[2022] JMSC Civ 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2018 HCV 02155

BETWEEN HERMINE MCFARLANE RESPONDENT/CLAIMANT

AND DONALD JACKSON APPLICANT/DEFENDANT

IN CHAMBERS

Ms Jean M. Williams for the Respondent/Claimant

Mr Lemar Neale instructed by Messrs. Nea | Lex for the Applicant/Defendant

Heard: February 24 and March 17, 2022

Civil procedure – Application to set aside court order – Order made at a first hearing in the absence of a party – Alternative method of service – Unperfected formal order served via electronic mail – Whether the service via electronic mail constitutes proper service – Whether the service via electronic mail constitutes proper service in the absence of a rule or practice direction to that effect – Whether the application to set aside is made within fourteen days of the date of service of the order – Whether there is a good reason for the failure to attend the first hearing – Whether it is likely that some other order would have been made had the party attended the first hearing – Civil Procedure Rules, 2002, rules 5.13, 6.1, 6.2, 6.3, 6.6, 39.6(1), 39.6(2), 39.6(3)(a) and (b)

A. NEMBHARD J

INTRODUCTION

[1] This matter concerns an application to set aside the Orders of this Court which were made on 5 April 2019, in the absence of the Applicant/Defendant, Mr Donald Jackson. The application raises the central issue of whether Mr Jackson has satisfied the requirements of rule 39.6 of the Civil Procedure Rules, 2002 ("the CPR"), as a consequence of which, the Court ought properly to set aside its Orders of 5 April 2019. Additionally, the application raises the issue of whether the service of an unperfected Formal Order on Mr Jackson, via electronic mail ("email") constitutes proper service.

[2] The application to set aside is made by way of an Amended Notice of Application for Court Orders, which was filed on 11 February 2022. The Applicant/Defendant, Mr Donald Jackson, seeks the following Orders against the Respondent/Claimant, Ms Hermine McFarlane: -

(i) That the Orders made by the Honourable Miss Justice Anne-Marie Nembhard on April 5, 2019, be set aside;

(ii) That the Registrar of Titles be directed to cancel the Duplicate Certificate of Title registered at Volume 1053 Folio 469 of the Register Book of Titles and re-issue same in the names of the Claimant and the Defendant;

(iii) That, in the alternative, Miscellaneous No. 2195259, as endorsed on the Duplicate Certificate of Title registered at Volume 1053 Folio 469 of the Register Book of Titles, be set aside;

(iv) That the proceedings commenced by the Claimant in the Parish Court for recovery of possession be stayed pending the outcome of this application;

(v) That the Defendant be permitted to file a Defence within 14 (fourteen) days of the date of the Order; and

(vi) That there be no Order as to costs.

THE ISSUES

[3] The application to set aside raises the following primary issue for the Court's determination: -

(a) Whether the Orders made on 5 April 2019 ought properly to be set aside.

[4] In seeking to determine the primary issue raised, the following sub-issues must also be resolved: -

(a) Whether the application to set aside the Orders made on 5 April 2019 was made within fourteen (14) days of the date of service of the Orders;

(b) Whether Mr Jackson has demonstrated that he has a good reason for failing to attend the hearing that was conducted on 5 April 2019;

(c) Whether Mr Jackson has demonstrated that it is likely that some other Order would have been made, had he been present at the hearing on 5 April 2019;

(d) Whether the service of the unperfected Formal Order, which was filed on 7 March 2019, via email, constitutes a proper alternative method of service.

BACKGROUND

[5] The application to set aside is made against the background of a dispute between Mr Jackson and Ms McFarlane concerning the property located at Lot 12, West Avenue (Camperdown), also known as 1 West Camp Close, Kingston 8, in the parish of Saint Andrew, being the land comprised in Certificate of Title registered at Volume 1053 Folio 469 of the Register Book of Titles ("the subject property"). The subject property was registered in the names of Ms McFarlane and Mr Jackson, as tenants in common.

[6] By way of a Fixed Date Claim Form, which was filed on 5 June 2018, Ms McFarlane commenced an action by virtue of which she sought an Order of the court that she is the sole legal and beneficial owner of the subject property.

