IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 06133

BETWEEN	**ANTHONY WILSON**	**CLAIMANT**
AND	**EDWARD McCARTHY**	**DEFENDANT**

IN CHAMBERS

Ms. Allison Lawrence, Attorney-at-Law for the Respondent/Claimant

Mr. Lemar Neale instructed by NEA|LEX, Attorneys-at-Law for the Applicant/Defendant.

Heard: 1st October, 9th October, and 30th October, 2020

Civil Procedure - Application to set aside judgment in default of acknowledgment of service – Effect of failure to file form of defence (form 5) and form of application to pay by instalments (form 6) – Whether defendant's conduct of filing an acknowledgment of service after being served with default judgment amounts to a waiver of irregularity of service of the claim – Whether default judgment was irregularly obtained.

Cor: V. Smith, J (Ag.)

Introduction

[1] This is an application to set aside a judgment in default of acknowledgment of service. It arises from a claim in respect of a motor vehicle accident. On the 23rd day of December, 2015, the respondent/claimant herein filed a claim form and

particulars of claim seeking damages from the applicant/defendant as a result of the accident which took place on the 26th day of October, 2012 along Port Henderson Road in the parish of St Catherine.

[2] The services of Brenda Singleton, a Process Server, were engaged for the purposes of serving the claim form and particulars of claim on the applicant/defendant. By way of her affidavit of service, Ms. Singleton indicates that this was done on the 16th day of January, 2016 by effecting personal service on Edward McCarthy, the applicant/defendant herein, at Lot 106 Chesterfield Road, Bridgeport, St Catherine. Though Mr. McCarthy indicates that this address is a family home and he ceased living there as of 2004, he accepts that it is his registered address and the address at which he receives his mail and other correspondence.

[3] The applicant/defendant did not file an acknowledgment of service nor was a defence filed in relation to the claim. Judgment in default of acknowledgment of service was entered on the 9th day of July, 2018. Once again, the services of Brenda Singleton were engaged and her affidavit evidence is that she served the judgment in default with an accompanying letter on Hubert McCarthy, the brother of Edward McCarthy. The applicant/defendant agrees that these documents were brought to his attention and indicates that he made arrangements for them to be delivered to his attorney-at-law from whom he sought legal advice. By way of a notice of application for court orders filed on the 9th day of April, 2019, the applicant/defendant is now seeking, inter alia, to have the default judgment set aside.

Background

[4] The applicant/defendant disputes that he was ever served with the claim form and particulars of claim or any documents in relation to the suit and indicates that he was only made aware of the matter before the court as a result of the judgment in default that was brought to his attention. He instructed his attorney to make checks

at the Supreme Court to ascertain what was filed. Having done so, he was advised by his attorney that the claim form did not have a form of defence (form 5) nor a form of application to pay by instalments (form 6) attached as is required by rule 8.16 of the Civil Procedure Rules, 2002 (CPR).

[5] This being a claim for money and the applicant/defendant being an individual, the form of application to pay by instalments ought to have accompanied the claim form when it was being served. There is no dispute between the parties that the said form was not served on the applicant/defendant and as such the respondent/claimant would be in breach of rule 8.16(1)(e). The applicant/defendant also contends that based on what was filed by the respondent/claimant, form 5 was not included in the documents that were purportedly served. The respondent/claimant maintains that the form of defence was included in the documents that were served. In the affidavit of service sworn to by Brenda Singleton and filed on the 19th day of February, 2016, she speaks to the claim form and particulars of claim but gives no specifics of any accompanying documents.

[6] A check of the court's records has revealed that the claim form and particulars of claim filed by the respondent/claimant on the 23rd day of December, 2015 were only accompanied by a form of acknowledgement of service and the prescribed notes for defendants pursuant to rules 8.16(1)(a) and 8.16(1)(c).

Applicant/defendant's submissions

[7] The applicant's/defendant's assertion that he was never served with the claim form and particulars of claim is keenly contested by the respondent/claimant. The applicant/defendant in his notice of application for court orders, filed on the 9th day of April 2019, sought, inter alia, an order requiring the process server to attend court for cross-examination. Ms. Brenda Singleton, the process server herein, attended a virtual hearing in the matter on the 1st day of October, 2020 where she was cross-examined at length by Mr. Neale on behalf of Mr. McCarthy.

