

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

SAINT VINCENT AND THE GRENADINES

CLAIM NO: SVGHCV2020/0039

BETWEEN:

**MOSES STAY
CHERYL STAY
CHELSEA STAY**

Claimants/Respondents

and

MASSY UNITED INSURANCE

First Defendant

KILFORD NEVERSON

Second Defendant

ASL AUTO

Third Defendant/Applicant

Appearances:

Mrs. Kay Bacchus-Baptiste for the Claimants/Respondents

Ms. Chanté Francis of Duane A. Daniel Chambers for the 3rd Defendant/Applicant

2022: July 7;
July 26.

RULING

[1] **GILL, M:** This is the court's decision on an application to set aside judgment in default of acknowledgement of service.

[2] On 1st April 2020, the claimants filed a claim form and statement of claim against all three defendants for damages for personal injuries and damage to a vehicle owned by the first claimant, caused by a motor vehicular accident which occurred on Christmas Day in 2017.

The 3rd defendant, ASL Auto, is an automotive repair business registered under the Companies Act. Augustin Ledger is the director of ASL Auto. He is also the director of another business, ASL Real Estate Agencies Inc.

- [3] By affidavit of service filed on 14th July 2020, Lynette Jameson, legal clerk, deposed that she served the claim on one “Shelly-Ann Wright at ASL Real Estate Agencies on behalf of Augustine Ledger owner of ASL Auto”.
- [4] Judgment in default of acknowledgement of service was entered against ASL Auto on 22nd September 2021. A first request filed on 14th July 2020 was refused by the learned registrar.
- [5] ASL Auto filed the instant application to set aside the set default judgment on the ground that it was wrongly entered. It contends that the claimants failed to prove service of the claim in accordance with the Civil Procedure Rules 2000 as amended (CPR 2000). An amended notice of application further asks the court to set aside the default judgment under the court’s inherent jurisdiction on the ground that it is irregular as the court office/registrar has no jurisdiction to enter default judgment against one party in a claim involving multiple defendants.

Issue

- [6] The court has to determine whether to set aside the judgment in default entered by the learned registrar on 22nd September 2021.

Law and analysis

- [7] CPR 13.2(1)(a) provides that the court must set aside a default judgment entered under Part 12 if judgment was wrongly entered because, in the case of a failure to file an acknowledgement of service, any of the conditions in CPR 12.4 was not satisfied.
- [8] In order for judgment to be entered in default of acknowledgement of service, CPR 12.4(a) requires the claimant to prove service of the claim form and statement of claim. ASL Auto’s evidence in support of the application is that it was not served with the claim form and statement of claim.

[9] In relation to a claim against a limited liability company, as is ASL Auto, CPR 5.7 provides that service 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 a place 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.

[10] In order to comply with CPR 5.7(a) or (b), the proper place to serve ASL Auto is the registered address as in the companies registry. The registered office of ASL Auto is Villa Flat, St. Vincent and the Grenadines. The affidavit of service of Lynette Jameson indicates that the claim was served at ASL Real Estate Agencies in Kingstown. Therefore, I find that service has not been effected in compliance with CPR 5.7 (a) or (b).

[11] CPR 5.7 (c) speaks to 2 elements. The proper person to be served is an officer or manager of the company. This person must be served at the proper place, that is, a place that has a real connection with the company.

Is Shelly-Ann Wright a proper person to be served for ASL Auto?

[12] Exhibited to the affidavit of the first claimant, Moses Stay, in opposition to the application, is the handwritten excerpt of the purported service on Ms. Wright. It reads as follows:

<i>"Defence</i>	<i>}</i>	<i>Received by: SWright</i>
<i>Acknowledgment</i>	<i>}</i>	<i>Date: 14.04.20</i>
<i>Claim form</i>	<i>}</i>	<i>Time: - 8:55"</i>

[13] The affidavit of Augustin Ledger filed in support of the application states that Shelly-Ann Wright is not an officer of ASL Auto, nor is she an agent of his and that she is not authorised to accept service of documents on his behalf. He further states that he is aware that Ms. Wright is employed by and performs secretarial duties for ASL Real Estate Agencies.

