

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

SAINT LUCIA

[1] Claim Number: SLUHCV2021/0130

BETWEEN

MARK D. MARAGH

Claimant

-and-

[1] RICHARD FREDERICK

[2] MC DOWELL BROADCASTING CORPORATION (MBC) LIMITED

[3] COLUMBUS COMMUNICATIONS (ST. LUCIA) LIMITED dba AS
FLOW

Defendants

Heard with:

[2] Claim Number: SLUHCV2021/0281

BETWEEN

MARK D. MARAGH

Claimant

-and-

[1] RICHARD FREDERICK

[2] MC DOWELL BROADCASTING CORPORATION (MBC) LIMITED

[3] COLUMBUS COMMUNICATIONS (ST. LUCIA) LIMITED dba AS
FLOW

Defendants

Before Master Alvin Pariagsingh

Appearance: V. Dexter Theodore KC and Garth Patterson KC for the Claimant in both matters;
Horace Fraser for the First Defendant in both matters;
Thaddaeus Antoine and Kenroy Denver Justin for the Second Defendant in both matters; and
Deale Lee and Renee St. Rose for the Third Defendant in both matters.

2022: November 15
2023: February 20

JUDGEMNT

[1] **PARIAGSINGH, M:** - There are five (5) applications before the Court in these two claims which are being heard together. The first four applications are in the first matter. The fifth application is in the second matter. They are:

1. The Claimant's request for judgment in default against the First Defendant.¹
2. The First Defendant's application disputing the Court's jurisdiction.²
3. The Third Defendant's application disputing the Court's jurisdiction.³
4. The Second Defendant's amended application disputing the Court's jurisdiction.⁴
5. The Second Defendant's application disputing the Court's jurisdiction (in the second claim).⁵

THE APPLICATIONS BY AND AGAINST THE FIRST DEFENDANT:

[2] The general rule is that applications are heard and determined in order of the priority of their filing. This is of course, subject to the exception that the Court may hear the applications in a different order where there may be some practicality in so doing.

[3] The application filed by the First Defendant disputing the jurisdiction of the Court, if determined in favour of the First Defendant will bring the proceedings against him to an end. Such a determination will render the Claimant's application otiose.

¹ Filed on April 20, 2021

² Filed on April 27, 2021

³ Filed on April 28, 2021

⁴ Filed on July 01, 2021

⁵ Filed on July 20, 2021.

[4] In my view therefore, the First Defendant's application to dispute the Court's jurisdiction ought to be heard before the Claimant's application for default judgment against him and I so hold.

FIRST DEFENDANT'S APPLICATION TO DISPUTE JURISDICTION:

[5] For the necessary context, it is important to mention a few facts. These are:

1. The first claim, a claim in defamation, was commenced by Claim Form and Statement of Claim.⁶
2. An affidavit of service was filed by the Claimant deposing that the First Defendant was served with the Claim Form, Statement of Claim and Notice of Authorization Code.⁷
3. The First Defendant has not filed an acknowledgment of service in this claim.
4. The Claimant applied for judgment in default of an acknowledgement of service or a sum to be decided by the Court.⁸
5. The first claim was then listed for case management before a Master together with the second claim. At the first case management conference a mediation referral order was made.⁹
6. It was subsequently reported to the Court that the parties did not settle this matter at mediation.¹⁰

⁶ Filed on April 01, 2021

⁷ Affidavit of Ernest Lafeuillee filed on April 02, 2021

⁸ Filed on April 20, 2021 – Note the title of document references judgment in default of a defence by the body of the document refers to judgment in default of an acknowledgement of service.

⁹ Order of Michel M (Ag.) made on March 04, 2022.

¹⁰ Notice of Outcome of Mediation of Mr. Urban Dolar filed on June 28, 2022

The First Defendant's submissions on prescription:

[6] The First Defendant firstly contends that the method of service is disputed.¹¹ He disputes the facts averred by Mr. La Feuille in his affidavit of service. He contends that the documents were thrown on the ground about 20 feet from where he was standing.

