

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2021/0023

BETWEEN:

**[1] JAYSON STICKINGS
[2] SHARON ALLEN**

Appellants

and

**RBC ROYAL BANK of CANADA
(NOW DOING BUSINESS AS ACB CARIBBEAN)**

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Louise E. Blenman
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett with him Ms. Latoya Letlow and Ms. Kari-Anne Reynolds for the Appellants
Mr. Benjamin Drakes with him Ms. Andreen Vanriel for the Respondent

2022: February 24;
July 6.

Civil appeal - Default judgment - Setting aside judgment in default of acknowledgement of service - Exercise of a master's discretion - Whether the master erred in the exercise of his discretion by dismissing the application to set aside the default judgment - Part 12 of the Civil Procedure Rules 2000 - Rule 13.3. - Whether the application fell to be considered under the discretionary provision of Rule 13.3 - Service of the originating claim - Rule 5.15 of the Civil Procedure Rules 2000 - Proof of Service - Whether there was proof of service upon the appellants in accordance with Rule 5.15 and 12.4 (a) - Failure to file acknowledgment of service - Whether there was a valid obligation to acknowledge service as specified under the rules or by order of the court - Part 7 and Rule 13.2 of the Civil Procedure Rules 2000- Service out of the jurisdiction

By order of the High Court dated 21st October 2015 in claim no. ANUHCV2015/0558, the respondent, RBC Royal Bank of Canada (now doing business as ACB Caribbean) ("the Bank") was granted permission to sell certain properties which were obtained by the appellants through a loan facility secured by legal charge in respect of the two properties. The sale of the two properties were insufficient to satisfy the appellants' debt to the Bank, consequently, on 22nd September 2016, the Bank filed an amended claim form and amended statement of claim in claim no. ANUHCV2016/0437 to recover the balance of a debt owed by the appellants to the Bank. The Bank also filed a without notice application for permission to serve the amended claim form and amended statement of claim on the appellants outside the jurisdiction of Antigua and Barbuda.

On 23rd September 2016, the Bank obtained a court order permitting service of the amended claim form, amended statement of claim and a copy of the order, on the appellants in England by Federal Express ("FedEx"), at 3 Coopers Drive, Bexley Grange, Dartford, Kent, England, DA3 7W3. In proof of service, the Bank filed an affidavit of service sworn to by Anthea Joseph, Litigation Clerk. Ms. Joseph deponed that on or about 4th October 2016 she delivered to the FedEx office in St. John's, Antigua, a sealed package containing a claim form, a statement of claim, an amended claim form and amended statement of claim and order, to be delivered to the appellants at the stated address in England. Ms. Joseph exhibited a copy of the FedEx Airway Bill and a copy of the FedEx tracking sheet.

On 12th January 2017 judgment in default of acknowledgement of service was entered by the court in the sum of \$827,627.88 plus interest and costs. The appellants applied to set aside the default judgment pursuant to rule 13.3 of the Civil Procedure Rules 2000 ("CPR"). The appellants claim that they were never served with the amended claim form, amended statement of claim and the other documents. They did not live at the address stated and had not resided there since 2008; thus, were in no position to file an acknowledgement of service as they were unaware of the claim. The learned master found that the appellants did not satisfy the requirements of CPR 13.3 and dismissed the application to set aside the judgment in default of acknowledgement of service.

The appellants being dissatisfied with the decision of the learned master appealed. The issues for this Court's consideration are: (i) whether the master erred in dismissing the application to set aside the default judgment and concluding that the application fell to be considered under the discretionary provision of CPR 13.3. (ii) whether there was proof of service upon the appellants in accordance with CPR 5.15 and 12.4 (a) and (iii) whether there was a valid obligation to acknowledge service as specified under the rules or by order of the court.

Held: (per Baptiste JA and Blenman JA), allowing the appeal and setting aside the master's decision and order dismissing the application to set aside the judgment in default of acknowledgement of service and awarding the appellants' costs of the appeal in the sum of \$1000.00, to be paid by the respondent Bank that:

1. The purpose of service of the originating process is to seek to ensure that the defendant(s) in a civil claim are given proper notice of the claim brought against them and is given a reasonable opportunity to put forward any defence to the claim.

When service is properly effected it is only then that the defendant is subject to the court's jurisdiction. CPR 13.2 mandates that the court must set aside a judgment entered under Part 12 if the judgment was wrongly entered. In this present case, it cannot be said that service of the claim form at an address at which the appellants were not residing for about 8 years, could have constituted service in accordance with the court's order. Service at the given address could not reasonably be expected to have brought the proceedings to the attention of the appellants. It follows therefore that the learned master ought to have set aside the default judgment since time for filing the acknowledgment of service had not begun to run.

Part 12 of the Civil Procedure Rules 2000; Rule 13.2 of the Civil Procedure Rules 2000; Barton v Wright Hassall LLP [2018] UKSC 12 applied; Dubai Financial Group LLC v National Private Air Transport Services Company (National Air Services) Ltd [2016] EWCA Civ 71 applied; Personal Management Solutions Limited and Others v Gee 7 Group Limited and Another [2016] EWHC 891 (Ch) applied; Canada Goose UK Retail Ltd & Another v Persons Unknown and another [2019] EWHC 2459 (QB) applied; Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6 applied.

2. Where a defendant has not been served with the originating process, to deprive him thereafter of any period during which he can acknowledge service is unfair and unjust. CPR 7.5(1)(c) provides that an application to serve out of the jurisdiction may be made without notice but must be supported by evidence on affidavit stating where the defendant may probably be found. In this case, the Bank had to prove service of the claim at the appellants' usual place of residence in England. A bald assertion as to the usual residence is not sufficient, there must be a nexus with that address. The learned master found that the appellants were not aware of the claim as they did not reside at the address at which the claim was served. The master's finding that this was a good explanation for failure to file an acknowledgement of service, cannot, in the circumstances, be divorced from the important issue of lack of service of the originating process. It cannot be said that the appellants were under a valid obligation to acknowledge service, either as specified under the CPR or by order of the court. Accordingly, the default judgment entered in those circumstances ought to have been set aside.