[8] The affidavit evidence of Ms. Singleton is that she is a private investigator/process server and that on the 16th day of January, 2016 at approximately 3:25pm she personally served Edward McCarthy, the applicant/defendant herein, with claim form and particulars of claim dated December 22, 2015. She indicates that service was effected at Lot 106, Chesterfield Road, Bridgeport in the parish of Saint Catherine and at the time of service, the applicant/defendant was not known to her, but admitted to being Edward McCarthy.

[9] It was borne out under cross-examination, that on the day of the purported service, Ms. Singleton drove by the abovementioned address and saw an individual walking at the side of the house thereon. She asserts that she beckoned to the individual and told the person that she was there to see Edward McCarthy at which point the individual said that he was Edward McCarthy. Ms. Singleton admits that she did not know Edward McCarthy before, did not know what he looked like, did not have a picture of him, nor was she in the company of someone who knew him personally.

[10] She further admits that the person who identified himself as being Edward McCarthy, was not requested by her to (nor did he) provide any means of identification. When questioned as to whether she did not think it prudent to ensure that the person she was there to serve was actually the person being served, she indicated that as she was at the address for service, she did not think it necessary to request identification. When questioned as to whether she knew if anyone else resided at the address, her response was that she had no need to know because enquiring if others lived there was not pertinent to what she went there about. She accepts that it is possible that there were other occupants of the house but that was not something she was interested in. She also acknowledged that she was not in a position to dispute whether or not Mr. McCarthy was residing elsewhere at the time, but maintains that the abovementioned address was the address she received for him.

[11] It was suggested to her that she does not know for sure if the person she served is Edward McCarthy. She responded by saying that she has no reason to believe that the person who acknowledged being Edward McCarthy is not in fact him. When asked if she would be able to identify the person who indicated to her that he was Edward McCarthy, she responded by saying that she was not sure as she would have seen the person almost seven years ago. Ms. Singleton was then asked to have a look at the applicant/defendant who was seated beside Mr. Neale and to say whether or not she knew him. Her response was "That person wants to resemble the person I served. Maybe in person, I could make a better judgment, the lighting in your office is not great." It was suggested to her that she did not serve Edward McCarthy, the applicant/defendant herein, with which suggestion she disagreed.

[12] Counsel for the applicant/defendant submits that based on the cross-examination of Ms. Singleton, there is sufficient evidence to persuade this court on a balance of probabilities that the claim form and particulars of claim were not personally served.

[13] The applicant/defendant further asserts that even if the court was to find that he was served with the claim form and the accompanying documents, the failure to include forms 5 and 6 in the documents served, would render the service irregular. Mr. Neale contends that Mr. McCarthy has at no time admitted to the claim and has not acted in a manner that would waive the irregularity of the service. He avers that the resulting judgment entered would have been irregularly obtained and thus based on the circumstances of this case the judgment in default ought to be set aside as of right.

Respondent/claimant's submissions

[14] The respondent/claimant asserts that personal service was effected on the applicant/defendant herein and submits that he has failed, on a balance of probabilities, to prove that it was not. The applicant/defendant's affidavit, filed on

the 9th day of April, 2019 was allowed to stand as his evidence in chief. Thereafter, he was subjected to cross-examination by Ms. Allison Lawrence, counsel for the respondent/claimant.

[15] Mr. McCarthy states in his affidavit evidence that he now resides in Florida in the United States of America. He contends that on the 15th day of March, 2019 a friend of his sent him photographs via the social media platform known as 'WhatsApp'. These photographs were of the contents of an envelope, which had his name on it. The envelope contained a letter from the respondent/claimant's attorney-at-law as well as a default judgment. It is the evidence of the applicant/defendant that he forwarded these documents to his attorney-at-law and sought legal advice. He states that he was shown the affidavit of service of Brenda Singleton filed on the 19th day of February, 2016 indicating that she served him with a claim form and particulars of claim dated December 22, 2015, but denies ever being served with any documents related to the suit and states that he has never met Ms. Singleton. He further states that Lot 106, Chesterfield Road, Bridgeport in the parish of Saint Catherine is a family home where he resided until sometime in 2004. The house is now occupied by his brother and his brother's family but is used as his registered address where he receives mail and other correspondence.

[16] He disputes being at the premises on the 16th day of January, 2016 and vehemently denies that Ms. Singleton effected personal service of the claim form and particulars of claim on him. He is adamant that he first knew of these court proceedings when the judgment in default was brought to his attention.

