[2018] JMCC Comm 45

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018 CD 00083

BETWEEN	**FIRST GLOBAL BANK LIMITED**	**CLAIMANT**
AND	**ORVILLE SPENCE**	**1ST DEFENDANT**
AND	**NADINE SPENCE**	**2ND DEFENDANT**

IN CHAMBERS

Mr. Christopher Henry instructed by Samuda & Johnson Attorneys-at-Law for the Claimant

Mr. Lemar Neale instructed by Nea Lex Attorneys-at-Law for the 1st Defendant

Ms. Gaylan Baxter as counsel for the 2nd Defendant

HEARD: 20 June and 17 December 2018

CIVIL PRACTICE AND PROCEDURE – SERVICE BY ALTERNATIVE METHOD – AFFIDAVIT OF SERVICE FILED WITH REQUEST FOR DEFAULT JUDGMENT – RULES REQUIRING COURT TO BE SATISFIED AS TO SERVICE – AFFIDAVIT OF SERVICE TO BE ENDORSED BY COURT THAT SERVICE IS SATISFACTORILY PROVED – AFFIDAVIT NOT ENDORSED BY REGISTRAR BUT REQUEST FOR DEFAULT JUDGMENT GRANTED – WHETHER FAILURE BY REGISTRAR TO ENDORSE AFFIDAVIT RENDERS THE SERVICE DEFECTIVE – APPLICATION TO STRIKE OUT CLAIM AND FOR SUMMARY JUDGMENT DUE TO DEFECT IN SERVICE – CIVIL PROCEDURE RULES, 2002, PART 5, RULE 5 .13

EDWARDS, J

Background

[1] By notice of application for court orders filed 30 May 2018, Mr Orville Spence (hereinafter referred to as Mr Spence), applied for summary judgment and in the alternative that the claim against him brought by the claimant First Global Bank Limited (First Global) be struck out. The broad basis for the application is Mr. Spence's allegation that the claim was statute barred, as he had not been properly served with the claim form within the limitation period. It is also averred that as a result of the limitation period expiring, the amended claim form filed 22 March 2018 is invalid, as the claim is statute barred.

[2] This matter has its genesis in the claim form filed by First Global on the 11 March 2013. First Global claimed against Mr Spence and his wife, Mrs Nadine Spence (together hereinafter referred to as the defendants) the sum of four hundred and ninety-one thousand, three hundred and thirteen dollars and forty-four cents **($491,313.44),** together with interest accruing daily on the principal balance, until payment and being the balance due and owing to First Global by the defendants on a Visa Gold credit card provided on 28 June 2007 to the defendants.

[3] The defendants were then served with the claim form and the relevant accompanying documents (Mrs Spence personally and Mr Spence through Mrs Spence) on the 12 June 2013. In the affidavit of service of the process server Mr Christopher Thompson, filed on the 22 August 2018, he deposed to the personal service of the documents on Mrs Spence and also said the following:

> "3. That the said Second Defendant told me that it was not possible for me to see the First Defendant, but that she was willing to accept the documents on his behalf and that she would give it to him later that day.
>
> 4. That I did on the 12th day of June 2013 between the hours of 9:00 o'clock and 10:00 in the morning… serve the First Defendant, Orville Spence with a sealed copy Claim Form dated the 28 day of February 2013 and filed on the 11 day of March 2013, with Notice to defendant, prescribed notes to defendant , blank Acknowledgement of Service of Claim Form,

blank Defence, blank Application to pay by instalments and supporting documents attached by handing same to his wife, Second Defendant, Nadine Spence and she accepted service of the said documents for and on behalf of her husband, the First Defendant, Orville Spence.

5. That given the Second Defendant's confirmation that she would give the First Defendant the said documents later that same day it is likely that the First Defendant would receive the Documents and be in a position to ascertain the contents of same on the said 12th June 2013 with Notice to the defendant, prescribed notes to defendant blank Acknowledgment of Service of Claim Form, blank Defence, blank Application to pay by instalments and supporting documents attached which were served marked " CT- 1" for Identification.

6. That I also exhibit herewith marked "CT-2" for Identification a copy of letter dated 14 March 2013 addressed to me from the Attorneys-at-Law for the claimant which the Second Defendant, Nadine Spence acknowledged in writing that she accepted service of the aforesaid documents for and on behalf of her husband the First Defendant, Orville Spence."

[4] As a result of the defendants' failure to file an acknowledgment of service and defence within the prescribed time, First Global requested and were successfully granted default judgement by the Registrar of the Supreme Court, as against the defendants, on 22 August 2013. By amended notice of application for court orders filed 26 February 2018, the defendants applied for an order by the court that the default judgement entered against them be set aside. On 7 day of March 2018 the default judgement was set aside.

[5] On 22 March 2018, First Global filed an amended claim form and served if on the defendants on 4 April 2018. On 18 May 2018 the defendants filed a defence to the

amended claim. This application was thereafter filed by Mr Spence on 30 May 2018.