Part 7 of the Civil Procedure Rules 2000 applied.

Per Webster JA [Ag.] (dissenting):

1. Where either the CPR or an order of the court provides the method of service and that method is followed, but the claim does not come to the attention of the defendant, his remedy is to either apply to set aside the order granting permission to the applicant to serve the claim out of the jurisdiction or apply under CPR 13.3 to set aside the default judgment. In this case the amended claim form and amended statement of claim were served in accordance with the order of Henry J dated 23 September 2016 for service on the appellants outside the jurisdiction by FedEx. The

appellants did not apply to set aside the order for service. Instead, they applied under CPR 13.3 to set aside the default judgment.

Rule 13.2 of the **Civil Procedure Rules 2000** applied; **Rule 5.15 and 12.4** of the **Civil Procedure Rules 2000** considered; **Barton v Wright Hassall LLP** [2018] UKSC 12 distinguished; **Dubai Financial Group LLC v National Private Air Transport Services Company (National Air Services) Ltd** [2016] EWCA Civ 71 distinguished; **Abela and others v Baadarani** [2013] UKSC 44 distinguished.

2. The court may set aside a default judgment if it is satisfied that the applicant has met the three conditions in CPR 13.3. A failure to satisfy any one of the three conditions is fatal unless the defendant brings himself within CPR 13.3(2) by demonstrating that there are exceptional circumstances warranting the setting aside of the default judgment. The learned master found that the appellants did not satisfy the third condition in CPR 13.3(1), namely, that they had a real prospect of successfully defending the claim, and that there were no exceptional circumstances attending the application. Therefore, he dismissed the application to set aside the default judgment. An appellate court will disturb the exercise of a master's discretion only where it finds that the master erred in principle in his approach or has left out of account some aspect that he should have considered, or considered some matter that he should not have, and as a result his decision exceeded the generous ambit within which reasonable disagreement is possible, or the decision is wholly wrong. If it cannot be said that the master, in exercising his discretion, acted improperly or erred in principle, there is no basis upon which this Court can properly interfere with the exercise of his discretion to dismiss the application.

Rule 13.3 of the **Civil Procedure Rules 2000** applied; **Public Works Corporation v Matthew Nelson** DOMHCVAP2016/0007, (delivered on 29th May 2017, unreported) applied; **Yates Associates Construction Co Ltd v Brian Quammie** BVIHCVAP2014/0005 (delivered on 5th May 2005, unreported) applied.

JUDGMENT

- [1] **BAPTISTE JA:** This appeal emanates from the learned master's dismissal of an application to set aside a judgment in default of acknowledgement of service entered at the instance of the RBC Royal Bank of Canada (now doing business as ACB Caribbean) ("the Bank") on 12th January 2017. Judgment was in the sum of EC \$827,627.88 plus interest and costs.

Background

- [2] The brief background facts are that by order of the High Court dated 21st October 2015, in a fixed date claim, (ANUCHV2015/0558) the Bank was granted permission to sell certain properties obtained by the appellants through a loan facility secured by a legal charge in respect of two properties. The sale proved insufficient to satisfy the debt, thus in 2016 the Bank filed an amended claim form and amended statement of claim (ANUHCV2016/0437) to recover the balance of the debt owed. The Bank also filed a without notice application for permission to serve the amended claim form and amended statement of claim on the appellants outside the jurisdiction of Antigua and Barbuda.
- [3] On 23rd September 2016, the Bank obtained a court order permitting service of the amended claim form, amended statement of claim and a copy of the order, on the appellants in England by Federal Express (“FedEx”), at 3 Coopers Drive, Bexley Grange, Dartford, Kent, England, DA3 7W3. Upon receipt, the appellants were required to file and serve an acknowledgement of service within 35 days of service and a defence within 56 days.
- [4] In proof of service, the Bank filed an affidavit sworn to by Ms. Anthea Joseph a litigation clerk in the office of the Bank’s solicitors. Ms. Joseph deponed that on or about 4th October 2016 she delivered to the FedEx office in St. John’s, Antigua, a sealed package containing a claim form, a statement of claim, an amended claim form and amended statement of claim and order, to be delivered to the appellants at the stated address in England. Ms. Joseph exhibited a copy of the FedEx Airway Bill and further deposed “[t]hat on the 13th day of October 2016 at approximately 11:16 a. m. the said package was delivered to the above-mentioned address for the said Jason Stickings & Sharon Allen.” She exhibited a copy of the FedEx Express tracking sheet.
- [5] The appellants claim that they were never served with the amended claim form, amended statement of claim and the other documents. They did not live at the

address stated and had not resided there since 2008; thus, were in no position to file an acknowledgement of service as they were unaware of the claim.

- [6] The application to set aside the default judgment was made pursuant to rule 13.3 of the **Civil Procedure Rules 2000** (“CPR”). Ground one of the application stated that the default judgment was wrongly entered because the appellants never received the claim form and statement of claim prior to the issuance of the default judgment. The learned master recognised that it was clear from the first ground that the appellants were disputing that they were served with the claim. In the circumstances, he found it prudent to consider whether the application fell within the ambit of CPR 13.2, which sets out the circumstances whereby the court must set aside a default judgment.
- [7] CPR 13.2 (a) states that the court must set aside a default judgment entered under CPR Part 12 if judgment was wrongly entered because in the case of a failure to file an acknowledgement of service – any of the conditions in CPR 12.4 was not satisfied. The conditions in CPR 12.4 include (a) the claimant proves service of the claim form and statement of claim; and (b) the defendant has not filed (i) an acknowledgement of service; or (ii) a defence to the claim or any part of it.
- [8] The learned master found that CPR 13.2 did not apply. He reasoned that the order of 23rd September 2016 permitting service out of the jurisdiction also specified the method by which the order was to be served. The affidavit of service of Ms. Joseph clearly evidenced that the terms of the order were carried out, in that the claim and other documents were served at the address stated in the order via FedEx. In the circumstances CPR 12.4 was complied with and that judgment cannot be set aside pursuant to CPR 13.2.
- [9] Having found that CPR 13.2 did not apply, the master then considered whether the default judgment could be set aside pursuant to CPR 13.3. CPR 13.3(1) states that if rule 13.2 does not apply, the court may set aside a judgment entered under Part

12 only if the defendant – (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered; (b) gives a good explanation for the failure to file an acknowledgement of service; and (c) has a real prospect of successfully defending the claim. The master found that the appellants applied to the court as soon as reasonably practicable; had a good explanation for the failure to file the acknowledgment of service; but did not have a real prospect of successfully defending the claim, hence did not satisfy the cumulative requirements of CPR 13.3.