[17] The applicant/defendant was cross-examined by Ms. Lawrence and under cross-examination he accepted that Lot 106 Chesterfield Road, Bridgeport, St Catherine is a family home where he grew up and he would have been living there up until 2004. He agreed that as a family home he could visit there as he liked and accepted that it is possible that he could have visited there in the month of January, 2016. He stated that up to 2004, he lived at the address with his brother, Hubert

McCarthy and his brother's girlfriend both of whom remained at the house after he moved.

[18] It is the evidence of the applicant/defendant under cross-examination that in January, 2016 his brother, his brother's new girlfriend and her children were living at the premises. He does not dispute that he still uses the premises as his registered address but indicates that he relies on his brother and a friend who lives across the road to bring correspondence to his attention. This correspondence he receives by pictures on 'WhatsApp'. He maintains that the first time he was made aware of this claim was when the judgment in default was brought to his attention and disagrees with the suggestion, that he was at the premises on the 16th day of January, 2016. It was further suggested to him that he would have met Ms. Singleton on the said date. He replied by saying that he has never met her before, as the day of this hearing is the first that he has seen her and denies being served with any court documents by her.

[19] Ms. Lawrence submits that the applicant/defendant was personally served and has failed, on a balance of probabilities, to prove that he was not served with the claim form and particulars of claim herein. She contends that Ms. Singleton should be accepted as a witness of truth and a witness upon whom the court can rely. She therefore asks the court to find that the applicant/defendant was duly served as per Ms. Singleton's affidavit of service filed on February 19, 2016.

[20] Ms. Lawrence accepts that the claim form that was served was not accompanied by form 6 as provided for by rule 8.16(1)(e) but disagrees that form 5 was not included. She agrees that the failure to include either of these forms would result in the service being irregular. She suggests that even though the additional document was not served, it would have been clear from the claim form that there should have been an additional document. She submits that the applicant/defendant waived his right to receive any additional documents when he filed an acknowledgment of service, which in effect, put in an appearance in the matter. She intimates therefore, that by taking part in the proceedings he subjected

himself to the jurisdiction of the court and having not challenged the jurisdiction of the court, this would have served to waive any irregularity in the service. As such, he would now be estopped from raising it.

[21] In addition, she argues that if the judgment in default were to be set aside, the respondent/claimant would be severely prejudiced as fresh proceedings could not be instituted due to the claim now being statute-barred She contends therefore that should the court be minded to set aside the default judgment, the court has the power to dispense with the need to re-serve the claim form and the accompanying documents thereby allowing the claim to proceed.

[22] She also submits that the application to set aside the judgment in default is not properly before the court as the procedure in rule 13.4 of the CPR was not complied with. She asserts that this is because no draft of the proposed defence was exhibited as required by rule 13.4(3).

Issues to be determined:

[23] There are a number of issues which arise for the court's determination:

i. Whether service of the claim form and particulars of claim was effected on the applicant/defendant?

ii. If service was effected:

(i) Was the service irregular?

(ii) If service was irregular, was the irregularity waived?

(iii) Was the application to set aside properly before the court?

(iv) If the judgment is set aside, should the court dispense with service of the claim form?

Whether service of the claim form and particulars of claim was effected on the applicant/defendant?

[24] It is a requirement of the CPR that a claimant proves service of the claim form and particulars of claim on the defendant. Rule 12.4 states, inter alia, as follows:

> 12.4 The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if –
>
> (a) the claimant proves service of the claim form and particulars of claim on that defendant;

[25] It may be useful at this point to set out the provisions of rule 5.5 dealing with proof of service:

> 5.5(1) Personal service of the claim form is proved by an affidavit sworn by the server stating –
>
> (a) the date and time of service;
>
> (b) the precise place or address at which it was served;
>
> (c) the precise manner by which the person on whom the claim form was served was identified; and
>
> (d) precisely how the claim form was served.

[26] In the instant case, the respondent/claimant has sought to prove through the affidavit of service of Brenda Singleton filed on February 19, 2016 that service was duly effected. There being no acknowledgment of service nor defence filed in response, the registry entered judgment in default. The applicant/defendant now seeks to have that judgment set aside by averring that he was never served and that the respondent/claimant failed to comply with rule 12.4(a). It is therefore for the applicant/defendant to prove on a balance of probabilities that he was not served.

