



[2012] JMCC Comm 14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 CD 00004

BETWEEN	CAPITAL AND CREDIT MERCHANT BANK LIMITED	CLAIMANT
AND	LENBERT LITTLE-WHITE	1ST DEFENDANT
AND	CHERYL RYMAN	2ND DEFENDANT

IN CHAMBERS

Ms. Taneisha Brown instructed by Henlin Gibson Henlin for the Claimant.

Mr. Daniel Chacko-Wilmot and Mrs. Sasha Vacianna-Riley instructed by Vacianna & Whittingham for the Defendants.

**Heard: 19th July, 17th September, 18th October, 25th October 2012 and 2nd
November 2012**

**CIVIL PRACTICE AND PROCEDURE – APPLICATION TO SET ASIDE DEFAULT
JUDGMENT – WHETHER COURT PROCESS PERSONALLY SERVED – WHETHER
PROPOSED DEFENCE SHOWS REAL PROSPECT OF SUCCESSFULLY DEFENDING
CLAIM**

MANGATAL J:

[1] The Claimant Capital and Credit Merchant Bank Limited %CCMB+ is a limited liability company which offers banking services to the public.

[2] The Defendants are and were at all material times, directors of Orange Valley Holdings Limited %the Borrower+. CCMB loaned the Borrower the sum of \$17,000,000.00. The loan was disbursed in 2009. By a Joint and Several Guarantee in writing dated August 17, 2009, and in consideration of CCMB granting the loan facility to

the Borrower, the Defendants irrevocably and unconditionally guaranteed the payment of all principal and interest and other amounts due or owing or to become due and owing by the borrower to CCMB ~~or~~ remaining unpaid by the Borrower to the Claimant+.

[3] In its Particulars of Claim, CCMB states that under the terms of the Joint and Several Guarantee, it was agreed, amongst other things that:

1. *The Guarantee shall apply to and secure the balance due or remaining unpaid to the Claimant under the Agreement [between the Claimant and the Borrower]*
2. *The liability of the Guarantors is that of principal debtor as between the Guarantor Defendants and the Claimant.*
3. *The Guarantor Defendants' liability to make payment under the Guarantee arises forthwith after demand for payment has been made in writing and is personally delivered or sent by registered post.*
4. *Upon default in payment of principal and interest owing by the Borrower, the Claimant may treat guaranteed liabilities as due and payable and to be forthwith collected.*
5. *The written statement of an Attorney-at-Law acting on behalf of the Claimant as to unpaid amount by the Borrower shall be conclusive evidence and prima facie evidence against the Guarantor Defendants as to the amount remaining unpaid to the Claimants.*
6. *It would constitute an event of default for the Borrower to default in payment of any amount payable when it falls due.*

[4] The Borrower defaulted and failed and/or neglected to repay the sums outstanding and interest that had accrued due. Pursuant to the Guarantee, CCMB states that they made a formal demand on the Defendants requiring them to make good upon their obligations under the Guarantee. CCMB claims that the Defendants failed, refused and or neglected to honour their obligations under the Guarantee and are liable to CCMB.

[5] CCMB filed Suit against the Defendants, and filed Affidavits attesting to service on the Defendants of the required Court process. In default of the Defendants

acknowledging service, CCMB entered default judgment on the 9th of February 2012, a day after acknowledgement of service would have been due.

[6] By Notice of Application for Court Orders filed April 24 2012 the Defendants have applied to set aside a Default Judgment entered against them as follows:

1. *That the Judgment entered in default of Acknowledgement of Service and Defence granted by this Honourable Court on the 9th of February 2012 and all consequent proceedings, including any order for Seizure and Sale, and any processes in execution of the Judgment be set aside and the matter proceed to trial on the merits.*
2. *That the Defendants be at liberty to file a Defence within 7 days of the date of the Order made on this Application.*
3. *Such further and other ... relief as this Honourable Court may deem just.*
4. *Costs of, and incidental to this application be costs in the claim.*

[7] The stated grounds for the application are as follows:

1. *The Default Judgment was not properly entered as neither of the Defendants/ Applicants was properly served, or was served at all, with the Claim Form and Particulars of Claim.*
2. *In the alternative, the Defendants/ Applicants have a reasonable prospect of successfully defending the claim.*
3. *The Defendants / Applicants have applied to the court as soon as was reasonably practicable after finding out that judgment has been entered.*
4. *The Defendants/ Applicants have given a good explanation for the failure to file an Acknowledgement of Service.*
5. *Rules 26.8 of the Civil Procedure Rules 2002.*
6. *That it is just to do so.*