[6] The application reads as follows:

> "The Applicant/1st Defendant, **Orville Spence**… seeks the following Orders:
>
> 1. Summary Judgment be granted for the 1st Defendant on the Claim
>
> 2. In the alternative, the claim be struck out against the 1st Defendant.
>
> 3. Costs of this application be awarded to the 1st Defendant to be agreed or taxed
>
> 4. Such further and other relief as this Honourable Court deems just.
>
> **The grounds on which the Applicant is seeking these orders are as follows:**
>
> 1. Rule 15.2 of the Civil Procedure Rules, 2002 (as amended) ('the CPR") empowers the Court to grant summary judgement on a claim.
>
> 2. The Claimant has no real prospect of succeeding on the claim.
>
> 3. Pursuant to Rule 26.3(b) of the CPR, the Amended Claim Form is an abuse of process of the Court.
>
> 4. The 1st Defendant was never served with the Claim Form issued on 11 March 2013, which expired on March 11, 2014 and he had not acknowledged the debt within the period of six years immediately preceding the filing of the Amended Claim Form and as such, the claim is statue-barred.
>
> 5. It will be in keeping with the overriding objectives and in the interest of justice that Summary Judgment be granted (sic) for Applicant."

[7] In support of this application Mr Spence filed an affidavit on 31 May 2018, in which he stated, inter alia, as follows:

> "4. I am advised by my Attorneys-at-Law and do verily believe that the Claim Form that was issued on March 11, 2013 was valid for one year and therefore expired on March 11, 2014.
>
> 5. In addition to the fact that I was never served with the Claim Form issued on March 11, 2013 which later expired, I have not acknowledged the debt within the last six years immediately preceding the filing of the Amended Claim Form on March 22, 2018.
>
> 6. I am further advised by my Attorneys-at-Law and verily believe that since I have not acknowledged the debt within the last six years immediately preceding the filing of the Amended Claim Form, any claim for such debt was statute-barred by the time the claimant filed its Amended Claim Form."

[8] In the said application Mr Spence requested the court's permission to rely on his affidavit filed on 8 January 2018 and dated 5 January 2018, in which he swore to the following:

> "3. Sometime in June 2013, my wife, the 2nd Defendant in these proceedings, informed me that she had received some documents from a gentleman, with whom she was familiar, acting on behalf of First Global Bank Limited ("the Bank"). She was familiar with him as he had served some documents on her from the bank in another suit. The bank had sued us and our company in relation to a loan it advanced to our company which was guaranteed by the 2nd Defendant and me (Claim No. 2012 HCV 02607). I was aware of those proceedings as the Bank seized several vehicles belonging to our company under a Bill of Sale.
>
> 4. My wife did not bring the documents in these proceedings to my attention. She was of the view that they related to the previous

proceedings. We did not hear anything more about this suit until my wife received a document entitled Judgement Summons on or about November 16, 2017. Upon perusal of the documents I realized that it had a date for us to attend court on November 27, 2017…"

[9] On the 18 June 2018, First Global then filed a notice of application for court orders for summary judgment. Both matters were set for hearing on same day. The court determined that it would hear the application of Mr Spence first. In support of its application First Global relied on the Affidavit sworn to and filed on 14 June 2018 by Jheanelle Chin Bachan, in response to Mr Spence's affidavit filed 31 May 2018 and sworn to 30 May 2018, in which she stated, inter alia, as follows:

"4. That in relation of paragraph 4 of the said Affidavit, I am advised by the Claimants Attorneys-at-Law (hereinafter referred to as "the said Attorneys") and do verily believe that, initially, the Claim Form was properly served on both Defendants in this matter and the Second Defendant having been personally served during the validity of the Claim Form time would automatically cease to run and the validity of the Claim Form would not expire…

5. That in response to paragraph 5 of the said Affidavit, I repeat paragraph 4 herein and state that the credit card was held jointly by both Defendants and they both signed the Conditions of Use in acknowledgement of the acceptance of the credit card and the conditions under which it was to be used. Further, in confirmation of the First Defendant's acceptance of the debt, to my certain knowledge the debt was being serviced from its inception up until January 13, 2012 when the last payment was made and thereafter the Defendants defaulted…

6. That further and in relation to paragraph 5 of the said Affidavit, the Bank instructed the said Attorneys to demand payment of the balance due and to take legal action if the Defendants did not respond to the demand. Demand letters dated August 28, 2012 were sent to the Defendants at their given residential address an at Sunsational Car Rentals and Tours Limited, Payless Car Rental 26 Sunset Avenue Montego Bay, P.O, St. James the address at which the Defendant's (sic) were conducting business at the time.

Exhibited herewith are copies of the letters with the Certificates of Posting attached marked “JCB-3” for identification. I am further advised by the said Attorneys and verily believe that the Demand Letters sent by registered post, to date, have not been returned to their office and the Defendants did not respond to the said letters.

7. That in relation to paragraph 6 of the said Affidavit, I am advised by the said Attorneys and verily believe that the Claim is not Statute Barred having been filed on March 11, 2013 which took into account a balance owed in 2012.

8. That further in relation to paragraph 6 of the Affidavit, I am advised by the said Attorneys and verily believe that the Claim Form was Amended within the time prescribed by the Rules of the Court.