[27] Counsel for the respondent/claimant relied on ***Lyn's Funeral Home v. Paul Fearon*** [2018] JMSC Civ 133, in which there was a claim for a specified sum of

money. The claim form and particulars of claim were served on the defendant who failed to file an acknowledgment of service or a defence and as a result default judgment was entered. Although form 6 was not served with the claim form as is required, the defendant was found to have been served with the claim form and particulars of claim and instead of availing himself of the provisions of rule 9.6 of the CPR to challenge the court's jurisdiction, chose to file an acknowledgment of service after judgment in default was entered. The court held that to file an acknowledgment of service at that point served no useful purpose. Integral to the court's findings was the fact that there were divergent views on affidavit evidence regarding service and as such the defendant should have called upon the process server to be cross-examined, but did not do so. He therefore had not discharged his obligation to prove on a balance of probabilities that he had not been served and the court held that the judgment in default had been properly entered and should therefore stand. This court is of the view, however, that this case can be distinguished from the one at hand.

[28] In the instant case, the issue of service of the claim form, particulars of claim and additional documents is stoutly contested between the parties. On the one hand, the applicant/defendant maintains that he was never served with these documents whereas the respondent/claimant, through his process server, avers that service was in fact effected. In light of the conflicting evidence both the process server and the applicant/defendant were required to undergo cross-examination.

[29] It was borne out under cross-examination of Ms. Singleton, that she did not know the applicant/defendant prior to the date she indicates he was served. She did not have a picture or description of the person she intended to serve nor was she accompanied by anyone who knew him and would have been in a position to identify him. She did not see any identification of the person she said she served, nor did anyone assist in independently identifying the person being served. Her evidence is that she drove by the address that she was given and saw an individual walking to the side of the house. She beckoned to the person, when he approached, she told him she was looking for Edward McCarthy and the person

then identified himself as such. This is the basis for her saying that the applicant/defendant was personally served.

[30] When asked at the virtual hearing to look at the applicant/defendant, who was present and to confirm that he was the person she served on January 16, 2016, her response was that “the person wants to resemble the person I served”. Ms. Singleton did however indicate that the lighting where the applicant/defendant was located was not the best and she could perhaps make a better judgment if it was done face to face. The court did take note of the lighting at the time but is not of the view that it prevented the applicant/defendant from being clearly seen.

[31] It is the evidence of the applicant/defendant that he had ceased to reside at the premises in 2004 and that in January of 2016, his brother and his family were residing there. He accepts that the premises is used as his registered address and that the system by which mail is brought to his attention still exists but categorically refutes meeting Ms. Singleton on January 16, 2016 or being served with any documents on that day. In fact, it is his evidence that although he may have visited the premises in the month of January, 2016 he was not there on the 16th day. Despite rigorous cross-examination the applicant/defendant maintained his position and was consistent in his account.

[32] Ms Singleton has, strictly speaking, complied with rule 5.5(1), as it relates to providing proof of personal service. However, she relies solely on having travelled to the registered address where the person she spoke to acknowledged being Edward McCarthy, as proof that she served the applicant/defendant herein. This causes the court to pause with concern, especially as it relates to her ability to identify the person upon whom she was effecting service. The evidence of Ms. Singleton must be looked at in light of the applicant’s denial, on oath, that he was there that day. The court had an opportunity to observe the applicant/defendant when he was being cross-examined. He was not shaken under cross-examination and remained consistent in his account. Having noted his demeanour, his body language, how he responded to questions asked of him and suggestions made to

him, the court finds that he is a credible witness and a witness upon whom the court can rely.

[33] Rule 13.2(1) states, inter alia, that:

> 13.2(1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because –
>
> (a) In the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;

[34] Having carefully weighed the evidence as it relates to the purported service on January 16, 2016, this court is not satisfied on a balance of probabilities that the applicant/defendant was served. As a consequence, rule 12.4(a) was not complied with and as such, the judgment in default entered on the 9th day of July, 2018 was irregularly obtained and must be set aside pursuant to rule 13.2(1)(a).

[35] If the applicant/defendant had been found to have been served, the question then arises as to whether the outcome would be different and the other issues would therefore have to be addressed.

If the applicant/defendant had been found to have been served, was service irregular?

[36] It may be useful at this stage to examine the provisions of rule 8.16(1) of the CPR which provides as follows:

> 8.16(1) when a claim form is served on a defendant it must be accompanied by –
>
> (a) a form of acknowledgment of service (form 3 or 4);
> (b) a form of defence (form 5)
> (c) the prescribed notes for defendants (form 1A or 2A)
> (d) a copy of any order made under rules 8.2 or 8.13; and,
> (e) if the claim is for money and the defendant is an individual, a form of application to pay by instalments (form 6).