- [10] The learned master reasoned that although the dispute as to whether the appellants were served with the claim did not avail them under CPR 13.2, that dispute may well be a relevant consideration under CPR 13.3. In addressing the question of whether the appellants had a good explanation for the failure to file an acknowledgement of service, the master noted that the basis of the appellants' application was that they had not been served with the 2016 claim filed by the Bank. He also referred to the appellants' affidavit evidence that they had not lived at the address stated in the order since 2008 and were not aware that the 2016 claim had been filed or that a default judgment had been entered against them. At paragraph 29 of his judgment, the master stated:

"No evidence had been provided to conclusively rebut the Defendants' evidence that they were unaware of the 2016 claim. Therefore, notwithstanding that I have taken the view that the 2016 claim was properly served in accordance with the court's 23rd September 2016 Order, I accept the Defendants' version of events that they were not aware of the 2016 claim as they did not reside at the address at which the claim was served in 2016. This in my view is more than a good explanation for the Defendants' failure to file an acknowledgement of service."

The Appeal

- [11] The appellants allege in their two grounds of appeal, that the master erred in dismissing the application to set aside the default judgment as:
- (1) the provisions of CPR 5.15 and CPR 12.4 (a) had not been complied with, in particular, there was no proof of service of the claim form and statement of claim upon them; and

- (2) it was impossible to acknowledge service in accordance with the order as service of the amended claim form and statement of claim had not been affected upon them.

- [12] The appellants' counsel, Dr. David Dorsett, challenges the decision and reasoning of the learned master in dismissing the application to set aside the default judgment in the face of his express finding that the appellants were not aware of the 2016 claim. Learned counsel also takes issue with the finding that there was proof of service upon the appellants in accordance with CPR 5.15, which states: "Service is proved by an affidavit made by the person who served the documents showing the terms of the order have been carried out".
- [13] Dr. Dorsett argues that there was no affidavit of service, as Ms. Joseph did not serve the documents. Learned counsel asserts that there was no affidavit of service from the person who effected and executed the service and there was no service upon the appellants as per the order of the court. Further, the claim form had not been sent to the appellants' usual address and, in any event, there was no proof of proper service in accordance with the rules of court.
- [14] Mr. Benjamin Drakes, on behalf of the Bank, posits that the appeal is against the master's exercise of a judicial discretion and invites the court to find that the core issue is whether the master was correct in finding that the setting aside application fell to be considered under the discretionary provision of CPR 13.3. If the answer is in the affirmative, the question is, whether the court should interfere with the master's discretion. Learned counsel submits that the master was correct in ruling that the mandatory provision of CPR 13.2 did not apply to the application. Based on the service out order, Ms. Joseph demonstrated that she was responsible for effecting service of the documents by FedEx, she packaged them, and they were sent by FedEx to the address stated in the order thus satisfying CPR 5.15. Ms. Joseph received and exhibited a tracking sheet confirming service via FedEx.

- [15] Learned counsel also submits that once the master satisfied himself that service in accordance with the order was proved, the conditions of CPR 12.4 were made out and the master correctly so held. In the circumstances, the learned master was right in holding that the setting aside application had to be considered under the discretionary provision of CPR 13.3 and the appellants have not discharged the burden that the master was plainly wrong.
- [16] Mr. Drakes also relies on **Akram v Adam**¹ and submits that **Akram** is instructive for the just disposal of the appeal, as it provides strong persuasive guidance to this court. In **Akram** the claim form was posted to the defendant at his usual residence and was not returned undelivered. It was held to have been properly served under CPR 6.5 (6). The claim form contained a notification that the claim would be heard on a particular date. The defendant was unaware of the proceedings and did not attend the hearing. A possession order was made against him. He subsequently heard about it and applied for an order setting aside the judgment.
- [17] The application was made under CPR 13.3, presumably on the basis that a default judgment had been given under CPR Part 12. The district judge set aside the judgment, but the judge allowed the claimant's appeal, with the result that the application to set aside the default judgment failed. An appeal to the English Court of Appeal failed. The court held that there had been good service of the claim form under the rules, notwithstanding the defendant was unaware of the fact, that the court had a discretion whether or not to set aside the judgment and that in all the circumstances the judge was justified in refusing to do so.
- [18] Dr. Dorsett submits that the Bank's reliance on **Akram** is misplaced. He distinguished **Akram** on the basis that there was a finding in **Akram** that the claim form had been posted to the defendant at his usual residence and had been properly served under rule 6.5 (6) of the English Civil Procedure Rules ("the English CPR").

¹ [2004] EWCA Civ 1601.

- [19] At the end of the hearing, the court invited counsel to make written submissions on three authorities: **Abela and others v Baadarani**,² **Dubai Financial Group LLC v National Private Air Transport Services Company (National Air Services) Ltd.**³ and **Barton v Wright Hassall LLP**.⁴ In the post hearing written submissions, Dr. Dorsett posits that the default judgment entered against the appellants was obtained in circumstances where the important and indispensable purpose of service was not realised, in contravention of the appellants' constitutional right to a fair hearing and in breach of the rules of natural justice. Learned counsel submits that having regard to the purpose of service and the constitutional rights of the appellants to a fair hearing (which at the minimum means having notice of proceedings) it is only proper that the appeal be allowed as prayed.
- [20] Mr. Drakes posits that the line of authorities - **Abela**, **Dubai** and **Barton** - are all primarily concerned with the interpretation, ambit and judicial approach of the English court in applying the retrospective validation under rule 6.15(2) of the English CPR and there is no analogous or comparable power or rule under the Eastern Caribbean CPR. Counsel contends that the particular procedural context of those cases is markedly different from the case at bar.
- [21] Mr. Drakes states that **Abela** does not involve default judgment, nor does it consider the relevant principles for setting aside a default judgment. **Dubai** offers some instructive guidance but cannot be relied on unconditionally as laying down any binding or rigid rule. The reasons advanced are: (i) the court allowed the appeal for diverging reasons; and (ii) the decision does not establish any sweeping principle relating to setting aside of service as of right. **Barton** is of limited assistance; as in **Abela**, the main question in issue was whether the power to retrospectively validate service under rule 6.15 of the English CPR should be exercised and in the context of service by electronic communication. The case did not consider an application or approach to default judgment under Part 13 of the English CPR.

