[2017] JMCA Civ 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 103/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**BUPA INSURANCE LIMITED (trading as BUPA GLOBAL)**	**APPELLANT**
AND	**ROGER HUNTER**	**RESPONDENT**

Written submissions filed by Myers, Fletcher & Gordon for the appellant

Written submissions filed by Hylton Powell for the respondent

13 February 2017

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

PHILLIPS JA

[1] I have read, in draft, the comprehensive judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and I have nothing useful to add.

MCDONALD-BISHOP JA

[2] Bupa Insurance Limited, trading as Bupa Global (Bupa), has brought this procedural appeal against the decision of Sykes J, delivered in the Commercial Division of the Supreme Court on 7 October 2015, in which he refused Bupa's applications to, inter alia, set aside an order permitting service of the claim form and particulars of claim out of the jurisdiction; set aside the service of the said originating documents served pursuant to that order; and to strike out the claim. In those proceedings below, Bupa is named as second defendant in a claim brought by the respondent, Dr Roger Hunter (Dr Hunter), against Bupa and Mrs Alma Grace-Leahy (Mrs Leahy), who is named as the first defendant. The claim was brought on the basis that Bupa and/or Mrs Leahy are indebted to Dr Hunter in the sum of £194,800.00 for medical treatment of Mrs Leahy by Dr Hunter.

The background

[3] Bupa is a company incorporated in the United Kingdom and carries on business internationally as a provider of medical insurance. It provided group health insurance coverage to Kier Group Plc (Kier). Mrs Leahy is covered under this policy, being the spouse of an employee at Kier. Dr Hunter is a consultant spinal surgeon and consultant neurosurgeon at the Medical Associates Hospital (MAH).

[4] On 14 January 2014, Dr Hunter performed surgery on Mrs Leahy at MAH, to address serious spine-related medical complications. Prior to the surgery, Bupa provided written pre-authorization confirmation/treatment approval for Mrs Leahy to proceed with the surgery. The terms of the treatment approval were embodied in a form, the

treatment approval form. By those terms, Bupa, inter alia, approved the conduct of the surgery and treatment by Dr Hunter and agreed to pay for the treatment within the terms and conditions of the patient's plan. Bupa also declared in the form that "we will only meet costs that are medically necessary to treat this particular condition and that are reasonable and customary".

[5] Following the surgery, Dr Hunter, at the request of Bupa, sent Bupa an invoice in the sum of £221,700.00. The invoice set out details of the treatment and costs attributable to each aspect of the treatment. Bupa paid Dr Hunter only £26,900.00 and refused to pay the balance of £194,800.00. Mrs Leahy also refused to accede to Dr Hunter's demand for the payment of the outstanding balance.

Proceedings in the Supreme Court

[6] By a claim form filed on 5 January 2015, and amended on 29 April 2015, Dr Hunter claims against Mrs Leahy and Bupa the outstanding sum of £194,800.00.

[7] On 21 January 2015, Edwards J (as she then was) granted permission to Dr Hunter to serve the claim form and the particulars of claim outside of the jurisdiction on Bupa. It was also a term of the order that Bupa was to file an acknowledgment of service within 42 days and the defence within 70 days of service on it of the claim form and particulars of claim. On 7 May 2015, Bupa was served by a procedurally acceptable method with the order of Edwards J for service out of the jurisdiction, the amended claim form (together with prescribed notes to the defendants and forms of acknowledgment of service of claim form), and the amended particulars of claim. Bupa,

however, failed to file an acknowledgment of service and a defence in the time stipulated in the order.

[8] In the meantime, on 31 March 2015, Mrs Leahy filed her defence to the claim. In her defence, she averred, inter alia, that the agreement for her treatment was between MAH and Bupa and that Dr Hunter was an agent of the hospital. According to Mrs Leahy, there was no agreement by her to pay Dr Hunter's reasonable fees and expenses for the surgery and other treatment in the event and to the extent that he was unable to recover from Bupa. Mrs Leahy averred further, and in the alternative, that even if there was an agreement between herself and Dr Hunter, he would have been estopped from pursuing the claim against her because, based on his conduct, she was of the view that Bupa would cover all the costs and expenses related to the surgery and she had relied on this representation to her detriment. Further, she averred that the payment already made by Bupa to Dr Hunter is reasonable and customary for the treatment received. Her case, therefore, is that she is not liable to Dr Hunter for the outstanding sum he is claiming.

[9] On 3 July 2015, Bupa, without filing an acknowledgment of service and or a defence in compliance with the order of Edwards J, filed an application to set aside the order permitting service of the claim form and particulars of claim outside of the jurisdiction as well as the service of the said documents. An application was also made for the time to be extended for the application to be made. An amended application was filed on 13 July 2015, which included an application to set aside any judgment in default

of acknowledgment of service, if entered against Bupa, and to strike out Dr Hunter's statement of case against Bupa.

[10] On 18 September 2015, a further amended notice of application for court orders was filed by Bupa, which now included an application for an order that the court has no jurisdiction to try the claim. It was at the filing of that further amended notice of application for court orders that Bupa filed an acknowledgment of service, which was, for all intents and purposes, out of time.

[11] On 23 September 2015, Sykes J heard the applications. The applications to extend time to make the applications; to set aside the order for service out of the jurisdiction; to set aside the service of the amended claim form and amended particulars of claim; for an order that the court had no jurisdiction to try the claim; and for the striking out of the claim were hotly contested by Dr Hunter. There was no contest to the application to set aside the default judgment (if one had been entered).

[12] On 7 October 2015, Sykes J, made the following orders:

> "1. The application to extend time to make these applicat-ions is granted.
>
> 2. The application to strike out the claim is refused.
>
> 3. The application to set aside the order for service out of the jurisdiction is refused.
>
> 4. The application to set aside the service of the Amended Claim Form and particulars of Claim is refused.
>
> 5. Any default judgment entered is set aside.
>
> 6. Leave to appeal is granted.

7. The period for filing the 2nd Defendant's Defence is within 56 days of the date of this Order.

8. No Case Management Conference date is to be set until the appeal is heard and determined or the 2nd Defendant indicates that it is not pursuing the appeal.
…"

The appeal

[13] Dissatisfied with Sykes J's decision, Bupa filed this procedural appeal, challenging the following four aspects of the order of Sykes J:

"(1) The application to strike out the claim is refused.

(2) The application to set aside the order for service out of the jurisdiction is refused.

(3) The application to set aside the service of the Amended Claim Form and Particulars of Claim is refused.

(4) The implicit refusal of the application for a declaration that the Supreme Court has no jurisdiction to try the claim against [Bupa]."

Grounds of appeal

[14] These are the grounds on which Bupa has brought its appeal:

"(1) The learned judge erred by exercising the court's jurisdiction in circumstances where it had no jurisdiction due to improper service.

(2) The learned judge erred by failing to appreciate that [Dr Hunter's] failure to serve [Bupa] in compliance with the Civil Procedure Rules, 2002 amounts to a breach of natural justice, which cannot be cured.

(3) The learned judge erred by treating Bupa's procedural errors as equivalent to Dr Hunter's.

(4) The learned judge erred by failing to appreciate that [Dr Hunter's] failure to properly serve [Bupa] means

that time had not yet started to run against [Bupa] and, in any event, jurisdictional points may be taken at any time.

(5) The learned judge erred by failing to appreciate that Bupa's original application filed July 3, 2015 was, on its face, a challenge to the court's jurisdiction.

(6) The learned judge erred by failing to set aside the Order permitting service out of the jurisdiction pursuant to the CPR or *ex debito justitiae.*

(7) The learned judge erred by failing to set aside the service of the Amended Claim Form and Amended Particulars of Claim pursuant to the CPR or *ex debito justitiae.*

(8) The learned judge erred by failing to appreciate that Bupa is not a necessary or proper party to this claim.

