in **CPR 8.13(4)(b)** is met by a claimant who decides to await review by a legal practitioner of the finalization of particulars of a claim under the English regime. Applying the principles enunciated in **Rondex, Steinberg** and **Williams v Chang** to the evidence before the court, I am satisfied that the claimants and the appellant's decision to await review by a King's Counsel before serving the claim was deliberate, well-considered and intentional and does not meet the threshold of a special reason under **CPR rule 8.13(4)(b)** to warrant the grant of an extension of the validity of the claim form. Ultimately, the learned master's decision on this aspect of the application was the correct decision although the authority he applied in reaching it did not contain the finding that he said it did. I am fortified in this conclusion by reference to the claimants' conduct after the review by the KC was completed. Not only did the claimants delay making an application to amend the claim form and statement of claim, they served the claim without any

amendments while the application for amendment was pending and significantly, they made no attempts to serve the claim in the limited period of validity after review by the KC where the prevailing circumstances suggest that there was no practical difficulty achieving service on the respondents. In those circumstances, I am not persuaded that review by the KC qualifies as a special reason under rule 8.13(4)(b) of the **CPR**.

Lawyer Errors

[99] With respect to the alleged errors by the claimants' lawyers, the learned master found:

"[55] It is not for this Court to make any findings on these allegations. This Court is of the view that any errors made by the Claimants' lawyers may, form the basis of a separate action. They do not provide any special reason for extending the validity of the claim form.

[56] ... The Claimants in this claim submit that, Attorneys in this jurisdiction the effect of bringing a claim against the Solicitors is not practical or effective as solicitors are not required to carry insurance and in any event, there would be other difficulties given the relatively small Bar. Whilst this may be so, the Court declines to consider this a material factor for its consideration. The fact is, the cause of action exists. This is therefore not a special reason for extending the validity of the claim form in the Court's view."⁴⁵

[100] The appellant points to paragraphs 17 and 18 of the First Decision as amounting to a finding that the learned master erred in finding that one of the reasons for the non-service of the claim was lawyer error. At paragraphs [17] and [18] the learned master said:

"[17] There was a clear decision by Counsel for the Claimants not to serve the claim as a litigation decision due to a tangential case. This in my view is not a special reason to extend time to serve the claim. The **Rondex Finance** case dealt with whether a litigation decision not to serve was a good or special reason to extend the life of a claim form. Bannister J said:

'What cannot, in my judgment, be a special reason for extending the time within which a claim form may be served is,

⁴⁵ At paragraphs [55] and [56] of the First Decision.

as here, a unilateral decision on the part of the claimant not to comply with the rules, however admirable might be his motives. There can be no injustice in refusing an extension in such a case. If the Defendants had been unwilling to agree, following service, to defer the hearing of any challenge to the grant of permission to serve out until after the jurisdictional point had been resolved in the Swiss courts, then I accept that it might turn out that costs would have been wasted, but that is in the nature of the beast.'

[18] On the contrary, not serving the claim within the life of the claim form deprived the Defendants from agreeing to stay this claim until the determination of the tangential claim. Further, the Claimants has (sic) proffered no reason for not serving the claim and seeking direction from the Court in relation to the other Defendants who the Claimants are unable to serve. Likewise, no reason is given why the Defendants within the jurisdiction were not served. From the evidence the obvious conclusion is that these was a calculated decision not to do anything after the claim was filed. It seems only on the eve of the life of the claim form expiring, Counsel moved with alacrity to obtain the impugned order."

[101] Taking paragraphs [17], [18], [55] and [56] together, it is readily discernible that nowhere in those paragraphs did the learned master characterize the behaviour of the claimants' legal practitioners as lawyer errors or found that the claimants or the appellant advanced 'lawyer errors' as a basis for filing the extension application or resisting the set aside application. He noted however that to the extent that such a contention was being put forward, it was not a factor to which he attached much significance and those were issues to be determined in another forum. Finally, he ruled that such concerns did not constitute a special reason for purposes of rule 8.13(4)(b).

[102] A review of the decisions in **Aktas v Adepta** and **Firman v Ellis** reveals that the pronouncements of those courts are of no applicability in the instant appeal for the simple reason that the issues under consideration are not similar. In **Aktas v Adepta** and **Firman v Ellis** the English Courts were examining section 33 of the UK Limitation Act which empowers the court in personal injury claims to refrain from

applying the three-year limitation period as well as the strict approach that is followed in applications for extension of validity of a claim. The parties appear to all accept that the strictness of the regime is common to the English and Welsh and this jurisdiction. However, no similar provision to section 33 of the UK Limitation Act is under contemplation in the case at the appeal bar.

