[2021] JMCA Civ 47

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2019CV00047

BETWEEN	**ANNETTE GISCOMBE**	**1ST APPELLANT**
AND	**MARSHA NICOLA GISCOMBE**	**2ND APPELLANT**
AND	**YANIQUE NICKETTA GISCOMBE**	**3RD APPELLANT**
AND	**RUTHANN GEORGIA GISCOMBE (By Mother & Next Friend Annette Giscombe)**	**4TH APPELLANT**
AND	**JOSEPH CHARLES GISCOMBE (By Mother & Next Friend Annette Giscombe)**	**5TH APPELLANT**
AND	**HALVARD HOWE**	**1ST RESPONDENT**
AND	**NORMAN SHAND**	**2ND RESPONDENT**

Oraine Nelson and Ms Claudia Forsythe instructed by Forsythe & Forsythe for the appellants

Mrs Suzette Burton-Campbell instructed by Burton-Campbell & Associates for the respondents

18 March and 5 November 2021

EDWARDS JA

[1] I have read the draft judgment that has been written by my learned sister, Dunbar-Green JA (AG) and I agree with the reasoning and conclusion. I wish to add nothing.

SIMMONS JA

[2] I too have read in draft the judgment of Dunbar-Green JA (AG) and agree with her reasoning and conclusion.

DUNBAR-GREEN JA (AG)

Introduction

[3] The appellants, who were the claimants in the court below, are the widow and children of the late Egland Giscombe ('the deceased'). They are seeking to reverse an order of Thomas J (Ag) (as she then was) ('the learned judge'), which was made on 11 December 2018, setting aside an interlocutory judgment in default of acknowledgement of service and staying a final judgment on assessment of damages which had been entered in the appellants' favour. The basis upon which the learned judge made the order was that the claim form and particulars of claim had not been served on the respondents (who were the defendants in the court below).

Background

[4] On 2 August 2004, a motor car belonging to Mr Norman Shand ('the 2nd respondent') hit the deceased whilst he was riding his bicycle along the roadway in the vicinity of Shortwood Road and Central Avenue, in Saint Andrew. The motor car was being driven at the time by Mr Halvard Howe ('the 1st respondent'). The deceased sustained severe injuries and, unfortunately, on 19 July 2005, he succumbed to those injuries. The appellants alleged that the accident was caused by the negligence of the 1st respondent who disobeyed a traffic light, drove through the intersection, and hit the deceased from his bicycle. It is also the appellants' case that the 1st respondent was driving as the agent or servant of the 2nd respondent.

[5] On 30 July 2010, the appellants commenced an action in the Supreme Court against the respondents to recover damages under the Fatal Accidents and the Law Reform (Miscellaneous Provisions) Acts. On 23 August 2010, a notice of proceedings was served on Advantage General Insurance Company Limited ('the insurance company') which was the insurer of the motor car.

[6] In an affidavit filed 5 March 2013, Mr Junior Rowe, the process server, deposed that he was unsuccessful in his attempts to serve the respondents with the claim form and particulars of claim. The process server stated that when he went to Apartment 73, Campview Apartments, Saint Andrew, neighbours of the 1st respondent informed him that he had removed from that address and they had no knowledge of his whereabouts. After unsuccessful attempts to locate the 2nd respondent, it was discovered that the address on the claim form was incorrect. According to Mr Rowe, the correct address for the 2nd respondent was ascertained by the appellants' then attorney-at-law, Sylvester C Morris, to be 1035 Flintstone Close, Eltham Park, Saint Catherine. However, he had been unable to effect personal service after several visits to that address and was reliably informed that the 2nd respondent was a taxi operator who left early in the mornings and returned late at nights "whenever he [was] there". Mr Rowe's last attempt to serve the 2nd respondent was on 4 December 2012.

[7] By affidavit, filed on 20 September 2013, Mr Sylvester C Morris deposed that he had come to ascertain the 2nd respondent's new address in Saint Catherine "after intensive search including help from the police and the Collector of Taxes".

[8] On 7 November 2013, Master Lindo (as she then was) heard an *ex parte* application for the appellants to dispense with personal service and ordered that the appellants were at liberty to effect service of the claim form and particulars of claim by registered post at the respondents' "last known address". No address was indicated in the order for either respondent.

[9] By affidavits filed on 22 May 2014, Bernice Scott, secretary to Sylvester C Morris, deposed that she posted the claim form, notice to the defendant, defence, prescribed notes for the defendant and acknowledgment of service of claim form and particulars of claim ('the originating documents') by registered mail in the forenoon of 24 April 2014. The address for the 1st respondent was stated as Apartment 73, Campview Apartments, Kingston 5. No address was indicated in the body of the affidavit for the 2nd respondent. However, the exhibited certificate of posting of the registered article ('the registered slip') indicated a registration number - 004216, a note that the fee had been paid, the date stamp of the office (24 April 2014) and an address which was stated as "D35 Flintstone Close" Eltham Park PO, Saint Catherine. This was different from 1035 Flintstone Close which the process server, Junior Rowe, had deposed, in his affidavit, as the ascertained and correct address for the 2nd respondent.

[10] On 24 and 25 April 2014, notices of the registered mail were directed to the respective addresses, by the post office.

[11] By virtue of rule 6.6 of the Civil Procedure Rules, 2002 ('CPR'), the claim form and particulars of claim would have been deemed served 21 days after the date indicated on the post office receipt /registered slip.

[12] On 29 May and 14 June 2014, the respective registered letters/mail, containing the originating documents, were returned by the Post and Telecommunications Department ('the postal authority'), to Sylvester C Morris, as they had been unclaimed.

[13] On 24 September 2014, Sylvester C Morris obtained an order from the court for his name to be removed from the record as attorney-at-law for the appellants. He was replaced by Forsythe & Forsythe, as evidenced by the notice of change of attorney dated 26 January 2015.

[14] On 26 January 2015, the appellants sought and obtained a default judgment. The judgment in default was entered by a registrar of the Supreme Court on the basis that no acknowledgement of service and defence had been filed by the respondents within

the time specified by the CPR. In the record of appeal is an unsigned judgment order which indicates that damages were assessed on 28 March 2016, and a final judgment entered in favour of the appellants. The date of the assessment of damages seems to be an error as it could not have preceded the filing of the affidavits by Karen Cross in 2017, in support of the assessment of damages. These affidavits will be referred to in greater detail below.