[7] The First Defendant also contends that he was purportedly served on a public holiday, April 02, 2021.¹² As such, he contends that the deemed date of service on him is April 05, 2021.¹³

[8] The First Defendant contends that as the deemed date of service was April 05, 2021 there was no judicial demand on him before time became prescribed. As such he contends that this Court has no jurisdiction.¹⁴

[9] The First Defendant relied on Articles 2101, 2123 (1), 2085 and 2087 of the Civil Code as well as Parts 6.2 (2) and (3) CPR.¹⁵

[10] The nub of the First Defendant's submission is that since the claim was served on a public holiday the deemed date of service is the next business day.

[11] There is no dispute that the prescription period for defamation claims is one year. Where the parties part company is when this period is reconciled from. This point arises later in my judgment but for the purpose of this application it is not necessary to resolve it now.

¹¹ Paragraph 1.3 of the First Defendant's submissions.

¹² April 02, 2021 being Good Friday in Saint Lucia in 2021.

¹³ Paragraph 1.5 of First Defendant's submissions.

¹⁴ Reference was made to the cases of David Sweetnam & Anor v The Attorney General & Anor Civil Appeal No. 42 of 2005 (Saint Lucia) and Walcott v Serieux – Civil Appeal No. 2 of 1975.

¹⁵ CPR- Civil Proceedings Rules 2000 as amended.

The Claimant's submissions:

[12] The Claimant contends that the service on April 02, 2021 was good service.

[13] The Claimant submitted that prescription is a defence and must be pleaded.¹⁶

[14] The Claimant also contended that the Court of Appeal held that Section 8 (3) of the UK Defamation Act applies to Saint Lucia. For this reason it was submitted that time for the purpose of prescription is reconciled from the date on which the publication first came to the attention of the Claimant and not the date of first publication of the defamatory statements.¹⁷ This date of knowledge he submits has to be pleaded by the Defendant and is a matter for resolution on evidence.

[15] I have approached this authority with caution as this case has been appealed to the Board.¹⁸

Resolution of prescription issue.

[16] In my view the issue of prescription is not as involved so as to consider the reconciling of the period. The First Defendant's argument about being served on a public holiday is in my view without any merit. Part 6.6CPR relied on by the First Defendant does not apply to service of a claim. That part applies to service of other documents.

[17] In relation to service, whilst the First Defendant made heavy weather of the manner in which he was served and whether it amounts to proper service I am unable to find that the service was not proper.

¹⁶ Paragraph 8 of Claimant's submissions. Reference was made to Aurelien v Chitoli – SLUHCV2008/0946

¹⁷ Reference was made to Chastanet v Hilaire – SLUHCVAP2019/0005

¹⁸ Appealed to the Board in appeal No. JCPC2021/0007 listed for hearing on February 23, 2023 before Lord Lloyd-Jones, Lord Leggatt, Lord Burrows, Lord Stephens, Lady Rose.

[18] The Claimant bears the obligation to prove proper service. The Claimant has filed affidavit evidence setting out the day, time, place and manner of service. The First Defendant disputes that and asserts a different version of facts.

[19] The rules provide for cross examination in interlocutory proceedings with leave. The First Defendant did not apply to cross examine the Claimant's witness on service. I therefore accept the Claimant's evidence on service as I am unable to resolve this factual dispute on conflicting affidavits without more.

[20] In addition, I was particularly impressed with the detail of particularity of service set out in the affidavits dealing with service. These details included time stamped photographs to corroborate service as contended. I therefore find as a fact that the First Defendant was properly service with this claim on April 02, 2021.

[21] In summary, whether the law is determined to be that the period of one year is reconciled from the date of the publication of the statement or the date of knowledge of the Claimant, the latter only being possible on a later date from the former, the earliest date that time could possibly be held to expire for the purpose of prescription is April 02, 2021 in this claim.

[22] The claim having been served on the last date of this period, a proper judicial demand was made on the First Defendant before the period of prescription expired and I so hold.