² [2013] UKSC 44.

³ [2016] EWCA Civ 71.

⁴ [2018] UKSC 12.

- [22] Learned counsel contends that quite distinct from the present case, in the three abovementioned decisions, there was non-compliance with the rule or order permitting service. He submits that this, together with the reasons for differentiating these cases, underscore why under the CPR the approach is to consider lack of notice as a factor in exercising discretion - not setting aside as of right.
- [23] Mr. Drakes makes two principal submissions from the three authorities:
- (1) An important component of service is to bring the contents of the claim to the attention of the defendant. This principle must be considered in the context of the relevant procedural rule or rules under consideration.
 - (2) While the cases speak to the purpose of service in bringing the contents of the proceedings, they do not purport to lay down any rigid rule, nor should this court so find that the absence of this feature inevitably leads to setting aside as of right.
- [24] Mr. Drakes submits that **Abela** (paragraph 37 thereof) does not lay down nor purport to establish a sweeping principle that in all cases where the content of the documents served was not communicated to the defendant, this automatically leads to a setting aside as of right under CPR 13.2. Further, where there has been compliance with a rule or order, whether the content of a document is a factor to be considered by the court, this factor is considered under the discretionary provisions of CPR 13.3.
- [25] Learned counsel also argues that the procedural regime of the CPR, under CPR 7.8B, contemplates and makes provision for dispensing with the requirement for service (in appropriate cases). CPR 13.2 expressly specifies the circumstances in which the mandatory provisions are triggered, and default judgment must be set aside. The wording of the rule is unambiguous; other circumstances cannot be implied. To apply a rigid principle that once an applicant demonstrates that the contents of the claim were not brought to his attention, without more, any default

judgment must be said aside as of right, would effectively sterilize the court's powers to make orders by a specified method.

- [26] Further, it would create uncertainty in practice and procedure for obtaining and enforcement of judgments obtained after an order for service by a specified method, whereby, notwithstanding the unambiguous requirements under CPR 12.4, and proving compliance and service in accordance with such an order, judgment could be easily set aside by a defendant as of right, arguing ignorance of the contents of the claim. This lends to uncertainty and protracted litigation on procedural points. Mr. Drakes contends that in circumstances where the respondent has complied with the order and proved service on the terms of the order, yet the appellants demonstrate that the contents of the claim was not brought to their attention, this feature remained relevant for the court to consider for the exercise of discretion under CPR 13.3, as conducted by the master.

Discussion

- [27] Undoubtedly, the issue of service is critical to this appeal. Why is service critical? As Lord Clarke said in **Abela** at paragraph 37: '[s]ervice has a number of purposes, but the most important is to my mind to ensure the contents of the document served, here the claim form, is communicated to the defendants'. This principle was endorsed by Lord Sumption in **Barton**, who referred to it as a 'critical factor' (para 9 (2)). Lord Sumption also explained at paragraph 16 that:

"Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line rule is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them."

- [28] In **Barton**, Lord Briggs stated a second important general purpose of service at paragraph 28:

"While I did not wish in any way to depart from Lord Clarke's dictum in the **Abela** case that the most important purpose of service is to ensure that the contents of the claim form (or other originating document) are brought to

the attention of the person to be served, there is a second general purpose. That is to notify the recipient that the claim has not merely been formulated but actually commenced as against the relevant defendant, and upon a particular day. In other words it is important that the communication of the contents of the document is by way of service, rather than, for example, just for information. This is because service is that which engages the court's jurisdiction over the recipient, and because important time consequences flow from the date of service, such as the stopping of the running of the limitation periods and the starting of the running of time for the recipient's response, failing which the claimant may in appropriate cases obtain default judgment."

[29] In **Barton**, Lord Sumption said at paragraph 8:

"The rules governing service of a claim form do not impose duties, in the sense in which say, the rules governing the time for service of evidence impose a duty. They are simply conditions on which the court will take cognizance of the matter at all. Although the court may dispense with service altogether or make interlocutory orders before it has happened if necessary, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction."

[30] The question of service was also addressed in **Dubai**, which was an appeal from a judge's refusal to set aside a default judgment entered in favour of Dubai (the claimant and respondent). The English Court of Appeal held by a majority that where there has not been valid service, the defendant has no obligation to acknowledge service, and a default judgment entered in those circumstances is one which can be set aside under CPR 13.2. Rule 13.2 of the English CPR states that a court must set aside a judgment entered under Part 12 if judgment was wrongly entered because (a) in the case of judgment in default of acknowledgement of service, any of the conditions in rule 12.3 (1) and 12.3 (3) was not satisfied.

[31] In **Dubai**, McCombe LJ stated at paragraph 40:

"I agree that CPR 13.2 specifies the circumstances in which a default judgement must be set aside and in my judgment one of those circumstances is when a judgment has been entered in default of an acknowledgement of service when 'any of the conditions in rule 12.3 (1) ... was not satisfied'. Here one such condition was not satisfied, namely the time for acknowledgement of service had not expired, because none had ever become applicable."

[32] At paragraph 41, McCombe LJ said:

“If a defendant has never become under a valid obligation to acknowledge service, either as specified under the rules or by order of the court, I do not see how it can be that a judgment can be entered against him in default of such acknowledgement. He is simply not in default at all.”

