



**THE GRAND COURT OF THE CAYMAN ISLANDS  
CIVIL DIVISION**

**CAUSE NO. G 212 OF 2019**

**BETWEEN:**

**JOHN FELDER**

**PLAINTIFF**

**AND:**

**SANDRA HILL**

**DEFENDANT**

**IN CHAMBERS**

**Appearances:** **Mr. James Dixon of Priestleys for the Plaintiff**  
**Mr. Kyle Broadhurst of Broadhurst for the Defendant**

**Before:** **The Hon. Mr. Justice Robin McMillan**

**Date of Hearing:** **22 November 2021**

**Date of Circulation of  
Draft Reasons for Judgment:** **3 December 2021**

**Date of Reasons for Judgment:** **8 December 2021**

**HEADNOTE**

*The power of the Grand Court to set aside a Default Judgment on the ground of procedural irregularity. The responsibility of a represented Plaintiff to ensure that an unrepresented Defendant is not prejudiced because of a material nondisclosure. The importance of complying with the practice and procedure of the Grand Court.*



## REASONS FOR JUDGMENT

1. On 22 November 2021, the Court heard and determined a Summons Application on behalf of Ms. Sandra Hill (“the Defendant”) against Mr. John Felder (“the Plaintiff”). The Court granted the relief claimed in paragraphs 1, 2 and 4 of the Summons, which was dated 5 November 2021.
2. The Summons in relevant parts seeks the following Orders:
  - “1. Pursuant to the GCR Order 2, Rule 2, that the default judgment entered pursuant to the Order of the Honourable Mr. Justice McMillan, filed the 15<sup>th</sup> day of January 2021, be set aside on the basis of irregularity. The irregularity being that the Plaintiff failed to serve the Statement of Claim before the expiration of 14 days after the defendant gave notice of intention to defend, as required by GCR Order 18, Rule 1, and the Court having not granted leave for the Statement of Claim to be served out time;
  2. Pursuant to the GCR Order 2, Rule 2, that the Order made by the Honourable Mr. Justice McMillan, filed the 25<sup>th</sup> day of August 2021, be set aside on the basis that the default judgment had been improperly obtained, as the Plaintiff failed to validly serve the Statement of Claim in accordance with the GCR Order 18 Rule 1 and leave to serve the Statement of Claim outside of the prescribed time period was not obtained.
  3. That the Order for damages made by the Honourable Mrs. Justice Carter, filed the 17<sup>th</sup> day of September 2021, based upon the default judgment Order of Mr. Justice McMillan, filed 15<sup>th</sup> of January 2021, be set aside on the basis that the default judgment had been improperly obtained, as the Plaintiff failed to validly serve the Statement of Claim Statement of Claim in accordance with the GCR Order 18 Rule 1 and leave to serve the Statement of Claim outside of the prescribed time period was not obtained.
  4. That the costs of this Summons be provided for.”
3. In summary terms, the Court decided that there had been a material irregularity in the granting of the original Default Judgment, and that crucial evidence in relation to how the Default Judgment



was proceeded upon and obtained was not adduced by the Plaintiff under circumstances where the Plaintiff had a legal obligation to adduce it.

#### THE BACKGROUND

4. The background to this matter was set out in the Reasons for Judgment dated 2 September 2021.
5. At that time the Court refused an application by the Defendant to set aside a Default Judgment dated 29 July 2020 in favour of the Plaintiff.
6. It is clear from paragraph 23 of the Reasons that the Court acted on the basis that the Default Judgment itself had been properly obtained, and that there was no respect in which the Default Judgment could be described as irregularly obtained.
7. The Court then proceeded to consider and to criticize various aspects of the Defendant's conduct of her case. The Court concluded by declining to exercise its discretion to set aside the Default Judgment in this case.
8. It should be emphasized that although the Defendant had indeed fallen short of what was required in the conduct of her case nonetheless the Court was not aware of any material irregularity, and the evidence of the Plaintiff clearly affirmed that there was no such irregularity in issue.
9. A helpful summary of the relevant chronology appears at paragraphs 1-7 of the Plaintiff's Skeleton Argument dated 19 November 2021:

*“1. The Plaintiff filed a Writ of Summons of 27 December 2019 and served this document on 2 January 2020.*

*2. The Plaintiff filed and served a Statement of Claim on 29 January 2020.*

*3. On 29 July 2020, following a contested hearing of the Plaintiff's application for default judgment (the Defendant not having filed a Defence) before McMillan J, judgment was entered by the Grand Court against the Defendant for injunctive relief and damages to be assessed for libel in respect of three articles which the Defendant published or caused to be published in December 2019 and January 2020 (“Defamatory Articles”) on*



the website [www.caymanmarlroad.com](http://www.caymanmarlroad.com) and associated social media platforms.

4. On 15 April 2021, the Defendant served a Summons to Set Aside Default Judgment.
5. On 16 April 2021, a damages assessment was heard before Carter, J. (contested hearing).
6. On 12 August 2021, the Defendant's Summons to Set Aside Default Judgment was heard before McMillan, J. (a contested hearing). The Summons was dismissed.
7. On 14 September 2021, Carter, J. awarded the Plaintiff damages of CI\$105,000 in respect of the damage caused to the Plaintiff by the publication of the Defamatory Articles, together with interest and costs."

#### THE APPLICABLE RULES OF PROCEDURE

10. The Defendant submits at paragraphs 3-11 of her Skeleton Argument dated 19 November 2021 as follows:

- “3. These proceedings were commenced by way of a Writ of Summons which was generally endorsed and served upon the Defendant.
4. The Defendant filed an Acknowledgment of Service on 14 January 2020. In the Acknowledgement of Service the Defendant indicated that she would be representing herself.
5. GCR Order 18 Rule 1 sets out when a Plaintiff is required to serve a Statement of Claim. It states:

“Unless the Court gives leave to the contrary or a statement of claim is indorsed on the writ, the plaintiff must serve a statement of claim on the defendant or, if there are two or more defendants, on each defendant, and must do so either when the writ is served on that defendant or at any time after service of the writ but before the



*expiration of 14 days after that defendant gives notice of intention to defend.”*

6. *The Plaintiff did not obtain leave to serve the Statement of Claim outside the time frame mandated by GCR Order 18 Rule 1. He was accordingly required to serve the Statement of Claim on or before 28 January 2020. That did not occur.*
7. *On 29 January 2020, the Statement of Claim was filed and delivered to Pools By Us, a business located nearby the Defendant’s business. The fact that the document was served on that date is confirmed by both the letter of service containing a handwritten notation confirming the date or receipt by Pools By Us and the fact that the Statement of Claim had not been filed until 29 January 2020.*
8. *As a result of the failure of the Plaintiff to serve the Statement of Claim on or before 28 January 2020, he was in default. The subsequent attempt at service of the Statement of Claim on 29 January 2020 did not cure the default. The default remains and there can be no valid service of the Statement of Claim unless and until leave of the Court to serve the Statement of Claim outside of the requirement of GCR Order 18 Rule 1 has been granted.*
9. *In North Midland Construction Plc v Geo Networks Ltd [2015] EWHC 2384 Justice Edwards-Stuart explained at paragraph 68 of his judgment the consequences for failure to serve a statement of claim within the prescribed time frame. He stated:*

*“As the courts have repeatedly made clear, to strike out a claim is a very Draconian sanction. It is not the automatic sanction for failure to serve the particulars of claim, unless that is done in breach of an “unless order”. The sanction for failure to serve particulars of claim within the time specified in the rules is that there can be no valid service thereafter without the leave of the court. It is as if the action becomes stayed. However, the practical consequences may not be very different to that of striking out, because the starting of a second claim for the same cause of action while the first action is*



*still in existence would probably amount to an abuse of the process of the Court, this making the second action amenable to being struck out .” (emphasis added)*

