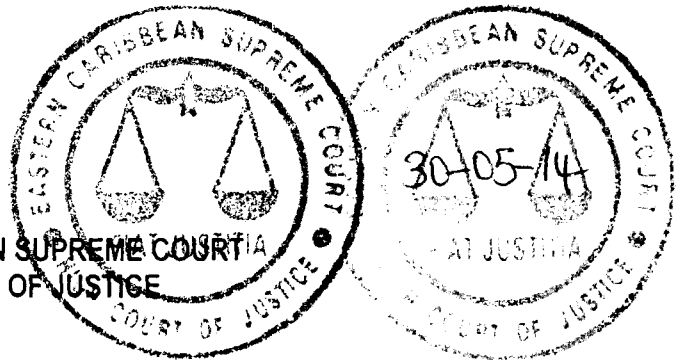
SAINT VINCENT AND THE GRENADINES



THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO 290 OF 2012

BETWEEN:

GOTSON WARRICAN

Claimant

AND

RONNIE TROTMAN
SHERWIN SAM

Defendants

Appearances
Mr Samuel E Commissiong for the Claimant
Mr Duane Daniel for the Defendants

.....
2013: 15th May 2013;
2014: 31st January 31; May 30
.....

DECISION

INTRODUCTION

[1] **LANNS, MASTER**: The Defendants herein, Ronnie Trotman and Sherwin Sam did not file an Acknowledgement of Service or Defence to the Claim in negligence instituted against them on 23rd October 2012, and thus on 8th January 2013, the Claimant applied for and obtained a judgment against the Defendants for their failure to acknowledge service. Come now the Defendants with an application filed on 15th April 2013, for an order setting aside the said default judgment entered by the Registrar of the High Court against the Defendants.

[2] In summary, the grounds of the application are that

1. The setting aside procedure is permitted under CPR 13.3.
2. The Claimant originally filed a claim on October 23, 2012, which was personally served on the 2nd Defendant in November 2012, but not personally served on the 1st defendant.
3. The Default Judgment was not personally served on the 1st Defendant.

4. The Defendants never became aware of the fact that the judgment was entered against them until, at the earliest April 4, 2013.

5. The 1st Defendant as owner, and the insured, informed his insurers and consulted with legal counsel;

6. The applicants believe that they have a real prospect of success in defending the claim.

[3] The Defendants swore to separate Affidavits in support of their Application with a copy of the Draft Defence and Counterclaim exhibited thereto. Ian Da Silva, Claims Manager of Metrocint General Insurance Co Ltd, also swore to an affidavit in support of the Defendants' application.

[4] The Claimant swore to an Affidavit in reply to the Defendants' Application to set aside.

Bases upon which an application can be made to set aside a default judgment

[5] There are two bases upon which a default judgment can be set aside. The first is where the Defendant can establish that the correct procedures have not been followed in obtaining judgment, in which case normally the Defendant can have judgment set aside as of right without the requirement of establishing a defence to the Claimant's claim. Here, the court may set aside judgment on or without an application.
(**Royal Trust Corporation of Canada v Dunn** 60 OR 3rd 468); **(CPR 13.2 (2).**

[6] On the other hand, if the judgment is regularly obtained and the Defendant is asking the court to exercise its discretion under CPR 13.3 to set aside the default judgment and allow the Defendant to defend the Claimant's claim, a number of conditions must be satisfied.

[7] In relation to the first situation which is in the context of CPR13.2, it has been suggested that the judgment in default of acknowledgment of service was irregularly obtained because of improper on non-personal service on the 1st Defendant. So before we proceed to the conditions under CPR 13.3, we look to see whether the default judgment was irregularly obtained. This, the court is permitted to do with or without an application.

The Evidence

[8] Mr Trotman has deposed that he was never personally served with the court documents in the matter. For the purposes of CPR13.2, the relevant part of the affidavit is paragraph 5.