[7] On 19 September 2018, Mr Jackson filed an Acknowledgment of Service by virtue of which he confirmed receipt of the Fixed Date Claim Form as well as the supporting Affidavit, each filed on 5 June 2018.

[8] Attached to the Acknowledgement of Service was a handwritten document entitled “Defence”, bearing the signature of Mr Jackson.

Chronology of events

[9] In the present instance, a careful examination of the chronology of events is instructive.

[10] The first hearing of the Fixed Date Claim Form, which was filed on 5 June 2018, was first scheduled for 7 November 2018. In light of the absence of Mr Jackson from that first hearing, it was subsequently adjourned to 31 January 2019. On 12 December 2018, a Notice of Adjourned Hearing, in respect of the hearing date of 31 January 2019, was sent by registered mail to Mr Jackson, at his address at the subject property.

[11] On 31 January 2019, the first hearing was again adjourned and was rescheduled for 4 April 2019. The record of the court reflects that both Mr Jackson and Ms McFarlane were absent on 31 January 2019, although Learned Counsel Ms Jean Williams was present on Ms McFarlane’s behalf. On 7 March 2019, Ms Williams filed a Formal Order to this effect.

[12] On 4 April 2019, the first hearing was listed before this Court, at which time Mr Jackson was once again absent. The Court made an Order that proof of the service of the Notice of Adjourned Hearing, in respect of the first hearing that was scheduled for 4 April 2019, which was said to have been effected on Mr Jackson, was to be provided to the Court. The first hearing was adjourned to 5 April 2019.

[13] On 5 April 2019, Ms Williams filed an Affidavit of Service via Email, in which she avers that on 2 April 2019, she emailed the unperfected Formal Order, which was filed on 7 March 2019, to Mr Jackson using his email address. Ms Williams further avers that this was an email address which she had received from Ms McFarlane and at which she [Ms Williams] had previously communicated with Mr Jackson.

[14] On 5 April 2019, Mr Jackson remained consistent in his absence. On this occasion, the Court treated the first hearing as the trial of the Fixed Date Claim Form and granted Orders in terms of the Fixed Date Claim Form, which was filed on 5 June 2018, as amended.

[15] On 28 May 2019, Mr Jackson filed a Notice of Application for Court Orders, accompanied by an Affidavit in support, by virtue of which he seeks an Order setting aside the Orders made on 5 April 2019.

[16] On 11 February 2022, an Amended Notice of Application for Court Orders was filed.

[17] It is in this context that this judgment seeks to address the issues raised by the application to set aside as to whether Mr Jackson has satisfied the requirements of rule 39.6 of the CPR and whether, as a consequence, the Court ought properly to set aside the Orders which were made on 5 April 2019.

THE LAW

[18] The CPR contain the relevant provisions governing the service of court documents and the varying methods and alternative methods by which service may properly be effected. The relevant provisions of the CPR, for present purposes, are captured below: -

Alternative methods of service

"5.13 (1) Instead of personal service a party may choose an alternative method of service.

(2) Where a party-

(a) chooses an alternative method of service; and

(b) the court is asked to take any step on the basis that the claim form has been served,

the party who served the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form.

(3) An affidavit under paragraph (2) must-

(a) give details of the method of service used;

(b) show that-

(i) the person intended to be served was able to ascertain the contents of the documents; or

(ii) it is likely that he or she would have been able to do so;

(c) state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents; and

(d) exhibit a copy of the documents served.

(4) The registry must immediately refer any affidavit filed under paragraph (2) to a judge, master or registrar who must-

(a) consider the evidence; and

(b) endorse on the affidavit whether it satisfactorily proves service.

(5) Where the court is not satisfied that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the registry must fix a date, time and place to consider making an order under rule 5.14 and give at least 7 days' notice to the claimant.

(6) An endorsement made pursuant to 5.13(4) may be set aside on good cause being shown."