[8] There were 5 Affidavits filed on behalf of the Defendants, i.e. the Affidavit of Lennie Little-White, sworn to on the 24th April 2012, the Affidavit of Camille Richards, sworn to on the 24th April 2012, the Affidavit of Clifton Gallimore, sworn to on the 11th May 2012, and the Affidavits of Devon McAnuff and Donovan Haughton, both sworn to

on the 14th May 2012. However, only Mr. Little-White and Miss Richards came to Court and were available for cross-examination, even though it was understood that the other affiants would be required for cross-examination, based upon Notice of that intention filed on behalf of CCMB, and so I attach no weight to the Affidavits of Gallimore, McAnuff, and Haughton and will disregard them.

[9] On behalf of the Claimant, a number of Affidavits were referred to and relied upon, being the Affidavit of Service of the First Defendant, sworn to by process server Canute Ashmead on the 30th January 2012, Affidavit for Approval of Alternative Method of Service (on Second Defendant), sworn to on January 30 2012, again sworn to by Canute Ashmead,(these being the Affidavits filed prior to the entry of the default judgment), the Affidavit of Canute Ashmead in Response, sworn to on the 16th May 2012, Affidavit of Tanya Campbell, sworn to on the 16th of May 2012, and the Affidavit of Taneisha Brown, sworn to on the 16th May 2012. Only Mr. Ashmead was required by Counsel for the Defendants for cross-examination, and he attended and was cross-examined.

THE ENTRY OF DEFAULT JUDGMENT

[10] On the 9th of February 2012 judgment was entered against both Defendants in default of Acknowledgement of Service for the specific sum of \$15,033,287.73 plus interest at the rate of 6% per annum. It was Mr. Ashmead's evidence that he served as process server in this matter. He states that he served the Claim Form and Particulars of Claim and other required documents on the 1st Defendant Lennie Little-White at 16 South Avenue, Kingston 10, in the Parish of Saint Andrew on the 24th of January 2012 at approximately 3:35p.m. He states that upon inquiry, the 1st Defendant was pointed out to him by Mr. Little-White's secretary Camille Richards, and the 1st Defendant admitted that he was the person Mr. Ashmead was enquiring about. It is Mr. Ashmead's evidence that in his presence the 1st Defendant gave instructions to Camille Richards to accept the documents from him. Thereafter he claims to have seen Camille Richards pass the documents to the gentleman who identified himself as Lenbert Little-White. Mr. Ashmead states that Lenbert Little-White was not known to him before, but when asked

he admitted to being the 1st Defendant herein and he was also pointed out to him by his secretary Camille Richards. Mr. Little-White accepted the documents.

[11] The learned Master also approved the alternative method of service on the 2nd Defendant set out in the Affidavit for Approval of Alternative Method of Service. In that Affidavit Mr. Ashmead stated that he served the 2nd Defendant by leaving the Claim Form and Particulars of Claim and other documents by leaving them with the 1st Defendant Lenbert Little-White in paragraph 3 he states, "upon her instructions to do so". Mr. Ashmead further states that he effected service on the 2ND Defendant by leaving the documents with the 1st Defendant, who also works with the 2nd Defendant at 16 South Avenue, Kingston 10, in the Parish of Saint Andrew. Mr. Ashmead avers that Mr. Little-White advised that he would ensure that the documents come to the attention of the 2nd Defendant.

[12] At paragraphs 4-6 Mr. Ashmead states that he so served the documents at 16 South Avenue, Kingston 10, St. Andrew, on the 24th of January 2012 at approximately 3:35 p.m. At paragraph 8 Mr. Ashmead states that he verily believes that this method of service was sufficient to enable the 2nd Defendant to ascertain the contents of the documents on January 24 2012 or at a date soon thereafter.

