

APPROPRIATE TECHNOLOGY and The NEW CIVIL PROCEDURE RULES

In Jamaica, since January of 2003, our new Civil Procedure Rules (CPR) have without any fanfare ushered 21st century technology into the administration of justice and the conduct of civil cases in the Supreme Court

The reference to technology appears in the Preface to the CPR in the sentence "Allowing for greater use of modern technology" and shortly after in Part 2 under Application and Interpretation of these Rules

RULE 2.7 (3) -- The court may order that any hearing be conducted in whole or in part by means of a telephone conference call, video-conference or any other form of electronic communication

RULE 2.7 (4) -- The court may give directions to facilitate the conduct of a hearing by the use of any electronic means of communication or storage or retrieval of information, or any other technology it considers appropriate

The cue was clearly taken from the "Access to Justice" Reports published in the UK prior to their 1998 adoption of their own new Civil Procedure Rules. In that report much was made of the importance of using computer-assisted technology to improve the efficiency of the administration of civil justice at all levels.

The final Access to Justice Report advised that technology may be used to great advantage;

- (1) by practitioners to assist them in the management of their cases,
- (2) by courts (a) for the purpose of recording information about individual cases, tracking their progress and ensuring deadlines are met, and (b) for the purpose of providing management information about pending business to aid forward planning of sittings and listing, and
- (3) by courts and parties to aid communication between one another

Rules 2.7 (3) & (4) of our CPR clearly anticipate that technology may be used in the court room itself to facilitate the presentation of evidence and argument.

Upon close examination it will become apparent that our Civil Procedure Rules recognize "making use of technology" as essential to achieving the overriding objectives of;

- (a) enabling the court to deal with cases justly by ensuring that the parties are on an equal footing,
- (b) saving expense,
- (c) ensuring that cases are dealt with expeditiously and fairly
- (d) to facilitate the underlying case management process

We who are the first in practice to apply the new CPR are virtually all starting out like a field of marathon runners, and it is incumbent on us to inform ourselves and develop a clear understanding of the how the specific provisions in the CPR are to be interpreted and applied.

The specific references to the types of technology and uses stated in the new CPR can be found at;

RULE 2.4 –Definition of “FAX”

RULE 3.8 –Filing and Service by FAX

**RULE 3.9 (2) (b)–Sealing of documents issued by Court...
*.seal on the document electronically***

RULE 3.11 (2) (b)–Statement of case-address for service... *the telephone number and (if applicable) FAX number*

RULE 5.12 –Proof of service by FAX

RULE 6.2 (c) –Method of service FAX

RULE 6.3 (2) –address for serving such documents-FAX number

RULE 6.6 (1) – Deemed date of service-FAX, other electronic method

RULE 29.3 – Evidence by video link or other means

The objective of this presentation is to focus attention on how these specific types of technology are to be used correctly and the response which the law has made and is likely to make when the technology is used correctly or incorrectly. We will look at the specific provisions to see what interpretations have been made in other jurisdictions

Having used cutting edge technology in the practice of law for the past 20 years, experience has taught one vital rule, FRTM -First Read The Manual.

You need not know how to programme or operate any particular equipment but at least you will know what the technology ought to do and how the technology should do it.

Throughout this paper therefore you will see the caption Practical advice. It will mark a recommendation of something you ought to do to make sure the use of the technology does not defeat its own purpose, embarrass you or incur unnecessary cost.

RULE 2.4 – “Fax” means the making of a facsimile copy of a document by the transmission of electronic signals

At the core of this definition is the simple fact that a fax is essentially a copy of another document which happened to be made over a distance by electronic communication between two machines.

The definition seemed to have emerged from as long ago as March 1990 in *Hastie & Jenkerson (A Firm) v. McMahon [1991] 1 All Er 255* when the U.K. Appeals Court examined the issue of **validity of service by fax**.

The facts of that case are that a List of documents was required to be served by the Plaintiff on the Defendant by a specified date. The Plaintiffs attempted to comply with the deadline by transmitting by fax a legible list of documents on the last specified date – The issues considered by the Court were (a) Whether a document transmitted by fax was validly served (b) Whether service by fax complied with the rules of court (c) Whether the quality of a document produced by fax was acceptable – The relevant sections were RSC Ord 65, r 5(1), Ord 66, r 1, 2.

The Appellate Court in affirming the lower Courts decision that the service by fax was valid, stated the following reasons-

“(1) The transmission of a document (other than documents required to be served personally or writs and other documents which initiated proceedings) by fax constituted good service, provided that it could be proved that the document had in fact been received in a complete and legible state by the person on whom service was effected, since the purpose of serving a document was to ensure that its contents were available to the recipient, and whether it was served in the conventional way or by fax the result was exactly the same because, although what was transmitted was an electronic message, what was produced, using the recipient’s machine and paper, was the document which the other party intended should be served. It followed that service by fax could be good service subject to any

requirement of the order requiring service of the particular document and the Rules of the Supreme Court. However, where the parties had not agreed to service by fax, the sender took a considerable risk in transmitting a document by fax, since, in the absence of consent, it might well be difficult to prove that a legible copy of the document had in fact been printed at the recipient's premises. dictum of O'Connor LJ in Ralux NV/SA v. Spencer Mason (1989) Times, 18 May applied.

