[2024 Gib LR 8]

PARODY v. GIBDOCK LIMITED

COURT OF APPEAL (Kay, P., Davis and Fulford, JJ.A.):
March 7th, 2024

2024/GCA/004

Civil Procedure—service of process—time of service—pursuant to CPR, r.7.5, claim form to be served on defendant within 4 months of date of issue—if last day of 4-month period is Sunday, service on Monday out of time—Interpretation and General Clauses Act 1962, s.54 does not apply

The appellant claimed to have suffered loss and damage as a result of the respondent's negligence.

The appellant had been employed by the respondent as a steel worker. He claimed that he had been negligently exposed to harmful chemicals during his employment which had caused or materially contributed to his ill health which included leukaemia.

The appellant issued a claim form on December 3rd, 2021 with a view to protecting limitation. The letter before claim was sent to the respondent on March 21st, 2022. On March 25th, 2022 the appellant sent the respondent relevant enclosures, including a doctor's letter setting out his diagnosis and current situation. The appellant filed an amended claim form on or about April 4th, 2022, naming the respondent and setting out the brief details of the claim. The appellant served the claim form, particulars of claim and response pack on the respondent on April 4th, 2022.

The respondent filed an acknowledgement of service on April 8th, 2022 indicating an intention to defend the claim. The parties agreed that there should be a stay of proceedings for investigation. A draft consent order for a stay was approved by the parties and filed in court on April 22nd or 25th, 2022, providing for the proceedings to be stayed until August 19th, 2022.

On July 1st, 2022, the respondent informed the appellant that it considered the claim to be statute-barred for limitation, and that the claim form had also been served out of time. On August 19th, 2022, the respondent filed an application contesting jurisdiction and seeking summary judgment. The appellant argued that his claim form had been served within the relevant time period and that in any event CPR, r.7.6 provided for applications for extensions of time. Furthermore, the stay agreement had been reached at the respondent's request and was based on the fact that the particulars of claim had been issued and served. The acknowledgement of service did not

include any challenge to jurisdiction and it was argued that the stay order had not been intended to suspend CPR, r.11 which provided the procedure for disputing the court's jurisdiction.

In the Supreme Court, Ramagge Prescott, J. declined jurisdiction to try the claim because the appellant had failed to serve the claim form within four months of the date of issue (2023 Gib LR 644). The claim was issued on December 3rd, 2021 and CPR, r.7.5 provided that service must occur before midnight on the calendar day four months afterwards. It was accepted that the appellant had until midnight on April 3rd, 2022 to serve the claim form on the respondent, but the appellant contended that because April 3rd, 2022 was a Sunday, service on the following day came within the period provided by the rules. The appellant relied on s.54 of the Interpretation and General Clauses Act 1962, which provided:

> "54 In computing time for the purpose of any Act, unless the contrary intention appears—
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> . . .
>
> (b) if the last day of the period is Sunday or a public holiday which days are in this section referred to as excluded days) the period shall include the next following day, not being an excluded day . . ."

"Act" was defined in s.2 of the 1961 Act as—

> "'Act' means an Act of the Parliament of Gibraltar except where that reference was introduced into the laws of Gibraltar prior to the coming into effect of the Gibraltar Constitution Order 2006, in which case, in that reference 'Act' shall mean an Act of the Parliament at Westminster and such references to Acts of Parliament shall be references to Acts of the United Kingdom Parliament . . ."

The judge agreed with the respondent that the Civil Procedure Rules were not an Act of the Parliaments of Gibraltar or the United Kingdom.

The judge considered the effect of "deemed" days under CPR, r.6.14 and concluded that service would have been "deemed" to have taken place on the second business day following the day on which service was actually effected.

The judge did not accept the appellant's submission that the respondent was out of time to challenge the court's jurisdiction. The stay preserved the position that the respondent had 14 days to file its defence. The judge also found that the various steps taken by the respondent did not constitute submission to the jurisdiction of the court.

The appellant raised three grounds of appeal:

(1) The judge erred in concluding that the Civil Procedure Rules were not an "Act" and as a consequence the provisions relating to service as contained in the Interpretation and General Clauses Act s.54 did not apply in the present case. Pursuant to s.25 of the Interpretation and General Clauses Act, any steps taken under subsidiary legislation were to be deemed to be done under the enabling Act (in this case s.38A(1) of the Supreme Court Act 1960).

(2) The judge erred in holding that service of a claim form and particulars on the next business day where time for service expired at midnight on the previous day, that day being a Sunday, was not good service, by confusing "effected service" under CPR, r.7.5 with "deemed service" under CPR, r.6. It was repeated that s.54 of the Interpretation of General Clauses Act applied to change the rules as to service as set out in the Civil Procedure Rules.

