

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHAD2013/0002

BETWEEN

BAREFOOT YACHT CHARTERS (CARIBBEAN) LIMITED

CLAIMANT

and

KENNETH HOUSTON

DEFENDANT

Appearances:

Ms. Annique Cummings for the claimant.

Defendant unrepresented.

2018: Jul. 2

Jul. 4

DECISION

BACKGROUND

- [1] **Henry, J.:** This is an application by the claimant for an order dispensing with service of the claim form on the defendant. Barefoot Yacht Charters (Caribbean) Limited ('Barefoot Charters') claims to be a company incorporated in the State of Saint Vincent and the Grenadines, with its principal place of business at Blue Lagoon on mainland Saint Vincent. It alleged that Kenneth Houston is the owner of the yacht 'Freedom Quest' and that Barefoot Charters entered an agreement with him to manage the yacht. Barefoot Charters averred that the agreement conferred on it authority as sole agent to market, manage and maintain the yacht.

- [2] Barefoot Charters asserted that Mr. Houston reneged on his agreement to pay for the services, as a consequence of which his account fell into debt. It alleged that it has lost contact with Mr. Houston since June 2010 despite steady efforts to contact him. Barefoot Charters claimed that it has incurred expenses totaling \$210,389.70 for the management, upkeep, maintenance, marketing and chartering of the yacht 'Freedom Quest'. On 9th April 2013, it filed this claim in rem to recover the debt of \$332,828.92, including interest and costs. By Amended Claim Form filed on 24th April 2013, Barefoot Charters reduced the sum claimed to \$223,141.66 and expanded the period¹ over which the debt was allegedly incurred.
- [3] By affidavit of service filed on 4th October 2013 and attested to by Atisha Illisa Gould, Law Clerk at Cardinal Law chambers, Barefoot Charters advanced that the claim form, statement of Claim, acknowledgement of service and Defence and counterclaim were sent to Mr. Houston by Federal Express at his last known address at 1630 Elmore Drive, Jonesboro, Georgia 30236, USA. Ms. Gould exhibited a copy of the 'proof of delivery' which reflected that it was signed for by J. Josey'. Barefoot Charters did not indicate whether J. Josey was related to Kenneth Houston and if so in what capacity, nor did it indicate if he was likely to have received the package.
- [4] By order dated 19th February 2018 Barefoot Charters was granted an extension of time to effect service of the claim form and supporting documentation on Mr. Houston. No further affidavit of service has been filed. By Notice of Application filed on 31st May 2018, Barefoot Charters applied for an order to dispense with service of the amended Claim Form.

ISSUE

- [5] The issue is whether the court should make an order dispensing with service of the amended claim form.

ANALYSIS

Issue – Should the court make an order dispensing with service of the amended claim form?

- [6] The Court may dispense with the service of a claim form in exceptional circumstances.² It may do

¹ From '2008 to January 31st 2013' to 'October 1st 2007 to 31st March 2013'.

² Rule 7.8B of the Civil Procedure Rules 2000 ('CPR').

so at any time on application made without notice and supported by evidence on affidavit.

[7] The application in this case is supported by the affidavit of Glenda Barrow filed on 31st May 2018. Ms. Barrow averred that she is a law clerk at Cardinal Law Firm and that she makes the affidavit on Barefoot Charters' behalf and with its permission. She deposed that on June 3rd 2013, the Court made an order that Mr. Houston be served with the claim form by courier at his last known address '1630 Elmore Drive, Jonesboro, Georgia, USA'.

[8] It is a matter of record that the referenced court order was made on application by Barefoot Charters supported by affidavit by Ms. Atisha Illisia Gould. In that affidavit, Ms. Gould averred among other things that Kenneth Houston's last known address is 1630 Elmore Drive, Jonesboro, Georgia 30236, United States of America; and that she is advised by legal counsel that service of the claim form and statement of claim via international courier service to the respondent's last known address is sufficient to enable him to ascertain the contents of the claim.

[9] The records on the case file reveal that the court order provided:

- '1. That the Applicant is permitted to serve the Claim Form and Statement of Claim in the above matter via an international courier service.
2. That the time limit for the filing of an Acknowledgement of Service shall be 35 days after the date of service.
3. That the time limit for the filing of a Defence shall be 56 days after the date of service.'

