THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2017/0008

BETWEEN:

RBC ROYAL BANK OF CANADA

Appellant

and

LIONEL NEDWELL

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

On Written Submissions:

Ms. C. Debra Burnette for the Appellant
No submissions filed on behalf of the Respondent

2017: August 14.

Civil appeal – Default judgment – Rule 13.2 and 11.18(3) of Civil Procedure Rules 2000 ("CPR") – Application for declarations and an account –Setting aside judgment in default – Whether it was open to judge to set aside order of the master setting aside default judgment merely based on lack of notice or absence of respondent at the hearing – Whether judge ought to have fixed a date or ordered that hearing of the appellant's application to set aside default judgment be set down for a fresh hearing

The respondent instituted a claim against the appellant seeking various declarations. The appellant failed to file its defence in a timely manner and judgment was entered against it for a specified sum, notwithstanding no specified sum had been claimed. The appellant applied to set aside the default judgment, which application was duly served on the respondent. The court office listed the application on its general hearing list, however, no fixed date, time and place were included in the notice. Neither the respondent nor his attorney attended the hearing, and the respondent did not file or serve any response to the appellant's application. On the date of the hearing of the appellant's application, the master set aside the default judgment as being wrongly entered on the basis that the claim was not one for a specified sum but, rather, for declarations and an account. The master also gave leave to the appellant to defend the claim by filing and serving its defence by a

specified date. The respondent thereafter applied to set aside the order of the master on the basis that neither him nor his attorney were given notice of the hearing of the appellant's application to set aside the default judgment. The learned judge then set aside the order of the master solely on the basis that there appeared no evidence that the respondent was given notice of the date fixed for the hearing. The learned judge did not order that the appellant's application to set aside the default judgment be fixed for a new hearing at a later date or that a fixture be obtained for a fresh hearing of the application.

Held: allowing the appellant's appeal against the decision of the learned judge to set aside the order of the master; affirming the master's order; and awarding costs to the appellant of the appeal and the application in the court below to be paid within 21 days, that:

1. The omission of a fixed date, time and place in the notice was not sufficient to allow the judge to set aside the master's order having regard to the nature of the application on which the master's order was made. Having made the order under CPR 13.2, which could have been made with or without notice, the learned judge was required to have regard to CPR 11.18, particularly the conjoint considerations to be satisfied under CPR 11.18(3). Had the judge done so, she would have no doubt concluded that, given the nature of the default judgment for a specified sum of money when no such claim was made, coupled with the fact that the respondent's claim in essence was a claim for an accounting which attracted the Fixed Date Claim procedure and which does not allow for the default judgment procedure under CPR Part 12, the court was required to set aside such a judgment *ex debito justitiae* and could have done so without the need for an application as an exercise of its inherent power to put matters right in regularizing its process. The learned judge would have been drawn to further conclude that the likelihood of the respondent satisfying 11.18(3)(b), even were he able to satisfy sub-rule (3)(a), was hopeless on the clear circumstances on the face of the respondent's claim.

   Rules 11.18(3) and 13.2 of **Civil Procedure Rules 2000** applied; Rules 11.10, 12.5, and 12.10 of **Civil Procedure Rules 2000** considered.

2. Where the learned judge had set aside the master's order due to the party's lack of notice and absence at the hearing, it would have merely and properly have had the effect of restoring the application to set aside to be heard afresh on its merits. Having concluded, however, that this appeal ought to be allowed and that the order of the learned judge be set aside, this restores the order of the master setting aside the default judgment which he was right to do for the reasons he gave.

JUDGMENT

[1] **PEREIRA CJ**: This appeal is brought with leave of the Court granted on 4th May 2017, against the decision of the learned judge dated 13th March 2017, setting aside the decision of the master who on 19th July 2016 had by order set aside a judgment in default on the basis that it was wrongly entered pursuant to **Civil Procedure Rules 2000** ("CPR") 13.2. The judge's order of 13th March 2017, setting aside the master's order of 19th July 2016 was premised solely on the basis that there appeared to be no evidence that the respondent had been given notice of the date fixed for the hearing, namely 19th July 2016, when the appellant's application to set aside the default judgment was set to be heard. The learned judge did not, in the circumstances, order that the application to set aside the default judgment be fixed for a new hearing on a later date or that a fixture be obtained for a fresh hearing of the said application.

