



[2023] JMSC Civ. 191

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2019CV02774**

<b>BETWEEN</b>	<b>ASTON WILSON</b>	<b>CLAIMANT/RESPONDENT</b>
<b>AND</b>	<b>EGBERT HEWITT</b>	<b>DEFENDANT/APPLICANT</b>

**IN CHAMBERS**

Georgia Hamilton for the Claimant/Respondent instructed by Georgia Hamilton & Co.

Michelle Shand Forbes and Miguel Palmer for the Defendant/Applicant

HEARD: June 26<sup>th</sup>, 2023 and October 13<sup>th</sup>, 2023

**Civil Procedure – Application to set aside default judgment – Alternate service –  
Amendment of date of service by Process Server – Overriding objectives.**

**T. HUTCHINSON SHELLY, J**

**INTRODUCTION**

[1] On or about the 21<sup>st</sup> of July 2015, the Claimant was driving motor vehicle registered **0057GU** along Temple Hall Main Road in the parish of St. Andrew, when he came to a stop behind another motor vehicle in a line of traffic. It is his case that while he was still stationary, a motor vehicle which was being operated by Clayton Brown, the alleged servant and/or agent of the Defendant, collided into the rear of his motor vehicle propelling it into motor vehicle which had been ahead of his. As a result of the collision, the Claimant sustained serious personal injuries, suffered

loss and damage and incurred expenses. He thereafter commenced litigation against the Defendant on the 5<sup>th</sup> of July 2019.

[2] An affidavit of service was filed by the Claimant on the 8<sup>th</sup> of January 2020, in which the Process Server, Mr Oswald Hamilton stated that the documents filed were served on the Defendant on the 25<sup>th</sup> of July 2019 by leaving them at his home with a male who identified himself as Jerome Hewitt, the son of Egbert Hewitt. Mr Hamilton stated that the male accepted the documents with the undertaking to provide them to his father on his return home.

[3] On the 5<sup>th</sup> of May 2023, a second affidavit provided by the Process Server was filed in which he stated that the service occurred on the 26<sup>th</sup> of July 2023. On the 8<sup>th</sup> of January 2020, Default Judgment was entered on the basis that no acknowledgment of service had been filed and the matter was scheduled for a case management hearing for assessment of damages.

[4] On the 28<sup>th</sup> of March 2023, the Applicant/Defendant, Egbert Hewitt filed a notice of application for court orders in which he seeks the following orders:

- *The Default Judgment entered against the Defendant herein and all subsequent proceedings be set aside.*
- *Such further and other relief as this Honourable Court deems just.*

[5] The grounds on which the Applicant is seeking the orders are as follows:

1. *The Defendant has a good explanation for the failure to file an Acknowledgement of Service or Defence in this matter.*
2. *The Defendant was not personally served with the Claim Form and Particulars of Claim as required by Rule 5.3 of the Civil Procedure Rules, 2002.*

3. *Rule 5.13 of the Civil Procedure Rules outlines the procedure where an alternative method of service is adopted and makes 'provision for service made pursuant to an alternative method to be set aside on good cause being shown.*
4. *The Defendant has a good cause as to date, the Claim Form and Particulars of Claim have not been served on him and/or brought to his attention.*
5. *Pursuant to Rule 13.2 (1) of the Civil Procedure Rules 2002, the Court must set aside a judgment that has been wrongly entered.*
6. *That the Applicant applied to set aside the Judgment as soon as reasonably practicable after finding out that Judgment had been entered.*

**[6]** On the 26<sup>th</sup> of June 2023, the application was heard and evidence was taken from the Applicant, his son Jerome Hewitt and the Process Server. The affiants were cross-examined and submissions were filed both prior to and subsequent to the hearing. The evidence of the respective parties and submissions made on their behalf are summarised below.

## **EVIDENCE FOR THE APPLICANT**

### **Egbert Hewitt**

- [7]** In his affidavit which was allowed to stand as his evidence-in-chief, Mr Hewitt acknowledged that there had been a collision involving his vehicle while it was being driven by Clayton Brown, his employee at that time. Following the accident, a report was made to his insurers, The Insurance Company of the West Indies (ICWI), on July 31, 2015.
- [8]** He stated that he heard nothing more about the matter until July 2021 when he was contacted by a representative from ICWI enquiring whether he had been

served with any documents in relation to the accident and he informed the representative that he had not. He added that the only time that he had received Court documents was in 2022 when he received the Interlocutory Judgment by post.