[23] Accordingly, the First Defendant's application must fail.

[24] There is no reason to depart from the general rule that costs follow the event. The First Defendant must therefore pay the Claimant's costs of the application to be assessed by this Court in default of agreement within 28 days from today on the application of either party.

**THE CLAIMANT'S APPLICATION FOR JUDGMENT IN DEFAULT OF AN
ACKNOWLEDGMENT OF SERVICE:**

[25] The application itself has in its title that judgment is being sought in default of a defence.

In the body of the document it refers to judgment in default of acknowledgment of service.

[26] This request was filed seventeen (17) days after service of the claim on the First Defendant. Although the title of the request states request for judgment in default of a defence the body of the document refers to judgment in default of acknowledgment of service.

[27] By priority of reason, the application for default judgment can only be for judgment in default of an acknowledgment of service. Bannister J (Ag.) in **Integral Petroleum SA v Melares Group Limited**¹⁹ discussed what is a claim for a fixed sum of money and opined that default judgment can only be granted for failure to file an acknowledgement of service if the claim is for a fixed sum. I agree and adopt his reasoning set out in his judgment.

[28] The Board in its recent decision **Lux Locations Limited v Yida Zhang**²⁰ commended a similar approach to that stated in **Integral Petroleum SA (supra)**. In essence, a party cannot obtain judgment in default of an acknowledgment of service if the relief claimed is not a fixed sum.

[29] This is a claim for damages for defamation. A perpetual injunction is also sought. It is not a claim that is susceptible to a judgment in default of acknowledgement of service and I so find.

¹⁹ BVIHCOM2015/0087

²⁰ [2023] UKPC 3

[30] Accordingly, the Claimant's request for judgment in default of an acknowledgement of service against the First Defendant is refused. As there is no participation by any party in such an application, there shall be no order as to costs.

THE THIRD DEFENDANT'S APPLICATION TO STRIKE OUT AND DISPUTING THE COURT'S JURISDICTION:

[31] In its acknowledgement of service²¹ the Third Defendant contends that it was served on April 14, 2021. It contends that by that time, time was prescribed for the bringing of this claim.

[32] The Claimant counters that with the argument that time is reconciled from the date of knowledge of the defamatory statement. As stated above, the issue of the correct interpretation of the relevant section of the Code²² is set to be heard by the Board on February 23, 2023.

[33] Whether the Claimant is correct or not raises two questions. The first is does the Claimant have to plead the date the statements came to his knowledge; and the second being, does the Third Defendant have to plead prescription.

[34] It is common ground that prescription is very different from limitation. The former extinguishes both right and remedy and goes to the jurisdiction of the Court. The latter is a procedural bar to enforcement. The UK Defamation Act prescribes a period to bring an action for defamation based on the Limitation Act UK. The UK has a common law system and not a civil law or mixed jurisdiction as Saint Lucia. The law in relation to pleading limitation as a defence has been long settled in common law jurisdictions. Limitation must be pleaded.²³

²¹ Filed on April 15, 2021

²² Article 2123 of the Civil Code

²³ Kennett v Brown [1988] 2 All ER 600

[35] In his submissions, the Claimant shift the burden on the Defendants, saying that none of the Defendants have pleaded when the defamatory statements came to the attention of the Claimant. This in my view is simply untenable. It is hard to fathom how the Defendants or any of them would know when something came to the attention of the Claimant. The Defendants at best would be able to say when the statements were published, which is the date they have suggested for the purpose of prescription.

[36] In my view it must be that it is the Claimant who pleads a full cause of action including pleading facts that establish that his claim is within the prescription period. The Claimant has pleaded no such facts in his Statement of Claim. The Claimant simply states the date on which the alleged statements were made.²⁴ The Claimant make no aversion that he did not have knowledge of the statements when they were made or that his knowledge of the statements came at a later date. This is in clear breach of his duty under Part 8CPR to put before the Court all facts relevant to this case.