The appeal

[2] The primary issue on this appeal is whether it was open to the learned judge to set aside the order of the master setting aside the judgment in default as being wrongly entered pursuant to CPR 13.2 merely on the basis of lack of notice or absence of the respondent at the hearing. Ancillary to that question is whether the judge, having set aside the master's order due to absence of the respondent by lack of notice, ought to have fixed a date or at least ordered that the hearing of the appellant's application to set aside the default judgment be set down for a fresh hearing.

History

[3] Lionel Nedwell, the respondent, issued a claim against RBC Royal Bank of Canada ("the Bank') in which he sought as against the Bank various declarations. No relief was sought in terms ordering the Bank to pay or return any sums of money to the respondent albeit the declarations sought were in these terms:

> "(a) A declaration that [the respondent] is entitled to the return of his funds in the sum of $165,996.00…

(b) A declaration that [the respondent] is entitled to the return of funds [the Bank] has wrongfully and unlawfully frozen…

(c) A declaration that [the Bank] provide [the respondent] with an accounting for the sum of $165,996.00…"

He also claimed "interest pursuant to statute" and cost*s*.

[4] The Bank, having failed to file its defence timely, judgment in default for a specified sum of $335,127.78 was entered up against the Bank on 10th February 2016. This was so entered notwithstanding no specified sum had been claimed by the respondent.

[5] The Bank applied to set aside the default judgment pursuant to CPR 13.2 on the basis that it had been wrongly entered. The application was served on the respondent on 20th May 2016.[1] The court office listed the application on its hearing list circulated for a hearing on 19th July 2016. The respondent did not attend the hearing neither did his legal practitioner. Further, no response to the Bank's application to set aside the default judgment had been made or served by the respondent.

[6] The master's order of 19th July 2016, after noting that no response had been made to the Bank's application, recorded, so far as is relevant for the purposes of this appeal, the following:

> "The [respondent's] request for default judgment asked for a default judgment for a specified sum. It is apparent to me that the claim is not one for a specified sum. Even though a sum has been entered on the claim, the action is for declarations and an account ... Applying CPR 13.2, the court must set aside the default judgment as it was irregularly entered for a specified sum when the claim was not one for a specified sum."

The master also noted that the primary relief sought by the respondent was for an

[1] On the same day, the respondent issued a judgment summons against the Bank based on the default judgment.

account and thus attracted the procedure set out in CPR 41.1(2).[2] The master thereupon set aside the default judgment and additionally gave leave to the Bank to defend the claim by filing and serving its defence by a specified date.

[7] The respondent then applied on 3rd August 2016 to set aside the master's order primarily on the basis that neither him nor his attorney had been given notice of the hearing of 19th July 2016. In his affidavit in support of his application the respondent further stated (at paragraph 17):

> "That had my attorneys and I been informed, the court would not have made such an order to set aside the default judgment. The defendant had in excess of forty days and failed and/or refused to file a defence."

No basis was put forward as to why the court would not have made the same order setting aside the default judgment had the respondent been notified and been present.

The CPR

[8] CPR 13.2 is in the following terms:

> "13.2 (1) The court **must** set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –
> (a) a failure to file an acknowledgment of service – any of the conditions in rule 12.4 was not satisfied; or
> (b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied." (Emphasis added).

Sub-rule 13.2(2) permits the court to set aside a default judgment under this rule on an application or without an application.

[9] CPR 12.5 then sets out the conditions to be satisfied where a claimant requests the court office to enter a default judgment for failure to defend. It is these terms:

> "12.5 The court office at the request of the claimant must enter judgment for failure to defend if –
> (a) (i) the claimant proves service of the claim form and statement of claim; or

[2] This would have required the claim being brought by fixed date claim which does not allow for the utilization of the default judgment procedure under CPR Part 12.

(ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;

(b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;

(c) the defendant has not –

(i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6)); or

(ii) (if the only claim is for a specified sum of money) filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or

(iii) satisfied the claim on which the claimant seeks judgment; and

(d) (if necessary) the claimant has the permission of the court to enter judgment."

