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

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV1997/0425

BETWEEN:

RAPHAEL GRIFFITH

Claimant

and

CECIL LEWIS
MRS. GORDON BAPTISTE
(Also called Tiny Baptiste)

Defendants

Appearances:
Ms. Celia Edwards, QC and Mr. Deloni Edwards for Claimant
Mr. Alban John and Ms. Thandiwe Lyle for the First Defendant

2015: April 16
June 30

DECISION

[1] **AZIZ, J.:** These proceedings were instituted by Writ of Summons on the 26th August 1997. The plaintiff's claim is for damages for personal injuries, consequential loss and damage to his motor vehicle, caused on or about the 27th February 1996 by the negligence of the 2nd named defendant, while a passenger in bus registration number HD 773, owned and driven by the 1st named defendant. The details are set out later in this ruling.

The Application before the Court

[2] An application was filed on the 9th January 2015 on behalf of the 1st named defendant, Mr. Cecil Lewis, seeking various declaratory orders. They are namely:

1) An order that the time limited pursuant to the order of Mr. Justice Wallbank, made herein on December 2, 2014 within which to apply to vary or discharge the said order be extended to the date of hearing of the application;

2) A declaratory order that the Judgment Debtor summons filed herein on the 11th October 2013, is void for being brought in breach of Rule 46.2 (a) (b) (c) and (e) of the CPR 2000 and S.19 of the Civil Procedure Act, CAP 55 of the Continuous Revised Edition of the Laws of Grenada, in that no leave to bring or issue it (the summons) was first obtained before bringing or issuing it;

3) A declaratory order that on the record, there is no proof of service of the said judgment debtor summons of October 2013 on the first defendant and as such, the first defendant is entitled to the setting aside of the said order of December 2, 2014 *ex debito justitiae;*

4) A declaratory order that in any event the enforceability by action of the judgment upon which the said judgment debtor summons is premised, is barred pursuant to S.30 of the Limitation of Actions Act, Cap 173 of the Continuous Revised Edition of the Laws of Grenada and a court will not give leave to issue the execution when the right of action on the judgment is barred;

5) An order in the premises that the claimant ought to have made full and frank disclosure to the court prior to or at the time of the making of the said order on December 2, 2014, of all circumstances concerning the status of the judgment and there is nothing on record to indicate that such disclosure was made to the court. Consequently the court was handicapped in the making of the said order and the same ought to fairly and properly be set aside;

6) An order that the judgment herein, as against the first defendant, be set aside as of right, the writ and statement of claim never having been served on the first defendant, and;

7) An order that the claimant do pay the costs of this application to the applicant.

Summary of Claim – The Writ

[3] As indicated earlier, both the 1st and 2nd named defendants were in one bus and the plaintiff was seated in the driver's seat of his (another) bus. The 2nd named defendant opened his door, which then caused that door to collide with the door of the plaintiff's bus, and additionally caused injury to the plaintiff's arm.

[4] The damage and injury complained of were alleged to be as a result of both the 1st and 2nd named defendants' negligence.

[5] The particulars of negligence against the defendants were as follows. On behalf of the 1st named defendant, Mr. Cecil Lewis, it was alleged that he:

1. Stopped in a position such that passengers could not open the passenger door safely;
2. Failed to introduce a safe system of operating the bus doors;
3. Failed to ensure that it was safe so to do before permitting passengers to open the bus door.

[6] On behalf of the 2nd named defendant the particulars of negligence were as follows:

1. Opening the said door when it was unsafe to do so;
2. Failing to ensure that there was enough space to open the said door;
3. Failing to give any warning of her intention to open the said door;
4. Failing to open the said door in such a manner as to not to cause injury to the Plaintiff.