[37] The applicant/defendant posits that the respondent/claimant has not abided by the dictates of rule 8.16(1) and has failed specifically to comply with rules 8.16(1)(b) and 8.16(1)(e) which failure renders the service of the claim form irregular. In support of this submission, counsel for the applicant/defendant cites and relies on the authority of ***Dorothy Vendryes v Richard Keane and Karene Keane*** [2011] JMCA Civ 15. In this case, the claimant served the claim form and the particulars of claim on the defendant. However, the other documents that were required to be served by virtue of rule 8.16(1) were not served. The defendant failed to file an acknowledgement of service and as such, the claimant sought and obtained judgment in default of acknowledgement of service. The court ruled that the judgment was irregularly obtained. Sykes, J (as he then was) found that there was non-compliance with rule 8.16(1) and as such the irregularly obtained judgment had to be set aside as of right.

[38] On appeal, Harris, J.A., in upholding the decision of Sykes, J stated:

> *"Rule 8.16(1) expressly specifies that, at the time of service, the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word "must", as used in the context of the rule is absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated, offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside. The learned judge was correct in so doing."*

[39] Counsel, Mr. Neale, also relied on the case of ***Cedric Harper v David Lee*** [2017] JMCC COMM. 06. In this case, the claimant brought a claim against the defendant for recovery of debt, arising from a debt repayment guarantee executed by the defendant. Similar to the instant case, an application to pay by instalments (form 6) was not served together with the claim form as required by rule 8.16(1)(e). Laing J, ruled that the service of the claim form and particulars of claim should be set aside as being irregular. It was noted in this case that even in circumstances where the service of a claim form is irregular, this irregularity can be cured by re-serving the claim form with all the requisite documents.

[40] In the Court of Appeal case of ***B & J Equipment Rental Limited v Joseph Nanco*** [2013] JMCA Civ 2, Morrison JA (as he then was) in delivering judgment on a procedural appeal, stated:

> *"[37] Indeed, it is difficult to see why, as a matter of principle, it should follow from a failure to comply with rule 8.16(1), which has to do with what documents are to be served with a claim form, that a claim form served without accompanying documents should itself be a nullity. While the purported service in such a case would obviously be irregular, as Sykes J and this court found in* ***Vendrys****, I would have thought that the validity of the claim form itself would depend on other factors, such as whether it was in accordance with Part 8 of the CPR, which governs how to start proceedings. It is equally difficult to see why a claimant, who has failed to effect proper service of a claim form because of non-compliance with rule 8.16(1) should not be able to take the necessary step to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule."*

[41] It is clear therefore, that service of a claim form without the accompanying documents as prescribed by rule 8.16(1) does not render the claim form a nullity, but instead renders the service irregular. Such an irregularity is capable of being cured and there is an avenue open to a claimant who wishes to cure the irregular service of a claim form.

[42] There seems to be no dispute that the documents filed by the respondent/claimant did not contain the form of defence nor the form of application to pay by instalments. What is filed by the respondent/claimant is to mirror what is to be served in the claim, thus on a balance of probabilities, this court has no difficulty in finding that what was purportedly served by the respondent/claimant would not have contained the requisite forms 5 and 6, thus running afoul of the provisions of rules 8.16(1)(b) and 8.16(1)(e) and thereby rendering the purported service irregular.

Was the irregular service waived?

[43] In the instant case, no steps were taken by the respondent/claimant to have the claim form re-served with the required documents in a bid to cure the procedural irregularity. However, it is contended by the respondent/claimant that the

irregularity was waived by the conduct of the applicant/defendant in filing an acknowledgment of service.

[44] Counsel placed great reliance on the ***Nanco*** case in which the circumstances were that the defendant was served with a claim form, particulars of claim and a form of acknowledgment of service, but not with a form of defence nor the prescribed notes for defendants as required by the CPR. An acknowledgment of service was filed indicating an intention to defend the claim. However, the defendant failed to file a defence and judgment in default was entered against him. The defendant's attorneys later took part in a hearing for an order for interim payments as well as a hearing for the assessment of damages. Final judgment was then entered and served on the defendant. At no point did the defendant make an application to challenge the court's jurisdiction as a result of the claimant's failure to serve all of the required documents with the claim form. Based on the conduct of the defendant, the Court found that he had waived the irregularity of service.