(2) Service by fax did not conflict with RSC Ord 65, r 5(1), which was not to be read as laying down exhaustive requirements for the ordinary service of documents, since the purpose of r 5(1) was not to restrict methods of service but to assist the parties to achieve service and, where necessary, to prove that service had taken place, and if service could be proved to have taken place apart from reliance on r 5(1) then clearly there was no need to make use of the rule. Re Sharpley & Manby's Arbitration [1942] 1 All ER 66, Stylo Shoes Ltd v. Prices Tailors Ltd [1959] 3 All ER 901 and dictum of May LJ in Austin Rover Group Ltd v. Crouch Butler Savage Associates (a firm) [1986] 3 All ER 50 at 56 applied.

(3) A document produced by a fax machine was to be regarded as a proper document even though the majority of documents produced by the use of fax machines were not as durable as documents printed on ordinary paper, since if it was to be referred to in court copies of the document would normally be made by the recipient which would then in fact comply with the provisions of RSC Ord 66, rr 1 and 2 dealing with the quality and size of paper and the printing of documents 'prepared by a party for use in the Supreme Court'. In any event, it was probable that those rules were not intended to deal with the quality of documents served on other parties but rather with the quality of documents prepared for use in Court.

RULE 2.4 unfortunately has not addressed the issue of whether or not the copy must be legible and that crucial feature may have to be the subject of a later practice direction having regard to the Courts observation as to quality in paragraphs (1) and (3) of the judgment. If the party who has been served produces the document to show that it was not very legible then the question of whether or not a Fax copy has been made can become a triable issue.

Practical advice:

The age, condition and basic settings of a fax machine affect every aspect of its fax sending and receiving capability. It is

recommended that you have your fax machine serviced, the digital signature set, the scanner cleaned, the paper feed rollers changed, the ink or toner or heat printer set to the sharpest resolution and the default page size set to letter to match the mandated size of Court documents. Then its fax transmission and receiving quality should be tested. You may find that your fax machine does not in fact "make a copy of a document" as Rule 2.4 requires and it may become necessary to replace your machine to ensure that it can comply with the CPR.

RULE 3.8 –Filing and Service by FAX

"In addition to any conditions contained in a practice direction any document filed or served by fax must include

- (i) the name address and telephone number of the sender**
- (ii) the date and time of the transmission**
- (iii) the total number of pages transmitted including the cover page**
- (iv) the number of the fax machine at which documents may be received and**
- (v) the name and telephone number of a person to contact if problems occur in transmission**

This rule speaks to the vital information which must be generated manually to accompany the fax and electronically by the fax machine without which information the fax transmission would not be valid service. Items (i) to (v) can be easily provided on a cover page containing all the required details.

With the newer fax machines that scan the document into it's memory the time at which you feed the machine and dial to send the fax may be a half hour or more before the fax is actually transmitted and due to line faults some of the pages may have been dropped in the transmission. The correct details of items (ii) and (iii) therefore can only be confirmed from a report generated by the fax machine itself called a "Transmission Record. The correctness of that information will prove to be vital under Rule 5.12, discussed later.

Practical advice:

It is strongly recommended that only a black ink pen should be used to fill in the details of a handwritten fax cover page. If a blue or green inked pen is used the writing on the fax received may prove to be illegible. This is because in most fax machines, the high intensity lamp used to scan the document emits a green light which acts as a filter against the blue or green writing. If a blue pen is

used what emerges as the Cover page of the fax (copy) may not show the critical details required under Rule 3.8.

Filing by fax under Rule 3.8 is not immediately available. To do so requires practice Directions which are to be issued after the Supreme Court obtains dedicated machines for that purpose. An interesting set of practice direction on the subject was recently issued in the UK, (*see Practice Directions; pleadings and use of electronic transmission of documents [2002] All E.R. (EC) 460*); Also in the UK are CPR Practice Guides On The Use Of Technology. Chapter 14 Use of Information Technology, prescribes under 14.11 which deals with Filing by fax;

“All fax messages should have a cover sheet setting out the name of the case, the case number and the (case management) judge's name, if known. Written evidence should not be sent by fax”

In anticipation of the use of this facility by out of town and uptown practitioners and the proposed setting up of County branches of the Supreme Court Registry, care will have to be taken that the Supreme Court and Court of Appeal staff are properly trained on how to treat with documents filed by fax in order to avoid administrative errors that could lead to judicial review proceedings.

This was the situation in ***Gwynedd Cc v. Grunshaw [2000] 1 W.L.R. 494; [1999] 4 All E.R. 304; (2000) 32 H.L.R. 610;***

There, the Defendant attempted to lodge a Notice of Appeal within the prescribed time limit. The Court manager declined to accept the application on the basis that it should have been lodged with an alternative court pursuant to the Rules of the Supreme Court Ord.9 r.4. The Defendant attempted to fax the Notice of Appeal to the other court, but the application arrived outside the prescribed time limit and the filing by fax was deemed ineffective. The Defendant appealed against the original refusal to accept her notice of appeal. In allowing the appeal, the Court held that the receipt and processing of documents by a court officer were acts of a purely administrative nature. The court manager had a minimal discretion with regard to documents obviously wholly outside the jurisdiction of the court, but he had no authority to make what amounted to a judicial decision regarding the trial venue.

Practical advice:

The alternate meaning of BWIA, But Will It Arrive, can easily affect any attempt to serve or file a document by fax. Before sending an important fax it is prudent to first dial the fax number to which you intend to transmit, from an ordinary phone, just before you transmit

the fax, to make sure that the line to that number is working and that the receiving machine sends a tone confirming that it is on.