[14] The claimants contend that Ms. Wright falls within section 543(c) of the Companies Act¹ which defines the word “officer”. Section 543 reads:

“officer” in relation to a body corporate means –

- (a) the chairman, deputy chairman, president or vice-president of the board of directors;*
- (b) the managing director, general manager, comptroller, secretary or treasurer; or*
- (c) any other person who performs for the body corporate functions similar to those normally performed by the holder of any office specified in sub-regulation (a) or (b) **and who is appointed by the board of directors to perform such functions.** (my emphasis)*

[15] Whereas it can be successfully argued that Ms. Wright, in accepting service of the claim, performed a function similar to those normally performed by other senior officers of a company, there is nothing before the court evidencing that she was appointed by ASL Auto’s board to perform such function. Further, “secretary” in section 543 (b) is taken to refer to a corporate secretary and not a receptionist or someone performing clerical duties. In the classic text, *A Practical Approach to Civil Procedure*,² the learned author states:

“Personal service on a company is effected by leaving the documents with a person in a senior position (CPR, r 6.5 (3)(b)), which in turn means a director, treasurer, secretary, chief executive, manager, or other officer (PD 6A, Para 6.2)”

Mr. Ledger’s affidavit exhibits a Notice of Appointment of Secretary/Assistant Secretary dated 25th June 2014 pursuant to the provisions of the Companies Act of 1994. The document appoints the secretary of ASL Auto Inc as Kayon N. Howard-Ledger. In all these circumstances, I am of the view that service of the claim on Shelly-Ann Wright does not amount to proper service on ASL Auto. Therefore, the claimants have not satisfied the requirements in CPR 5.7(c). The same analysis and conclusion suffice in respect of CPR 5.7 (d).

¹ Cap. 143 of the Laws of Saint Vincent and the Grenadines

² Book by Stuart Sime, 19th Edition, page 75, rubric 6.29

Proper place of service on ASL Auto - Does ASL Real Estate Agencies have a real connection with the claim?

[16] Notwithstanding my holding, for completeness, I will consider the second element of CPR 5.7(c). Mr. Ledger in his affidavit sets out that ASL Real Estate Agencies is a company which, as the name suggests, engages in real estate business, while ASL Auto engages in the business of automotive repair services and the sale of auto parts. He swears, "I can confirm that services (*sic*) ASL Real Estate Agencies Inc have no connection whatsoever with the services offered by ASL Auto Inc." The claim before the court concerns, among other things, automotive repairs to a vehicle owned by Moses Stay, the first claimant.

[17] Mr. Stay deposes that following the accident, the subject matter of the claim, he visited the premises of ASL Auto at Villa Flat to discuss the repairing of his vehicle, and Mrs. Kayon Howard-Ledger, the wife of Augustin Ledger and also a director of ASL Auto, sent him to the "office in Kingstown", that is, ASL Real Estate, in order to discuss the issue of his auto repairs. Mr. Stay states that he understood Mrs. Howard-Ledger to mean that the business of ASL Auto takes place at the Kingstown office. The same day, he went to the office of ASL Real Estate Agencies, and after an initial interaction with the aforementioned Ms. Shelly-Ann Wright, he and his wife, the second claimant, met with Mr. Ledger in his office at ASL Real Estate about repairing the vehicle, and a contract was negotiated for Mr. Ledger to repair the vehicle on behalf of the insurance company. Mr. Stay further states that he had various meetings with Mr. Ledger about his vehicle at the Kingstown office and absolutely refutes Mr. Ledger's claim that the two businesses have no connection.

[18] Additional evidence on this is provided in the affidavit of Kendol Texeira which reveals that he conducted business with Mr. Ledger in relation to his car at the Kingstown office.

[19] ASL Auto has not challenged the evidence of Moses Stay with regard to the direction of Mrs. Ledger to him to go to the Kingstown office (ASL Real Estate) to deal with the repairs to his vehicle or to any of the evidence of his dealings with Mr. Ledger in relation to the auto repairs at that office. It appears that Mr. Ledger accommodated Mr. Stay at the location he was based to conduct the business of ASL Auto. The evidence of Kendol Texeira is also unchallenged. In my view, therefore, in these circumstances, ASL Real Estate has a real

connection with the claim for damages in respect of the repairs to Mr. Stay's vehicle. Unfortunately for the claimants, I have already ruled that service of the claim on Ms. Wright is not proper service on ASL Auto in accordance with the rules. The two elements in CPR 5.7 (c) are conjunctive.