(3) The judge erred in determining that the respondent had not submitted to the jurisdiction of the court, given that the respondent's acknowledgement of service indicated an intention to defend the claim and the respondent had not ticked the box indicating jurisdiction was to be challenged. Instead, it was suggested that the respondent applied to extend time to file a defence as part of the agreed stay order. This amounted to a clear submission to the jurisdiction of the court.

Held, dismissing the appeal:

(1) The Civil Procedure Rules did not come within the definition of an "Act" for the purposes of the Interpretation and General Clauses Act 1962. The Rules were not "an Act of the Parliament of Gibraltar" or "an Act of the Parliament of Westminster" as defined in s.2 of the 1962 Act. The application of the Rules in Gibraltar was authorized by s.38A of the Supreme Court Act 1960, which provided that the Rules applied in Gibraltar with such modifications as the circumstances of Gibraltar might require. It was clear from that section that instead of creating subsidiary legislation, the Rules were applied directly in Gibraltar. The 1962 Act drew a clear distinction between an "act" and an "Act," thereby reflecting the separate nature of primary and secondary legislation. Section 25 of the 1962 Act provided that steps taken in accordance with subsidiary legislation took their authority from the relevant primary legislation. That did not involve merging the separate legislative provisions because otherwise the definition in s.2 of "an Act of the Parliament of Gibraltar" or "an Act of the Parliament at Westminster" would be of little or no real effect. It followed that s.25 did not have any impact on the rules relating to service, as set out in the Civil Procedure Rules. In any event, even if s.54 of the 1962 Act did apply and the Civil Procedure Rules were to be treated as an Act, the latter would still be the governing provision as presently framed because s.54 provided "in computing time for the purposes of any Act, unless the contrary intention appears" and by the Civil Procedure Rules such a "contrary intention" had clearly been given. It followed that s.54 would not have the effect of amending the Civil Procedure Rules if, as suggested by the appellant, they were to be treated as having become law by direct adoption pursuant to the principal Act and were to be treated as an "Act." Therefore, it was clear that the Parliament of Gibraltar intended the Civil Procedure Rules to apply in Gibraltar with full effect, save for modifications such as for nomenclature, and accordingly, for the purposes of s.54 of the 1962 Act, a contrary intention had been expressed. The

method of calculating days if the last day was a Sunday (as set out in s.54) did not apply to the present case (paras. 32–36).

(2) The respondent correctly submitted that the distinction analysed by the judge between "deemed" service and "actual" service did not require any detailed consideration. Subject to his argument under s.54, the appellant accepted that actual service was out of time in the sense that it was not effected before midnight on April 3rd, 2022. Given the court's view of the correct decision on the relevance of s.54, it was unnecessary to investigate whether service occurred on a still later date because of the provisions relating to "deemed" service. Under both scenarios the claim form and the particulars of claim were served out of time. The judge's decision was therefore not dependent on the date of deemed service (para. 38).

(3) The respondent had not submitted to the jurisdiction of the court. The test to be applied was whether a disinterested bystander with knowledge of the case would have regarded the acts of the defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge. To conclude that there had been an effective submission to the jurisdiction, the steps taken would need to be consistent only with the party in question having accepted the court should be given jurisdiction. If the step relied upon could be explained because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there would have been no submission. The court therefore had to assess whether the only possible explanation for the conduct relied on was an intention on the part of the defendant to submit to the jurisdiction of the court. The Civil Procedure Rules provided that a defendant must file an acknowledgement of service but, as set out in r.11.1(3), by taking this step the defendant did not compromise his ability to contest jurisdiction. Instead, any application challenging jurisdiction must be filed within 14 days following the filing of the acknowledgement of service (r.11.1(4)). If this did not happen, the defendant would be treated as having accepted that the court had jurisdiction to try the claim. In this case it was not fatal that the respondent had simply failed to tick the box on the acknowledgement of service indicating that the jurisdiction point was being taken. Standing alone, this did not prevent the defendant from later contesting jurisdiction. This was particularly the case when, as in the present case, the respondent at all material times sought a stay of the claim to preserve the pre-action position. The inclusion of the provision in the stay order that there was to be a case management conference on the first available date after September 9th, 2022 and the respondent had permission to file and serve the defence no later than September 2nd, 2022 was no more than an integral part of the agreement they had reached to stay the proceedings to provide the defendant with time to investigate and respond to the claim in accordance with the pre-action protocol. It was not a formal application for an extension of time in proceedings which had been initiated and conducted in accordance with the established rules and procedures. However, even if the agreement in the stay order to allow until September 2nd, 2022 to file the defence amounted to an extension of time

to file the defence, this was not determinative. When the stay order was signed, the respondent was still within the 14-day period in which to file an application to contest jurisdiction. Given the respondent could still avail itself of this opportunity, any conduct on its part said to amount to a submission to jurisdiction would need to have been wholly unequivocal for the appellant's submissions to succeed. The present facts were not unequivocal and the court had no hesitation in concluding that the respondent had not submitted to the jurisdiction of the court (paras. 43–49).