RULE 3.9 (2) (b)–Sealing of documents issued by Court...
The Court may place the seal on any document by- printing a facsimile of the seal on the document electronically or by any other means.

Electronic signatures or seals are things reproduced by a scanning and printing device. It may take the form of a human readable graphic and alphanumeric information or a machine readable bar code. This is a programmed electronic imprint which the user cannot control once the machine is programmed to attach it to the document. Electronic seals are visible to the naked eye, or to touch if it perforates the paper.

Fax machines put electronic date, time and contact digital signature at the head or foot of a fax telling which machine sent the fax, from which number and at what date and time. The importance of this will be seen later.

RULE 3.11 (1):-Every Statement of case must contain an address within the jurisdiction at which the party filing the statement of case will accept service of documents.

3.11 (2):- that address for service must also state-

(b)– the telephone number and (if applicable) the FAX number of the Attorney-at-Law filing the document or of the party if in person

There appears to be an latent ambiguity in this rule as to whether or not it is obligatory that a Fax number be provided for service.

The issue of whether or not a fax number has been intentionally provided for the purpose of accepting service where it appeared in a document forming part of the Statement of case arose in *Molins Plc v. GD SpA* [2000] 1 W.L.R. 1741; [2000] 2 Lloyd's Rep. 234; The UK Appeals Court examined their Civil Procedure Rules 1998 Part 6 and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965; The facts are that Molins, an English company and GD SpA, an Italian company, were involved in a dispute concerning the payment of royalties under a licensing agreement. Molins, commenced proceedings in England by service of a claim form on GD prior to which GD had attempted to serve a writ on M Molins, by fax. The English proceedings were set aside on the basis that the Italian court was the court first seised of the action by virtue of GD's

prior service by fax and under the Brussels Convention 1968 the court was obliged to stay the proceedings. GD had contended that service by fax was effective and fulfilled the requirements of the Civil Procedure Rules Part 6.2(1)(e) since the headed notepaper used by Molins, in correspondence included a fax number which was an indication that M was prepared to accept service by fax as required by Civil Procedure Rules 1998 Part 6 PD 6 para.3.1(1)(a). Molins, appealed.

In allowing the appeal, the Court held that service by fax was ineffective and did not satisfy the requirements of the 1998 Rules since the inclusion of a fax number on headed notepaper was not a sufficient written indication of Molins, willingness to accept service by fax. Consequently, there had been no effective service and the Italian court had not been first seised of the action, since Italian law required that service was effected before proceedings could become definitely pending before the court. The Hague Convention 1965 Art.15 required that a fax number must be expressly provided for the purpose of accepting service to amount to a written indication.

Our Rule 3.11 (2) (b) speaks to the fax number being in the "address for service". It would therefore suggest that the fax number appearing elsewhere may not satisfy the rule.

Attention is drawn to Rule 7.3 (3) which deals with service out of the jurisdiction in claims about contracts and Rule 7.8 (1) (b) which deals with service out of the jurisdiction in accordance with the law of the country in which it is to be served and Rule 7.14 which deals with service of Court process other than a claim form

Practical advice

Attorneys who practice primarily in the field of commercial law and especially those who deal with international contracts should take heed. Most commercial contracts contain a clause prescribing an address for service and often suggest "any suitable" method of service of any notices which may arise from the contract. Having regard to Rule 7.8 (1) (b) and Rule 7.14 the agreed method of service of any contract notices should be given close attention by those commercial law practitioners. It is recommended that care should be taken in the drafting of the "method of service of any notices" contract clause to specifically exclude any service of Court process by electronic means.

RULE 5.12 –Proof of service by FAX

- (1) Service by FAX is proved by an affidavit of service by the person responsible for transmitting the claim form to the person to be served**
- (2) The affidavit must exhibit-**
 - (a) a copy of the document served**
 - (b) a copy of any cover sheet to that document; and**
 - (c) a copy of the transmission record and must state-**
 - (i) the date and time of the transmission; and**
 - (ii) the FAX number to which it was sent**

Rule 5.12 (2) (c) and the last two requirements of the rule make it obligatory to produce information which can only be generated by or extracted from the fax machine itself. That is the all important Transmission Record mentioned above.

All fax machines less than 10 years old are designed to keep an electronic transmission log. The log is a record of the date and time and duration of the transmission, the number of pages sent or received and the number to which the outgoing fax was delivered or from which the incoming fax was received. Each entry in the log is a transmission record.

The fax machine can be made to print the transmission log at a specific time or at regular intervals. Without the information from the machines transmission log you cannot say with accuracy what was the date and time or receiving number of the fax transmission.

The transmission log reporting is very different in a fax machine designed for a business as compared to a fax machine designed for personal or home use. Business fax machines (eg. Those made by Xerox, Hewlett Packard, Minolta etc) will automatically or on request generate an individual confirmation or failure report for each fax sent or received. That individual report as shown on the attachment will provide all the details needed to satisfy the CPR. Personal fax machines simply generate a list as shown.

As will be seen from the authorities mentioned, it can be just as important to show that an attempt to send or to receive a fax had failed as it is to show that it succeeded.

It is absolutely critical that the fax machine be programmed with the correct date and time, sending telephone number and users name or Station identifier, before the Transmission Record can be relied on to provide the vital information required under 5.12 (c) (i) & (ii).