9. That I crave leave of this Honourable Court to rely on and refer to the Affidavit of Jordan Chin filed on January 26, 2018 in opposition to the Defendants’ application to set aside Default Judgement granted in this matter which depones to the entire history of this matter before this application...

12. That based on the Defendant’s admission of the debt by servicing same and their promises to make good subsequent to the last payment they made in January 2012, I verily believe that the application filed by the First Defendant for the Summary Judgement is simply an attempt to avoid contractual obligations which the Defendants freely entered into with the Claimant and to defeat what is a legitimate claim to enforce agreements made by them.

13. That as at June 13, 2018 the Defendants are indebted to the Claimant in the amount of $1,420, 320.63 with interest continuing at the rate of 3.5% per month until payment…”

[10] The respondent’s position is articulated in the affidavit of Jordan Chin, filed 26 January 2018, in opposition to the affidavits of the defendants, in which he stated inter alia, as follows:

“4. That I categorically deny that the Default Judgement obtained from the alternative method of service of the Claim Form herein

on the First Defendant is irregular and that the proceeding would be a nullity as stated in the Defendants' said Affidavits.

5. That the First Defendant was properly served in compliance with Rule 5.13 of the Civil Procedure Rules 2002, as amended. The reason for choosing this method of service resulted from information received from the process server that the First Defendant could not be found as several unsuccessful attempts were made by him to personally serve the First Defendant with the Claim Form in this matter and documents in another related matter…

6. That in addition Rule 5.13 (2) and Rule 5.13 (3) (a),(b),(c) and (d) were fully complied with as the relevant Affidavit evidence was filed with all the requirements set out in Rule 15.13 (3)…

7. That the Affidavit of Service mentioned in paragraph 6 above was brought to the attention of the Registrar when the documents to ground the application for Default judgment was filed and considered in keeping with Rule 5.13 (4).

8. That if the Registrar was not satisfied with the evidence on the Affidavit she would not have entered the Default Judgement but instead, a date, time and place would have been fixed to consider seeking an order under Rule 5.14 stipulated by Rule 5.13 (5).

9. That in relation to paragraph 3 of the Affidavit of the Second Defendant, Nadine Spence filed herein, the Second Defendant ought to have known and was well aware that in addition to the suit with the company that is **Claim No. 2012 HCV 02607 First Global Bank Limited v Sunsational Car Rental Limited, Orville Spence and Nadine Spence** there was an existing outstanding credit card debt owing to the Claimant by the Defendants which was separate and apart from the claim involving the company Sunsational Car Rental Limited.

10. Further, and in relation to paragraph 3 of the Second Defendant's Affidavit, the said Defendant having been served with a court document, and having signed accepting service of the Claim Form on behalf of the First Defendant it was her duty to bring the Claim Form to the attention of the First Defendant. It was also

her duty to peruse the document and, if this was done, it would be apparent that the claim was for the credit card debt as paragraphs 1 and 2 of the Claim Form in this matter specifically speaks to a Visa Gold Card…

11. That in addition and in relation to paragraph 3 of the Second Defendant's Affidavit, the Claim Form for the Credit Card debt should not have been perceived as relating to the Claim involving Sunsational Car Rental Limited as Sunsational Car Rental Limited was not named as a Defendant in the Claim Form and the sum claimed in the Sunsational Car Rental claim was much greater that (sic) that owing for the credit card debt…"

The Issue

[11] The single issue raised by this application is whether Mr Spence was properly served pursuant to Rule 5.13 of the CPR.

Was Mr Spence properly served?

[12] If Mr Spence was properly served, then that's the end of the matter. If he was not properly served, then this court will have to make a determination on the validity of the amended claim which was filed and served personally on the defendants in January 2018.

i. The applicant's submissions

[13] Counsel for Mr Spence**,** Mr Neale, submitted that based on Rule 8.14 of the CPR, a claim form must be served within twelve months after the date when the claim was issued or the claim ceased to be valid. Counsel pointed out that this claim began its life on 11 March 2013 (prior to its amendment in January 2018); this, he said, meant that the claim form issued on 11 March 2013 ceased to be valid on the 11 March 2014, if it was not served. Counsel argued that the service on Mr Spence was not in keeping with the mandatory requirement of Rule 5.1. Counsel argued further that the procedure used to effect service on Mr Spence was an alternative method of service, which was ineffective without a judge, master or registrar

endorsing the affidavit of service. Counsel pointed out that there was no evidence of an endorsement by the court on the affidavit of the process server Mr Christopher Thompson, indicating satisfactory proof of service. Counsel submitted that the claim form having not been properly served on Mr Spence within 12 months from its issue, it ceased to be valid by 11 March 2014, as against him.

[14] Counsel noted that based on First Global's own evidence, the defendants last acknowledged the debt in January 2012. Counsel argued that this meant that the debt became statute-barred by January 2018, as against, Mr Spence, from when he last acknowledged it, pursuant to section 46 of the Limitation of Actions Act. Counsel asked that the court note that that Act provided that an acknowledgement of a debt or promise must be in writing to take a case out of the operation of the statute. Counsel submitted that, as the applicants had not done that, the claim remained statute-barred.