- [9]** Mr Hewitt stated that he did not know what those documents were related to and so he left the island on the 27<sup>th</sup> of December 2022. He returned on the 7<sup>th</sup> January 2023 and when he checked his post office box in Lawrence Tavern, he found a document for the Case Management Conference scheduled for March 9, 2023.
- [10]** He then spoke to an Attorney following which he realized that the papers related to the accident. This prompted him to take them to his Insurance Agent. He stated that between the hours of 10 a.m. and 11 a.m., when Mr Hamilton says he visited his house on July 25<sup>th</sup>, 2019, he would have been at work at his hardware store which is in close proximity to his home. He denied ever receiving these documents from his son and asserted that he would have wanted to be served to defend this matter.
- [11]** Mr Hewitt was cross-examined and informed the Court that his son is self-employed but assists at the store in his free time. He confirmed that his son's name is Jerome Hewitt and that he is his only son. Mr Hewitt acknowledged that his son was fully aware of this accident. He acknowledged that he had reviewed the documents received by post but insisted that he had not made the connection to the accident. Mr Hewitt conceded that at the time of completing the accident report, he would have listed the Claimant (Aston Wilson) as the 3<sup>rd</sup> party. He maintained however that while he would have known that name from 2015, he had believed that the matter had been settled.
- [12]** He denied that Mr Jerome Hewitt had brought the Claim Form and Particulars of Claim to his attention in July 2019. He disagreed with Counsel that he had ignored them because of the belief that the matter was being settled by the Insurance Company.

## **JEROME HEWITT**

- [13] Mr Jerome Hewitt provided two (2) affidavits in this matter. The first in time was filed on the 28<sup>th</sup> of March 2023 and the second on the 26<sup>th</sup> of May 2023. Both affidavits were allowed to stand as his evidence-in-chief. In his first affidavit, Mr Jerome Hewitt disputed the contents of Mr Hamilton's affidavit. He also denied that he had ever been served at home or anywhere else on July 25, 2019, or at all.
- [14] He averred that on July 25, 2019, he had been engaged in the installation of security cameras and an electric gate system at 5 Windy Way, Harbour View, Kingston 17 at the residence of a Dr Nash. He recounted leaving home at around 7 a.m. and travelling to Mount Ogle District where he picked up two (2) workers, Tassio Khouri and Ricardo Bell to assist in the project. He then travelled back through Temple Hall and other communities making his way to Harbour View.
- [15] Mr Hewitt deponed that he arrived at Dr Nash's house at around 8:30 a.m. and a total of six (6) persons were present as he was met at the location by three (3) other workers. The job was not completed until around 6 p.m. and he did not leave Dr. Nash's house until in the night as he had to wait to show Dr Nash how to operate the camera system and the gate.
- [16] Mr Hewitt exhibited pictures taken during the process and on completion. These pictures bear a date and time stamp. The date stated is the 25<sup>th</sup> of July 2019. He also exhibited a copy of his receipt book. He denied being served with any documents on July 25, 2019, between the hours of 10 a.m. and 11 a.m. as he was not at home at that time.

## **Second Affidavit**

- [17] The second affidavit was filed in response to a further affidavit from the Process Server in which he indicated that the 25<sup>th</sup> of July 2019 was an error and the service occurred on the 26<sup>th</sup> of July 2023. Mr Hewitt denied that service had occurred on July 26, 2019, or at all. He also denied being at home at 10:50 a.m. on July 26,

2019. He insisted that he had not told anyone that his father had just left home for work as his father usually left home early to open the store at 7 a.m.

**[18]** Mr Hewitt averred that he was present at 5 Windy Way, Harbour View, Kingston 17 on both the 25<sup>th</sup> and 26<sup>th</sup> of July 2019 as he returned there to do the networking of the camera system installed on the 25<sup>th</sup>. He recounted arriving at 8:30 a.m. on the 26<sup>th</sup> and working until early afternoon. He subsequently returned to Dr. Nash's house on July 31<sup>st</sup>, where he installed an upgraded DVR system and more cameras.

**[19]** He was cross-examined and stated that he did not know Mr Hamilton before this matter. He acknowledged that he is his father's only son and that no one else lived at the house with them. He was asked about the fact that he had previously stated that he last provided service to Dr Nash on the 25<sup>th</sup> but later said it was the 26<sup>th</sup>. He insisted that both statements were correct. He agreed that invoices had been produced by him for work done on the 25<sup>th</sup> and 31<sup>st</sup> of July 2019, but none had been produced for the 26<sup>th</sup>.

**[20]** In further cross-examination, Mr Jerome Hewitt acknowledged that while Mr Bell could confirm that he went by Dr Nash's home on the 24<sup>th</sup> and 25<sup>th</sup>, he would not be able to corroborate his account of being there on the 26<sup>th</sup> as well. He was asked if he agreed that before Mr Hamilton's supplemental affidavit, he at no time mentioned returning to Dr Nash's house on 26<sup>th</sup> July and he did not agree. Mr Hewitt disagreed with the suggestion that the 26<sup>th</sup> had not been mentioned because he did not return to Dr Nash's house on that date. He insisted that he had never been served with or accepted documents from the Process Server on behalf of his father. He also denied identifying himself by name to the Process Server indicating that he was the son of Mr Egbert Hewitt.

