

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CIV-2019-092-004319
[2021] NZDC 9436**

BETWEEN

JAMES STEWART KIRKPATRICK AND
WAREHOUSE WORLD LIMITED, AS
TRUSTEES OF THE JAMES TRUST
Plaintiff

AND

PRINAL GOBIND
Second Defendant

Hearing: 18 May 2021

Appearances: P Murray for the Plaintiff
G Collecutt on behalf of N Tabb for the Second Defendant

Judgment: 18 May 2021

ORAL DECISION OF JUDGE G M HARRISON

[1] By application of 25 June 2020, the second defendant, Mrs Prinal Gobind, seeks to set aside a judgment by default that was entered against her in this Court on 13 February 2020.

[2] It is obvious that judgment by default could only be entered against her if the proceedings issued by the plaintiff had been properly served on her.

[3] The essence of the proceedings is that Mrs Gobind and her husband, Kiran Gobind, guaranteed the obligations of Pacific HVAC Supplies Limited, which took an assignment of a lease of premises at unit 5, 906-930 Great South Road, Penrose, from the then tenant, KPG Electrical Limited. The company fell into arrears, and the lease was terminated, although there is a challenge to whether that termination was valid.

[4] The plaintiff landlord now seeks to recover the amount owing under the lease in the sum of \$26,391 plus accrued interest and costs and disbursements.

[5] The evidence of service of the application for summary judgment and supporting documentation on Mrs Gobind appears in an affidavit of Catherine Ann Lewis-Guthrie sworn on 20 December 2019. In the early part of her affidavit, she outlines the documents she had for service and attempts that were made to locate Mrs Gobind, often through contact with her husband, as to arrangements being made for service to be effected at particular locations. But, for various reasons, that did not occur.

[6] The relevant extracts from Ms Lewis-Guthrie's affidavit appear at paragraphs 11 to 15 of her affidavit. In essence, Ms Lewis-Guthrie says:

11. My colleague and I had several telephone conversations with Mr Gobind over the following four weeks in which we attempted to arrange a time to serve Mrs Gobind. We did not speak to Mrs Gobind directly, Mr Gobind eventually advised their lawyers, Bytalus Legal, could accept service.
12. On 4 December 2019 we contacted Bytalus Legal and spoke with someone who identified himself as Matt Blomfield. Mr Blomfield agreed to check whether he was authorised to accept service on behalf of Mrs Gobind. He eventually advised Bytalus Legal were authorised to accept service.
13. On 10 December 2019 at approximately 2:40pm my colleague attempted to serve the Documents at 124 Hobsonville Road, Hobsonville, Auckland 0618, being the offices of Bytalus Legal. There was no one present who had authority to accept service.
14. On 11 December 2019, I attended the offices of Bytalus Legal. Louisa Keddall identified herself as being authorised to accept service on behalf of the second and third defendants. At 11:35am on that date Ms Keddall accepted service of the Documents on behalf of the second and third defendants.
15. Ms Keddall signed an acknowledgement stating that she had accepted service and was authorised to do so on behalf of the second and third defendants. A copy of the acknowledgement is annexed and marked C.

[7] The second defendant is Mrs Gobind; the third defendant is the company.

[8] Annexed to Ms Lewis-Guthrie's affidavit is exhibit C. This is a receipt which contains the heading of these proceedings and the Court-allocated number, as well as the reference to the plaintiff and three defendants. The receipt reads:

I, Louisa Keddall, acknowledge that I have been served with documents pertaining to matter CIV-2019-092-4319 which I am authorised to accept on behalf of Prinal Gobind and on behalf of Pacific HVAC Supplies in her capacity as director of the company.

[9] Provision is then made for Ms Keddall's signature, name, and location and for Ms Lewis-Guthrie to sign as a witness, the date of the purported service being 11 December 2019 at 11.35 am.

[10] In her affidavit in support of the application, Mrs Gobind says in paragraph 2 of her affidavit of 25 May 2020: "I was surprised when I was told there was a Court judgment against me. I have never received any Court documents. I had no idea there was a Court proceeding against me."

