

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE**

**SAINT CHRISTOPHER AND NEVIS**

**CLAIM NO: NEVHCV2020/0125**

**BETWEEN:**

**ANSELM CAINES**

Claimant

**and**

**EVERTON POWELL**

Defendant

**Appearances:**

Mr. Perry Joseph for the Claimant

Mrs. Sherry-Ann Liburd-Charles for the Defendant

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2022: May 30,  
June 27;  
September 26.  
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**RULING**

- [1] **GILL, M.:** This is the court's ruling on the defendant's application to set aside service of the claim on him, which was done by publication in two consecutive issues of a local newspaper although he lives at an address outside of the jurisdiction.

**Procedural background**

- [2] Prior to the instant claim, the claimant, Anselm Caines, filed a claim in defamation ("the first claim")<sup>1</sup> against the defendant on the same grounds and seeking the same relief as in this claim. On an *ex parte* application, the claimant obtained an order of the court granting

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<sup>1</sup> NEVHCV2018/0106

permission to serve the defendant personally at an address in Maryland, USA. Attempts to serve the claimant were unsuccessful and the first claim lapsed.

- [3] On 2<sup>nd</sup> December 2020, the claimant refiled the claim (“the present claim”). The claimant was unable to ascertain an address for the defendant, whether locally or in the USA or at all. Therefore, on 16<sup>th</sup> February 2021, the claimant applied to the court pursuant to Rule 7.8A of the Civil Procedure Rules 2000 as amended (CPR 2000) for permission to serve the defendant by publication in a local newspaper.
- [4] The application was granted by order of the court on 22<sup>nd</sup> March 2021 (“the publication order”). Service was effected by publication in The St. Kitts and Nevis Observer on 21<sup>st</sup> May and 28<sup>th</sup> May 2021.
- [5] The defendant filed an acknowledgment of service on 12<sup>th</sup> July 2021 admitting service of the claim on 16<sup>th</sup> June 2021.
- [6] On 11<sup>th</sup> October 2021, the defendant filed the instant application with supporting affidavit for several orders, among other things, disputing the jurisdiction of the court to hear the claim (CPR 9.7 and 9.7A), to set aside service of the claim (CPR 7.7), and to discharge the publication order. The defendant has confined his submissions to these issues.

#### **Defendant’s application**

- [7] CPR 7.7 makes provision for the court to set aside service of a claim served under CPR 7.3. CPR 7.7(2) sets out that the court may set aside service if –
  - a) service out of the jurisdiction is not permitted by the rules;
  - b) the claimant does not have a good cause of action; or
  - c) the case is not a proper one for the court’s jurisdiction.

The rule does not limit the court’s power to make an order under CPR 9.7 to dispute the court’s jurisdiction.<sup>2</sup>

- [8] The defendant contends that the manner in which the claim was served is not permitted by the rules. He alleges that the claimant’s application filed on 16<sup>th</sup> February 2021 was a clear

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<sup>2</sup> CPR 7.7(3)

attempt to circumvent the mandatory requirement for permission to serve outside of the jurisdiction in circumstances where the defendant is ordinarily resident outside of the jurisdiction. The crux of the application is that service of the claim form and statement of claim by advertisement in a local newspaper is defective/bad and must be set aside as the defendant is domiciled/ordinarily resident outside of the jurisdiction and the claimant was not granted any permission from the court for service of the claim out of the jurisdiction.

[9] CPR 7.3 authorises the court to permit service out of the jurisdiction in specified proceedings. The defendant's position is that the claimant did not seek, and was not granted, the court's permission to serve the present claim on the defendant out of the jurisdiction. Further, the claimant made no attempt to serve this claim personally on the defendant as is required by the rules. Therefore, service of the claim must be set aside.

[10] The claimant submits that there is palpable evidence before the court that leave was granted to serve the defendant out of the jurisdiction. He asserts that the application for the publication order pursuant to CPR 7.8A was deliberate given the circumstances of this case. In the first claim, the claimant sought and was granted permission to serve the defendant outside of the jurisdiction when personal service in Nevis was ineffective and the whereabouts of the defendant became unknown. Under the rubric "Mode of service – alternative procedure", CPR 7.8A(1) reads:

*Where service under Rule 7.8 is impracticable, the claimant may apply for an order under this Rule that the claim form be served by a method specified by the court.*

CPR 7.8 provides the modes of service of a claim outside of the jurisdiction. CPR 7.8A provides for alternative methods of service outside of the jurisdiction.

[11] The claimant avers that while the present claim is a newly filed claim, the defendant is the same and the substance of the claim is the same as in the first claim which expired. Although the order of 22<sup>nd</sup> March 2021 is a bare order without reasons or substantial recitals, by the grant of the publication order, the learned judge accepted that if the claimant could not effect personal service on the defendant outside of the jurisdiction (as was attempted in the first claim), and because his whereabouts became unknown, then service by local publication was acceptable to bring the contents of this claim to the defendant's attention.

[12] The claimant posits that it would have been futile, impractical and a waste of court resources to attempt personal service again when there was clear and uncontroverted evidence that either the defendant did not live at the address and/or was evading service rendering any such further attempt futile. Such an attempt, the claimant says, would be contrary to the spirit and intention of CPR 2000 and the overriding objective to dispense with cases justly, which includes the proper use of court time and resources to bring matters to trial.

[13] In order to succeed in obtaining permission to serve by the alternative procedure, the claimant had to convince the court that a mode of service under CPR 7.8 was impracticable. In so doing, the claimant provided evidence of the futile attempts to serve the defendant in the first claim for which the court granted permission for service out of the jurisdiction under CPR 7.8.

**Alternative method of service *within* the jurisdiction to serve the defendant *outside* of the jurisdiction**

[14] The claimant points out that CPR 7.8A does not present an exhaustive list, or any specific list, of alternative modes of service out of the jurisdiction. He cites the following cases to show that a method of service within the jurisdiction may be used for alternative service out of the jurisdiction.

- i. **Gray v Hurley.**<sup>3</sup> The claimant resided in England. He obtained an order to serve the defendant who resided in New Zealand by WhatsApp.
- i. **General Medical Council v Benjamin.**<sup>4</sup> Email service was authorised by the court to serve a claim on the defendant outside of the jurisdiction.
- ii. **CMOC Sales & Marketing Limited v Persons Unknown and 30 Others.**<sup>5</sup> The court utilised Facebook Messenger, WhatsApp and a virtual Data Room to serve defendants whose whereabouts were unknown.

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<sup>3</sup> [2019] EWHC 1636 (QB)

<sup>4</sup> [2010] EWHC 1761, see paragraphs 13, 15, 20 and 21

<sup>5</sup> [2018] EWHC 2230

- [15] With no specified alternative methods, the claimant had to satisfy the court that publication in a local newspaper was an appropriate alternative method of service out of the jurisdiction under CPR 7.8A. He was required to provide a proper evidential basis for the court to exercise its discretion to allow service by publication in this jurisdiction as a means of effecting service on the defendant outside of the jurisdiction. By his evidence, the claimant sought to convince the learned judge that given the failed attempts to serve the defendant under CPR 7.8 in the first claim, publication was the only viable method of serving the defendant and bringing the contents of the present claim to his attention. He furnished the court with copies of the reports and affidavits of process servers who made numerous attempts to serve the defendant at the very Maryland, USA address which he subsequently confirmed in his acknowledgment of service to be his correct address. He made his case by stating his belief that publication in a local newspaper would bring the contents of the present claim to the attention of the defendant because most or all newspapers also have an online presence, and the local print and online publication would allow the defendant to see the contents of the claim, and that third parties could also bring the claim to his attention. He averred that the defendant was a well-known social media blogger and personality who through this medium had a following both locally in Nevis and elsewhere.
- [16] In his application under CPR 7.8A, in my view, the claimant provided cogent evidence as to why service under CPR 7.8 was impracticable. The publication order gave the claimant permission to serve the defendant by an alternative method to those specified in CPR 7.8, that method being service by publication in a local newspaper. I am satisfied that this order gave the claimant permission to serve the defendant out of the jurisdiction by the alternative method of local publication. For the removal of doubt, paragraph 2 of the publication order stipulated that an acknowledgement of service and defence be filed on behalf of the defendant in 42 days and 56 days respectively from the date of the second consecutive publication. This is in keeping with CPR 7.5(2) which provides that an order granting permission to serve a claim outside of the jurisdiction must state periods for acknowledgement of service and defence (outside of the general rules).<sup>6</sup>

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<sup>6</sup> CPR 9.3(1) and CPR 10.3(1)

[17] To my mind, this was an order in respect of the mode of service out of the jurisdiction without an application for, or consideration of, the granting of permission to serve out under CPR 7.3. Before an order under CPR 7.8 or 7.8A can be made, the court must first give permission for service out after being satisfied that the case before it is one for which leave ought to be so given. In other words, the applicant must first bring the case within CPR 7.3 in order to obtain the court's authorisation to serve by a method provided in CPR 7.8 or 7.8A. In **Stanford International Bank Limited v Proskauer Rose LLP & Another**,<sup>7</sup> Blenman JA, as she then was, stated:

“By way of emphasis, cognisance must be paid to the fact that on an application to set aside the leave to serve out order, the court is required to scrutinise SIB's pleaded case, the application to serve out, the application in support together with the affidavit evidence and the opposing application of Proskauer and its affidavit evidence in support. **At the set aside stage, the court seeks to determine whether the three requirements for service out of the jurisdiction had in fact been satisfied and whether the order to serve out was properly granted.**”  
(*Emphasis added*)

[18] Accordingly, I agree with the defendant's submission that the issue of alternative modes of service outside the jurisdiction only becomes relevant when the court has considered all the circumstances and has satisfied itself that the matter before it is one in which service outside the jurisdiction is appropriate. In order for a claimant to properly serve a defendant outside of the jurisdiction, it must be a case where CPR 7.3 allows and the court permits.

[19] The claimant points out that he was granted leave to serve the first claim out of the jurisdiction by a method of service under CPR 7.8 pursuant to an application under CPR 7.2, CPR 7.3 and CPR 7.5. This is exactly the point being made by the defendant. In making an order to serve out by an application under CPR 7.3, the court must first be satisfied that the conditions that enable it to do so exist, and on the evidence and the circumstances before it, determine whether to grant an order to serve out by the modes in CPR 7.8 or 7.8A.

[20] There is no requirement on a particular application for the claimant to attempt service under CPR 7.8 first and on failing to effect service there, to make a subsequent application under CPR 7.8A. In my view, it was incumbent on the claimant to apply for permission to serve the

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<sup>7</sup> ANUHC VAP2018/0011 at paragraph 60

defendant out of the jurisdiction and, **in the same application**, make a case for service by a method under CPR 7.8A.

[21] The claimant is, in effect, asking this court to rule that his application to serve the defendant out of the jurisdiction in the first claim suffices in the present claim without the need for him to show why the present claim is suitable for service outside of the jurisdiction. I do not agree with this approach. Whereas I am of the view that the claimant has made a case for the alternative procedure of local publication for service outside of the jurisdiction, the basis for service outside of the jurisdiction under CPR 7.3 has not been established in the present claim.

[22] This is a set aside application pursuant to CPR 7.7, the only provision in Part 7 to set aside service out of the jurisdiction. The rule specifically addresses CPR 7.3. It contemplates a situation where an order has been made under that rule, which is obviously a precursor to an order under CPR 7.8 or 7.8A. The claimant side-stepped an application for permission to serve outside and directly sought to serve by an alternative mode of service to serve outside. The learned judge granted the application under CPR 7.8A to serve outside by an alternative method without an application under CPR 7.3 to serve outside. In my respectful view, the publication order for service outside of the jurisdiction was not properly made in the absence of an application for service out under CPR 7.3. Therefore, the manner in which the service of the claim was done is not permitted by the rules, and service pursuant to the publication order must be set aside.

### **Claimant's application**

[23] Subsequent to the instant application, on 11<sup>th</sup> February 2022, the claimant filed an application to deem service by publication in the local newspaper proper or to dispense with service. The court determined, with the agreement of counsel for the parties, that the defendant's application, being first in time, ought to be dealt with first. On closer examination, the claimant submits that this does not preclude the court from simultaneously considering the matters raised in the claimant's application and proceeding immediately, at this stage, to treat with the application to dispense with service. This is in the context of the court setting aside service due to a technical defect, as arises here. The claimant urges upon the court

that the issue of dispensing with service is inextricably linked with that of setting aside service. The application to dispense with service is the claimant's manner of adopting a "belt-and-braces" approach encouraged by the court in dealing with both issues.<sup>8</sup> The claimant posits that if the court finds that Nevis is the proper forum for this matter, but that service should be set aside due to a technical defect, the court can proceed to determine whether to dispense with service of the claim form on the claimant's application pursuant to CPR 7.8B.

### **Appropriate forum**

[24] Included in the grounds of the defendant's application to set aside service is a challenge to the jurisdiction of this court to entertain this claim. Grounds 16 and 17 of the application read:

"16. *This case is not a proper one for the Court's jurisdiction and Nevis is not the proper forum for the trial of this matter. The alleged tort was committed outside of the jurisdiction of the Court in Maryland, USA. According to the Claimant the alleged postings were done on the worldwide media on social media in the USA. The Defendant is domiciled in Maryland, USA. All of the third parties named in the claim by the Claimant as allegedly publishing or commenting of the allegedly defamatory posts reside in the USA outside of the jurisdiction of the Court. These individuals are not subject to the jurisdiction of this Court. At the time of the filing of this claim, the Claimant himself is ordinarily resident in St. Lucia outside of the jurisdiction of the Court. The law governing the dispute is prima facie the law in the place where the alleged tort was committed, that is Maryland, USA. Therefore, the laws governing libel in Maryland, USA are the applicable laws. This matter has no real and substantial connection with Nevis.*

17. *It would be seriously prejudicial and leads to injustice for the Defendant to have to defend this claim given the impediments/inconvenience and costs which would result in proceeding with this matter in Nevis."*

[25] In opposition, the claimant avers that Nevis is the proper forum because publication occurred in Nevis where the defendant's words were read by many Facebook friends and followers of the defendant who reside in Nevis. He posits that the applicable law in these circumstances is the law with which the parties and the acts done have the most significant connection. The claimant contends that the subject matter of the alleged libel, the Nevis Island Assembly Elections, allegations of voter and other tampering, are germane to, and concern Nevis. He submits that the tone and tenor of the libel and third-party posts reveal

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<sup>8</sup> See *Kevin Hellard v Flavio Maluf* BVIHC(COM) 2017/0134 at paragraphs 24 and 26

that the defendant's primary target was a Nevis audience. The claimant points out that the statement of claim makes reference to a Facebook post made by the defendant immediately following the 2017 Nevis Island Assembly Elections where the defendant bragged about winning the "online social media propaganda war" and further boasted that "no other website or blog in all of SKN" (St. Kitts and Nevis) could claim to have garnered as many views, engagements or attracted the following that his Facebook page (and WhatsApp group) did during the election campaign period, which according to the defendant, garnered "a million views". The claimant further points out that both parties are Nevisian nationals. The claimant was in Nevis at the time of the publication where he lived all his life. He says that his potential witnesses are predominantly located in Nevis and all of the witnesses he intends to call, in fact, reside in Nevis. He insists that there is no prejudice incurred, nor is any provided, if the defendant is called to defend his case in Nevis.

[26] The parties agree on the established principles laid down in the seminal case of **Spiliada Maritime Corp v Cansulex Ltd**<sup>9</sup> (the Spiliada principles) where Lord Goff set out as the underlying aim in all cases of disputed forum "to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice". Our courts have adopted the Spiliada principles.<sup>10</sup>

[27] As to the issue of where publication occurred, Michel JA in **Lennox Linton and Others v Keiron Pinard-Byrne**<sup>11</sup> opined:

"Publication would normally be considered to have taken place when the defamatory words were communicated to a third person, meaning a person other than the claimant or defendant in the defamation action, while communication would normally be considered to have taken place when the words were heard or read by the third person."

[28] At paragraph 57 of the judgment, His Lordship cited the case of **Bata v Bata**<sup>12</sup> as authority for the proposition that "the tort of defamation is committed in the place where the publication of the defamatory material was received by the hearer, reader or viewer". In relation to the

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<sup>9</sup> [1987] AC 460 at 480G

<sup>10</sup> See *IPOC International Growth Fund Limited v LV Finance Group Limited and Others* Civil Appeals Nos. 20 of 2003 & 1 of 2004 per Gordon JA at paragraph 27

<sup>11</sup> DOMHCVAP2011/0017 at paragraph 54; see also *Breeden v Black* [2012] 1 S.C.R. at paragraph 20

<sup>12</sup> [1948] WN 366

internet, Michel JA drew attention to the Australian case of **Dow Jones & Co Inc v Gutnick**<sup>13</sup> where the court “concluded that publication of internet content (whether words and/or images) takes place in the jurisdiction(s) where the content is downloaded from the website where it is posted.” His Lordship went on and stated:

“Both the reasoning and the conclusion in **Dow Jones** are likely to be applied by the courts in the Commonwealth and it can be considered as having settled (for the time being) the issue of the place of publication of internet content.”

- [29] The defendant submits that the claimant has to show that the offending words were published in the particular jurisdiction, and there are no pleadings by the claimant that the words complained of were published in Nevis, so that the court is precluded from making a finding that Nevis is the proper forum for the trial of this case. He contends that all of the third parties named in the claim as allegedly publishing or commenting on the allegedly defamatory posts reside in the USA outside of the jurisdiction of the court, and the location of potential witnesses, which is a relevant consideration,<sup>14</sup> is in the USA.
- [30] The claimant refers to the defendant’s allegations concerning third parties as patently false and misleading. He names persons mentioned in the claim as “liking” the defendant’s posts as residing in Nevis and others who are Nevisians, who while not ordinarily resident in Nevis, travel back and forth frequently to the Federation. He urges upon the court that his potential witnesses are not confined to those who visibly posted or commented, but can include anyone who read the defendant’s posts.
- [31] The claim reveals that the offending words were posted on the defendant’s Facebook account on the worldwide web. The defendant’s assertion that he uploaded the allegedly offending posts from his computer in Maryland and therefore, Maryland is where publication occurred is simplistic. On the authorities, publication occurred anywhere in the world the posts were viewed or read, including Maryland. Evidence of viewing or reading of the posts in Nevis grounds publication in Nevis. Whereas the claim does not specifically state that the words were published in Nevis, it identifies persons who commented on the posts whom the claimant now contends are residents of Nevis at the time the posts were made and when

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<sup>13</sup> [2002] HCA 56

<sup>14</sup> See *Petroval SA v Stainby Overseas Ltd & Others* BVIHCV2007/0291 at paragraph 49

they liked/commented under the posts. Therefore, on the face of the claim, though not in those exact words, there was publication of the words complained of in Nevis. Further, the matter has not yet reached the stage of disclosure or witness statements. In due course, the claimant will have the opportunity to produce his witnesses, all of whom he has indicated will be residents of Nevis, thereby providing the requisite proof of publication in this jurisdiction.

[32] In support of his argument on this point, the defendant heavily relies on **Lennox Linton**<sup>15</sup> and **Michael Perkins v Nevis Pages Ltd.**<sup>16</sup> Having reviewed these cases, I cannot conclude that they are authorities for the submission that the pleadings must specifically state that publication occurred in the jurisdiction that the claimant submits is the proper forum for trial of the matter. These cases, both concerning full trials, highlighted the issue of the necessity to provide evidence showing publication in the jurisdiction, as opposed to the requirement of a specifically worded pleading.