### **Oswald Hamilton**

**[21]** Mr Hamilton provided two (2) affidavits in this matter. The first affidavit was dated January 8<sup>th</sup>, 2020, and the second affidavit bore the date, 5<sup>th</sup> of May 2023. Both

affidavits were permitted to stand as his evidence-in-chief. In the first affidavit, Mr Hamilton deponed that on or about July 25, 2019, he received an envelope containing a Claim Form, Particulars of Claim and other related documents from Miss Georgia Hamilton, the Attorney-at-Law for the Claimant. He was also instructed to serve the Defendant, Mr. Egbert George Hewitt, at his address in Temple Hall, Lawrence Tavern, St. Andrew.

- [22] On the said day, between the hours of 10:00 a.m. and 11:00 a.m., he went to the address. On arrival, he called at the gate and a gentleman came out of the house. He enquired if the Defendant was home and was informed that he was not. The individual then identified himself to him as Mr. Jerome Hewitt, the son of Mr. Egbert George Hewitt. Mr Hewitt told Mr Hamilton that the Defendant would return home later in the day. Mr Hamilton averred that he explained to Mr Jerome Hewitt the purpose of his visit and Mr Hewitt indicated that the documents could be left with him, and he would bring them to the attention of his father. Following this indication, Mr Hamilton handed the documents to him and left.
- [23] He emphasized that he believed that the contents of the Claim Form and Particulars of Claim would have come to the attention of the Defendant on that day or shortly thereafter as the Defendant resided with Mr Jerome Hewitt at the same address and is the father of Mr Jerome Hewitt.

### **Second Affidavit**

- [24] The second affidavit was filed in response to this application and after the first affidavit of Mr Jerome Hewitt. Mr Hamilton stated that in addition to the documents for the claim which were handed to him on the 25<sup>th</sup> of July 2019, he was also provided with a form captioned '*Particulars of Service*.' He said this was handed to him by Ms Sashenna Campbell, a paralegal at Ms Hamilton's office.
- [25] Mr Hamilton stated that on this form, Ms Campbell had written in the name of the client, the claim number, and the documents to be served. This "Particulars of

Service" document is one which is used by the Firm to record the details of service of Court documents contemporaneously.

- [26] He deponed that on leaving the documents with Mr Jerome Hewitt, he wrote his name on the Particulars of Service form and put in brackets the word "son" to indicate that he was the son of the Defendant. He also recorded the date and the time that Mr Jerome Hewitt was served, which was the 26<sup>th</sup> of July 2019 at 10:50 a.m. Mr Hamilton stated that on reviewing Hewitt's earlier affidavit and the Particulars of Service form, he realized that he had made an error in respect of the date of service. He asserted that he knows for a fact that the documents were served on 26 July 2019, as he had written down the date and time of service on the form after handing the documents to Mr Jerome Hewitt.
- [27] Mr Hamilton explained that upon returning the Particulars of Service to the Firm the following day, he had been questioned by Miss Lashauna Farquharson, a former employee of the Firm, as to the reason why personal service had not been effected. He recounted his exchange with Mr Jerome Hewitt and the latter's undertaking. Mr Hamilton averred that he observed Ms Farquharson noting what he told her on the form as well as his personal information.
- [28] He was contacted by Ms Campbell a few weeks later while she was in the process of preparing his affidavit and he explained to her the reason why the documents were not personally served. He stated that he was certain that the affidavit had been prepared by Ms Campbell as the Microsoft Word document properties '*print-out*' confirmed this.
- [29] Mr Hamilton deponed that he has been a Process Server since 2006 and is aware that for Supreme Court documents, he is able to serve a relative, family member or close associate of a party, once he has satisfied himself that it is likely that the court documents will come to his/her attention. He further deponed that this was the basis on which he left the documents with Mr Jerome Hewitt. Mr Hamilton



exhibited the Microsoft Word print-out and the Particulars of Service bearing the entries made by Sashenna Campbell, Lashauna Farquharson and himself.

- [30]** Mr Hamilton conceded that he had not served the documents on Mr Jerome Hewitt on the 25<sup>th</sup> of July 2019. He insisted however that he had done so on the 26<sup>th</sup> of July 2019. He asserted that Mr Jerome Hewitt was not being truthful that service had not occurred on the 26<sup>th</sup>. Mr Hamilton averred that prior to the 26<sup>th</sup> of July 2019, he had not met the Defendant or Mr Jerome Hewitt, neither did he know that the Defendant had a son by the name of Jerome Hewitt. He maintained that he met Mr Jerome Hewitt when he went in search of the Defendant and on that occasion, Jerome introduced himself to him by name and as Mr. Egbert Hewitt's son.
- [31]** Mr Hamilton reiterated that he was not the one who prepared his Affidavit and stated that although he has executed dozens of Affidavits over the years, he has never prepared one. He acknowledged that he should have reviewed the notes prior to executing the document as he would have likely noted the error. He explained that he had no intention to mislead the Court.
- [32]** In cross-examination, Mr Hamilton agreed that he had never been to the Defendant's house prior to the date of service. He accepted that the address provided did not include a lot or street number. He also agreed that both of his affidavits provided no details on how he was able to locate the house. He explained that he asked questions/directions in order to do so. When asked to describe the gate at the house, he stated that he was unable to do so.
- [33]** He insisted that the male identified himself as Jerome Hewitt but conceded that no identification was produced by this individual, neither was there anyone else present with Mr Hewitt who confirmed his identity. He was questioned as to why he left documents of such importance without verifying the individual's identity and responded that he accepted the male's identification of himself by name, the relationship to the Defendant provided and the statement that they lived together.