[15] It is noteworthy that the application for default judgment indicated that the 2nd respondent was served "at his lawful residence at Apt. 73 Campview Apartments". This was the same address at which the 1st respondent was purportedly served and was different from the address of D35 Flintstone Close indicated on the registered slip exhibited by Bernice Scott and 1035 Flintstone Close, the "ascertained" address of the 2nd respondent. There was no indication that the registrar who entered the judgment in default of acknowledgment of service was alerted to the return of the claim form and particulars of claim, unclaimed. There was also no evidence whether the new attorneys-at-law, Forsythe & Forsythe, had known that those documents had been returned to the former attorney-at-law approximately seven months prior to the request for judgment.

[16] The evidence reveals that all relevant documents were posted to the 2nd respondent at D35 Flintstone Close and not 1035 Flintstone Close. On 25 November 2016 and 10 March 2017, affidavits were filed by Karen Cross in which she averred that she had posted, among other documents, witness statements and notices of adjourned assessment of damages hearings to the 2nd respondent at D35 Flintstone Close. In another affidavit which was filed on 7 December 2018, Nelton Forsythe, attorney-at-law on record for the appellants, deposed that on 13 January 2017, a notice of adjourned assessment of damages hearing was sent by registered post to the 2nd respondent "at his last known address of D35 Flintstone Close…". He also stated that the latter notice was returned to his office with the envelope endorsed: "Not Collected".

[17] On 27 September 2017, the insurance company filed a notice of application on behalf of the 2nd respondent, pursuant to rule 13.2 of the CPR. The application was to

set aside the default judgment entered by the registrar and all proceedings flowing therefrom, and staying the final judgment. The grounds were that the 2nd respondent was never served with the claim form or particulars of claim. The insurance company further sought and obtained an order, on 5 July 2018, to intervene in the claim on behalf of the 2nd respondent.

[18] The notice of application to set aside default judgment reads, in part:

> "The Applicant, Norman Shand of D35 Flintstone Close, Eltham Park, Spanish Town in the parish of Saint Catherine seeks the following orders:
>
> (1) That there be a stay of execution of the final judgment entered herein on the 28th day of March 2017 until the hearing of the application herein.
>
> (2) That the judgment entered herein and recorded at judgment Binder 768 Folio 401 and all proceedings flowing therefrom be set aside."

[19] The application was supported by an affidavit of Vanessa Peck, legal officer of the insurance company, filed on 25 June 2018. It is reproduced, here, in part:

> "3. That on or about 7th February 2004 a policy of insurance was issued by the Applicant (formerly United General Insurance Company Limited) to the 2nd [respondent] providing coverage of his Toyota Corolla motor vehicle licensed PP 905Y for the period 7th February 2004 – 6th February 2005. The vehicle was to be operated as a taxi and Mr Halvard Howe, 1st [respondent] herein was the assigned driver.
>
> 4. That at the time the [2nd respondent] applied for insurance coverage, he gave his address as D 35 Flintstone Close, Eltham Park, Spanish Town, in the parish of St Catherine.
>
> …

> 7. That it was the intention of the Applicant company to defend the claim pursuant to its rights of subrogation, but the Claim Form and Particulars of Claim in the matter were never forwarded by the [respondents]...
>
> …
>
> 9. That up until the date of service of the final judgment neither the 1st nor 2nd [respondent]…had submitted any court documents to the Applicant pursuant to the terms of the insurance policy.
>
> …
>
> 13. That checks were made at the Post and Telecommunications Department and based on information received the letter containing the Claim Form and Particulars of Claim were never delivered to the 1st and 2nd [respondents] but was returned to the [appellants'] Attorney on 29 May 2014 and 14 June 2014…
>
> …
>
> 21. That by letter dated 12th September 2017 I was informed by the Post and Telecommunications Department that the articles which were posted by the [appellants'] Attorneys and for which registered slips numbered 7669, 8372, 7670, 8373, 0869 and 0870 had been issued were returned to the [appellant's] Attorneys…"

[20] The letter from the postal authority, dated 12 September 2017, attached to Miss Peck's affidavit reads, in part:

> "…Please be advised that registered articles no. 004217 and 004216 were posted at the General Post Office on April 24, 2014 to addresses Halvard Howe located at 73 Camp View Apartment, South Camp Road Kingston 5 and Normand Shand located at D35 Flimstone [sic] Close, Eltham Park Spanish Town, St Catherine. The articles arrived at the Cross Roads Post Office and Spanish Town Post Office on April 24 and April 25, 2014 respectively. A notice was sent to both addresses on said dates. The articles were not collected and were subsequently returned to sender, Sylvester C Morris, 26 Duke

> Street Kingston on May 29, 2014 and June 14, 2014 respectively."

[21] The letter also indicates that notices of posting for other articles were sent to the 1st and 2nd respondents on 19 August 2016, 7 November 2016 and 21 February 2017. Those articles were uncollected and returned to the offices of the sender, Forsythe & Forsythe, 66 Duke Street, Kingston, between 25 September 2016 and 21 February 2017.

[22] As indicated earlier, Thomas J ordered a stay of execution of the final judgment and set aside the default judgment and "all proceedings flowing therefrom". Below, I have extracted the relevant portions of the agreed summary of reasons for the judge's decision which was filed on 30 October 2020:

> "Findings of Fact
>
> 1. The Claim Form and Particulars of Claim went to the same address and same were returned as being not collected. There is no challenge that the documents were returned. A return of documents can mean several things:
>   a. Notice not brought to the recipient's attention
>   b. Recipient may have changed address
>
> 2. Forsythe & Forsythe...took conduct of the file and as such it can be argued that they did not know that the documents were returned to Sylvester Morris (Attorney-at-Law).
>
> 3. Documents were also returned to Forsythe & Forsythe…and there is nothing to show that any further actions were taken to bring the documents to the Defendants' attention. Varying the order:
>   a. Serve by publication; or
>   b. Serve on the insurer
>
> 4. Evidence before the court is that counsel would have been aware that the documents had not been brought to the attention of the Defendants.
>
> 5. Notice of registered article comprises of the person's name, address and the registration no. and Certificate

of Posting of a Registered Article and Stamp of the Post Office.

6. There was no evidence that the notice would have conveyed to the Defendant who the particular documents were coming from and the contents.