[37] The onus was on the Claimant to plead all the facts to establish a cause of action. This would have included the date on which the alleged defamatory statements came to his knowledge. In the absence of this pleading I part company with the Claimant on his submission that the date of reconciling prescription is a triable issue which must be determined in accordance with evidence.

[38] In my view, even if prescription had to be specifically pleaded by the Third Defendant, in the absence of the Claimant specially pleading that the statement came to his knowledge on a particular day, the Court cannot determine when time started to run, that is still assuming the Claimant is correct in reconciling the prescription period.

[39] I next considered whether failure to plead a date of knowledge is fatal to the claim. I am mindful that pleadings are not closed. I am also mindful that the authorities establish that matters dealing with limitation cannot properly be raised in a reply. They must be raised in the statement of claim. Whilst the authority of **First Citizens Bank Limited v**

²⁴ See paragraph 8 of the Statement of Claim.

Shepyboys Limited²⁵ is not binding in this jurisdiction and deals specifically with pleading limitation, I adopt the reasoning set out therein. The Claimant must in my view plead the date of knowledge of the defamatory statements if he is alleging that time starts to run from that date. In the absence of that pleadings and barring amendment of the case, this defect in the case is incurable in my view.

[40] I have considered the authority of **Allert & Anor v Matheson & Ors**²⁶ which sets out the guiding principles in considering if to grant an amendment. The Court held that:

There are several factors that the court must take into consideration when deciding whether to exercise its discretion to amend a statement of case. These factors include: the justice to the parties; the legitimate expectation that the basis of a claim will not be fundamentally changed at the last minute; the adverse effect on other litigants of lost judicial time; the stage reached in the proceedings; whether the other side can be adequately compensated in costs; and whether the amendment will serve any useful purpose.

[41] Applying the factors above, the justice to the parties favours the determination of claims on its merits except in clear cases. This is not a clear case. If the Board determines that prescription is reconciled from the date of publication, the Claimant's case would not have offending the pleading rule. If the Board determines that the time is reconciled from the date of knowledge, the Claimant's claim can only be saved by an amendment. The legitimate expectation that the claim will not be changed at the last minute cannot be contended with any conviction in this case in my view. Pleadings are not closed. The claim is at the very embryonic stages. The lost judicial time and stage of the proceedings are fairly mitigated against because of the claim still being at the pleading stage. The amendment can be compensated in costs as will be ordered and the amendment will clearly serve a useful purpose. The Court will be able to know when time is being calculated from for the purpose of prescription. In my view therefore, an amendment should be permitted without reference to the draconian option of striking out at this stage.

²⁵ Procedural Appeal No. P231 of 20211 (Trinidad and Tobago Court of Appeal) unreported.

²⁶ GDAHCVAP2014/007

[42] In determining if the claim against the Third Defendant ought to be struck out, I also had regard, to the other points raised by the Third Defendant. The fact that the person served was a receptionist and that the authorization code was not served with the claim when it was served.

[43] Part 5 Rule 5.7 CPR²⁷ provides how service of a claim can be effected on a limited liability company. There are five (5) methods specified. The first method is to leave the claim at the registered office of the company.

[44] The Claimant contends that the claim was served at the registered office of the Third Defendant and it was signed for by the person who received it at the registered address. The Third Defendant has not averred that the documents were not served at its registered office.

[45] I note again, it is the Claimant who has the burden of proving service. The Third Defendant has not sought to cross examine the deponent of the affidavit of service on behalf of the Claimant. I am faced with a factual dispute as to whether the authorization code was served. In the absence of the Claimant's evidence on this issue being challenged, and it was not, I accept the Claimant's evidence that the authorization code was served with the claim at the registered office of the Third Defendant and I so find.

[46] The issue of who the document was served on does not arise. This issue arises when the claim is served at the place of business of the company which has a real connection with the company. In my view it is not material who the claim was served on.

²⁷ 5.7 Service on a limited company may be effected – (a) by leaving the claim form at the registered office of the company; (b) by sending the claim form by telex, FAX or prepaid post or cable addressed to the registered office of the company; (c) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim; (d) by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company; or (e) in any other way allowed by any enactment.