THE DEFENDANTS' EVIDENCE IN SUPPORT OF THE APPLICATION TO SET ASIDE THE DEFAULT JUDGMENT

[13] An Acknowledgement of Service was filed on behalf of the Defendants on the 29th of May 2012. In that Acknowledgement it was stated that the Claim Form and Particulars of Claim were received on February 16 2012. I note that this Acknowledgement was filed on behalf of both Defendants. It is therefore not completely accurate to say, as Mr. Little-White has, in his subsequent Affidavits and submissions that, since the 2nd Defendant does not work at the Office at 16 South Avenue, Kingston 10, but works at an office located at 4 Beresford Close, Red Hills, (at an address which the Defendants say that the Claimant knew to be her address for service), serving the documents on the 1st Defendant does not properly constitute an adequate alternative

method of service on, and was not sufficient to enable the 2nd Defendant to ascertain the contents of the documents. I note that to date, there has been no Affidavit sworn to by Cheryl Ryman herself, even though an Acknowledgement of Service has been filed on her behalf. The most that can be gleaned is that the 1st Defendant is suggesting that the 2nd Defendant was unable to ascertain the contents of the documents until after the default judgment had already been entered against her. That is certainly not the best or most direct evidence available.

[14] In his Affidavit filed April 24 2012 in support of the application, Mr. Little-White, the 1st Defendant states that having read both of Mr. Ashmead's Affidavits, he is of the view that Mr. Ashmead has not given a truthful account of what transpired at Mr. Little-White's office at 16 South Avenue, Kingston 10, on the relevant day and time.

[15] Mr. Little-White avers that he was never at his office on the 24th January 2012 at the relevant time and therefore Mr. Ashmead could not have seen or personally served him with the documents.

[16] Mr. Little-White states that on the 23rd of January 2012, he travelled on business to Outameni Experience located in Trelawny and did not return to Kingston until the 25th of January 2012. Outameni Experience is the name of his business in Trelawny which is a tourist attraction that showcases the History and Culture of Jamaica. While at Outameni, Mr. Little-White claims to have stayed at the Great House of the property at Coopers Pen, Trelawny until he returned to Kingston in the afternoon of 25th January 2012.

[17] Mr. Little-White further avers that he never saw Mr. Ashmead until the 16th of April 2012 when he approached his vehicle and asked another person, a carpenter Mr. Clifton Gallimore who was nearby if he, Mr. Little-White was Lennie Little-White and that Mr. Ashmead proceeded to throw a brown envelope into his car, while he Mr. Little-White was sitting inside the car outside his office. When Mr. Little-White opened the

envelope after Mr. Ashmead had left, he saw that it contained an attested copy of the Default Judgment.

[18] On the issue of whether the Defendants have a real prospect of successfully defending the claim, a draft of the Defence was exhibited to Mr. Little-White's Affidavit. At paragraph 21, Mr. Little-White states that the essence of the defence is that CCMB failed to carry out its duty to advise the Defendants to seek independent legal advice before they signed the agreement making themselves Guarantors and that therefore the Defendants are not liable to pay the amount of principal and interest owed by the Borrower.

[19] Ms. Camille Richards also swore an Affidavit on behalf of both Defendants. She stated that having read Mr. Ashmead's two earlier Affidavits, she concluded that he has not given the Court a truthful account. She states that on Monday the 23rd of January 2012 Mr. Little-White left the Corporate Area and did not return to the office at South Avenue until the 26th January 2012. She states that Mr. Ashmead did not give the documents to Mr. Little-White as he averred; instead Mr. Ashmead gave her an unmarked envelope without stating either the nature or the importance of the contents.

[20] Ms. Richards claims that Mr. Ashmead stated that he was looking for either the 1st or 2nd Defendant. When she informed him that neither the 1st nor 2nd Defendant were present at the office, Mr. Ashmead gave her the unmarked envelope and when she asked him who had sent the envelope he said he did not know. She states that at no time did Mr. Ashmead inform her of what was contained in the said unmarked envelope.

[21] Ms. Richards attests that since Mr. Ashmead did not inform her of the importance nor the significance of the contents of the said unmarked envelope, she did not place the documents in any special place for Mr. Little-White, but instead she states that she placed them into their general mailing system which deals with all the mail received by Orange Valley Holdings Limited, Mediamix Limited, and Palm Productions Limited, entities all have their offices located at 16 South Avenue, Kingston 10.