7. There was no evidence to say that the notice was received by the Defendants. Counsel is asking the court to speculate.

Findings of law

1. The burden of proof is on the Claimant to prove that he in fact served the Defendants.

2. The fact that the letter is returned is tantamount to the fact that the Claim Form and Particulars of Claim were not brought to the attention of the recipients.

3. The presumption of service has been rebutted and the judgment must be set aside.

4. Based on decision in Frank Lee. 'Once [sic] document is not served the Defendant has a right to set aside the default judgment ex debatio justiae' [sic].

5. The basis on which judgment in default was entered is irregular. Based on the case of Lovleen Morgan v MMTH, I find in this case that counsel had evidence that the documents were not delivered or served on the Defendants."

[23] It is this order of Thomas J which has occasioned this appeal for a determination of whether the learned judge was correct to have set aside the default judgment.

The appeal

[24] On 14 May 2019, the appellants obtained permission from this court to appeal the order of the learned judge and a notice of appeal was filed on 21 May 2019. The grounds of appeal are:

> "(i) The address of D35 Flintstone Close, Eltham Park, St. Catherine as being the address of the 2nd Defendant was not challenged;
>
> (ii) The Affidavit evidence submitted by the Applicant and the Respondent established that the Certificate of Posting of a Registered Article was sent to the 2nd Defendant at his address;
>
> (iii) There was no evidence that the Certificate of Posting of a Registered Article sent to the 2nd Defendant at his address was not received;
>
> (iv) The threshold for service by registered post is not the receipt of the Claim Form and Particulars of Claim by the Defendant but that he will likely be able to ascertain the contents of the Claim Form and Particulars of Claim;
>
> (v) Service by registered post of the Claim Form and Particulars of Claim on the Defendant does not require delivery of the Claim Form and Particulars of Claim to the Defendant;
>
> (vi) A Defendant served by registered post has an obligation on receipt of the Certificate of Posting of a Registered Article to retrieve the Claim Form and Particulars of Claim from the post office;
>
> (vii) The affidavit evidence submitted by the Applicant and the Respondent established that the Claim Form and Particulars of Claim were not collected from the office by the 2nd Defendant;"

Submissions on behalf of the appellants

[25] In the skeleton and oral arguments, Mr Nelson, who appeared for the appellants, asserted that the 2nd respondent's last known address was D35 Flintstone Close, Eltham Close, in the parish of Saint Catherine. It was also pointed out that the address was not disputed at the hearing of the application to set aside the default judgment. That address was also referenced in the 2nd respondent's notice of application for court orders and the affidavit of Vanessa Peck, in support. It was contended that the insurance company's acceptance of the address as that of the 2nd respondent's, coupled with the evidence of despatch of the certificates of posting of registered articles to the same address, was sufficient to prove service.

[26] Counsel contended that there was no requirement for the pleadings to have been received, to satisfy the provisions of the CPR. The despatch of the notice of the claim form/certificate of posting to the last known address of the 2nd respondent was sufficient and it was for him, having received the notice, to account for not acting upon it. Mr Nelson indicated that the evidence showed that the certificate of posting was sent to the 2nd respondent's last known address, it had not been returned to the post office and there was no evidence from the 2nd respondent that he did not receive it. He argued further that since there was proof that the notice was sent to the 2nd respondent's last known address, the claim form and particulars of claim were deemed to have been served on the 2nd respondent.

[27] Counsel went on to explain that the threshold for specified service by registered post was distinct from that of personal service. He referred to rules 5.14(2) and 6.4(1)(b) of the CPR and posited that the threshold for service by a specified method, based on rule 5.14(2)(b), was that the method of service used was "likely to [enable the person served to] ascertain the contents of the claim form and particulars of claim". Rule 5.14 of the CPR was, therefore, satisfied where the intended recipient had the opportunity to ascertain the contents of the article, even if he did not collect it from the post office.

[28] The argument was also made that the recipient of a certificate of posting was obligated to attend the post office to collect the registered article. The certificate of posting was intended to alert the recipient to the presence of the article at the post office and give him the authority to collect it, and where the recipient refused or failed to do so, it was inequitable for him to say that a judgment ought to be set aside because he did not receive the article. The appellants were only required to show that the 2nd respondent was served with notice of the claim form (that is, the certificate of posting/ the registered slip) at his usual or last known place of residence, he asserted.

[29] It was acknowledged that the onus was on the appellants to satisfy the court that the method of service was likely to bring notice of the claim form and particulars of claim to the 2nd respondent's attention. The obligation was met, counsel submitted, pointing to the following reasons:

i) the 2nd respondent's address was not challenged;

ii) notice was sent to that address;

iii) there was no challenge to the assertion that the notice was received;

iv) there was no evidence that the 2nd respondent did not receive the notice (no affidavit from the 2nd respondent who has the burden of proof); and

v) there was no evidence that the certificates of posting were returned.

[30] Mr Nelson was also of the view that the appellants did not only satisfy the threshold for service by registered post but proved service on the 2nd respondent by the filing of affidavit evidence. The affidavits of Bernice Scott were referenced as proof of service in terms set out in rule 5.11 of the CPR. It was contended that the letter from the postal authority, the affidavits of service bearing the attached certificates of posting of the registered articles, and the photocopied envelopes, established that the appellants had also proved service in accordance with rule 5.15 of the CPR. Service having been effected

by registered post, there was no duty to deliver the mail containing the claim form to the 2nd respondent by hand or to see to it that it was delivered to him by the post office. A party ought not to be asked to do more than is required under the law, he posited. The 2nd respondent had failed or refused to collect the claim form and particulars of claim from the post office and such failure or refusal, without more, was an insufficient basis on which to have the default judgment set aside.

[31] Counsel said it made no difference that the documents were returned to the sender. It was also irrelevant whether the registered slip had indicated what was contained in the envelope to be collected.

[32] In those circumstances, the court erred when it set aside the judgment on the basis that the claim form and particulars of claim were not received by the 2nd respondent.

[33] Reliance was placed on the cases of **Cranfield & another v Bridgegrove Limited and other appeals** [2003] EWCA Civ 656 (‘**Cranfield v Bridgegrove**’), (especially paragraphs 97 and 102) and **Mohammed Akram v Richard Benjamin Adam** [2004] EWCA Civ 1601 (‘**Akram v Adam’**) (paragraphs 33 and 34) for the meaning of “deemed service” by registered post. Counsel also said that the cases relied on by the insurance company could be distinguished on the basis that they involved the non-delivery of notices.