[45] The facts in the ***Nanco*** case, however, can be distinguished from the facts in the case at bar. In the ***Nanco*** case, the acknowledgment of service was filed in response to the defendant being served with the claim form as well as some of the other relevant documents. In addition, the defendant participated through counsel, in various stages of the matter before the court, thus clearly subjecting himself to its jurisdiction. This is in the context of the defendant not making any application to challenge the court's jurisdiction.

[46] In the case of ***Rayan Hunter v. Shantell Richards and Stephanie Richards*** [2020] JMCA Civ 17, the appellant filed acknowledgments of service in relation to claims for damages for personal injuries sustained in a motor vehicle accident. In doing so, the appellant acknowledged receipt of the claims, indicated that he did not admit to the claims in whole or in part and did not indicate whether he intended to defend them. He however indicated at the top of the forms, that:

> *"This Acknowledgment of Service is filed for the sole purpose of making an application to set aside service of the Claim Form and Particulars of Claim pursuant to rule 9.6 of the Civil Procedure Rules 2002."*

[47] McDonald-Bishop JA opined therein:

> *"[21] In this case, the appellant, having been served with invalid claim forms, acted on the premise that the court did not have the jurisdiction to try him, or alternatively, that it should not do so, given the breach of procedure relative to service. To approach the court to raise the point, he acknowledged the service of each claim on him but expressly indicated his reason and purpose for filing the acknowledgment of service. His purpose was limited in scope and effect as expressly and unambiguously stated by him.*
>
> *[22] There is no question that the acknowledgment of service of each claim was limited to raising the issue of jurisdiction, pursuant to rule 9.6, for the purpose of having the service set aside. It was for no other purpose, as the appellant did not indicate any intention to defend the claim and neither did he admit the claim. He also refrained from taking any other step in the proceedings, beyond filing the acknowledgments of service for the limited purpose he had expressed with an application to that effect. He was lawfully entitled to make such an application to the court in the way he did.*

[48] It was held, that it was wrong in such circumstances to treat the acknowledgments of service as a waiver of an irregularity in service and as an unconditional response to the claims.

[49] In the instant case, the applicant/defendant filed an acknowledgment of service only after being served with the judgment in default. It is of note that he indicated clearly within the acknowledgment of service that he had not been served with the claim form nor the particulars of claim. Though he also indicated on the form that it was his intention to defend the claim, he qualified this position by stating clearly that his intention was to apply to set aside the default judgment.

[50] The inescapable inference to be drawn from this qualification is that there was no intention on the part of the applicant to enter a defence, but rather, to bring to the court's attention the fact that rule 12.4 had not been complied with and that as a result, the judgment in default would have been irregularly obtained and ought to be set aside pursuant to rule 13.2. The court notes that his application for court

orders to have the default judgment set aside was filed on April 9, 2019 whereas the acknowledgment of service was filed on April 10, 2019. It would seem therefore that the acknowledgment of service was filed for the narrow purpose of establishing that rule 12.4 had not been complied with due to the failure of the respondent/claimant to serve the claim form and particulars of claim on him.

[51] Though in the case of ***Rayan Hunter*** the acknowledgments of service were filed with respect to the receipt of the claim forms, in the instant case, the acknowledgment of service was filed in response to the receipt of the judgment in default. Despite this distinction, this court finds that the principle enunciated in the ***Rayan Hunter*** case is applicable in this instance.

[52] In this case, the acknowledgment of service by the defendant was filed for the limited purpose of indicating that he was not served with either the claim form or particulars of claim and to indicate his intention to apply to set aside the judgment in default. The court therefore finds that the applicant/defendant, by his conduct in filing the acknowledgment of service with the express and clear intention of applying to set aside the default judgment on the basis of him not being served with the claim form and particulars of claim, cannot be said to have waived the irregularity of service.

Is the application to set aside properly before the court?

[53] Counsel for the respondent/claimant contends that the applicant/defendant's application to set aside the default judgment is not properly before the court as the applicant/defendant failed to comply with the provisions of rule 13.4, which sets out the procedure for applications to vary or set aside judgments.

[54] Rule 13.4 states:

> 13.4(1) An application may be made by any person who is directly affected by the entry of judgment.
>
> (2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence.

[55] In the application to set aside made by the applicant/defendant, no draft of a proposed defence was exhibited. Counsel for the respondent/claimant therefore relied on ***Bar.John Industrial Supplies Limited v. Honey Bee Fruit Juice Limited*** [2011] JMCA Civ 7, in support of her contention. In that case, the appellant had been served with a claim form but failed to file an acknowledgment of service. Instead, a defence was filed, but was deemed to have been filed out of time. Judgment was entered against the appellant who then applied to set aside the judgment. The application to set aside was refused on the basis that the defence, having been filed out of time, was not properly before the court and as such, the judgment in default had been properly entered. This was upheld on appeal.