That programming sets the digital signature of the machine which proves that the transmission record came from a particular machine. Should you receive service by fax which has an incomplete digital signature; ie. there is no sending telephone number and users name or Station identifier at the top of each page received then you may have grounds to challenge the Affidavit of Service filed for failing to comply with Rule 5.12 (2) in all material particulars

Practical advice;

Please ensure that the fax machines internal digital clock can keep the correct date and time. One still sees faxes coming from old machines which are not Y2K compliant where the transmission date is time stamped as sent in 1904 but the fax is received in 2003. If the transmission record is not correct then the purpose behind the use of the technology would have been defeated. In our firm we use a both a business fax and our computers to send and receive faxes. The computers fax software will provide the proper transmission record as needed and its hard drive will store the fax indefinitely to be viewed without necessarily printing it or for printing as often as required.

RULE 6.2–Method of service

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

- (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 of the court orders otherwise
- (Rule 3.6.(2) enables the Chief Justice to make practice directions as to the electronic service of documents.**

The present state of information technology has only two reliable forms of common immediate electronic communication with any permanent independent record of the transmission event, namely fax and voice mail.

Voice mail was treated by the Court as a suitable form of electronic communication in *Lavers v. Northern Upholstery Ltd- t/a DFS Ltd (Daily Telegraph, July 20, 2001)* . The facts are that a settlement proposal was presented pursuant to the CPR. The Plaintiffs solicitors telephoned the Defendants solicitors and left a message on their voice mail, rejecting the offer but indicating that a counter proposal of 8,400 pounds would be acceptable. A default

costs certificate was awarded to the Plaintiff and the Defendants solicitors applied for the certificate to be set aside on the basis that that they had no record of the voice mail message. The Court rejected the application on the ground that although it was unfortunate that the Defendants solicitors had not received the voicemail message, by having a voice mail system they were under an obligation to make sure it worked and that they picked up messages. There was no suggestion that the system was not functioning correctly.

RULE 6.2 (d) "other means of electronic communication"

The question that arises is does this include electronic mail ?, i.e. e.mail or text messaging.

A simple e-mail message is a digital document constructed in a language called ASCII. That is the abbreviation for American Standard Code for Information Interchange. ASCII is the basic language which all computers and fax machines speak when transmitting data.

Unfortunately an e-mail or a digital text message is not in good legal standing because of the technology behind them.

Firstly, a simple e.mail or a digital text message has no machine generated distinguishing mark to confirm who created it and the source from which it was sent can be hidden or disguised. Some verification key has to be attached to confirm it as genuine.

Secondly, contrary to popular belief electronic mail or mobile digital (text) messaging is not instantaneous. Unlike a fax the sender does not receive any immediate feedback to confirm the time of delivery. An e-mail or digital text message is in fact not received until the addressee downloads it from the electronic mailbox. It can arrive at the mailbox but stay uncollected for months if the mailbox is not opened. E.mail will return to sender, to advise if a message did not arrive at it's destination. This may happen if there is a transmission fault or a non existent address, or closed e.mail-box or firewall rejection. The e.mail message will be bounced back to the sender with an error message to advise that it was not received by the intended person.

Thirdly, the process of conveying and delivering of digital text messages is not very reliable. As each digital message is sent off into the electronic maze of the internet by the computer of the immediate Service Provider it is grouped and distributed by a process called packet switching and routed around the world controlled by varying modem transmission rates, line traffic, router volume and whether it is moving along a wire, fiber optic cable, microcell, radio or satellite link by various computers until it reaches its destination. In cyber-space digital messages can get lost, become garbled and they are often rejected by firewalls set up to

protect against viruses. Because an e-mail or a digital text message is not guaranteed to arrive at its destination at a specific time or at all, there can be no legally binding presumption of delivery of an e-mail

Fourthly, even when it is received, e.mail can pose problems of data translation where the computer which sent it and the one which receives it have different operating systems or data translation programmes.

E.mail can conceivably be used to serve documents but the governing practice directions should be carefully worded to take into account the caveat emptor of the complex technology which supports it.

From observations on the administration of justice in systems parallel to ours, e.mail seems to have been relied on only in very extenuating circumstances where there was no other means of locating or contacting the person to be served and a critical deadline had to be met over a very great distance.

In *RC Residuals Ltd (formerly Regent Chemicals Ltd) v. Linton Fuel Oils*; [2002] 1 W.L.R. 2782 & Times, May 22, 2002, the UK Court of Appeal gave consideration to the propriety of e.mail as other means of electronic communication under the UK Civil Procedure Rules 1998 Part 3 r.3.9(1). The Court observed, that whilst solicitors were entitled to refuse a request for email service, where such a refusal had occurred in an emergency situation the court might well be sympathetic to a request from the party in default for relief from sanctions. In that case certain expert evidence had been served no more than 20 minutes later than the time specified in an unless order but the non compliance had not been intentional.

The Australian Federal Court adopted the same approach on June 26, 2001 in *Re Brownlie*, [2002] B.P.I.R. 240. The facts are that Brownlie's Trustee in Bankruptcy applied to the Australian court for the issue of a Letter of Request to the High Court in England. Brownlie had become intentionally bankrupt in Australia and it had become apparent that he had an interest in property in England that was about to be sold. He had failed to notify his trustee of an apparent change of residential address but had however provided an e. mail address during the course of communications with his trustee. The trustee had been unable to effect personal service of the instant application upon Brownlie but had forwarded all documents to the e. mail address.