[103] Being mindful of the guidance in **Rondex** and **Steinberg**, it seems to me that the appellant's reliance on **Aktas v Adepta** and **Firman v Ellis** is misguided. Nonetheless, it is noteworthy that in **Aktas v Adepta** the court stated categorically in relation to the English CPR rules under consideration: "What is said is that the rules are strict and will be strictly applied. The negligence of a claimant's solicitor is no excuse. It is not a good reason for an extension, even where the extension is applied for in time. It is a bad reason, a reason for declining an extension".⁴⁶ Be that as it may, I wish to emphasize that I am not applying this pronouncement to the evidence in the case at the appeal bar. Instead, I am guided by the case law from this jurisdiction.

[104] Essentially, the learned master at paragraphs [55] and [56] refrained from making any findings as to alleged or perceived negligence of the claimants' former legal practitioners or findings as to whether their conduct constituted lawyer errors or a special reason within the requirement of rule 8.13(4)(b). He ruled that the claimants' argument that the absence of the requirement for professional indemnity insurance by lawyers was not a special reason for purposes of rule 8.13(4)(b). On the authority of **Rondex** and **Steinberg** he was entitled to find as he did, both on the law and on the evidence before him.

[105] Finally, the appellant's contention that the court erred in setting aside the Extension Order which had the effect of stifling his ability to pursue his rights to redress under the **ECHR** against his former legal practitioners is without merit on at least two

⁴⁶ At paragraph 71.

scores. Firstly, as acknowledged by the learned master and submitted by the 6th respondent, the appellant is entitled to pursue any such claim in a different forum. Secondly, with respect to the Libran respondents and the sixth and twelfth respondents, the **ECHR** has no applicability because they are not public bodies.

Limitation Defence

[106] The possibility of a limitation defence is one of the factors that the court must consider when determining an application for the extension of validity of a claim form. It is well-established that an extension of validity of a claim will be set aside if it can be demonstrated that the defendant might be deprived of a limitation defence by the extension of the claim's validity. In exceptional cases, an extension of time may be granted notwithstanding the possibility of a limitation defence.

[107] The words of Mitchell JA (Ag.) in **Steinberg** are instructive for present purposes. He said:

“From the authorities cited... once the respondents could show, as they have, that they may be deprived of a defence of limitation if time for service of the claim form was extended it was enough for the extension to have been set aside. The statutory limitation period should not be made elastic at the whim or sloppiness of a litigant. Public interest requires that claimants adhere strictly to the time limit for service or else provide a good reason for dispensation. That not having been done here, the learned judge was entitled to exercise his discretion to set aside the extension of time.”⁴⁷

[108] The learned master had this to say about this limitation defence factor:

“[48] The principle extracted from the authorities, is that once a limitation defense may be available to the defendants, the Court must consider that fact against granting the application. It is not for the court to resolve whether limitation has passed at this stage. Suffice to say the involved dispute as to when the limitation is or was is sufficient to resolve this issue against the Claimants in granting in any extension.

[49] Having considered the authorities, this Court is unable to pay any or any considerable regard to the limitation defence being removed from the Defendants (sic) arsenal in this case. In exercising any discretion,

⁴⁷ Ibid. at paragraph 73.

the Court has to balance the fairness of granting the application and the effect of removing the limitation defence from the Defendants. In my view, the interplay of the limitation defence makes a burden higher on the Claimants to demonstrate through cogent evidence that proactive and reasonable steps were taken to trace and serve the Defendants within the validity period of the claim form. More so, it makes the quality of a special reason higher when the effect would be to remove the limitation defence from the Defendants (sic) reach. This evidential threshold simply is not there to ground such a submission. ... The Court is unable to agree with the Claimants on this point.”⁴⁸

[109] An examination of the Claim Form and Statement of Claim in this case illustrates that the claimants alleged that the respondents conspired and took a series of premeditated steps commencing on 12th August 2013 and earlier, ending with a transfer of assets on 22nd April 2016 from NBA and CCB to NCBA and engaged in certain actions designed and intended to deprive the claimants of property and cause them loss. Additionally, it was pleaded that the fraudulent preference was committed by the signing of the Purchase and Assumption Agreement on 22nd April 2016 and the subsequent transfer of funds belonging to PB&T and CCIB depositors to NCBA. In their subsequent application to amend the claim filed on 24th November 2022, the appellant and the other claimants accepted that the limitation period had expired by that filing date.