[33] McCombe LJ aptly stated at paragraph 42:

“Our system of law has always taken pride in ensuring that even the apparently unmeritorious only have judgment entered against them once found to be liable by trial, by summary judgment, or when they have failed to meet the express procedural requirements of a clearly defined obligation to take a procedural step which has been drawn to their attention.”

[34] In **Cameron v Liverpool Victoria Insurance Co Ltd.**,⁵ Lord Sumption addressed the question of service at paragraph 14:

“Although an action is completely constituted on the issue of the claim form, for example for the purpose of stopping the running of a limitation period, the general rule is that ‘service of originating process is the act by which the defendant is subjected to the court’s jurisdiction’.”

Lord Sumption also stated that ‘[t]he court may grant interim relief before the proceedings have been served or even issued, but that is an emergency jurisdiction which is both provisional and strictly conditional.’

[35] In **Personal Management Solutions Limited and Others v Gee 7 Group Limited and Another**⁶. Arnold J said at paragraph 27: ‘[t]he question of whether an originating process has been properly served is not simply a technical question; it goes to the root of the court’s jurisdiction’. It is important to emphasise that valid service of the claim form is what founds the jurisdiction of the court over the defendant. As Carr LJ said in **R (The Good Law Project) v The Secretary of State for Health and Social Care and another**⁷ at paragraph 41: ‘[a]s for importance of valid service, service of a claim form can be distinguished from other procedural

⁵ [2019] UKSC 6.

⁶ [2016] EWHC 891 (Ch).

⁷ [2022] EWCA Civ 355.

steps. It performs a special function: it is the act by which the defendant is subject to the court's jurisdiction'.

- [36] As stated in in **Canada Goose UK Retail Ltd & Another v Persons Unknown and another**⁸ at paragraph 58:

"The Civil Procedure Rules provide a comprehensive framework for the commencement of claims and the service of originating processes upon defendants. In broad terms, the object is to seek to ensure that the defendants in civil claims are given proper notice of the claim that is being made against them and a reasonable opportunity to put forward any defence to the claim."

The court further stated at paragraph 59:

"Justice in legal proceedings must be available to both sides. It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard."

- [37] In **Jacobson v Frachon**,⁹ Lord Atkin described the principles of natural justice as follows:

"Those principles seem to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court."

- [38] In **London Borough of Barking and Dagenham and others v Persons Unknown and others**,¹⁰ Nicklin J in extracting the key principles in **Cameron** at paragraph 11 (2) stated:

"Service of originating process is central to domestic litigation procedure and was required long before statutory rules of procedure were introduced following the Judicature Acts of 1873. Different modes of service were permitted but each had the common object of bringing the proceedings to the attention of the defendant."

⁸ [2019] EWHC 2459 (QB).

⁹ (1927) 138 LT 386 at 392.

¹⁰ [2021] EWHC 1201 (QB).

- [39] The authorities cited above contain principles of general applicability with respect to the importance of service of a claim form. In summary, the importance of service is evident both from a jurisdictional standpoint, and to bring to the attention of the defendant that a claim has actually commenced against him and on a particular day, as important time consequences flow from the date of service. From a jurisdictional standpoint, as a general rule, service of the claim form is the act by which the defendant is subjected to the court's jurisdiction. Although the court may grant interim relief before the proceedings have been served or even issued, that is an emergency jurisdiction which is both provisional and strictly conditional. Whether an originating process has been validly served goes to the root of the court's jurisdiction. Valid service of the claim form founds the court's jurisdiction.
- [40] As Lord Sumption explained in paragraph 16 in **Barton**, the manner in which the contents of the claim form is brought to the attention of the defendant is important and rules of court must identify some formal step which can be treated as making him aware of it. The CPR provides for different methods of service and proof of service. The Bank filed an amended without notice application for service of the amended claim and amended statement of claim out of the jurisdiction. Part 7 of the CPR deals with service out of the jurisdiction. CPR 7.2 states that a claim form may be served out of the jurisdiction only if CPR 7.3 allows and the court gives permission. CPR 7.5 (1) (c) provides that an application to serve out of the jurisdiction may be made without notice but must be supported by evidence on affidavit stating in what place and in what country the defendant may probably be found.
- [41] CPR 7.8 A deals with mode of service - alternative procedure. An order made under this rule shall specify the date on which service of the claim form shall be deemed to have been effected: CPR 7.8 A (2). I note that no such date was stated in the order. CPR 7.8 A (3) states: 'where an order is made under this Rule, service by the method specified shall be deemed to be good service'. The evidence in support of the application must show that such method of service is likely to enable the person

to be served to ascertain the contents of the claim form and statement of claim: CPR 7.8 A 4 (c).

[42] In so far as is material, paragraph 7 of the affidavit of Ms. Joseph in support of the application states:

“I am advised by counsel and do verily believe that the respondents / defendants are ordinarily resident out of Antigua and Barbuda in England in the United Kingdom, at 3 Coopers Drive, Bexley Grange, Dartford, Kent, England DA3 7W3.”

As far as is relevant, paragraph 8 states:

“I therefore seek the court’s permission to serve the Respondents / Defendants by Fedex at their usual place of residence at 3 Coopers Drive, Bexley Grange, Dartford, Kent, England, DA3 7W3.”

[43] The order permitting service out states:

“IT IS ORDERED THAT:

- (1) The amended Claim Form and Amended Statement of Claim filed herein on the 20th day of September 2016 together with a copy of this Order be served on the Respondents / Defendants outside of the jurisdiction of Antigua and Barbuda at their usual residence in England at 3 Coopers Drive, Bexley Grange, Dartford. Kent DA3 7W3 via Fedex.
- (2) The Respondents / Defendants, upon receipt of the aforementioned documents, shall file and serve an acknowledgement of Service within 35 days of service, and a Defence within 56 days of service.”

