

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION**

**2017/CLE/gen/No.00838**

**BETWEEN**

**JEFFREY BARNHILL  
CHERYL BARNHILL**

**Plaintiffs**

**AND**

**DEBORAH KRUKOWSKI**

**Defendant**

**Before:** The Honourable Justice Keith H. Thompson

**Appearances:** Ms. Nerissa A. Green and Mr. Joseph Walker of Halsbury  
Chambers for the Plaintiff

Mrs. Lakeisha N. Hanna of Harry B. Sands, Lobosky & Company  
for the Defendant

**Hearing Date:** 26<sup>th</sup> September 2019

**RULING**

***Civil Practice and Procedure - Rules of the Supreme Court (RSC 1978) –  
Judgement in default of appearance – Judgement in default of defence – setting  
aside – procedure for substituted service – irregular judgment***

**Thompson, J:**

**Introduction**

1. Litigation is intricate. All things being equal, the appropriate application and adherence to the requisite procedure results in the thing prayed for. As such, I find on appeal that on the face of the application for Judgment in Default filed on October 13<sup>th</sup>, 2017 the Plaintiff contemplated both judgement in default of appearance and defence pursuant to Orders 13 and 19 of the Rules of the Supreme Court, 1976 (RSC,1976) the former being most proper. Notwithstanding the way Judgement in Default was set aside, I come to the same conclusion that it ought to have been set aside *ex debito justitiae*.

### **Procedural Overview**

2. The instant appeal is from the Registrar's February 27<sup>th</sup>, 2018 ruling setting aside Judgement in Default. It was filed by Notice of Motion dated March 6<sup>th</sup>, 2018 pursuant to Order 58 of RSC, 1976.
3. The action itself was commenced by specially indorsed writ of summons filed on July 17<sup>th</sup>, 2017 and concerns the agreement for the sale of *Fairwinds* situated at 140 Eastern Road, New Providence. On August 4<sup>th</sup>, 2017, the Plaintiff filed Summons and supporting Affidavit for an Order for substituted service and leave was granted for same on August 15<sup>th</sup>, 2017. The specially indorsed writ of summons was served on Harry B. Sands, Lobosky & Company on August 21<sup>st</sup>, 2017. Subsequently, an Affidavit of service was filed on August 24<sup>th</sup>, 2017 by the Plaintiffs. After conducting a search of the Supreme Court's registry, the Plaintiff entered Judgment in Default of Defence on October 13<sup>th</sup>, 2017 which was subsequently served on Harry B. Sands. On October 17<sup>th</sup>, 2017, the Defendant filed summons and supporting affidavit to set aside the default judgement. The Registrar made a decision setting aside the judgment on February 28<sup>th</sup>, 2018 which is the subject of this appeal.

### **Analysis**

4. Order 61, rule 4 (3) RSC, 1976 provides that 'substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.' Construing the Court's August 15<sup>th</sup>, 2017 Order for substituted service in

light of this, the Deputy Registrar prescribed the mechanism for substituted service when leave was 'granted to the Plaintiff to serve the Writ of Summons dated the 12<sup>th</sup> day of July, A.D., 2017 and filed herein on the 17<sup>th</sup> of July, A.D., 2017 on the Defendant by way of her agents Harry B. Sands Lobosky & Co.' Therefore, O. 10, r. 1 (1) RSC falls mute to the more apropos O.61, r.4 (3) RSC. The actual Order was not served because it was not mandated to be served. The Plaintiff is not to be punished for this.

5. I agree that the Plaintiff was called upon to indorse the writ within three days after service with certain particulars as mandated by O. 10, r.1 (4) RSC. This was left undone and constitutes the point at which service of the originating process by substituted service became irregular. Nevertheless, the Rules cannot be strictly construed in siloes as there is a great degree of interplay between them. A fortiori, it is trite law as gleaned from the Bahamian authority of *Island Bell Limited v. The Bahamas Telecommunications Company Limited - [2011] 3 BHS J. No. 82* relying on Bowen LJ in *Cropper v Smith 1884 26 Ch D 700* that 'the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.' Bowen LJ in *Cropper* further stated that "***I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party***". The learned justice further made note that "***courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy***".
6. Construing the principles of law enunciated above, I am called upon to remedy the improprieties of Counsel for the Plaintiff by not indorsing the writ within three days after service with certain particulars as mandated by O. 10, r. 1 (4) RSC not with a view to punishment but with a view to addressing the merits of the case. As such, I find that the irregularity which maintained pursuant to the failure of the Plaintiff to indorse the writ of summons was remedied by the August 24<sup>th</sup>, 2017 filing of an affidavit proving due service of the writ or notice of the writ on the defendant pursuant to O.13, r. 7 (1) RSC. The saliency of the affidavit of service is in substance the same as what ought to have been included in the O.10, r. 1 (4) RSC indorsement. Therefore, the only irregularity pertains to time as the affidavit was

filed in excess of just 4 days of the requirement of O.10, r.1 (4) which I am inclined to forgive.

7. Nonetheless this forgivable indiscretion on the part of the Plaintiff still leaves the Judgment in default amenable to setting aside *ex debito justitiae* in fairness to the Defendant. As such, I affirm the Registrar's ultimate decision that the Judgment in Default be set aside and mandate the filing of a defence to the substantive action by October 5<sup>th</sup>, 2020. Failure to comply will ipso facto result in final judgment against the Defendant on the exact terms of the October 13<sup>th</sup>, 2017 Judgement in Default with interest.
8. Costs in the cause.

Dated this 17<sup>th</sup> day of September, A.D., 2020



**The Honourable Keith H. Thompson**  
**Justice of the Supreme Court**  
**The Commonwealth of The Bahamas**