He also accepted the male's assurance that the documents would be given to the Defendant.

[34] Mr Hamilton stated that while he did not personally know Jerome Hewitt, he had asked questions on arriving at the location and someone pointed him out to him. He explained that it was on this basis that he went over, called and identified himself and Mr Hewitt did likewise. He further explained to the Court that the person who had pointed out Mr Hewitt to him had also provided information of the relationship between Mr Hewitt and the Defendant.

[35] Mr Hamilton agreed that he did not receive a telephone number for the male who identified himself as Jerome Hewitt. He also agreed that he did not return to the premises to confirm that the documents had been passed on to the Defendant. He stated that he did not do so as he had left the documents with his son and on that basis, he did not need to return to the premises.

[36] He denied that the reason why he was now providing another date was because of the contents of Mr Jerome Hewitt's first affidavit. Mr Hamilton insisted that he had been told that the Defendant had left for work and agreed that he did not try to find the workplace. He rejected the suggestion that it was not the defendant's address that he had visited. He reiterated that he had returned the Particulars of Service form to work the following day and denied that it was a falsified document.

### **CLAIMANT'S SUBMISSIONS**

[37] In written submissions on behalf of the Claimant, Ms Hamilton identified the relevant issue for the Court as being whether the Defendant was served with the Claim Form and Particulars of Claim. Learned Counsel submitted that in considering the Defendant's allegation that he was never served with the claim/originating documents, the Court should note that the setting aside of this application would have devastating consequences for the Claimant as the Limitation period has expired and the Claimant has '*incurred significant costs for medical care.*'

- [38] Ms Hamilton highlighted Parts **5** and **13** of the Civil Procedure Rules (“**CPR**”) which govern alternate service as well as the Court’s jurisdiction to set aside a default judgment as of right. She also relied on the authority of **Stervin Stone v Ronald Parker and Treavis St. Clare Reid** [2019] JMSC Civ. 56 which examined a similar situation. Counsel submitted that in refusing the application to set aside default judgment, the Learned Judge placed reliance on the reasoning of Phillips JA at paragraph 41 of **Linton Watson v Sewell** [2013] JMCA Civ. 10.
- [39] Ms Hamilton submitted that the determination of the issue as to whether service had taken place, ultimately depends on the credibility of the witnesses as well as the evidence. Counsel acknowledged that the Process Server had amended a portion of his previous account. Counsel submitted that this was inevitable as upon reviewing the affidavit of Mr Jerome Hewitt and consulting the information written in the Particulars of Service, he became aware of the error.
- [40] Ms Hamilton submitted that there were several inconsistencies and material omissions in the evidence given on behalf of the Defendants and itemized them as follows:
- a. Mr. Hewitt averred that he worked on a project at Dr. Nash’s house on the 24<sup>th</sup>, 25<sup>th</sup> and 31<sup>st</sup> of July 2019; but later gave evidence which demonstrates that the project lasted for four (4) days: 24-26 and 31 July 2019.
  - b. In his first affidavit, Mr. Hewitt spoke about staying behind to assist Dr. Nash with the operation of the system. However, in his second affidavit, he stated that he returned to Dr. Nash’s house on July 26, 2019 in order to do so.
  - c. In his first affidavit, Mr. Hewitt professes to be a self-employed Technician. But in the second affidavit, he sought to convey the impression that he works at his father’s hardware store.

- [41] Counsel submitted that the second affidavit undermines Mr. Hewitt as a credible witness as *“he seems desperate to place himself anywhere but home on the morning of July 26, 2019, between the hours of 10:00am and 11:00am.”* Ms Hamilton argued that the Defendant had waited an inordinately long period before contacting his insurers to find out whether any documents had been served in relation to the matter. She also highlighted that a Notice of Proceedings had been served on the insurers from as far back as July 2019.
- [42] Learned Counsel contended that the Process Server had no motivation to lie as he could not have known that the Defendant has a son, the name of the son and that he and his son lived together. Ms Hamilton insisted that the correction to the date of service should not affect the validity of the Judgment as the Civil Procedure Rules permits the correction of errors by way of the slip rule. She concluded that if the Court finds that service was effected by alternate means on July 26<sup>th</sup>, 2019, then the Defendant would have been required to file an Acknowledgment of Service by August 2019. In those circumstances, judgment would have been properly entered as 152 days had passed.