Who is to serve documents other than the claim form

"6.1 (1) Any judgment or order which requires service must be served by the party obtaining that judgment or order unless the court orders otherwise.

(2) Any other document must be served by a party, unless-

(a) a rule otherwise provides; or

(b) the court orders otherwise."

Method of service

"6.2 Where these Rules require a document other than a claim form to be served on any person it may be served by any of the following methods-

(a) any means of service in accordance with Part 5;
(b) leaving it at or sending it by prepaid post or courier delivery to any address for service in accordance with rule 6.3(1);
(c) (where rule 6.3(2) applies) FAX; or
(d) *other means of electronic communication if this is permitted by a relevant practice direction, unless a rule otherwise provides or the court orders otherwise.*"

Deemed date of service

"6.6 (1) A document which is served within the jurisdiction in accordance with these Rules shall be deemed to be served on the day shown in the following table-

Method of Service	**Deemed date of service**
…	
Other electronic method	*the business day after transmission.*

(2) Any document served after 4 p.m. on a business day or at any time on a day other than a business day is treated as having been served on the next business day."

Proof of service

"6.7 Where proof of service of any document is required this may be done by any method of proving service set out in Part 5."

Failure of party to attend trial

"39.5 Provided that the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules-

(a) If no party appears at the trial the judge may strike out the claim and any counterclaim; or

(b) *If one or more, but not all parties appear the judge may proceed in the absence of the parties who do not appear*."

Application to set aside judgment given in party's absence

"39.6 (1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing-

(a) good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

The requirements of rule 39.6 of the CPR

[19] It is clear from a reading of rule 39.6 of the CPR that there are three (3) conditions that must be satisfied by any applicant who approaches the court with the intention of having a judgment or order which was made in his absence, set aside. Firstly, the application must be made within fourteen (14) days of the date of service of the judgment or order; the affidavit evidence in support of the application must show good reason for the failure to attend the hearing; and that it is likely that some other judgment or order would have been made had the applicant attended the hearing.

[20] The authorities establish that the rule is to be read cumulatively, so that, in order to succeed on an application to set aside a judgment or order of the court, an

applicant is required to satisfy each requirement of the rule. Equally clear is the principle that there is no residual discretion in the trial judge, to set aside the judgment or order, if any of the conditions set out in the rule is not satisfied.[1]

[21] In **David Watson v Adolphus Sylvester Roper**,[2] K. Harrison JA cited with approval the dicta of Langrin JA in **Thelma Edwards v Robinson's Car Mart and Lorenzo Archer**.[3] At page 8, Harrison JA had the following to say: -

> "*The predominant consideration therefore in setting aside a judgment given after a trial in the absence of the applicant, is not whether there is a defence on the merits but the reason why the applicant had absented himself from the trial*. *If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations include the prospects of success of the applicant in a retrial; the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation. This court has approved these principles, and have applied them, from time to time."*

[22] In **Neufville v Papa Michael**,[4] the court held that where no adequate explanation has been given by a party who failed to attend a trial and failed to keep in touch with his solicitors, the application to set aside the judgment or order made in his absence would be refused.

[23] In **Alice McPherson v Portland Parish Council**,[5] Fraser JA considered the issue as to what constitutes a proper explanation or a 'good explanation', as contemplated by the rule. At paragraph [48], he stated as follows: -

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[1] See – **David Watson v Adolphus Sylvester Roper** S.C.C.A. No. 42 of 2005, per K. Harrison JA, **Barclays Bank plc v Ellis** (2000) The Times, judgment delivered on 24 October 2000, (This position was reaffirmed by the Court of Appeal in **Astley v The Attorney General** [2012] JMCA Civ 64) and **Vivienne Douglas Channer v Lorna Channer** [2022] JMSC Civ 24

[2] Supra

[3] SCCA 81/00 (unreported), judgment delivered on 19 March 2001

[4] [1999] LTL 23/11/99

[5] [2019] JMCA App 20

> *"…A 'proper' or good explanation or reason must be one which not only adequately reveals why the default occurred, it must also show that the default is excusable in the circumstances. Put another way, an explanation or reason may comprehensively outline what caused a particular failing but to be 'good', it also has to have the additional quality of justifying the relief, forbearance or favourable exercise of the discretion sought."*

