BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 2097 of 2011

BETWEEN:

THE BANK OF NOVA SCOTIA **CLAIMANT / RESPONDENT**

AND

JOSEPH TUDOR **FIRST DEFENDANT / APPLICANT**
ROSEANNA TUDOR **SECOND DEFENDANT / APPLICANT**

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 28 September 2017

Ms. Abigail Linton in association with Ms. Tanya Simmons for the Claimant/Respondent

Ms. Bernadette Callender for the Defendants

DECISION

INTRODUCTION

[1] The claimant ("the Bank") is a commercial bank. At some point the defendants were its customers. On 21 December 2011, the Bank filed a claim form and statement of claim by which it claims the sum of $24,588.54, interest and costs against them. The Bank asserts that the sum claimed is due under a

credit card which it issued to the defendants pursuant to a written agreement made between the parties around 25 June 2008.

[2] On 19 June 2013, the Bank entered a judgment in default of acknowledgment of service against the defendants in the proceedings. That judgment which is dated 11 September 2012 is for the payment by them to the Bank of the sum of $24, 588.54, interests and costs. The defendants now seek to have that judgment set aside.

[3] The defendants advance two principal arguments in support of their application. Firstly, they contend that they have not been served with the Claim Form on which the judgment was based and that, for that reason, the judgment must be set aside pursuant to ***Part 13.2(1)*** of the ***Supreme Court (Civil Procedure) Rules, 2008*** **("the CPR")**. Alternatively, they submit, the Court ought to set aside the judgment in the exercise of a discretionary power granted to it by ***CPR 13.3***.

THE RULES

[4] The rules that the defendants invoke are contained in ***CPR 13*** which deals with setting aside or varying default judgments. The relevant portions of that **Part** reads:

> **13.1** The rules in this Part set out the procedure for setting aside or varying a default judgment under Part 12 (default judgments).

13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of

(a) a failure to file an acknowledgement of service – any of the conditions in rule 12.4 was not satisfied;

(b) ...

…

13.3 (1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has

(a) applied to the court as soon as reasonably practicable after finding out that the judgment has been entered; and

(b) given a good explanation for the failure to file an acknowledgement of service or a defence as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.

[5] ***CPR 12.4*** is referred to in **CPR 13.2(1)(a)**. ***CPR 12.4*** reads:

12.4 The Registrar may, at the request of the claimant enter judgment for failure to file an acknowledgement of service where:

(a) the claimant proves service of the claim form and statement of claim;

(b) the period for filing an acknowledgement of service has expired;

(c) the defendant

(i) has not filed an acknowledgement of service;

(ii) has not filed a defence to the claim or any part of it;

(iii) where the only claim, apart from costs and interest, is for a specified sum of money, has not filed or served on the claimant an admission of liability to pay all of the money claimed together with a request for time to pay it; and

(iv) has not satisfied the claim on which the claimant seeks judgment; and

(d) necessary (***sic***), the claimant has the permission of the court to enter judgment.

THE AFFIDAVIT OF SERVICE

[6] The Bank asserts that on 6 January 2012 the claim form and related documents were served on the defendants by Mr. Harold Hinkson ("Mr. Hinkson"), a process-server. He swore an affidavit which the Bank filed on 14 February 2012 ("the affidavit of service"). It is in these terms:

I, HAROLD HINKSON …. MAKE OATH AND SAY as follows:-

1. …

2. I did on the 6th day of January 2010 at 10:40 a.m. serve the First Defendant at McEnearney Quality Inc., Wildey in the parish of Saint Michael in this Island and I did on the 11th day of January 2012 at 11:54 a.m. personally serve the Second Defendant at The Council for the Disabled in the parish of Saint Michael in this Island with a certified copy of the Claim Form dated the 26th day of October 2011 and Statement of Claim which were both filed the 21st day of December 2011 together with the following attachments (hereinafter referred to as 'the attachments'):

(a) notes for the Defendant in Form 1A;

> (b) an Acknowledgement of Service in Form No. 3;
>
> (c) Defence and Counterclaim in Form No. 5.
>
> 3. I went to the establishment which I understand is the workplace of the First Defendant. I went to the Office of the First Defendant and a male person came to the door and identified himself to me as Joseph Tudor the First Defendant. I then proceeded to serve the Claim Form and Statement of Claim with the attachments on him by placing them in his hand.
>
> 4. I further went to the establishment, which I understand is the workplace of the Second Defendant. I saw a female person who identified herself to me as Roseanna Tudor the Second Defendant. I then proceeded to serve the said Claim Form and Statement of Claim with the attachments on her by placing them in her hand.
>
> ...