In granting the application, the Court held that it was appropriate to order the issue of a Letter of Request without notice given the urgency of the matter and Brownlie's failure to supply a postal

address but the trustee was obliged to continue his efforts to effect personal service. *Hardie Rubber Co Pty v. General Tire & Rubber Co* (1973) 129 C.L.R. 521 followed.

RULE 6.3.(2)- Where a party's address for service includes a FAX number, documents may be sent by fax to that number

In parallel jurisdictions to ours, the interpretation of this rule has been very rigid both as to the withdrawal from accepting service by fax and as to making sure that the receiving fax machine is working properly.

It would appear that once the rule is adopted by an Attorney for a litigant, there is no right to withdraw from service by fax

This was the Court of Appeal's ruling in *Mayes v. Gayton International* [1994] C.L.Y. 3760 in considering RSC Ord.65 r.5(2B)(c) which provides that service by fax may be effected where: *"the solicitor acting for the party on whom the document is served has indicated in writing to the solicitor serving the document that he is willing to accept service by fax at a specified fax number and the document is transmitted to that number; and for this purpose the inscription of a fax number on the writing paper of a solicitor shall be deemed to indicate that such a solicitor is willing to accept service by fax at that number in accordance with this paragraph unless he states otherwise in writing"*.

The facts of the case are best listed in sequence;

- a. The Plaintiffs solicitors agreed to the Defendant's solicitors' request for an extension of time for service of the Defence until Friday, July 16.
- b. During the afternoon of July 16 the Defendant's solicitors received counsel's draft and at 4.15pm telephoned Plaintiffs solicitors who insisted that the defence must be served by first thing on Monday, July 19. During this conversation the Defendant's solicitors said they would serve the Defence by fax before noon on July 19.
- c. On July 19 at 9.20am the Plaintiffs solicitors in Manchester sent a fax to the Defendant's solicitors in Liverpool saying that service by fax would not be acceptable.
- d. At 10.07am D's solicitors served the Defence by fax; at that time the Plaintiffs solicitor's fax of 9.20am had not come to the attention of the Defendant's solicitor with conduct of the case.
- e. After receiving the Defendant's solicitors' fax enclosing the Defence, the Plaintiffs solicitors took the deliberate decision to enter judgment in default of Defence later that afternoon.

- f. The Defendant's applied to set aside the judgment for irregularity, calling for an interpretation of the words "unless he states otherwise in writing" in RSC, Ord.65, r.5(2B)(c)

In allowing the Defendants appeal the Court held that if solicitors have a fax number on their letter heading they should not be able to withdraw their acceptance of service by fax unless such withdrawal is stated on their letter heading. Alternatively, if a party seeks to preclude service by fax there must be proper notice to the party from whom the ability to serve the fax is being withdrawn, since otherwise there would be an absurd situation. The Court found that the default judgment was therefore irregular and the Plaintiffs solicitors who had acted unwisely were ordered to pay all the costs of the application and the appeal.

Once service by fax has been established under Rule 6.3.(2) as a protocol in the particular action our CPR does not afford the opportunity of withdrawal from being served by fax.

The act of disabling one's Fax machine in an attempt to avoid being served by fax before a deadline may have the opposite effect of extending the deadline for service.

So held the UK Court of Appeal in *Venables v. Mirror Group Newspapers Ltd (Times, December 9, 1998)*. There in libel proceedings brought by *Venables* an order was made that, unless *Mirror Group Newspapers* complied with an earlier consent order for production of a reporter's notes by 4.30 pm on July 31, 1997, its Defence would be struck out. At 4.10 pm on July 31 *Mirror Group Newspapers* attempted to fax the document to the Plaintiff's solicitors, but the solicitors' fax machine had been switched off while repairs were carried out. On learning that the machine would be out of service for half an hour, a solicitor acting for *Mirror Group Newspapers* immediately set off to deliver the documents in person but they were delivered after the deadline. *Mirror Group Newspapers* appealed against the judge's refusal to extend time for compliance with the unless order. The Court ruled that on the basis that service by fax before 4.30 pm would have been acceptable, an extension of time for compliance with the unless order to cover the personal service made by the Defendants' solicitor would be granted, as it would be unjust and disproportionate to the breach to do otherwise.

RULE 6.6 (1) – Deemed date of service

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-

- FAX (a) if it is transmitted on a business day before 4 pm:
the day of transmission; or**

(b) in any other case, the business day after the day of transmission

other electronic method: the business day after transmission

Other electronic method would no doubt mean e.mail as voice mail and text messaging cannot deliver a document.

Technology experts will tell you that the most unpredictable aspect of the use of technology is the interface between the function of the machine providing the technology and the human reaction of the persons using it. This seems to have become a critical point of departure in the use of fax technology especially as regards the time of service of the fax.

This issue was examined in the UK Appeals Court by Lord Justices Woolf Mr, Otton and Robert Walker LJJ in the interesting case of ***Lady Elizabeth Anson (Trading As Party Planners) v. Trump (Ivana) [1998] 3 All Er 331***

The Headnote reads

Judgment - Default of defence - Regularity - Defence served after expiry of time limit and without leave to serve out of time - Judgment in default entered after late service of defence - Whether judgment regular - RSC Ord 19, r 2. Practice - Service - Service by fax - Transmission - Whether reasonable time should be allowed between arrival of document at fax machine and communication to person concerned - RSC Ord 65, r 5(2B).

