

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2015/0014

BETWEEN:

DELORIS JACKSON GOULBOURNE

and

BANK OF NOVA SCOTIA



CLAIMANT

DEFENDANT

Appearances:

Mr. Sten Sargeant for the Claimant;
Mr. Roderick Jones with him Ms. Anne Arrindell for the Defendant

2017: September. 27

ORAL DECISION

- [1] **Henry, J.:** I propose to give an oral decision in this matter. The application which is before the Court is an application by the defendant to permit substituted service of the claim form on the added defendant Anthony Jackson.
- [2] This is opposed by the claimant Deloris Jackson-Goulbourne, who based on the pleadings so far, is the sister of the proposed added defendant. Learned counsel on behalf of the claimant Deloris Jackson Goulbourne, submits to the court that it would be an abuse of the process of the court for it to consider the instant application for substituted service which was filed on the 12th of July, 2017 or to consider a previous application which was filed on the 7th of July, 2017.

- [3] Legal practitioner on behalf of the claimant contends that the court already considered an application by the defendant for substituted service. The claimant refers in this regard to an order of the court made on the 12th of July, 2017, the preamble of which reads:

'Upon this matter coming before the court for the hearing of an application for an unless order and a Notice of Application by the respondent for an extension of time to comply with the order of court made on the 25th March, 2015 and upon reading the Notice of Application filed on June, 22nd 2017 and the Affidavit of Beverly Frederick in support and the Notice of Application filed on the 7th of July, 2017 and the Affidavit of Ms. Ann Arrindell in support and upon hearing counsel for the applicant and counsel for the respondent.'

- [4] One possible interpretation of the preamble as urged by learned counsel Mr. Sten Sargeant is that the court was considering dual applications on that date - one by the claimant and one by the respondent. The order which was made was a consent order. It reads:

' It is by consent ordered that the respondent is present an (sic) extension of time to comply with the court order made out (sic) 25th March, 2015 to execute service of the claim form with statement of claim and other supporting documents file (sic) on the 4th of February, 2015 on Anthony Jackson'.

- [5] That paragraph does not address the application for substituted service. It makes an order for personal service on the added defendant. Paragraph (2) reads:

'Unless with proof of service the defendant serves the added defendant Anthony Jackson of the territory of the British Virgin Islands with a Fixed Date Claim Form with statement of claim accompanied by the other forms prescribed in CPR 8.14 within (45) days of this order the defendants defence will be struck out'.

- [6] Similarly that paragraph speaks to personal service and not substituted service.

Paragraph (3):

'The claimant/applicant has carriage of this order which must be filed on or before 21st July, 2017'

And finally. Paragraph (4):

'no order as to costs'.

- [7] Paragraphs (3) and (4) do not deal with substituted service. They do not deal with personal service. They speak only to who is responsible for preparing and serving the order. So, reading that order in its totality, it is obvious, it is evident that the court did not on the 12th of July, 2017 address and fulsomely consider the application, made by the defendant for substituted service.
- [8] As quite correctly pointed out by Mr. Sargeant, the defendant subsequently filed a notice of discontinuance of that application which was filed on the 7th of July, 2017 for substituted service. So, the court did not get an opportunity subsequent to the 12th of July order, to consider the application by the defendant for substituted service on Anthony Jackson. What the Court considered was the application for personal service with an unless order attached to it, which was made by the claimant. That order was granted.
- [9] With the Notice of Discontinuance of the Notice of Application filed on the 7th of July, 2017 having been filed on the 18th of July 2017; without consideration and without an order from this court, there never was an order made in respect of it and this is the first time today, that the court is considering an application for substituted service on the added defendant. So, the issue of abuse of the process in respect of hearing a similar application on two separate occasions does not arise on that point.
- [10] The other point which learned counsel Mr. Sten Sargeant made:
 'that if the court finds that the application of the 7th of July, 2017 was not dealt with that it should not hear it today'.
Based on what has already been said that application is no longer before the court, so the issue of abuse of the process does not arise based on that submission.
- [11] In addition, learned counsel Mr. Sten Sargeant has indicated and contended that the defendant has not complied with the unless order and has not appealed against it. That is quite correct. There has been no appeal and based on the application which is presently before the court, and

the affidavit filed in support of the order (to which was attached the sanction for non-compliance) has not been complied with. In this regard, the defendant is saying we were unable to effect personal service because it was not possible to locate the added defendant. The court has wide discretion in those circumstances, to permit a party who has difficulty locating another party or prospective party, to do what is just. This is a stipulation as set out in the overriding objective. The court must always do what is just. Not just for one litigant but for all of the litigants in a matter when issue of service is critical.

- [12] There is no evidence which contradicts the testimony of the deponent Ann Arrindell that the defendant was unable to locate or contact Anthony Jackson. I accept that evidence and in those circumstances, it would be unjust to impose a sanction for non-compliance, where a party is saying we did not comply deliberately and intentionally but because it was impossible to comply. So that point in my opinion is without merit.
- [13] The other submission made by learned counsel Mr. Sten Sargeant on behalf of the claimant, is that if the court is to hear the instant application it may have the effect of possibly making an order contrary to one which it made before (which it made on sanction). And that would indeed be the effect if the court heard favorably considered the application which is before it.
- [14] The court in exercising any discretion under the rules must act judicially. Justice requires that the court takes into account the overriding objective, which is to ensure that both or all parties have justice. The claim which is before the court by the claimant is seeking certain remedies from the Bank. In a previous decision this court held, that certain trust issues arise which could only be properly considered when all of the evidence is before me.
- [15] The court is minded, having regard to the pleadings and what appears on the pleadings to be factual contentions which are in great dispute, that it would be just to give the applicant/defendant a final opportunity to serve on the added defendant the claim form and supporting documentation. The court takes judicial notice also that the territory of the British Virgin Islands was devastated

recently by a hurricane and in those circumstances; the court takes judicial notice of all the media reports that it is almost impossible to locate persons living within that British Overseas Territory.

[16] In light of all that I have said, I am of the opinion that the justice of this case requires the defendant to be given a further opportunity in this case to effect substituted service on the added defendant Anthony Jackson. The defendant has not sought costs. I make no order as to costs.

[17] **It is therefore further ordered that:**

- The defendant, the Bank of Nova Scotia be and is hereby granted leave to effect substituted service of the fixed date claim form with statement of claim and other documents in relation to the fixed date claim form filed on the 4th day of February 2015, on the added defendant Anthony Jackson, by substituted service through publication in two consecutive issues of a newspaper circulating within the jurisdiction of St. Vincent and the Grenadines.
- The first of such publication to be made no later than the 6th of October, 2017. The content of the publication to be in the usual manner.

[18] For the avoidance of doubt, the defendant is required to consult with the Registrar of the High Court to finalize the wording of the publication.



Esco L. Henry
HIGH COURT JUDGE

By the Court


Registrar