THE EVIDENCE

[7] I will now set out the evidence. The First Defendant ("Mr. Tudor") filed affidavits in support of the application on 17 February 2014 and 25 March 2015 respectively. The Bank filed an affidavit in opposition on 24 April 2015. It was sworn by Ms. Cherrie Ann Greaves, the Assistant Manager of the Centralized Retail Collection Unit of the Bank. There was no oral evidence at the hearing.

[8] At paragraphs 1 and 2 of his first affidavit, Mr. Tudor deposed as follows:

> 1. By judgment summons served on me at 2:25pm on 18th June 2014, I first became aware of a judgment purportedly entered against me on 11th September 2012 in this action. I must

> categorically state that I was not aware of the action and indeed and being in the habit of reading all documents served on me by the Claimant in the course of my dispute with it, I can state that prior to service of the judgment summons …, I had no knowledge of the commencement of this action.
>
> 2. …, at the time of the filing of this suit …, there was a pending action between us in an action titled CV1334/2011 which as far as I am aware embodied the full extent of the dispute standing between us. To that extent every document received by my wife (the Second Defendant) and I, I immediately took to the office of my attorney-at-law. Indeed following service of the judgment summons now pending in this action … I did confer with my attorney-at-law who did confirm that no documents relating to this action was among the papers of files pertaining to my wife (the Second Defendant).

[9] He deposed further in that affidavit that his Attorney-at-Law eventually managed to obtain a certified copy of the claim form, having sought unsuccessfully to obtain copies of the documents relating to the proceedings from the Bank's Attorneys-at-Law. His further evidence is that by a letter dated 29th September 2014, his lawyer requested copies of the written agreement, a monthly statement and a demand letter, all of which were referred to in the statement of claim but that these documents have not been forthcoming.

[10] In his second affidavit, Mr. Tudor set out the particulars of the intended defence. He denied entering into any agreement with the Bank on 25 June 2008 "in the nature alleged by [the Bank]". He states that he and Mrs. Tudor had a "Scotia Line Card" but that the account was "closed out" by them in

August 2004 and the balance due applied to their mortgage "as part of an up-stamping of the mortgage by further charge dated 27th August 2004." He states that after that, they held no credit cards.

[11] Ms. Greaves deposed that in response to a letter of claim sent by the Bank's Attorneys-at-Law to the defendants on 28 January 2011, Mr. Tudor made a proposal by e-mail to liquidate the defendants' indebtedness to the Bank. She exhibited a pre-action protocol letter dated 28 January 2011 purportedly from the Bank's Attorneys-at-law to the defendants and the response attributed to Mr. Tudor. She exhibited a copy of a letter which bears reference number "BNSDT 123/10" in which the Bank claims sums in relation to two "ScotiaLine" accounts bearing number 5443 3680 5000 4451 and 5443 3680 5000 4444 respectively. Both accounts were said to have been issued by the Bank pursuant to written agreements made on 25 June 2008.

[12] She also exhibited a letter that was said to be attached to Mr. Tudor's email. It starts by acknowledging receipts of the "letter dated January 29th 2011 reference BNSDT 123/10 and BNSFC 013/10". There is nothing before me which bears the latter reference number. In the second paragraph of that document, the author invites the intended recipient to "note that the parties involved Joseph & Roseanna Tudor have no intension (***sic***) of defaulting on the subject accounts." It later states that those individuals intend "to

completely clear all outstanding monies inclusive of the mortgage" but request time to do so.

[13] Ms. Greaves goes on to assert at paragraph 14 that the defendants did enter into the agreement dated 25 June 2008 and that they made transactions on the account which is in question. She did not exhibit any agreement but exhibited four statements which she deposed were issued to the defendants. These are dated 23 December 2009, 23 April 2010, 23 May 2010 and 23 June 2010.

SUBMISSIONS AND DISCUSSION

[14] I will now consider the submissions. I will start with those relating to ***CPR 13.2*** and go on to those in respect of ***CPR 13.3*** only if that becomes necessary.

[15] Ms. Bernadette Callender who appeared for the defendants submitted that the application is made pursuant to ***CPR 13.2*** and ***CPR 13.3***. She urged that a default judgment can be set aside under ***CPR 13.2*** at the instance of a party or on the court's own motion where the judgment has been entered irregularly, or at the court's discretion under ***CPR 13.3***. She contended that this case provides an instance of an irregularly entered judgment.

[16] The terms "regular" and "irregular" judgments are familiar to legal practitioners. However, ***the CPR*** makes no reference to these terms. ***CPR 13.3*** defines the circumstances in which a court **may** set aside a judgment entered under ***CPR 12***. ***CPR 13.2*** requires the court to set aside a default judgment

entered under ***CPR 12*** if it was "wrongly entered" because one or more of the conditions precedent to entry of the judgment "was not satisfied".

[17] Counsel submitted that the judgment had been wrongly entered since the condition contained in ***CPR 12.4(a)*** had not been satisfied. I reproduced that sub-rule at paragraph 5. It stipulates that "the claimant proves service of the claim form and statement of claim" as one of the conditions for the entering of a judgment in default of acknowledgment of service.