Presumed Service

[20] An affidavit which complies with the rules of procedure creates a rebuttable presumption of service. The burden then shifts to the party allegedly served to prove that there was no service.³ The claimants contend that the claim was served personally on an officer of ASL Auto and that they have complied with CPR 5.5. ASL Auto submits that the affidavit of service failed to comply with the CPR as it pertains to service of a claim on a body corporate and therefore, no presumption of service arises. I note that the affidavit of service is deficient in relation to the precise manner by which the person served was identified.⁴ Even if I am prepared to accept that service on ASL Auto was presumed, I am satisfied that ASL Auto has successfully rebutted the presumption by proving the failure of the claimants to effect service on a company in compliance with CPR 5.7.

Actual knowledge/notice of the proceedings

[21] The claimants submit that ASL Auto had knowledge of the claim as it was represented in court in these proceedings by counsel. The court's record shows that counsel from Duane A. Daniel Chambers appeared several times in these proceedings for "an interested party". The claimants rely on the statement of Henry J, citing Blackstone's Civil Practice⁵ in **Barefoot Yacht Charters (Caribbean) Limited v Kenneth Houston**⁶ that "the cases demonstrate that service is dispensed with primarily where the defendant has had some knowledge, whether actual or constructive of the impending proceedings, but seldom otherwise". The court refused an application to dispense with service on the basis of insufficient evidence in accordance with the CPR or the Interpretation and General Provisions Act. The instant case does not concern the issue of dispensing with service of a

³ *The Bank of Nova Scotia v Joseph Tudor and Roseanna Tudor* BB 2017 HC 44 at paragraph 26

⁴ See *ibid* at paragraphs 30, 31, 39 and 40

⁵ 2013 Edition

⁶ SVGHAD2013/0002 at paragraph 37

claim form, which requires a specific application and affidavit evidence,⁷ and which may be ordered only in exceptional circumstances.

[22] The claimants also rely on the case of **Olafsson v Gissurarson**⁸ to demonstrate, among other things, that the purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case. The Court of Appeal upheld the decision of a judge to dispense with service of a claim form in an exceptional case. Again, this was on an order sought under the English CPR 6.9 to dispense with service, which the Court noted was made with some delay. There is no such application before this court.

[23] Procedural rules regarding service are strictly applied in an originating process. Blackstone's Civil Practice⁹ states:

"The court may be prepared to make an order under r.3.10 [similar to CPR 26.9] 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))"

[24] Therefore, an irregularity in service of a claim form and statement of claim makes the service improper, ineffectual and invalid, and in my view, the appearance of counsel watching the interests of an interested party in these proceedings, with the imputation that ASL Auto had knowledge of the claim, does not attach to ASL Auto the obligation to submit to the jurisdiction of the court as being served with the claim.

[25] CPR 13.2(1)(a) mandates the court to set aside a default judgment obtained in the case of a defendant's failure to file an acknowledgment of service where the claimant fails to prove service of the claim. In such a case, the court has no discretion and must set aside the default judgment.

⁷ CPR 7.8B(2)

⁸ [2008] EWCA Civ 152 at paragraphs 32 and 55

⁹ 2020 Edition, 15:43, page 362

[26] In **Sherman v Glasgow and Campbell**,¹⁰ Actie M (Ag.), as she then was, dealt with a situation where judgment was entered in default of defence against one of multiple defendants. The court determined that the claim form and statement of claim were never served on the first defendant. The court held:

“CPR 12.5 provides conditions to be satisfied for entry of default judgment for failure to defend the claim. Proof of service of the claim must be established before the court can grant judgment in default of defence...

The court must be satisfied that there has been proof of valid service where an application for default judgment is made. In the absence of valid service of the claim a claimant is not entitled to judgment in default of appearance of defence.”¹¹

[27] The learned registrar, before entering judgment pursuant to CPR 12.4 was required to ensure that the claim was validly served in accordance with CPR 5.7. This principle was aptly put by the Court of Appeal of Jamaica in **Al-Tec Inc. Ltd v James Hogan**¹² as follows:

“The registrar, in entering a default judgment, is carrying out an administrative function, but in so doing, must comply with the rules. The registrar must enter judgment in default only on proof of proper service. Service is proper if it is done in conformity with the rules. If the registrar enters judgment when service in conformity with the rules is not proved, a judge must set that judgment aside.”