Cases cited:
(1) *Barton* v. *Wright Hassall LLP*, [2018] UKSC 12; [2018] 1 W.L.R. 1119; [2018] 3 All E.R. 487, referred to.
(2) *Deutsche Bank AG London* v. *Petromena AS*, [2015] EWCA Civ 226; [2015] 1 W.L.R. 4225; [2015] C.P. Rep. 27, referred to.
(3) *Global Multimedia Intl. Ltd.* v. *ARA Media Servs.*, [2006] EWHC 3612 (Ch); [2007] 1 All E.R. (Comm) 1160, referred to.
(4) *Grant* v. *Dawn Meats (UK)*, [2018] EWCA Civ 2212, referred to.
(5) *Sage* v. *Double A Hydraulics Ltd.*, [1992] T.L.R. 165, considered.
(6) *Smay Investment Ltd.* v. *Sachdev*, [2003] EWHC 474 (Ch); [2003] 1 W.L.R. 1973, considered.
(7) *Winkler* v. *Shamoon*, [2016] EWHC 217 (Ch), referred to.

Legislation construed:
Interpretation and General Clauses Act 1962, s.2: The relevant terms of this section are set out at para. 18.
s.25: The relevant terms of this section are set out at para. 31(i).
s.54: The relevant terms of this section are set out at para. 17.

Supreme Court Act 1960, s.38A: The relevant terms of this section are set out at para. 32.

Civil Procedure Rules (S.I. 1988/3132), r.2.8(4): The relevant terms of this provision are set out at para. 20.
r.7.5: The relevant terms of this rule are set out at para. 17 and para. 39.

C. Finch (instructed by Verralls Barristers & Solicitors) for the appellant;
O. Smith and *J. Pitaluga* (instructed by TSN) for the respondent.

1 **FULFORD, J.A.:**

The relevant history

This judgment concerns a decision by Mrs. Justice Ramagge Prescott declining jurisdiction as regards the appellant's claim on account of his failure to serve the claim form within four months of the date of issue. Given the relatively limited—albeit important—focus of this appeal, it is necessary to rehearse only particular aspects of the background facts.

2 Save for three relatively short breaks, the appellant was employed by the respondent as a steel worker between April 22nd, 2005 and January 26th, 2010. The name of the respondent company changed during his employment from Cammell Laird (Gibraltar) Ltd. to Gibdock Ltd. The present claim is for damages following the suggested negligence of the respondent in exposing the appellant to harmful chemicals which have contributed to a multifaceted illness which may prove to be fatal. The allegation of negligence is based on the suggested failure on the part of the respondent to provide adequate safety equipment and proper ventilation. The appellant additionally claims breach of contract and breach of statutory duty. The diagnosis of the appellant's condition was made on December 4th, 2018.

3 The appellant issued the claim form on December 3rd, 2021. The letter before claim was sent to the respondent on March 21st, 2022 which rehearsed that:

> "A claim form was filed in December 2021 with a view to protecting limitation. Particulars of claim will be filed shortly whereupon you will be served with the claim for your response."

4 On March 25th, 2022, the appellant sent various enclosures to the respondent which had not been provided earlier, along with the letter before claim. On April 4th, 2022, the claimant filed an amended claim form which provided brief details of the claim, including:

> "The Claimant's exposure to benzene and/or other chemicals whilst employed as a steel worker in the Defendant company with no protective gear or any or no proper ventilation has caused or materially contributed to his acute myeloid leukaemia and acute lymphatic leukaemia. As a result, other illnesses and/or ailments have arisen as set out in the particulars of claim (attached). The Claimant claims that the Defendant breached their duty as employers both in contract and negligence and/or breached their statutory duty in regard to him."

5 Additionally, on April 4th, 2022 the appellant served the claim form, the particulars of claim and the response pack on the respondent by email to mail@gibdock.com, at 17:16, and by hand on the same date when these materials were left at the respondent's offices.

6 The respondent filed an acknowledgement of service on April 8th, 2022 which indicated the claim would be resisted in full.

