

**IN THE HIGH COURT OF BELIZE, A.D. 2023**

**Claim No. 574 of 2022**

**BETWEEN**

**CYNTHIA MARIE DAWSON**

**CLAIMANT/RESPONDENT**

**AND**

**ELBERT DAWSON**

**DEFENDANT/APPLICANT**

**Before** the Honourable Madam Justice Geneviève Chabot

**Appearances**

Payal B. Ghanwani, for the Claimant/Respondent

Brandon S. Usher, for the Defendant/Applicant

**RULING ON APPLICATION TO SET ASIDE ORDER**

**Introduction**

1. The Claimant filed a Fixed Date Claim Form on September 28<sup>th</sup>, 2022, seeking declarations and orders in relation to Parcel 12091, Block 11 in the Belize Rural North II Registration Section and situated at Miles 21.5 Philip Goldson Highway, Gardenia Village, Belize (the “Property”). The Claim was not defended. The first hearing was treated as the trial of the Claim pursuant to Rule 27.2(3) of the *Supreme Court (Civil Procedure) Rules, 2005* (“CPR”), and the Court granted the declarations and orders sought by the Claimant (the “Judgment Order”).
2. On January 6<sup>th</sup>, 2023, the Defendant filed an Urgent Notice of Application seeking to set aside the Judgment Order. The Defendant alleges that he was never served with the Fixed Date Claim Form, and that had he been served, some other judgment or order would have been made. The Application is supported by the Affidavits of the Defendant, Elbert Dawson, his brother, Gilbert Dawson, and his sister Geraldine Amanda Dawson. The

Defendant's case is that service was attempted on Gilbert, not Elbert Dawson. The Defendant was therefore unaware of the existence of the Claim.

3. The Claimant opposes the Application on the ground that the Defendant was properly served with the Fixed Date Claim Form. She provided affidavit evidence in support of her contention that PC Ogaldez served the Fixed Date Claim Form on the Defendant on October 12<sup>th</sup>, 2022. She asks this Court to dismiss the Application.
4. At a hearing held on May 11<sup>th</sup>, 2023, Counsel informed me that they wished to have the Court deal with the Application on the papers. Counsel indicated that they disagree on the test I must apply to determine this Application. They each filed written submissions supporting their respective position. I inquired whether either Counsel intended to cross-examine any of the affiants in this matter. Both Counsel indicated that it would not be necessary.

### **Legal Framework**

5. The parties' disagreement revolves around the applicability of Rule 39.5 of the CPR to this Application. Rule 39.5 of the CPR provides that a party who was not present at trial at which judgment was given or an order made in his absence may, within 14 days, apply to set aside that judgment or order. Under Rule 39.5 of the CPR, to be successful the party applying to set aside the judgment or order must provide evidence on affidavit showing (a) a good reason for failing to attend the hearing, and (b) that it is likely that had the applicant attended, some other judgment or order might have been given or made.
6. The Defendant relies on the English cases of *Nelson and Another v Clearsprings (Management) Limited*<sup>1</sup> and *White v Weston*<sup>2</sup> in support of his position that where, as here, judgment has been entered "irregularly" by reason of a failure to properly serve a claim, the Defendant should, as of right, be able to have the order set aside *ex debito justitiae*. The Defendant notes that the court in *Nelson* specifically considered whether Rule 39.3 of the English CPR, which is similar to Belize's Rule 39.5, applied in those circumstances. The court held that it did not. Thus, if a defendant can show he has not been served with the claim form, he would normally be entitled to an order setting the judgment or the order aside.
7. The Claimant relies on Rule 39.5 of the CPR to oppose the Defendant's Application. The Claimant does not dispute that the Application was filed within 14 days of service of the Judgment Order. It is the Claimant's position, however, that the Defendant has not demonstrated that he had a good reason for failing to attend the December 6<sup>th</sup>, 2022

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<sup>1</sup> [2006] EWCA Civ 1252 ("*Nelson*").

<sup>2</sup> [1968] EWCA Civ J0308-2 ("*White*").

hearing, or that it is likely that some other judgment or order might have been given or made had he attended.

