

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES**

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2015 / 0036

BETWEEN:

**ROBBY MORAIN
RICKY MORAIN**

Claimants

and

BEVERLY WHINT

Defendant

Appearances:

Ms. Celia Edwards Q.C, with Celene Edwards & Deloni Edwards for the Claimants

Mrs. Kindra Mathurine-Stewart for the Defendant

Ms. Jody-Ann Johnson holding a watching brief for the Republic Bank Grenada Ltd.

2015: December 9;
2017: November 23.

DECISION

[1] **Adrien-Roberts, J.:** Before me are three applications; two of these applications are filed on behalf of the defendant, Ms. Whint and one is filed on behalf of the claimants, the Morains.

[2] Ms. Whint in her applications filed on 24th November 2015 and 30th December 2015 seeks inter alia the following orders:

- 1) Declaration that the court does not have jurisdiction to try and determine the claim herein since the validity of the said claim form had expired, same having been served in this jurisdiction on Ms. Whint outside the period specified by the rules for its service;
- 2) That the claim form and statement of claim be set aside;
- 3) That all orders obtained under the claim be discharged;
- 4) That the orders dated and filed 11th November 2015 be set aside;
- 5) Costs

- [3] The Morains' application was filed on 8th January 2016 and they seek an order for judgment in default of defence against Ms. Whint.

Background of Proceedings leading to these Applications

- [4] The Morains instituted a claim for specific performance of an agreement against (Ms. Whint) on 3rd February 2015. On that same day, they applied for and on 5th February 2015 obtained permission to serve Ms. Whint outside the jurisdiction at her address in New York.
- [5] Efforts to serve Ms. Whint outside the jurisdiction proved unsuccessful and on 19th August 2015 the Morains applied for an order for substituted service of the claim on Ms. Whint by publication in the Grenada Today Newspaper and for an extension of the life of the fixed date claim filed on "17th February 2015". (The claim was in fact filed on 3rd February 2015.) That application was never dealt with and on 2nd October 2015 by way of an amended application the Morains sought the same orders. The amendment to the August application has no bearing on this application.
- [6] Subsequently, but before the amended application could be dealt with, the Morains' got word that Ms. Whint was in Grenada and on 30th October 2015 served her with the claim and statement of claim.
- [7] The Morains' amended application was considered on 11th November 2015 and was intended to be dealt with without a hearing. Upon my considering it I first formed the opinion that it should be refused and noted my order in pen thereon but considered that it may be useful to hear counsel for the Morains on the application. When counsel attended Chambers he informed that Ms. Whint had been served personally in Grenada and prayed for an order that the service on Ms. Whint on 30th October 2015 be deemed proper service. The court granted the orders sought, extending the life of the claim to 31st October 2015 and deeming the service of the claim form and statement of claim on Ms. Whint on 30th October 2015 to be proper service. On 13th November 2015 Ms. Whint acknowledged service of the claim and statement of claim.

[8] **Issues:**

- 1) Whether service of the claim was invalid.

- 2) Whether the claim was valid on the date of service.
- 3) Whether the claim could be served in Grenada.
- 4) Whether it could be served without first obtaining an order granting permission to serve by alternative method;
- 5) Whether the court can validate retrospectively.
- 6) Whether the order of the court made on 11th November 2015 extending the life of the claim and deeming it to have been properly served should be set aside.
- 7) Whether the judgment in default of defence should be entered against Ms. Whint in favour of the Morains.

[9] I turn now to consider the validity of the service of the claim on Ms. Whint in Grenada. The service of claims outside the jurisdiction is governed by CPR Part 7 which Part contains provisions about the circumstances in which court process may be served out of the jurisdiction, and procedure for serving court process out of the jurisdiction. CPR Part 7.8 (A) provides for the substitution of an alternative procedure when service under CPR Part 7.8 is impracticable.

[10] The alternative mode of service ordered may very well be for a method of service to be effected within the jurisdiction as in **Alexander Katunin & Sergey Taruta vs. JSC VTB Bank** BVIHCVAP2015/0007. In that case, upon an application pursuant to CPR Part 7.8A to serve the proceedings by an alternative method at an address in Russia, the Judge ordered that the claimant Bank serve the defendant Mr. Katunin by leaving the documents with the registered agent of Mr. Katunin's companies in the Virgin Islands. The Bank served the proceedings in accordance with this order. Mr. Katunin challenged the service of the proceedings and the jurisdiction of the court. The Court of Appeal set aside the order for alternative method of service because the Bank in making the application failed to adduce evidence to show that it was impracticable to serve the claim pursuant to CPR 7.8. The Court of Appeal found that there was no proper evidential basis for the exercise of the discretion to make an alternative service order under CPR 7.8A. In that case the propriety of the alternative method of service order in so far as it was to be effected in the Virgin Islands was not raised and the Court of Appeal did not pronounce on it.

[11] Counsel for Ms. Whint submits that when the claim was served in Grenada it was an invalid claim and therefore the court is stripped of jurisdiction to adjudicate on it. This argument suggests that the term of the claim's validity contracted to 6 months upon it being served within the jurisdiction. I do not agree.