### **DEFENDANT’S SUBMISSIONS**

- [43] In her written submissions, Mrs Shand Forbes agreed that the relevant rules are found at Part 5 of the CPR. She made specific reference to Rule 5.1(1) which stipulates the general rule that a Claim Form must be served personally on the Defendant. Mrs Shand Forbes submitted that where rule 5.1(1) of the CPR is not possible, rule 5.13(1) of the CPR provides that the Court may allow alternative methods of service.
- [44] In taking issue with the Process Server’s evidence, Learned Counsel argued that it is imperative that a Claimant shows his/her attempts at effecting personal service before an order for alternative method of service can be made. She commended to the Court, the decision of **Rachel Graham v Erica Graham and Winnifred Xavier [2021] JMCA Civ. 51** in which G Fraser JA (AG) stated as follows:

*[21] “When confronted by difficulties in effecting personal service of the claim form on a defendant, within the jurisdiction, the claimant may enlist the court’s assistance and, instead of personal service, may choose an alternative method of service pursuant to rule 5.13 of the CPR or apply for an order for service by a specified method pursuant to rule 5.14 of the CPR.”*

- [45] Learned Counsel highlighted paragraph 41 of the decision and the references made to the remarks of Morrison JA in **ICWI v Shelton Allen [2011]** JMCA Civ. 33 and Lord Reading CJ in **Porter v Freudenberg** [1915] 1KB 857. She also relied on the authority of **Hoddinott v Persimmon Homes (Wessex)** [2008] 1 WLR to emphasize that the “*defendant has a right to effective notice of the claim against him by service of the claim form*” in order to be cognizant of the nature of the claim, participate in the litigation process and enable the Tribunal to regulate the litigation process.
- [46] Mrs Shand Forbes reminded the Court that it is the Defendant’s case that Mr Jerome Hewitt was not served with any documents and therefore no documents had been brought to the defendant’s attention. She argued that in these circumstances, the Interlocutory Judgment in Default was erroneously granted as it was based on the evidence in the Affidavit of Service filed on January 8, 2020. Counsel submitted that this account was now undermined by the contents of the Supplemental Affidavit filed on May 5, 2023 and the judgment should not be allowed to stand.
- [47] Mrs Shand Forbes posited that given Mr Hamilton’s evidence in cross- examination that his affidavit of service is collated from the details of service noted in the Particulars of Service form, he ought to have kept his own record of service to ensure accuracy of the information in his affidavit.
- [48] Counsel questioned the failure to use the information contained in the Particulars of Service in the preparation of the 1<sup>st</sup> Affidavit. She argued that it was only after the Affidavit of Jerome Hewitt had been filed and information provided by the

Applicant that the Particulars of Service '*suddenly appeared*' despite being in existence from July 2019.

- [49] Learned Counsel asked the Court to note that on Mr Hamilton's account, questions had even been asked internally about the manner of service. Mrs Shand Forbes contended that there had been adequate time to remedy the issues surrounding service as the Process Server could have returned to the location to effect personal service on the Defendant.
- [50] The Court was urged to take special note of the documentary evidence produced by Mr Hewitt which Mrs Shand Forbes described as providing strong support for his account. In respect of the absence of documents for the 26<sup>th</sup> of July 2019, Mrs Shand Forbes asserted that the witness would have been providing a response to assertions about the 25<sup>th</sup>.
- [51] Counsel relied on the authority of **Aston Whittaker v Calvin Campbell and Deno Jones** [2018] JMSC Civ. 185 in which the Process Server tried to effect personal service on three (3) occasions before leaving the documents with the Defendant's uncle. She contacted the Defendant's uncle four (4) days later to confirm that the documents had in fact been given to the Defendant. Learned Counsel emphasized that in this matter, there is no evidence that there were any attempts at personal service. She postulated that under cross-examination, the Process Server attempted service on one (1) occasion and never returned to the location thereafter.
- [52] Counsel also relied on the authority of **Jermaine Edmonds v Owen Marquesse & Ors.** [2020] JMSC Civ. 7 which considered rule 5.13 of the CPR. She highlighted paragraphs 24 and 25 which states:

*[24] Rule 5.13 of the CPR does not permit dispensing with service of the claim form altogether, but instead, it allows for service by a method other than personal service on a defendant. The wording of rule 5.13 is clear that there remains a need for the claim form to be served. What the rule provides for, is an assessment by*

*the Court regarding the method of service of the claim form chosen by the Claimant. Rule 5.13(2) states that where the Court is asked to take any step “on the basis that the claim form has been served, the party who served the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the Defendant to ascertain the contents of the claim form”.*