[10] CPR 5.13 provides that where a claimant chooses a method of service other than personal service or service by postal or electronic means, he must file evidence on affidavit proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form. Such affidavit must exhibit a copy of the documents served and give details of the method of service used.

[11] The CPR mandates that the affidavit must also show that the person intended to be served was able to ascertain the contents of the documents; or that it was likely that he would have been able

to do so. It must state the time when the person was or was likely to have been in such position to ascertain the contents of the documents.

[12] In the affidavit of service sworn to by Ms. Gould and filed on 4th October 2013, she stated:

‘I Atisha Illissa Gould, Law Clerk at Cardinal Law Firm, 114 Granby Street, Kingstown, St. Vincent and the Grenadines, do make oath and say as follows;

1. That on the 13th day of August, 2013, the Claim Form, Statement of Claim, Acknowledgment of Service and Defence and Counterclaim in the above matter, was sent to the Defendant via Federal Express, to be delivered at the following address “1630 Elmore Drive, Jonesboro, Georgia 30236, USA”. A copy of the international airway bill is annexed hereto and marked “AIG1”.
2. That on the 14th day of August, 2013 the aforementioned documents were delivered by Federal Express at the address stated above. A copy of the Proof of Delivery is annexed hereto and marked “AIG2”.
3. That the information stated to herein is true to the best of my knowledge, information and belief.’

[13] The affidavit did not comply strictly or substantially with the requirements outlined in CPR 5.13. In that regard, it did not attest that the method of service was sufficient to enable Mr. Houston to ascertain the contents of the claim form; did not exhibit a copy of the documents served and did not claim or show that Mr. Houston was able to ascertain the contents of the documents; or that it was likely that he would have been able to do so. Furthermore, it did not reveal the time when he was or was likely to have been in such position to ascertain the contents of the documents. The Court is therefore unable to ascertain that the documents have come to Mr. Houston’s attention.

[14] In her affidavit of 31st May 2018, Ms. Glenda Barrow deposed that Mr. Houston was served by Federal Express at the 1630 Elmore Drive address, in accordance with the June 3rd 2013 order of court. She did not indicate how she was able to ascertain this. She did not say whether she had firsthand knowledge of this. She averred that the package was signed for and accepted by a person residing at that address. This does not advance Barefoot Charters’ assertion that Mr.

Houston was served with the package.

[15] There was no evidence from which the Court could reasonably conclude that Mr. Houston resided at that address on the date of delivery of the package. The referenced service was not proved in accordance with the CPR. In the premises, Barefoot Charters failed to establish on a balance of probabilities that the documents had come to Mr. Houston's attention or were likely to have come to his attention.

[16] Ms. Barrow deposed further that Barefoot Charters informed her that Mr. Houston left his Yacht 'Freedom Quest' in its possession and has remained out of contact since 2010. She indicated further that Barefoot Charters informed her that:

1. Mr. Houston has made no attempts to collect the yacht for the past 8 years and has made no inquiry about the yacht;
2. all attempts to contact Mr. Houston since 2010 have been futile; that it has done all in its power to contact him and has exhausted all efforts to do so;
3. it has expended expenses in taking care of the yacht; and
4. Mr. Houston has abandoned his yacht and has made no efforts to reclaim it.

[17] Ms. Barrow attested that she has been advised by counsel that the Court may dispense with service in exceptional circumstances; that this is an exceptional case because Barefoot Charters has complied with the order to serve Mr. Houston with the Amended claim and accompanying exhibits at his last known address in 2013; that Mr. Houston has abandoned his yacht and cut off all communication with Barefoot Charters since 2010; that he is aware of the Yacht management agreement and has left his yacht in Barefoot Charters' possession.