"5. Sometime late in 2012, my brother, the second Defendant informed me that a bailiff served him with court documents, and my name was on them. I was never served personally. I collected the documents and was informed by my brother that that they were to do with the accident and the bailiff said they were to be taken to the insurance. The very next day, I took the documents to the insurance. ..."

[9] As to the Affidavit of the second defendant, the relevant passage is in paragraph 5:

'5. Sometime late in 2012, I was home when a bailiff brought court documents to me. I noticed my name as well as my brother's name was on them. I was told that they were to do with the accident, and the bailiff said that I was to give them to my brother for him to take to his insurance. I did as instructed. ... "

[10] At paragraph 2 of Mr Da Silva's Affidavit, he deposed:

'2. On November 19, 2012, the 1st applicant delivered to our offices a claim which had been served on his brother. .."

[11] The Claimant's affidavit of service is diametrically opposed to that of the other affiants. At paragraph 6 the Claimant deposed:

"6. The Defendants were both personally served with copies of the [claims] on the 15th day of November 2012. The affidavit of High Court bailiff Mr Marvin Mulcaire, filed on the 4th day of December states that hey were both served personally at Carapan. The First Defendant was served at 12:58 pm and the Second at 12: 50pm. That issue was never in dispute until they were served with the application for assessment of damages when the first Defendant claimed that he was not served personally. That is not true. ..."

[12] On 4th December 2012, Mr Marvin Mulcaire, High Court bailiff, swore to and filed two affidavits of service of the Claim. At paragraphs 2, 3 and 5, Mr Mulcaire deposed:

"2 I did on the 15th day of November 2012 at 12:58 pm, at Carapan serve the First-named Defendant with the following Court documents:

i) a copy of a Claim form and Statement of Claim duly filed at the High Court of Justice, Kingstown, Saint Vincent and the Grenadines on 23rd October 2012 in Claim No 290 of 2013;
ii) the form of Acknowledgement of Service, and
iii) the form of Defence and Counterclaim as prescribed by the Civi8l procedure Rules 2000; and
iv) the Notes for Defendant."

"3. I did on Thursday the 15th day of November 2012 at 12:50 pm at Carapan serve the Second-named Defendant with the following Court documents:

(i) a copy of a Claim form and Statement of Claim duly filed at the High Court of Justice, Kingstown, Saint Vincent and the Grenadines on 23rd October 2012 in Claim No 290 of 2013;
(ii) the form of Acknowledgement of Service, and
(iii) the form of Defence and Counterclaim as prescribed by the Civi8l procedure Rules 2000; and
(iv) the Notes for Defendant."

"4. I entertain no doubt that both Defendants named herein were served with the Court documents mentioned and referred to ... above"

"5. The facts deposed to herein are true and correct to the best of my knowledge, information and belief."

[13] Mr Mulcaire was subject to cross examination on his affidavit of service. Prior to him being tendered for cross examination, he acknowledged that he swore to the Affidavits of Service filed on 4th December 2012; 31st January 2013 and 15th April 2013. He confirmed that at the time he swore the affidavits, the contents thereof were true, and he stated that the contents thereof were still true and correct.

[14] Under cross examination, Mr Mulcaire stated that he served Ronnie Trotman at Ronnie's He stated that he met Sam at Ronnie's home. He stated that minutes later, while going to serve other documents, he met Ronnie at Caravelle School, stopped his vehicle, and explained to him what the documents were all about. He stated that Mr Trotman said that he would take them [the documents] to his insurers. Asked how many times he served Mr Trotman, Mr Mulcaire answered "personally, one time with Claim Form. On two other occasions, I spoke with him via telephone and he instructed me to leave the documents with Sam."

[15] The following exchanges then took place:

Mr Daniel: How long have you been a bailiff of the High Court?

Mr Mulcaire; I have been a bailiff of the High Court for nine years now.

Mr Daniel: Are you aware that the method of service identified is not personal service?

Mr Mulcaire: No. As far as I am aware, Mr Trotman gave instructions via telephone.

