

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

No. 507 of 2015

BETWEEN:

**EQUIPMENT CONSULTANTS
AND SERVICES LIMITED**

CLAIMANT

AND

**KERO CONSTRUCTION INC.
THE BARBADOS WATER AUTHORITY**

**FIRST DEFENDANT
SECOND DEFENDANT**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

Dates of Hearing: 2017 March 27th

April 10th

Date of Decision: May 31st

Appearances:

Mr. Cecil N. McCarthy Q.C., Attorney-at-Law for the Applicant/Second Defendant

Mr. Brian M. Clarke, Attorney-at-Law for the Claimant/Respondent

DECISION

Introduction

- [1] This is an Application filed in this matter by the Second Defendant herein on May 27th 2016, to set aside a Default Judgment dated March 21st, 2016 and entered April 11th 2016.
- [2] The grounds of the Application are that (i) the judgment was wrongly entered against the Second Defendant because the Second Defendant had filed an acknowledgement of service; (ii) the Claimant failed to serve a notice on the Second Defendant in compliance with **Rule 12.7** of the **CPR**; and (iii) the Defendant has a real prospect of successfully defending the claim.
- [3] The Application was supported by the Affidavit of Cecil McCarthy of equal date.

Background to the Application

- [4] The Claimant filed its Claim in this matter on April 16th 2015. It was a claim of \$73,050.08 pursuant to contract, together with interest at a rate of 6 per cent per annum.
- [5] The attached Statement of Claim reveals an unwritten contract between the Claimant and First Defendant for the supply of pipe and fittings, entered into on or about August 2006. On or about September 2006, the Claimant alleges that the Second Defendant gave an oral assurance, reiterated in writing, that

payment to the Claimant would be deducted from its payments to the First Defendant and paid directly to the Claimant.

[6] The case for the Claimant as it relates to the Second Defendant is that, it is deemed to have entered into a contractual relationship with the Claimant as agent of the First Defendant as the representations made by the Second Defendant regarding payment directly to the Claimant for the pipe and fittings gave rise to a collateral contract. In short, the Claimant pleads that the Second Defendant is contractually bound to make payments to the Claimant directly, setting off the total payment amount against monies owed by the Second Defendant to the First Defendant.

[7] There remains outstanding on this contract the sum of \$73,050.08, the allegation being that the Claimant's invoices were never paid in full. The First Respondent has through its attorney at law, denied that this sum is owed.

[8] By Order dated 21st day of March 2016, the Claimant obtained a default judgment which ordered "the Defendants jointly and/or severally to pay to the Claimant the sum of \$77,133.48, among other things".

[9] By Notice of Application filed May 27th 2016, the Second Defendant sought to have the said Order against the Second Defendant set aside.

[10] This Application was supported by the Affidavit of counsel for the Second Defendant of even date. Significantly, this Affidavit at paragraph 6 deposes

that service of the Claim Form was effected on 4th December 2015 and in response thereto, an Acknowledgement of Service was filed on the 18th December 2015.

[11] Counsel deposes that subsequent to this, no Notice of Intention to Enter Judgment was served on the Second Defendant as required by the Civil Procedure Rules. In other words, the only application for default judgment was made prior to service on the Second Defendant.

The Submissions

[12] Counsel for the Applicant/Second Defendant made the following points:

1. Service of the Claim Form was not effected on the Second Defendant prior to the Application for Default Judgment on July 3rd 2015 and therefore the Second Defendant had no duty to acknowledge service.
2. To effect service in accordance with **5.9(b)** of the **CPR** the Claim Form must be handed to a “principal officer” of the body corporate; namely the Chairman, Chief Education Officer, Secretary or Treasurer or similar officer of the Second Defendant; **Rule 5.9(b)** does not contemplate that the Claim Form could be accepted by anyone else.
3. Service in accordance with **Section 414** of the **Companies Act** is not applicable as the Barbados Water Authority is not a company within the meaning of **Section 2 of the Companies Act**; it is a statutory corporation.