*[25] I am therefore not persuaded by counsel’s written submission that “the pertinent issue being solely whether AGI had sufficient information to allow it to ascertain the contents of the Claim Form and Particulars of Claim”. It is not the insurance company that the Court is required to be concerned with, but rather the Defendants. The Court is required to be satisfied that (1) the claim form was served and (2) the method of service of the claim form is likely to cause a defendant to ascertain the contents of the claim form. While service of the claim form on an insurance company might be deemed good service on an insured/defendant, the service of “Notice of Proceedings” on UGI in this case cannot be deemed good service of the claim form.*

**[53]** Mrs Shand Forbes contended that the Defendant only received the Interlocutory Judgment and Notice of the Case Management Conference both of which were by registered mail. She asserted that it would not have been difficult to locate Mr688 Hewitt as his hardware store is in close proximity to his home and if Mr Hamilton had taken sufficient steps, he could have effected personal service on him.

**[54]** Counsel asked the Court to carefully scrutinize the evidence of Mr Hamilton as he had initially stated that no one had identified Mr. Hewitt to him as the Defendant’s son, then subsequently indicated that a gentleman had pointed out Mr. Hewitt to him. Learned Counsel submitted that this ‘*fresh evidence*’ was absent from his affidavits and the Court should find that the “*glaring discrepancies*” present in his affidavits (even after completing a Particulars of Service at the time of the alleged service in 2019) demonstrates that the Particulars of Service is a fabrication. Counsel urged the Court to find on a balance of probabilities that there was no service of the documents on the Defendant’s son and by extension, on the Defendant.

- [55] Mrs Shand Forbes referred to **Part 13** of the CPR which stipulates the procedure for setting aside or varying a default judgment. She submitted that there was no service on July 25, 2019 based on the Process Server's own admission and as such, the Interlocutory judgment ought to be set aside. Learned Counsel also posited that there is no evidence that the documents were brought to the Defendant's attention.
- [56] Counsel argued that the circumstances of this case are distinguishable from those in **Stervin Stone v Ronald Parker & Travis St Clare Reid** [2019] JMSC Civ. 56 as in that matter, it was the Defendants who were personally served and subsequently denied service. In the instant case, there is no dispute that the Defendant was not served with the court documents and the Defendant's son has denied that the documents were served on him.
- [57] Learned Counsel contended that there is good cause for setting aside the default judgment as **Rule 12.4(a)** of the CPR was not complied with and as such, the judgment entered was irregularly obtained and should be set aside.

## ANALYSIS/DISCUSSION

- [58] It is not in dispute between the Parties that the seminal issue which arises for consideration is whether the Defendant was served with the Claimant's documents and the default judgment was properly entered. The relevant provisions which then arise for the Court's consideration are found at Part **5, 12 and 13** of the CPR.
- [59] Rules **5(1)** and **5.13** have both been highlighted by Counsel and state as follows:

*5.1 (1) The general rule is that a claim form must be served personally on each defendant.*

*5.13 (1) Instead of personal service a party may choose an alternative method of service.*

*(2) Where a party –*

*(a) chooses an alternative method of service; and*



*(b) the court is asked to take any step on the basis that the claim form has been served,*

*the party who served the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form.*

*(3) An affidavit under paragraph (2) must –*

*(a) give details of the method of service used;*

*(b) show that –*

*(i) the person intended to be served was able to ascertain the contents of the documents; or*

*(ii) it is likely that he or she would have been able to do so;*

*(c) state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents; and*

*(d) exhibit a copy of the documents served.*

**[60]** Subsections 4 through 5 of Rule **5.13** provide for the affidavit of alternate service to be placed before a Judge to consider whether the evidence satisfactorily proves service and if it does not, then notification of this decision ought to be given to the Claimant. In the instant situation, the matter was dealt with accordingly and default judgment entered on the basis of good service. Rule **5.13(6)** provides that the endorsement of good service which would be made pursuant to Rule **5.13(4)** can be set aside on good cause being shown.

**[61]** Rule **13.2** governs the situation in which the Defendant can apply to set aside a default judgment as of right and provides as follows:

***13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because –***

***(a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;***

*(b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or*

*(c) the whole of the claim was satisfied before judgment was entered.*

*(2) The court may set aside judgment under this rule on or without an application*

**[62]** The final rule which is of relevance in this matter is Rule **12.4** which outlines that the registry, at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if:

***(a) the claimant proves service of the claim form and particulars of claim on that defendant;***

***(b) the period for filing an acknowledgment of service under rule 9.3 has expired;***

***(c) that defendant has not filed (i) an acknowledgment of service; or (ii) a defence to the claim or any part of it;***

*(d) where the only claim is for a specified sum of money apart from costs and interest, that defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;*

*(e) that defendant has not satisfied in full the claim on which the claimant seeks judgment; and*

*(f) (where necessary) the claimant has permission to enter judgment.*

**[63]** A review of the application filed by the Respondent on the 8<sup>th</sup> of January 2020, reveals that it contained a request that judgment be entered as no acknowledgment of service had been filed and the time for doing so had expired under **12.4 (b)**. The Parties are agreed that no acknowledgment of service was entered in this matter but differ in their reasoning as to why this was so.