[110] Against this background, it was open to the learned master in keeping with the principles set out in **Steinberg**, to conclude that the respondents potentially had a limitation defence in relation to the tort of conspiracy to deprive the appellant and other claimants of their property and cause loss to them. This was a relevant factor which justified setting aside the Extension Order unless exceptional circumstances justified a different outcome.

⁴⁸ At paragraphs [48] and [49] of the First Decision.

[111] The appellant argues before this Court that in light of his specific claim for recovery of the sums held in bank accounts with NBA that were unilaterally transferred from NBA to PB&T or PB&T assumed responsibility for communications with him in 2005, and further that the transferred funds were held as certificate of deposit contracts, such contracts which were rolled over for two years on 26th September 2013 and were valued at US\$893,921.46 as at 28th September 2015.⁴⁹ It is to be noted that in those paragraphs the appellant's claim to funds held by way of certificates of deposits are not separate from the monies which are the subject of the conspiracy claim under the succeeding paragraphs of the statement of claim. More fundamentally, the dates as pleaded relative to the alleged withholding of the monies held under the certificate of deposits predate the 22nd April 2016 'conspiracy' accrual date and would likewise be caught by the same six-year limitation period and the limitation defence factor. Moreover, as correctly argued by the respondents, a party's knowledge or awareness of a particular fact has no bearing on when a cause of action accrues or when the relevant loss happens. The pertinent question to be determined by the court is when the loss actually took place. The appellant's contention to the contrary is therefore of no assistance to him. This new line of argument does not advance the appellant's case.

[112] In all the circumstances and for all the foregoing reasons, I am satisfied that the learned master correctly identified and applied the applicable legal principles when considering the effect of a limitation defence in an application to set aside an Extension Order. His rulings in relation to the limitation defence, lawyer error and illness factors were grounded in well-established principles of law and were well-reasoned. Except to the extent noted in relation to the KC review point and misapplication of **Cecil v Bayat**, the learned master's analysis and determination are unimpeachable. In my view, his ultimate decision is not characterized by any error of fact or law that renders his judgment and orders blatantly wrong in relation to the set aside and striking out applications relative to the Libran respondents, the

⁴⁹ As pleaded at paragraphs 27 to 34 of the Statement of Claim.

sixth and twelfth respondents. I would therefore dismiss this ground of appeal and uphold his order in which he set aside the Extension Order in relation to the second, fifth, sixth, seventh, ninth, tenth, eleventh and twelfth respondents and struck out the claim against them.

Costs

[113] The general rule in relation to costs awards is that the successful party is entitled to his costs unless there is good reason to make a different order. There are no compelling reasons why the successful parties should not receive their costs in this appeal. The Libran respondents, the 6th and 12th respondents are entitled to their costs from the appellant on the appeal which are to be assessed if not agreed.

Disposition

[114] For the reasons outlined in this judgment I would order that:

1. The application by the appellant to adduce fresh evidence in this appeal is refused.
2. The appeal is upheld in relation to the Amendment Order. Paragraph [60] 1 of the learned master's decision dated 25th April 2023 dismissing the application to amend the claim form so far as it pertains to the first and eighth respondents is set aside. The Notice of Application to amend the claim form in relation to the first and eighth respondents is remitted to be determined by another master.
3. The appeal against the Setting Aside Order and the Striking Out Order in relation to the seventh respondent is dismissed. The order setting aside the Extension Order in relation to the seventh respondent as set out at paragraph [58] 1 of the learned master's decision dated 25th April 2023 is affirmed. The order striking out the claim as against the seventh respondent

as set out at paragraph [58] 2 of the learned master's decision dated 25th April 2023 is affirmed.

4. The appeal against the Substituted Service Order set out at paragraph [66] of the learned master's decision dated 25th April 2023 is dismissed. The order striking out the claim against the fourth respondent at paragraph [66] 1 of the master's decision dated 25th April 2023 is set aside. Liberty to the appellant to apply for any consequential orders.
5. The appeal against the order setting aside the Extension Order in relation to the 2nd, 3rd, 5th, 6th, 9th, 10th, 11th and 12th respondents and striking out the claim against them, set out at paragraph [58] 1 and 2 of the learned master's decision dated 25th April 2023 is dismissed. The learned master's order is affirmed.
6. The respondents shall have their costs of this appeal to be assessed within 21 days of today's date (i.e. on or before 14th August 2025) if not agreed.

[115] I am grateful to the appellant and to all legal practitioners for their submissions.

I concur.
Mde. Margaret Price Findlay
Chief Justice (Ag.)

I concur.
Mr. Reginald Armour
Justice of Appeal (Ag.)

By the Court

Chief Registrar