(9) The learned judge erred by failing to assess [Dr Hunter's] claim against [Bupa] on the basis of the evidence before him.

(10) The learned judge erred by allowing Dr Hunter to enforce a contract to which he is not privy.

(11) The learned judge erred by placing reliance on ***Brown & Davis Ltd v Galbraith***."

Orders being sought on appeal

[15] Bupa now seeks these orders from this court:

"(1) The appeal is allowed.

(2) The order of the Hon Mr Justice Sykes made on October 7, 2015 is set aside, save for the order granting an extension of time to [Bupa] and setting aside any default judgment that may have been entered against [Bupa].

(3) The order of the Hon Mr Justice Sykes made on October 7, 2015 is set aside, save for the order granting an extension of time to [Bupa] and setting

aside any default judgment that may have been entered against [Bupa].

(4) The Supreme Court has no jurisdiction to try the claim against [Bupa].

Alternatively,

(5) Dr Hunter's] statements of case against [Bupa] in the court below are struck out.

Alternatively,

(6) The order for service out of the jurisdiction made by the Hon Ms Justice Edwards on January 21, 2015 is set aside.

(7) Service of the Amended Claim Form and Amended Particulars of Claim on [Bupa] is set aside.

In any event,

(8) Costs of the appeal and of the proceedings in the court below are awarded to [Bupa], to be taxed if not agreed."

Discussion

[16] Although there are 11 grounds of appeal, it is recognised that they are closely related in some fundamental respects and so can be consolidated and treated with under broad headings based on the issues raised for consideration on those grounds. Therefore, for the purposes of analysis, the closely related grounds have conveniently been grouped together under several headings by reference to the issues to which they have collectively given rise.

[17] In this regard, it seems apt that the grounds relating to the question whether Bupa is a proper party to the proceedings ought to be examined first as the question,

which is one of substantive law, directly impacts the procedural issues concerning service outside the jurisdiction and whether the claim against Bupa should be struck out.

Issue (1): whether Bupa is a proper party to the claim (grounds 8, 9, 10 and 11)

> **"(8) The learned judge erred by failing to appreciate that Bupa is not a necessary or proper party to this claim."**
>
> **"(9) The learned judge erred by failing to assess [Dr Hunter's] claim against [Bupa] on the basis of the evidence before him."**
>
> **"(10) The learned judge erred by allowing Dr Hunter to enforce a contract to which he is not privy."**
>
> **"(11) The learned judge erred by placing reliance on *Brown & Davis Ltd v Galbraith.*"**

[18] Sykes J rejected Bupa's contention that it was not a proper party to the claim. The core bases for his conclusion can be found at paragraphs [36] to [42] of his comprehensive judgment (**Roger Hunter v Alma Grace Leahy and Bupa Insurance Limited** [2015] JMCC COMM 20). For convenience, the more significant aspects of his reasoning that led to his conclusion that Bupa is a proper and necessary party to the claim have been distilled and are set out in point form (albeit substantially in the judge's own words), as follows:

(i) While it may be true that the contract was really between Kier, the employer of Mrs Leahy's husband, and Bupa, and is one of an indemnity, that fact, without more, does not prevent the possibility of any liability arising against Bupa in

favour of Dr Hunter. This is so because the reality suggested by the pleadings is that Mrs Leahy was either unable or unwilling to pay 'up front' the full costs of the procedure and await indemnification under the insurance. Discussions took place with all the relevant parties to work out how the doctor would be paid.

(ii) The pleadings suggest that the arrangement arrived at was that Dr Hunter would be paid directly by Bupa, upon providing the services, provided the costs were reasonable and customary in Jamaica. This suggests that there is an issue to be tried between Bupa and Dr Hunter. "These are the questions that arise: did Bupa make any representation to Dr Hunter that led him to believe that he would be paid the full value of his services by Bupa once he provided the services? If yes, were these representations made in Jamaica? If yes, then clearly the Jamaican courts would have jurisdiction and therefore Bupa is a proper party and thus properly falls within rule 7.3".

(iii) These issues cannot be resolved on only the pleadings. Oral evidence is necessary along with the documentation so that the court can determine what exactly passed between Bupa,

Mrs Leahy and Dr Hunter. Bupa "cannot be relegated to the sidelines. It is an active player in this claim".

(iv) The underlying idea in the case of **Brown & Davis Ltd v Galbraith** [1972] 3 All ER 31, relied on by Dr Hunter, can be of assistance in analysing the case and can provide support for Dr Hunter's approach to this matter.

(v) Whether or not the contract was between Bupa and MAH and not with Dr Hunter, as contended by Bupa, is an issue that has to be determined at trial and not at this stage where the pleaded case suggests otherwise and discovery has not properly begun.

[19] The primary argument advanced on Bupa's behalf to support its contention that the learned judge erred in his finding that it is a proper and necessary party to the claim is that there was no contract between Dr Hunter and Bupa. So, with the absence of a contractual relationship between them, there would be no basis on which Dr Hunter can obtain an order permitting service out of the jurisdiction and there is no prospect of success on the claim against it. For these reasons, Bupa contends, Edward J's order and the service of the claim form should be set aside and the claim struck out in relation to it. The bases for this contention may be summarised thus:

(i) The treatment approval form on which Dr Hunter relies, as the basis of this alleged contractual relationship, was, in

fact, issued by Bupa to MAH, authorizing the provision of treatment to Mrs Leahy and so there was no "factual" basis for the assertion by Dr Hunter that the treatment approval form granted approval to him to treat Mrs Leahy. Nowhere on the form does it indicate that Dr Hunter should treat Mrs Leahy and in so doing, would be compensated by Bupa in the form of reasonable fees and expenses. The form does not establish any direction by Mrs Leahy to Bupa to pay Dr Hunter directly. There is thus no agreement between Bupa and Dr Hunter on the face of the treatment approval form as alleged by Dr Hunter or at all. The court, therefore, should not allow "a stranger" to enforce a contract.

(ii) At the time when the order was made, the court only had Dr Hunter's side of the story. What has since come to light is that Mrs Leahy contends that she was not Dr Hunter's patient but a patient of the hospital. This is entirely consistent with the treatment approval form issued to the hospital and is a fact accepted and pleaded by Dr Hunter.

(iii) Bupa has no contract with Dr Hunter and owes no duty to him. Its obligations are owed solely to Kier. The contract with Kier is a contract of indemnity, similar to how automobile insurers indemnify their clients. There is no

reason for Bupa to be a party to the claim as it does not "make it any more or less liable for the payment". Its liability for the payment would be based on its contract with Kier and the liability remains if the court finds that Dr Hunter is owed fees by Mrs Leahy. Further, Bupa, as a third party, could not be engaged as a party to the claim as there is no privity of contract between them and the law does not allow strangers to enforce contracts: such a joinder is an irregularity (see **Delroy Rhoden v Construction Developers Associates Ltd and Trevor Reid**, SCCA No 2/2002, delivered 18 March 2005 at page 15).

(iv) The substantive issue in this claim is not whether Bupa is liable to its insured, but whether the fees charged by Dr Hunter are reasonable and customary. Bupa is not a necessary party for that to be determined by this court.

(v) The learned judge's findings that there is an issue to be tried could not have been made on the basis of the very clear evidence before him provided by Dr Hunter himself, which does not support his case.

(vi) Sykes J's reliance on **Brown & Davis Ltd v Galbraith** is erroneous. There is no evidence of a "secondary, parallel or

tripartite contract". The issue that arose in that case does not arise on this case.

Findings and disposal of issue (1)

[20] In so far as the question whether Bupa is a proper and necessary party to the claim is relevant to the issue of the service of the claim form outside the jurisdiction, consideration must be given to the relevant rules of the Civil Procedure Rules, 2002 (the CPR) which permit service out of the jurisdiction. Rule 7.2 stipulates that a claim form may be served out of the jurisdiction, only if rules 7.3 or 7.4 allow, and the court gives permission. Rules 7.3 and 7.4 set out the various circumstances under which permission to serve the claim form out of the jurisdiction may be given by the court.