8. The Claimant's response to the Defendant's submission that Rule 39.5 of the CPR does not apply where a claim has not been properly served is as follows:

*The Claimant contends that the cases relied on by the Defendant are not binding on our Courts and in any event our CPR makes specific provisions for setting aside a judgment made in the absence of a Defendant. It is envisioned that not being served is a scenario which would be dealt with under the second threshold of the test. It goes without saying that if a party was not served, he has a good reason for not attending a hearing. However, that alone cannot be relied on as this would open pandora's box allowing every Defendant who chooses to do nothing when served with court proceedings to take action only after Judgment is issued and he appreciates the seriousness of the documents by simply asserting that he was not served.*

9. Although not binding, I find the cases relied on by the Defendant highly persuasive. It is helpful to begin by citing Rule 39.3 of the English CPR:

39.3 (1) The court may proceed with a trial in the absence of a party but –

...

(c) if a defendant does not attend, it may strike out his defence or counterclaim (or both).

(2) Where the court strikes out proceedings, or any part of them, under this rule, it may subsequently restore the proceedings, or that part.

(3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.

(4) An application under paragraph (2) or paragraph (3) must be supported by evidence.

(5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –

(a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;

(b) had a good reason for not attending the trial; and

(c) has a reasonable prospect of success at the trial.

10. While Rule 39.3 of the English CPR is not identical to Rule 39.5 of the Belize CPR, both are essentially of the same import. A court may grant judgment or make an order in the absence of a defendant, but the court can set aside that judgment or order if the defendant applies promptly (within 14 days in Belize) and can demonstrate both that he had a good reason for not attending the trial, and that his attendance would likely have changed the outcome of the trial. Neither Rule 39.3 of the English CPR, nor Rule 39.5 of the Belize CPR address the situation where a claim has not been properly served.
11. I find the Court of Appeal's reasoning in *Nelson* to be a fair and just interpretation of the legislator's intent in enacting Rule 39.3 of the English CPR. I adopt this interpretation and find that it applies to Rule 39.5 of the Belize CPR as well:

35. [...] So far as we are aware, there is no case in which the rule has been held to apply where the defendant has not been served with proceedings in accordance with the CPR and is ignorant of them. To accede to Mr Jones' submissions involves disregarding the complex provisions for service of process under the CPR and holding that, notwithstanding the fact that he has not been served (or deemed to have been served) with the proceedings, the burden is on the defendant to satisfy the criteria in subparagraphs (a), (b) and (c) of CPR 39.3(5). That includes his showing that he acted promptly and that he has a reasonable prospect of success at the trial.

36. It is, in our judgment, exceedingly unlikely that the draftsman of the CPR intended such a result. The CPR proceed on the basis that a defendant must be served in accordance with the detailed rules of service and that, if he is not served in time, the claimant must obtain an order extending the time for service under rule 7.6 or an order dispensing with service under rule 6.9 [...].

[...]

39. We do not think that the draftsman of the CPR can have intended to introduce what the editors call the more stringent requirements of rule 39.3(5) into applications to set aside judgments irregularly obtained, in the sense of being obtained without service of the claim form in accordance with the rules. In our judgment, the whole of rule 39.3 contemplates a trial in the absence of a party who has been served under the rules or in respect of whom service has been dispensed with [emphasis added].

12. With respect to Fixed Date Claims, the Belize CPR clearly contemplates that trial in the absence of a party can only occur where that person has been properly served. Under Rule 27.2(3) of the CPR, the first hearing of a Fixed Date Claim may be treated as the trial of the claim if the claim is undefended. Rule 27.2(7) requires the claimant to file evidence on affidavit of service of the Fixed Date Claim Form “at least 7 days before the first hearing”. This rule implies that the first hearing of a Fixed Date Claim can only proceed if the defendant has been served. It follows that a judgment or an order can only be made at a first hearing if the claim has been served. A judgment or order obtained under Rule 27.2(3) is irregular if the Fixed Date Claim Form has not been served.
13. Based on *Nelson*, Rule 39.5 of the CPR only applies where a trial has taken place in the absence of a party who has been regularly served. The trial of a Fixed Date Claim at the first hearing is only regular if the claimant can prove that the defendant has been served with the Fixed Date Claim Form. While I agree with the Claimant’s counsel that under Rule 39.5, the absence of service would provide a good reason for not attending the hearing, I find that it would not be just to place on the defendant the onus of having to prove that “some other judgment or order might have been given or made” where his failure to attend the hearing was through no fault of his own. I do not share the Claimant’s concern that this would “open pandora’s box allowing every Defendant who chooses to do nothing when served with court proceedings to take action only after Judgment is issued and he appreciates the seriousness of the documents by simply asserting that he was not served”. Where evidence of service has been adduced, it is for the defendant to prove that service was not regular.
14. It follows that if I find that the Defendant in this Claim has not been properly served, he is entitled to have the Judgment Order set aside as a matter of right because he had no knowledge of the Claim. If I find that the Defendant has been properly served, Rule 39.5 of the CPR applies and the Defendant will have to satisfy me that he had a good reason for failing to attend the hearing, and that it is likely that had he attended the hearing, some other judgment or order would have been given or made.