Mr Daniel: I am instructed, and I have to put to you that you did not personally serve the First Defendant on 15th November 2012, but that you in fact left the documents with his brother.

Mr Mulcaire: No please My Lady. I never serve Claim Forms by leaving them with other persons. I always explain what has to be done with the Acknowledgment of Service and Defence.

Mr Daniel: In relation to service of the Judgment in Default, your Affidavit of Service filed 31st January 2013 says that you did, on 22nd January 2013, serve Ronnie Trotman with a true copy of the Default Judgment. You never gave Ronnie Trotman the Default Judgment personally.

Mr Mulcaire: No.

Discussions, Findings and decision

[16] In **Royal Trust Corp of Canada v Dunn,** Borins J. commented at pages 478-479 as follows:

> "If the Defendant can establish that the correct procedures have not been followed either in obtaining judgment or in relation to some step taken by the plaintiff in the commencement of the proceedings, such as in failing to serve the statement of claim in a proper manner, then normally the defendant can have the judgment set aside as of right without the requirement of establishing a defence to the plaintiff's claim."

[17] Service of court process is the means by which a court commands a Defendant to answer to a claim. This service must be done in a proper manner.

(Per Rawlins JA in **Michael James v Tasman Group Inc and Betcorp Limited,** Antigua and Barbuda Civil Appeal No 6 of 2006 at paragraph [15], page 6.

[18] In order for the Claimant to properly obtain default judgment, he would have had to serve the Claimants with the Claim Form and Statement of Claim in a proper manner. Proof of proper service must be shown in the affidavit of service of the process server.

[19] CPR Rule 5.5(1) deals with proof of personal service:

> "1 Personal service of the claim form is proved by an affidavit of service sworn by the server stating –
>
> (a) the date and time of service;
> (b) the precise place or address at which it was served;
> (c) the precise manner by which the person on whom the claim form was served was identified; and
> (d) precisely how the claim form was served."

'2 If the person served was identified by another person, there must also be filed where practicable an affidavit by that person –

(a) proving the identification of the person served; and
(b) stating how the maker of the affidavit was able to identify the person served."

"3 (a) to (b)"

[20] On the face of it, Mr Mulcaire's Affidavit met the requirements for proof of personal service, but, were the contents thereof true and correct as Mr Mulcaire swore.

[21] Mr Mulcaire deposed that he personally served the First Defendant with the Claim Form and Statement of Claim at Carapan, Saint Vincent. Under cross examination, he seemed to have changed that stance to say that shortly after service on Sam, he met the First Defendant at Caravelle. This bit of evidence is inconsistent with the Affidavit of Service which is to the effect that Mr Trotman was served at Carapan. I am not convinced that Mr Mulcaire effected personal service of the Claim Form and Statement of Claim on the First Defendant. I prefer and accept the evidence of Mr Trotman and Mr Sam that the Claim Form and Statement of Claim were served on Mr Sam at Carapan, for and on behalf of Mr Trotman.

[22] A Claim Form is served personally on an individual in the jurisdiction by handing it to him or by leaving it with the person to be served at a place in the jurisdiction. It means therefore that leaving a Claim Form and Statement of Claim with another individual for and on behalf of the person to be served would be a procedural irregularity in the context of CPR13.2.

[23] At this juncture, I must point out an observation and it is this. Interestingly, the Judgment sought to be set aside is dated **7th January 2013**, although the Request for Judgment is shown as filed on **8th January 2013** (Emphasis mine). The Judgment was filed on **11th October 2013**. Usually, this is a procedural irregularity which may be sufficient ground for setting aside (or vary) the Judgment under CPR 13.2.

[24] On the totality of the evidence, I find and hold that the Default Judgment entered against the Defendants must be set aside for irregularity for improper service on the First- named Defendant, Ronnie Trotman.

[25] Having decided as I have, it is not necessary for me to go any further. However, in case I am found to be wrong, I go on to consider the conditions under CPR 13.3.