Submissions for the 2nd respondent

[34] Mrs Burton-Campbell, appearing on behalf of the 2nd respondent, submitted that the primary question in the appeal turned on the interpretation of the “deeming” provisions contained in rules 5.14 and 5.19 of the CPR, as well as section 52(1) of the Interpretation Act. She indicated that rule 5.11 was also relevant.

[35] Counsel pointed out that there was no indication in the order by Master Lindo as to the specific address of each respondent and this resulted in a conundrum. She observed that although the claim form had indicated that the 1st respondent’s address was Apartment 73, Campview Apartments, Saint Andrew, the affidavit of Junior Rowe

made it clear that even before the order for alternative service by registered post, it was known to the former attorney-at-law for the appellants that the 1st respondent was no longer residing at that address. The affidavit evidence had also established that the 1st respondent no longer lived at the address to which the documents were posted, so there would have been non-compliance with the order. If there was knowledge that he had moved, the address he removed from could not be taken to be his last known address. Reference was made to the case of **Idemia France SAS v Decatur Europe Limited & Others** [2019] EWHC 946 (Comm), as an illustration of the point that where there was information that a defendant no longer lived at particular premises, he could not properly be served at those premises as "his last known" residence.

[36] Counsel also indicated that despite confirmation by the appellants' former attorney-at-law that the 2nd respondent's correct address was 1035 Flintstone Close, the affidavit of posting, filed on 24 April 2014 by Bernice Scott, omitted to state an address of posting and the certificate of posting attached stated that the 2nd respondent's address was D35 Flintstone Close, Eltham Park PO, Saint Catherine. This was significant, she argued, because it meant that the 2nd respondent could not have been served "at his last known address", as the order of Master Lindo had directed.

[37] One's last known address, she argued, was where the person lived at the time of service (relying on **Mersey Docks Property Holdings & Others v Michael Kilgour** [2004] EWHC 1638) ('**Mersey Docks v Michael Kilgour**'), and the appellants had claimed to know, after enquiries, that the correct address and last known address for the 2nd respondent was 1035 Flintstone Close, yet purported to serve him at D35 Flintstone Close.

[38] Mrs Burton-Campbell referenced the letter from the postal authority which indicated that although the registered slip was sent to the address on the registered mail, the letter (containing the claim form and particulars of claim) had not been collected and was subsequently returned to the appellants' former attorney-at-law. She asked the court to note that the letter from the postal authority did not specifically state that the

registered slips were delivered to the respondents, and argued that in the absence of further evidence from the postmaster general to prove that the respondents had received those registered slips, the judge's finding that there was no evidence that the notices were received by the respondents could not be impugned.

[39] Mrs Burton-Campbell indicated that, in keeping with sections 6, 24(1), 31 and 37 of the Post Office Act and sections 69(3) - (4), 70 and 78 of the Post Office Regulations 1941, the contents of articles posted had to be kept private and postal clerks were under a duty not to disclose the contents of any registered article received by the post office. This prohibition, without more, she argued, would support the learned judge's finding that there was no evidence before the court that a certificate of posting of a registered article put a defendant on notice as to what the documents at the post office contain or who they came from. As a corollary to that point, it was contended that since a registered slip sent from the post office had no description of what the registered article was, the recipient would not be aware that it contained a claim form and particulars of claim or any information to alert the recipient to the claim. The case of **Ann Thomas v Guardsman Limited and NMIA Airports Limited** [2018] JMSC Civ 42 was relied on, in support of that submission.

[40] In the result, she observed, the certificate of posting, if received at all, would amount to no more than mere notice that a registered article had been received at the post office for the 2nd respondent and that would not have been sufficient to cause him to ascertain the contents of the claim form and particulars of claim.

[41] Counsel asserted that the appellants had the evidential burden to satisfy the court that the registered slip was served on the 2nd respondent. She contended that there was a difference between the registered slip being sent and it being received. She emphasized that the letter from the postal authority did not say that the certificate of posting was delivered. In the absence of such confirmation, she argued, it could not be said by the appellants, with any certainty, that it had been received. Furthermore, the return of the mail containing the claim form and particulars of claim undelivered was sufficient proof

of non-service and would constitute irrefutable evidence of the lack of service. The cases of **R v County of London Quarter Sessions Appeals Committee Ex parte Rossi** (1956) 1 QB 682 ('**Ex parte Rossi'**), **Hewitt v Leicester City Council** [1969] 2 All ER 802, **Callidine-Smith v Saveorder Limited** [2011] EWHC 2501 (Ch) and **Linton Watson v Gilon Sewell, McKay Security & Investigative Service Limited v Restaurants of Jamaica Limited** [2013] JMCA Civ 10 ('**Linton Watson v Gilon Sewell**') were referred to and relied on in support of those submissions.

[42] It was maintained by Mrs Burton-Campbell that quite apart from considering that the claim form and particulars of claim were returned undelivered, other aspects of the service were so unsatisfactory that the court could not reasonably conclude that the respondents had been served with the notice of the arrival of a registered article. The absence of a stated address of service in the affidavit of service and the fact that the address on the registered slip was different from that stated in the affidavit of Junior Rowe, would raise obvious questions as to whether service on the 2nd respondent was proper. She also observed that there had been no attempt to cure the defect in the affidavit of service.

[43] Counsel relied on rule 5.19 of the CPR and section 52(1) of the Interpretation Act as authorities for the proposition that the presumption of deemed service may be rebutted by contrary evidence. On the strength of those provisions, she submitted that where a claim form and particulars of claim were purportedly served by registered post and there was evidence of their return, the presumption of deemed service was rebutted and any step taken in reliance on such service could not stand and had to be set aside. The consequence of a failed attempt to serve the claim form and particulars of claim was that the requirement for the entry of a default judgment would not have been met and its entry would therefore be irregular. She relied on **Linton Watson v Gilon Sewell** per Phillips JA, para [40] and rule 12.4(f) of the CPR.

Issue

[44] The primary issue in this appeal is whether, on the evidence, and a proper construction of the rules 5.11, 5.14, 5.19, 12.4 and 13.2 of the CPR, the learned judge was correct to set aside the default judgment against the 2nd respondent, on the basis that he was not properly served with the claim form and particulars of claim.