- [64] The evidence of the affiants and submissions provided highlight the significance of Rule **5.13** in this matter and how it should be treated. It is the Applicant's position that the Court ought to exercise the power acknowledged at **5.13(6)** on the basis that good cause has been shown to undermine the reliability of the Process Server's account and set aside the judgment. On the other hand, the Claimant contends that even though the judgment was entered in respect of service on the 25<sup>th</sup> of July 2019, it could still have been entered even if service had occurred on the 26<sup>th</sup>, as at the time of its entry more than fourteen (14) days had passed as required at Rule **9.3(1)** of the CPR.
- [65] It is evident that on these completely opposite positions, much will indeed turn on the credibility of the witnesses. It is settled law that '*he who asserts must prove*' and ordinarily this would require that the evidence of the Applicant meets the requisite standard to persuade the Court to set aside the default judgment. In this situation however, where non-service is being raised, the evidence of the Process Server also comes in for scrutiny.
- [66] On examination of the evidence of Mr Egbert Hewitt, it is apparent that he had been aware of the collision involving his vehicle and that of the Claimant as following same, he made a report to the Insurance Company and assumed that it had been settled by the Insurance Company. He thereafter gave it no further thought and took no further action. There is no doubt that this continued to be his position even after he received documents by post as he placed them aside and travelled outside the jurisdiction. In fact, he only took the documents to his Insurance Agent after speaking to an Attorney earlier this year.
- [67] As I assessed his demeanour, while under cross-examination, I was satisfied that Mr Hewitt had placed great emphasis on the fact that his vehicle had been insured and that this had influenced his approach to this situation. He constantly reiterated that he had believed that the matter had been settled and having made the report, he never followed up with his insurers to find out the outcome of this matter. This laissez faire approach was also evident in the fact that even though, he examined

the documents received by post and ought to have seen the Claimant's name as well as his, he took no action for several months.

**[68]** I believe that the full weight of this matter only occurred to him upon receipt of the Case Management Notice for Assessment of Damages against him which apparently prompted a flurry of actions on his part. This situation begged the question as to whether there is in fact merit to the Claimant's contention that Mr Egbert Hewitt had in fact received the documents but simply chose to ignore them. In arriving at my decision on this question, I then considered the evidence of Jerome Hewitt.

**[69]** Mr Jerome Hewitt's account can be aptly described as the linch pin of the Applicant's case as it rebuts service on the 25<sup>th</sup> of July and provides documentary proof in support of same. His later affidavit also refutes the possibility of service on the 26<sup>th</sup> of July 2023. While it has been contended that Mr Hewitt never mentioned the 26<sup>th</sup> of July in his first affidavit because his affidavit had been in response to the alleged service on the 25<sup>th</sup> of July, I noted that in his first affidavit, Mr Hewitt stated that although the work was completed at 6 p.m. on the 25<sup>th</sup>, he did not leave as he stayed back until in the night to meet with Dr Nash and show him how to operate the camera system and the gate.

**[70]** In the 2<sup>nd</sup> affidavit, Mr Hewitt stated that although he completed the installation and test run with Dr Nash on the 25<sup>th</sup> of July, he returned on the 26<sup>th</sup> to connect the system to Dr Nash's phone so he could view the cameras whenever he was not home. He deponed that he arrived at 8:30 a.m. and remained until sometime after midday/noon. This evidence if accepted would wholly undermine the assertion of the Process Server that service occurred on the 26<sup>th</sup>.

**[71]** In assessing Mr Hewitt's evidence on this point, I had questions as to the veracity of his evidence in terms of the reason provided by him for his return on the following day. On his account, he had stayed late in the night familiarizing Dr Nash with the set-up and its operation. Despite having done this, he has asked the Court to

accept that he travelled all the way back to Lawrence Tavern to return to Harbour View the following morning to connect the Doctor's phone to the network.

**[72]** I carefully considered his demeanour as he was cross-examined on this point and he appeared to be defiant and somewhat evasive in his responses. This was evident in his response to Counsel's suggestion that there was no independent support for this alleged visit as while he had previously agreed that no one went with him and there was no invoice for this date, he strongly disagreed with same. I found that Mr Hewitt appeared at great pains to place himself at this location as he was fully aware of the significance for his father of him being absent from home. I had doubts as to whether he had in fact returned to 5 Windy Way. I also had questions as to the length of time that he says was required to connect the system to the phone.

