

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2023/0192

BETWEEN:

[1] RICHARD FREDERICK

Claimant

and

[1] MINERVA WARD

Defendant

Appearances:

Mr. Jared Jagroo for the Claimant; and
Ms. Vanessa Pinnock for the Defendant

2024: June 17
August 21

JUDGMENT

[1] **SAUNDERS, M:** The Claimant's ("*Mr. Frederick's*") claim is in defamation concerning statements allegedly made by the Defendant ("*Ms. Ward*") on her Facebook page. According to Mr. Frederick, Ms. Ward resides in Ontario, Canada¹ and so on 19 May 2023 he applied ("*the Service Application*") for permission to serve her out of the jurisdiction pursuant to the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("*the Rules*")². The Service Application was granted by an order dated 25 May 2023 ("*the Service Order*") which recited that the order was being made "*Upon the Court being satisfied*

¹ See affidavit of Mr. Frederick filed 19 May 2023.

² Neither party contended that the governing rules were the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023. Indeed, the effect of Part 75.3 of the Revised 2023 rules is that the 2000 Rules continue to govern proceedings which have not yet had a case management conference and were initiated prior to the Revised 2023 rules entering into force on 31 July 2023.

*that the Claimant is entitled to the relief sought having satisfied the criteria in Part 7 Rule 7.5 of the Civil Procedure Rules 2000 as amended*³.

[2] On 7 August 2023 Ms. Ward challenged the Service Order by applying (“*the Jurisdiction Application*”) for, among other things, a declaration that the Court has no jurisdiction, or, ought not to exercise its jurisdiction to hear Mr. Frederick’s claim. The Jurisdiction Application is premised, in summary, on the grounds that:

- a. No information was supplied by Mr. Frederick to persuade the Court that he had satisfied Part 7.5(1) of the Rules and that St. Lucia was the appropriate forum for the trial;
- b. Neither of the affidavits in support addressed whether (pursuant to Part 7.3(4)), the alleged publication took place, or, damage was sustained by Mr. Frederick, within the jurisdiction;
- c. The Service Order did not provide sufficient reasons to justify the decision; and
- d. Mr. Frederick was in contempt of the Service Order as he had not filed an affidavit that he had satisfied its terms within seven (7) days of service as had been mandated.

[3] On 17 June 2024, I heard oral submissions concerning the Jurisdiction Application and, for the reasons set out further below, have decided that:

- a. The Court has no jurisdiction to hear the Claimant’s Claim;
- b. The Court’s Order dated 25 May 2023 must be discharged pursuant to Part 9.7(6)(a);
- c. The service on Ms. Ward of the claim and the materials relevant thereto must be set-aside pursuant to Part 9.7(6)(b); and
- d. I will hear the parties’ submissions as to the costs of the Jurisdiction Application at the next hearing of the matter.

³ Order dated 25 May 2023.

Service out of the jurisdiction under the Rules

[4] The Court's remit on an application for service out of the jurisdiction can be gathered from the Court of Appeal decision **Thornton Tomasetti Inc v Anguillan Development Corporation Ltd.** AXAHCVP2014/0008. In that appeal Blenman JA decided that on an application to serve out of the jurisdiction, the claimant is seeking to persuade the court of the appropriate forum for the trial of the action⁴. It is a burden which rests upon the claimant alone⁵ and that is even so at the application to set aside service⁶. On determining the application, the Court's complete role is as follows:

- a. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both⁷.
- b. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other⁸.
- c. Third, the claimant must satisfy the court that in all the circumstances the forum which is being seised is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction⁹.

[5] Blenman JA would repeat her guidance in **Thornton Tomasetti Inc** in the decision **Stanford International Bank Limited v. Proskauer Rose LLP** ANUHCVP2018/0011. In **Stanford International Bank Limited** Her Ladyship decided that "*a claim form may be served out of the jurisdiction only if: (a) the case falls within one of the categories covered in rule 7.3; and (b) the court gives permission*"¹⁰. Blenman JA went on to decide in **Stanford International Bank Limited** that because the evidence adduced by the claimant failed to

⁴ **Thornton Tomasetti Inc v Anguillan Development Corporation Ltd.** AXAHCVP2014/0008; [20].

⁵ *Ibid*; at [20].

⁶ *Ibid*; at [21].

⁷ *Ibid*; at [19].

⁸ *Ibid*; at [19].

⁹ *Ibid*; at [19].

¹⁰ *Ibid*; at [51].

demonstrate that there was any tort committed in Antigua, or, that damage was sustained within that jurisdiction flowing from the commission of the tort, there was no basis for concluding that there was an arguable case for granting service out of the jurisdiction.