[7] The particulars of injury set out were *"Deep jagged laceration of the forearm affecting the muscles of the arm".*

[8] The plaintiff claimed:

1. Damages;
   (a) Special Damages - $13,540.00
   (b) General Damages
2. Further or other relief;
3. Costs.

[9] It is clear from the declaratory orders sought and from the clear and helpful submissions of Mr. John, that service of the writ of summons was an issue. He submitted that there was a two-pronged approach to his submissions and they were as follows:

1. The writ of summons was not served on the 1st defendant, and
2. The enforceability of the judgment summons that followed from the writ was barred in time, as nothing had been done for 15 years.

[10] Learned Queens Counsel, Ms. Edwards QC, equally set out her stall succinctly, and with clarity. In essence, Ms. Edwards QC indicated that the parties, when coming to the court, must come with clean hands.

[11] Ms. Edwards QC urged the court to consider the contents of the affidavits filed by the process servers and in particular the affidavits of Matthew Braveboy and also that of Mr. Hankey.

[12] Counsel for the claimant submitted that the defendant, Mr. Lewis, was not a man of truth and the court ought to refer itself to the various endorsements on the court file.

[13] Counsel further submitted that the application made in 2013, was not a writ for possession but an application pursuant to the Civil Procedure Rules (CPR 2000) 52.2.

[14] It was also submitted that this was not a matter for a charge on land, and therefore S.30 (referring to the Limitation Act) was not applicable. Ms. Edwards QC asked that the defendants' application be dismissed with costs.

Chronology[1]

25th August 1997 -	Writ of Summons Filed with an endorsement that Matthew Braveboy served the Writ at New Hampshire, St. George on the defendants Cecil Lewis, and Tiny Baptiste personally on Friday 29th August 1997 and Monday 1st September 1997. This was signed by M. Braveboy.
4th September 1997 -	An affidavit sworn to by Matthew Braveboy, before the Deputy Registrar, deposing to having served the 1st named defendant (Cecil Lewis) on the 29th September 1997. Also deposing to serving the 2nd named defendant (Mrs. Gordon Baptiste aka Tiny Baptiste) on the 1st September 1997.
22nd October 1997 -	Plaintiff's application for judgment to be entered. Affidavit of Raphael Griffith seeking judgment in default of appearance.[2]
22nd October 1997 -	Certification by Registrar of non-appearance by neither the 1st nor 2nd named defendants.
22nd October 1997 -	Defendants adjudged to pay plaintiffs damages to be assessed and costs.
21st November 1997 -	Affidavit of service of Joseph M. Hankey deposing to service on the 1st named defendant at New Hampshire, in the parish of St. George on the 11th November 1997, and also serving the 2nd named defendant in Grenville Vale on the 17th November with documents filed including Certificate of No Appearance, affidavit of Raphael Griffith, judgment in

[1] Dates of documents filed at the Registrars Office
[2] Paras 4 & 5

default of appearance, and the request for judgment in default of appearance.

Paragraph 2 of the said affidavit also deposes to: *"delivering them personally to the above named defendant after they identified themselves as the persons named therein."*

27th November 1997 - Summons to the defendants for assessment of damages.

14th January 1998 - Affidavit of service of summons on 2nd named defendant by Joseph Hankey

20th January 1998 - Notice of Adjournment

29th January 1998 - Affidavit of service on 2nd defendant of Notice to Proceed by Joseph Hankey

19th February 1998 - Notice of adjournment to 13.03.1998

26th February 1998 - Affidavit of service of Notice to Proceed by Joseph Hankey

18th March 1998 - Notice of Adjournment to 21.05.1998 to both defendants

20th May 1998 - Affidavit of Matthew Braveboy deposing to serving Cecil Lewis on the 24.03.1998 in the Market Square of the Notice of Assessment of Damages filed on the 18.03.1998.