[10] CPR 12.10 then sets out the various types of default judgments which may be entered. Rule 12.10(1)(a) deals with a default judgment for a specified sum of money. Rule 12.10(1)(b) says that a default judgment on a claim for an unspecified sum of money must be judgment for the payment of an amount to be decided by the court. Pre-CPR, this was commonly called a 'default interlocutory judgment for damages to be assessed.' Rule 12.10(1)(c) deals with a default judgment on a claim for goods. Rule 12.10(4) provides that "[d]efault judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim", and, importantly, contemplates the making of an application to the court to determine the terms of the judgment for the purpose of obtaining such other remedy. Although such an application need not be on notice it must be supported by evidence on affidavit. The rationale for this must be so as to satisfy the court that a claimant is entitled to such other remedy.

[11] Counsel for the Bank complains that the judge had regard solely to CPR 11.10 which provides that the notice of application must state the date, time and place when the application is to be heard. I observe that this is a continued failing in many court offices across the Court's jurisdiction where there is a failure to insert a hearing date before returning filed copies to the parties for service on other

parties, but relying instead on general listing notices which are then later circulated to all legal practitioners. Be that as it may, the omission of a fixed date, time and place in the notice was not sufficient to allow the judge to set aside the master's order having regard to the nature of the application on which the master's order was made. Having made the order under CPR 13.2, which could have been made with or without notice, the learned judge was required, as counsel for the Bank contends, to have regard to CPR 11.18 which states as follows:

> "11.18 (1) A party who was not present when an order was made may apply to set aside or vary the order.
> (2) The application must be made not more than 14 days after the date on which the order was served on the applicant.
> (3) The application to set aside the order must be supported by evidence on affidavit showing –
> (a) a good reason for failing to attend the hearing**; and**
> **(b) that it is likely that had the applicant attended some other order might have been made**." (Emphasis added).

[12] Had the judge addressed her mind in particular to the conjoint considerations to be satisfied under sub-rule (3), she would have no doubt concluded that, given the nature of the default judgment for a specified sum of money when no such claim was made, coupled with the fact that the respondent's claim in essence was a claim for an accounting which attracted the fixed date claim procedure and which does not allow for the default judgment procedure under CPR Part 12, the court was required to set aside such a judgment *ex debito justitiae* and could have done so without the need for an application as an exercise of its inherent power to put matters right in regularizing its process. No exercise of discretion is involved save for deciding whether to do so on notice or without notice but not whether it must set aside such a judgment. Such is the mandatory language of CPR 13.2 where it is determined that a default judgment has been wrongly entered. In so concluding she would have been drawn to further conclude, having regard to satisfying the conjoint considerations contained in CPR 11.18(3), that the likelihood of the respondent satisfying 11.18(3)(b), even if he were able to satisfy sub-rule (3)(a), was hopeless on the clear circumstances on the face of

the respondent's claim.

[13] Although I need not deal with the Bank's second complaint in order to dispose of this appeal, for the sake of completeness I make the observation that where the learned judge had set aside the master's order due to the party's lack of notice and absence at the hearing, it would have merely and properly have had the effect of restoring the application to set aside to be heard afresh on its merits. Having concluded, however, that this appeal ought to be allowed and that the order of the learned judge be set aside, this restores the order of the master setting aside the default judgment which, in my view, he was right to do for the reasons he gave. A fresh hearing in any event would not place the respondent, even with notice or on being heard, in any better position. The default judgment entered is simply irregular and was wrongly entered. It cannot stand.

Conclusion

[14] For the reasons given I would:

(a) allow the appeal and set aside paragraph 1 of the judge's order dated 13th March 2017; and

(b) for the avoidance of doubt, affirm the master's order of 19th July 2016.

Costs

[15] The Bank was granted its costs on its application to set aside the default judgment. No costs order was made in respect of the judge's order of 13th March 2017. The Bank has asked for its costs in the appeal and in respect of the application in the court below. The general rule is that a successful party is entitled to its costs and any deviation from that rule must be explained. I see no reason to deprive the Bank of its costs and accordingly I would order that the respondent bears the costs of the appeal and the application in the court below

fixed in the sum of $1,500.00 to be paid within 21 days.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar