

IN THE EASTERN CARIBBEAN SUPREME COURT:

IN THE HIGH COURT OF JUSTICE
Civil Division

COMMONWEALTH OF DOMINICA

Claim Number DOMHCV2021/1027

Between

BRITISH AMERICAN INSURANCE COMPANY LIMITED
(In Judicial Management)

Claimant

-and-

DANIEL NUNEZ

Defendant

Before Master Alvin Shiva Pariagsingh

Appearances: Heather F. Felix – Evans for the Claimant; and
Jodie J. Luke for the Defendant.

2022: June 28
October 03

DECISION

Defendant's application to set aside order deeming
service by alternative method as good service

[1] **PARIAGSINGH, M:** - Before the Court is the Defendant's application seeking an order setting aside or varying the order of this Court made February 14, 2022.¹ In the alternative, the Defendant seeks an extension of time to file a defence to this claim within 28 days.

[2] In support of the application is an affidavit of the Defendant. The Defendant deposes that he is ordinarily resident in Saint Lucia. He contends that Saint Lucia is outside of the jurisdiction of Dominica. As such, he submits that permission ought to have been

¹ Application filed on March 07, 2022.

sought and granted for this claim to be served out of the jurisdiction in accordance with Part 7 CPR.² He also contends that he ought to have been served personally in accordance with Part 5 CPR. He further contends that the order of this Court made on February 14, 2022 was not made in accordance with Parts 5 or 7 CPR and ought to be set aside.

- [3] On June 21, 2022 the Claimant filed an affidavit of Frank V. Myers in opposition to the application. The Claimant contends that service of the claim by email brought the claim to the attention of the Defendant which was the objective. The Claimant relies on the fact that before and after service of the claim on the Defendant he continued to communicate with the Claimant's Judicial Manager using the same e-mail address.
- [4] The claim was served twice on the Defendant at the same email address previously used on October 21, 2021 and October 26, 2021. The Defendant did not file any acknowledgment of service or defence.
- [5] By an email sent on November 19, 2021³ the Defendant, using the same email address he was served at, wrote to the Agent of the Claimant's Judicial Manager (copied to the Judicial Manager). In this email he directed that all further correspondence be sent to his lawyer in Saint Lucia and provided a name and email address for his lawyer.
- [6] The Attorney who the Defendant indicated was his lawyer in Saint Lucia never confirmed or indicated that he had instructions to accept service. Notwithstanding this, on December 06, 2021 the claim was personally served at the chambers of the Attorney in Saint Lucia. No steps were taken on this service by the Attorney. In particular, no acknowledgement of service or defence was filed.
- [7] On January 07, 2022 the Claimant applied for judgment in default of acknowledgment of service and defence. The Claimant also sought an order pursuant to Rule

²CPR- Civil Proceedings Rules 2000 as amended.

³Exhibits FVM – 9 to affidavit in opposition.

5.13(4)CPR that the chosen method of service was sufficient to enable to the Defendant to ascertain the contents of the claim.

[8] On February 14, 2022 this matter came on for hearing ex parte before me. On that day having considered the affidavit of the Claimant I was satisfied that the method of service of the claim used enabled the Defendant to have notice of the claim and be able to ascertain the contents of the claim. I made the following order:

[1] Pursuant to Part 5 Rule 5.13 of the Civil Proceedings Rules 2000 as amended, the Registrar shall endorse on the affidavit filed on November 02, 2021 that the said affidavit satisfactorily proves service on the Defendant;

[2] The Defendant is to be served with a copy of this order via email and is at liberty to apply to vary or discharge same within 14 days of said service.'

[9] The Defendant was served with the order dated February 14, 2022 on February 18, 2022. He did not apply within the time stated in the order to set aside the order neither did he apply for an extension of time to make his application.

[10] The Defendant makes two main arguments. The first is that the Claimant needed permission to serve the claim out of the jurisdiction. Secondly, the Defendant says that he ought to have been served with the claim personally.