[56] It is this court's view that the case at bar can be distinguished from the ***Bar.John*** case as that case turned on the fact that the default judgment was properly entered. Hibbert JA (Ag) who delivered the judgment for the panel stated:

> *"[17] The appellant, having failed to show that the judgment was improperly entered, cannot therefore rely on the provisions of rule 13.2(1) which could only assist if any of the conditions in rule 12.4 was not satisfied."*

[57] In the instant case, the irregularity of service was neither cured by the respondent/claimant, nor waived by the applicant/defendant and as such, the judgment could not be said to have been properly entered. The circumstances of the case at bar can thus be distinguished from one in which the application is made pursuant to rule 13.3 where the applicant seeks to rely on the fact that he has a real prospect of successfully defending the claim as the basis for the judgment to be set aside. In such circumstances, it would be necessary for the draft of the proposed defence to be available so as to allow the court to make such a determination and it would be understandable why in such circumstances the absence of the draft of the proposed defence would be fatal.

[58] Additionally, it is worthy of note that rule 13.2(2) states that the court may set aside judgment under that rule on or without an application. This speaks to the court's

inherent jurisdiction to deal with matters in circumstances where the judgment was wrongly entered and ought to be set aside as of right. As a result, it is the view of this court, that the failure on the part of the applicant/defendant to file a draft of the proposed defence as per rule 13.4(3) would not, in circumstances where the judgment was irregularly obtained, be fatal to his application to set aside. To find otherwise would run contrary to the overriding objective to treat with cases justly. Reliance on ***Bar.John*** in the circumstances of the instant case, is therefore misplaced.

Should the court dispense with service of the claim form?

[59] Finally, counsel for the respondent/claimant asserts that if the judgment were to be set aside this would result in severe prejudice to the respondent/claimant, as the claim would now be statute-barred. The claim originated as a result of an accident that took place in 2012. Thus, based on the provisions of the Limitation of Actions Act the respondent/claimant would have six (6) years from the date the cause of action arose to bring the claim. Setting aside the judgment, she asserts, would therefore have the result of being a final disposition of the claim. She thus argues that if the court finds that the judgment ought to be set aside then the circumstances of the instant case would make it fitting for the service or re-service of the claim form to be dispensed with. She contends that this would serve to cure any irregularity of service and thus allow for the matter to be tried on its merits. In support of this contention the respondent/claimant relied on the judgments of Master N. Hart-Hines (as she then was) in the cases of ***Alicia Hughes v. PAJ Imports Limited*** [2019] JMSC Civ 93 and ***Kerry-Ann Barnaby-Stoddart v. Renville Barker and Eric Williams*** [2019] JMSC Civ 118 which examined, inter alia, the issue as to whether the court has jurisdiction to dispense with the service and/or re-service of a claim form.

[60] In response, Mr. Neale on behalf of the applicant/defendant argues that the court has no jurisdiction to dispense with the service of a claim form. He contends that part 5 of the rules deals with the service of claim forms within the jurisdiction and

it is not contemplated within that section that service can be dispensed with. He further argues that if it were the intention of the crafters of the rules to allow for the service of a claim form to be dispensed with then this provision would have been included in part 5 of the CPR. He goes further to say that immediately thereafter, part 6 of the rules deals with service of other documents and as such, it is clear that it treats with the service of documents other than claim forms. He therefore argues that rule 6.8(1) which empowers the court to dispense with the service of a document if it is appropriate to do so, should only be construed as pertaining to documents other than claim forms. Any other interpretation, he contends, would be misplaced and would not accurately reflect what was intended by the authors of the CPR.

[61] In the case of ***Alicia Hughes v. PAJ Imports Limited***, the court held the view that the defendant had been served with the claim form and particulars of claim and was thus aware of the proceedings, yet chose not to take the requisite actions to address the matter. Additionally, significant delays on the part of the court registry hindered the progression of the matter, during which the claim became statute-barred. The possible prejudice to be faced by both parties was also weighed by the learned Master. Having set aside the default judgment pursuant to rule 13.3 and taking all of the exceptional circumstances into account, the court made an order dispensing with the need for the claim form to be re-served as it found that it was appropriate so to do.