[18] Barefoot Charters submitted that at no time did it seek not to serve Mr. Houston or to hide the contents of the claim form from him. It cited the case of **Godwin v City Borough Council**. It quoted May LJ where he stated in the judgment:

‘There will be plenty of commonplace circumstances in which formal service or reservice of a document may be pointless and where it will be sensible and economic for the court to dispense with it.’³

[19] Barefoot Charters contended that the instant case is one in which it is ‘sensible and economic’ for the Court to dispense with reservice of the document or further proof of service ‘given that the Claim Form was served in accordance with an order of court five years ago’, having been delivered and received at Mr. Houston’s last known address ‘as stipulated in the court order’.

[20] Barefoot Charters submitted that further pronouncements by May LJ in the same case are instructive. It referred to statements set out in paragraph 50 where the learned Judge recited part of the judgment of Douglas Brown J in **Elmes v Hygrade Food Products**⁴. There, Douglas Brown J explained that the Court has a general power to dispense with service, and that that power must be read together with the rules relating to the overriding objective.

[21] The referenced passages state:

‘In these circumstances striking out this claim is not dealing with the case justly. It would in my view be an affront to justice and if the rules required that result then there would be something seriously wrong with the rules. The rules, however, are not defective. Rule 6.9 enables the court to reach a just result. If reservice can be dispensed with, so can service in the usual circumstances if this case.’

‘The remarks of Lord Justice Simon Brown [in Elmes], with which Mr. Justice Penry-Davy agreed, are *obiter* and although persuasive are not binding on me. The core of Lord Justice Simon Brown’s judgment on this point is that rule 6.8 cannot be operated retrospectively. He appears to rule out use of rule 6.9 for the same reason. The use of rule 6.9 here is not strictly retrospective use. The claimant is entitled to say here, with these facts and circumstances, in the court’s discretion the court

³ [2011] EWCA Civ 1478, at para. 50.

⁴ [2001] EWCA Civ 121.

should exercise the power to dispense with the service. In all these circumstances I do exercise that discretion and dispense with service. He [s.c. the defendant] does lose a fortuitous limitation defence but there is otherwise no prejudice to the defendant on such an order being made and the matter should now proceed on the pleadings as they stand on particulars of claim and defence and no more time should be taken up on procedural wrangling.’³

[22] Barefoot Charters submitted further that the overriding objective should be applied in considering the court’s power to dispense with service in the instant case. I agree. CPR 1.1 enjoins the Court to give effect to the overriding objective whenever it is called upon to exercise its discretion under the Rules or to give effect to its provisions.⁵

[23] The decision in **Godwin v City Borough Council** arose in circumstances where the claimant applied for and received an extension of time to serve the claim form. The claim form was duly served on the last day for service set out in the order. The defendant claimed that it was not served within the stipulated time. Significantly, the claim form was issued just before the relevant limitation period expired. The issue of limitation therefore arose. The claim form was served by first class post and received by the defendant the following day which happened to be the deadline for service.

[24] The applicable provision of the CPR (the English rule 6.7) provided that documents served by first class post are deemed to have been served on the second day after it is posted. The Court of Appeal agreed with the district judge that the service was deemed to have occurred the day after the deadline for service. In arriving at its decision, the Justices of Appeal commented on the applicability of rule 6.9 which is similar to rule 7.8B in this jurisdiction.

[25] Rule 7.8B provides:

‘7.8B (1) The court may dispense with service of a claim form in exceptional circumstances.

⁵ CPR 1.2.

- (2) An application for an order to dispense with service may be made at any time and-
- (a) must be supported by evidence on affidavit; and
 - (b) may be made without notice.'

[26] Rule 6.9 of the English CPR (considered in the *Godwin* case) provides:

- '(1) The court may dispense with service of a document.
- (2) An application for an order to dispense with service may be made without notice.'

[27] May LJ opined in the **Godwin** case that 'rule 6.9 does not extend to extricate a claimant from the consequences of late service of the claim form where limitation is critical' and that rules relating to limitation do not avail the claimant. Two distinguishing features between the instant case and the **Godwin** case emerge. Firstly, the issue of limitation does not arise in the case at bar. Secondly, while it was established in the **Godwin** case that the claim form actually reached the defendant, there is no admission or proof of that in the present case.