CPR 13.3 (1) (a) : Whether the Defendants have applied to the court as soon as reasonably practicable after finding out that judgment had been entered

[26] Mr Commissiong has submitted that the Defendants were served with the Default Judgment on 22nd January 2013. Mr Trotman, on the other hand complains that he was not personally served with the Default Judgment. Indeed, that much has been conceded

by Mr Mulcaire under cross-examination, thereby destroying the evidence contained in his Affidavit of Service wherein he stated at paragraph 3 that he did "on Tuesday the 22nd day of January 2012 at 3:25 pm, at Carapan, Saint Vincent and the Grenadines serve Ronnie Trotman with a true copy of a Judgment in Default of Acknowledgement of Service filed on the 11th January 2013... " It also destroys paragraph 5 of the said Affidavit of Service where he stated that "the facts deposed are true and correct. ... "

[27] In any event, the rules require the application to be filed 'as soon as reasonably practicable after finding out that the judgment had been entered, and not after service of the Default Judgment. Mr Trotman claims that he became aware of the judgment on 4th April 2013. Mr Sam on the other hand states in effect that he only "recently" became aware that the judgment had been entered against them. How recent is "recently" The Court is left to speculate, which it should not do. In those circumstances, I think it is reasonable to assume that both Defendants found out that the judgment had been entered against them on 4th April 2013. Their application to set aside was filed on 15th April 2013, eleven days after. I do not find a period of eleven days after finding out that the judgment had been entered to be unreasonable. I am satisfied that the Defendants have crossed the threshold requirement of CPR 13.3 (1) (a).

[28] I am aware of the cases of **Louise Martin v Antigua Commercial Bank**, Claim No ANUHCV1997/0015 [Antigua and Barbuda]; and **Earl Hodge v Albion Hodge**, Claim No BVIHCV2007/0098 [British Virgin Islands] in which the Courts found a period of fifteen days and thirteen days respectively between being served with the judgment and filing of the application to set it aside was reasonable. That being said, I am of the view that, given the peculiar facts of this case, the period between the alleged date of service of the Judgment and the date of filing of the application does not matter.

[29] At this juncture, I would wish to state that I fully recognize that according to the Affidavit of Mr Mulcaire, the First and Second Defendants were served with the Judgment in Default on the 22nd January 2013. However, under cross-examination, Mr Mulcaire admitted that he did not personally serve the First Defendant with the Judgment. To date, although Mr Trotman is aware of the Judgment, he has not yet been personally served therewith. What is the court to assume in the circumstances? Mr Mulcaire's statement of facts as contained in his affidavit in relation to service of the Judgment on Mr Trotman is far from being "true" and "correct" as he has deposed.

[30] A default judgment that has not been served is liable to be set aside and cannot be enforced. CPR 42.6 applies. .

(See **Anison Rabess and Joyce Rabess v National Bank of Dominica** - HCVAP2011/030, (Per the Hon Don Mitchell J.A. [Ag]).

CPR 13.3 (1) (b): Whether the Defendants have given a good explanation for their failure to file a defence

[31] Mr Daniel submitted that the Defendants have given a good explanation for their failure to file a Defence. Mr Commissiong does not agree.

[32] The reason for the failure is contained in the affidavit sworn by the Defendants as well as that sworn by Mr Da Silva. Briefly stated, the reason for the failure to file a defence seems to be ignorance. The Defendants reposed confidence in their insurers, (as is usually the case in these types of matters) to assist them with either retaining Counsel or settling the matter. Indeed, they said (and I believe them) that that the bailiff told them to take the papers to their insurers. Mr Da Silva confirmed that they did deliver the papers and were in fact referred to a lawyer who according to Mr Da Silva did not take "appropriate steps". It appears that the Defendants had every intention to defend the matter, because they too allegedly suffered loss and damage.