[11] That statement casts an obligation on the plaintiff to prove that service had been effected validly upon Mrs Gobind according to the rules of the Court. Those rules appear in the District Court Rules 2014, where the relevant ones are as follows.

[12] Rule 5.67 provides that personal service is required. Rule 6.7 provides that there may be service under an agreement. The agreement is directed by the rule to be an agreement in writing. There is no such agreement in this case. Any such agreement would have to be by Mrs Gobind appointing some person on her behalf as an agent to accept service of the documents.

[13] The next relevant rule is that of r 6.4, which relates to personal service on spouses or partners. The rule applies to a married couple. Rule 6.4(2) provides: "Service on one spouse, civil union partner, or de facto partner is not to be treated as service on the other unless the court so orders." There is no application before the Court for such an order, although it seems that Mr Gobind was properly served on an earlier occasion.

[14] That leaves for consideration r 6.20, which relates to service on a solicitor. That rule provides: “A document is treated as served on a person on the date on which the solicitor for that person signs on a copy of the document a note accepting service of it, or a proved earlier date.”

[15] In this case, the first crucial consideration is whether or not Ms Keddall is a solicitor. The receipt attached to Ms Lewis-Guthrie’s affidavit of service does not indicate that Ms Keddall is a solicitor. Ms Keddall does not describe herself as such. Indeed, in an affidavit filed the day before the hearing – which was, of course, late, and in respect of which the plaintiff may have had a right of reply – made clear that Ms Keddall was not a solicitor. The affidavit was from a Mr Matthew Blomfield, who describes himself as a director of Blomfield & Co Ltd, which at relevant times had an office at Level 1, 124 Hobsonville Road, Hobsonville, Auckland. A law firm called Bytalus Legal also has its offices at Level 1, 124 Hobsonville Road, Hobsonville. There may have been some sharing of facilities between the two organisations. There is no evidence of that, but of relevance is the fact that Mr Blomfield describes Ms Louisa Keddall as his personal assistant. Mr Blomfield is not a solicitor. In those circumstances, the evidence is tolerably clear that Ms Keddall is not a solicitor and therefore unable to accept service as a solicitor pursuant to r 6.20.

[16] On that basis, then, valid personal service has not been proved as required by the relevant rule.

[17] The next question is whether the judgment entered against Mrs Gobind should be set aside.

[18] The application to set aside judgment is brought pursuant to r 15.10 of the District Court Rules. The fundamental rule is that if a judgment has been obtained irregularly, then the defendant is entitled as a matter of justice to have the judgment set aside. There is no place for the exercise of any discretion by the Court in reaching that decision. A discretion may be exercised if a defendant is otherwise legally or validly served but otherwise seeks to have a judgment by default set aside, but that is not the case here.

[19] Consequently, the application is granted, and the judgment by default entered against Mrs Gobind on 13 February 2020 is set aside.

[20] The proceedings are otherwise adjourned to a case management conference, when the situation can be reviewed, in the expectation that Mrs Gobind will have been properly served in the meantime and directions as to a hearing of the summary judgment application can be made, if still sought at that time.

[21] Having heard from counsel on the issue of costs, the Rules require that an interlocutory application's costs are fixed and are not reserved pending finalisation of the substantive proceedings.

[22] It seems to me in this case that costs should follow the event and be awarded in favour of Mrs Gobind on a category 2B basis. It must have been clear to the plaintiff that Mrs Gobind denied being properly served with the proceedings. It became incumbent upon them to prove valid service. Part of the hearing for today was to enable witnesses to be cross-examined in that regard. That would have entailed the presence of Ms Keddall and Ms Lewis-Guthrie to be cross-examined by Mr Collecutt on behalf of Mrs Gobind. They were not in present and, in any event, I have been able to determine the matter on the affidavits presently before the Court.

[23] Consequently, I see no basis on which costs should not be awarded, and there will be an order accordingly.

G M Harrison
District Court Judge