Discussion

[45] Rule 13.2 of the CPR states:

> "(1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because-
>
> (a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;
>
> …
>
> (2) The court may set aside judgment under this rule on or without an application."

[46] Rule 12.4 of the CPR deals with conditions to be satisfied and the failure to acknowledge service as a basis for a default judgment. It states, in part:

> "12.4 The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if-
>
> (a) the claimant proves service of the claim form and particulars of claim on that defendant;
>
> (b) the period for filing an acknowledgment of service under rule 9.3 has expired;
>
> (c) that defendant has not filed-
>
> (i) an acknowledgment of service; or
>
> (ii) a defence to the claim or any part of it;

…"

[47] Since rule 13.2 mandates that the default judgment must be set aside, as of right, if any of the conditions under 12.4 was not satisfied, the learned judge would have been correct to do so if there was an absence of proof that the claim form and particulars of claim were served on the 2nd respondent.

[48] As already indicated, the application in the court below, challenging the validity of service of the claim form and particulars of claim, was brought by the insurance company, on behalf of the 2nd respondent. Although Mrs Burton-Campbell made submissions in relation to both respondents, it is apparent from the grounds of appeal and submissions on behalf of the appellants, that this appeal is only concerned with the issue of service as it relates to the 2nd respondent. Consequently, the issues will be discussed in relation to the 2nd respondent only, except when the context makes it necessary to refer to both respondents.

Last known address

[49] The record of appeal reveals that at the time the order for service by registered post was made, evidence was before the learned master that 1035 Flintstone Close had become known to the appellants as the current address of the 2nd respondent (see affidavit of Junior Rowe filed 5 March 2013 and affidavit of Sylvester C Morris filed 20 September 2013). The last attempt to serve him, personally, at that address was in December 2012.

[50] Some five months after Master Lindo's order, in April 2014, based on the information stated in the relevant registered slip exhibited to the affidavit of Bernice Scott (there was no address stated for the 2nd respondent in the affidavit of service), the registered mail (containing the claim form and particulars of claim), was posted to the 2nd respondent at D35 Flintstone Close**.** However, the record does not disclose what further enquiries, if any, were made, at the time of posting of the registered mail, that would have established D35 Flintstone Close as the 2nd respondent's current or last known

address. Nor was there any explanation in the evidence from which it could be inferred that at the time of the posting of the registered mail, the appellants knew the 2nd respondent's last known address to be D35 Flintstone Close and not 1035 Flintstone Close. In my view, since the earlier ascertained address of 1035 had not been used, it was incumbent on the appellants to establish, as a matter of evidence, when D35 Flintstone Close became known as the 2nd respondent's last known address.

[51] In **Mersey Docks v Michael Kilgour**, the words "last known place of business" was construed by Toulmin J at paragraphs 62 to 63:

> "62 I have therefore the two alternatives: either to construe 'last known place of business' as the last place known to the claimant...or alternatively the last known ascertainable place of business…
>
> 63 It seems to me that the proper construction is last known place of business in the sense of last place of business known to the claimant. This is, in itself, a relatively onerous provision, since in order to acquire the requisite knowledge a party must take reasonable steps to find out at the date of service what is the current place of business or the last place from which the party carried on its business. It will be a matter of evidence whether or not a party has discharged the obligation to have the requisite knowledge at the time of service…"

[52] That case shows that the defendant must not only be served at what is his last known or current address but there must be evidence provided by the claimant from which the court may ascertain how the claimant came by that knowledge.

[53] In her affidavit of June 2018, Miss Peck deposed that D35 Flintstone Close had been given by the 2nd respondent in 2004 for insurance purposes. That contract of insurance was for one year. Before this court, the appellants seized upon this disclosure as providing confirmation that of the two alternative addresses, D35 Flintstone Close was indeed the correct one to have been used as the last known address. But there was no evidence of any efforts made by the appellants, at the time of posting the registered mail,

in 2014, to establish or which did, in fact, establish that the 2nd respondent's current or last known address was D35 Flintstone Close.

[54] Whilst there was evidence that the 2nd respondent had resided at D35 Flintstone Close at the time of the contract of insurance, there was no evidence that it had remained or was his address up to the point at which the registered mail containing the claim form and particulars of claim was posted some 10 years later. In fact, the evidence which the appellants provided in the court below was to the contrary. The affidavit evidence shows that after 2005 (when, according to the insurance company, the contract of insurance had terminated), the appellants had ascertained that the 2nd respondent was residing at 1035 Flintstone Close.

[55] So, bearing in mind the evidence of Junior Rowe and Sylvester C Morris that 1035 Flintstone Close had been ascertained as the 2nd respondent's last known address and that personal service had been attempted there; that the reference in the request for default judgment was to Apartment 73, Campview Apartments as the address at which the 2nd respondent was purportedly served the registered mail containing the claim form and particulars of claim; that the affidavit of service filed by Bernice Scott did not say to which address the registered mail containing the claim form and particulars of claim was posted; and that there was an absence of reasons why the registered slip was addressed to the 2nd respondent at D35 Flintstone Close instead of 1035 Flintstone Close, it could not be said with any certainty that the 2nd respondent was served at his last known address.

[56] On this basis alone, service could be found to be irregular (see **Al-Tec Inc Limited v James Hogan et al** [2019] JMCA Civ 9 ('**Al-Tec v Hogan**') (see paras [105], [106] and [108]).

[57] However, the court below did not base its findings on the question of whether the address for service was correct, as it had not been raised there as an issue. Counsel for the 2nd respondent was asked, in the course of hearing this appeal, whether there ought

to have been a counter-notice of appeal because the accuracy of the address for service was being challenged before this court. She submitted that there was no necessity to do so because the order for alternative service did not indicate a last known address and the evidence had clearly established that the 2nd respondent had not been served by the appellants at his last known address.