[44] The Bank had to prove service of the amended claim form and amended statement of case at the appellants’ usual place of residence in England at the address stated. The difficulty is that the appellants did not reside at that address. The only nexus they had with that address was that they last resided there eight years before service at that address. This refutes any suggestion that this was their usual address. Further, the affidavit of Ms. Joseph essentially makes a bald assertion as to the usual residence. It is also noteworthy that the appellants state that prior communication with them has been by email. Importantly, the master accepted that the appellants were not aware of the claim as they did not reside at the address at

which the claim was served. The master's finding that this was a good explanation for failure to file an acknowledgement of service, cannot, in the circumstances, be divorced from the important issue of lack of service of the originating process upon them.

[45] The critical importance of service has been addressed from the jurisdictional perspective as founding the court's jurisdiction over the appellants as well as bringing to the attention of the appellants, the contents of the claim. None of which were achieved in this case. Serving the claim form at an address at which the appellants were not living and had not lived for 8 years, could not constitute service in accordance with the court's order. Further, service at the address given could not reasonably be expected to bring the proceedings to the attention of the appellants: they did not live there; it was not their usual address and they had not lived there for eight years preceding service. In fact, there was no service at all. I am satisfied that the claim form and statement of claim were not served on the appellants in accordance with the court's order. In the circumstances, time for acknowledgment of service had not expired, because the appellants had not been served in accordance with the rules or court order.

[46] The principle that due process should be followed is well established. Where a defendant has not been served, to deprive him thereafter of any period during which he can acknowledge service is unfair and unjust. The appellants never became under a valid obligation to acknowledge service, either as specified under the rules or by order of the court. Accordingly, at the time the default judgement was entered, the appellants were not in default. A default judgment entered in those circumstances is one which can be set aside under CPR 13.2.

Conclusion

[47] For the reasons given, I would order that:

- (1) The appeal is allowed;
- (2) The decision and order of the master dated 21st October 2021 dismissing the application to set aside judgment in default of acknowledgement of service is set aside; and
- (3) The appellants are awarded costs of the appeal in the sum of \$1000.00, to be paid by the respondent Bank.

I concur
Louise E. Blenman
Justice of Appeal

[48] **WEBSTER JA [AG.]:** I have read in draft the judgment of my learned brother, Baptiste JA, and for the reasons set out in this dissenting judgment, I respectfully disagree with his conclusions and his order allowing the appeal.

Background

[49] This is an appeal against the decision of the learned master dated 21st October 2021, dismissing the appellants' application to set aside a default judgment entered on 12th January 2017.

[50] On 22nd November 2007, the appellants obtained a loan from the respondent ("the Bank") to purchase two properties. At the time, they signed a commitment letter in which they stated their address as '3 Coopers Drive, Bexley Grange Dartford, Kent DA3 7WE'. Upon the appellants defaulting on their loan obligations, the Bank applied by fixed date claim form in Claim No. ANUHCV2015/0558 on 23rd June 2015 for permission to sell the two properties by private treaty. The fixed date claim form included the appellants' address as 3 Coopers Drive, Bexley Grange Dartford, Kent

DA3 7WE. On 21st October 2015, Lanns J, acting under powers given to the court by section 75 of the **Registered Land Act** (as amended),¹¹ gave the Bank permission to sell the properties for a gross sum of \$675,000.00 by private treaty pursuant to an existing contract of sale dated 16th May 2015 to named purchasers. The appellants were represented by counsel at the hearing of the application and no attempt was made to update their address as stated on the fixed date claim form.

[51] The Bank sold the two properties, but as the proceeds of sale were insufficient to satisfy the outstanding balance on the loan, the Bank filed a claim form and statement of claim in Claim No. ANUHCv2016/0437 to recover the balance on the loan. On 22nd September 2016, the Bank filed an amended claim form and statement of claim, along with an amended without notice application to serve the amended claim on the appellants outside of the jurisdiction. On 23rd September 2016, the court ordered:

“1) The Amended Claim Form and Statement of Claim filed herein on the 20th day of September 2016 together with a copy of this Order be served on the Respondents/Defendants outside of the jurisdiction of Antigua and Barbuda at their usual place of residence in England at 3 Coopers Drive, Bexley Grange, Dartford, Kent DA3 7W3 via FedEx,

2) The Respondents/Defendants, upon receipt of the abovementioned documents, shall file and serve an Acknowledgement of Service within 35 days of service, and a Defence within 56 days of service.”

[52] On 27th October 2016, the attorneys for the Bank filed an affidavit of service sworn to by Ms. Anthea Joseph, a litigation clerk in the office of the Bank’s attorney. She deposed as follows:

“2) On or around the 4th day of October, 2016, I delivered to the Federal Express office situate at High Street, St. John’s Antigua a sealed package containing a Claim Form, a Statement of Claim, Amended Claim Form & Amended Statement of Claim and Order all filed on the 31st day of August, 2016, 22nd September, 2016 and 28th September, 2016 respectively to be delivered to **JAYSON STICKINGS & SHARON ALLEN**, the Defendants herein, at 3 Coopers Drive, Bexley Grange, Dartford, Kent, England, DA37WE. A true copy of the Federal Express Airway Bill is exhibited at page 1 of “AJ.1”.

¹¹ Cap. 374, Laws of Antigua and Barbuda.

3) That on the 13th day of October 2016 at approximately 11:16am the said package was delivered to the above-mentioned address for the said **JAYSON STICKINGS & SHARON ALLEN** at the given address. A true copy of the Federal Express tracking sheet is exhibited at page 2 of “AJ.1”.

[53] The appellants did not file an acknowledgement of service within the time stipulated in the order. The Bank filed a request for default judgment and judgment was entered on 12th January 2017. On 2nd October 2020, some 3 years after the default judgment was entered, the appellants applied to set aside the judgment under rule 13.3 of the **Civil Procedure Rules 2000** (“CPR”).¹²

[54] In the court below, the learned master noted that although the application was brought under rule 13.3, the appellants were in fact disputing that the claim had been served. This led the learned master to consider whether the default judgment could be set aside under either CPR 13.2 or CPR 13.3. He eventually concluded that, service having been made in accordance with an order of the court, there was proper service under CPR 13.2 and therefore the judgment could not be set aside on that basis. He then considered CPR 13.3. He found that the appellants had satisfied the first two limbs of the conjunctive requirements in CPR 13.3(1), namely, that they applied to the court as soon as reasonably practicable after finding out that judgment had been entered, and that they gave a good explanation for not filing an acknowledgement of service. However, the master, in exercising his discretion under the rule, found that the appellants had not satisfied the third limb of having a real prospect of successfully defending the claim. He also found that there were no exceptional circumstances that would justify setting aside the default judgment under rule 13.3(2). Consequently, he dismissed the appellants’ application to set aside the default judgment.