Service took place by putting the documents in his lap while sitting in his bus. Cecil Lewis *"ran after me shouting, Come and take out that thing from the bus, I don't want anything from you all next time you come back with any paper I would dismantle one of all you."*

2nd June 1998 - Order of Damages made for $5,075.50 special damages and $15,000.00 general damages

18th June 1998 - Application and affidavit of Raphael Griffith for examination of judgment debtors to take place on 25.09.1998

30th September 1998 - Notice of Examination of judgment debtors adjourned to 30.10.98

5th October 1998 - Order that defendants attend for examination on means of satisfying judgment on the 30.10.98

30th October 1998 - **Hearing before Alleyne, J. The 1st named defendant, Mr. Cecil Lewis, was present having been served and the 2nd named defendant was absent.**

3rd November 1998 - Affidavit of service on both defendants by Joseph Hankey. Cecil Lewis was served on Melville Street in St. George's.

9th November 1998 - Warrants for Mrs. Gordon Baptiste with a returnable date of the 13.11.98 (warrant also issued on the 03.12.98).

13th November 1998 - **Hearing in Chambers No. 2. The 1st named defendant was present but not the 2nd named defendant. A warrant was issued for the 2nd named defendant with a returnable date of 04.12.98.**

20th January 1999 - Order that warrant continue for arrest of 2nd named defendant and matter adjourned to 05.02.99

21st April 1999 - Further warrants were then issued for the arrest of the 2nd named defendant throughout 1999.

23rd May 2000 - Summons for Order for Sale of freehold property between Gwendolyn Baptiste and Mrs. Gordon Baptiste, with a supporting Affidavit of Raphael Griffith sworn to on the 19th May 2000.

31st May 2001 - There were several further adjournments in relation to the summons mentioned above. The matter was then adjourned until Friday 8th June 2001. There is an endorsement that seems to the Court to be "Lewis for C. Edwards – 7/6/01."

11th June 2001 - Order withdrawing summons dated 23.05.2000.

30th April 2013 - Issue of judgment summons

31st May 2013 - Letter from Ms. Byer, Attorney-at-Law, requesting a date of hearing be fixed as there was a judgment

	summons issued but the file could not be located at the Court office.
16th July 2013 -	Letter in response from the Court Administrator with a date of 30.09.13.
8th October 2013 -	Judgment Summons filed 30.04.13 withdrawn by Mohammed, J.
11th October 13 -	Judgment summons issued for examination on oath.
12th February 14 -	Affidavit of service of judgment summons dated 11.10.13 on 2nd named defendant.
6th November 2014 -	Judgment summons to be heard on 02.12.14
10th November 2014 -	Notice of Adjourned Hearing filed (02.12.14 new hearing)
1st December 2014 -	Affidavit of service relating to the Notice of Adjourned Hearing served on the 1st named defendant, Cecil Lewis, at Cemetery Hill in St George's.
2nd December 2014 -	Hearing of Judgment Debtor Summons and the 1st named defendant, Mr. Cecil Lewis, appearing in person and the 2nd named defendant not present. Order made for Cecil Lewis to pay $1,000.00 a month on the 5th January 2015 and every month thereafter, costs of $500.00 and liberty to apply to vary or discharge the order before the 5th January 2015.
10th December 2014 -	Final order as stated above filed.

Current application

[15] This brings us back to the current application before the court to have this order set aside. The court has regard to the application filed on behalf of the 1st named defendant dated the 9th January 2015, and supported by an affidavit filed on the same date by Mr. Cecil Lewis.

[16] Counsel for the defendant submits that the effective date that we are concerned with is the 22nd October 1997, and has referred the court to the

case of **Leymon Strachan v The Gleaner Company Ltd. & Dudley Stokes**[3], and Mr. John submits that when considering payment, the relevant date which the court considers is the date of the judgment with damages to be assessed. In the current case under consideration, it is right that the defendants were adjudged to pay the plaintiffs damages and costs to be assessed on the 22nd October 1997. Furthermore assessment did not take place until the 22nd May 1998.

[17] Mr. John submits that nothing has been done by the plaintiffs for almost 15 years, and that the plaintiff did not seek leave from the court to bring the summons or to have it (the summons) enforced.