[58] **Murphy v Staples UK Limited** ('**Murphy**') is helpful on this point. That case was one of the appeals decided under the title of **Cranfield v Bridgegrove**, dealing with various issues on service. In **Murphy**, the claimant had sent the claim form by registered post to the defendant's registered office when it had been indicated that it should have been served on the defendant's attorney-at-law. It was conceded in the lower court that there was improper service under the UK CPR 6.5. However, on appeal, the claimant advanced the argument that the service had been good under section 725(1) of the Companies Act 1985. That provision allows for service by post to the company's registered office. The defendant objected on the basis that this argument had not been raised before and it was too late to take the point. The UK Supreme Court decided that "it would be unsatisfactory to determine [the] appeal on a false basis" and "[any] prejudice caused to the defendant by the fact that the point was taken so late could be met by an appropriate order for costs, and giving the defendant time to submit further submissions in writing on the new point" (see paragraph 74).

[59] I adopt the approach articulated in **Murphy** that a new point which had not been pursued below could be dealt with provided that the other party had time to respond and that a matter should not be decided on a false basis. Moreover, in hearing an appeal, this court is not confined to the grounds that have been set out and may make its decision on any ground not contained in the notice or counter-notice of appeal, if the parties had sufficient opportunity to contest such a ground (rule 1.16(3)(b) of the Court of Appeal Rules ('CAR')). This court also has broad powers to draw any inference of facts which is justified on the evidence in a particular case (rule 1.16(4) of the CAR).

[60] Although the point about the address was taken late, the appellants had an opportunity to respond and did so. Having considered the evidence and those submissions, I hold the view that it had not been established by the appellants, with any certainty, that the purported service of the claim form and particulars of claim was at the 2nd respondent's last known address, as directed by Master Lindo's order, and on that premise, the default judgment could be set aside.

[61] While that reason is sufficient to dispose of the appeal, I will go on to consider the issue of service, on which the learned judge decided the case, and other grounds advanced in the appeal.

Service by registered post

[62] Service on an individual by an alternative method of service is effected in accordance with rules 5.11, 5.14 (or 5.13 where applicable), 5.15 and 5.19 of the CPR.

[63] It is intended by rule 5.14 that the efficacy of the proposed method of alternative service be proved to the satisfaction of the court. So, it has to be shown that the method of service is likely to be effective, otherwise, the order will more than likely not be granted. Rule 5.14 provides that:

> "(1) The court may direct that service of a claim form by a method specified in the court's order be deemed to be good service.
>
> (2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit-
>
> (a) specifying the method of service proposed; and
>
> (b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim."

[64] Under rule 5.11, proof of service must be established in an affidavit by the person responsible for posting the claim form. The affidavit must exhibit a copy of the claim form

and contain a statement stating the date of posting as well as the address to which it was sent.

[65] There is also the requirement in rule 5.15 for the sender of the claim form to show that the terms of the order for alternative service were carried out. What this means is that in the absence of an acknowledgment from the 2nd respondent that he received notice of the claim form and particulars of claim, the appellants needed to prove that he was served with them at his last known address, in accordance with service by registered post.

[66] Rule 5.19 of the CPR creates a presumption of service. That provision states, as far as is relevant:

> "(1) A claim form that has been served within the jurisdiction by prepaid registered post is deemed to be served, unless the contrary is shown, on the day shown in the table in rule 6.6."

[67] Section 52 of the Interpretation Act makes it plain that for the presumption of deemed service to prevail, the document to be posted must be properly addressed. This means that the intended recipient's address should be correct and complete. Section 52 states, in part:

> "52. (1) Where any Act authorizes or requires any document to be served by post, whether the expression 'serve', 'give' or 'send' or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

[68] On the assumption that the document is properly addressed (and the other conditions in the provision are satisfied), it is to be considered delivered in the ordinary course of post.

[69] The meaning of "deemed service" was explained in **Ace Betting Company Limited v Horseracing Promotions Limited** Consolidated Appeals (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 70 & 71/1990, judgment delivered 17 December 1990, a case that was decided by this court under the now repealed Civil Procedure Code Law. Forte JA (as he then was) stated that a writ that was sent by registered mail and not returned, with no indication that it had not been delivered, would be deemed as having been served on the relevant date. This is the general position under the CPR. A decision to similar effect was made by the England and Wales Court of Appeal in **Akram v Adam.** Once it has been proved that the claim form and particulars of claim were sent to the intended recipient's last known address, in accordance with service by registered post, they would be deemed to have been served (see also **Cranfield v Bridgegrove**. However, the presumption of service of the claim form may be rebutted, by evidence to the contrary, as provided for in rule 5.19 of the CPR.

[70] What constitutes a rebuttal of that presumption of service is a matter of evidence. In **Linton Watson v Gilon Sewell**, Phillips JA considered rule 5.19 of the CPR and distilled that the words, "unless the contrary is shown", applied not only to the question of whether there was service at a particular date but to a situation where the act of service itself was being disputed, as in the instant case. At para [36], she stated:

> "…The words in rule 5.19, 'unless the contrary is shown', do suggest that the server or the recipient can attempt to show to the court, once in conformity with the rules, when actual receipt of the documents occurred. In respect of the claimant, evidence can be produced to show that the claim form was in fact sent earlier than the date on which service was deemed to have been effected, thereby dispelling the fiction of deemed service on any other day, and, in my view, in respect of the instant case, that service may not have been effected at all. The presumption of the deemed date of service is therefore, in my opinion, in relation to this rule, rebuttable."

[71] And continuing at para [40], she enunciated that:

> "On any interpretation of rule 5.19 of the CPR, as indicated previously, the presumption of service is clearly rebuttable by evidence. This evidence may be adduced on behalf of either the claimant or the defendant, to show that the service of the claim form did not take place on the deemed day of service set out in rule 6.6 or at all."

[72] At para [41], Phillips JA went on to say that the mere denial of receipt of the registered mail was not sufficient to disprove service where there had been no evidence from the postal service that the claim form had been returned unclaimed. That statement is consistent with the earlier authorities. But would it also be consistent with the 2nd respondent's submission, that the return of the letter containing the claim form, by the postal authorities, is sufficient to rebut the presumption of service?

[73] I found the dictum of the court in **Ex parte Rossi** to be instructive on this point. That case concerned the service of a registered letter to the respondent from the clerk for the County of London. Section 3(1) of the Summary Jurisdiction (Appeals) Act, 1933 (UK) required that notice be given by the clerk, stating the date, time and place of the hearing of the appeal. The notice to any person "may be sent by post in a registered letter addressed to him at his last or usual place of abode". The notice which was sent had been returned, marked: "Undelivered…No response…22-9-54".