[18] Ms. Callender's specific contention was that ***CPR 5.5*** limits proof of personal service of a claim form to an affidavit sworn by the process-server and containing the information required by that rule. She urged that the affidavit did not state precisely how the defendants were identified thereby failing to meet the requirement expressed in ***CPR 5.5(c)***.

[19] ***CPR 5.5*** reads:

> 5.5 Personal service of a claim form is to be proved by an affidavit sworn by the server stating
>
> (a) the date and time of service;
>
> (b) the precise place or address at which it was served;
>
> (c) precisely how the person served was identified; and
>
> (d) precisely how the claim form was served.

[20] Ms. Callender submitted further that where an affidavit of service complies fully with ***CPR 5.5***, it raises a presumption of service which may be rebutted.

She contended that no presumption arises in this case but that if the Court so found, that the presumption has been rebutted. Counsel cited ***Riley v Cuffie High Court Suit No. 4837 of 2011***, ***decision of the High Court of Trinidad and Tobago (date of decision, 7 November 2014)*** (***Riley***) in support of the legal proposition she advanced with respect to the effect of a compliant affidavit of service.

[21] In ***Riley*** Master Awai considered whether to set aside a default judgment pursuant to **rule 13.2 (1)** of the **Civil Proceedings Rules, 1998** of Trinidad and Tobago (**the TTCPR**). That rule is identical to ***CPR 13.2***. In particular, Ms. Callender referred me to the following passage which is found at paragraph 12:

> In Republic Bank v Homad Maharaj CA 136 of 2006, the court ruled where a default judgment was obtained based on an affidavit of service which complied with the requirements of O65 r 8 of the Rules of the Supreme Court 1975 (which is equivalent to CPR 5.5), the affidavit of service created a presumption of service. The onus therefore lay on the other party to prove there was no service. In that matter there was no cross-examination of the process servicer and the court found that the presumption of service was not rebutted.

[22] Ms. Callender submitted further that the process-server's affidavit is not dispositive of the issue of service. She emphasised what she had earlier highlighted as a deficiency in the affidavit of service in submitting that "the full benefit of the presumption" only arises where there is full compliance with ***CPR 5.5***. Counsel urged that Mr. Tudor's evidence demonstrates that the

defendants were "astute on receipt of any process from [the Bank]" and that the Court should take account of this.

[23] In her counter-submissions, Ms. Abigail Linton, who appeared for the Bank, urged that the affidavit of service had set out the details required by ***CPR 5.5***. Counsel took no issue with Ms. Callender's submissions in respect of the effect of an affidavit of service. She cited a passage from paragraph 6 of ***Buckradee v Naidoo CV 962 of 2011, High Court of Trinidad and Tobago*** (***date of decision, 27 September 2012***) in which Mohammed M noted that such an affidavit "creates a presumption of service which can be rebutted through cross-examination of the process- server".

[24] However, urged Ms. Linton, the defendants had not established that they had not been served. She contended that there was no evidence to rebut the contents of the affidavit of service, noting that the defendants had not adduced any evidence to show their whereabouts at the time that service was said to have taken place. The process-server was not cross-examined.

[25] These submissions invite some discussion on the effect of ***CPR 5.5*** and the probative value of an affidavit of service. In respect of the latter, I have found the Trinidadian authorities very helpful. In addition to ***Riley*** and ***Buckradee*** which Counsel cited, I have considered ***Republic Bank Limited v Maharaj***

Civ. App. No. 136 of 2006, Court of Appeal of Trinidad and Tobago (date of decision 10 July 2009) which was referred to in ***Riley***.

[26] I have discerned the law to be that an affidavit of service which complies with the related procedural rules gives rise to a presumption of service which may be rebutted by a defendant who refutes that he or she has been served. The onus is on the defendant in such a case to show that he has not been served and the usual course is via cross-examination of the process-server without which a court may not be able to accept the evidence of a defendant over the affidavit of service.

[27] This brings me to **CPR 5.5** and what is required of a claimant to establish personal service of a claim form. **The CPR** allows for orders to be obtained against litigants who have been served with process but decline to get involved. Judgment in default of acknowledgement of service provides a glaring example. It is therefore reasonable that the law should impose standards in respect of proof of service so as to minimise the risk of injustice to an unserved litigant.

[28] ***CPR 5.5*** must be intended to serve that objective. It stipulates that personal service of a claim form "**is to be proved**" in the manner prescribed. A failure to comply with the requirements of ***CPR 5.5*** is a failure to prove personal service of the claim form. In effect therefore, in order for a claimant to prove

personal service of a claim form, there must be affidavit evidence from the process-server stating (i) the date and time of service; (ii) the precise place or address at which it was served; (iii) precisely how the person served was identified; and (iv) precisely how the claim form was served.