ISSUES:

[11] The two issues to be determined are;

1. Whether the Claimant needed to apply for leave to serve this claim out of the jurisdiction; and

2. Whether there are any grounds to set aside the order of this Court made on February 14, 2022 deeming the service on the Claimant by an alternative method as good service.

ANALYSIS:

Whether the Claimant needed to apply for leave to serve this claim out of the jurisdiction

[12] Jurisdiction is defined in the CPR as:

‘means the jurisdiction of the court as extending throughout the Member States and Territories and any part of their territorial waters’

[13] There are two contexts in which the word ‘jurisdiction’ is used in the rules. The first is the jurisdiction of the Court and the other connotes the physical jurisdiction of Member State or Territory. Jurisdiction for the purpose of an application out of the jurisdiction of the Court is the former and not the latter. Permission is only required to serve a claim outside the jurisdiction of the Court if the claim is being served outside of the jurisdiction of the Eastern Caribbean Supreme Court.

[14] The Defendant submits that the rules require an address to be stated within the jurisdiction for service and so, jurisdiction must be taken to be a physical place. Counsel makes reference to Rule 3.11 CPR and uses the example that if jurisdiction does not refer to the physical place it lends to an interpretation that a claim can be filed in Dominica and an address for service be put in Antigua and Barbuda. I disagree with this submission. This example is short lived if one considers the same Rule 3.11 (2) CPR. It gives context to ‘jurisdiction’ being a physical place in that case and not jurisdiction of the Court. Sub rule (2) goes on to provide that the address for service must also state the name and reference of the person who is dealing with the matter (if given by a legal practitioner) and the telephone number and fax number of the legal practitioner. Legal Practitioners are admitted in this jurisdiction individually in each

Member State and Territory. It then can only lead to the conclusion that if a claim is filed in a Member State or Territory by a legal practitioner, an address for service in that physical jurisdiction must be stated. This is administrative and does not go to jurisdiction of the Court in my view.

[15] The common law evolution of service out of the jurisdiction is a concept coined based on enforcement. In the early common law authorities, claims were issued and served on people when they were physically in the physical jurisdiction. This was then modified to permit claims to proceed in the jurisdiction against people who were not subject to the jurisdiction of the Court in which the claims originated. **Blackstone's Civil Practice 2020, 16. 1 Page 376** states:

'Inevitably, there are a number of complexities where the intended defendant to proceedings is outside the jurisdiction. At common law, an action in personam (i.e. an action against a legal person as opposed to an action in rem against a shop or other property) could only be brought against a defendant served with process while in England or Wales. This, at least superficially, had the merit of ensuring that the courts of this country did not purport to exert an exorbitant jurisdiction of defendants who were not amenable to the coercive powers of the Court. The superficiality stemmed from the fact that jurisdiction could be established by service on a defence while on a temporary visit to this country or by a foreign defendant submitting to the jurisdiction. In any event, the restrictive common law rule has been subject to a discretionary power to allow English proceedings against defendants outside the jurisdiction since the enactment of the Common Law Procedure Act 1852. This discretionary power is governed by CPR, r 6.36.'

[16] From the above the principle can be distilled that 'jurisdiction' refers to the jurisdiction of the Court. I agree with the submission of Counsel for the Claimant that Saint Lucia is within the jurisdiction for the purpose of service under Part 5 CPR. I also agree with Counsel for the Claimant that Practice Direction 7, No 8 of 2008 which gives the respective periods within which a defendant who is out of the jurisdiction must file an acknowledgment of service and defence is stated supports this position. None of the Member States or Territories which together comprises the Eastern Caribbean Supreme Court are listed in the Practice Direction.

[17] I hold that there was no need to obtain leave to serve this claim outside of the jurisdiction on the Defendant as he resides within the jurisdiction of the Court.

Whether there are any grounds to set aside the order of this Court made on February 14, 2022 deeming the service on the Claimant by an alternative method as good service.