The claim having been intended to be served outside the jurisdiction was valid for twelve (12) months and its service was subject to CPR Part 7 exclusively. Any alternative method of service employed pursuant to an order made under CPR Part 7.8(8) (1) would, irrespective of where service is to be effected, enjoy twelve (12) months validity.

[12] Counsel's submission would lead to many very unhappy results. A claimant who has to resort to obtaining an order under CPR Part 7.8(A) for alternative mode of service to be effected within the jurisdiction would have to do so within 6 months unless that 6 months term was extended under CPR Part 8 (13). CPR Part 7.8 (A) does not specify a time within which an application can be made. I therefore hold that the claim was a valid claim when it was served on Ms. Whint.

[13] Albeit that the claim is valid, it was served on Ms. Whint without obtaining permission under Rule 7.8(A) (1) to so do. CPR Part 7.8 (A), captioned "**Mode of service – alternative procedure**" provides:

"7.8(A)(1) 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.

(2) An order made under this Rule shall specify the date on which service of the claim form shall be deemed to have been affected.

(3) Where an order is made under this Rule, service by the method specified in the court's order shall be deemed to be good service.

(4) An application for an order under this Rule may be made without notice but must be supported by evidence on affidavit -

(a) specifying the method of service proposed;

(b) providing full details as to why service under Rule 7.8 is impracticable;

(c) showing that such method of service is likely to enable the person to be served to ascertain the contents of the claim form and statement of claim; and

(d) certifying that the method of service proposed is not contrary to the law of the country in which the claim form is to be served.

(5) Where any method of service specified in an order made under this Rule is subsequently shown to be contrary to the law of the country in which the claim was purportedly served, such service shall be invalid.

[14] I revert now to the Morains' amended application. The amended application prayed for inter alia an order for substituted service of the claim by way of publication in a local newspaper or in the alternative as this Honourable Court shall see fit. The affidavit in support satisfies the evidential requirements of Rule 7.8(A) (4). My order upon this application was to deem service on Ms. Whint as proper. The Morains' application was first filed in August and the amendment thereto in October, that is before they adopted the alternative mode of service but before any order was made.

[15] The question therefore is whether the service of the claim was invalid because an order had not been obtained from the court. I think not. I am of the view that the service was irregular but not invalid. In the instant matter the Morains did exactly what they were required to do and that is to apply for an order for alternative service but failed to wait for an order to be made.

[16] CPR Parts 26.9 clothes the Court with jurisdiction to regularise the service and to do so retrospectively. That Rule provides:

“26.9(1) This rule applies only where the consequence of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders.

(3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party.”

[17] The order deeming service on Ms. Whint as proper is therefore properly made.

Application to set aside the Order Extending Time to Serve

[18] The Morains' application filed in August 2015 and the amended application subsequently filed on 2nd October 2015 for an extension of time fell to be considered under CPR Part 8.13. There is no doubt that the claim was one intended to be served outside the jurisdiction. Ms. Whint's address was stated in the claim to be in the USA and an order was applied for and obtained for service on her outside the

jurisdiction. The period for serving the claim was twelve (12) months and its validity would expire on 2nd February 2016. CPR Part 8.12 (2). I therefore agree with counsel for Ms. Whint that the order extending the life of the claim is wrong and should be set aside. That is so because the application was considered as if the claim had been one for service within the jurisdiction and valid for six (6) months. The claim was at that time valid for twelve (12) months and there was no need for an extension of time. The order had the effect of contracting rather than extending the term of the validity of the claim.

The Morains' Application

[19] I turn now to the claimant's application for default judgment. Ms. Whint's application is a challenge to the jurisdiction of the court. The prescribed manner for so doing is to file an acknowledgment of service within the time prescribed for filing it and an application within the time limited for filing a defence. No defence need be served. Acknowledging service does not affect Ms. Whint's right to contest the jurisdiction of the court. Taking any step in the action other than acknowledging and applying to contest the court's jurisdiction "is extremely dangerous". Any such action would be likely to constitute a voluntary submission to the jurisdiction of the court. In the premises the Morains' application for judgment in default is refused.

[20] As it is now, the acknowledgment of service that was filed ceases to have effect and Ms. Whint must now complete, file and serve a new acknowledgment of service within fourteen (14) days. This acknowledgment will be treated as a submission to the jurisdiction of the court.

Conclusion

For the reasons stated above it is hereby ordered as follows:

- 1) The Defendant's application for an order setting aside the order of the court extending the time to serve the claim is granted.

- 2) The order of the Court extending the time to serve the claim is set aside.
- 3) The defendant's application for an order setting aside the order of the Court deeming the service of the claim on Ms. Whint is refused and dismissed.
- 4) The claimant's application for default judgment is refused and dismissed.
- 5) Ms. Whint shall file and serve an acknowledgment of service within fourteen (14) days and a defence within twenty-eight (28) days of this order.
- 6) The claim shall proceed thereafter in accordance with the Civil Procedure Rules.
- 7) Both parties enjoy success and suffer defeat on the hearing of these applications. In the premises I make no order as to cost. Each party shall bear his or her own costs.
- 8) Cost awarded to the claimant in the sum of \$1,000.00.

Wynante. M. Adrien-Roberts
High Court Judge

By the Court


REGISTRAR
SUPREME CO
Registrar
WEST INDIES