[21] The rule which has been engaged by Dr Hunter in the instant case, and which has given rise to the question under consideration, is rule 7.3(2)(c). It reads:

> "(2) A claim form may be served out of the jurisdiction with the permission of the court where-
>
> (a)...
>
> (b)...
>
> (c) a claim is made against someone on whom the claim form has been or will be served, and-
>
> (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and -
>
> (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and

> who is a necessary and proper party to that claim..."

[22] There is no question that Dr Hunter has made a claim against someone on whom the claim form had been or would have been served (Mrs Leahy) and that there is between Mrs Leahy and Dr Hunter a real issue, which is reasonable for the court to try. The material question is whether Bupa, as "another person" who is outside the jurisdiction, is a necessary and proper party to that claim between Dr Hunter and Mrs Leahy to satisfy rule 7.3(2)(c)(ii).

[23] In **Re ERAS EIL Actions**, Times Law Reports, 28 November 1991, relied on by Dr Hunter, Mustill LJ usefully explained the concept "a necessary and proper party" in these terms:

> "The class of necessary or proper parties to an action included persons who ought to have been joined by the plaintiff as a co-defendant or a co-plaintiff or whose presence before the court was otherwise necessary or proper.
>
> The words were amply wide enough to include a case where, for instance, a defendant was seeking relief, such as an indemnity, from a non-party in respect of the plaintiff's claims in the action.
>
> Depending on the particular facts, that might be a question or issue arising out of or connected with the relief claimed by the plaintiff in his action. If it was, then the court had to decide whether it would be justifiable and convenient to determine that question or issue between the defendant and the non-party as well as between the plaintiff and the defendant."

[24] Having considered the circumstances of the case against what is meant by a "necessary and proper party", I accept the submissions made on behalf of counsel for Dr

Hunter that Sykes J did not err in finding that Bupa is a proper and necessary party to the claim. I say this for the following reasons, which substantially accord with the arguments put forward by counsel on behalf of Dr Hunter.

[25] Counsel for Dr Hunter, in their response, have pointed out aspects of the treatment approval form, which they argue would establish a contractual relationship between Bupa and Dr Hunter. The form has been examined. The form does show in section 1, that Bupa undertook to pay for the "treatment within the terms and conditions of the patient's plan" and "will only meet costs that are medically necessary to treat this particular condition and that are reasonable and customary". Section 3 headed "**How to claim**" states:

> "You will not need to complete a separate claim form to enable us to settle this claim. **Simply ask the provider of your treatment to fully complete any blank sections of this statement**. All you need to do is to check the information is correct and sign the declaration. Then ensure that this is returned to us at the address detailed below with the invoices within 6 months of treatment or payment cannot be guaranteed."

[26] Under section 6 of the form, Dr Hunter was specifically identified as the "consultant in charge of treatment". Dr Hunter was also required to complete and affix his signature to that section of the form. The last part of that section also contained a declaration to be signed by Dr Hunter, as the doctor providing the treatment, which reads:

> "I confirm that I have read, understood and agree [sic] to abide by those terms of this agreement that apply to me and

> furthermore confirm that those matters in section [sic] 5 and 6 of this agreement of which are of a medical treatment and/or diagnostic nature are to the best of my knowledge accurate and correct."

At section 8, the form required information as to payment details, including who should be paid, whether "doctor/hospital", "patient" or "principal member".

[27] Dr Hunter completed the form as requested by Bupa agreeing to abide by the terms of "the agreement" that apply to him and proceeded to provide the treatment. Following that, he was eventually paid directly by Bupa for his services upon submission of his invoice to it. Bupa, however, refused to pay the balance on the grounds that the costs are not reasonable and customary.

[28] It is, indeed, arguable that the treatment approval form can be taken as confirmation of pre-authorization given by Bupa for Dr Hunter to treat Mrs Leahy in exchange for payment of reasonable and customary fees that were medically necessary to treat Mrs Leahy's condition within the terms and conditions of her insurance plan. Dr Hunter's case that he is a consultant to MAH, that he was the private doctor of Mrs Leahy and that MAH was merely the facilitator for the surgery, and not the service provider, has given rise to issues for consideration, which would require ventilation at trial on evidence.

[29] Also, it is clear that Dr Hunter, himself, bore obligations under the treatment approval issued by Bupa as set out in section 6 to "abide by those terms of [the] agreement that apply to [him]". The question whether he gave consideration for Bupa's undertaking to pay him for the surgery (as he alleges), inevitably, arises for exploration

in the light of Bupa's argument that there is no privity of contract between it and Dr Hunter. Indeed, the fact that Bupa had directly paid to Dr Hunter (and not to MAH) what, in its view, are reasonable and customary fees has given rise to an issue that directly involves Bupa as to whether there was a binding undertaking on the part of Bupa to pay Dr Hunter his fees and not MAH. Also, the issue whether the fees claimed by Dr Hunter are not reasonable and customary, as both Bupa and Mrs Leahy have asserted, in refusing to pay Dr Hunter, arises for resolution.

[30] It does seem, in all the circumstances, that it is reasonable to hold that the terms of the pre-authorized treatment approval form and all the surrounding circumstances, including the subsequent conduct of the parties, do give rise to a valid question as to whether there is a binding contract between Dr Hunter and Bupa. There is thus a clear dispute between Bupa and Dr Hunter, which is intimately connected to the dispute between Dr Hunter and Mrs Leahy concerning the payment of his fees, which warrants investigation on evidence at a trial. It is reasonable for the court to try them together.

[31] The thought process of Sykes J, as revealed in his well-reasoned judgment, gives a clear indication that he did assess the pleadings, and whatever evidence was put before him at that stage, in considering Dr Hunter's claim against Bupa. There is thus no basis on which it may be said that the learned judge misapprehended the pleadings of the case brought by Dr Hunter and the case to be advanced by Bupa in respect of the substantive claim. Bupa's complaints on ground 9, that the learned judge erred by failing to assess Dr Hunter's claim against it on the basis of the evidence before him in coming

to his finding that Bupa is a proper and necessary party to the claim, is without merit and must, therefore, fail.

[32] The same fate befalls Bupa's complaint made in ground 11 that the learned judge erred in his reliance on **Brown & Davis Ltd v Galbraith** in arriving at his conclusion that Bupa is a necessary and proper party to the claim. Dr Hunter relies on this authority to advance the premise that a court could find in the circumstances that there was a contract between him and Bupa with respect to the payment of his fees, which he considers to be "reasonable and customary", even if another contract subsists between Bupa and MAH or any another party.

[33] In that case, repairers of a motor vehicle sued the owner of the vehicle after the owner and the insurance company had not paid for the repairs. The repairers had effected repairs after an assessor employed by the insurance company had completed the insurers' estimate form in which it agreed to the costs of repairs and the towing charge and authorized the repairers to carry out the work. The insurers subsequently went bankrupt and so the repairer sought to recover the full costs of the repairs and the towing charge from the owner. The judge at first instance found that the owner was liable to pay for the repairs. On appeal by the owner, the English Court of Appeal held that two contracts had been entered into: one between the repairers and the insurance company, by which the insurers undertook to pay the main costs of the repairs and a portion of the towing charge, and another between the repairers and the owner of the car, by which the owner was responsible for the insurance excess and a portion of the

towing charge. The Court found that there was no implied term in the contract that the owner had accepted any liability for the main costs of the repairs.