- [6] Turning to what Part 7.3 does provide, Part 7.3(1) of the Rules introduces the “gateways” through which a claimant may obtain permission to serve a claim abroad by stating as follows: *“The court may permit a form to be served out of the jurisdiction if the proceedings are listed in this Rule”*. Part 7.3(2) goes on to describe certain general preconditions which must be observed (depending on the type of claim) to receive permission to serve out of the jurisdiction, including that:

“Features which may arise in any type of claim

A claim form may be served out of the jurisdiction if a claim is made –

(a) Against someone on whom the claim form has been or will be served, and -

(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and

(ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is necessary or proper party to claim.”

- [7] Part 7.3(4) then sets out what is to be proved in respect of claims concerning torts specifically, prescribing that:

“Claims in tort

7.3(4) A claim form may be served out of the jurisdiction if a claim in tort is made and the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction.”

- [8] The Service Application was premised, simply, on the grounds and evidence that, Mr. Frederick has a claim against Ms. Ward which has a realistic prospect of success, Ms. Ward is a St. Lucian national living in Canada and there was no

other means of serving her. A supplemental affidavit was eventually filed¹¹ to make it clear that Ms. Ward was going to be served personally and that no application was being made for service by a substituted method. As is the gist of the Jurisdiction Application, Mr. Frederick presented no evidence to persuade the Court that St. Lucia was the appropriate forum for the trial. Notwithstanding that, the Service Order was made and Mr. Frederick received permission to serve Ms. Ward outside of the jurisdiction.

The Jurisdiction Application

[9] Part 9.7, which is the rule that sets out the procedure for disputing jurisdiction, is as follows:

“Procedure for disputing court’s jurisdiction

9.7(1) A defendant who disputes the court’s jurisdiction to try the claim may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.

(3) An application under paragraph (1) of this Rule must be made within the period for filing a defence; the period for making an application under this Rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence.

**Rule 10.3 sets out the period for filing a defence.*

(4) An application under this Rule must be supported by evidence on affidavit.

(5) A defendant who –

(a) files an acknowledgement of service; and

(b) does not make an application under this Rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim.

(6) An order under this Rule may also –

(a) discharge an order made before the claim was commenced or the claim form served;

¹¹ On 23 May 2024.

(b) set aside service of the claim form; and

(c) strike out a statement of claim.

(7) If on application under this Rule the court does not make a declaration, it –

(a) may –

(i) fix a date for a case management conference; or

(ii) treat the hearing of the application as a case management conference; and

(b) must make an order as to the period for filing a defence.

**Part 26 sets out powers which the court may exercise at a case management conference.*

(8) Where a defendant makes an application under this Rule, the period for filing a defence is extended until the time specified by the court under paragraph (7)(b) and such period may be extended only by an order of the court.

** Rule 10.3(4) deals with an application to stay proceedings where there is a binding agreement to arbitrate.” [emphasis added]*

[10] Mr. Frederick, in response to the Jurisdiction Application, has argued, in summary, that:

- a. The Jurisdiction Application is an abuse of process because it seeks to now challenge the Service Order, without having applied to set it aside under Part 7.7;
- b. He did not need to satisfy Part 7.5(1) or 7.5(1)(d) as the claim was made pursuant to Part 7.3(4);
- c. Ms. Ward does not dispute that she was in fact properly served as she has filed an Acknowledgement of Service¹².
- d. St. Lucia is an appropriate forum because the claim has a realistic prospect of success and was filed after disparaging attacks against Mr. Frederick;
- e. Even if the court is minded to set-aside the Service Order, this case is an appropriate one to dispense with service as in **Anselm Caines v Everton Powell** NEVHCV2020/0125.

¹² filed 19 July 2023.

[11] The following issues therefore arise for determination on the Jurisdiction Application:

- a. Whether Ms. Ward can set-aside service of the claim with the Jurisdiction Application;
- b. Whether Mr. Fredrick, in the Service Application, was required to satisfy Part 7.5(1) of the Rules having served his claim under Part 7.3(4);
- c. Whether the filing of an Acknowledgment of Service obviates the need for the Court to consider if service out of the jurisdiction should have been granted;
- d. Whether St. Lucia is the appropriate forum because the claim has a realistic prospect of success in light of Ms. Ward's alleged attacks; and
- e. Whether the Court should dispense with service.

Whether Ms. Ward can set-aside service of the claim with the Jurisdiction Application.

