

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
IN THE PROBATE AND ADMINISTRATION DIVISION

Cause No.: P 105 of 2018

IN THE MATTER OF THE ESTATE OF GEORGE MCIRVIN (DECEASED)

BETWEEN

ANNA BENNETT  
(THE PERSONAL REPRESENTATIVE OF MR GEORGE MCIRVIN, DECEASED)

PLAINTIFF

AND

PETER WIGHT

RESPONDENT

IN CHAMBERS

Appearances: Mr. Clayton Phuran of BP & Associates for the Plaintiff  
Ms. Cherry Bridges of Ritch & Conolly for the Respondent

Before: The Honourable Mr. Justice Robin McMillan  
Heard: 13 August 2020

Judgment Delivered: 13 August 2020

Reasons for Judgment Delivered: 24 August 2020



HEADNOTE

*The requirements for proof of service of a writ – The need for compliance with O.13, r.7 GCR –  
The high standard expected for an ex parte Application – The serious consequences of  
procedural breach leading to the setting aside of a Judgment in Default*

## REASONS FOR JUDGMENT

### Introduction

1. This matter arises from a Summons Application dated 10 October 2019 seeking to set aside or vary a Judgment in Default for Damages to be assessed, itself dated 23 August 2019. The Default Judgment was obtained by Anna Bennett (“Ms. Bennett”), the Plaintiff, against Peter Wight, the thus described Respondent (“Mr. Wight”). Ms. Bennett is the Personal Representative of Mr. George McIrvin, Deceased.
2. The central contention of Mr. Wight who now seeks to set aside the Default Judgment is that the purported service of the Writ and Statement of Claim upon Mr. Wight’s then attorneys at the relevant time, Giglioli & Company, on 1 August 2019 relied upon for the Application for a Default Judgment was itself irregular and defective.
3. After hearing this matter on 13 August 2020 and after considering the respective submissions of Counsel for the Parties, the Court agreed with the arguments put forward on Mr. Wight’s behalf, and the Court accordingly set aside the Default Judgment. The Court provided *ex tempore* reasons, and these reasons are now set out more comprehensively in these Reasons for Judgment.



4. The Writ of Summons and Statement of Claim alleges that Ms. Bennett is the personal representative of the Estate of the Late George McIrvin and that Mr. Wight was given a power of attorney to have general administration over property found on the Land Register of the Cayman Islands at Registration Section George Town Central Block 14C Parcel 18, title to which was sold in due course and the proceeds of sale subsequently paid over to Mr. Wight. Thereupon Ms. Bennett has claimed that Mr. Wight as Trustee is liable to account for the net proceeds of the sale to the Estate of the Deceased and that he had not yet done so.

### **The Default Judgment**

5. An Application for Default Judgment was dated 20 August 2019, requesting Interlocutory Judgment with Damages to be assessed against Mr. Wight.
6. In the Application, Ms. Bennett certifies as follows:

*“The Plaintiff hereby certifies that:*

- 1. The Writ was served on Mr. Peter Wight through his attorney as evidenced by Affidavit of SENECA EBANKS dated 12<sup>th</sup> August 2019; and*
- 2. The Respondent has not served any notice of intention to defend as at the date hereof.”*



7. The Application was supported by an Affidavit of Service of Ms. Seneca Ebanks dated 12 August 2019. The Affidavit states that she was duly authorised and instructed by BP & Associates to serve the Writ of Summons on Mr. Wight under cover of a letter dated 1<sup>st</sup> August 2019. The Affidavit then states that at the Office of Giglioli & Company she did personally serve the above-mentioned document on Giglioli & Company, described as *“Attorneys-At-Law for the Defendant.”*

8. The covering letter dated 1 August 2019 was from BP & Associates.

9. The letter in relevant part states:

*“Enclosed by way of service Writ of Summons sealed March 15, 2019. Please acknowledge receipt of the same by signing copy of this letter with date and time.”*

10. The exhibited copy bore the signed words “G.Giglioli” and the date 1 August 2019 and the time of 1:00 p.m.

11. However, at no time did this firm expressly state that it was instructed or authorised to accept service on Mr. Wight’s behalf, and indeed it has consistently maintained in email correspondence that it had never been instructed to accept service of process on Mr. Wight’s behalf.