7 Various procedural points were taken by the respondent which have only a tangential bearing on the issues that fall to be considered on this appeal, namely the respondent avers that the appellant failed on April 4th, 2022 to provide the full medical records and no expert report was served with the particulars of claim, and it is additionally suggested that the letter before claim failed to (i) provide any of the facts or details relating to the

underlying allegation; (ii) set out the basis for the allegations of negligence and breach of statutory duty; and (iii) allow the respondent three months in which to respond prior to the service of the claim. The respondent invited the appellant to apply for a stay of the proceedings to afford sufficient time under the Pre-Action Protocol for Personal Injury Claims to comply with its obligations and to investigate the claim. None of this has been challenged by Mr. Finch on behalf of the appellant. In essence, Mr. Smith for the respondent submits that given the problems that arose as a result of the failure by the appellant to follow properly the Pre-Action Protocol, they sought to press "pause" in order to consider what approach to take to this proposed litigation.

8 Following various exchanges regarding procedural issues, the proceedings were stayed on the mutual agreement of the parties, as finalized on April 12th, 2022. A draft stay order that was agreed and signed by the parties on April 22nd, 2022, which was filed with the court on either April 22nd, 2022 or April 25th, 2022 (Christina Linares' witness statement at para. 9 is unclear on this issue). It included the following:

> "[T]he parties have agreed to stay the proceedings to provide the Defendant with time to investigate and respond to the claim in accordance with the Pre-Action Protocol for personal injury."

9 Other provisions included:

(i) The proceedings were stayed until August 19th, 2022;

(ii) The respondent had permission to file and serve the defence no later than September 2nd, 2022; and

(iii) There was to be a case management conference on the first available date after September 9th, 2022.

10 The stay order was issued by the court on April 27th, 2022. Thereafter, the parties limited their correspondence to pre-action matters, and in particular as to whether the details set out in the letter before claim sufficiently complied with the Pre-Action Protocol. The respondent, for instance, contended that the time for responding to the letter before claim had not expired, given that the three-month stay was designed to enable the respondent to investigate the claim.

11 On June 1st, 2022, the appellant sent a letter providing further particulars of the claim.

12 Thereafter, on July 1st, 2022, the respondent's then solicitors (Ince & Co.) wrote to the appellant's solicitors suggesting that the claim was time barred under the Limitation Act 1980 and that the claim form had been served outside of the prescribed period. On August 2nd, 2022, the respondent repeated these contentions and indicated that if the appellant did not discontinue the claim, an application would be made to the court

on August 19th, 2022 when the stay expired, contesting jurisdiction and applying for summary judgment. The appellant failed to respond to these letters, and on August 19th, 2022 the application was duly filed with court.

13 On August 22nd, 2022, the appellant wrote to the respondent contesting that they had failed to comply with the Pre-Action Protocol or that the claim form had been issued outside of the three-year limitation period, stating *inter alia*:

> "[O]ur client could not have known before his diagnosis that he had sustained a life threatening and therefore substantial injury before being told of the diagnosis . . . it was not until much later that his condition could be linked to benzene and/or other products which he was compelled to work with whilst in your clients employ."

14 It was averred that the claim form had been served within the relevant time period and that in any event, Civil Procedure Rules ("CPR"), r.7.6 provided for applications for extensions of time. Furthermore, the stay agreement had been reached at the respondent's request and was based on the fact that the particulars of claim had been issued and served. It was noted that the acknowledgement of service did not include any challenge to jurisdiction, and it was maintained that the stay order had not been intended to suspend CPR, r.11 which provides the procedure for disputing the court's jurisdiction. Generally, it was averred that claims of this kind should be advanced at the outset or at least "as soon as possible." Finally, it was suggested that the respondent's application constituted an abuse of process having been filed on August 19th, 2022 during the currency of the stay order which expired at midnight on August 19th/20th, 2022. The respondent replied on August 24th, 2022 contending that the claim had only been stayed *until* August 19th, 2022. I note that this latter contention by the appellant has not been pursued on this appeal.

The decision of Mrs. Justice Ramagge Prescott

15 As set out above, on August 19th, 2022 the respondent issued an application contesting jurisdiction and in the alternative seeking summary judgment. The hearing took place on September 27th, 2023 and Mrs. Justice Ramagge Prescott handed down her decision on September 27th, 2023 (reported at 2023 Gib LR 644). Given the three grounds of appeal, it is only necessary to focus on limited elements of the learned judge's decision, which addressed a wide variety of issues.

The key stages in the process

Method of service

16 The purported service by email to mail@gibdock.com at 17:16 on April 4th, 2022 was invalid, given the respondent had not previously

indicated that service could be effected by electronic means to this email address. Practice Direction 6A, para. 4.1 provides that the solicitor acting for the party to be served must previously have indicated in writing that they are willing to accept service electronically and have provided the electronic address for service (see also CPR, r.6.3(1)(d)). However, as the judge observed, it is accepted that there was good service when a copy of the claim form was left at the offices of the respondent on April 4th, 2022, as this conformed with the rules.