[34] Sykes J, however, did not cite the case for the decision itself, which was in favour of the owner. He cited it for what he saw as the usefulness of the dicta that could be adopted by a court to grant Dr Hunter the redress he seeks. He noted, in particular, the dicta of Buckley and Sachs LJJ at pages 39 and 40, respectively. Buckley LJ stated:

> "The crucial part of the judgment of the learned county court judge is that where he dealt with the contractual position between the parties. He reached the conclusion, and rightly reached the conclusion I think, that two contracts were here involved, one between the plaintiffs and the insurance company, and one between the insurance company and the defendant, the owner of the car.

Sachs LJ, for his part, opined:

> "Any decision in this type of case must necessarily depend on the facts established in evidence. In general however, in those everyday transactions – there must be thousands each week - when, on a car owner bringing his damaged car to a repairer for repairs, which in practice will be paid for by the insurers, and the insurers are then brought into the negotiations, the resulting arrangements produce an agreement which in law is properly termed a tripartite agreement. I prefer that term to 'two separate agreements' although in the present case, as indeed in most cases, it makes no difference which terminology is used.
>
> That tripartite agreement is one to which there are three parties, the owner, the repairer and the insurers, and each can acquire rights and each can come under obligations. As in practice there is on such occasions hardly ever any overall agreement in writing, it follows that the rights and obligations of each party have to be gathered from such documents as are put in evidence and from the implications to be drawn from the circumstances of the case as a whole. In the end one looks at the position as if the three parties

> were round a table and then applies the **Reigate v Union Manufacturing Co (Ramsbottom) Ltd** [1918] 1 KB 592 tests for any matter which does not appear from the documents before the court."

[35] Sykes J, upon following the guidance of these dicta, then stated at paragraphs [40] and [41] of his judgment:

> "[40] This court is fully aware that these statements were not part of the ratio of the case but nonetheless they provide insight into how these matters may be viewed. While made in the context of a motor car repair case, the underlying idea can be of assistance in analysing the present case. What these Lords Justices recognised was that the reality of these arrangements is that the insurers are crucial to the payment arrangements. Unless there was some indication that they would pay it may be that the necessary repairs would either not be done or done solely or substantially at the insured's expense. It is interesting to observe that neither Lord Justice thought that the finding of two contracts was beyond the pale. They spoke as if it were the most natural conclusion. This is not to say that under closer judicial scrutiny the obiter dicta will hold up but what is clear is they provide support for Dr Hunter's approach to this matter.
>
> [41] Interestingly, the court in **Galbraith** cited cases where it was apparent that no one thought it strange that a contract may arise between the repairers and the insurers despite the fact that the contract between the insurers and the insured was a contract of indemnity. Mrs Robinson made a valiant attempt to dispose the **Galbraith** case by pointing to the peculiarities of motor vehicle insurance. She even referred to the insurance statute dealing with motor vehicle insurance. This submission cannot avail counsel because the points of dissimilarity are not so great as to make the essence of the cases inapplicable to the circumstances under consideration."

[36] It is clear that the learned judge, in considering the dicta in **Brown & Davis Ltd v Galbraith**, viewed the case as providing a possible way that a trial court could analyze the evidence in the instant case and find Bupa liable to Dr Hunter. This

possibility is not at all far-fetched. The principles, even though not binding on our courts, could well be found to be of high persuasive value in determining whether a contract exists between Bupa and Dr Hunter within the context of this case. Therefore, whether there is evidence of a "secondary, parallel or tripartite contract", within the ambit of the principles enunciated in that case would ultimately be a matter for a trial court to investigate. So, if on one possible view of the case, the principles enunciated in it are acceptable, then Dr Hunter could well succeed in establishing his claim of breach of contract against Bupa.

[37] There is nothing in the learned judge's reasoning with respect to the utility of the authority in his decision that has rendered, as plainly erroneous, his finding that Bupa is a proper and necessary party to the claim. I am therefore constrained to disagree with Bupa's position that the learned judge's reliance on the case (for the limited purpose he did) was misplaced. I find no merit in this particular ground of appeal and so it fails.

[38] For all the reasons already discussed, it cannot be said, as is contended in ground 10, that the learned judge erred by allowing Dr Hunter to enforce a contract to which he is not privy. The issue of whether or not there is privity of contract is one for ventilation at a hearing and the learned judge so correctly ruled. He cannot at all be faulted on this basis.

[39] In light of the finding that the learned judge was correct in holding that Bupa is a proper and necessary party to the claim involving Dr Hunter and Mrs Leahy he would also have been correct in holding that the criterion laid down under rule 7.3(2)(c)(ii) of

the CPR was satisfied for an order to be made by the court for the claim form to be served on Bupa out of the jurisdiction. Therefore, the order could not be set aside on the basis that Bupa is not a proper party to the claim.

[40] The learned judge's decision not to set aside the order for service, the service of the claim form and particulars of claim and to strike out the claim on the basis contended by Bupa that it is not a proper and necessary party, is therefore unassailable. Grounds 8, 9, 10 and 11, therefore, fail.

[41] The remaining question is whether the order was defective for any other reason, thereby rendering the service of the claim ineffectual in invoking the jurisdiction of the court as contended by Bupa. In this connection, the grounds relating to service of the order and the claim form will now be examined.

Issue (2): whether the order and service should be set aside due to non-compliance with the CPR (grounds 2, 6, and 7).

> **"(2) The learned judge erred by failing to appreciate that [Dr Hunter's] failure to serve [Bupa] in compliance with the [CPR] amounts to a breach of natural justice, which cannot be cured."**
>
> **"(6) The learned judge erred by failing to set aside the Order permitting service out of the jurisdiction pursuant to the CPR or *ex debito justitiae."***
>
> **"(7) The learned judge erred by failing to set aside the service of the Amended Claim Form and Amended Particulars of Claim pursuant to the CPR or *ex debito justitiae.*"**

[42] The core contention of Bupa, challenging the service on it of the claim form and accompanying documents outside the jurisdiction, is that there has been improper service rendering both the order for service and the service of the claim form nullities, which cannot be rectified by the court. The allegation of improper or invalid service is based on non-compliance with rules 11.15 and 11.16(3) of the CPR, which Bupa contends amounts to a breach of natural justice.

[43] It is necessary for the purposes of further discussion to set out both rules of the CPR that have been engaged by Bupa in advancing its appeal. In this connection, rule 11.15 provides:

> "11.15 After the court has disposed of an application made without notice, the applicant must serve a copy of the application and any evidence in support on all other parties."

Rule 11.16, then, states:

> "(1) A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.
>
> (2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.
>
> (3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule."

[44] Sykes J's reasoning, in disposing of this issue concerning improper service, may be summarised thus:

(i) It seems that the only thing Bupa did not know in this particular case was that it had 14 days to make the application under rule 11.16. Even if Bupa did not know this, the CPR would not have barred Bupa from applying to set aside the ex parte application because it is well known that an application made ex parte can always be set aside, unless some law prohibits it. See **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd and Another** [1991] 1 WLR 550, in which the Privy Council endorsed the dicta of Lord Donaldson MR in **WEA Records Ltd v Visions Channel 4 Ltd** [1938] 1 WLR 721, and of Lord Denning MR in **Becker v Noel and Another (Practice Note)** [1971] 1 WLR 803. The CPR has not altered the principles from these authorities. All the CPR has done is to add a time limit within which to make the application provided there is notification of that right in the order served on the affected party. The CPR provides that the time for making the application may be extended. So, a litigant can apply for an extension of time to make applications, even

after the time for making the application has passed, as was, in fact, done by Bupa.

(ii) The failure to inform Bupa that it had 14 days to make the application to set aside the order did not prevent it making an application challenging the jurisdiction of the court, that is to say, the failure to make the challenge to the order in 14 days did not prevent Bupa filing the acknowledgment of service within the 42 day period and making the application to challenge jurisdiction within the 70 days for filing the defence.