[62] In the latter case of ***Kerry-Ann Barnaby-Stoddart v. Renville Barker and Eric Williams***, the applicant gave evidence that he was never served with the claim form and particulars of claim, whereas the process server did not attend for the purposes of cross-examination. The court gave greater weight to the sworn testimony of the applicant than the affidavit evidence of the process server and on that basis held that the judgment in default should be set aside. In considering whether to dispense with the service of the claim form, the learned Master took into account the conduct of the defendant. The defendant's application to set aside the default judgment was made nearly 2 years after he was served with the

judgment in default. Additionally, he filed his affidavit in support some 20 months later. The defendant failed to give any explanation for the significant delays and the learned Master found that his conduct contributed to the significant delay in the progression of the matter. In particular, in paragraph [17]3 of her judgment, the learned Master stated:-

> *"It is not justice that the applicant should benefit from his dilatory conduct or nonchalance, now that the claim is statute-barred."*

She therefore opined that the exceptional circumstances of the case made it appropriate to dispense with the service of the claim form.

[63] The learned Master, in determining if the court has power to dispense with the service of a claim form, formed the view that Parts 5, 6, 7 and 8 of the CPR should be read conjunctively. Thus, she concluded that the rules relating to the service of a claim form are not just confined to Part 5 of the rules and as such, the power to dispense with the service of a document, as provided by rule 6.8, also extends to the claim form. The learned Master was careful to point out that this discretionary power should be exercised sparingly and only in exceptional circumstances.

[64] Even if this court accepts the view that it has the power to dispense with the service or re-service of a claim form, there are no exceptional circumstances in the instant case, which would warrant the exercise of such a power. The cause of action arose from a motor vehicle accident, which occurred on the 26th day of October, 2012. The claim form was filed on the 23rd day of December, 2015, that is, a little more than 3 years after the cause of action arose. The request for judgment in default was filed on July 12, 2018, a mere 3 months prior to the matter becoming statute-barred. Based on the affidavit evidence of Ms. Singleton, service of the default judgment was effected on March 7, 2019. The affidavit of service in proof thereof was not filed until September 24, 2019. The notice of application for court orders filed by the applicant/defendant to set aside the default judgment along with his affidavit in support were filed on April 9, 2019 and an acknowledgment of service on the 10th of April, 2019.

[65] This court therefore, cannot find that the applicant/defendant contributed in any way to the delay in the progression of the claim. Though the court is mindful of the effect setting aside the default judgment will have on the respondent/claimant in circumstances where the claim is now statute-barred, having regard to the chronology of events, it is clear that the applicant/defendant acted with alacrity once notice of the default judgment was brought to his attention.

Conclusion

[66] At this juncture, I wish to take the opportunity to express my appreciation to counsel on both sides for the thorough oral submissions made and for the list of authorities cited in support thereof. Though I may not have dealt with each authority individually, they were read and taken into account in treating with the application before this court.

[67] Having carefully reviewed the affidavit evidence as also the evidence given under cross-examination by the applicant/defendant and the process server, the court finds on a balance of probabilities that service of the claim form and particulars of claim was not effected on the applicant/defendant, Mr. Edward McCarthy. Consequently, rule 12.4 was not complied with and as such, the judgment in default would have been irregularly obtained and must be set aside pursuant to rule 13.2.

[68] Even if there was a finding that service of the claim form and particulars of claim had been effected on the applicant/defendant, this court finds that the form of defence and form for payment by instalments were not included with the documents to be served and as such, any resultant service would have been irregular. No action was taken by the respondent/claimant to cure this irregularity nor was anything done by the applicant/defendant which would have resulted in the irregularity being waived. It follows therefore, that the default judgment entered would have been irregularly obtained and as such must be set aside pursuant to rule 13.2.

[69] In light of the claim now being statute-barred, the court is acutely aware of the hardship that the setting aside of the judgment will have on the respondent/claimant as it results in the final disposition of the claim. However, even if the court was of the view that it had the power to dispense with service of the claim form, there are no exceptional circumstances in the instant case that would justify the exercise of such a power.

[70] In light of the foregoing, it is hereby ordered as follows:

1. Judgment in default of acknowledgment of service filed on the 9th day of July, 2018 in Binder No. 772 Folio No. 462 is hereby set aside.
2. Costs to the applicant/defendant to be taxed if not agreed.
3. Leave to appeal granted to the Claimant
4. Formal order to be prepared filed and served by the applicant/defendant.