

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE (CIVIL) A.D. 1998

SUIT NO: 434 of 1996

BETWEEN

CLAREY FONTENELLE

PLAINTIFF

AND

**(1) TRANSPORT & HANDLING SERVICE LTD.
(2) LINUS AMBROISE**

DEFENDANTS

Appearances

K Momplaisir QC for the Plaintiff
Mrs A Foster for the Defendants

1994: November 11

DECISION

Mitchell J

These are my reasons for setting aside the ex parte assessment of damages made on 5th November 1998.

The Summons for Assessment of Damages has been pending since 25 September 1997. On 28 September 1998 in open court at a call over at the request of the Plaintiff, the Defendants being absent and unrepresented, 7 October 1998 at 1.30 pm in Chambers was fixed as the date and time for the giving of directions for the hearing of the Summons for Assessment of Damages. At the hearing in Chambers on 7 October neither the Defendants nor their Counsel being present, but being assured that they had been served with Notice of the hearing which had not yet reached on file, I had given directions for the

hearing of the Summons for Assessment of Damages on 5 November at 9 a.m. I had emphasized to Counsel for the Plaintiff the need to ensure that the Solicitor for the Defendants was served with a copy of the Directions I had given, so that Counsel could appear ready to deal with the matter on 5 November.

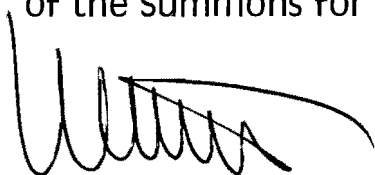
The following directions were given:

- (1) detailed Affidavits of the injury and loss to be filed by the Plaintiff and served;
- (2) the Plaintiff given leave to amend the Statement of Claim to detail further expenses as special damages;
- (3) Defendants' Solicitor to be served with a Notice of the adjourned date and with any additional Affidavits;
- (4) the matter to stand adjourned to 5 November at 9 a.m. for determination.

On 5 November the Summons came up in Chambers to be determined. Neither the Defendants nor their Counsel were present. There was no Notice of Adjourned Hearing for 5 November on file. There was no copy of the Order made on 7 October nor of an Affidavit of Service of the Notice on file. Counsel assured me that an Affidavit of Service had been sworn and filed, but had not yet physically reached the file. There was no explanation as to why the Defendants were absent. The Plaintiff was a paraplegic who had travelled a long way to be present in Court with his family. I decided to proceed with the assessment. After reading the Affidavit evidence and hearing legal submissions of Counsel I made an award to the Plaintiff. I directed that the draft Order should be presented to me at the earliest opportunity to check it prior to its being filed.

On 6 November the file came back to me with the draft Order made on 5 November. On the file at this time was the Affidavit of Service filed on 5 November. That is where the problems began. First, the Affidavit of Service states that one Shirdean Pamphile a receptionist employed by the Defendant Company had been on 2nd November served with a copy of a Notice, 2 Affidavits, and the Plaintiff's List of Exhibits by leaving a copy with her for the Manager of the 1st Defendant. The Companies Act sets out how a company is to be served. Service on a receptionist is not proper service on a company. The Affidavit does not say that the company was served by leaving a copy at the office of the company with the Receptionist for the Manager. For all I know from this Affidavit she may have been served with the Notice while she was at the supermarket doing her weekly shopping. Secondly, the only Notice on file is the Notice for 7 October. There is no Notice for 6 November. It is the Notice for the hearing on 7 October that appears to have been served on 2nd November. By 2 November service of the Notice for 7 October was an exercise in futility. This Notice should have been served early and in time for the hearing on 7 October. Another Notice for the 6 November should have been prepared and served. There should have been an Affidavit of Service of this second Notice. But thirdly, in any event, I had specifically directed on 7 October that the Solicitor for the Defendants was to be served, not the Defendants personally. Even prayer service on the company would have been in contravention of the direction as to how the company was to be served in this particular case. Even if the company had been properly served I would not have proceeded on 6 November if I had realized that the Solicitor for the company had not been served with the Order and the Affidavit evidence.

From the above it is apparent that the ex parte Order made on 7 October was made when the Defendants had not been served with a Notice of the fixture for 7 October. This Order of 7 October is set aside for the reasons given above. The Order made ex parte on 5 November assessing damages is set aside. The matter is adjourned to 24 November, 1998 at 9 a.m. for directions to be given for the hearing of the Summons for Assessment of Damages.

A handwritten signature in black ink, appearing to be 'Mitchell J', written in a cursive style.

Mitchell J
High Court Judge (Ag)