(iii) Rule 26.9 applies where the consequences for the failure to follow a rule, practice direction or court order is not specified. The terms of the rule are plain. It is giving the court the maximum discretion where the consequence of a procedural failure has not been specified in any rule, practice direction or court order. Where a rule specifies the consequence, then that consequence governs unless there is relief from the consequence. Where the consequence is not specified, the court must look at things in the round and determine the way that is best to proceed. This is

in keeping with the overriding objective to deal with cases justly. Mangatal J's decision in **Valley Slurry Seal Caribbean and Another v Valley Slurry Seal Company and Another** [2012] JMCC Comm 18, that the failure to comply with rule 11.5 means that the court does not have jurisdiction over the defendant, is not accepted.

[45] In stating his conclusion on this point, the learned judge opined:

> "[32] As this court understands Mrs Robinson, in respect of her complaint about 11.16(3), she is not saying that there was a defect in the application for the order for service out of Jamaica; she is not saying that there was a failure to meet ex parte application standards; she is not saying that the judge acted upon incorrect information. Her complaint is that the order did not have the words specified by rule 11.16(3). It is the conclusion of this court that the omission of those words, important as they are, in the circumstances of this case, is not sufficient for the order to be set aside. Looking at things in the round no harm has been done to Bupa. It is not been [sic] prejudiced in any way whatsoever. The only possible prejudice it might suffer is that a judgment in default of acknowledgment of service may have been entered and even then, Miss McLeod has indicated that she would not be opposing the setting aside of the judgment if it has been entered."

[46] The contention on behalf of Bupa is that the failure of Dr Hunter to serve Bupa with the notice of application for service out of the jurisdiction, along with the affidavit, meant that it was not aware of the evidence that was placed before Edwards J on which the order for service outside the jurisdiction was granted and that resulted in it being unaware of the basis for the granting of the order (breach of rule 11.15). Further, that

the omission of the statement in the order served on Bupa, to inform it of its right to apply to set aside the order within 14 days, meant that it was unaware of the right to set aside the order until the first hearing on 30 July 2015, when the documents were provided by Dr Hunter's attorney at the behest of the court (breach of rule 11.16(3)). Bupa, therefore, maintains that the service on it of the necessary documents and notice at the time of the service of the order was vital as they contained important information about how it could go about exercising the options available to it.

[47] Counsel for Bupa also advanced the argument that the word 'must' used in rules 11.15 and 11.16(3) should be treated as mandatory and so, in the light of the mandatory nature of the rules and Dr Hunter's failure to comply with them, Sykes J should have declared that the court lacked jurisdiction to hear the claim against Bupa. As such, he had no discretion to make right 'an error of procedure or failure to comply with a rule, practice direction or court order', as this is not simply a matter of procedure but a matter of substantive law that goes to the very heart of civil litigation and the court's jurisdiction in law. Accordingly, Sykes J had no discretion to exercise in relation to the setting aside of the service of the claim form, despite the requirements of rules 11.15 and 11.16(3) not being met. For these arguments, strong reliance was placed on **Dorothy Vendryes v Richard Keane and Another** [2011] JMCA Civ 15 and **Valley Slurry Seal Caribbean**.

Findings and disposal of issue (2)

[48] There is no question that there was a breach of rules 11.15 and 11.16(3), as alleged by Bupa, and which is conceded by counsel for Dr Hunter. The question

confronting Sykes J then was: what was the effect of the breach of the rules of procedure? Sykes J ultimately relied on rule 26.9 in resolving the question before him, and the question is whether he was wrong in so doing. Bupa says he was.

[49] Rule 26.9 provides:

> "26.9(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.
>
> (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.
>
> (4) The court may make such an order on or without an application by a party."

[50] Counsel for Bupa contends, on the authority of **Vendryes**, that rule 26.9 is not applicable because of this court's position on the mandatory nature of service and so where service is deficient, it goes to the very jurisdiction of the court, and cannot be either cured or waived. Based on this, the irregular service on Bupa cannot cause time to run as it was insufficient to invoke the court's jurisdiction; time only running on proper service.

[51] In **Vendryes**, the claimant had only served the claim form and particulars of claim on the defendant. The other documents that are required to be served with the claim form by virtue of rule 8.16(1) were not served. Upon the failure of the defendant

to file an acknowledgment of service, the claimant proceeded to request judgment in default of acknowledgment of service, which was entered. At first instance, Sykes J ruled that the judgment was irregularly obtained due to non-compliance with rule 8.16(1) and as such, it had to be set aside as of right. His decision was upheld on appeal. Harris JA, in delivering the judgment on behalf of the Court of Appeal, stated:

> "[12] Rule 8.16 (1) expressly specifies that, at the time of service, the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word 'must', as used in the context of the rule is absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated, offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside."

[52] In treating with the applicability of rule 26.9 to the case, Harris JA concluded that it was inapplicable to the case. She expressed it this way:

> "[34] The general words of rule 26.9 cannot be extended to allow the learned judge to do that which would not have been possible. A judge can only apply a rule so far as he is permitted. The claim form was a nullity. It cannot be restored by an order of the court. The service of the requisite documents accompanying the claim form is a mandatory requirement. The amended pleadings must be served before any further steps can be taken in the proceedings."

It is these dicta of Harris JA that have evidently provided counsel for Bupa with the energy to strongly argue that the breach in this case rendered the order for service out of the jurisdiction and the service of the claim form a nullity.

[53] Having reviewed the nature of the breach in this matter and the clear terms of rule 26.9, I am propelled to reject the arguments advanced by Bupa that rule 26.9 has no application to this case, once the rule in question is worded in mandatory terms. **Vendryes** cannot be taken as laying down any such principle of wide and universal application in the face of the unambiguous wording of rule 26.9.

[54] In fact, this court has already put it beyond question in **Rohan Smith v Elroy Hector Pessoa and Another** [2014] JMCA App 25, in endorsing the dictum of Morrison JA (as he then was) in **B & J Equipment Rental Ltd v Joseph Nanco** [2013] JMCA Civ 2, that "any such position" coming out of **Vendryes** that breach of rule 18.16(2) should be visited with "the more dire consequence of the originating documents being invalid" was *obiter*. Phillips JA, speaking on behalf of the court in **Rohan Smith**, stated that the breach of rule 8.16(2) produced the result that the service would have been irregular and as such did not render the originating documents invalid. In **B & J Equipment Rental**, Morrison JA, for his part, treated with the dictum in **Vendryes** that the claim was a nullity in this way:

> "Accordingly, given that the validity of the claim form as such was not an issue before the court in **Vendryes**, I can only regard the statements that the claim form served in breach of rule 8.16(1) was a nullity as *obiter*, and not part of the court's reason for its decision in the case."

[55] On the basis of the pronouncements of this court in **Rohan Smith**, it means that **Vendryes** cannot be taken as proper authority for the proposition that improper service due to a breach of rules 11.15 and 11.16(3) means that all steps taken in the

proceedings are to be invalidated. It is clear to me, in the light of rule 26.9, that the framers of the CPR did not intend for every breach of the rules to be taken as invalidating the proceedings and that would be so whether or not the particular rule that is engaged is stated in mandatory terms. Once the consequence for breach of the rule is not provided for by the CPR or otherwise, then consideration must be given to the provisions of rule 26.9 in determining the way forward in the proceedings.

[56] It should be noted, however, that even if it could be argued that what was said in **Vendryes** was not *obiter*, the court in **Vendryes** had formed the view that rule 26.9 was inapplicable because it had concluded that the claim was a nullity, albeit that the breach of the rule in issue was seen as an irregularity in service. Due to that finding that the claim was a nullity, then it would have followed logically and inevitably that the court would have had to rule, as it did, that the breach could not be rectified. This position accords with the well-known distinction between an irregularity and a nullity, in that, whereas an irregularity can be waived or rectified, a nullity cannot be.

[57] In **Strachan v Gleaner Co Ltd and Another** (2005) 66 WIR 268, at paragraphs [25]-[31], the Privy Council highlighted the distinction between orders, which are often described as nullities and those which are merely irregular. At paragraph [25], Lord Millet, speaking on behalf of the Board, stated:

> "The distinction between orders which are often…described as nullities and those which are merely irregular is usually made to distinguish between those defects in procedure which the parties can waive and which the court has a discretion to correct, and those defects which the parties

> cannot waive and which give rise to proceedings which the defendant is entitled to have set aside *ex debito justitiae*."

[58] In this case, the first question to be considered in determining whether Sykes J was wrong to invoke rule 26.9, in treating with the breach, is whether the breach in question had rendered the service an irregularity or a nullity. The CPR does not provide that the effect of such a breach is to nullify steps taken in the proceedings or that it affects the validity of the claim form. In fact, the CPR has prescribed no penalty for the breach. It was within that context that rule 26.9 would have become relevant to Sykes J's deliberations. I agree with the conclusion of Sykes J that that rule gives the court an unfettered discretion to determine how a breach of a rule of procedure (which was involved in the case before him) should affect the proceedings, having regard to all the circumstances and the clear dictates of the overriding objective in the interpretation and operation of the rules.

[59] I made a similar point (as judge at first instance) in **Joseph Nanco v Anthony Lugg and B & J Equipment Rental Ltd** [2012] JMSC Civil 81, in treating with the same rule 8.16 that was under consideration in **Vendryes**. I will now reiterate that view with added emphasis:

> "Rule 26.9(2) then provides, among other things, that failure to comply with a rule does not invalidate any step taken in the proceedings, **'*unless the court so orders*'**. **It means that the effect on the proceedings of the claimant's failure to comply with rule 8.16(1) does not, without more, invalidate the proceedings. Whether it should do so is, ultimately, a question for the court to determine in the circumstances of the case.**" (Emphasis added)

[60] Therefore, in the circumstances of the instant case in which there is absence of a specified consequence for breach of the rule in question, rule 26.9 was engaged and so it was entirely for Sykes J to determine whether the breach should invalidate any step taken in the proceedings, which he did. When one looks at what was in question in this case, it had nothing to do with the propriety of the service of the claim form itself or the validity of the claim itself, which is the originating process. In other words, there was no deficiency or irregularity with the claim itself and the supporting documents needed to initiate the proceedings or with the actual service of those documents.

[61] Edwards J was entitled to hear *ex parte*, the application for service of the claim form out of the jurisdiction and was equally entitled to grant the order *ex parte* upon being satisfied that the conditions laid down by the relevant rule for an order for service outside the jurisdiction to be made were satisfied. Edwards J did comply with Part 7, which governed the treatment of the application and the making of the orders before her. As Sykes J also observed, Bupa is not complaining that there was anything, like, material non-disclosure on the part of Dr Hunter in obtaining the order. The order granting permission was therefore properly grounded on the provisions of the special regime prescribed under Part 7. So, it was not that proper permission was not granted for the service of the claim as required by law. It cannot be said then, that the order permitting service was obtained in breach of natural justice because there was no breach of the rules that were applicable to the procurement of the order granting permission.

[62] The matters with which issue is taken by Bupa relate to requirements that should have been satisfied after the grant of the order. Therefore, those post order requirements could not affect the legitimacy of the order granting permission itself. In this connection, the provisions of the rules that have been breached apply to the right of Bupa to be heard, not before the order was made, but rather after it was made, simply for the purpose of setting aside the order. So the order remained valid until or unless it was set aside. The procedural failings in this regard are such that they could have been corrected by the court in the exercise of its discretion, in that, the relevant documents could have been served on Bupa and time extended outside of the 14 days for Bupa to make the application to set aside the order. It was a breach that could have been corrected by the court. It was also a breach that could have been waived by Bupa by appearing without protest to the service of the claim on it, despite the omissions.

[63] It is in this connection that it should be noted that by the time of the hearing before Sykes J, the necessary documents had been served, so Bupa would have had the information that was not earlier provided to it. The only rule of procedure that would have remained unfulfilled by the time of the hearing was the information in the order that Bupa had 14 days within which to apply to set aside the order. But even with that omission, Bupa had already managed to apply to set aside the order and the service, albeit that the application was out of time. It, however, had an application for an extension of time within which to make the application, which Sykes J granted without hesitation.

[64] It is within that context that Sykes J found that even though the documents were important, based on the circumstances before him, orders could have been made to put matters right and so the breach of the rules of procedure was not such as to invalidate the proceedings. He saw the results of the breach as something that could have been rectified by him in the proper exercise of his powers under the CPR and the general law and he proceeded to do so. He therefore viewed the breach as producing an irregularity. He cannot at all be faulted for his treatment of the breach as an irregularity.

[65] So, in the end, Bupa was not deprived of a chance to be heard by the court on the question of the setting aside of the order for service out of the jurisdiction and the service of the claim form, to which the non-compliance would have related. Its grouse with the order and the service was fully ventilated and duly considered by Sykes J. There was, therefore, no breach of the rules of natural justice arising from the non-compliance with the rules in question. The contention of Bupa on ground 2, that the failure to serve the originating documents in compliance with the CPR amounted to a breach of natural justice, is rejected.

[66] Even more importantly, for present purposes, rule 7.7(2) provides that the court may set aside service where (a) service out of the jurisdiction is not permitted by the rules; (b) the case is not a proper one for the court's jurisdiction; or (c) the claimant does not have a reasonable prospect of success in the claim. So, the rule has specifically enumerated the circumstances in which the court must set aside service of the claim form outside the jurisdiction. It is material to note that nowhere does it stipulate that a

basis for setting aside the service is for failure to comply with rules 11.15 and/or 11.16(3) on which Bupa is relying as a ground to set aside the order and the service.

[67] This observation serves to strengthen the conclusion of Sykes J, as well as my own view, that failure to comply with the rules in question was not intended by the framers of the CPR to necessarily or automatically invalidate the service of the claim or the claim itself, following on an order made pursuant to Part 7. It is worth emphasizing that it is a matter for the particular judge, in considering the matter and exercising his discretion judicially, to determine what effect the breach of the rules of procedure should ultimately have on the proceedings. In carrying out that assessment, consideration should be given to the question whether any order could be made to set matters right in order to give effect to the overriding objective.

[68] When one considers the conditions laid down by rule 7.7(2), for setting aside the order for service as well as service of the claim, none of the conditions subsists. That is to say, it could not fairly be said that service on Bupa out of the jurisdiction was not permitted by the rules because Bupa was correctly served out of the jurisdiction by virtue of an order granting permission pursuant to rule 7.3(2)(c)(ii). It could not reasonably be said, as Sykes J found, and with which I agree, that the case is not a proper one for the court's jurisdiction and that Dr Hunter does not have a reasonable prospect of success in the claim.

[69] Furthermore, it must be noted as a material consideration that neither the breach in procedure nor the rectification efforts of Sykes J, in seeking to set matters right, as he

was empowered to do by virtue of rule 26.9(3), have led to any discernible prejudice to Bupa whatsoever. Therefore, having regard to the overriding objective, there is no clear and compelling basis on which the order for service out of the jurisdiction and the claim form should be set aside for mere non-compliance with rules 11.15 and 11.16(3).

[70] I would, therefore, reject the contention that Sykes J erred in failing to set aside the order permitting service out of the jurisdiction as well as the claim form and particulars of claim pursuant to the CPR or *ex debito justitiae*. Grounds 2, 6 and 7, therefore, fail.

Issue (3): whether the learned judge erred by treating Bupa's procedural errors as equivalent to Dr Hunter's (ground 3)

[71] Ground 3 has emanated from Sykes J's findings that Bupa, having failed to file an acknowledgement of service and defence within the time ordered by Edwards J, and being non-compliant with the provisions of Part 9 in relation to challenging the jurisdiction of the court, was in no better position than Dr Hunter.