[24] The court is required to determine, at its discretion, whether, as a question of fact, a good explanation has been provided, having regard to all the circumstances of the case. The court is not however required to look for an 'infallible' explanation.[6]

[25] Nor is the court to embark on a mini trial, in its consideration of the third requirement of the rule. In determining whether an applicant has demonstrated that it is likely that some other judgment or order would have been made had he been present at the hearing, the court is not required to say whether he has a good defence or a defence with a reasonable prospect of success.

ANALYSIS

[26] In the present instance, the primary consideration for the Court is not whether there is a defence on the merits but rather the reasons advanced by Mr Jackson for his absence from the scheduled first hearings. Where the Court finds that his absence was deliberate or was not due to accident or mistake, it is unlikely that it will order a rehearing. Other relevant considerations include the delay (if any) in applying to set aside; the conduct of Mr Jackson before and during the proceedings; any prejudice that would be occasioned to Ms McFarlane by the Orders being set aside; and the public policy consideration that there should be finality to litigation.

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[6] See – **Sean Greaves v Calvin Chung** [2019] JMCA Civ 45, per Edwards JA

Whether the Orders made on 5 April 2019 ought properly to be set aside

(i) Whether the Application to set aside was made within fourteen days of the date of service

[27] In this regard, the evidence before the Court discloses that the Orders of 5 April 2019 were served on Mr Jackson on 15 May 2019.[7] This evidence has not been contradicted by Mr Jackson. On 28 May 2019, Mr Jackson filed his application to set aside the Orders of 5 April 2019.

[28] The Court accepts the evidence in this regard and finds that Mr Jackson has satisfied this requirement of rule 39.6(2) of the CPR. Accordingly, the Court finds that the application to set aside was made well within fourteen (14) days of the date of service of the Orders of 5 April 2019.

(ii) Whether Mr Jackson has demonstrated that he has a good reason for failing to attend the hearing that was conducted on 5 April 2019

[29] It is well established by the authorities that, in determining whether to set aside a judgment or order that was made in the absence of a party, the court must consider the reason(s) advanced for the applicant's absence at the time that the order was made. Where the court finds that the absence of an applicant is deliberate and is not due to some accident or mistake, setting aside the judgment or order and allowing a rehearing is unlikely.

[30] It is equally well established that each reason advanced for the absence of an applicant must be a good one and should have that additional quality of justifying the relief, forbearance or favourable exercise of the judicial discretion that is sought.

[7] See – Affidavit of Service sworn to on 9 October 2019 and filed on 11 October 2019

(a) Mr Jackson's absence on 7 November 2018

[31] Learned Counsel Mr Lemar Neale, in his submissions advanced on Mr Jackson's behalf, contends that the primary reason for Mr Jackson's absence from the first hearing of the Fixed Date Claim Form, which was filed on 5 June 2018, was that he was never advised by his then Attorney-at-Law, Mr Charles Williams, that he was required to attend. Mr Neale further contends that Mr Jackson was advised by Mr Williams that efforts were being made to settle the matter out of court.

[32] Mr Neale asserts that Mr Jackson did not become aware of the fact that Mr Williams was absent from the proceedings on 7 November 2018, until after the Orders of 5 April 2019 were served on him. Nor was Mr Jackson aware that the matter had been adjourned to 4 April 2019.

[33] Mr Neale asserts further that Mr Jackson's conduct, subsequent to the service of the Orders of 5 April 2019 on him, demonstrates an intention on his part to have the substantive matter resolved on its merits and that Mr Jackson has, since then, acted with alacrity.

[34] Finally, Mr Neale submits that Mr Jackson ought not to be punished for the inaction of his previous Attorney-at-Law.