[74] One of the arguments put forward by the applicant in **Ex parte Rossi** was that the words, "shall be deemed to be effected" were qualified by, "unless the contrary is proved" in the second half of section 26 of the Interpretation Act, UK (similar to section 52 of our Interpretation Act) and the contrary had been proved because the court knew that the letter had been undelivered. The respondent argued, as did the appellants in this case, that the relevant provisions did not require proof that a person received the communication if he did not appear to a summons served by registered post. If the statute said "sent", sending the notice was sufficient. It was sending and not receiving which was decisive.

[75] Lord Denning, in construing the relevant section, and in response to the argument that it was sufficient to comply with the section once the registered letter was sent to the respondent, even if not received by him and known not to be received, posited, at page 691:

> " [I]t is to be remembered that it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them. The common law has always been very careful to see that the defendant is fully apprised of the proceedings before it makes any order against him…"

[76] Similarly, Morris LJ stated at page 696:

> "…The purpose of giving notice to a party of the hearing of a case is so that the party may have the opportunity to appear in order to assert or to defend his rights. It seems to me, therefore, that it is of the very essence of such notice that it should be communicated to or should reach the party interested.
>
> It is fundamental in our system of administration of justice that a party should have the right and opportunity to be heard or to be represented. This is well recognized…"

[77] Morris LJ, construing the meaning of the term "unless the contrary is proved" in the context of section 26 of the UK Interpretation Act, opined at pages 697 to 698:

> "But here the contrary was proved. It was proved, not merely that the letter was not delivered in the ordinary course of post but that the letter was not delivered at all. Service cannot in this case be deemed 'to have been effected' at some particular time, i.e., in the ordinary course of post: service was proved not to have been effected at all…Though a letter was sent it did not arrive. 'A notice' was sent, but Mr Rossi was not given notice..."

[78] Lord Denning, in addressing the operation of service by registered post in the UK stated at page 692:

> "…The merit of registered post in this regard is that the postman will only deliver the letter to the person to whom it is addressed or to someone who will take responsibility for seeing that he gets it. Otherwise he will return it to sender, who will thus get to know, sooner or later, if the letter is not received…[W]hen the case was called on…and Mr. Rossi did not appear, it was essential for counsel for Mrs. Minors to prove service of the notice in accordance with section 3 (1) of the Act. He had to prove that the clerk of the peace had in due course given Mr. Rossi notice of the date, time and place of hearing. This could be done by proof that a notice had been sent to him in good time by post in a registered letter which had not been returned, for it could then be assumed that it had been delivered in the ordinary course of post… But once it appeared that the letter had been returned undelivered, then it was quite plain that he had not been given notice at all of the date, time and place of the hearing. In short, service had not been effected…"

[79] As alleged in the instant case, so too was it advanced in **Ex parte Rossi** that the defendant was evading service. I adopt what Lord Denning had to say in that regard at page 693:

> "In any case, even if he was evading service, it does not help [the respondent]. Evading service would be a ground for ordering personal or substituted service, but not for dispensing with service altogether."

[80] These remarks are to be understood in the particular circumstances of that case, specifically that there was a first hearing at which the applicant was present. It was also known at the time of the second hearing that the applicant had not been served with notice of that hearing but it was decided nonetheless to proceed. One of the reasons for proceeding was that the District Court judge seemed to have accepted that the applicant was evading service. This was found not to be so by the appellate court.

[81] In **Hewitt v Leicester City Council**, a notice sent in a letter by the recorded delivery service to an intended recipient was returned undelivered through the post marked "gone away". Lord Denning MR, at page 804, said:

> "This is a case like *Rossi's* case… We are not bound to "deem" a notice to be served at a particular time, when we know that in fact it was not served at all."

[82] A similar issue arose in **Beer v Davies** [1958] 2 All ER 255. In that case, the respondent was involved in a motor vehicle accident and notice of intended prosecution of a driving offence was sent to his home address by registered post within the statutory period. The notice was not delivered because the respondent was away on vacation and no one was at his home. The notice was returned to the appellant by the post office. The information against the respondent was dismissed on the ground that the notice of intended prosecution was not served within the statutory period as it had not been delivered. Lord Goddard CJ at 257 commented as follows:

> "The Court of Appeal in *R. v. London Quarter Sessions, Ex p. Rossi (1) ([1956] 1 All E.R. 670)*, have decided that where a notice is to be served by registered post, though it is prima facie enough to prove that it was correctly directed, stamped and posted, yet if it can be shown that the notice was never delivered there has not been service and s. 26 of the Interpretation Act, 1889, does not assist. In R*. v. London Quarter Sessions, Ex p. Rossi* (1) the Court of Appeal were not concerned with the Road Traffic Act, 1930. The question was one of an appeal to quarter sessions in a bastardy matter, but the substance of the decision applies equally here because the Court of Appeal were considering s. 3 of the Summary Jurisdiction (Appeals) Act, 1933, which provides for the giving of various notices, and says:
>
> 'A notice required by this sub-section to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode'." (Italics as in the original)

At page 258 Lord Goddard CJ further opined:

> "…but at any rate there is the decision of the Court of Appeal that a notice sent by registered post but not delivered is not good service..."

[83] In the line of cases just referenced, it was not just the return of the documents which determined the outcome but evidence of the circumstances, such as the intended recipient being away when the postman called. The result might not be the same where there is evidence that the notice (registered slip) was sent by registered post and the documents were returned, uncollected or unclaimed, without more being said. The possibilities are indeed endless as to why the documents might be returned, uncollected. There can be no doubt that the return of documents by the postal authorities is strong evidence of rebuttal of deemed service but I would think that it is not necessarily determinative of the issue of service.

[84] It was significant in **Ex parte Rossi** that there was evidence on affidavit from the applicant himself in which he stated that "during the time between August 13 and September 29, 1954 [service was attempted on him on 22 September 1954], he visited Kent to do some fruit-picking". Based on that evidence, the appellate court remarked that all the evidence was consistent with the view that the applicant was away from his home when the postman called and the evidence did not substantiate that he was evading service. It was in those circumstances that the court ruled that service was ineffective.