[15] Counsel further submitted that the amended claim form was issued 22 March 2018, over two months after the limitation period ran in favour of Mr Spence. Counsel pointed out that the authorities emphasised that striking out on the basis of a limitation defence should only be done in the clearest of cases and argued that this was one of the clearest cases where the defendant had acquired a limitation defence. Counsel submitted, that in these circumstances, the claim should be struck out as being an abuse of process.

[16] Counsel further submitted that Rule 26. 3(1)(b) of the CPR empowers the court to strike out a statement of case if it is an abuse of the process of the court. It was submitted that a claim would be considered an abuse of process where it was filed and served outside of the limitation period. Counsel noted that where this is the case, a defendant can apply the strike out the claim upon specifically pleading the limitation as a procedural defence.

[17] Counsel made reference to the case of **Div Deep Limited et al v Topaz Jewellers Limited** [2017] JMCC Comm 26, in which this court said that:

> *"The question of whether a claim is statute barred is a procedural defence which must be specifically pleaded. If pleaded, it is a complete defence where the period limited within which a claim should have been brought has expired. If it is raised as a defence it is normally resolved at trial. However, if the defence is pleaded it is open to the defendant to have it tried as a preliminary issue or to apply to have the claim struck out on the basis of the limitation…*
>
> *Faced with such a plea the burden is on the claimant to prove that the claim was brought within the time limited to do so. If the defence is pleaded and the claimant does not discontinue the claim, a defendant may apply to have the claim struck out as an abuse of the process of the court. The principles were correctly traversed by Simmons J in* ***Joy Douglas et al v Barclays Bank et al*** *at paragraphs 56 –59 and paragraphs 93. Simmons J in addition also considered the courts inherent discretionary jurisdiction to strike out a statement of case where it is shown to be an abuse of the process of the court."*

[18] Counsel also submitted that the defendant has no prospect of success in the circumstances and summary judgment ought to be granted. Counsel went further to argue that if the case is dismissed in favour of Mr Spence, it ought to be dismissed in favour of the 2nd defendant as well, since the debt was joint and not severable.

ii. **The respondent's submissions**

[19] Counsel Mr Henry argued on behalf of the respondent that the question as to whether Mr Spence was served should be resolved in favour of the respondent. Counsel argued that the claim form and accompanying documents were personally served on the 2nd Defendant, Mrs Spence, on 12 June 2013. Those documents, he submitted, were also properly served on Mr Spence that same day. This was effected he said, by the process server handing the documents to Mrs Spence, who agreed to accept service and who subsequently confirmed, by endorsement on the letter from counsel to the process server, that she accepted service on her husband's behalf.

[20] Counsel conceded that Rule 5.1 of the CPR sets out the general rule that a claim form must be served personally on each defendant. This rule, counsel accepts, is clear and unambiguous. Counsel however, pointed to the fact that Rule 5.13 also provided for an alternative method of service, if personal service cannot be effected. Counsel also pointed out that for this method to be effective, the court, which for the purpose of the rule meant a judge, master or registrar, must accept the affidavit of service, as proof that service is satisfactory.

[21] Counsel further submitted that Mr Spence was properly served in 2013 with the original claim form, and properly served in 2018 with the amended claim form, which was well within time. Counsel submitted that it would be furthering the interest of justice not to grant this application. Counsel argued further, that no evidence was presented by the defendants to contradict First Global's case and thus the matter is not appropriate for summary judgement to be granted to the defendants.

[22] Counsel further argued that the alternative method of service had been approved by the Registrar of the Supreme Court and that there was no just cause why this claim should be struck out. Counsel pointed out that the fact that default judgement had been entered on behalf of First Global meant the affidavit was considered and approved by the registrar and as such was endorsed by the court. It was submitted that this, therefore, meant that time would have ceased to run as of 2013 when the affidavit was filed, therefore, section 46 of the Limitations of Actions Act had no bearing on the case.

iii. Discussion and analysis

[23] The general rule is that service of the claim form must be personally effected. This means that service must be on the party directly. The general rule is provided for in Rule 5.1 which states:

"(1) The general rule is that a claim form must be served personally on each defendant.

(2) The defendant must be served with a copy of the claim form sealed by the court in accordance with Rule 3.9 (sealing of documents issued by the court)."

[24] Rule 5.2 states:

"(1) The general rule is that the claimant's particulars of Claim must be served with the claim form.

(2) However the claim form may be served without the particulars of claim in accordance with rule 8.2 (particulars of claim to be issued and served with claim form).

(3) In this Part reference to service of the claim form requires that:

(a)the particulars of claim; or

(b)where these Rules so require, an affidavit or other document; and

(c)a copy of any order or the certificate and application made under rule 8.2,

must be served with the claim form unless the particulars of claim is contained in the claim form."

[25] Rule 5.3 states**:**

"A claim form is served personally on an individual by handing it or leaving it with the person to be served."

[26] There is no doubt that Mr Spence was not personally served. It is true that Rule 5.13 provides for a litigant to serve the claim form and particulars of claim by an alternative method of service other than by serving it on a defendant personally. It is convenient to set out the rule here. It states:

"5.13(1) Instead of personal service a party may choose an alternative method of service.