10. *As leave has not been obtained by the Plaintiff, he remains in default of his obligation to serve the Statement of Claim. The purported service on 29 January 2020 was accordingly invalid.*

### ***Misrepresentation***

11. *Despite failing to serve the Statement of Claim in accordance with GCR Order 18 Rule 1, the Plaintiff applied for default judgment on 30 April 2020.”*

11. These submissions have been set out at length because they are critical to the determination of this case.
12. The Plaintiff appears to concede the force of the Defendant’s submissions at least to the extent of describing “*an administration error*” in paragraph 24 (iii) of the Plaintiff’s Skeleton Argument. Nonetheless, the Plaintiff submits that the Defendant has suffered “*no prejudice*” as a result of the document being served on 29 January 2020 rather than on 28 January 2020 and that the Plaintiff will suffer significant prejudice if the Court sets aside the Default Judgment.
13. With great respect to the Plaintiff, this is an over-simplification.

### **THE EVIDENCE BEFORE THE COURT**

14. There is no doubt that in support of the Application for Default Judgment it was represented to the Court on behalf of the Plaintiff that the Statement of Claim had been served on 28 January 2020.
15. In the First Affidavit dated 5 May 2020, of a Senior Legal Secretary at the firm of the Plaintiff’s Attorneys, she states at paragraph 5 that a Statement of Claim was “*filed and served on the Defendant on 28 January 2020*”.
16. In addition, in the First Affidavit of a Corporate Administrative Assistant in the employment of the same firm, she sets out the following at paragraph 5-7:



- “5. *On Tuesday 28 January 2020, I was instructed by the attorney with carriage of this matter to serve the Statement of Claim dated 29 January 2020 (“SoC”) upon the Defendant. I again attended the unit which the Defendant operated out of which is located at Dorcy Place, Industrial Park, George Town. Upon attending the unit I rang the doorbell which is a Ring doorbell which connects directly to the occupant’s cell phone. The Defendant answered the call and advised me that she was not in the office. She stated that I could leave the legal documents I was serving at the pool supply store which is the business located in the unit next door to the Defendant’s unit.*
6. *I rang the attorney with carriage of the matter and advised him of my conversation with the Defendant. The attorney confirmed that as the Defendant, with full knowledge that I was serving documents of a legal nature, had specially instructed me to leave the documents at the pool supply store in the next unit, then I should proceed to do so.*
7. *I attended the premises of Pools By Us the pool supply store located in the unit next door to the Defendants, and spoke with Shawn Scott. Ms. Scott confirmed that she was willing to accept the document on behalf of the Defendant. I then personally handed to her, in a sealed envelope, the SoC together with a covering letter. Ms. Scott then signed a second copy of the covering letter confirming she was accepting the documents on behalf of the Defendant.”*

17. The Defendant argues that paragraph 5 of the Corporate Administrative Assistant’s Affidavit gives a false impression that the events in the foregoing paragraphs all occurred on 28 January 2020.
18. In the Skeleton Argument of the Plaintiff dated 28 July 2020 and relied upon for the entry of Default Judgment, paragraph 6 sets out a chronology which explicitly affirms that the Statement of Claim was served on the Defendant on 28 January 2020.
19. Finally, in oral submissions on 29 July 2020 in respect of the same Application the transcript records that the Statement of Claim was served on 28 January according to the Plaintiff’s Counsel.