The Appeal

[55] The appellants appealed against the learned master’s decision on the grounds that:

¹² Rules 13.2 and 13.3 are set out below in paragraph [58].

- (1) he erred in finding that there was proof of service of the claim form and statement of claim upon the appellants and that CPR 5.15 and CPR 12.4(a) had been complied with; and
- (2) he erred in dismissing the application to set aside the default judgment when it was impossible for the applicants to have acknowledged service as they had not been served.

The appellants did not appeal against the learned master's findings that they had not complied with the requirements of CPR 13.3, and in particular CPR 13.3(1)(c) and CPR 13.2(3).

[56] I agree with the learned master's decision to consider both CPR 13.2 and CPR 13.3 in deciding whether to set aside the default judgment and I will adopt the same course.

[57] It is helpful at this juncture to set out these rules in their entirety:

"Cases where court must set aside default judgment

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 acknowledgment of service – any of the conditions in rule 12.4 was not satisfied; or
- (b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.

(2) The court may set aside judgment under this rule on or without an application.

Cases where the court may set aside or vary default judgment

13.3(1) If Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –

- (a) Applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
- (b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and
- (c) Has a real prospect of successfully defending the claim.

(2) In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.

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

*Rule 26.1(3) enables the court to attach conditions to any order.”

CPR 13.2

[58] It is settled that CPR 13.2 is a mandatory provision, and if an applicant satisfies the requirements of the rule the court must set aside the default judgment. Where there has been a failure to file an acknowledgement of service, all that an applicant has to prove under this rule is that the conditions in CPR 12.4 were not satisfied. CPR 12.4 requires a claimant to prove service of the claim form and statement of claim.

[59] This raises a major issue that is central to this appeal: whether the Bank proved proper service of the amended claim form on the appellants.

[60] As the appellants were resident outside of Antigua and Barbuda, the Bank applied to the court for permission to serve the amended claim form and statement of claim outside of the jurisdiction, at the address that had been provided to the Bank. The court was obviously satisfied that the information provided by the Bank was sufficient to warrant the grant of the application. Consequently, the court made an order for specified service, namely, that the Bank was to serve the appellants at 3 Coopers Drive, Bexley Grange, Dartford, Kent DA3 7W3 via FedEx.

[61] CPR 5.15 deals with proof of service by a specified method and states that '[s]ervice is proved by an affidavit made by the person who served the document showing that the terms of the order have been carried out'. The affidavit of service sworn by Ms. Anthea Joseph was the proof of service filed as a precursor to the application for default judgment. This affidavit, and the accompanying exhibits, show that the terms of the order were carried out and that service was effected in accordance with the order. It was not necessary for the Bank to prove who actually delivered the FedEx package to the address in England.

- [62] The appellants' contention is that the Bank had to prove service at the appellants' usual place of residence, but that they had not resided at the Coopers Drive address for eight years prior to the purported service. However, this was the address provided by the appellants to the Bank. Proper procedure would have required the appellants to inform the Bank of any change in their address. Despite having the opportunity to do so at the hearing of the application to set a sale price for the properties in 2015, this was not done. While admittedly the Bank could have taken further steps to verify the appellants' current address, many years having passed since the Coopers Drive address was given, it cannot be faulted for relying on the address provided at the time the loan was granted, even more so because the appellants did not take the opportunity to advise the Bank of the change of address at any time during the 2015 proceedings (see paragraph [50] above).
- [63] Furthermore, the court, on hearing the application for permission to serve the claim out of the jurisdiction, was satisfied, based on the evidence provided, that 3 Coopers Drive, Bexley Grange Dartford, Kent DA3 7WE was the appellants' usual place of residence. In serving the claim at that address, the Bank was simply following the order of the court. The appellants ought to have applied to set aside the order for service if they intended to challenge service on the ground that the address used was not their usual place of residence.
- [64] Where either the CPR or an order of the court provides the method of service and that method is followed, but the claim does not come to the attention of the defendant, his remedy is to either apply to set aside the order granting permission to the applicant to serve the claim out of the jurisdiction; or to apply under CPR 13.3 to set aside the default judgment.
- [65] The Court of Appeal of England dealt with a similar situation in **Akram**. In that case, the appellant applied to set aside a judgment on the basis that he had not been served and that he was unaware of the proceedings. On appeal against an order of the lower court affirming the default judgment, the English Court of Appeal found

that, since the claim form had been posted to the defendant at his usual residence, and there had been no finding that the claim form had been returned undelivered, it had been properly served under rule 6.5(6) of the English CPR. The judgment had not been wrongly entered and could only be set aside as a matter of discretion pursuant to rule 13.3 of the English CPR.¹³

[66] The appellants attempted to distinguish **Akram** on the ground that there was service on Mr. Akram at his usual residence and there was no such service on the appellants. However, as I stated above, any assertion that the address used was not the appellants' usual place of residence should not affect the validity of the service carried out pursuant to an unchallenged order of the court.

[67] Counsel for the appellant has relied on three additional cases dealing with the purpose of service which I shall deal with now. In **Abela**, the Supreme Court of England noted that service has a number of purposes, but the most important is to ensure that the contents of the document served are communicated to the defendant. This is trite law and, in my view, does not affect the issues in this case. **Abela** concerned an application to retrospectively validate service outside the jurisdiction by an alternative method not specified in the order for service – the case did not involve a default judgment nor did it consider service in accordance with an order of the court.

[68] The case of **Barton** also highlighted that the most important purpose of service was the critical factor of ensuring that the contents of the documents are brought to the defendant's attention. However, the circumstances differ greatly from the instant appeal. **Barton** dealt primarily with the retrospective validation of non-compliant service (as in **Abela**). There was no proper service in accordance with a rule or an order of the court as in the instant appeal.

