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## CASE NOTE: *AYRE V REUTERS NEWS & MEDIA INC*

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### WHEN IS SERVICE NOT SERVICE? THE ELECTRONIC LITIGATION FILING AND SERVICE PROCEDURE RULES IN THE EASTERN CARIBBEAN, AND CASE NOTE ON *AYRE V REUTERS NEWS & MEDIA INC*

The recent case of [Ayre v Reuters News & Media Inc](#) in the Eastern Caribbean Court of Appeal has confirmed the crucial importance of serving the authorisation code for the Electronic Litigation Portal at the same time as the claim form. Without it, the service is invalid.

#### THE ELP RULES

The Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules 2019 (the “ELP Rules”) marked an important transition in the Eastern Caribbean from paper-based filing and paper-based hearings to a new era of electronic case management and electronic service of documents. The ELP Rules created a new “Electronic Litigation Portal”, a central database of cases which can be accessed securely over the web by Judges, court officers, litigants and their lawyers, and which provides a single point of access for the electronic filing and management of documents for court. The ELP Rules came into effect in different states and territories at different times but are in force across the Eastern Caribbean.

The Chief Justice has clarified extra-judicially that the aims of the ELP Rules were to reduce paper document management, save unnecessary travel, allow litigants to file documents from anywhere with a web browser, assist pro se litigants (ie. litigants in person) to engage more easily in the process, and also reduce the significant difficulties caused recently in the Eastern Caribbean by exceptionally heavy storms.

The ELP Rules contain broadly three types of provisions: those which deal with the general operation of the portal, those which deal with the electronic *filing* of documents (including the electronic commencement of proceedings), and those which deal with the electronic *service* of documents. Most of the ELP Rules (Rules 1 to 12 and Rule 16) deal with the first two of these categories, but ELP Rules 13, 14 and 15 deal with the electronic service of documents. It is this aspect which can cause significant problems in practice, and which is the focus of this article.

#### ELECTRONIC SERVICE OF DOCUMENTS

The key provision of the ELP Rules for present purposes is Rule 13. It is headed “*Service of document by electronic means*”. Among other things, Rule 13(3) requires that service of a document must be effected in

accordance with the applicable rules of court, and (crucially) that the filing party must at the same time as serving the document itself also serve the authorisation code generated by the Electronic Litigation Portal. This authorisation code is a unique code which is individually generated for each case and which permits a party to access documents relating to that case on the portal. ELP Rule 13(4) goes on to specify the swingeing consequences of not serving the authorisation code on a party in accordance with sub-rule 3. It provides that such a failure means that service is deemed not to have been effected (except in the limited circumstance where service is effected in accordance with directions given by the court as part of an order permitting substituted service).

## PREVIOUS AUTHORITY

There were several previous authorities which considered the meaning and effect of ELP Rule 13(4). Most prominent among these was [Flavio Maluf v Durant International Corp](#), BVIHCMAP2021/0025, 13 January 2022. This was a decision of the Eastern Caribbean Court of Appeal on appeal from Commercial Division of the High Court in the BVI. The Court of Appeal stated at [85] and [87] that service of a Claim Form was invalid if not accompanied by the authorisation code. However, those comments were *obiter* because the result of the appeal had already been decided on the basis of at least three other grounds of appeal which the Court of Appeal had already determined before moving on to this point. The decision was therefore persuasive but non-binding.

## AYRE V REUTERS NEWS & MEDIA INC

In the recent case of [Ayre v Reuters News & Media Inc](#), ANUHCVP2023/0029, the provision again came before the Court of Appeal, and a new argument was raised. *Ayre* was a decision of the Eastern Caribbean Court of Appeal on appeal from a decision of Master Michel in Antigua. The appeal was heard in November 2023 and judgment was handed down on 22 December 2023.

## FACTS OF AYRE

The facts of the case were in essence as follows. The underlying claim was a claim for defamation in relation to various allegations made about the Claimant in a news article. On 28 February 2020, the Claimant issued his claim form (within the relevant statutory limitation period for defamation). He applied for permission to serve the claim form out of the jurisdiction on the then defendant, an English company (“Reuters UK”), in London. That application was granted on 22 December 2020, and the order required that such service was to be made by way of personal service at the registered address of Reuters UK in London. On 22 January 2021, the claim form was served personally on Reuters UK in the manner required by the order. This took place within the validity period of the claim form (which was 12 months – see EC CPR 8.12(2)). However, the authorisation code under the ELP Rules was not served at the same time.

On 8 April 2021, the Claimant provided Reuters UK with the authorisation code, but this was after the expiry of the 12 month validity period of the claim form (which had expired on 1 March 2021). Reuters UK did not acknowledge service within the prescribed time or at all and did not at any time issue any application contending that it had not been properly served.