A synopsis of the case facts in sequence follows;

1. The Plaintiff had issued proceedings to recover a balance on an account stated. On 14 June 1996 the master granted the Plaintiff leave to amend her statement of claim and ordered that the original Defence be withdrawn and an amended Defence served within 21 days after service of the amended Statement of Claim.
2. The amended statement of claim was duly served on 28 June, but the amended defence was not served until 22 November, when, without leave being obtained for an extension of time, it was served, pursuant to RSC Ord 65, r 5(2B), a by a fax transmitted at 9.42 am.
3. At 10 am, without knowledge of the fax, a representative of the plaintiff's solicitors entered judgment in default for the original sum claimed pursuant to Ord 19, r 2(1)b.
4. The judge dismissed the defendant's application to set aside the default judgment, holding that although the defence raised the contention that the plaintiff's solicitors were dilatory and

obstructive by refusing to disclose documentation in support of the claim, it was nevertheless hopeless

5. The defendant appealed, contending among other points that the judge had erred in implying into Ord 65, r 5(2B) a delay period between the actual arrival of the document at the fax machine and communication to the person dealing with the case, and that therefore the defence had been properly served before judgment in default had been entered;

The Court Held; that by virtue of Ord 65, r 5(2B) pleadings could be served by fax to a solicitor's business address, but there was no scope to import a gloss of reasonableness or reasonable lapse of time between the physical arrival of the pleading and its communication to a person who was dealing with the case. The word 'transmission' in R 5(2B)(b) meant the process from the moment that the document was despatched by the sender to a time when the complete document had been received by the recipient's fax equipment, with no reasonableness implied. It followed, in the instant case, that as the faxed defence had been transmitted at 9.42 am on 22 November 1996, it was served before judgment in default was entered.

Order 65, r 5 provides as follows:

'(1) Service of any document, not being a document which by virtue of any provision of these rules is required to be served personally or a document to which Order 10, rule 1, applies, may be effected ... (a) by FAX in accordance with paragraph (2B) ...

(2B) Service by FAX may be effected where-(a) the party serving the document acts by a solicitor, (b) the party on whom the document is served acts by a solicitor and service is effected by transmission to the business address of such a solicitor ... Where the FAX is transmitted on a business day before 4 p.m., it shall, unless the contrary is shown, be deemed to be served on that day, and, in any other case, on the business day next following.

The judge at first instance took the view that in order to make Ord 65, r 5(2B) work, there must be implied into it a reasonable time between the actual arrival in the fax machine and a communication to someone in the office who knows about the matter in question.

The judge said:

'... I would be prepared to hold that service by fax under Ord 65, r 5(2B) has to be interpreted in a way which is sensible and workable. In my judgment it would be very undesirable if in a situation such as the present the court had to embark on an inquiry as to the precise time when a judgment was entered and a precise time at which a fax was received, to embark on an inquiry as to whether a fax was received perfectly or imperfectly, and it would be very undesirable for every clerk attending to sign a judgment to have to stand in the judgments room with a mobile telephone

clamped to his or her ear so as to get up-to-the-second instructions from somebody standing by the fax machine as to whether or not the defence has been served. In my judgment that would be quite ludicrous. I take the view that the only way in which para (2B) can be made to work is by implying into it that a reasonable period of time is to elapse between the physical arrival of the fax and its reasonable communication to someone at the solicitors' office who knows something about it. A reasonable time may be no more than an hour, but in my view a reasonable time must be allowed to elapse, otherwise the ludicrous situation would arise whereby a fax comes in (one of thousands or tens of thousands) to a huge city firm. It is quite impossible logistically for that fax to reach the hands of anybody who knows what they are doing in under half an hour, however efficient the system in place. None the less, the moment the last page is out the document is taken to be served. Therefore, I would hold that in the circumstances of this case, these solicitors having in my judgment quite deliberately cut it as fine as they possibly could, have cut it too fine and that there had not been proper service of the documents.'

On the Appeal, OTTON LJ in his Judgment made a careful analysis of the fax process and the interface of the use of the technology to arrive at a practical interpretation of the law. The Lord of Appeal had this to say (at p 338).

"I regret that I cannot accept the learned judge's reasoning. In my judgment there is no scope within the rules to import a gloss of reasonableness or a reasonable lapse of time. This introduces a subjective element into the rule which is not called for, and would undermine it and lead in time to uncertainty. What would be reasonable in a single practitioner's office would be unreasonable in a large city firm and vice versa.

Transmission must be given a meaning which is consonant with modern communication technology and commercial practice. I would hold that 'transmission' means the process from the moment that the document is despatched by the sender to a time when the complete document has been received into the recipient's faxed equipment. This may be a matter of seconds or even nano-seconds, it may be somewhat longer if the recipient's fax machine is busy or the document is longer. The fact that it may remain in the fax memory before being printed or read is to my mind irrelevant. Consequently I would respectfully differ from the judge and hold in this case that, in the absence of evidence to the contrary and assuming that the clock on the transmitter's fax machine was accurately set, the defence which consisted of two pages and probably a covering sheet was transmitted and served at about 9.42 am on 22 November.

You will recall the Practical advice regarding the fax machines internal clock.

This interpretation of how the technology should operate under the law has been accepted as correct and was applied in *Reynolds v. Long Ashton Research Station* (Times-November 1, 2000)

In that case the Plaintiffs solicitors issued a claim form in March 2000. The claim form was served by fax on the Defendant's solicitors on Friday July 7, 2000. The evidence was that the fax was received at 4.17 pm. The Defendant's complained of a number of defects in the service of the claim form, and it was struck out by the court. The Plaintiff appealed, and the Defendant cross appealed. On their cross-appeal, the Defendant contended that the claim form had not been served with the four-month period specified by the Civil Procedure Rules 1998 Part 7 r.7.5 because it had been served by fax after 4 pm and should be deemed served on the next business day, which was one day too late.