[28] As outlined earlier, the evidence relied on by Barefoot Charters does not meet the threshold set out in the CPR for proof of service. In the premises, Barefoot Charters cannot avail itself of the dicta by May LJ which suggests that the Court may dispense with service where for example a claim form had previously been served on the defendant informally or before being amended.⁶ Moreover, May LJ opined that even if an application had been made to dispense with service in the circumstances of that case, it would not be successful.⁷ The other Justices of Appeal agreed with his conclusion. Therefore, the dicta highlighted by Barefoot Charters do not assist its case.

[29] Barefoot Charters referred to the case of **Elmes v Hygrade Food Products** but did not provide a copy of that judgment. That decision does not advance its case. In it, the English Court of Appeal was presented with circumstances in which the claimant served the claim form in time, but on insurers instead of on the defendants personally. The Court held that it had no power to

⁶ At paragraph 50.

⁷ At paragraph 50 of the *Godwin* case.

retrospectively correct such error by making an order dispensing with service or approving service by an alternative method (on the insurers). Lord Simon Brown opined that it would not have been proper to make either order⁸.

[30] The facts in the instant case do not resemble those details. Accordingly, the judgment is of limited application. Lord Simon Brown seemed to suggest that an order dispensing with service could not be granted retrospectively. May LJ disagreed with that notion in the **Godwin** case, but still did not dispense with service. These cases cited by Barefoot Charters can be distinguished from the present one.

[31] I am satisfied that in the instant case no effective service has been proved by the evidence. Therefore, the issue of re-service does not arise. Significantly, those courts adopted a strict approach to the requirement for service and with good reason having regard to the legal consequences which flow from service.

[32] Barefoot Charters contended that Mr. Houston is not prejudiced because he left his yacht in its possession without contact for 8 years and made no attempt to reclaim the yacht or to contact Barefoot Charters regarding the yacht. As I understand it, the requirement for service of a claim form on a defendant is to inform him of the case which he faces. It underpins a fundamental principle of law which dictates that a person must know the case which is being made against him.

[33] It is therefore understandable that the CPR stipulates that the provision to dispense with service must be used sparingly. It should be noted that the CPR provides generous alternative options for effecting service on an elusive party. These include publication in a newspaper with leave of the Court, on proof that the contents would likely come to the defendant's attention. Whatever method opted for by the claimant, the Court must be satisfied before proceeding to hear the claim, that the defendant had ample opportunity to be notified of the contents of the claim.

[34] Barefoot Charters contended that it is not making an attempt to evade service as it complied with

⁸ At paragraph 13.

the order and served Mr. Houston at his last known address. It argued that it can no longer get in touch with Mr. Houston and has no means of providing further proof of service. It has not indicated what if any attempts it has made to locate Mr. Houston by searching social media records or platforms or otherwise. Significantly, it has not said why it did not exhibit copies of the documents transmitted to the USA address in August 2013.

[35] Barefoot Charters submitted alternatively that even if Mr. Houston did not have notice of the Claim Form, he has no interest in recovering the yacht 'Freedom Quest' because he left it in excess of 8 years, while Barefoot Charters had to incur expenses and care for it. It argued that if Mr. Houston had any interest in the yacht he would have laid claim to it pursuant to the yacht management agreement. It reasoned that it would be contradictory to the overriding objective and impractical not to dispense with service in the case at bar.

[36] The submissions made on Barefoot Charters' behalf are understandable and I am not unsympathetic to it. It is reasonable to appreciate that a claimant in a position such as the one described would be frustrated. The Court must however not lose sight of its duty to do justice as between the parties. There is any number of reasons why Mr. Houston might not have contacted Barefoot Charters. I do not speculate.

[37] The learned authors of Blackstone's Civil Practice⁹ state that attempting to serve a document without prior notification to the defendant are powerful factors against dispensing with service. It appears from the learning in that text that the cases demonstrate that service is dispensed with primarily where the defendant has had some knowledge, whether actual or constructive of the impending proceedings¹⁰, but seldom otherwise. I have not been presented with any authorities that demonstrate a departure from that approach.

[38] It seems to me that to dispense with service of the claim form on Mr. Houston would prejudice him by denying him an opportunity to defend the claim. On the other hand, the prejudice to Barefoot

⁹ 2013 Ed.