[18] It has been submitted by Mr. John that the rules are clear, that the debt cannot be enforced without leave of the court once a period of 6 years has elapsed.[4] Mr. John argued that these were enforcement proceedings. Mr. John also submitted that the order should be set aside *ex debito justiciae.* The court has referred itself back to the case of **Leymon Strachan v The Gleaner Company Ltd. & Dudley Stokes**[5].

> "25. The distinction between orders which are often (though in their Lordships' view somewhat inaccurately) described as nullities and those which are merely irregular is usually made to distinguish between those defects in procedure which the parties can waive and which the Court has a discretion to correct and those defects which the parties cannot waive and which give rise to proceedings which the defendant is entitled to have set aside *ex debito justitiae.* The leading example is **Craig v Kanssen** [1943] 1 KB 256, where the proceedings were not served on the defendant at all. The Court of Appeal held that the proceedings were a nullity which the defendant was entitled, as of right, to have set aside. Unfortunately, Lord Greene MR expressed the view that the court of first instance had an inherent jurisdiction to set aside an order made in such proceedings and that it was not necessary to appeal from it. But this was expressed in cautious terms, was *obiter,* and has since been doubted. Moreover, Lord Greene left open the question, on which there was clear authority and which would seem to be highly relevant, whether the order had sufficient existence to found an appeal. Their Lordships respectfully think that he was mistaken."

[3] Privy Council Appeal No. 22 of 2004 [2005] UKPC 33
[4] Civil Procedure Rules 2000, Rule 46.2 (c)
[5] [2005] UKPC 33

26. In ***re Pritchard*** [1963] 1 Ch 502, 520 Upjohn LJ observed that:

> " ... part of the difficulty is that the phrase '*ex debito justiciae*' has been taken as equivalent to a nullity, but, with all respect to Lord Greene's judgment in **Craig v Kanssen,** it is not. The phrase means that the (defendant) is entitled as a matter of right to have it set aside."

Upjohn LJ distinguished between defects in proceedings which could and should be rectified by the court and those which were so fundamental that they made the whole proceedings a nullity. These included (i) proceedings which ought to have been served but which have never come to the notice of the defendant at all; (ii) proceedings which have never started at all owing to some fundamental defect in issuing them; and (iii) proceedings which appear to be duly issued but fail to comply with a statutory requirement. These are all examples of orders of the court made in proceedings which are nullities because they have not been properly begun or served. None of them is an example of a case where an order has been made in proceedings which have been properly begun and continued. In **re Pritchard** itself was an example of the second class; the proceedings had never been started at all. According to Danckwerts LJ, the originating process had no more effect to commence proceedings than a dog licence."

[19] Mr. John sought to draw a distinction between execution and bringing a new action. It was further submitted that the action in this case is subject to a limitation period and after the expiration of the time or the relevant period has expired for the action or any part thereof to continue, leave of the court is required. It was also pointed out that the judgment summons was not supported by any evidence and that the court did not have all the relevant information.

[20] The court has considered the cases put forward and of note is the case of **WT Lamb & Sons v Rider**[6] where there was a distinction drawn, as in other cases[7] that have been decided between an action such as a Writ of Execution and Enforcement of a Judgment.

[21] As far as CAP 173, the Limitation of Actions Act, S.30 states that:

[6] [1948] 2 All ER 402
[7] Civil Appeal No. 15 of 2002, Morrison Knudsen Intl Inc and The Consultant Ltd & Barclays Bank Ltd

> *"No action or other proceeding shall be brought to recover any rent, annuity or other periodical payment, charged upon or payable out of any other land,* ***or to recover any sum of money*** *secured by any mortgage,* **judgment** *or lien, or charged upon or payable out of any land or rent, or any legacy whether so charged or not, but within 12 years next after a present right to receive it has accrued to some person capable of giving a discharge for or release of it, unless in the meantime some part of the principle money or some interest thereon, has been paid or some acknowledgement of the right thereto has been given, in writing, signed by the person by whom it is payable, or his or her agent, to the person entitled thereto, or his or her agent; and in that case no such action or other proceeding shall be brought but within 12 years after the payment or acknowledgement, or the last of the payments or acknowledgements, if more than one, was made or given."*