(2) Where a party-

(a) chooses an alternative method of service; and

(b) the court is asked to take any step on the basis that the claim form has been served;

The party who served the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form.

(3) An affidavit under paragraph (2) must –

(a) give details of the method of service used;

(b) show that –

(i) the person intended to be served was able to ascertain the contents of the documents; or

(ii) it is likely that he or she would have been able to do so;

(c) state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents; and

(d)exhibit a copy of the documents served.

(4) The registry must immediately refer any affidavit filed under paragraph (2) to a judge, master or registrar who must –

(a) consider the evidence; and

(b) endorse on the affidavit whether it satisfactorily proves service.

(5) Where the court is not satisfied that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the registry must fix a date, time and place to consider making an order under Rule 5.14 and give at least 7 days notice to the claimant.

(6) An endorsement made pursuant to 5.13 (4) may be set aside on good cause being shown."

[27] Counsel for First Global relies on this rule to support his contention that Mr Spence was properly served. Counsel for Mr Spence, however, maintained his stance, that without the endorsement by the registrar on the affidavit of Mr Christopher Thompson, the requirements of the rule had not been met and service is bad. No issue has been joined between the parties as regards the contents of the affidavit of Mr Christopher Thompson and this court accepts that the affidavit meets the requirements laid out in Rule 15.13 (3). The remaining issue is whether the affidavit was endorsed by the registrar as required by the rules and whether the absence of such an endorsement on the affidavit itself, invalidates the alternative method of service.

[28] I need cite no authority for the long established practice of the court of resorting to the dictionary meaning of words. According to the Oxford English Dictionary 9th Edition, the word 'endorse' means "*to declare one's public approval of*", or "*to sign on the back of (a cheque)*". The Black's Law Dictionary 4th Edition 1968 defines the word indorse (the original Latin derivative of the word) as:

"To write a name on the back of a paper or document."

[29] It was further stated that "indorse" is a technical term, having sufficient legal certainty without words of more particular description. Taking into account the literal meaning of the word 'endorse', it would seem that what the rule requires, in practice, is for the registrar to literally write on the back of the affidavit. However, counsel for the respondent submitted that he knows of no case in which the Registrar of the Supreme Court has ever endorsed the back of any affidavit when a request for default judgment is made. Certainly, he says, it has never been done in any of the number of cases in which a request for default judgment was made by his firm. But what in fact occurs, he says, is that if the registrar is satisfied as to proof of service, the default judgment is granted, if not, it is rejected. Of course, I was not presented with any affidavit evidence of these factual assertions.

[30] Counsel for the respondent also argued that the grant of the requested default judgment serves as an endorsement by the registrar and proves that the registrar was satisfied as to service. This may well be so. The question is whether the registrar is to be held to the rules and whether the applicant is to be held to blame for the registrar's default.

[31] In the Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, Volume 1, Lord Woolf in reference to the Civil Procedure Rules of Wales and England which bear vast similarity to our jurisdiction:

> *"The new rules will have to be used in a different way; they will have to be read as a whole not dissected and viewed word by word under a microscope. The new rules were deliberately framed so that the approach of those constructing them can be more purposive and less technical. It is the responsibility of the judiciary to make this system work."*

[32] It was further stated by Lord Woolf at page 275 that:

> *"The CPR was deliberately not designed expressly to answer every question which could arise. The statement of the overriding objective I have ruled "provides a compass to guide courts and litigants and legal advisers as to the general course…"*

[33] In the case of **James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd** [1977] Q.B 208 Lord Denning M.R Explained:

> *"Under the purposive method of interpretation the judges are not go to the literal meaning of words or by the grammatical structure of the sentence. They go by the design or purpose behind it, when they come upon a situation which is to their minds within the spirit but not the letter of the legislation, they solve the problem by looking at the effect it was sought to achieve."*

[34] Rule 1.1 of the CPR states that the court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules. Rule 1.1 states:

> *"1.1 (1) These Rules are new procedural code with the overriding objective of enabling the court to deal with cases justly.*
>
> *(2) Dealing justly with a case includes –*
>
> *(a) ensuring, so far as is practicable that the parties are on equal footing and are not prejudiced by their financial positions;*
>
> *(b) saving expense;*
>
> *(c) dealing with it in ways which take into consideration-*
>
> *(i) the amount of money involved;*
>
> *(ii) importance of the case;*
>
> *(iii) the complexity of the issues; and*
>
> *(iv) the financial position of each party.*
>
> (d) *ensuring that it is dealt with expeditiously and fairly; and*
>
> (e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".*

[35] I will give due regard to all those principles. Although the court must give effect to the overriding objective, it does not do so at the expense of clear words in the Rules. When construing the Rules, like any other instrument, the court must seek to find the natural meaning of the words used. It is clear from Rule 5.13 (4) (b) that 'endorse' in that context was meant to have a literal meaning or according to Black's Law Dictionary, a technical meaning; that is, that a judge, master or registrar (collectively the court) would actually write on the affidavit showing their approval of the alternative method service used by the claimants. However,

applying a purposive approach, as outlined in the **James Buchanan** case, the issue must be looked at more holistically.