[12] The word "*jurisdiction*" in Part 9.7 connotes both the Court's *in personam* jurisdiction and whether the Court has the authority or should exercise its authority to try a claim initiated within the jurisdiction¹³. At the hearing of the oral arguments both parties made submissions regarding whether Part 9.7 could be invoked to challenge a previous order granting service out of the jurisdiction. Although at the time it seemed to me that Part 9.7 could not be invoked in that fashion as there is a specific rule which deals with such an application (Part 7.7), upon further reflection the following clearly militates against my *prima facie* view:

- a. Parts 9.7(6)(a) and (b) provide, explicitly, that the Court may both set-aside service as well as an order made prior to the service of the claim, respectively. It is not hard to understand why the High Court should have the authority to review a previous order as material may come to its attention during a Part 9.7 application which could question whether permission to serve out should have been granted. Additionally, the ability to set-aside service on a Part 9.7 application permits a defendant to address both the issue of the appropriate forum as well as the procedural propriety concerning the service of the claim in one application. Otherwise, a

¹³ **Davidson Ferguson v Sarah Anita Ferguson** SLUHCv2012/0387; at [25].

defendant would be required to file two applications, both dealing with questions concerning jurisdiction.

- b. Note 7.1 of **The Caribbean Civil Court Practice**, 3rd Edn states that the provisions related to setting aside service of the claim should be used in close conjunction with the Part 9 provisions relating to disputing the Court's jurisdiction where the proceedings involve service out of the jurisdiction¹⁴. See also vol 1 of the **Civil Court Practice 2024 (the Green Book)** which notes that, on an application to dispute jurisdiction under the English CPR¹⁵, a defendant is entitled to complain that service was incorrectly obtained, and they should therefore not have been served¹⁶; and
- c. There are a plethora of cases concerning jurisdiction applications where orders were sought to set aside service on the basis that permission to serve out of the jurisdiction was improperly granted. See e.g. the United Kingdom Supreme Court decision **Okpabi et al v Royal Dutch Shell Plc** [2021] UKSC 3 in which the respondents challenged the court's jurisdiction and sought to set aside service of the claim out of the jurisdiction on the basis that the claim did not in fact have a realistic prospect of success. See also **Canada Trust Co. and Others v. Stolzenberg and Others (No. 2)** [1998] 1 WLR 547 which was decided under the old English Rules of the Supreme Court.

[13] Considering all of the above I am of the view that Ms. Ward is entitled to challenge, or, set aside the Service Order under Part 9.7 of the Rules.

¹⁴ pg. 142.

¹⁵ In **Texan Management Ltd and Others v Pacific Electric Wire & Cable Company Ltd** [2009] UKPC 4 (British Virgin Islands) the Judicial Committee of the Privy Council decided that the English civil procedure rules concerning disputing jurisdiction are essentially *in pari materia* with Part 9.7 of the Rules.

¹⁶ pgs. 1913-1914.

Whether Mr. Fredrick, in the Service Application, was required to satisfy Part 7.5(1) of the Rules having served his claim under Part 7.3(4).

[14] Part 7.5(1), including 7.5(1)(d), of the Rules is the Part which tells Mr. Frederick how he was supposed to have structured the Service Application. It provides as follows:

“Permission to serve claim form out of jurisdiction

7.5(1) An application for permission to serve out of the jurisdiction may be made without notice but must be supported by evidence on affidavit stating–

(a) the grounds on which the application is made;

(b) that in the deponent’s belief the claimant has a claim with a realistic prospect of success;

(c) in what place, within what country, the defendant may probably be found; and

(d) if the application is made under rule 7.3(2)(a), the grounds for the deponent’s belief that the conditions are satisfied.

...”

[15] It does not assist Mr. Frederick to say that he served his claim in reliance on Part 7.3(4) of the Rules. Given what I have set out above¹⁷, Part 7.3(4) must be read in the context of the whole of Part 7.3 (including, Parts 7.3(1) and 7.3(2)). Part 7.3(1) introduces the “gateways” to obtain permission, Part 7.3(2) contains general preconditions applicable to all claims to which they are relevant before other specific preconditions are stipulated (the actual gateways) in respect of certain causes of action at Part 7.3(3)-(10). Per Part 7.5(1)(a), the grounds of the Service Application should have been those in respect of a claim brought under the tort gateway, Part 7.3(4). All Part 7.5(1)(d) says is that an applicant should comply with the general precondition at Part 7.3(2)(a) which authorises service on an accessory. That Part (7.3(2)(a)) was therefore not relevant to the Service Application.