[33] This claim involves an internet posting by a Nevisian (albeit on his computer in Maryland, USA) containing words offensive and allegedly defamatory of another Nevisian in relation to voter fraud and tampering and other interference in elections in Nevis. The claim shows that Nevisians residing in and outside of Nevis read the postings. Further, I note that the claim is one in libel, which is actionable *per se*. In these circumstances, I am satisfied that Nevis is the forum with which the claim has the most real and substantial connection. In the interests of the parties and for the ends of justice, Nevis is the appropriate forum where this case can be suitably tried. The defendant has not persuaded the court that Maryland is clearly or distinctly more appropriate for the trial of this case.<sup>17</sup> The Nevis court has proper jurisdiction in the present claim.

### **Dispensing with service**

[34] This court determined that the defendant's application to set aside service, being first in time, should be determined first. Having ruled that service of the claim be set aside, I see no reason not to deal with the claimant's application to dispense with service at this stage as

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<sup>15</sup> Supra at note 11

<sup>16</sup> NEVHCV2012/0084

<sup>17</sup> See *Spiliada Maritime Corporation v Canulex Ltd* [1987] AC 460 (p. 476, paragraphs B – E; p. 477, paragraph E; p. 480, paragraphs G – H; p. 483, paragraphs E – H and p. 484, paragraphs A – B)

the issues are inextricably linked. To my mind, it would be a waste of time and costs to deal with this issue in a separate hearing. The claimant addressed the issue directly in his original and closing submissions. The defendant dealt with his own application to set aside service in submissions before the hearing. At the request of the parties, the court ordered closing submissions. The deadline for the defendant to file closing submissions was 22<sup>nd</sup> July 2022. On the said date, counsel for the defendant filed a notice signed by counsel for both parties consenting to an extension of time to 27<sup>th</sup> July 2022 for the defendant to file the submissions. The defendant did not file closing submissions then or at all. In any event, there is sufficient material before the court from both parties to allow the court to proceed on the claimant's application.

- [35] When an order is set aside, it does not automatically result in the invalidation of the steps that have been taken pursuant to that order.<sup>18</sup>
- [36] CPR 7.8B empowers the court to dispense with service of a claim in exceptional circumstances.
- [37] Notwithstanding the technical defect in service, the defendant promptly filed an acknowledgement of service on 12<sup>th</sup> July 2021 admitting service of the claim. It is clear, therefore, that the defendant had actual knowledge of the claim. The primary purpose of service is to bring notice of the proceedings to the defendant and not about playing technical games as stated in **Abela & Others v Baadarani**.<sup>19</sup> It is interesting that in his acknowledgement of service, the defendant confirmed that his Maryland, USA address is his correct address. This is the said address the claimant averred that multiple process servers previously tried to serve him but were told he did not live there, or were otherwise rebuffed.
- [38] In my view, exceptional circumstances exist in this case to dispense with service of the claim. There was a previous valid attempt to serve the defendant with the first claim before it expired. The evidence of the process servers, coupled with the defendant's admission that the Maryland, USA address is his correct address, strongly infers that the defendant was

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<sup>18</sup> See *Tasman Gaming Inc. et al v Michael James et al* ANUHCv2005/0450 at paragraph 6

<sup>19</sup> [2013] UKSC 44 at paragraphs 37 and 38

evading service. The defendant had notice of the proceedings since June 2021. An order to allow the defendant to be properly served at this stage would be to cause further delay of these proceedings which were instituted since 2018. This would not be in keeping with the overriding objective to deal with cases justly. The defendant has full knowledge of this claim. This court will not create any further delay by making an order that will certainly protract this matter further. It is high time to carry on. I will grant the claimant's application to dispense with service of the claim.

### **Order**

[39] Based on the forgoing, it is ordered as follows:

- 1) The defendant's application to set aside service is granted.
- 2) The claimant's application to dispense with service is granted.
- 3) The defendant shall file and serve a defence within 42 days of this order.
- 4) Thereafter, the matter shall take its normal course in accordance with CPR 2000.
- 5) Both parties achieving some degree of success, there is no order as to costs.

**Tamara Gill**  
Master

**By the Court**

**Registrar**