[36] The endorsement required by Rule 5.13 (4) (b) is a signal that the request made of the court will be granted because proof of service has been given. Rule 5.13 (2) (a) and (b) is applicable to a party who has chosen not to serve the other party personally and who requires the court to take action on the basis that the claim has been served. Such a claimant must then file an affidavit of service in proof of such service. That affidavit filed pursuant to 5.13 (2) (a) and (b) must be considered by judge, master or registrar and endorsed as being satisfactory as to proof of service. If the registrar grants the request on being satisfied that there is indeed proof of service, is the validity of that service affected by the technical absence of an endorsement on the affidavit itself? I think not. In this case the registrar endorsed the letter of request for default judgment which accompanied the affidavit of service, by signing, dating and stamping the written request and entering judgment on it by entry of the folio and binder number on the letter of request.

[37] The rule does not indicate what form the endorsement on the affidavit should take. It could be a signature, it could be a phrase, it could be a combination of both. Could the defendant take issue with the endorsement because one or other is used? I think not. Similarly, I do not think a defendant can successfully challenge the validity of the service on the basis that the court granted a request based on a method of service which has been proved to its satisfaction but failed to append a signature or a phrase or a combination of both on the back of the affidavit. This is so especially where the written request for the registrar to do an act, which accompanied the affidavit of service, was itself endorsed by the registrar.

[38] Rule 5.14 also provides for service by a specified method. That method will be specified in a court order and an affidavit of proof of service by that method must be filed thereafter. Rule 5.13 (5) provides for an order to be made under Rule 5.14 if there is a failure to prove service under Rule 5.13 (2). This means that if the registrar is not satisfied as to proof of service by the alternative method chosen by

a party, the registry ought to send the matter to a judge for an order to be made for service by a specified method, pursuant to Rule 5.14. In this case, there was no necessity for such a referral to be made by the registry, the registrar having granted the request for default judgment, on proof to her of satisfactory service being made on the 1st Defendant.

[39] Morrison JA (as he then was) considered the framework of Rule 5.13 in **Insurance Company of the West Indies Limited v Shelton Allen et al** [2011] JMCA Civ 33 where he said that:

> *"It will be seen that, while personal service remains the primary method of service (rule 5.1 (1), provisions is also made for an "alternative method of service" at the option of a party who chooses (rule 5.13 (1). Where a party chooses an alternative method of service and the court is thereafter asked to take any step on the basis that the claim form has been served, that party must file evidence on affidavit "proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form (rule 5.13 (2). The required affidavit of service must not only give details of the method of service used, but must also show either that (i) the person intended to be served was able to ascertain the contents of the documents; or (ii) it is likely that he or she would have been able to do so (rule 5.13 (3) (b). Once filed, this affidavit must immediately be referred by the registry to a judge, master or registrar, who must consider the evidence provided and endorse on the affidavit "whether it satisfactorily proves service" (rule 5.13 (4). Such an endorsement may be set aside "on good cause being shown" – (5.13 (6)). If the court is not satisfied that "the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form", then the registry will fix a date for consideration of making of an order under 5.14 (rule 5.13 (5)."*

[40] Rule 5.13 (6) states that an endorsement may be set aside on good cause being shown. The rules provide that a default judgment (which is a request made of the registrar to act on the affidavit of service and enter judgment), may be set aside. In this case it was in fact set aside at the defendants' request. There has been no

prejudice to Mr Spence by the failure of the registrar to literally endorse the back of the affidavit.

[41] If I were to take the literal approach of Mr Spence that the endorsement can only be demonstrated by the court writing on the affidavit itself, it may well then mean then that such endorsement could only be set aside by an erasure of such endorsement from the document; or at least by another endorsement written on the affidavit revoking the first endorsement. I cannot imagine that this was the intention of the drafters. The section does not outline the proper procedure to set aside the endorsement, and it is clear that the intention was for the action taken by the registrar to be set aside, as in the case of the setting aside of a default judgment, rather than the actual erasure of the physical endorsement on the document itself. Unless, of course, if a registrar endorsed on an affidavit, say for example, words such as "service proved", it may possibly be set aside by a second endorsement to the effect, "approval revoked".

[42] As Lord Wolf stated, it is clear that the answer to all questions do not lie within the CPR and as such I am guided to look at the purpose for which the rule of endorsement was made. I am of the firm view that, although procedurally, it could be that the intention was to have the approval of alternative service shown by writing on the affidavit words to the effect that "service is satisfactorily proved", this could not have been the paramount concern and intention of the drafters of the Rules. No clear evidence has been led that the court has ever made any such endorsement on an affidavit.

[43] A purposive approach must be taken in interpreting these Rules. A purposive approach to the interpretation of the CPR, rather than a technical restrictive approach, was encouraged in the decisions of the English Court in **(YD (Turkey) v Secretary of State for the Home Department** [2006] 1 WLR 1646 and **R v (Corner House Research) v Director of the Serious Fraud Office** [2008] EWHC 246 (Admin).

[44] To my mind, Rule 5.13 (5) goes further to show that what the drafters were concerned with, ultimately, was the fact that, on the affidavit, it is demonstrated that there was actual service of the documents, meaning that there is clear evidence that the documents have and or will be brought to the attention of the intended party. This intention is made clear by the fact that, if the court does not approve the method of alternative service, the parties are given another opportunity, although at the judge's discretion, to serve the documents by substituted service. It is clear that the real intention is to dispel any doubts that the documents have been brought to the defendant's attention. It is the grant of the request made to the registrar which actually signifies her satisfaction that service is satisfactorily proven and not the technicality of manually writing or even stamping on the affidavit. Most importantly, a literal approach to the interpretation of the word "endorse", in this context, does not operate to further the overriding objective, of dealing with cases justly.

[45] I am of the view that the function required to be performed by the registrar of endorsing the affidavit is an administrative function and as such it is a formality. It is a mechanical exercise and not a condition precedent to the grant of the default judgment. It only leaves for me to provide a few examples of how the court has treated with the carrying out of such administrative functions by the registrar. In **Christopher Olubode Ogunsalu v Dental Council of Jamaica** SCCA No 53/2008, unreported (judgment delivered 3 April 2009), the court was dealing with the duty of the registrar to affix claim numbers to the files. The court found that this was merely a mechanical exercise, the failure of which could be remedied by the registrar affixing the correct suit number. In this instant case, I find that the physical endorsement by the registrar is also a technical and mechanical exercise which can be remedied, if necessary, at any time.

[46] In the case of **JaminCorp International Merchant Bank Limited** and in the matter of **The Companies Act and Re The Minister of Finance and JaminCorp International Merchant Bank** [1986] 23 JLR 522, the Court of Appeal had to

determine the effect of the registrar's failure to make an appointment under Rule 33 of the Company (Winding-up) Rules. In that case the petitioner had complied with all the requirements of the rule and had filed a memorandum with the registrar to the effect that all the requirements had been met. The registrar, thereafter, was required to set a date for attendance before him to satisfy himself of the petitioner's compliance with the rules, but failed to set a date for appointment. The result was that the petitioner's compliance was not certified by the registrar. There was no time limit for or sanction in the rules, in the event the registrar failed to appoint a day for attendance before him. The judge at first instance decided that Rule 33 was mandatory and that the failure to attend before the registrar was a fatal defect. The Court of Appeal disagreed and held that, notwithstanding the imperative 'shall' in Rule 33, the appointing of the date for attendance to obtain a certificate of compliance was merely directory and that the omission was that of the registrar who, was a public officer. The court held that it was merely a formal defect or irregularity from a public officer, which was remediable and caused no substantial injustice to the respondent.

[47] The case was appealed to the Privy Council (reported at [1987] 24 JLR 261). The Privy Council agreed with the Court of Appeal that Rule 33 was directory and not mandatory and that failure to comply with the rule was not fatal. The Board observed that the rule was primarily an administrative provision for the benefit of the court and was directory only.

[48] In the case of **Sammuel Francis v The Priory School Trust Society Limited and others** [1996] 33 JLR 269, a case decided pre CPR, the plaintiff filed a writ of summons to which the defendant filed a defence but the 2nd 3rd and 4th defendants filed a conditional appearance and a summons to strike out the writ against them. The conditional appearance sought leave from the registrar for it to stand for 14 days. The registrar failed to sign it. It was held that the leave of the registrar is required merely to prevent such proceeding from being abused and to prevent delay. The failure of the registrar to sign ought not to put a defendant at a

disadvantage. The court found that once the requirements had been met, it was unlikely that the registrar would have refused leave.

[49] A registrar has administrative duties as set out in section 12 of the Judicature (Supreme Court) Act including to "enter satisfaction and assignments of judgments". As was said by Rattray P in **Moncure v Delisser** [1997] 34 JLR 423 at 425 paragraph I, the registrar carries out administrative, rather than adjudicatory functions when entering a default judgment. Although this was a pre CPR decision, I venture to say the CPR has not changed that position. The grant of default judgment by the registrar under the CPR still remains purely an administrative act.

[50] To my mind, therefore, in the case of the grant of a request for default judgment after service, pursuant to Rule 5.13, it is the grant of the request by the registrar which truly shows that the registrar is satisfied that the affidavit of service is compliant with the requirements of that rule. The requirement for the registrar to endorse the affidavit is a technical requirement purely for administrative purposes. No prejudice to a defendant accrues from the failure to make such an endorsement.

[51] I must agree with the submission of counsel for the respondent that if the alternative means of service had not been approved by the registrar, then pursuant to Rule 5.13 (5) the application for default judgment would not have been granted and would have been sent by the registry to a judge to seek an order for substituted service. However, default judgment was entered thus showing an approval by the registrar of the means of service adopted, regardless of the fact that there was actually no physical endorsement on the affidavit by the registrar.

[52] In any event to strike out a claim or grant summary judgment in circumstances where the affidavit required was compliant with the rules and the request was granted for default judgment by the registrar based on the said affidavit, would be extremely draconian, disproportionate and unfair. This application, I regard as

tactical posturing. See **Tip Communications LLC v Motorola Ltd** [2009] EWHC 212. See also **Chilton v Surrey County Council** [1999] LTL 24/6/99.

[53] I should point out also, that in order to convince this court that summary judgment should be granted or that the claim should be struck out, Mr Spence not only claimed that service on him was defective for lack of the endorsement by the registrar but he also claimed that, although Mrs Spence told him the documents were served, she never handed them to him. However, the evidence is that the service of the documents was brought to his intention by Mrs. Spence, who was personally served with them. Mrs. Spence claimed she told him of the documents being served on her but did not hand them to him. There is no explanation why she did not examine the documents herself or why she did not acknowledge service, even though she was personally served with them. There is also no explanation why she did not hand the documents to Mr Spencer or why he did not ask to see them.

[54] In cases under Rule 15.13, the registrar is required to satisfy herself that the method of alternative service used by the applicant was such as would ensure that the defendant was able to ascertain the contents of the documents or it is likely he or she would have been able to do so. The affidavit of Mr. Christopher Thompson stated that he received an oral guarantee from Mrs Spence, after service on her personally, that she would bring the documents to the attention of Mr Spence. The affidavit also exhibited a signed endorsement on the letter to the process server by the claimant's attorney, on which Mrs Spence wrote:

> *"June 12, 2013 9:05 am accept document on behalf of my Husband Mr. Orville Spence"*

[55] Section 15.3 (a) requires the court to consider the evidence in the affidavit of service when examining whether there is proof of alternative service. It seems clear from the affidavits filed in this case, that the defendants lived together and the evidence shows that the wife accepted service on behalf of her husband and

was personally served with these documents in hand. There is evidence he was told of the service of the documents on her, it is therefore, not unreasonable for the court to conclude that in those circumstances, it is likely the contents of the documents would have been brought to the attention of Mr Spence. That being the case, it is also not unreasonable for the court to conclude that he was in a position to ascertain the contents of the documents if he had wanted to do so. This would therefore, have justified the registrar accepting the affidavit of the process server as to proof of service and granting the claimant its request for default judgment.

[56] Furthermore, Mr Spence, in his affidavit, stated that Mrs Spence told him about the documents but that she was of the view that the documents were in relation to the previous proceedings. However, he did say, in his affidavit, that the previous proceedings were in relation to a loan that was advanced to their company and was guaranteed by Mrs Spence and himself. They were both parties to that suit and he would be privy to information relating to that matter. It is contrary to good sense to accept that, if it was their belief that the documents were in relation to that earlier suit in which they are both also involved, Mrs Spence would not have brought it to the attention of Mr Spence. He has, in fact, given no explanation as to why the documents relating to the earlier suit would have been of no interest to either of them. In any event, as the affidavit evidence of Jordon Chin shows, the earlier proceedings involved a company that, on the documents with which Mrs Spencer was served, is not named as a defendant.

[57] The rule requires proof of circumstances which suggests the person intended to be served was able to ascertain the contents of the documents or the likelihood that he would be able to do so. It does not require proof of whether the person chose to look or not to look at the contents of the documents, even though he or she was able to do so or had every opportunity to do so and wilfully refused to look at them.

[58] It is the court's duty to assess the affidavit evidence and if on that evidence it is found that the method of service was sufficient to ensure that the defendant was

able or likely to ascertain the contents of the documents, then approval will be granted. The litigant cannot be held accountable for the failure of the registrar to carry out a technical, mechanical and administrative act of writing on the back of the affidavit, if indeed that is what the rules require. For the endorsement serves no other purpose than to signify satisfaction that service was proved, since there is no requirement for this endorsement to be served on anyone. The fact that the registrar acted on the affidavit of service and granted the request made by the applicant, also serves as proof that the registrar was satisfied as to service. In the case of a request for default judgment, the default judgment is served on the defendant who may apply to set it aside. In this regard, the registrar's 'endorsement' is subject to being set aside.

[59] In this case the defendants filed defences to First Global's amended claim form, putting it to strict proof of its claims. The defendants did however admit entering into the transaction which led to this suit but have opposed the annual interest rate of 42% as excessive (the conditions of which they agreed to on 20 June 2007 when signing the referral form), but have never disputed the sum owed. Nonetheless, prior to First Global filing an amended claim form the defendants filed an amended notice of application for court orders on 26 February 2018 requesting that the default judgement be set aside on various grounds and in that very application requested that the claim be transferred to the Commercial Division of the Court.

[60] One of the grounds outlined in this application read:

> *"The issues in the claim surround the obligation of joint debtors to a contract and contain question of law and fact which are particularly suitable for decision by a judge of the Commercial Division."*

[61] From my analysis of the evidence I am of the opinion that Mr Spence was duly served on 12 June 2012, the amended claim form was filed on 22 March 2018 and is valid. The claim is not statute-barred. There is no basis, therefore for striking out the claim. Since service was the sole basis for the application for summary judgment, that too will be denied.

Disposition

[62] In light of the foregoing, I hereby order the following:

(i) The defendants application for summary judgment/and or striking out of the claim is dismissed.

(ii) The costs of this application to the respondent to be taxed if not agreed.