Time for service

17 The claim was issued on December 3rd, 2021. CPR, r.7.5 provides that service must occur "before 12.00 midnight on the calendar day four months after the date of issue of the claim form." As the judge noted, it is accepted that the appellant had until midnight on April 3rd, 2022 to affect valid service of the claim form on the respondent, save that the appellant contended that since April 3rd, 2022 was a Sunday, service on the following day came within the period provided by the applicable rules. In support of this contention the appellant relied on s.54 of the Interpretation and General Clauses Act 1962 ("IGCA") (an Act of the Parliament of Gibraltar) which addresses the issue of the computation of time:

> "54 In computing time for the purpose of any Act, unless the contrary intention appears—
>
> . . .
>
> (b) if the last day of the period is Sunday or a public holiday (which days are in this section referred to as excluded days) the period shall include the next following day, not being an excluded day . . ."

18 The judge concluded that the difficulty with the appellant's reliance on this provision is that its application is limited to computing time for the purpose of any "Act," which is defined within s.2 of the IGCA (Interpretation of Specific Words and Phrases) as follows:

> "'Act' means an Act of the Parliament of Gibraltar except where that reference was introduced into the laws of Gibraltar prior to the coming into effect of the Gibraltar Constitution Order 2006, in which case, in that reference 'Act' shall mean an Act of the Parliament at Westminster and such references to Acts of Parliament shall be references to Acts of the United Kingdom Parliament . . ."

19 The judge agreed with the respondent that the Civil Procedure Rules are not an "Act" of the Parliaments of either Gibraltar or the United Kingdom. Furthermore, the judge concluded that the IGCA did not alter the rules *vis-à-vis* the time for service of documents.

20 In his submissions in the court below, Mr. Finch additionally relied erroneously (as the judge concluded) on CPR, r.2.8(4) which provides in full:

"(4) Where the specified period—

(a) is 5 days or less; and

(b) includes—

(i) a Saturday or Sunday; or

(ii) a Bank Holiday, Christmas Day or Good Friday,

that day does not count."

21 However, in Mr. Finch's skeleton argument the provision was set out as follows:

"Where the specified period—

. . .

(b) includes—

(i) a Saturday or Sunday;

(ii) a Bank Holiday, Christmas Day or Good Friday,

that day does not count."

22 The judge concluded that once the rule is considered in its entirety, it has no application to the present position given the relevant timeframe was 4 months (CPR, r.7.5). Therefore, on the basis of calendar days, the claim was out of time.

23 The judge considered the effect of "deemed" days under CPR, r.6.14 but for reasons I will set out shortly below, it is unnecessary in my view to consider this issue in any detail, save to note that the judge concluded that service would have been "deemed" to have taken place on the second business day following the day on which service was actually effected.

24 It was noted in the judgment that no application had been made to extend time for the service of the claim form.

Whether the respondent could challenge the court's jurisdiction

25 The appellant submitted to the judge that the respondent was out of time to challenge the court's jurisdiction and, in that event, he was not entitled to relief from sanctions. Mr. Finch submitted that the failure to indicate a challenge to jurisdiction in the acknowledgment of service was fatal to the respondent's application. Furthermore, the appellant argued that the various steps taken by the respondent in addition to acknowledging service demonstrated that he had submitted to the jurisdiction of the court.

26 The judge highlighted that within 14 days of service of the claim form, the respondent had requested the appellant to seek the stay order to preserve the pre-action position of the parties and to afford the respondent time to consider the claim and to investigate it. The judge observed (2023 Gib LR 644, at paras. 55 and 57):

> "55 I am of the view that the stay preserved the position as it existed at the time of the stay. Despite the defendant being given permission to file a defence at a future date, the effect of the stay was to suspend the proceedings removing from either party the ability or option to take any further steps in the action . . ."

> "57 In this case, the step to make provision for the extension of time to file a defence was not, in my view a submission to the jurisdiction. It was a provision which was embodied in the stay order, and it can be explained because in the context of a stay it preserved for the avoidance of doubt the position before the stay, which was that the defendant had 14 days within which to file his defence. For the defendant submitted that on the date the parties had agreed to stand still the time for filing an application to contest jurisdiction had not expired and there remained 14 days for the filing of the defence, therefore the stay simply preserved that position by allowing for the filing of the defence 14 days after the lifting of the stay. I am of the view that the stay does not constitute an extension of time for the filing of a defence."

27 In the alternative, the judge decided that even if the stay order constituted an extension of time, it did not constitute a submission to the jurisdiction of the court.