CCMB'S EVIDENCE IN RESPONSE

[22] Mr. Canute Ashmead swore an Affidavit in response to the Affidavits filed on behalf of the Defendants. He referred to the Affidavits filed on behalf of the Defendants and stated that as regards service on the 1st Defendant, it is not true that Mr. Little-White was not in office at 16 South Avenue, Kingston 10 when he visited there on the 24th of January 2012. Mr. Ashmead further states that on the day in question he introduced himself to Ms. Camille Richards and told her that he needed to see Mr. Little-White and Ms. Ryman and that he needed to see them personally. Ms. Richards wanted to know what it was about but Mr. Ashmead says that he did not tell her because based upon his experience people are unwilling to accept service of court documents. He denies that Ms. Richards told him that the Defendants were not in office. He states, that after he asked to see either of the Defendants personally, Ms. Richards got up from her station and went to another part of the office. On her return she told Mr. Ashmead that whatever he had to give Mr. Little-White he must give to her because Mr. Little-White was in a meeting. Mr. Ashmead stated that he declined to act on that suggestion and made it clear that he needed to personally give Mr. Little-White the contents of the envelope, He states that Ms. Richards insisted that he give the envelope to her and he maintained his refusal to do so and asked her to give him her full name, which she did. She then went back through a door to the other part of the office that he had seen her go towards earlier. After a while Ms. Richards came back through the door. Mr. Little-White then came to the door where Mr. Ashmead could see him. Mr. Ashmead states that he did not know him before. Mr. Little-White was wearing a light blue shirt, which Mr. Ashmead describes as looking like %a bush jacket, the kind that doctors wear.+ It was Mr. Little-White who identified himself to Mr. Ashmead and this was affirmed by Ms. Richards. Mr. Little-White then told him that whatever it is, Mr. Ashmead should give it to Ms. Richards. Mr. Ashmead states that the person that he came to identify as Mr. Little-White when he served him with the default judgment on the 16th of April 2012 is the same person who came out to speak to him on the 24th of January 2012. Mr. Ashmead states that he gave the envelope to Ms. Richards on the basis of Mr. Little-White's indication and that he saw when Ms. Richards handed Mr. Little-White the envelope. Mr. Ashmead states that the envelope was not unmarked. He wrote Mr.

Lenbert Little-White's name on it. Mr. Ashmead states that the entire sequence of events from his arrival at the office until the time when Mr. Little-White came out to direct him to hand the documents to Ms. Richards lasted approximately one hour. Mr. Ashmead states that he waited that long because he wanted to give Mr. Little-White the documents personally.

[23] Mr. Ashmead further states, that as regards service on the 2nd Defendant, his instructions from Henlin Gibson Henlin was that 16 South Avenue was her place of employment and/or business and that it was the registered office and principal place of business of Orange Valley Holdings Limited, of which Ms. Ryman is a director and shareholder along with Mr. Little-White. Mr. Ashmead states that he was never told that Ms. Ryman was not present at the office when he visited there on the 24th of January 2012.

[24] As regards service of the Default Judgment on Mr. Little-White, Mr. Ashmead states that on the 16th of April 2012, he served Mr. Little-White at 16 South Avenue with the Judgment. At the time of service, Mr. Little-white was seated in his car and he was speaking to another person nearby. Mr. Ashmead states that he knew that it was Mr. Little-White because of his encounter with him at the office on the 24th of January 2012. Mr. Ashmead states that he approached the car and said "Good evening Mr. Little-White. I have a document for you." He states that he told Mr. Little-White that it was similar to the document that he had served on him before. Mr. Little-White said "ok" and Mr. Ashmead gave him the envelope and left. Mr. Ashmead states that at no time did he throw anything at Mr. Little-White and nor did he have a conversation with anyone else.

CROSS-EXAMINATION AND THE EVIDENCE GENERALLY

[25] I should state that, quite separate and apart from the requirements of Counsel, Mr. Wilmot having initially indicated that he no longer wished to cross-examine Mr. Ashmead, and Ms. Brown indicating initially that she no longer wished to cross-examine Miss Richards, I advised Counsel, that on the authority of the Privy Council's decision in **Chin v. Chin** Privy Council Appeal No. 61 of 2009 judgment delivered 12th February

2001, cross-examination of a number of the affiants was necessary in order for me to decide the critical issues of whether Mr. Little-White was personally served, at his office on the relevant date and time, and whether he agreed to accept service on behalf of the 2nd Defendant Ms. Ryman . see in particular paragraphs 11 and 14 of the Judgment. This is because these issues are issues upon which there has been a conflict which I will have to grapple with, and which cannot be resolved without the evidence, or at least a significant part of the evidence of Mr. Ashmead on the one hand, or Mr. Little-White or Ms. Richards, being rejected.