20. In other words, there is no doubt whatever as to the position which the Plaintiff presented to the Court and which ultimately has been shown to be inaccurate.
21. Meanwhile Ms. Hill the Defendant was unrepresented in these proceedings until 16 September 2021.
22. Subsequently further evidential light has emerged following various enquiries by the Defendant's newly instructed attorneys and made to the Plaintiff's attorneys, who themselves have acted throughout the course of this matter.
23. In the Corporate Administrative Assistant's Second Affidavit dated 19 November 2021, she amplifies her previous evidence at paragraphs 4-5 in this manner:

*“4. On Tuesday 28 January 2020, I was instructed by the attorney with carriage of this matter to file and serve the SoC on the Defendant. I collected the SoC from the attorney at Priestleys and proceeded to drive to court to file the document.*

*5. Earlier that day, 28 January 2020, the Cayman Islands was hit by a 7.7 magnitude earthquake. This event caused significant disruption and I encountered unusually heavy traffic as I approached the centre of George Town. When I eventually arrived at court entrance, a member of court staff informed me that the court staff had left the building on account of the earthquake. In the circumstances, I was unable to file the SoC and I returned to Priestleys.”*

24. In light of these facts and having regard to the disappointing manner in which they have ultimately emerged, it is clear that there has been material breach on the part of the Plaintiff of GCR O. 18, r.1. A material irregularity has arisen and no effort had been made to correct it before the Default Judgment was both sought and obtained.
25. At this juncture the Court observes that while a major earthquake may well justify an application for an extension of time within which to serve a Statement of Claim, it cannot justify taking no action at all and, even if unintentionally, leaving a material irregularity both uncorrected and unknown to the Court.



26. The Court also carefully reminds itself that at all times up to the granting of the Default Judgment Ms. Hill was unrepresented. The Court would certainly have alerted the Defendant to the significance of the point to be raised by the Defendant if the Court itself had even been made aware of it by the Plaintiff.
27. Finally in this regard the Court notes that if the Defendant's recently appointed attorneys had not made enquiry of the Plaintiff's attorneys a full account of those events might never have become known.

#### **LEGAL CONSEQUENCES OF PROCEDURAL IRREGULARITY**

28. The Defendant contends at paragraphs 23-24 of her Skeleton Argument that she is now entitled to relief:
  - “23. Pursuant to GCR Order 2 Rule 1, where there has been a failure to comply with the requirements of the rules, the failure shall be treated as an irregularity. The failure of the Plaintiff to validly serve the Statement of Claim renders the Default Judgment and the orders following it irregular.
  24. The time in which Ms. Hill was required to file her Defence had not (and has still not) begun to run. In the absence of valid service in accordance with the rules, Ms. Hill is entitled to *ex debito justitiae* to have the Default Judgment set aside and to the costs of this application.”
29. The Defendant further contends at paragraph 27 that she has suffered prejudice as a result of this irregularity (as well as from other irregularity) and that she has had Judgment entered against her on a technical basis without any hearing on the merits. It is also stated at paragraph 28 that this Application was brought immediately upon the Defendant becoming aware of the irregularities.
30. The Plaintiff on the other hand argues at paragraph 21 of his Skeleton Argument that should the existing Orders be set aside he will suffer “*significant prejudice*”.
31. It is further claimed that the Application was not brought “*within a reasonable time*”. Complaint is also made that the Plaintiff would be denied “*the fruits of his Judgment*”.



32. The central issue to which these various submissions relate is as to how the Court should address the circumstances when a Default Judgment has been obtained subsequent to and in consequence of an uncorrected procedural irregularity.
33. An indication of the approach of the Court to Default Judgment defects is found in *Anna Bennett (the Personal Representative of Mr. George McIrvin, Deceased) v Peter Wight (Unreported, Cause No. P 105 of 2018, 24 August 2020, McMillan J)*.
34. This matter arose from a Summons Application dated 10 October 2019 seeking to set aside or vary Judgment in Default for Damages to be assessed, itself dated 23 August 2019. The Default Judgment was obtained by Anna Bennett, the Plaintiff, against Peter Wight, the thus described Respondent. Ms. Bennett was the Personal Representative of Mr. George McIrvin, Deceased.
35. The central contention of Mr. Wight who sought to set aside the Default Judgment was that the purported service of the Writ of Summons 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.
36. An Application for Default Judgment was dated 20 August 2019, requesting interlocutory Judgment with Damages to be assessed against Mr. Wight.
37. In the Application, Ms. Bennett certified 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.”*

38. The Application was supported by an Affidavit of Service of Ms. Seneca Ebanks dated 12 August 2019. The Affidavit stated that she was duly authorized 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 stated 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.”*



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

40. The letter in relevant part stated:

*“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.”*

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

42. However, what must be emphasized is that at no time did this law firm expressly state that it was instructed to or authorized to accept service on Mr. Wight’s behalf, and indeed it consistently maintained in email correspondence that it had never been instructed to accept service of process on Mr. Wight’s behalf.