4. In view of the above, the default judgment was wrongly entered (an irregular judgment) since the service upon which it relies was contrary to the Rules of the Court and therefore ineffective. As set out below, service was effected to one of the offices of the Second Defendant. Counsel relied on the ruling in the Jamaican case (**unreported**) of **Winston Hunter et al v Benjamin Hunter HCA No. 2371 of 2007**, where an acknowledgement of service was filed before the request for judgment in default was entered, though filed outside of the time allowed by the general rule. It was held that any default judgment so entered will be irregular and must be set aside. This position was noted to be in contrast to the UK position on this point.
5. Alternatively, the Second Defendant argues that the judgment is irregular on another ground, namely, that the Claimant failed to serve notice on the Second Defendant in compliance with **Rule 12.7** of the **CPR**. This Rule stipulates that:

“No request for final judgment in default of defence shall be filed unless notice in writing has been served upon the Defendant.”
6. In the alternative, if the Court is not persuaded by the above argument, the Second Defendant argues, pursuant to **Rule 13.3** the default judgment should be set aside as the Second Defendant “has a real prospect of successfully defending the claim” on the authority of **Beswick v Beswick [1968] AC 58**, there being no privity of contract between the Claimant and

the Second Defendant. He submits (pursuant to **Rule 13.3 (2)**) that he applied for an order to set aside “as soon as reasonably practical after finding out that judgment had been entered”; and has “given a good explanation for the failure to file acknowledgment of service”.

[13] Counsel for the Claimant/Respondent argued *inter alia*, as follows:

1. The language of **Rule 5.9** gives options for service, one of which is “in any other way allowed by any enactment”. In consequence, he submits that service may be effected in accordance with **section 414** of the **Companies Act Cap 308**.
2. Service was effected on the Second Defendant in accordance with **Rule 5.9(b)** and/or **Rule 5.9(c)**. Service was effected on the General Manager of the Second Defendant by service on Adriana Seale, who signed on behalf of the General Manager at the Second Defendant’s then registered office.
3. While the Defendant applied to the Court promptly, the application to set aside must still fail because the Second Defendant gives no good explanation for its failure to file an Acknowledgement of Service and/or Defence, and further have no real prospect of successfully defending the claim.

4. There is a binding Collateral Contract in existence between the Claimant and the Second Defendant which obligates the Second Defendant to pay the amount owed by the First Defendant.

How Default Judgment is obtained

[14] The Rules provide that a Claimant may obtain a default judgment if the Defendant has not filed an Acknowledgment of Service or a defence to the claim, and the relevant time for doing so has expired.

[15] The Claim Form and Statement of Claim were “received” by Adriana Seale on April 17th 2015. In accordance with the **CPR** provisions, an Acknowledgement of Service was required to be filed by May 1st 2015 and a Defence by May 15th 2015. This not having been done, the Claimant applied for an obtained Default Judgment pursuant to **Part 12.4** of the **CPR**, which said judgment was given on March 21st, 2016.

Issues Arising

[16] The following issues arise from the facts outlined above:

1. Whether the Claim Form and Statement of Claim was effectively served on the Second Defendant on April 17th, 2015;
2. Whether the Second Defendant has a real prospect of successfully defending the claim;
3. Whether the Second Defendant has applied to the Court as soon as reasonably practicable after finding out that judgment had been entered and whether it had given a good explanation for its failure to file an Acknowledgement of Service or a Defence.

How service was effected

[17] On the 20th April 2015, the Claimant filed an Affidavit of Service, and as it relates to service of the Claim on the Second Defendant, Roslyn Best the agent of the Claimant, stated as follows:

“2. I did on Friday the 17th of April at approximately 8:55 a.m. serve the Second Defendant the Barbados Water Authority with a sealed and certified copy of a Claim Form filed herein on the 16th April, 2015 at their Offices at Manor Lodge, Lodge Hill, in the parish of Saint Michael by leaving same with Adriana Seale, who accepted same on behalf of the Second Defendant.”

[18] By subsequent Affidavit dated December 4th, 2015, the attorney at law for the Claimant filed another Affidavit of Service which stated as follows:

“1. I did on Thursday the 3rd day of December at approximately 4:35 p.m., serve the Second Defendant The Barbados Water Authority with a sealed and certified copy of a Claim Form filed herein on the 16th April, 2015 by leaving the same at the offices of Mr. Cecil McCarthy QC, Attorney at law, of Equity Chambers, 35 Roebuck Street, in the parish of Saint Michael, who accepted same on behalf of the Second Defendant.”

