

LITIGATION UPDATE

Grand Court confirms that service of proceedings on attorneys invalid without confirmation that they hold instructions to accept service on behalf of their client.

Key Takeaway

- In a recent judgment of the Grand Court (*Anna Bennett (Personal Representative of Mr George McIrvine Deceased) v. Mr Peter Right* – P105 of 2018 (Unreported)), McMillan J set aside a default judgment after having found that there had been an inadequacy and a deficiency in complying with O.13, r.7 of the Grand Court Rules (“**GCR**”), which sets out how proof of service of a writ may be established.
- The inadequacy and a deficiency arose as a result of the Plaintiff’s counsel attempting to assert that service had been effected on the Respondent’s counsel, in circumstances where no such agreement as to service was in place between the respective practitioners.
- The decision serves as a useful reminder to practitioners of the importance of confirming (preferably in writing) that your opponent holds instructions to accept service on behalf of their client.

Background

The matter arose from a Summons Application seeking to set aside or vary a Default Judgment for Damages to be assessed, which had been obtained by the Plaintiff against the Respondent at an *ex parte* hearing.

The central contention of the Respondent seeking to set aside the Default Judgment was that the purported service of the Writ and Statement and Claim upon his attorneys was itself irregular and defective.

More particularly, it was alleged that while a copy of the pleadings had been served (and signed for) at the Respondent’s attorney’s office, at no time did the Respondent’s firm expressly state

that it was instructed or authorised to accept service on the Respondent's behalf, a fact that it had consistently maintained in email correspondence to the Plaintiff's counsel.

Hearing

At the hearing, counsel for the Plaintiff sought to overcome what had been described by the court as a "serious and potentially fatal difficulty" in reliance upon two alternative proposition (1) that in accordance with the practice stated at Note 10/1/0 of the UK Supreme Court Practice 1999, Volume 1, (UK) service on a Defendant's attorneys pursuant to an unqualified oral agreement by them to accept service is good and effective service; and (2) in the circumstances it remained open to the Court in the interests of justice to exercise a broad discretion which would ultimately permit the Judgment in Default to stand.

Decision

In delivering his *ex tempore* reasons, MacMillan J set out the reasons for rejecting both propositions put forward by the Plaintiff's counsel, in finding that:

1. No evidence of any unqualified agreement between the respective counsels with respect to service had been adduced, with at best there being a unilateral assumption on behalf of the Plaintiff's counsel that such a state of affairs was in existence, being entirely insufficient in relation to the requirements for proof of service; and
2. In circumstances where the Plaintiff was in breach of the Grand Court Rules, the Court did not consider that it was a case which would merit a discretionary consideration or benefit in the Plaintiff's favour.

In reaching its judgment, the Court emphasised the fact that as this was an *ex parte* application, a high standard was placed upon counsel not only to be accurate and precise as to the formalities and the procedures leading up to the application, but also to enlighten the Court as a matter of disclosure as to any untoward issue that may have arisen.

In circumstances where the Court had not been informed as to procedure undertaken by the Plaintiff, nor any potential issue with respect to the formality of service, it concluded “*with great regret that there was on part of the Plaintiff at least in technical terms a material non-disclosure of the true circumstances that had arisen.*”

Consequently, the Court found that there had been an inadequacy and a deficiency in complying with O.13, r.7 of the Grand Court Rules (“**GCR**”), and as such, the Default Judgment must be set aside.

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Broadhurst LLC is a boutique offshore litigation firm with over 30 years’ experience in the Cayman Islands. For further information on this decision or any other legal enquiry, please reach out to one of the authors of this publication.

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