It then became clear in correspondence that the correct defendant to the claim was not in fact Reuters UK but rather an American company within the Reuters group (“Reuters US”). Therefore, on 11 May 2021, the

Claimant applied to the court under EC CPR 19.4 to substitute Reuters US as the defendant in lieu of Reuters UK, on the basis that Reuters UK had been named in the claim form by mistake for Reuters US. On 2 December 2021, this application succeeded before Master Gardner-Hippolyte, who ordered the substitution and also granted leave to serve the amended proceedings on Reuters US out of the jurisdiction (in the USA). On 11 March 2022, service of the amended proceedings was duly effected on Reuters US, this time together with the authorisation code. On 21 March 2022, Reuters US filed an acknowledgement of service indicating that it intended to defend the claim.

However, on 2 June 2022, Reuters US applied to strike out the claim form under EC CPR 9.7 on the basis that the court had no jurisdiction to hear the claim. The argument was in essence that there had never been any valid service of the claim form on Reuters UK (ie. the original defendant) and the validity of the claim form had then expired, so that there were in effect no valid proceedings into which Reuters US (ie. the new defendant) could be substituted. This application was granted by Master Michel on 31 May 2023. He held that the purported service of the claim form on Reuters UK (ie. the original defendant) was ineffective as a result of ELP Rule 13(4) because the authorisation code had not been served at the same time, and that it had not been open to Master Gardner-Hippolyte to make an order under CPR 19.4 substituting the new defendant because the claim form had expired and accordingly there were no proceedings.

The Claimant appealed this decision to the Court of Appeal. The Court of Appeal considered four issues in total. This article focuses on the first two.

## ISSUE 1 – VALIDITY OF SERVICE

The first issue was whether a failure to serve the authorisation code at the same time as the claim form invalidated the service of that claim form (under ELP Rule 13(3) and (4)) in circumstances where the document had been served in accordance with a court order (ie. the order granting permission to serve out of the jurisdiction) which expressly specified the manner in which the document was to be served. The Claimant contended that ELP Rule 13(3) did not apply where the Court has specifically ordered personal service out of the jurisdiction in a particular way (ie. by personal service at a specified address), and that if that order had been complied with (as it had been) then there was valid service. As part of this argument, the Claimant contended that such an order displaced the operation of ELP Rule 13(3), among other things because ELP Rule 13(1) qualifies the operation of the whole of Rule 13 as it excludes the situation where “*a rule of the court or an order provides otherwise*”, and the order for service out did “*provide otherwise*”. In other words, the Claimant contended that effective service in compliance with an express court order could not be annulled by Rule 13(4). This argument was however rejected by the Court of Appeal, which held that the operation of ELP Rules 13(3) and 13(4) was clear.

## ISSUE 2 – STATUS OF CLAIM FORM

However, that was not the end of the Claimant’s arguments. The Claimant also contended that, even if the service of the claim form on the original defendant (Reuters UK) had indeed been invalid (ie. if issue 1 was resolved against him), the proceedings nevertheless remained extant (even if the period for service of the claim form had expired) and therefore it had still been open to the Master to make an order under CPR 19.4 substituting Reuters US as the new defendant and for service out of the amended claim form. As part of this argument, the Claimant contended that, if a claim form is not served in time, that does not mean that it ceases to exist or that it is deprived of all effect: rather, it merely goes ‘into limbo’ and needs to be disposed of

formally if it is to be brought to an actual end. The Claimant relied on (among other cases) *Aktas v Adepta* [2010] EWCA Civ 1170, [2011] QB 894 at [18] *per* Rix LJ. Support could also be found in, for example, *Pitalia v NHS England* [2023] EWCA Civ 657, [2023] 1 WLR 3584 (no analogy “between the expiry of a claim form and the death of a living creature”). Again, the Court of Appeal rejected this argument and held that, once the period for service of the claim form had expired, the claim form was of no effect (distinguishing *Aktas* on the basis that it was decided on different wording in the English CPR) and therefore no new Defendant could validly have been substituted in.

## CONCLUSIONS

*Ayre* offers a salutary reminder of the importance in the Eastern Caribbean of serving the ELP authorisation code at the same time as the substantive document being served (especially where that document is a claim form). It should be noted that *Ayre* is currently the subject of an application for leave to appeal to the Privy Council, which is due to be heard at the end of April 2024. It should also be noted that the ELP Rules are due to be replaced by Part 5A of the new Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023, but for the moment the ELP Rules continue to apply.

## THE AUTHOR

Simon Adamyk is an experienced chancery/commercial barrister with an international practice. He is called both in England and Wales and the Eastern Caribbean (BVI). He has attended court in The Bahamas, the Isle of Man, the BVI and Antigua, appeared before the Court of Appeal of the Eastern Caribbean, appeared in the Court of Appeal, the Supreme Court and twice in the Privy Council. He has also conducted high value commercial arbitrations in Paris, London and Dubai, and advised in a substantial cases in Jersey and Cayman. He regularly deals with cases involving millions or billions of pounds or dollars. He has a triple first in law from Cambridge and a Master’s degree from Harvard Law School, and came top in the year in all three years of his law degree. He is ranked as a Leading Junior in Chambers UK Bar, Chambers Global and Legal 500. He was instructed on behalf of the Claimant in the appeal in *Ayre v Reuters News & Media Inc.*



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