The Court allowed the Defendant's cross appeal by ruling that for the claim form to have been served in time pursuant to r.7.5 it had to be served on or before July 7, 2000, (July 8 and 9 being a weekend). As service of the claim was effected by fax after 4 pm, applying Part 6 r.6.7(1) of the Rules, it was deemed to have been served on the next business day, namely July 10, and therefore out of the period of validity of the claim form. Accordingly, the claim form had never been validly served and must fail.

An interesting conundrum arises from this interpretation of the time of service by fax. It is that the deeming provisions of Rule 6.6(1) do not provide an exception in terms of "unless the contrary is proved". Rule 6.6 (1) (b) deals with circumstances in which the court would treat service as not having been validly effected until a time after actual service.

It therefore overrides Rule 6.7 which allows that a party may show when actual service had been effected. The logical conclusion is that under Rule 6.7 it is not open to a party to show that actual service by fax occurring after 4.00 pm had been effected before deemed service defined by Rule 6.6 (1) (b).

The practical application of these rulings on the use of facsimile or other electronic technology to effect service of documents may be summarized as follows;

Service by fax or other means of electronic communication may validly take place only where;

- (1) the party on whom the document is to be served is acting as legal representative,

- (2) the legal representative's business address must be within the jurisdiction (and should be in the physical location of his office).
- (3) the document is transmitted to be served at the legal representative's stated address for service, and
- (4) the legal representative who is to be served has previously expressly indicated in writing his willingness to accept service by this means and has provided in the stated address for service
 - (a) a fax number, or
 - (b) his e-mail address.

Where an electronic address is given in conjunction with the business address, the electronic address will be presumed to be at the business address. It is not advisable to use an arrangement of convenience where the receiving fax is in another practitioners office that may be locked or unattended when a fax arrives.

“document which is served within the Jurisdiction in accordance with these rules”

On the law governing jurisdiction in cyberspace the issue is still unresolved as to whether a yahoo or email.com address can be said to be within the jurisdiction. This stems from the fact that the Internet Service Provider of the e.mail box is in the USA.

A cwjamaica.com or kasnet.com address furnished through a local Internet Service Provider most certainly is within the jurisdiction.

Practical advice

The most common advice given for the use of information technology is “always back up”. Where a document is served by fax or other electronic means, the Attorney serving the document is not required to send, in addition, a copy by post or acknowledged document delivery, but if he does not do so and the document is proved not to have been received then the court may, on any application arising out of that non-receipt, rule that there was no valid service if in fact a hard copy was not physically sent.

This advice is founded on the UK Court of Appeal decision in ***Ralux NV/SA v. Spencer Mason (Daily Telegraph, May 18, 1989)*** where the Defendants application to set aside a default judgment obtained by the Plaintiff was granted on condition that a defence and counterclaim was served by 4pm on 18 April 1988. The defence and counterclaim were served by fax. R's solicitors refused service at 3.20pm on the 18th. The Defendants then faxed other agents in the same town who served the documents personally at 4.20pm. The Defendants appealed against refusal of extension of time for service. The Appeal was allowed on the basis that the

issue was not whether service by fax was valid service, but whether the serving party could prove that a legible copy of the document was given to the other party and the rules of service complied with. In the circumstances the copy was legible and the rules had been complied with and the Plaintiff would suffer no prejudice by an extension of 20 minutes.

RULE 29.3 – Evidence by video link or other means

Long before the new CPR our Court of Appeal anticipated the use of video link as appropriate technology for the administration of Justice. The dictum expressed in that court's Judgment in ***Wallace and Another v. Ramsay and Another (Ratray P (dissenting), Bingham JA and Walker JA)*** 9 JULY, 29 NOVEMBER 1999 showed how enlightened our judges are.

The case examined the issue of an Order or direction as to manner in which evidence may be given, specifically Evidence by video conference or video link. The point was whether the Court had Jurisdiction to adduce evidence by that means.

The appellants had sought to prove the will of a person in contested probate proceedings in Jamaica. The sole surviving witness of the will was an aged lady who lived in Florida, USA and who claimed to be unable to travel to Jamaica to give evidence as her husband required her full-time attention. The appellants applied to the court for leave to take the witness's evidence by video conference or video link.

Panton J at first instance refused the application before him and stated (inter alia):

'In my view, this suggested method of giving evidence does not lie within the power of the courts at present. Specific legislation is required to deal with this technological advance.'

The appellants then appealed to the Court of Appeal which held (1) that s 368A(1) of the Judicature (Civil Procedure Code) Law (read together with ss 31B and 31E(1) of the Evidence Act) conferred jurisdiction on the court to allow an application for the admission of evidence by way of video conference or video link.

The guiding principles for an application to conduct a hearing by video link were recently examined in ***Rowland v. Bock [2002] 4 All E.R. 370***

In that case the second plaintiff in a debt action, appealed against an order refusing him leave to give evidence by way of a video link. He had previously been arrested and detained in the UK in connection with an extradition request concerning insider dealing. At first instance the Master held that it would be unfair to the defendant to be cross-examined in court when the claimant would be cross-examined on video; that his discretionary exercise was to

determine whether the circumstances that prevented the claimant from coming to England should outweigh the disadvantages to the defendant arising from his inability to cross-examine the claimant in person; that the giving of evidence through video link was a second class way of conducting a trial; that it should only be ordered where there was a pressing need for an order, eg if a witness were too ill to attend in person; and that the extradition proceedings against the claimant were a separate.