[26] On cross-examination, Mr. Little-White stated that most times he is not in the office and stated he is a businessman and filmmaker. Mr. Little-White at paragraph 7 purports to give evidence of ~~what~~ what transpired according to his recollection+ at the office on January 24, 2012. According to Mr. Little-White, unopened mail are put either on his desk or a tray, or on a desk or credenza in his office. He states that it is not necessarily brought to him the same day. Mr. Little-White, while saying that he came back to office on the 26th of January 2012, was unable to say the exact date or time when Ms. Richards told him that a gentleman brought an unmarked envelope to the office.

[27] At paragraph 19 Mr. Little-White does curiously state that ~~personal~~ personal service on me at the Office was not sufficient to enable the Second Defendant to ascertain the contents of the aforesaid documents+. Yet in cross-examination he admits that Ms. Ryman is a Director of Orange Valley Holdings Limited and Media Mix Limited. He indicates that both he and Ms. Ryman executed the Loan Documentation on behalf of the Borrower. Mr. Little-White also admitted that he did execute the Joint and Several Guarantee. Curiously, he at first in cross-examination indicated that he can~~q~~ speak to whether Ms. Ryman also executed the Joint and Several Guarantee. It was only after it was pointed out to him that in paragraph 5 of the Proposed Defence it is stated that the Defendants admit that they signed the Joint and Several Guarantee+, that Mr. Little-White then admitted that Miss Ryman did sign the document. Mr. Little-White also admitted that he lives with Ms. Ryman at 4 Beresford Close and he says that Ms. Ryman sometimes uses the office located there.

[28] I also found it interesting that Mr. Little-White claims in paragraph 17 of his Affidavit that the contents of the Unmarked Envelope were never brought to the attention of the Second Defendant, as once I discovered that a claim had been brought against the Second Defendant and myself, I immediately took the Documents to the said Attorneys-at-Law. I find it odd that Mr. Little-White would have not brought the contents of the envelope to the attention of his fellow Director and shareholder in the Borrower Company; Ms. Ryman being his co-worker and the person with whom he resides.

[29] Ms. Richards' evidence in cross-examination was that the envelope was unmarked. She admitted that this envelope was collected by her directly; she says it was not placed on Mr. Little-White's desk; it was placed on his credenza. In answer to a question from the Court as to how she was able to recall that Mr. Little-White was not in office on the 24th of January 2012, Ms. Richards for the first time stated that there is a calendar that she keeps as Administrator where a record is kept as to when Mr. Little-White is or is not in office as well as other staff members. In response to Counsel Ms. Brown who further cross-examined Ms. Richards in respect of this calendar, Ms. Richards said that this calendar is kept at the office and there is a recording put in of events ahead of time. She claimed that there would be a recording of whether Mr. Little-White did or did not attend these activities or occasions. Ms. Richards went on to admit that there is a signing in sheet for persons to sign in signifying their attendance, however, Mr. Little-White does not sign. She stated that she also was able to recall from memory that Mr. Little-White was not in office on the 24th of January 2012 when Mr. Ashmead came there.

[30] In cross-examination, Mr. Ashmead stated that he is a process server for Henlin Gibson Henlin but he is not employed there full-time. He is currently employed at the Jamaica Public Service Company Limited as a Senior Customer Care Representative. Mr. Ashmead insisted that the envelope was not unmarked and that it was addressed to Mr. Little-White. He stated that the Law firm Henlin Gibson Henlin gave him the documents. They were not given to him in an envelope. It is he who purchased an

envelope. He insisted that he saw and served Mr. Little-White personally that day. In re-examination Mr. Ashmead indicated that he knows what personal service means. He stated that his understanding is that since the claim is against a person, it is important that the person receives the documents personally. When asked whether Mr. Little-White did receive the documents personally, Mr. Ashmead stated that he insisted on serving Mr. Little-White personally. Mr. Ashmead indicated that when Miss Richards came back in and came back out from Mr. Little-White's office, Mr. Little-White came close to the entrance, and he said to Mr. Ashmead, "Boss, whatever you have to give me, give it to her". That is when, Mr. Ashmead says, that he gave the documents to Ms. Richards and she took them to Mr. Little-White.