[19] When asked by the Court to clarify the circumstances of the service and the authority of the person who received the Claim Form, counsel filed another document titled Affidavit of Service under the hand of his process server Roslyn Best, effectively an addendum to the document of April 20th, 2015 at paragraph 3 which reads as follows:

“3. That at the time of the said service on the Second Defendant, the said Adriana Seale advised that she was instructed and authorised to accept service of the aforementioned Claim Form on behalf of the General Manager of the Second Defendant and duly stamped the Office copy of the Claim Form with the General Manager’s Stamp. A copy of the page from the said office copy of

the Claim Form showing the stamp from Ms. Seale is exhibited hereto and marked RB1.”

[20] The Claimant’s copy is stamped with the stamp of the General Manager Water Authority above which is handwritten “Adriana Seale for”.

Discussion

[21] The general learning is that service is not a mere formality. The learned author Adrian Zuckerman in his text **Zuckerman on Civil Procedure; Principles of Practice, Third Edition**, speaks to service being a fundamental requirement of justice, in the following words:

“Service is the means by which a party fulfils its obligation of bringing court documents to the attention of another party to the proceedings. Service generally, and especially service of originating process such as that of the claim form, is no mere formality.”

[22] For service to be effective the Claimant must use one of the permitted methods of service for the purpose of serving the claim form.

What must be done to serve the Claim Form

[23] Service of a Claim Form is governed by **Rule 5.9** of the **CPR**, entitled “**Service on a Body Corporate**”, which provides as follows:

“Service on a body corporate, other than a limited company may be effected

- (a) By sending the claim form by pre-paid post to the principal office of the body corporate; or
- (b) By serving the claim form personally on any principal officer of the body corporate; or
- (c) In any other way allowed by any enactment.”

In this Rule, “principal officer” means “the Chairman or President of the body, the Chief Executive Officer, Secretary or Treasurer or other similar officer of the body.”

- [24] The Second Defendant is a Statutory Corporation established by Act of Parliament (**Barbados Water Authority Act, Cap. 274A** and a body corporate within the meaning of **Rule 5.9**).
- [25] It is the Court’s view that since **5.9(a)** and **(c)** are not relevant on the facts (there was no service by post and **section 414 of the Companies Act Cap. 308** is not applicable), that service on these facts could only have been “personal service” in accordance with **Rule 5.9(b)**. It is noted that **(a)**, **(b)** and **(c)** are listed in the alternative **(or)**.
- [26] Personal Service in accordance with this rule involves leaving the Claim with one of the persons listed above.
- [27] Adriana Seale is not one of the persons listed above, but she purports to act on the authority of the General Manager of the Barbados Water Authority, who without doubt would fall under aegis of “other similar officer of the body”.
- [28] The Second Defendant suggests that she did not have the authority to receive process, she was not even the General Manager’s Secretary and the location where she worked (and received process) was not even the Head Office of the Statutory Corporation. No information is volunteered by the Claimant as to

where the office of the General Manager is located and why the decision was made to serve this document at a location other than the head office.

[29] Other than the fact that she had in her possession the General Manager's stamp, there is nothing to establish that she had the authority to act for the General Manager.

[30] The burden of establishing the validity of service in accordance with CPR falls on the Claimant. There is no presumption of service; there is the concept of 'deemed service', but that is inapplicable to the circumstances at hand.

[31] Counsel for the Second Defendant in his Written Submissions makes reference to **Civil Appeal No. 21 of 2000 Royal Caribbean Hotels Ltd v Barbados Development Limited et al**, in which **Chief Justice Simmons** (as he then was) speaks to the importance of personal service of a writ of summons as follows:

“The law insists that a defendant must be served personally to ensure that he knows of the proceedings against him. To omit to serve a defendant and then proceed to secure a series of orders against that defendant, strikes at the roots of fundamental justice. In our judgment, the defect of procedure in this case is so fundamental as to entitle Royal Caribbean, ‘ex debito justitiae’, to have the orders of Moore J and Blackman J avoided and set aside.”

[32] In this case, a Consent Order was set aside on the basis of what the Court of Appeal characterised as “the procedural point”, that is, that there was no service on Royal Caribbean, a named party with an interest as a mortgagor.