### **Determination**

*Was the Defendant properly served with the Fixed Date Claim Form?*

15. I am not satisfied on the balance of probabilities that the Defendant was properly served with the Fixed Date Claim Form.
16. It is the Claimant’s evidence that the Defendant was served on October 12<sup>th</sup>, 2022. In his Affidavit filed in support of this Application, PC Dayton Ogaldez states that he attended the residence of the Defendant’s mother, Alice Dawson, and asked for the Defendant, Elbert Dawson. The Defendant’s sister, Geraldine Amanda Dawson, indicated that Elbert Dawson

was in the shower. PC Ogaldez waited for Elbert Dawson to come outside, and when he did, asked him whether his name was Elbert Dawson. According to PC Ogaldez, the person he spoke to responded “yes”. PC Ogaldez further states that he did not ask the person he spoke to for his ID because he is “familiar” with Elbert Dawson and the person identified himself as Elbert Dawson. PC Ogaldez notes that the person he served the documents to on October 12<sup>th</sup>, 2022 is the same person he served the Judgment Order to on December 24<sup>th</sup>, 2022.

17. In his Affidavit in support of this Application, PC Ogaldez states that the person he spoke to refused to accept the documents, and as such he placed the documents on a barrel near that person and left. I note that this information does not appear in the Affidavit of Service he swore on October 13<sup>th</sup>, 2022. In that Affidavit of Service, PC Ogaldez simply states that he personally served the documents on Elbert Dawson. No mention is made of how PC Ogaldez was able to identify Elbert Dawson, and of the fact that Elbert Dawson allegedly refused service.
18. On the other hand, the Defendant filed two Affidavits which provide evidence that service was attempted on Gilbert Dawson, not Elbert Dawson. The Affidavits of Gilbert Dawson and Geraldine Amanda Dawson are consistent in that they both indicate that Gilbert Dawson lived at Alice Dawson’s house and that he was in the bath or the shower on October 12<sup>th</sup>, 2022 when PC Ogaldez arrived. In both Affidavits, it is stated that upon coming outside, Gilbert Dawson informed PC Ogaldez that he was not Elbert Dawson and that PC Ogaldez “had the wrong man”. The evidence of both affiants supports PC Ogaldez’s assertion that he left the documents on a barrel and departed. While I agree that none of the Affidavits sworn on behalf of the Defendant provides evidence as to what happened to the papers left on the barrel after PC Ogaldez departed, I note that Gilbert Dawson and Geraldine Amanda Dawson are strangers to these proceedings and did not have any obligations in respect of those papers.
19. I have not been persuaded by PC Ogaldez’s evidence because, although he attests to being “familiar” with Elbert Dawson, he did not provide any details as to the extent of this familiarity. He also did not indicate whether he also knows Gilbert Dawson. In addition, PC Ogaldez failed to explain why he attended the residence of the Defendant’s mother instead of the Defendant’s residence which PC Ogaldez says is “adjacent”. It is clear that PC Ogaldez knows where Elbert Dawson lives because he served him there with the Judgment Order on December 24<sup>th</sup>, 2022. It is therefore curious that PC Ogaldez did not go there first on October 12<sup>th</sup>, 2022, but instead went to Alice Dawson’s residence to find him. The evidence is that Gilbert Dawson lives in Alice Dawson’s house. It is more likely than not that it is Gilbert, not Elbert Dawson who would have been bathing or showering there.

20. As I have not been satisfied that the Defendant has been properly served with the Fixed Date Claim Form, Rule 39.5 of the CPR does not apply. The Judgment Order dated December 6<sup>th</sup>, 2022 and perfected on December 16<sup>th</sup>, 2022 must be set aside as of right.

**IT IS HEREBY ORDERED THAT**

- (1) The Application is granted.
- (2) The Judgment Order dated December 6<sup>th</sup>, 2022 is set aside.
- (3) The Defendant shall file a Defence to the Claim within 14 days of the date of this Order.
- (4) The Claimant may file a Reply to the Defence within 14 days of the filing of the Defence.
- (5) Costs of this Application are awarded to the Defendant in a sum to be agreed or assessed.

Dated July 12<sup>th</sup>, 2023

Geneviève Chabot  
Justice of the High Court