RESOLUTION OF THE ISSUES

[31] The power and discretion that the Court has to set aside a default judgment is governed by Part 13 of the Civil Procedure Rules 2002 "the CPR". However, where a Defendant can successfully show that he was not served with the originating process, he is entitled under Rule 13.2 of the CPR, to have the default judgment set aside as of right, because in such a case, the default judgment would have been wrongly, or irregularly entered-see also the well-known old case of Anlaby v. Praetorius (1888) 20 QB 764.

[32] In order to resolve the issues, I think it is useful to look at the matters which are not in dispute in this case, as discussed in the submissions of CCMB's Attorneys-at-Law. They are that:

- a. Both Defendants are directors and shareholders of the Borrower;
- b. Mr. Little-White operates a number of businesses from 16 South Avenue, Kingston 10. The Borrower's registered address is located at that address.
- c. Mr. Ashmead visited the office on January 24 2012.
- d. Mr. Ashmead advised Ms. Richards during their encounter that he had documents to deliver to the 1st or 2nd Defendant.

- e. At no time did Ms. Richards advise Mr. Ashmead that the 2nd Defendant does not work at the 16 South Avenue office of the Borrower, but at Lot 4 Beresford Close, Red Hills.
- f. The envelope with the originating process was handed to the 1st Defendant's Administrative Assistant Ms. Richards at the Borrower's office.

[33] I found Mr. Ashmead to be a witness who gave his evidence in a calm and convincing manner, not given to any embellishment. He was consistent in saying that he had seen Mr. Little-White on the day of the alleged service and to my mind, he was not shaken in cross-examination in any material way. The details of his description of the entire event, including how Mr. Little-White was dressed, what was discussed in the conversations between himself and Mr. Little-White and Ms. Richards, strike me as authentic and lend themselves to credibility. On the other hand, I was not impressed with the demeanour of either Mr. Little-White or Ms. Richards. I formed the impression that Mr. Little-White was being evasive, particularly when he spoke of how mail reaches him, of Ms. Ryman and whether she had signed the Joint and Several Guarantee, and further, his reasons for stating why the documents were not brought to the attention of Ms. Ryman are not credible. Ms. Richards's evidence was internally inconsistent. At first, she gave the impression that the envelope was put in some kind of central sorting system for mail in the office, but then subsequently, she states that she put the envelope on Mr. Little-White's credenza. Then her account of this calendar and how she used it as a means of recalling when Mr. Little-White was or was not in office, I found quite incredible and incapable of belief. In my judgment, Mr. Little-White gave his evidence denying his presence in the office in an attempt to have the default judgment set aside, and to avoid his and the 2nd Defendant's not inconsiderable liability and indebtedness to CCMB. I also found Ms. Richards to be a witness of convenience, and not a witness of truth, who had simply come to the Court to give evidence to assist her employer in avoiding the consequences of service of the court process on him and on the 2nd Defendant.

[34] On a balance of probabilities, I accept Mr. Ashmead's evidence that he saw Mr. Little-White at the office on the 24th of January 2012 and that Mr. Little-White was present and directed him to give the documents to Ms. Richards on his behalf. I also accept and find as a fact that Mr. Little-White did accept documents from Mr. Ashmead on behalf of Ms. Ryman and did indicate that he would ensure she received them. I reject the evidence of the Defendants' witnesses that Mr. Little-White was not in the office at 16 South Avenue on the 24th of January 2012.

[35] CCMB's Attorneys-at Law relied upon the UK House of Lords' decision in **Kenneth Allison Ltd. V. A. E. Limehouse & Co. (A firm)** [1991] 3 W.L.R. 671. In that case it was held that service on a partnership was effected when process was served on a personal assistant for one of the partners, acting on the instructions of a partner who was in another part of the premises. The evidence here is, as Counsel for CCMB have argued in their written submissions, even more convincing, because Mr. Ashmead says that Mr. Little-White gave instructions to him directly and accepted the documents in his presence. I agree that although this case was decided under English Rules that pre-date their new Civil Procedure Rules, which are for present purposes similar to our own new Rules the CPR, the reasoning appears equally apposite. On behalf of the Defendants, Mr. Wilmot had submitted that the case of **Kenneth Allison** is distinguishable, and would only be relevant if CCMB were effecting service on a partnership or company. However, in my view, the reasoning in the case is not so limited. At page 676, G-H, Lord Bridge of Harwich quoted with approval from **Montgomery, Jones & Co. V. Liebenthal & Co** [1898] 1 Q.B.487 where at page 493-494 Chitty L.J. stated:

I can find no rule which prohibits a person agreeing as to the mode in which service may be effected on him, as for instance, by the writ being left with his wife or some other person. If the contention of the defendants is correct, a person who is ill cannot make a request that the plaintiff should hand the writ to his wife, but must endure the inconvenience of being served personally, otherwise the service will be bad as being in contravention of the rules. I cannot find that in any of the rules

At page 677 H, Lord Bridge disposed of an argument by Counsel that the reasoning only applied to more formal contractual arrangements, by stating:

I do not see any difficulty in holding that the kind of ad hoc agreement in question is legally effective. If one party, knowing that another wishes to serve process upon him, requests or authorises the other to do so in a particular way which is outside the Rules and the other does so, then, unless the Rules themselves prohibit consensual service, the party so served cannot be heard to say that the service was not valid.

[36] I find as a fact that CCMB properly effected personal service on the 1st Defendant. As regards the 2nd Defendant, the method of service was deemed satisfactory by endorsement of the Master on February 14, 2012. The Rules provide that this endorsement may be set aside on good cause being shown. However, in my judgment, the Defendants have not shown any proper basis for setting aside the endorsement of the mode of service on the 2nd Defendant. That service therefore stands.

RULE 13.3 OF THE CPR – COURT’S DISCRETION TO SET ASIDE DEFAULT JUDGMENT – NEED FOR DEFENDANT TO DEMONSTRATE REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM

[37] In the alternative, the Defendants seek to have the default judgment set aside on the basis that the judgment was regularly obtained. Under Rule 13.3 of the CPR, the Court may set aside the default judgment if the defendant has a real prospect of defending the claim. Although this is really the crux of the matter, the Court in considering whether to set aside, must consider whether the defendant has applied to the court as soon as is reasonably practicable after finding out that judgment has been entered, and whether he has given a good explanation for the failure to acknowledge service . see Rule 13.3 and the Court of Appeals decision in **Merlene Murray-Brown v. Dunstan Harper and Winsome Harper** [2010] JMCA App 1, paragraph 23, per Phillips J.A..

[38] In this case, the Defendants in their proposed Defence allege that CCMB breached its fiduciary duty to them in failing to advise them to seek independent legal advice and reliance is placed on the case of **Lloyds Bank Ltd. v. Bundy** [1974] EWCA

Civ 8. However, the banker-customer relationship does not ordinarily give rise to a fiduciary duty . see **Lloyd's Bank** itself and **Lender Liability**, by James O'Donovan, 8th Edition, paragraph 1.180, and **National Commercial Bank v. Hew** [2003] UKPC 51, both cited by CCMB. There are no facts alleged in Mr. Little-White's Affidavit or in the Draft Proposed Defence which could ground a claim to the existence of a fiduciary duty or to take the case outside of the ordinary relationship of Banker and Customer. There is no allegation of undue influence and there are no facts to suggest that the Defendants would fall into any special category, such as were found in the **Lloyd's Bank** case, to base and impose additional duties on the bank and require special protection of the Defendants. In the instant case, the 1st Defendant claimed that the Bank said that they would not look to the guarantors until they tried to sell the property. However, in cross-examination, he admits that he read the guarantee, understood and signed it. The Defendants are engaged in several businesses. The transaction was made for the benefit of the Defendants's company, the Borrower. The claim that the execution of the Guarantee was involuntary is, on the basis of the evidence presented, without any merit or real prospect of success because there is nothing on the evidence that could constitute duress. It is the Defendants's duty to satisfy the Court on the evidence presented in support of the application that they have a defence with a real prospect of success and they have failed to do so. In my judgment the proposed defence is fanciful.

[39] As regards the other matters that should inform the exercise of my discretion, I am not satisfied that there is a good explanation for the failure to file an acknowledgement of service or that the Defendants applied to the Court as soon as reasonably practicable after finding out that judgment had been entered against them. However, in any event, on the crucial issue of whether the Defendants have shown that they have a defence with a real prospect of success, they have failed to reach that important bar and threshold.

[40] In all the circumstances, it is in my view just and appropriate to dismiss the Notice of Application for Court Order to Set Aside Default Judgment filed on behalf of

the Defendants on the 24th April 2012, with costs to the Claimant CCMB to be taxed if not agreed.