[47] Accordingly, unless the Claimant files and serves an amended Statement of Claim within seven (7) days specifically pleading when the alleged defamatory statements came to his knowledge, his claim against the Third Defendant is struck out with costs.

[48] The costs of this application shall be the Third Defendant's costs in the cause in any event.

THE SECOND DEFENDANT'S APPLICATION DISPUTING JURISDICTION:

[49] This application is premised on the fact that time began to run for the purposes of prescription on the day the alleged defamatory statements were made. Put another way, the application is made on the premise that the Claimant had knowledge of the alleged defamatory statements on the day it was made.

[50] For the same reasons set out above, I find that this application ought not to be granted until the Claimant pleads the date on which he had knowledge of the statements.

[51] The deficiency in the pleading does not in my view render the case hopeless. Accordingly. Unless the Claimant files and serves an amended Statement of Claim within seven (7) days specifically pleading when the alleged defamatory statements came to his knowledge, his claim against the Second Defendant is struck out with costs.

[52] The costs of this application shall be the Second Defendant's costs in the cause in any event.

THE SECOND DEFENDANT'S APPLICATION DISPUTING JURISDICTION IN THE SECOND CLAIM:

[53] The evidence is that this claim was served on the Production Manager of the Second Defendant at its place of business.

[54] The questions that arises is whether the Production Manager is a 'Manager' for the purpose of Rule 5.7(c) CPR and whether the place of business has a real connection with the Company.

[55] I find that both questions must be answered in the affirmative. Starting with the latter, the address the documents were served at is the place of business of the Second Defendant. It is difficult to see how this place does not have a real connection with the company. This is against the evidence that the registered office of the Second Defendant is listed as 'John Compton Highway'. The address listed is a road. This is not a proper or full address at which any process can be served.

[56] The Manager contemplated in Rule 5.7 (c) CPR must be a Manager who has a function in the upper management of the company. Whilst the affidavit evidence of Mr. Flermius is that he had no such function, I find that difficult and do not accept that to be so.

[57] Mr. Flermius did in fact bring the documents served to the attention of the appropriate officer and the necessary steps were taken. An acknowledgment of service and defence have been filed on behalf of the Second Defendant. The objective of service, to bring the claim to the attention of the persons who will carry on or direct the litigation on behalf of the Company has been achieved.

[58] Again as above, the issue of the reconciling of time has not finally been determined. Notwithstanding, pleadings are not as yet closed. The earliest date of knowledge can only be the day on which the statements were made. The claim was served on the one year anniversary of that day.

[59] Accordingly, this application fails. The Second Defendant must therefore pay the Claimant's costs of this application to be assessed by his Court in default of agreement within 28 days on the application of either party.

ORDERS:

[60] It is hereby ordered that:

1. The First Defendant's application filed on April 27, 2021 is dismissed;
2. The First Defendant shall pay the Claimant's costs of the application filed on April 27, 2021 to be assessed in default of agreement within 28 days from today on the application of either party;
3. The Claimant's request for judgment in default of an acknowledgment of service against the First Defendant filed on April 20, 2021 is refused with no order as to costs;
4. Unless the Claimant files and serves an amended Statement of Claim within seven (7) days specifically pleading when the alleged defamatory statements came to his knowledge, his claim against the Second and Third Defendants (in the first claim) is struck out with costs.
5. The costs of the Third Defendant's application filed on April 28, 2021 shall be the Third Defendant's costs in any event;
6. The costs of the Second Defendant's application filed on July 01, 2021 shall be the Second Defendant's costs in any event;
7. The Second Defendant's application (in the second matter) filed on July 20, 2021 is dismissed; and

8. The Second Defendant shall pay the Claimant's costs of the application filed on July 20, 2021 to be assessed by this Court in default of agreement within 28 days on the application of either party.

**Alvin Shiva Pariagsingh
High Court Master**

By the Court,

Registrar