[28] Service on Shelly-Ann Wright, who is not an appropriate person to be served with the originating process, is not proper or valid service on ASL Auto. Service was not carried out in conformity with CPR 5.7. That being the case, this court is left with no choice but to set aside the default judgment.

Claimants' first request for default judgment

[29] ASL Auto contends, as is added in its amended application and submissions, that the registrar had no jurisdiction to entertain a request for a default judgment against one of multiple defendants, but that this jurisdiction vests exclusively in a master or judge of the court on an application by a claimant. In a claim against multiple defendants, CPR 12.9(2) provides that the court may enter judgment against one defendant only if the claim can be dealt with separately from the claim against the other defendants. ASL Auto cites case law

¹⁰ VC 2014 HC 1; SVGHCV 259 of 2011

¹¹ Ibid at paragraphs 10 and 11; see also *Clouden et al v Culzac and James* VC 2014 HC 15 at paragraph 8

¹² JM 2019 CA 22 at paragraph 88

where masters of this court have interpreted this provision to mean that the court office in the person of the registrar has no jurisdiction to enter a default judgment against one party in a claim involving multiple defendants.¹³

[30] The claimants assert that if the registrar had no authority to enter judgment, then the request filed on 14th July 2020 remains live to be dealt with by this court. In support of this proposition, the claimants rely on the authority of **Pablo Stapleton v Sherlon Pierre and Pheon Jones**.¹⁴ In that case, on an application for default judgment against the first defendant, Pariagsingh M. (Ag.), as he then was, in keeping with CPR 12.9(2)(b), determined that an application which had been previously refused by the assistant registrar, remained live to be dealt with at the determination of the claim against the second defendant. This provision deals with the situation where a claim cannot be dealt with separately from the claim against the other defendants. The learned master dismissed the application restating the position of the assistant registrar that the claim against the first and second defendants could not be separated. Hence, the request for judgment in default which was refused by the assistant registrar remained live to be determined at the determination of the claim against the second defendant.

[31] In this case, the learned registrar refused the claimants' first request, referring to CPR 12.9(2). In a letter to learned counsel for the claimants dated 16th July 2020, the registrar set out that under CPR 12.9(2)(b), the court office had no authority to grant default judgment against one of two or more defendants. By letter of 21st July 2020, counsel responded indicating that the registrar had the authority to enter default judgment pursuant to CPR 12(9)(2)(a)(i), whereby the court may enter judgment against one defendant where the claim can be dealt with separately from the claim against the other defendants. Subsequently, the registrar advised that a new request be filed as the request of 14th July 2020 had already been determined. The claimants filed the second request and the judgment, the subject of the instant application, was made and granted. Clearly, the learned registrar determined that the claim against ASL Auto could be separated from the claim against the other two

¹³ See *Sherman v Glasgow and Campbell VC 2014 HC 1* at paragraph 13; see also *Clouden et al v James VC 2014 HC 15* at paragraph 9 and *Development Bank of St. Kitt-Nevis v Greame Huggins, Leslie Wallace and Celestine Stanley KN 2018 HC 8*; *SKBHCV2009/0119* at paragraph 7

¹⁴ NEVHCV2020/0060, delivered November 1, 2021

defendants. Incidentally, on 8th July 2021, the claimants filed an entry of satisfaction in relation to the first and second defendants.

[32] If this court finds that the learned registrar had no jurisdiction to consider a request or application for judgment in default where there is more than one defendant, then obviously, this principle will apply to the claimants' first request. Therefore, there would be no rational basis for this court to determine that the first request remains alive. The court in **Pablo Stapleton** took no issue with the authority of the assistant registrar to consider and refuse the first defendant's request. In fact, the learned master made it clear that his was not a new determination.¹⁵

[33] In any event, the crux of the matter before the court is the failure of the claimants to prove proper service on ASL Auto in accordance with CPR 5.7. Respectfully, I confine my ruling to this fundamental issue. Even if the first request is deemed to be alive, the claimants would face the same hurdle in relation to service, which in my considered view, is insurmountable.

Order

[34] Based on the foregoing, it is hereby ordered as follows:

- 1) The default judgment entered on 22nd September 2021 is set aside.
- 2) The claimants shall pay ASL Auto costs of the application in the sum of \$750.00.

Tamara Gill
Master

By the Court

Registrar

¹⁵ NEVHCV2020/0060 at paragraph 16