43. GCR O.13, r. 7 was of particular importance. It states in relevant part:

***“Proof of service of writ (O.13, r.7)***

*1. Judgment shall not be entered against a defendant under this Order unless-*

*...*

*(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.”*

44. This Court concluded at paragraph 16-17 of its Reasons for Judgment:

*“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.”*

45. This Court then stated at paragraph 18:



“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.*”

46. If in the instant case there has equally been no proof of service as recognized in law, then likewise a subsequent failure by Ms. Hill to file and serve a Defence becomes irrelevant. The Defendant had no requirement or obligation to do so. In the *Bennett* case the Court set aside the Default Judgment which had been entered.
47. The Court also expressed its concern that in an *ex parte* application where a high standard is placed upon Counsel not only to be accurate and precise as to the formalities and procedures but also to enlighten the Court as to any matter of disclosure of any untoward issue that might have arisen, neither of these aspects were complied with on that occasion.
48. By analogy, when an unrepresented litigant such as Ms. Hill was endeavouring to present her arguments, the failure to draw to her attention the significance of late service of the Statement of Claim was itself most disappointing.
49. Moreover, where the Court was misdirected as to the timing of service by the Plaintiff's own evidence itself, the gravity of the consequences are inevitably compounded. In this respect and regardless of intention neither the Court nor Ms. Hill was correctly informed.

#### **THE FINDINGS OF THE COURT**

50. In light of the disadvantage under which the Defendant was placed by the conduct of the Plaintiff, the Court finds that the Defendant's Summons Application dated 5 November 2021 was made within an entirely reasonable time.
51. In addition as the Court had earlier indicated it is established as a matter of law and as a matter of fact that there has been a procedural irregularity in relation to the service of the Plaintiff's Statement of Claim as stipulated in GCR O.18, r 1.
52. The procedural irregularity which could in principle have been corrected with leave of the Court remained uncorrected up to the time when the Default Judgment was sought and obtained. In



effect it is now clear that there was no proof of valid service from which it can be deduced that there has been a subsequent failure by the Defendant to file and serve a Defence.

53. Finally, even if the Court has an available discretion to refuse to set aside the Default Judgment, this is clearly not a case where any such discretion, if it arises, should be exercised in favor of the Plaintiff.
54. First, the Plaintiff had ample opportunity to seek leave to extend the time for service of the Statement of Claim but he failed to do so. Secondly, the Plaintiff also presented evidence as to service which has been demonstrated to be false in a material respect. Thirdly, the Plaintiff has placed the Defendant whom he knew to be an unrepresented litigant at a serious disadvantage in circumstances which were entirely avoidable by him.
55. In the Court's view any such discretion as there may be should exercised be in favour of the Defendant.

#### CONCLUSION

56. For the Reasons identified above the relief sought in paragraphs 1, 2, and 4 of the Defendant's Summons Application is granted.
57. Following the circulation of the draft Reasons for Judgment, the attorneys for the Plaintiff have stated to the Court's Secretary by email message dated 7 December 2021 that the assurances regarding the date of service of the Statement of Claim were made entirely in good faith and with an honest, albeit mistaken, belief that those assertions were true. This was accompanied by a Third Affidavit of the Senior Legal Secretary. For the record the Court has no difficulty in permitting that statement of clarification to be made.



**Honourable Mr. Justice Robin McMillan**  
**Judge of the Grand Court**