28 The appellant argued that the respondent filed the application challenging jurisdiction outside the relevant 14-day period (CPR, r.11). The short history is that on April 8th, 2022, the respondent filed the acknowledgement of service. On April 22nd, 2022 the parties also approved the draft stay order which was then filed with the court. It was approved on April 27th, 2022. Given the role of the court was "essentially administrative," the judge concluded that when the parties signed the consent order, they had indicated that they were bound by its terms. Accordingly, the judge concluded (*ibid.*, at para. 65) that the standstill agreement was in place on April 22nd, 2022. The stay order recited "the parties having agreed to stay the proceedings" and, therefore, the order as approved by the court, reflected "a negotiated and agreed position to be approved by the court."

29 CPR, r.11.1(4)(a) provides that an application to contest jurisdiction must be made within 14 days after filing an acknowledgment of service (in this case, this occurred on April 8th, 2022). Given the judge had concluded that the stay order was agreed and became effective on April 22nd, 2022,

she determined that the application to contest jurisdiction was filed in time. There has been no challenge to this decision in the written grounds of appeal.

Other conclusions

30 As set out above, the judge reached conclusions on other issues that have not been pursued by the appellant before us.

The grounds of appeal

31 There are three grounds of appeal:

(i) The judge erred in concluding that the Civil Procedure Rules are not an "Act" and as a consequence the provisions relating to service as contained in s.54 of the IGCA do not apply in the present case. In advancing this submission, Mr. Finch suggests that any steps taken under subsidiary legislation are to be "deemed" to be done under the enabling Act (in this instance, s.38A(1) of the Supreme Court Act 1960 ("SCA")). He submits that this is because of the effect of s.25 of the IGCA, which provides:

> "**Acts done under subsidiary legislation to be deemed done under Act by which subsidiary legislation authorised.**
>
> 25. An act shall be deemed to be done under an Act or by virtue of the powers conferred by an Act or in pursuance or execution of the powers of or under the authority of an Act if it is done under or by virtue of or in pursuance of any subsidiary legislation made under any power contained in such Act."

Mr. Finch argues in his written and oral submissions that the Civil Procedure Rules in Gibraltar "become law by direct adoption pursuant to the principal Act" and not as subsidiary legislation, and that pursuant to s.38A they are therefore an "Act." He also submits there is no tension between the operation of the Civil Procedure Rules and s.54(b). He argues that there has been no "contrary intention" which indicates that the scheme set out in s.54(b) should not prevail in these circumstances. Mr. Finch contends that if the submissions that he advances are not followed, the Civil Procedure Rules will be undermined in their application.

(ii) It was argued that the judge erred:

> "in holding that service of a claim form and particulars on the next business day where time for service expires at midnight on the previous day, that day be a Sunday, was not good service, by confusing 'effected service' under CPR 7.5 with 'deemed service' under CPR 6, the previous day being a day when the Court Office was closed."

It was further repeated that s.54 of the IGCA applied to change the rules as to service as set out in the Civil Procedure Rules.

(iii) The judge erred in determining that the respondent had not submitted to the jurisdiction of the court, given the respondent's acknowledgment of service indicated an intention to defend the claim and the respondent had not ticked the box indicating jurisdiction was to be challenged. Instead, it is suggested that the respondent applied to extend time to file a defence as part of the agreed stay order. Mr. Finch particularly relied on the fact that the defendant sought, as he suggests, a stay of the action and for a new date for the service of the defence. This, as Mr. Finch argued, was an unequivocal step, amounting to a clear submission to the jurisdiction of the court. It is necessary, he submits, that the claimant should know whether the case is going to be contested or not. He relies additionally in his oral submissions between equivocal and unequivocal indications given by a defendant, and he suggests in this case that the respondent had given unequivocal indications of submission to the jurisdiction. He contends the defendant had acted "conclusively."

Discussion

Time for service

32 I agree with the judge that the Civil Procedure Rules do not come within the definition of an "Act" for the purposes of the IGCA. They are not "an Act of the Parliament of Gibraltar" or "an Act of Parliament at Westminster," as defined by s.2 of the IGCA. Instead, as the respondent suggests, the Civil Procedure Act 1997 (an Act of the United Kingdom Parliament) provided for the formation of the committee known as the Civil Procedure Rules Committee which is responsible for making the Civil Procedure Rules, subject to the consent of the Lord Chancellor who, pursuant to s.3, directs the day on which they are to come into force. They are contained in a statutory instrument to which the Statutory Instruments Act 1946 applies, as if set out in rules made by Minister of the Crown. The application of the Civil Procedure Rules in Gibraltar is authorized by s.38A of the SCA (a Gibraltar statute):

> "(1) Subject to this and any other Act (and without prejudice to the generality of sections 15 and 38), and to rules made under this Act specifying otherwise, the Civil Procedure Rules made (and as amended from time to time) under the Civil Procedure Act 1997 in England and Wales shall apply in Gibraltar with such modifications (for example, in nomenclature) as the circumstances in Gibraltar may require.
>
> (2) The Chief Justice may make Rules supplementing, amending or modifying the Civil Procedure Rules as they apply to Gibraltar."