[35] Regrettably, the Court is unable to accept the submissions advanced by Mr Neale in this regard. A careful examination of the court record reveals that Mr Jackson filed an Acknowledgement of Service on 19 September 2018. By way of that Acknowledgement of Service, Mr Jackson confirmed his receipt of the Fixed Date Claim Form as well as the supporting Affidavit, each filed on 5 June 2018. The Fixed Date Claim Form indicates, on its face, that the first hearing was scheduled for 7 November 2018. As such, it cannot tenably be argued that Mr Jackson was unaware firstly, that there was a matter that was before the court and secondly, of the very first date for which the first hearing of the Fixed Date Claim Form was scheduled.

[36] Furthermore, the unchallenged evidence of Mr Charles Williams is that he was never retained by Mr Jackson in respect of this matter. Mr Williams avers that he

was approached by Mr Jackson who brought to him the originating documents that had been served on him [Mr Jackson] in respect of this matter. Mr Williams avers further that he encouraged Mr Jackson to settle the matter with his sister, Ms McFarlane. Mr Williams maintains that he has never represented Mr Jackson in court; that, in respect of this matter, his name was never entered on the record of the court as representing Mr Jackson; and that he filed no Acknowledgement of Service in Mr Jackson's behalf.[8]

[37] In any event, had Mr Jackson been made to understand that the matter was to be settled out of court, as he contends, it is reasonable to expect that he would have made an effort to liaise with his Attorney-at-Law, in an effort to ascertain the progress of the matter and the details of any settlement agreement that might have been arrived at.

[38] In the result, the Court finds that Mr Jackson has failed to demonstrate that he has a good reason for his failure to attend the first hearing that was scheduled for 7 November 2018.

(b) Mr Jackson's absence on 31 January 2019

[39] Ms Williams avers that Mr Jackson was informed of the hearing date of 31 January 2019. The uncontradicted evidence before the Court is that a Notice of Adjourned Hearing, in respect of this hearing date, was sent to Mr Jackson via registered mail, to his address at the subject property.[9] Mr Charles Williams also avers that he too advised Mr Jackson, via telephone, of this hearing date.[10] Mr Jackson has not sought to challenge this evidence.

[40] The Court accepts the evidence of Ms Williams in this regard and finds that the service of the Notice of Adjourned Hearing by way of registered mail is an acceptable alternative method of service, as contemplated by the CPR. The

[8] See – Affidavit of Charles Williams in response to Affidavit of Donald Jackson, which was filed on 23 February 2022, at paragraphs 6, 7 and 8

[9] See – Affidavit of Posting sworn to and filed on 12 December 2018

[10] See – Affidavit of Charles Williams in response to Affidavit of Donald Jackson, which was filed on 23 February 2022, at paragraph 10

Court also finds that this method of service was sufficient to bring the hearing date of 31 January 2019 to Mr Jackson's attention.

(c) *Mr Jackson's absence on 4 April 2019*

[41] The first hearing of the Fixed Date Claim Form, which was filed on 5 June 2018, came before this Court on 4 April 2019. With respect to this hearing date, Mr Jackson contends that he was never served with the unperfected Formal Order, filed on 7 March 2019, by virtue of which it is asserted that he was advised of this hearing date. Conversely, Ms Williams avers that the unperfected Formal Order was served on Mr Jackson, via email. Mr Jackson also contends that he has since then checked his email account and particularly his messages received on 2 April 2019 and has been unable to locate that email from Ms Williams and is, as a consequence, 'doubtful' that he was in fact served with a copy of the unperfected Formal Order.[11] It is for that reason, Mr Jackson contends, that he was absent from the hearing on 4 April 2019.

[42] It is instructive that Mr Jackson does not deny or otherwise indicate that the email address (domadlj@yahoo.com) attributed to him by Ms Williams does not in fact belong to him. Nor does he deny that he has previously received emails from Ms Williams at this email address.