[72] After extensively setting out various provisions of Part 9, Sykes J stated in this regard:

> "[22] From these rules it is clear then that any defendant who wishes to dispute the claim or contest jurisdiction must begin with the filing of an acknowledgment of service unless he files and serves a defence within the time laid down either by the general rule (if the general rule applies) or the time set by the order permitting service out of Jamaica (which is the case here). Bupa has failed to (a) file the acknowledgment of service within the time laid down by the order; (b) failed to file a defence within the time specified in

> the order for filing a defence and (c) failed to make the challenge to jurisdiction within the time laid down by the rules. Thus the kettle and the pot are of the same hue."

He then observed:

> "[30] Edward J's order did not say what was to happen if Bupa failed to act in accordance with the order. Part 11 does not specify the consequence if the applicant serves an order that does not comply with rule 11.16(3). No practice direction has been cited to say what the consequences are for Bupa's breach and Dr Hunter's breach.
>
> [31] The court observes that it is ironic that Bupa is seeking to enforce strict compliance with rule 11.15 and 11.16 when it failed to comply with any of the procedural rules within the time prescribed either by the rules or the court order which it could have done without any reference to rule 11.15 and 11.16."

[73] It is Bupa's contention that the learned judge's reliance on its procedural failings to file an acknowledgment of service as "equivalent" to those of Dr Hunter reveals his failure to appreciate the difference between them. It argues that "Dr Hunter's failures are fundamental, make the proceedings a nullity and negate the Court's jurisdiction, [while] Bupa's failings were merely related to timing and thus entirely capable of being cured either under the court's case management powers or under its inherent jurisdiction, *ex debito justitiae*, without going under the rule". This contention is, however, rejected for reasons detailed below.

Findings and disposal of issue (3)

[74] Part 9 deals with the procedure to be used by a defendant who wishes to contest proceedings and avoid a judgment in default of acknowledgment of service being obtained. Rule 9.2(1) states:

"(1) A defendant who wishes –

(a) to dispute the claim; or

(b) to dispute the court's jurisdiction,

must file at the registry at which the claim form was issued an acknowledgment of service in form 3 or 4 containing a notice of intention to defend and send a copy of the acknowledgment of service to the claimant or the claimant's attorney-at-law."

Rule 9.2(5) states:

"(5) However the defendant need not file an acknowledgment of service if a defence is filed and served on the claimant or the claimant's attorney-at-law within the period specified in rule 9.3."

Rule 9.6 provides:

"(1) A defendant who-

(a) disputes the court's jurisdiction to try the claim; or

(b) argues that the court should not exercise its jurisdiction,
may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service.

(3) An application under this rule must be made within the period for filing a defence."

Rule 9.6(5) then provides:

"(5) A defendant who-

(a) files an acknowledgment of service; and

(b) does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim."

[75] The acknowledgment of service form that accompanied the amended claim form that was served on Bupa had the standard notification in a section headed: 'WARNING' that the defendant who is served must "[s]ee Rules 9.2(5) and 9.3(1)". So, Bupa's attention would have been directed to Part 9. Bupa's attention would also have been directed in the same form to Part 10, relating to filing of a defence. In this case, the time specified in the order of the court for filing the acknowledgment of service was 42 days of service of the claim form. Bupa did not do so. In addition, the court order gave Bupa 70 days to file its defence. Bupa also did not do so. Bupa would have had sufficient information, at the time of service, to ensure compliance with the order of the court for filing its acknowledgment of service and defence and so, as Sykes J noted, it needed no legal advice to be mindful of its need to comply with the orders and the rules of court.

[76] Against this background, it may be said that the failure of Dr Hunter to comply with Part 11 was no more fundamental or egregious than Bupa's failure to file an acknowledgment of service and a defence by the time of filing its notice of application to set aside the service of the claim out of the jurisdiction. Both parties were, indisputably, in breach of the rules. In fact, Bupa was also in breach of the order of the court. Bupa's breach may have been (or was) even more catastrophic for it, because of the attendant

consequence of failure to challenge the jurisdiction of the court in the manner prescribed by the rules. The jurisdiction can be deemed to have been accepted according to the rules and the general law (as will be discussed shortly), while there is nothing in the rules or the general law, which stipulates that failure to comply with rules 11.15 and 11.16(3) is such as to negatively affect the jurisdiction of the court.

[77] Therefore, the learned judge's observation that Bupa and Dr Hunter, being non-compliant with the rules, were "both of the same hue" as the proverbial "kettle" and the "pot", is correct. His observation is, therefore, not of any potency to adversely affect his finding that the breach of rules 11.15 and 11.16(3) should not be treated as invalidating the proceedings or affecting the jurisdiction of the court. Ground 3 has no merit and, therefore, fails.

Issue (4): whether the learned judge erred in exercising the jurisdiction of the court due to improper service (grounds 1, 4 and 5)

> **"(1) The learned judge erred by exercising the court's jurisdiction in circumstances where it had no jurisdiction due to improper service."**
>
> **"(4) The learned judge erred by failing to appreciate that [Dr Hunter's] failure to properly serve [Bupa] means that time had not yet started to run against [Bupa] and, in any event, jurisdictional points may be taken at any time."**
>
> **"(5) The learned judge erred by failing to appreciate that Bupa's original application filed July 3, 2015 was, on its face, a challenge to the court's jurisdiction."**

Findings and disposal of issue (4)

[78] From the provisions of Part 9, it is clear that Bupa, if it had wished for the court not to exercise its jurisdiction over the claim, was obliged to first file an acknowledgment of service, taking issue with the jurisdiction of the court, and then to file an application during the time limited for filing its defence to ask the court not to exercise its jurisdiction. There was no compliance with the rules in this regard. In the absence of those documents, it cannot be said that the learned judge erred by failing to appreciate that Bupa's original application filed on 3 July 2015 was, on its face, a challenge to the court's jurisdiction, as contended in ground 5. That complaint is also without merit.

[79] The rules are clear as to how a challenge to the court's jurisdiction should be taken as well as the time in which it should be taken. Sykes J correctly noted all those matters. The application to set aside the order for service out of the jurisdiction and the claim form filed on 3 July 2015, and which was later amended to include an application to strike out the claim, without more, was not a challenge to the court's jurisdiction. In fact, the application standing alone, unconditionally, had the opposite effect, in that, Bupa had voluntarily submitted itself to the jurisdiction of the court to ask the court to exercise its jurisdiction over the claim and to grant the redress it was seeking. Sykes J was, indeed, correct in his observation when he stated at paragraph [23]:

> "f. It is entirely possible that the conduct of [Bupa] may be seen to be one of submitting to the jurisdiction of the court which means that he [sic] cannot make that an issue after such an act of submission has occurred."

[80] The learned judge was, therefore, correct to find on the provisions of Part 9 that there was no challenge to the jurisdiction of the court by Bupa. Ground 5 also fails.

[81] Accordingly, it follows logically that there is also no merit in ground 4 that the learned judge failed to appreciate that Dr Hunter's failure to properly serve Bupa meant that time did not start to run against Bupa, and that the jurisdictional point may be taken at any time. The time for responding to the claim, in terms of the jurisdiction of the court, would have started to run from the time the claim form and particulars of claim were properly served on Bupa and it was advised of its rights and responsibility to file an acknowledgment of service, which was necessary for it to either contest the claim or to challenge the jurisdiction of the court. It was all there in black and white for Bupa to see it. That would have been separate and distinct from any right it may have had under Part 11 to be served with the documents relating to the *ex parte* application and to be notified of its right to apply to set aside the order permitting service out of the jurisdiction.