[33] The UK Court of Appeal, like our Court of Appeal, in the case of **Bethel Construction Ltd v Deloitte and Touche [2011] EWCA Civ 1321, [9]**, emphasised the fact that the Rules as they relate to service must be strictly followed:

“... Service of the claim form must be effected in the manner for which the rules provide. Compliance with those provisions may be waived and a defendant may be stopped from relying on a failure to comply but that depends on the actions of the defendant... The rules are there to be complied with. They are capable of amendment in accordance with the Civil Procedure Act 1997 but not by the unilateral act of the claimant.”

[34] **Zuckerman** states at **5.26** that this passage “expresses a strong judicial policy to enforce compliance with the rules of service, which means that the court is unlikely to come to the aid of a claimant who has made a mistake or followed a sloppy practice”.

[35] It was the responsibility of the Claimant to show that Adriana Seale was a person authorized to receive process and it has failed to do so.

Findings

[36] It is the finding of this Court that there was no valid service of this Claim, although the Second Defendant clearly had notice of the Claim. In this regard this Court adopts the approach and ruling of the UK Court of Appeal in **Towers v Morley [1992] 1WLR 511**, where it was held that the mere fact

that the defendant knew that a writ had been issued, and even paid money into court, was not enough and the claim was set aside on the grounds that the writ had not been served.

[37] This service was so fundamentally incorrect that it should not be cured by the general discretion to cure defects to be found at **Rule 26.4 (3)**.

[38] Judgment entered pursuant to the purported service was irregular and should be overturned.

[39] It is significant that after counsel for the Claimant spoke with counsel for the Second Defendant, sometime in the latter part of 2015, that counsel for the Second Defendant agreed to accept service of the Claim Form and Statement of Claim. It is significant and taken as an admission by counsel as to the invalidity of the first purported service, that he deposes in his Affidavit of Service dated and filed December 4th 2015 as follows:

“1. I did on Thursday the 3rd day of December at approximately 4.35 p.m serve the Second Defendant The Barbados Water Authority with a sealed and certified copy of a Claim Form filed herein on the 16th day of April, 2015 by leaving the same at the offices of Mr. Cecil McCarthy, Attorney at law, of Equity Chambers, 35 Roebuck Street, in the parish of Saint Michael, who accepted same on behalf of the Second Defendant.”

[40] This was service of originating process and not copies of documents already served provided as a courtesy.

[41] It is also curious that judgment was entered in March/April 2016 when the file shows quite clearly that the Registration Department had on December 18th,

2015 received the Acknowledgement of Service of counsel Mr. McCarthy QC on behalf of the Second Defendant. There is persuasive authority for the position that where a defendant files an acknowledgment late, the claimant would not thereafter be able to obtain a default judgment notwithstanding the lateness of the acknowledgment: see **Zuckerman 6.4** where he states as follows:

“... A defendant who has missed the deadline for acknowledging service or for serving a defence will normally be allowed to do so, but if the claimant has in the meantime applied for a default judgment, the court would normally extend the time for serving the defence on terms that the defendant pay the claimant’s costs.”

[42] This matter is determined on the basis of an invalid service, but were this Court to make this determination in accordance with **Rule 13**, it makes the further observation that there is an explanation as to why there was no Acknowledgement of Service in May 2015 (note that there was an Acknowledgement filed in December 2015 after the December 3rd 2015 service), and that in accordance with the standard established by **Swain v Hillman [2001] 1All ER 91 and ED & F Man Liquid Products Ltd v Patel and Anor [2003] EWCA Civ 472**, both frequently followed in this jurisdiction, there is evidence that the Second Defendant has a real prospect of successfully defending this claim. There is an issue of law and fact as to whether there exists a Collateral Contract between the Claimant and the Second Defendant, the terms of such contract, if it exists, and whether those

terms have in fact been breached (it is noted that the stated position of the First Defendant was that full payment had been made.) The Claimant has agreed/conceded that the Second Defendant applied to the Court as soon as reasonably practicable after finding out the Judgment had been entered.

Disposal

[43] In view of the above, I make the following Orders:

1. The default judgment entered April 11th 2016 is hereby set aside.
2. Leave is granted to the Second Defendant to file its Defence within 14 days of the date of this judgment.

[44] The normal rule is that the successful party is entitled to his costs. However, in the circumstances of this case I decline to make an award of costs.

MARGARET A. REIFER
Judge of the High Court