[22] Ms. Edwards QC, for the plaintiffs, did submit that this was not an action which involved any land and suggested therefore that S.30 had no applicability. I considered the submission which was well intentioned, but on closer inspection of the section, the words ***"or to recover any sum secured by… judgment … but within 12 years next"***, encourages the court to have a closer inspection of that particular section. Having done so, this court is led to the conclusion that the Limitation period does apply.

[23] "Action", as it is established, includes any proceedings in a court of law. It was submitted by Mr. John, that enforcement were considered proceedings, and for that reason it is caught by S.30 of the Limitation Act and the relevant Limitation period applies. It is also the case that the inclusion of the words "any proceedings" in a court of law is designed to catch all of the various types of proceedings such as repossessions and redemptions etc.

[24] There is a clear distinction between the Civil Procedure Rules [CPR 2000] Part 46 and Part 52. Under Part 46, Writ of Execution means any of the following:

(a) an order for sale of land

(b) an order for seizure and sale of goods, a writ *fieri facias*

(c) an order for sequestration of assets

(d) a writ of delivery

(e) a writ of possession

[25] This court finds that this is a case in which Part 46 does not apply as neither of the above (a) to (e) are being sought by the claimant, therefore if Rule 46.1, is not applicable then it follows reading the legislation as a whole that Rule 46.2 (a)(b)(c) and (e) are not strictly applicable.

Note: From a general perspective the court would find that if the Limitation of Actions Act, S.30 applied, as the court so finds, then it would lead to a result whereby:

a. The 1st named defendant, Cecil Lewis, is no longer liable to have the judgment enforced against him;
b. An application for leave ought to have been sought from the court for any further proceedings to continue, bearing in mind more than 12 years has passed;
c. As above;
d. The judgment creditor would not be entitled to enforce the order without the sanction of the court.

Civil Procedure Rules Part 52 – Judgment Summons

[26] The claimants argue that this is not a matter that falls under Rule 46 but rather it is a judgment summons governed by Part 52.2.

[27] Part 52.1 states: "This part deals with applications to commit a judgment debtor for non-payment of a debt where this is not prohibited by any relevant enactment."

[28] Part 52.2 deals with the issue of a judgment summons, and the application to commit a judgment debtor for failing to pay all or part of the judgment debt must be made by judgment summons.

[29] Part 52.3(1) states that the judgment creditor must serve the judgment debtor with the judgment summons in accordance with Part 5, not less than 7 days before the date fixed for the hearing of the application to commit.

[30] Part 5 refers to the Service of a Claim Form within the jurisdiction. The Court bears in mind Part 5.1 (1). The general rule is that a claim form must be served personally on each defendant. Part 5.3 under the heading of Method of personal service states that:

> "A claim form is served personally on an individual by handing it to or leaving it with the person to be served".

[31] Although this Part deals with a claim form, the court has directed itself to Part 6 of the CPR 2000, entitled Service of other Documents. The relevant section for these purposes is Part 6.2 which states:

> "If these Rules require a document other than a claim form to be served on any person it may be served by any of the following methods:
>
> a) Any means of service in accordance with Part 5;
> b) Leaving it at or sending it by prepaid post to any address for service in accordance with rule 6.3 (1);
> c) If rule 6.3(2) applies by FAX; or
> d) Other means of electronic communication if this is permitted by a relevant practice direction;
>
> Unless a rule otherwise provides or the court orders otherwise."

[32] It is therefore clear in accordance with Part 6.2 (a) and Part 5, that any other documents ought to have been served personally on the 1st named defendant.