[16] No evidence, however, was submitted by Mr. Frederick in the course of the Service Application concerning the requirements of Part 7.3(4)- Mr. Frederick’s

¹⁷ At [4]-[8] of this decision.

chosen gateway. That is, evidence that *“the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction”*¹⁸. That information is certainly of the kind which is relevant under Part 7.5(1)(a). While I acknowledge that a cause of action may be made out on Mr. Frederick’s pleadings, the following questions so far as publication and damage remain at large for the purpose of the Service Application:

- a. Where were the alleged defamatory words published? In **Lennox Linton et al v Kieron Pinard-Byrne** DOMHCVAP2011/0017 Michel JA at [57] decided that in the case of internet material, publication takes place in the jurisdiction(s) where the internet content is downloaded. Michel JA then went on to consider whether, in applying that principle, publication had been proved. The Learned Judge commented as follows regarding the evidence of a Mr. Bellot in his witness statement and at trial regarding that issue:

“The respondent’s witness, Parry R. Bellot, in a witness statement loaded with hearsay and opinion evidence, seemed to have said everything other than that he downloaded the first appellant’s article in Dominica from the third appellant’s website. He also said quite a lot under cross-examination, sometimes unrelated to the questions asked of him, but did not say that he downloaded the internet article in Dominica”

In my view it was very material to the Service Application, whether and to what extent, the alleged defamatory material was downloaded or viewed by persons in St. Lucia as that evidence is the only basis upon which the Court can be satisfied that the first limb of Part 7.3(4)¹⁹ has been fulfilled. It is not axiomatic that because the website contained political material relevant to St. Lucia, that it was being downloaded or viewed by persons in St. Lucia. For example, the defendant’s website may be one which is viewed only, or, mainly by St. Lucian expatriates in Ontario. The Court is not able to know one way or the other without the relevant evidence and cannot act on a presumption; and

¹⁸ Part 7.3(4) of the Old Rules.

¹⁹ *“That the act causing the damage was committed within the jurisdiction...”*.

- b. Following on from the above, how can the Court be satisfied that the damage was suffered within the jurisdiction unless evidence is given, at the very least, concerning the fact that the material was consumed, so to speak, in St. Lucia? Mr. Frederick suggested in his written submissions that because the material concerns local politics and he is a well-known politician, obviously, it would have impacted upon his reputation. The question in relation to the Service Application, and now the Jurisdiction Application, is whether Mr. Frederick has given evidence that his reputation was impacted by the alleged defamatory publications within the jurisdiction.

Whether the filing of an Acknowledgment of Service obviates the need for the Court to consider whether service out of the jurisdiction should have been granted.

- [17] For the reasons I have set out at [4]-[8] of this decision, the issue is not simply whether Ms. Ward has received the court documents. The issue is whether Mr. Frederick was entitled to have served Ms. Ward. For the reasons I have set out at [12]-[16], he was not.

Whether St. Lucia is the appropriate forum because the claim has a realistic prospect of success in light of Ms. Ward's alleged attacks.

- [18] For the reasons I have set out at [4]-[8] of this decision, the issue is not, solely, whether there appears to be a viable cause of action in St. Lucia. The issue that must first be determined is whether the St. Lucia High Court has jurisdiction to hear the claim.

Whether the court should dispense with service.

- [19] Without evidence that St. Lucia is the appropriate forum, the Court is not able to dispense with service for the reasons I have set out at [12]-[16] above. Insofar as the decision **Anselm Caines v Everton Powell** NEVHCV2020/0125 was cited to me in which the Court dispensed with service in a defamation claim where service out had been granted, two facts suggest that decision is distinguishable:

- a. The claimant in **Anselm Caines** did produce some evidence concerning the viewership of the published material in St. Christopher and Nevis²⁰; and
- b. The decision was successfully appealed and the order dispensing with service was set aside²¹.

Conclusion

[20] For all the reasons set out above, the Jurisdiction Application should be granted. Mr. Frederick has not provided sufficient evidence to persuade the Court that he has satisfied Part 7.5(1) of the Rules. The affidavits have not adequately treated with the questions whether (pursuant to Part 7.3(4)), the alleged publications took place, or, damage was sustained by Mr. Frederick within the jurisdiction. I will therefore grant the declaration, discharge the Service Order, set-aside the service of the claim on Ms. Ward and hear the parties on the issue of costs at the next hearing of the matter. My Order is as follows:

- a. The Court has no jurisdiction to hear the Claimant's Claim for all the reasons set out above;
- b. The Court's Order dated 25 May 2023 is discharged pursuant to Part 9.7(6)(a);
- c. The service on Ms. Ward of the claim and the materials relevant thereto is set-aside; and
- d. I will hear the parties' submissions as to the costs of the Jurisdiction Application at the next hearing of the matter.

[21] Having determined the Jurisdiction Application in Ms. Ward's favour, I have not gone on to consider whether it can be contended that the reasons set out in the Service Order were inadequate as that issue has been overtaken.

Yuri Saunders

Master

Registrar

²⁰ **Anselm Caines v Everton Powell** NEVHCV2020/0125; at [25]-[31].

²¹ NEVHCVAP2022/0013 (certificate of result).