[85] It can be seen quite readily from Lord Denning's exegesis on the postal system in the UK that it operates differently from ours. Whereas in the UK (certainly at the time of the **Ex parte Rossi** decision) emphasis seemed to have been on whether the mail was delivered or delivery attempted, that is not the case in Jamaica. There was no direct evidence before this court as to how service by registered post is effected but it can be deduced from the letter by the postal authority that it involves these steps. After the article is received by the post office, a notice (that is, the registered slip) is sent to the intended recipient. It is the registered slip which alerts the recipient to the existence of a registered article at the post office for collection. The recipient is then expected to collect the article from the post office. Once it is proved that the registered slip was properly addressed, stamped, the fee paid and it was sent to the correct address, in the ordinary course of post, service is deemed to have been effected at a particular date. However,

as was established by rule 5.19, the legal fiction of "deemed service" as it concerns the claim form, is rebuttable.

[86] Counsel for the appellants has submitted that the threshold for deemed service by registered post was not the receipt of the claim form and particulars of claim by the 2nd respondent or their delivery to him personally. Rather, it should be shown that by sending the mail by registered post, he would have likely ascertained the contents of the claim form. That is the plain meaning of rule 5.14 of the CPR. The rule does not say that it is not good service if the party to be served does not receive the documents. As Mr Nelson contended, the intended recipient of the notice of a registered mail is obligated to claim the mail once he receives the notice. However, rule 5.14 must also be read with rule 5.19(1), which means that deemed service of the claim form can be rebutted where there is evidence to the contrary.

[87] It is my view that had it been established, on the evidence, that the registered slip was correctly addressed and sent in the ordinary course of service by registered post, notwithstanding the return of the article, unclaimed, the onus would have been on the 2nd respondent or the insurance company which sought to set the judgment aside, to provide evidence that the registered mail was sent to the wrong address and the 2nd respondent did not receive the registered slip, and this was the reason for the return of the registered mail. If it were otherwise, rule 5.14 would make no sense and a recalcitrant defendant who is served with a registered slip would be able to wait until the postal authority returned the article to successfully claim non-service. It must be the intent behind rule 5.14 that such a defendant would ignore the registered slip at his peril. Ultimately, whether a claim form is served is not a matter of pure law. It is also a matter of evidence.

[88] In this case, there could be no "deemed service" where there was no certainty that D35 Flintstone Close was the correct address to which the claim form should have been posted. As I already indicated, confronted with the affidavit of Junior Rowe regarding 1035 Flintstone Close and Sylvester C Morris' averment as to how it had been

ascertained as the address of the 2nd respondent, coupled with the absence of any information as to how D35 was ascertained to be the last known address of the 2nd respondent thereafter, the court was in no position to determine with any certainty that the 2nd respondent was served at his last known address.

[89] The return of the letter containing the claim form and particulars of claim, to the sender, unclaimed, was additional and relevant evidence to rebut the presumption of deemed service.

[90] It is only left for me to comment on the proposition by the 2nd respondent that the registered slip should disclose what was contained in the letter to be collected at the post office. The words "able to ascertain the contents" and "likely that he or she would have been able to do so", in rule 5.14 of the CPR, make it plain that the registered slip did not have to specify the contents of the registered article. The proposition which suggests that service by registered post would be improper where the content of the documents was not ascertained before the parcel is claimed, would, in my view, be incorrect. And the learned judge fell into error when she so found. Rule 5.14 suggests that once the content is ascertainable, and the other rules are complied with, there would be proper service. Particularly, in reference to the claim form, service will be effective, unless the contrary is shown.

[91] In light of the above and the circumstances of this particular case, there is sufficient reason for this court to conclude that the returned "as uncollected" registered article, containing the claim form and particulars of claim, coupled with the fact that there appears to be doubt whether the registered slip was sent to the 2nd respondent's last known address, means that service was irregular. Once proper service was not proved the judgment obtained was irregular. The learned judge was therefore correct to have set it aside.

Breach of the CPR

[92] Before concluding I should deal briefly with one further point that was not the subject of any counter-appeal but was nevertheless raised by the 2nd respondent.

[93] Counsel for the 2nd respondent complained that the affidavit of Bernice Scott was in breach of rule 5.11 of the CPR because it failed to state the address at which the 2nd respondent was purportedly served, and there was no attempt to cure that defect. The implication is that service was not proved on that basis, as well.

[94] It is not entirely clear whether this point was raised before the learned judge but the absence of an address for the 2nd respondent was evident in the affidavit which was put forward to prove service and there was no evidence of any attempt to cure the defect. Under rule 5.11 of the CPR, it is mandatory that the affidavit in proof of service state the address to which the claim form was sent. Since this was not done, it follows that the affidavit filed by the appellants to prove service was defective.

[95] Having said that, once there was proper service of the claim form, the appellants could have cured the procedural error by filing a supplemental affidavit stating the address to which the registered mail was posted. That approach would have accorded with the view expressed by Brooks J (as he then was) in **Coates v XXtra Lee Supermarket Limited** (unreported), Supreme Court, Jamaica, Claim No 2003/HCV0390, judgment delivered 3 March 2004, and upheld by this court in **Al-Tec v Hogan** para [73], that a supplemental affidavit could cure a procedural error where the breach of the rules was not non-service of the documents but a failure to specify, in the affidavit of service, that the documents accompanying the claim form were in fact served.

[96] The record of appeal revealed other defects, not least of which was that the request for judgment in default indicated that both respondents were served at Apartment 73, Campview Apartments. As it turned out the registered slips, relative to service of all documents on the 2nd respondent, were addressed to him at D35 Flintstone Close or "D35 Flimstone [sic] Close" (according to the letter from the postal authority).

These defects had a bearing on whether the provisions of rules 5.11 and 5.15 of the CPR were satisfied.

Disposition

[97] For the reasons stated, the appeal cannot succeed. The learned judge was entitled to find that the claim form and particulars of claim were not validly served on the 2nd respondent and, as a result, the default judgment entered in favour of the appellants was irregular and ought to have been set aside.

[98] In the circumstances, I propose the following orders:

i. The appeal is dismissed.

ii. The order of Thomas J (Ag) (acting as she then was) made on 11 December 2018 is affirmed.

iii. Costs in the appeal to the 2nd respondent to be agreed or taxed.

EDWARDS JA

ORDER

1. The appeal is dismissed.

2. The order of Thomas J (Ag) (as she then was) made on 11 December 2018 is affirmed.

3. Costs in the appeal to the 2nd respondent to be agreed or taxed.