[33] Exhibited to the Affidavit of Mr Da Silva is a copy of a letter dated 23rd November 2013, addressed to Grant Connell, Barrister – at- Law requesting that he enter an appearance on behalf of the Defendants. It reads thus:

> "November 23, 2012
>
> Grant Connell
> Barrister-at-Law LLB, BVC
> 10 White Chapel
> Kingstown, St Vincent
>
> Dear Sir,
>
> **Re Suite #290 of 2013**
>
> The above (sic) suite between the claimant and our insured (defendant) is forwarded to you with a request that you enter an appearance on behalf of the defendant before the specified time elapses. The enclosed documents are self-explanatory.
>
> We will provide you with any additional information required.
>
> Yours truly,
>
> .....
> Ian F Da Silva
> Claims Department"

[34] I am satisfied, on the basis of the evidence, that the Defendants had taken the necessary steps to move the matter forward, and did show an interest in defending their matter. I am satisfied that the Defendants' explanation is plausible and reasonable. They heeded the

wise counsel of the bailiff and acted swiftly in attending their insurers who referred them to a lawyer, with a request that an appearance be entered on their behalf. The lawyer scheduled a meeting and a visit to the scene of the accident. For whatever reason, he never showed up, and, unbeknownst to the Defendants, he took no action in the matter. Their explanation shows involvement and interest in the matter, although their interest and involvement, and that of their insurers could, and should have been at a higher level. The fact that neither the lawyer nor the insurers never got back to them should have been a cause for concern. They should not just sit there and form "the impression," as they claim, "that the matter was being dealt with". Nevertheless, I accept their explanation.

CPR 13.3 (c): Whether the Defendants have a real prospect of successfully defending the claim

[35] The Defendants say that they have a real prospect of defending the claim. In the proposed Defence, they have set out their version of the facts, and have alleged full or contributory negligence on the part of the Claimant. They counterclaim for damages for negligence, and they set out the particulars of negligence and particulars of loss and damage.

[36] Learned Counsel for the Claimants does not agree that the Defendants have any prospects of successfully defending the Claim. Counsel has repeated the Claimants version of the facts, and has submitted that the Defendants should not be allowed to come before the court six months after the accident to plead full or contributory negligence. As far as counsel is concerned, the Defendants have not satisfied the third condition. They have no real prospect of success Counsel submitted.

[37] The Defence has denied paragraph 5 of the Statement of Claim and have set out a different account of the facts. The issues raised in that paragraph are matters which can only be proven on evidence before a tribunal of fact. The court cannot engage in speculation. Nor can it engage in a preliminary trial without discovery, oral examination and cross-examination of witnesses. That being said, I do not think that the Defence can be described as weak or hopeless. The plea of contributory negligence constitutes a good defence. Given the matters in dispute, I think there ought to be a determination of the merits of the claim.

[38] In all the circumstances, I am satisfied that the Defendants have satisfied the conjunctive requirements of CPR 13.3., they have applied to the court with promptitude, the have provided a good explanation for their failure to file a defence and they have a meritorious Defence, with prospects of success.

CONCLUSION

[39] In the circumstances, I make the following order.

1. The judgment in default of acknowledgement of service dated the 7th January 2013 be and the same is hereby set aside.

2. The Defendants do file their Defence within 7 days of the date of delivery of this decision.

3. The Claimant do file a Reply to the Defence if necessary within 14 days of service of the Defence, and a Defence to the Counterclaim within 28 days of service of the Defence and Counterclaim; and the Defendants may file a Reply to the Defence to Counterclaim if necessary within 14 days of service thereof.

4. Thereafter the matter shall proceed to the first case management conference in accordance with the time line set forth in CPR 27.3, and the court office shall give all parties not less than 14 days notice of the date, time and place of the case management conference.

5. Given the peculiar circumstances of this application, there shall be no order as to costs.

[40] I apologise to the parties for the delay in delivery of this decision due to other pressing work commitments.

PEARLETTA E. LANNS
Master