33 It is clear from the wording of this section that instead of creating subsidiary legislation, the Civil Procedure Rules are applied directly within Gibraltar. The section additionally makes the operation of the Civil Procedure Rules subject to any relevant Gibraltar Acts, past or present, which is a clearly necessary provision.

34 I accept also the respondent's submission that the IGCA draws a clear distinction between an "act" and an "Act," thereby reflecting the separate nature of primary and secondary legislation. Section 25 of the IGCA provides that steps taken in accordance with subsidiary legislation take their authority from the relevant primary legislation. This does not involve merging these separate legislative provisions (*viz*. primary and secondary legislation) because otherwise the definition in s.2 of the IGCA of "an Act of the Parliament of Gibraltar" or "an Act of the Parliament at Westminster" would be of little or no real effect. It follows that s.25 of the IGCA does not have any impact on the rules relating to service, as set out in the Civil Procedure Rules.

35 In any event, even if s.54 of the IGCA did apply in the present context and the Civil Procedure Rules are to be treated as an Act, the latter would still be the governing provision as presently framed because s.54 provides (as set out above) "in computing time for the purposes of any Act, unless the contrary intention appears" and by the Civil Procedure Rules (introduced under s.38A(1) of the SCA) such a "contrary intention" has clearly been given. It follows that s.54 would not have the effect of amending the Civil Procedure Rules if, as suggested by the appellant, they are to be treated as having become law by direct adoption pursuant to the principal Act and are to be treated as an "Act."

36 Therefore, to summarize, on this alternative formulation, it is clear that the Parliament of Gibraltar intended the Civil Procedure Rules to apply in Gibraltar with full effect, save for modifications such as for nomenclature, and, accordingly, for the purposes of s.54 of the IGCA, a contrary intention has been expressed. This is entirely consistent with the Civil Procedure Rules and s.54 acting, in the words of Mr. Smith, "in harmony" and with clarity. In the result, the method of calculating days if the last day is a Sunday (as set out in s.54) does not apply to the present case. I agree, therefore, with the judge that for this additional reason, reliance cannot properly be placed on s.54 of the IGCA.

37 Finally, on this ground of appeal, a point mentioned by Mr. Finch in his oral submissions but not developed in the grounds of appeal touched on whether the court was open at the material time. It is only necessary to indicate that whether or not the court office was open is irrelevant to the issue of service on the respondent.

The distinction between "deemed" and "actual" service

38 The respondent correctly submits, in my view, that the distinction analysed by the judge between "deemed" service and "actual" service does not require any detailed consideration. Subject to his argument under s.5(4) of the IGCA, the appellant accepts that actual service was out of time in the sense that it was not effected before midnight on April 3rd, 2022, and given what in my view is the correct decision on the relevance of s.5(4), it is unnecessary to investigate whether service occurred on a still later date because of the provisions relating to "deemed" service. As the respondent observes, under both scenarios the claim form and the particulars of claim were served out of time, thereby permitting the respondent to take the present point on jurisdiction. The judge's decision was therefore not dependent on the date of deemed service.

39 It is to be emphasized, nonetheless, in this regard that CPR, r.7.5 provides that:

> "Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the *calendar day* four months after the date of issue of the claim form." [Emphasis added.]

40 Calendar days include Saturdays, Sundays, Bank Holidays or indeed any other day, as confirmed by the Supreme Court in *Barton* v. *Wright Hassall LLP* (1). Calendar days are to be distinguished from business days (see CPR, r.6.14). The effect of this distinction is that service needed to have occurred before midnight on April 3rd, 2022, as is accepted by the appellant subject to his argument on s.5(4) of the IGCA, given that he has not challenged the statement by the judge (2023 Gib LR 644, at para. 42):

> "Pursuant to CPR r.7.5 service must have taken place by midnight on April 3rd, 2022 and there is no doubt in my mind that the claim form was served out of time."

41 As noted by the respondent, no application has been made by the appellant to extend time for the service of the claim form and the particulars of claim.

The respondent submitted to the jurisdiction of the court

42 Mr. Finch submits that giving an indication of an intention to defend a claim normally constitutes waiver but all the more so when the parties seek an extension of time to file a defence and request a stay from the claimant to consider their response to the claim. It is suggested that these factors are unequivocal and the court had jurisdiction to try the case.

43 The test to be applied when it is suggested that the defendant has submitted to the jurisdiction of the court was explained by Sir Andrew Morritt, C. in *Global Media Intl. Ltd.* v. *ARA Media Servs.* (3). The Chancellor endorsed the approach ([2006] EWHC 3612 (Ch), at para. 27) described by Lord Justice Farquharson in *Sage* v. *Double A Hydraulics Ltd.* (5), namely that—

> "A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the Defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge."