12. Nonetheless, for the purpose of the Plaintiff's Application for Default Judgment, the Plaintiff has maintained as we have already seen that Mr. Wight has not served any Notice of Intention to Defend as at the date hereof, viz., 20 August 2019.

**The Procedure Governing Proof of Service of Writ**

13. At this point it is essential to consider the relevant procedural principles set out in the Grand Court Rules. Order 13 GCR is headed "*Failure to Give Notice of Intention to Defend.*" Accordingly the Court is required to consider whether such a failure to give notice arises in this case and if so how it arises.

14. In the instant case O.13, r.7 is of particular importance. It states:

***"Proof of service of writ (0.13, r.7)***

*(1) Judgment shall not be entered against a defendant under this Order unless –*

*(a) the defendant has acknowledged service on him of the writ; or*

*(b) an affidavit is filed by or on behalf of the Plaintiff proving due service of the writ on the defendant; or*

*(c) the Bailiff has indorsed on a copy of the writ that he has served it on the defendant; or*

*(d) the Plaintiff produces the writ indorsed by the defendant's attorney with a statement that he accepts service of the writ on the defendant's behalf."*



15. It is immediately apparent that there is a crucial distinction between service on a Defendant directly and where the Plaintiff produces the writ indorsed by the Defendant's attorney with a statement that he accepts service of the Writ on the Defendant's behalf.
16. Ms. Bennett did not rely on Mr. Wight having acknowledged service on him of the Writ for the purpose of then applying for Default Judgment.
17. However, equally Ms. Bennett is unable to rely upon or to allege that Giglioli & Company indorsed the Writ in question with a statement that Giglioli & Company accepted service of the Writ on Mr. Wight's behalf.
18. In other words, there is no proof of service from which it can be deduced that there has been a subsequent failure by Mr. Wight to give Notice of Intention to Defend.

### **The Findings of the Court**

19. Upon being confronted in the course of the hearing by this extremely serious and potentially fatal difficulty, Counsel for the Plaintiff has relied upon two alternative propositions.
20. First, he argues that in accordance with the practice stated at Note 10/1/10 of the Supreme Court Practice 1999, Volume 1, service on a Defendant's attorneys pursuant to an unqualified oral agreement by them to accept service is good and effective service.



21. The Court is unable to accept the validity of this submission because no evidence of any such unqualified oral agreement has been adduced. At best, there may have been an assumption to that effect on the part of the Plaintiff's attorneys, but in relation to the requirements for proof of service such a unilateral assumption is entirely insufficient.

22. Secondly, Counsel for the Plaintiff contends that in the circumstances it remains open to the Court in the interests of justice to exercise a broad discretion which would ultimately permit the Judgment in Default to stand.

23. In support of this approach, he expressly identifies O.13, r.9 which briefly states:

*"Setting aside judgment (O.13, r.9)*

9. *The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."*

24. Even if this particular discretion arises other than on setting aside or varying any judgment, nonetheless the Court considers that this is not a case where a party who is in breach of the Grand Court Rules should merit discretionary consideration or benefit.

25. As this Court has already emphasised in delivering its *ex tempore* ruling, this was an *ex parte* Application. In an *ex parte* Application, a high standard is placed upon Counsel not only to be accurate and precise as to the formalities and the procedures but also to enlighten the Court as a matter of disclosure as to any untoward issue that may have arisen.



26. Unfortunately, both aspects were not complied with on this occasion. The Court was not informed that there could be a potential issue as to whether in fact there had been an indorsement by Mr. Wight's attorneys with a statement that they accepted service of the Writ on his behalf. Likewise, there was no suggestion that an amplified approach to acceptance of service on the basis of an unqualified oral agreement was even raised in seeking Default Judgment.

### **Conclusion**

27. The Court concludes that there was an inadequacy and a deficiency in complying with O.13, r.7, and that in light of that breach of procedure the Default Judgment must be set aside. The Court also concludes with great regret that there was on the part of the Plaintiff at least in technical terms a material non-disclosure of the true circumstances which had arisen.

28. The Default Judgment is therefore set aside.



*Robin McMillan*

**THE HONOURABLE MR. JUSTICE ROBIN MCMILLAN**

**JUDGE OF THE GRAND COURT**