**[73]** Mr Hewitt did not know Mr Hamilton before this matter. It is his evidence that he is the only son of the Defendant, his name is Jerome Hewitt and he and his father reside at their address. He also agreed that his father would not have been at home between the hours of 10:00 a.m. and 11:00 a.m. in the morning of either the 25<sup>th</sup> or 26<sup>th</sup>, as he would leave early to open the hardware store by 7 a.m. Having accepted the foregoing however, Mr Hewitt denies that he ever saw or spoke to Mr Hamilton. He offered no opinion on the fact that Mr Hamilton's affidavit made mention of these factors.

**[74]** In continuing my assessment of this application, I then considered the case for the Respondent. I note that Mr Hamilton was the sole witness, and it is uncontroversial that his evidence has undergone a significant transformation between the period when he had filed his first affidavit and after the first affidavit of Jerome Hewitt had been served. There were then valid questions as to the authenticity and reliability of the Particulars of service form which was only produced after Mr Hewitt's affidavit. The document was not signed by the server and made no reference to how the individual served was identified. It states however that the date and time of service was the 26<sup>th</sup> of July 2019 at 10:50 a.m. It also bears the notation that Mr

Jerome Hewitt, the son of Egbert Hewitt, had indicated that his father had just left for work and he was named as the person served.

- [75] It was the evidence of Mr Hamilton that it was Ms Farquharson who completed this form. He made no mention of signing it, neither did he state that it had been handed to him to sign. While it has been suggested that this form is fabricated evidence, no actual evidence has been produced to this Court in support of same. While the Court recognizes that this document only made its appearance after the affidavit of Mr Jerome Hewitt, I note that apart from the difference from the date in the first affidavit, all the other information is the same.
- [76] I have carefully considered the fact that the date was only '*changed*' after Mr Jerome Hewitt provided his affidavit and documents in support. Had this change not occurred the Defendant's application could conceivably be described as insurmountable. In deciding how to view this development, I am mindful of the fact that on all the accounts, Mr Hamilton did not know the Defendant or his son before. It has not been suggested that he did, neither has it been suggested that he has a motive to be untruthful about serving him.
- [77] Mr Hamilton would not have known of the relationship, neither would he have known the individual's name. It also appears improbable that he would have known that they lived together or that the Defendant would have been at work at the time he went to the house. I believe that this information could only have been provided by Mr Jerome Hewitt and that he identified himself to Mr Hamilton and gave him the assurance that he would pass the documents on to his father. I believe that Mr Jerome Hewitt was in fact at home on the 26<sup>th</sup> of July 2019 and this explains how Mr Hamilton was able to meet and interact with him. I accept that when Mr Hamilton arrived in the area, the house and male were pointed out and Mr Hewitt subsequently accepted service of the documents.
- [78] I do not believe that Mr Hamilton went to a different house in the neighbourhood and was fortunate enough to meet an individual who provided him with all this

information and accepted the Court documents for a matter in which they were not involved. While it was a clear failing on the part of Mr Hamilton not to ask for identification, I am not persuaded that this has had the effect of undermining the reliability of his account as to whom he served.

[79] I have considered the submission that Mr Hamilton gave '*fresh evidence*' to the Court and I agree that there was additional evidence in terms of service which did not appear in his affidavits. This evidence was provided in the context in which he had previously accepted that his accounts provided no details on how he had found the house and merely provided details of the interaction with the individual served. I am satisfied that the circumstances within which the affidavit would have been provided are markedly different from the dynamic setting of a Courtroom where questions are asked and additional details may emerge in answers given.

[80] I took careful note of his demeanour as he was being cross-examined in respect of these details. From my observation, I found him to be candid in accepting his failures and without guile in explaining his reliance on the assurances of the male whom he served. He did not seek to justify his actions but spoke honestly as to what he did and why. I believe that he was a witness of truth and his account in respect of service is reliable.

[81] In my analysis of all the evidence, I considered the rules and authorities cited with special emphasis on the ***Jermaine Edmonds v Owen Marquesse*** decision. I believe that the contents of the affidavit filed on the 8<sup>th</sup> of January 2020 provided a sufficient basis on which the Court could accept that service had been effected as the rules do allow for service on an individual whom it is believed could bring the documents to the attention of the intended recipient. In circumstances where the individual being served was the son of the defendant, who resided with him, the relevant considerations had been addressed.

**[82]** Accordingly, I am unable to agree with the submission of Learned Counsel for the Defendant that the change of date was sufficient to provide the '*good cause*' on which the judgment could be set aside.

## **CONCLUSION**

**[83]** For the foregoing reasons, it is my ruling that the Defendant's application has not satisfied the required threshold to set aside default judgment and the application is denied. Accordingly, the Orders of the Court are as follows:

1. The Notice of Application to set aside Default Judgment filed on the 28<sup>th</sup> of March 2023 is refused.
2. Costs of this application is awarded to the Claimant/Respondent to be taxed if not agreed.
3. The Defendant's/Applicant's Attorney is to prepare, file and serve the Formal Order herein.