On this basis, the Chancellor observed that in order to conclude that there had been an effective waiver or submission to the jurisdiction, the steps taken would need to be consistent only with the party in question having accepted the court should be given jurisdiction. If the step relied upon can be explained because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will have been no submission (see also *Deutsche Bank AG London* v. *Petromena AS* (2)). This is an objective test.

44 It follows that these are highly fact-specific decisions, and the court will be assessing whether the only possible explanation for the conduct relied on is an intention on the part of the defendant to submit to the jurisdiction of the court.

45 CPR, r.11.1 governs the procedure for contesting jurisdiction, and this includes the requirement that the defendant must file an acknowledgement of service (see CPR, r.11.1(2)) as highlighted by Mr. Smith. This is a necessary step. As set out in CPR, r.11.1(3), by taking this step the defendant does not compromise his or her ability to contest jurisdiction. Instead, any application challenging jurisdiction must be filed within 14 days following the filing of the acknowledgment of service (see CPR, r.11.1(4)). If this does not happen, he or she is to be treated as having accepted that the court has jurisdiction to try the claim.

46 In my view, it is not in any sense necessarily fatal that the respondent had simply failed to tick the box on the acknowledgment of service indicating that the jurisdiction point was being taken (see the judgment of Mr. Justice Henry Carr in *Winkler* v. *Shamoon* (7) ([2016] EWHC 217 (Ch), at para. 39)). Standing alone, this does not have the effect of preventing the appellant from later contesting jurisdiction. This is particularly the case when, as here, the respondent at all material times sought a stay of the claim in order to preserve the pre-action position. The stay was expressly designed to give the respondent the opportunity which ought to have been afforded under the Pre-Action Protocol to consider the claim and take any necessary steps. Put otherwise, it was designed to put the respondent in the position that it should have been in if the Pre-Action Protocol had been

properly followed. Time stood still or was "halted" or "frozen" (see *Grant* v. *Dawn Meats UK* (4) ([2018] EWCA Civ 2212, at para. 18)).

47 Contrary to the submission of Mr. Finch, the inclusion of the provision in the stay order that there was to be a case management conference on the first available date after September 9th, 2022 and the respondent had permission to file and serve the defence no later than September 2nd, 2022 was no more than an integral part of the agreement they had reached "to stay the proceedings to provide the Defendant with time to investigate and respond to the claim in accordance with the Pre-Action Protocol for Personal Injury Claims."

This was not, therefore, a formal application for an extension of time in proceedings which had been initiated and conducted in accordance with the established rules and procedures.

48 However, even if the agreement in the stay order to allow until September 2nd, 2022 to file the defence amounted to an extension of time to file the defence, this is not determinative. In *Smay Investment Ltd.* v. *Sachdev* (6), two of the defendants had ticked the "intention to defend" box on the acknowledgement of service, and one of them had obtained directions from the court extending time for the service for his defence. In addition, he had offered an undertaking to the court. The argument was raised that this conduct was only consistent with an intention to defend the proceedings on their merits at trial. Mr. Justice Patten observed in dismissing these contentions ([2003] EWHC 474 (Ch), at para. 41):

> "It seems to me that when a Defendant has complied with CPR Part 11 with a view to challenging the jurisdiction of the Court, and the time for making his application under CPR Part 11(4) has not yet expired, then any conduct on his part said to amount to a submission to jurisdiction, and therefore a waiver of that right of challenge, must be wholly unequivocal."

And a little later (*ibid.*, at para. 43):

> "Insofar as the extension of time for a defence was sought and obtained, that is not inconsistent with a continuing intention to challenge jurisdiction. On the contrary, it seems to me equally consistent with a desire to postpone any obligation to serve a defence until after the issue of jurisdiction had been determined."

49 In the present case, by the time the stay order was signed (when the agreement was reached), the respondent was still within the period of 14 clear days in which to file an application to contest jurisdiction (see CPR, r.2.8). Given the respondent could still avail himself of this opportunity, any conduct on its part said to amount to a submission to jurisdiction would need to have been wholly unequivocal for Mr. Finch's submissions to succeed. The present facts are in my view—notwithstanding Mr. Finch's

helpful and forceful arguments—at a considerable distance from being unequivocal and I therefore have no hesitation in concluding that the respondent had not submitted to the jurisdiction of the court.

Conclusion

50 I am, therefore, against Mr. Finch on his three grounds of appeal and it follows that for my part I would dismiss this appeal.

51 **DAVIS, J.A.:** I agree with the judgment of Sir Adrian Fulford.

52 **KAY, P.:** I also agree. It follows that the appeal is dismissed.

Appeal dismissed.