[43] Rule 6.2(a) of the CPR allows for documents other than a claim form (such as the Unperfected Formal Order which had been filed on 7 March 2019) to be served on any person by any means of service in accordance with Part 5 of the CPR. Rule 5.13 of the CPR provides that a party may elect to serve documents by an alternative method of service in lieu of personal service. Where a party chooses an alternative method of service, that party must prove, by way of evidence on affidavit, that the method of service utilized is sufficient to enable the other party to ascertain the contents of the documents served. It is instructive

[11] See – Supplemental Affidavit of Donald Jackson in Support of Amended Notice of Application for Court Orders, which was sworn to on 10 February 2022 and filed on 11 February 2022, at paragraph 6

that the rule does not place any limitation on a party who chooses to utilize an alternative method of service.[12]

[44] It is correct that there is currently, and was, at the material time, no practice direction permitting service via email, nor was there in force any applicable rule or order of the court that permitted the service of the Unperfected Formal Order, which was filed on 7 March 2019, via email. Although rule 6.2(a) of the CPR permits other documents to be served by any means of service in accordance with Part 5 of the CPR, the validity of service via email, as an alternative method of service under rules 5.13 and 5.14 of the CPR, would be dependent on the approval of the court.[13]

[45] To this end, Ms Williams avers that she received Mr Jackson's email address from Ms McFarlane and that that was the address to which the unperfected Formal Order, which was filed on 7 March 2019, was sent. Ms Williams avers that Ms McFarlane communicated with Mr Jackson on prior occasions by means of the same email address. Ms Williams maintains that she has also communicated with Mr Jackson on previous occasions using the same email address.

[46] In this regard, the evidence of Mr Jackson does not inspire confidence. The Court accepts the evidence of Ms Williams and finds that the method of service she utilized is an 'alternative method of service', as contemplated by rule 5.13(1) of the CPR. The Court also finds that that alternative method of service was sufficient to enable Mr Jackson to ascertain the contents of the unperfected Formal Order, or, at the very least, that it is likely that he would have been able to do so.

[47] The Court is unable to accept Mr Jackson's evidence that he is 'doubtful' that he was ever served with a copy of the unperfected Formal Order, which was filed on

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[12] See – Rule 5.13(3) of the CPR

[13] See – **Sean Greaves v Calvin Chung** (supra), at paragraphs 90-94, per Edwards JA

7 March 2019. The Court is also unable to accept the assertion that Mr Jackson was unaware that he was required to attend the hearing on 4 April 2019.

[48] In the result, the Court finds that Mr Jackson has failed to demonstrate that he has a good reason for his failure to attend the hearing on 4 April 2019.

(d) *Mr Jackson's absence on 5 April 2019*

[49] On 4 April 2019, this Court further adjourned the first hearing of the Fixed Date Claim Form, which was filed on 5 June 2018, to 5 April 2019. This was to allow for the filing of an Affidavit of Service, in respect of the service of the unperfected Formal Order, which was filed on 7 March 2019, that was said to have been effected on Mr Jackson. Mr Jackson maintains that he was only advised of this hearing date five (5) minutes prior to the time at which the hearing was scheduled to commence. Mr Jackson maintains further that, at that time, he was 'out of town'.

[50] Mr Neale submits that, on 5 April 2019, the first hearing of the Fixed Date Claim Form ought properly to have been adjourned. It was further submitted that Mr Jackson ought to have been given notice of the new date to which the hearing would have been adjourned. In the circumstances, Mr Neale contends, Mr Jackson was not given proper and or sufficient notice of the hearing date of 5 April 2019 and that it was not sufficient for Mr Jackson to have been contacted by telephone five (5) minutes prior to the commencement of the hearing.

[51] This Court is unable to accept those submissions. The evidence before the Court is that Mr Jackson was advised via email of the hearing scheduled for 4 April 2019. On 4 April 2019, Mr Jackson was again absent and the Court requested an affidavit of service in respect of the service of the unperfected Formal Order, which was filed on 7 March 2019 and which was said to have been served on Mr Jackson. As a consequence, the first hearing was adjourned to 5 April 2019, to facilitate the filing of the affidavit of service.[14] Additionally, Ms McFarlane has given evidence that, on 4 April 2019, whilst waiting on the matter to be dealt with

[14] See – Affidavit of Service via Email sworn to on 4 April 2019 and filed on 5 April 2019

by the court, Ms Williams telephoned Mr Jackson and enquired of his whereabouts. Ms McFarlane avers that she heard Mr Jackson say that he 'could be there in a few minutes.'[15] This evidence has not been challenged by Mr Jackson.