In allowing the appeal the Court held in relation to the video evidence that;

- (1) *No defined limit or set of circumstances should be placed upon the discretion to permit video link evidence. A conclusion to the contrary would conflict with the broad and flexible purpose of the CPR*
- (2) *Rule 32.3 was part of the procedure for furthering the overriding objective of the CPR, set out in r 1.1b, of enabling the court to deal with cases justly.*
- (3) *Dealing with a case justly included ensuring that the parties were on an equal footing which envisaged the active management of cases by making use of technology.*
- (4) *The CPR envisaged considerations of costs, time, inconvenience and so forth as being relevant considerations*
- (5) *Save in exceptional circumstances, full access to the court for justice in a civil matter should not be at the price of a litigant losing his liberty and facing criminal proceedings.*
- (6) *Whatever difference there might be between video link evidence and live evidence in court, the parties would plainly be on a more equal footing than if one party was present and cross-examined while the evidence of the other was confined to the reading of a statement pursuant to a Civil Evidence Act notice.*

For the overriding objective, active case management and the discretion to allow the giving of evidence through a video link, see *37 Halsbury's Laws (4th edn reissue) paras 60, 62, 952.*

Very recently (May 19, 2003) an order for video link testimony was given for the first time under the new CPR in the case of ***Eagle Merchant Bank v. Chen Young & Others (CL 1998/E-095)***. An interesting feature of that order was a proviso for a representative of the other side to be present on location when the witness was giving the testimony, no doubt to act as a monitor.

The guiding principles suggest that Video link testimony should be treated as an immediate alternate method of conducting the examination of a witness whenever suitable and need not be limited

to persons who are abroad. The implication of video link technology in the world of the global village is that video link testimony will give greater accessibility to witnesses and to more experts throughout the world whose testimony can be provided in local hearings without the expense of affording that witness a Jamaican vacation.

Practical advice

Practitioners in litigation should carefully consider the cost implications of the use of video link testimony vis-a-vis bringing the witness here from abroad. The Courts wider discretion as to costs under the new CPR may in some instances disallow the cost of travel to Jamaica and accommodation of a witness where it can be shown that video link testimony would have sufficed.

The correct use of technology to aid the administration of justice can hardly be over emphasized.

The focus which the United Kingdom Courts have taken on the use of technology in the administration of Justice and in civil litigation practice is aptly expressed as an obiter dictum in the following statement;

“The conduct of complex Chancery actions will be informed by the guidance set out in the Chancery Guide which aims to provide additional practical information not already contained in the Civil Procedure Rules 1998 or the practice directions supplementing them.... the guiding principle set out in the Chancery Guide, namely that the use of information technology is acceptable only if it will save time or money and will not unfairly prejudice any party.

So pronounced the UK Appeal Court of on 21 December 1999 when delivering Judgment in *Morris and Others v. Bank Of America National Trust And Others* [2000] 1 All Er 954

In that case the Pleadings and documentary evidence exceeded 1000 pages. The Court castigated the lawyers involved for not using available technology to ease the Courts burden in handling the huge amounts of paper in the bundles.

The Courts expectations for the use of technology was summed up in these judicial remarks

“There is no reason why the judge should not be provided with material such as pleadings, skeleton arguments and statements of issues in electronic form, supported by hypertext or other links enabling him to move rapidly from the claimant’s case to the defendant’s case on a particular matter, or enabling him to

*** BROADCAST REPORT ***

05-29-02 10:29

ID:8769262685
ALTON E.MORGAN & CO.

1

JOB NUM. 378

No. TELEPHONE NUMBER

01 9201117

ENTRY

INFO.

OK

This report proves that a fax was successfully sent

This report confirms that an attempt to send a fax or
to receive a fax failed.

2

*** CONFIRMATION REPORT ***

TX FAILURE

08-13-02 04:48

ID:8769262685
ALTON E.MORGAN & CO.

JOB NUM.	-----	530
START TIME	-----	04:47
ID NUM.	-----	9065861
RESOLUTION	-----	
TOTAL PAGES	-----	00
MACHINE ENGAGED	-----	00'57
INFORMATION	-----	009

This report gives a summary of faxes sent and
received and if it was completed or not.

3

*** ACTIVITY REPORT ***

02-25-02 15:24

ID:8769262685
ALTON E.MORGAN & CO.

DRUM COUNTER = 007301
TOTAL PRINT COUNTER = 007301

No.	DATE	START	IDENTIFICATION	PAGE	TIME	INFO.	JOB NUM.
-----	------	-------	----------------	------	------	-------	----------

TRANSMISSION

01	02-20	10:03	16250115	01/01	00'18	OK ECM	166
02	02-20	12:44	9262685	02/02	00'47	OK	168
03	02-20	14:25	9672745	02/02	01'12	OK	169
04	02-20	15:18	8769068895	00	00'36	STOP	170

RECEPTION

27	02-20	12:45	9262685	00	00'16	104	167
28	02-20	12:58	876 922 4811	02	00'37	OK ECM	
29	02-20	14:28	876 922 4811	13	03'50	OK ECM	
30	02-25	10:56		00	00'23	141	