[29] It seems to me that the requirement for precision in **CPR 5.5** calls for a measure of detail as to the way in which the identification took place. Did the defendants produce some form of identification? Did they identify themselves by verbal acknowledgment? Did they do so by non-verbal acknowledgement and, if so, what form? These are but examples. Such details enable a determination as to whether the claimed identification was any identification at all.

[30] The affidavit of service appears to be quite adequate in respect of the date, place and the manner of personal service as it relates to each defendant. However, the same cannot be said about the evidence in relation to identification. It is limited to bald statements that the defendants identified themselves to the process-server. It does not state how that self-identification was done. I am not persuaded that this satisfies the requirement to state precisely how the defendants were identified.

[31] It follows that the affidavit of service raises no presumption that the defendants had been served with the claim form. Hence, when the default

judgment was entered, the claimant had not proved service of the claim form and statement of claim on the defendants. In other words, the ***CPR 12(4)(a)*** requirement was not met.

THE REQUIRED APPROACH

[32] The above conclusions point inexorably to the result that the judgment must be set aside. However before getting there, I must, albeit belatedly, address a concern I have harboured as to the approach to be taken in an application to set aside a default judgment pursuant to ***CPR 13.2***.

[33] The submissions of both Counsel proceeded on the assumption that it is proper on an application pursuant to ***CPR 13.2*** for a court to allow for cross-examination of the process-server on his affidavit of service and the provision of evidence from the defendants. This approach was evident in ***Riley*** and ***Buckradee***. I have grave reservations as to whether this is correct.

[34] **CPR *13.2(1)(a)*** states that the court must set aside the judgement if it "**was wrongly entered**" because "any of the conditions in rule 12.4 **was not satisfied**". It seems to me that this language invites a review of the entry of the default judgment measured by reference to whether the conditions were then satisfied. It seems to me that the question a court must ask is whether the default judgement **was wrongly entered** on account of one or more of the conditions in ***CPR 12.4*** **not having been satisfied**.

[35] In this case, the defendants assert that the condition set out at **CPR 12.4(a)** was not established. ***CPR 12.4(a)*** sets out a requirement that "the claimant proves service of the claim form and statement of claim." The idea that the defendants are entitled to go beyond the record and carry out an evidential inquiry into service may be based on a misconception of that condition. Ms. Linton submitted that the condition noted in the provision "is that the Claim Form and Statement of Claim must be served". That is not so.

[36] In my view, therefore, where an applicant seeking an order under ***CPR 13.3*** alleges that the ***CPR 12.4(a)*** condition was not satisfied, the court is limited to an examination of whether there was an affidavit of service before the Registrar and, if so, whether it met the requirements for proof of service.

[37] If that is correct, it is a matter for future determination how a defendant against whom a judgment in default has been entered in the face of a ***CPR 5.5***-compliant, but false, affidavit of service may proceed to have that judgment set aside. Does the inherent jurisdiction to set aside an irregular judgment *ex debito justitiae* (for the sake of justice) co-exist with ***CPR 13***, or is the latter a complete code for the setting aside of judgments in default entered pursuant to ***CPR 12***?

[38] In ***Edgecombe et al v Antigua Flight Training Centre ANUHCVA2015/0005, Court of Appeal of Antigua, (date of decision, 26***

June 2015) Perreira J held that the inherent jurisdiction co-exists with procedural rules similar to ***CPR 13***. That position differs from that taken by the Court of Appeal of England and Wales in ***De Ferranti v Execuzen Ltd [2013] EWCA Civ 592, para 49 / Nelson v Clearsprings (Management) Ltd [2006] EWCA Civ 1252*** with respect to ***Part 13*** of that jurisdiction's rules.

[39] However, that general debate and a discussion of those authorities are not one for this Court which heard no relating submissions. I am satisfied that this application under ***CPR 13.2*** must succeed. This is so because the affidavit of service that was before the Registrar when the judgment was entered does not state precisely how the defendants were identified as is required by ***CPR 5.5(d).*** Thus, the ***CPR 12.4(a)*** condition was not satisfied and the judgment in default must be set aside for that reason.

[40] What if I am wrong in respect of the limited approach I have advocated in a ***CPR 13.2(1)(a)*** application? The result must be the same. The claimant adduced no additional evidence with respect to service. Given the deficiency in the affidavit of service, there is no evidence of service. No presumption of service arises and in the absence of an admission from the defendants that they were served or some evidence from which I could imply it, I can make no finding to that effect.

[41] It is now unnecessary for me to consider the application under ***CPR 13.3.***

[42] It is ordered that the judgment in default of acknowledgement of service be set aside. I will hear the parties on the question of costs.

OLSON DeC. ALLEYNE
JUDGE OF THE HIGH COURT