[18] On this issue Counsel for the Claimant has conceded, that there has been non-compliance with Practice Direction No. 2 of 2014. The Claimant did not obtain the agreement of the Defendant to accept service by electronic means or verify the e-mail address before service.

[19] **Blackstone's Civil Practice 2020, 15.43, page 362** states:

'The Court has the power to make an order for service of other documents by an alternative methods or at an alternative place under CPR, r.6.15, as well as to make an order dispensing with service (rr.6.27 and 6.28). In both cases, the application must be supported by evidence and may be made without notice (rr.6.15 (3) and 6.28 (2)). In *R (Hanuman) v University of East Anglia* [2015] EWHC 4122 (Admin), the Court retrospectively ordered service by an alternative methods under rr.6.27 and 6.15 as the debtor had tried to made service difficult, had refused to accept service by email even though he resides in Barbados, and refused to give an address in the United Kingdom at which he could be served. The court may be prepared to make an order under r.3.10 curing any irregularity in effecting service of any other document (other than a claim form). A wider approach to r 3.10 would be justified in relation to documents other than claim forms because the rules relating to service of subsequent documents are concerned only with bringing them to the attention of the other party so as to notify the taking of a procedural step, not with establishing jurisdiction (*Integral Petroleum SA v SCU – Finanz AG* [2014] EWHC 702 (Comm))'

[20] The Claimant submits that this is not fatal. I agree that is it not fatal, but it makes the service irregular. The UK Rule 3.10 is similar to Rule 26.9 CPR in this jurisdiction. It gives the Court the power to make an order to rectify matters where there has been a breach of a rule, practice direction or order.

[21] In considering an order under Rule 26.9 CPR I am mindful of the narrow more restrictive approach to making such an order in relation to service of a claim form as advocated in

Blackstone's above. The Court's power to make an order rectifying irregular service of documents does not extend to service of originating process.

[22] In considering what is the appropriate order to make, I am also mindful of undisputed facts that:

1. the Defendant visited the Claimant's office in Saint Lucia at least once but gave no address.
2. the Defendant communicated with the Claimant directly before and after he was served with the claim twice by email.
3. the Defendant used the same email address to write to the Claimant to instruct that his lawyer in Saint Lucia be served with the claim and provide an email address.
4. the Defendant's lawyer in Saint Lucia was served personally with the claim.
5. the Defendant received service of the order of February 14, 2022 on the same email address
6. the Defendant acted on the order of February 14, 2022 which was sent to him via email and made the application now before the Court.

[23] In my view, the Claimant's non-compliance cannot be rectified by an order under rule 26.9 CPR. To do so will be applying a broader approach to Rule 26.9 CPR as it relates to service. Given the facts set out in paragraph [22] however I am not minded to set aside the order of February 14, 2022. I am minded to however vary it. It is clear that notwithstanding the technicality of strict non-compliance with the Practice Direction, the Defendant has well had notice of the claim in excess of 8 months. I reiterate, receipt of service was never disputed.

[24] This is a fair compromise given the conduct of the Defendant, the time that has elapsed, the non-denial of service and the fact that the Claimant made an application for judgment is an unless order in my view.

[25] The general rule is that costs follow the event. The Defendant has been unsuccessful on his jurisdiction point. The fact of the non-compliance was conceded by the Claimant and on the second ground I am not setting aside the order but varying it. In this regard, in my view each party ought to bear their own costs of this application.

[26] In the circumstances, it is hereby ordered that:

1. The order of this Court made on February 14, 2022 is varied to include a new paragraph [3] which reads:

'[3] Unless the Defendant files and serves a defence to this claim on or before October 31, 2022 judgment in default of a defence is granted for the Claimant against the Defendant for damages, interest and costs to be quantified by the Court;'

2. The costs of the application shall be the cost in the cause.

Alvin Shiva Pariagsingh
High Court Master

By the Court,

Registrar