[82] Sykes J was correct to find that the omission in the order telling Bupa it had 14 days to make an application to set aside the order did not prevent Bupa from filing an acknowledgment of service raising a jurisdictional point and making an application for the court not to exercise its jurisdiction within the time limited for doing so. It cannot be said then that in a case such as this, where what had arisen was a mere irregularity rather than a nullity, the jurisdictional point could have been taken at any time. In fact, the submission of Bupa to the jurisdiction of the court, through the making of its applications, before disputing the jurisdiction of the court, stands in itself as a waiver of

the irregularity, and so the jurisdiction point could no longer be taken on the ground of improper service.

[83] This point as to waiver of the irregularity in service, through submission to the jurisdiction of the court, is well illustrated in the decision of the Privy Council in the pre-CPR Jamaican case of **Warshaw and Others v Drew** (1990) 38 WIR 221. In that case, an order was granted *ex parte* for service of the writ out of the jurisdiction on the defendants who lived in the United States of America. There was a dispute as to whether the writ was, in fact, served. But whether or not it was served, the defendants did not enter an appearance to the writ and the plaintiffs (as they would have been then) took no further steps in the action. The defendants, however, without entering an appearance (just like Bupa in this case not having filed an acknowledgment of service) issued a summons to strike out the writ/dismiss it for want of prosecution. One of the issues for the Board's consideration was whether, if the writ was not served on the defendants, the defendants, nevertheless, by their conduct, in issuing and proceeding with their summons for an order striking out/dismissing the action for want of prosecution, had waived the non-service of the writ.

[84] To appreciate the value of this decision to the resolution of the issue at hand, it would prove rather helpful to set out their Lordships' reasoning *in extenso.* They opined at page 227*:*

> "It is well established that it is open to a defendant in an action to enter an appearance in it voluntarily, even though the writ in it has not been served on him, and that by doing so he waives such service. Modern authority for this

proposition is to be found in ***Pike v Michael Nairn & Co Ltd*** [1960] Ch 553. That was a case of proceedings begun by originating summons which was not served on the respondent. Cross J said (at page 560):

> 'The service of the process of the court is made necessary in the interests of the defendant so that orders may not be made behind his back. A defendant, therefore, has always been able to waive the necessity of service and to enter an appearance to the writ as soon as he hears that it has been issued against him, although it has not been served on him.'

...The principle was applied again later in ***The Gniezno*** [1968] P 418, where the defendant had voluntarily entered an appearance to a writ the period of validity of which had already expired.

It appears to their Lordships that, if a defendant in an action who has not been served with the writ in it can waive such service by voluntarily entering an appearance, it must follow that he can also waive such service by voluntarily taking an even more advanced step in the action than entering an appearance, such as issuing and prosecuting a summons for an order dismissing the action for want of prosecution… In the present case the appellants would ordinarily only have been entitled to apply for dismissal of the action for want of prosecution if they had been served with the writ and entered an appearance. They elected to do so however, without either of these procedural steps having been taken. By doing so the appellants waived service of the writ on them, and the respondent, by taking no point on the appellants not having entered an appearance, waived the need for such entry. In their Lordships' view, therefore, on the assumption (contrary to the fact) that the writ in the present case was not served

> **on the appellants, their conduct, in voluntarily applying for an order dismissing the action for want of prosecution, constituted a clear waiver by them of such service. The justice of this is obvious: a defendant cannot be allowed to take an active part in an action and at the same time to assert that he has never been served with the process by which the action was begun**." (Emphasis added)

[85] The advent of the CPR has done nothing to modify these profound principles of substantive law as to waiver of non-service or an irregularity in service of an originating process and so I embrace them and would apply them to the case at bar. Indeed, in **Rohan Smith v Elroy Hector Pessoa**, this court affirmed the applicability of the principle of waiver of an irregularity in service within the context of the CPR.

[86] I am, therefore, guided by the words of their Lordships in **Warshaw v Drew** to make the point that, Bupa, by taking an active part in the proceedings, such as by making and prosecuting the applications to set aside the service of the claim and to strike out the claim as disclosing no reasonable cause of action against it, ought not to be allowed, in the interests of justice, to assert that it was never properly served with the claim due to non-compliance with the rules and so the service is a nullity. Indeed, I would endorse the argument advanced by counsel for Dr Hunter before Sykes J, which he accepted and expressed as follows:

> "[24] [Bupa], having submitted to the court's jurisdiction by its conduct on July 3 ... cannot now wriggle its way out of the 'clutches' of the court by the simple device of filing its acknowledgment after submitting unequivocally to the court's jurisdiction."

[87] I find, therefore, for this reason also that the time for Bupa to have taken the jurisdictional point had already elapsed before 18 September 2015, when it filed its out of time acknowledgment of service and sought to make an application for the court not to exercise its jurisdiction. By then it was simply too little too late, because by its own conduct, Bupa had unequivocally submitted to the court's jurisdiction and, by so doing, had waived any irregularity there may have been in service. So, in such circumstances, Bupa's contention that time for raising the jurisdictional point had not started to run, and that it could have taken the point at any time, must be rejected. Ground 4 therefore fails.

[88] I would hold that the breach of rules 11.15 and 11.16(3), in all the circumstances of this case, did not affect the validity of the order for service outside the jurisdiction and the service of the claim form served pursuant to it. The breach did not go to the heart of the court's jurisdiction, especially in this situation where there was a submission by Bupa to the jurisdiction of the court, without protest, and therefore a waiver of the irregularity in the service complained of.

[89] In these circumstances then, Sykes J was not bound to follow the decision of Mangatal J in **Valley Slurry Seal Caribbean** to hold that the court had no jurisdiction to deal with the claim due to a breach of rule 11.15 (and/or rule 11.16(3), for that matter) nor was he obliged to follow **Vendryes** by holding that rule 26.9 did not apply. He had sufficient basis not to treat the proceedings as being invalidated by the breach of procedure, given the circumstances before him and the relevant law. It cannot therefore be said that the learned judge erred in departing from those decisions and in applying

rule 26.9 to set matters right in the light of the breaches complained of. Therefore, the learned judge had the power to invoke the jurisdiction of the court over the claim, which he did. He made no error of law. Inevitably, ground 1 must also fail.

Conclusion

[90] In keeping with the principle extracted from Lord Diplock's oft - cited dictum in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 ALL ER 1042 and reiterated in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, this court must be slow to interfere with the decision of the learned judge at first instance. As Morrison JA (as he then was) stated in the latter case:

> "[20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[91] This was, indeed, a case that required Sykes J to put matters right in the interests of justice, which he clearly did. In the interpretation and application of the rules, he was duty bound to give effect to the overriding objective in Part 1, which he evidently did.

[92] Ultimately, the question as to whether this court should interfere with the decision of Sykes J must be whether Bupa was prejudiced by the breach of the rules and Sykes J's effort at rectification so as to lead to an injustice in the conduct of the proceedings. Sykes J concluded that that was not the case and I would agree with his conclusion.

[93] I would, therefore, hold that Sykes J cannot be faulted in his effort to manage the case before him within the ambit of the CPR and the general law. In doing so, he demonstrated that he was quite mindful of his duty to act judicially, which he did. For all the foregoing reasons, I see no merit in the 11 grounds of appeal that would provide a basis for this court to interfere with the aspects of his decision appealed against.

Disposal of the appeal

[94] I would dismiss the appeal with costs to Dr Hunter to be agreed or taxed.

[95] I also believe that an apology is warranted for the delay in the delivery of this judgment, which I now sincerely proffer on behalf of the court. I would refrain from proffering an excuse and will simply say that despite our best efforts, we were unable to keep the prescribed timetable for its delivery, which we deeply regret.

F WILLIAMS JA (AG)

[96] I too have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

(1) The appeal is dismissed.

(2) The decision of Sykes J, made on 7 October 2015, is affirmed.

(3) Costs of the appeal to the respondent to be agreed or taxed.