[52] On 5 April 2019, having read the Affidavit of Service via Email, dated 4 April 2019 and which was filed on 5 April 2019, the Court approved the alternative method of service employed by Ms Williams and found that that method of service was sufficient to enable Mr Jackson to ascertain the contents of the unperfected Formal Order, or, at the very least, that it is likely that he would have been able to do so.

[53] In the result, the Court accepts the evidence of Ms McFarlane and finds that Mr Jackson has exhibited a pattern of conduct of being absent from the court proceedings that were scheduled in respect of this matter. Mr Jackson has demonstrated scant regard for the court and its processes as well as for the documents which emanated from the court's registry in respect of this matter.

[54] On a preponderance of the evidence, the Court finds that Mr Jackson has failed to demonstrate that he has a good reason for his absence on each date for which the first hearing was scheduled and, in particular, on 5 April 2019.

(iii) Whether Mr Jackson has demonstrated that it is likely that some other Order would have been made, had he been present at the hearing on 5 April 2019

[55] Mr Neale asserts that it is quite likely that, had Mr Jackson been present at the hearing on 5 April 2019, the Court would not have made the Orders that it did. To buttress this argument, Mr Neale referred to the evidence of Ms McFarlane that Mr Jackson 'may' be entitled to a beneficial interest in the subject property.

[56] Mr Neale maintains further that the Affidavits filed on Mr Jackson's behalf, in support of this application, demonstrate that he has a defence with a real

[15] See – Affidavit of Hermine McFarlane in Response to Supplemental Affidavit of Donald Jackson in Support of Notice of Amended Court Orders, which was sworn to and filed on 23 February 2022, at paragraph 7

prospect of success. On this basis, Mr Neale contends, the Court ought properly to grant the relief Mr Jackson seeks by way of the application to set aside the Orders of 5 April 2019.

[57] The Court is rendered unable to accept these submissions. A careful examination of the averments made by Mr Jackson reveals a dearth of evidence in this regard. In fact, the Court is faced with Mr Jackson's bald assertion that he 'has a good defence with a real prospect of success' and that he 'believes' that he is 'entitled' to a beneficial interest in the subject property.

[58] Having regard to the evidence filed by Ms McFarlane in respect of the substantive matter and the content of the documents that have been exhibited to that Affidavit, this Court is of the view that it is unlikely that it would have made some other Order at the hearing on 5 April 2019, had Mr Jackson been present.[16]

[59] As a consequence, this Court is of the view that Mr Jackson has failed to satisfy two of the three conditions outlined in rule 39.6 of the CPR. The Court finds that Mr Jackson has failed to demonstrate that he has a good reason for his absence from the hearing on 5 April 2019. Mr Jackson has also failed to demonstrate that, had he been present at that hearing, it is likely that some other Order would have been made.

[60] In the result, the Court is unable to grant the relief sought by Mr Jackson and finds that the Amended Notice of Application Court Orders, which was filed on 11 February 2022, ought properly to be refused with costs to the Respondent/Claimant, to be taxed if not sooner agreed.

DISPOSITION

[61] It is hereby ordered as follows: -

(1) The Amended Notice of Application for Court Orders, which was filed on 11 February 2022, is refused;

[16] See – Affidavit of Hermine McFarlane in Support of Application under the Partition Act which was sworn to on 31 May 2018 and filed on 5 June 2018 and in particular, paragraphs 6-9, 10-16, 19-20, 22 and 24 and Exhibit **"HM3"**

(2) The costs of the Amended Notice of Application for Court Orders, which was filed on 11 February 2022, are awarded to the Respondent/Claimant against the Applicant/Defendant and are to be taxed if not sooner agreed;

(3) The Applicant/Defendant is granted Leave to Appeal; and

(4) The Attorney-at-Law for the Respondent/Claimant is to prepare, file and serve these Orders.