¹³ The English rule 13.3 is to the same effect as EC CPR 13.3, though differently worded.

[69] In **Dubai** the English Court of Appeal found that where there had been no valid service, the defendant was under no obligation to enter an acknowledgement of service. However, the circumstances of that case were such that the defendant was served with the originating documents, but nothing in the claim form itself indicated to the recipient a date by which it was required to acknowledge service. Therefore, when the judge entered the default judgment, the relevant time for acknowledging service under the English CPR 12.3(1)(b) had not expired because none had become applicable. Although this case also dealt with a default judgment, the critical distinguishing factor is that there had been no proper service in accordance with the rules or an order of the court.

[70] I find these cases to be of little assistance in determining whether there was proper service. It is accepted that the purpose of service is to bring the proceedings to the attention of the defendant. However, in the cases cited, there was either no proper service or the court simply did not deal with service for the purposes of setting aside a default judgment.

[71] For the reasons set out above, I am constrained to conclude that the Bank proved proper service of the amended claim form and statement of claim in accordance with the order of the court. No application having been made to set aside service or to set aside the order of the court granting permission to serve the claim at 3 Coopers Drive, Bexley Grange Dartford, Kent DA3 7WE, any application to set aside the default judgment under CPR 13.2 must fail.

CPR 13.3

[72] CPR 13.3 is a discretionary rule under which the court may set aside a default judgment if it is satisfied that the applicant has met the three conditions in the rule. The Court of Appeal in **Public Works Corporation v Matthew Nelson**¹⁴ emphasised that the discretion granted under CPR 13.3(1) to set aside a default judgment is relatively limited. A failure to satisfy any one of the three conditions is

¹⁴ DOMHCVAP2016/0007 (delivered on 29th May 2017, unreported).

fatal unless the defendant brings himself within CPR 13.3(2) by demonstrating that there are exceptional circumstances warranting the setting aside of the default judgment.

[73] In order to succeed on an application under CPR 13.3(1), an applicant must satisfy the court that: (i). it has made the application as soon as reasonably practicable after finding out that judgment had been entered; (ii). there was a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and (iii). it has a real prospect of successfully defending the claim.

[74] The learned master considered each of these limbs at length when determining the application at first instance. He concluded that:

(1) The application was made as soon as reasonably practicable after finding out the judgment had been entered. He noted that CPR 13.3(1) does not provide a time within which a person is to bring an application and so the court must consider the facts of each case to determine what is reasonable. Although the application was made almost 3 years after the default judgment was entered, the master accepted the appellants' evidence that they applied within 4 months of discovering that the judgment was entered. He noted that although there was delay on the part of the appellants after finding out about the default judgment, it was reasonable as they resided outside of Antigua and Barbuda and the restrictions imposed by the Covid-19 pandemic at the time made it difficult for them to obtain and instruct counsel.

(2) There was a good explanation for the failure to file an acknowledgement of service. The master found that although the claim had been properly served by the Bank in accordance with the order of the court, there was no evidence to rebut the appellants' assertions that they had never received the claim.

(3) The appellants did not have a real prospect of successfully defending the claim. The master noted that to satisfy this limb of the rule, the appellants would have to demonstrate that their defence was more than merely arguable, it had to carry a degree of conviction. The crux of the appellants' defence was that the Bank had breached its statutory duty to them (under section 75(1) of the **Registered Land Act** ("the Act")) by selling the properties for less than the balance of the loan. However, the learned master noted that the Bank was not exercising its power of sale under the Act. The properties were sold in accordance with an order of the Court dated 21st October 2015 by which Lanns J gave the Bank permission to sell the properties by private treaty for the gross sum of \$675,000.00 and otherwise on the terms set out in the order.¹⁵ There is no evidence that the sale was conducted other than in accordance with the terms of the order of Lanns J.

[75] The law is clear that a failure to satisfy any of the three limbs of CPR 13.3(1) is fatal to an application to set aside a default judgment.¹⁶ The third limb not having been satisfied, the learned master concluded that the application must fail.

[76] The learned master went on to consider whether the case fell within the exceptional circumstances contemplated by CPR 13.3(2). Counsel for the appellants cited the value of the claim and the fact that the Bank was seeking to enforce the default judgment during the Covid-19 pandemic, as exceptional circumstances. The master found that these were no exceptional circumstances that reached to the threshold imposed by the rule and accordingly dismissed the application to set aside the default judgment.

¹⁵ See paragraph [50] above.

¹⁶ *Public Works Corporation v Matthew Nelson DOMHCVAP2016/0007* (delivered on 29th May 2017 unreported).

The Master's Discretion

[77] In **Yates Associates Construction Co Ltd v Brian Quammie**¹⁷ the Court of Appeal repeated the well-known rule of practice that an appellate court will disturb the exercise of a master's discretion only where it finds that the master erred in principle in his approach or has left out of account some aspect that he should have considered, or considered some matter that he should not have, and as a result his decision exceeded the generous ambit within which reasonable disagreement is possible, or the decision is wholly wrong. If it cannot be said that the master, in exercising his discretion, acted improperly or erred in principle, there is no basis upon which this Court can properly interfere with the exercise of his discretion.

[78] It is clear from the decision of the learned master that he conducted a thorough evaluation of the evidence and considered all relevant factors and legal principles when considering the application. He did not err in principle, nor was he wholly wrong, in finding that the appellants did not satisfy the conjunctive requirements of 13.3(1), nor did their situation fall into the category of exceptional circumstances under 13.3(2). Whether or not this Court may have exercised the discretion differently is wholly immaterial. It is not the role of this Court to substitute its own decision for a decision of the trial court made following the proper exercise of discretion by the judge or master.

Conclusion

[79] For these reasons, I would dismiss the appeal and affirm the decision of the learned master in the court below and award the Bank \$1,000.00 as the costs of the appeal.

By the Court

Chief Registrar

¹⁷ BVIHCVAP2014/0005 (delivered on 5th May 2015, unreported).