[33] The court finds that there is a discrepancy between the place of service of the 1st named defendant on the 29th August 1997. The writ is endorsed with

service on the 1st named defendant personally in New Hampshire and the affidavit states of whom dated and filed that the 1st named defendant was served personally at the Market Square.

[34] Mr. John submitted that these two locations are some distance apart, and the court accepts that this is the case, and it is quite improbable that the 1st named defendant was served personally twice on the same day at two different locations.

[35] It is clear that the 1st named defendant was served on the 11th November 1997 with documents filed on the 22nd day of October 1997 and included the request for judgment in default of appearance and also the order of judgment in default of appearance. The court does not accept as pleaded that he, the 1st named defendant, was not served with any documents, in this case. It has to be said that the court acknowledges and echoes the submission of Ms. Edwards QC that those who come to the court seeking equity must come with clean hands. The broad statement of principle is that:

> "He who comes into equity must come with clean hands".

[36] This court makes the observation that although those seeking equity must come with clean hands, the maxim or principle is not meant to punish a party for a mistake or carelessness, and although it is pleaded, the court finds that the assertion of not receiving any documents is a clear mistake through carelessness or inadvertence by the drafter but the court is not of the opinion that it was meant to deliberately mislead.

[37] Thereafter, further notices to proceed were served personally on the 2nd named defendant by Joseph Hankey but not on the 1st named defendant, Cecil Lewis.

[38] On the 24th March 1998 there was service on Cecil Lewis; documents filed on the 18th March 1998 were placed on his lap while he was sitting in his bus.

[39] On the 27th October 1998, both defendants were served with the Order in Chambers relating to oral examinations about their property or means of satisfying the judgment. The 1st named defendant was present on the 30th October 1998 but not the 2nd named defendant.

[40] Both defendants were served with the summons filed on the 23rd May 2000. On the 11th June 2001, this summons was withdrawn.

[41] The next event (relevant for calculation purposes) some 14 years and 6 months later, was the judgment summons issued and filed on the 30th April 2013. This summons was eventually withdrawn on the 30th September 2013. But the court accepts that the relevant date for consideration is the date of the judgment, which is October 22, 1997.

[42] A further judgment summons was filed on the 11th October 2013 but only personally served on the 2nd named defendant. There was a further notice of adjourned hearing served on the 1st named defendant on the 24th November 2014.

[43] The defendant was present on the 2nd December 2014, when an order was made before the Judge for payment of $1,000.00 per month. There is no evidence and neither is there any record that the court can peruse about service on the 1st named defendant. It may be well to say that the 1st named defendant had constructive notice of the hearing, but the rules are clear that the judgment debtor must be served with the notice.

[44] This court finds that it cannot be sure whether the 1st named defendant had been in fact served "personally" with the judgment summons. From the circumstances it would seem that it (the summons) more likely than not was not personally served on the 1st named defendant.

[45] It is therefore adjudged that:

1. The application for time to vary/discharge the said Order was already determined and the request had been granted.

2. Part 46.2 of the CPR 2000 is not applicable, as this is not a Writ of Execution being enforced but rather a judgment summons pursuant to Part 56 of the CPR 2000. This declaratory order sought is therefore dismissed.

3. The order of December 2, 2014 be set aside as there is no proof of personal service of the judgment summons dated October 11, 2013 on the 1st named defendant.

4. The Limitation Act does apply and therefore the judgment summons dated 11th October 2013 is out of time. There was no permission sought for leave, no reasonable explanation given for any delay and therefore as a natural consequence no permission granted for leave to issue the judgment summons filed on 11th October 2013 out of time.

5. The claimant to pay the costs of the application to the defendant in the sum of $850.00.

[46] The court wishes to express gratitude to learned Counsel for the assistance in both oral and written submissions that were provided during the hearing and apologizes for the delay in delivering this judgment.

Shiraz Aziz
High Court Judge