¹⁰ Olafsson v Gissurarson (No. 2) [2008] EWCA Civ 152, [2008] 1 WLR 2016.

Charters would be for it to make a further attempt to serve Mr. Houston. In doing so, it will likely incur additional expenses and resources including loss of time. Such efforts may include publication in a newspaper locally or elsewhere.

[39] Central to a resolution of this matter is the nagging questions ‘whether service is effective if made at one’s last known address, if one does not live there anymore and in circumstances where there is no proof that the document is brought to the addressee’s attention? and ‘Whether other public modes of service are more likely to enable him to be notified?’

[40] It does not go unremarked that the affidavits supporting the application contained primarily hearsay evidence which do not comply with the rules¹¹ governing admissibility. In some respects they amount to testimony from counsel at the bar table. The weight to be attached to those statements is therefore negligible. Mary Barnard, Barefoot Charters’ Managing Director swore affidavits at other stages in the proceedings. She averred that since June 2010 she had made several unsuccessful attempts to contact Mr. Houston at his known email address.

[41] She deposed that Mr. Houston had also given permission to have paperwork done for the purpose of selling the ‘Freedom Quest’. She indicated that he did not complete the required documentation. Ms. Barnard has not produced any of the referenced email or other correspondence with Mr. Houston.

[42] The Interpretation and General Provisions Act¹² may provide an avenue which has not been pursued by Barefoot Charters. Section 3(5) states:

‘(5) Where any written law authorizes or requires any document to be served by post, whether the expression “serve”, “give” or “send” or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person so served, prepaying and posting, by registered post, a letter containing the document,

¹¹ Made pursuant to section 55 of the Evidence Act, Cap. 220 of the revised Laws of Saint Vincent and the Grenadines, 2009.

¹² Cap. 14 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

and, unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of the post.'

- [43] The Interpretation and General Provisions Act was enacted and came into force in 1976¹³. It has been amended several times since, including as recently as 2001. The referenced section has not been amended. It is arguable that transmitting the claim form by courier would qualify as 'posting' by registered mail.
- [44] That would be a compelling argument save that it is to be observed that the House of Assembly has not changed the section to reflect the reality of faster modes of service available in the 20th and 21st centuries, such as courier dispatch, which would provide a receipt of delivery. This presents a dilemma, especially in face of the provisions of CPR 7.8B which were promulgated after the Interpretation and General Provisions Act. It is recognized that the CPR (subsidiary legislation) does not and cannot amend the Interpretation and General Provisions Act which is primary legislation.
- [45] The Interpretation and General Provisions Act requires proof by registered post. Likewise, the CPR and the Interpretation and General Provisions Act both require proof of delivery of the referenced documents to the defendant's last known address. Such proof is absent in the case at bar. Without addressing what might be considered to be a variance between the CPR and the Interpretation and General Provisions Act, it is important to note that the CPR were made by the Honourable Chief Justice and two Judges of the Supreme Court who would have been cognizant of the provisions of the Interpretation and General Provisions Act.
- [46] Barefoot Charters has not transmitted the document to Mr. Houston's last address by registered post. I accept that it sent a package to that address. There is no adequate evidence of what it contained. While it is arguable that Barefoot Charters has complied to some extent with the procedure in section 3 (5) of the Interpretation and General Provisions Act, it has not supplied the required proof.

¹³ On 16th November.

[47] On balance, it seems that Mr. Houston would be more prejudiced if a decision is made against him than if the application is denied. I am reasonably sure that with further efforts Barefoot Charters would be able to satisfy the Court that Mr. Houston has been served in accordance with the CPR or the Interpretation and General Provisions Act. For all of the foregoing reasons, I make no order dispensing with service of the amended claim form. Barefoot Charters' application is accordingly dismissed.

ORDER

[48] It is accordingly ordered:

- (1) Barefoot Yacht Charters (Caribbean) Limited's application for an order dispensing with service of the amended claim form on Mr. Kenneth Houston is dismissed.
- (2) Barefoot Yacht Charters (Caribbean) Limited shall bear its own costs.

[49] I wish to record thanks to learned counsel for her written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar