IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2008 HCV 00555

BETWEEN	TESLYN CARTER	CLAIMANT/RESPONDENT
AND	JAMAICA URBAN TRANSIT COMPANY LIMITED	1st DEFENDANT/APPLICANT
AND	METROPOLITAN MANAGEMENT TRANSPORT HOLDINGS LIMITED	2ND DEFENDANT

Ms. Danielle Archer and Mr. Everton Dewar instructed by Kinghorn and Kinghorn for Claimant/Respondent.

Mr. Kent Gammon instructed by Kent Gammon and Company for 1st Defendant/Applicant.

Application to Set Aside Default Judgment

Heard 2nd and 9th November 2009

Master S. George (Ag.)

Background

(1) This is a claim for damages for personal injury allegedly sustained by the Claimant on one of the Defendant's bus. It is alleged that the Claimant was travelling in one of the Defendant's public transport bus, when the driver drove in such a manner that resulted in a collision, causing injury to the Claimant.

Chronology

(i) Incident took place on or about 2nd July 2005

(ii) Claim and particulars were filed on 31st January 2008

(iii) Claim served on JUTC by registered post on 12th February 2008 (see affidavit of service filed 7th May 2008).

(iv) Deemed date of service - 21 days after.

(v) Acknowledgement of service filed 11th April 2008.

(vi) Default judgment request made 7th May 2008.

(vii) Default judgment entered in Folio: 745 Binder: 261.

(viii) Application to set aside was filed 20th July 2009 and listed for hearing 2nd November 2009.

Application

(2) The application was supported by the affidavit of Ms. D. Buchanan, Legal Officer of JUTC, and an attached draft defence.

The application as outlined by the affidavit and Counsel's submissions is based on the following:

(i) That the claim and particulars although filed by the Claimants on 31st January 2008 was not received by them (1st Defendant) until 10th March 2008.
The Claimants however contend that they sent the claim as permitted by Part 5 of the Civil Procedure Rules, to the Defendant's address by way of registered post. Affidavit of 7th May 2008 supports this. The 1st Defendant, although highlighting both in its submission as well as in the supporting affidavit that the claim actually came to their notice on 10th March 2008, when asked by the court whether they were taking any issue with service, Counsel un-hesitantly said "No." Therefore, nothing more needs to be said on this aspect. The rules are clear as to the presumption of service in relation to registered post in these circumstances and the 1st Defendant has not sought to provide any evidence in rebuttal.

(ii) Having received the claim, these were passed to their insurance brokers for them to handle. The insurers received this 11th March 2008 – the first Defendant is saying that as soon as it received the claim, it acted promptly. Note there is no explanation as to why he received the claim on 10th March 2008 when it was posted 31st January 2008. The Defendant is also saying that in passing on the claim so promptly, it is indicative of their intention even at that stage to defend the claim (see paragraph 5 of the affidavit). But surely whether this is prompt is dependent on whether the claim was in fact received on the 10th March as asserted and if it was so received the reason(s) why it was not received before. In any event an 'intention to defend,' without more, is not of much merit.

(iii) The insurance brokers then wrote to the insurer on 12th March 2008 enclosing the claim. This was one day after they received it. The insurance brokers therefore acted swiftly and so did the insurers.

(iv) Hence, acknowledgement of service dated 31st March 2008 was filed on April 1, 2008 by the insurers.

(v) It was assumed by JUTC that the insurers would, in keeping with the policy, instruct Counsel.

(vi) On 16th April 2008 (note that this was soon after) JUTC received a number of returned claims from the insurance brokers advising that they would no longer be handled by their insurers. Included in these was the subject claim.

(vii) The return of these claims resulted in embarrassing and challenging administration including a shortage of staff and money (see paragraph 9 of the affidavit).

(viii) JUTC nevertheless went ahead and retained Counsel as instructed by the then Chairman, Mr. Douglas Chambers – Mr. Philbert Smith was retained in June 2008. (Note that this was even after the 42 days for filing the defence had passed and in fact a request for default judgment had already been filed.

(ix) Shortly after, Mr. Chambers was killed, and this helped to compound the problem.

(x) Applicant's insurers had only sent documents referred to in paragraph 3 of the affidavit. These were (i) particulars of claim (ii) claim form and (iii) acknowledgment of service. So Mr. Smith attempted to reconstruct file (what else would have been missing?) by seeking to obtain a copy of the Court's records – so he wrote to the Court on 26th August 2008 (see paragraph 12 of affidavit). I am at a loss to see what else was required by Counsel in order to put in a defence or to ascertain whether a default judgment had been entered. Why would he need to reconstruct the file? What would have been missing? If anything was in fact missing, how would this affect Counsel's ability to enter a defence or to ascertain whether a default judgment had been entered and if so, make the appropriate application to set aside at this stage? I do not accept this explanation; being in possession of the particulars and the claim form, would have provided the Defendant with sufficient material to ground a defence or to ascertain the status of the mater from the Claimant's attorney or the Court.

(xi) JUTC took several steps, conversations and meetings with Mr. Smith regarding the claim and gave repeated instructions to enter appearance and take steps to protect the Defendant's interests.

(xii) Counsel did not provide the Defendant with updates – basically the allegation is that Counsel was tardy and inefficient.

(xiii) On 4th May 2009, Counsel advised JUTC that request for default judgment had been filed and that he had misplaced the file.

(xiv) In June 2009 JUTC terminated services of Mr. Smith and requested that file be returned and also tried to obtain copies of Court file.

(xv) Failure to file defence not intentional but due to failure of insurers and or former Counsel to take the necessary steps.

(xvi) When became aware that default judgment obtained, new Counsel was retained (Mr. Gammon) on 20th July 2009 (see paragraph 21).

(xvii) Reasonable prospect of successfully defending claim – proposed defence attached.

An examination of the Draft Defence

(i) The Claimant is herself negligent in that she failed to hold on to hand bars in front of her.

(ii) Failing to take any sufficient care for her own safety and well being or at all.

(3) Rule 13.3 sets out the parameters within which any application to set aside a default judgment should be addressed by the court. The material limb is Rule 13.3(1) which requires the court to be firstly satisfied that the Defendant has a real prospect of success. If the Defendant fails on this limb, then the whole application fails. Therefore, the court, in considering whether there is a real prospect of success must, without trying the case, have sufficient regard to the defence, juxtaposed against the claim.

(4) Although the claim does not clearly state that the Claimant was sitting, the 1st Defendant has put that position forward in its draft defence. This draft defence is therefore being examined, in light of this fact as put forward by the defence.

(5) In my view, a passenger seated on a bus (not standing) is not reasonably expected to hold on to the 'rail in front' (being referred to in the defence as the 'hand bar') continuously

throughout a journey. This would be rather awkward and uncomfortable and perhaps impossible. In fact what is referred to as the 'hand bar' is nothing more than the metal frame/bar at the top of the back of the seat in front and is part of the support of the said seat. If there is a collision or violent jerk or swerve of the bus, a passenger may be saved from injury by this 'bar' depending on the amount of time/opportunity given to do so before any fall or flinging of the passenger or on the quick reflex of the passenger. But a passenger cannot be said to be negligent or contributory as a result of not having quick reflexes or not having had sufficient opportunity to hold on to the bar. In any event how would you determine that there was or was no sufficient opportunity to hold on or indeed that the passenger did not have a quick enough reflex?

(6) I find this defence to be of little merit and with no reasonable prospect of success. If a passenger is seated in a bus, then if she is injured as a result of the bus being in a collision, then the Court is very likely to find that she should be compensated for any injuries that flow there from and the issue of liability, contributory or otherwise, would be very hard to be argued by any Defendant and if so argued is unlikely to succeed. In a case where the court is considering whether a matter has a 'real prospect' of succeeding in the context of whether to set aside a default judgment, the court has to consider the proposed defence. However, the court is not at this time required to make a determination as to whether the defence will succeed but only if it has a 'real prospect of success.' The proposed defence does not have 'a real prospect of success.'

(7) Although the Defendant has failed on this material limb, I will nevertheless consider the other provisions of Rule 13.3.

(1) Rule 13.3(2) – further provides that:

(a) In considering whether to set aside a default judgment, the court must consider whether the Defendant has applied to the court as soon as is reasonable practical after finding out that judgment has been entered.*

(b) Given a good explanation for failure to file acknowledgment of service/or defence.

(8) I have considered the limbs of Rule 13.3 (2) (a) and (b) – In relation to Rule 13.3 (2)(a) the Defendant claims that it was unaware of the default judgment until June 2009. It then swiftly retained new Counsel, who soon after made application to set aside the default judgment. Based on these facts, I have no difficulty in accepting that the "D**efendant has applied to the Court as soon as is reasonably practical after finding out that judgment has been entered"** (see above)*

(9) In seeking to satisfy the Court under Rule 13(2) (b) the 1st Defendant, in its affidavit set out the reasons for the delay. The reasons, which I have outlined above, amounts to a great administrative mishap – blunders, inefficiency and confusion, contributed to by Counsel, the Defendant's insurers and the Defendants.

(10) The claim was filed by way of registered post on 12th February 2008. The deemed date of service is 21 days after. The Defendant states that they did not receive this until the 10th March 2008. The Claimants have provided an affidavit of proof of service, in which they have exhibited the certificate of posting. The Defendant has given no explanation as to why they received the documents so long after it was posted to them. In fact, they have not sought to rebut the deeming provisions as to service provided by Rule 5.19, of the CPR.

(11) I do not accept that the reasons given for the delay are good reasons. The Defendant had a fair and reasonable opportunity to defend the claim prior to the filing of the default judgment.

The claims were returned to them on the 1st April 2008. The request for default was made on 7th May 2008.

(12) Up to the time of this hearing, a defence has not been filed. No attempt was made to do so prior to the application in July 2009 to extend time to file defence. The reasons given are clearly ones, which were avoidable. In fact, they are the classic areas of inefficiency resulting in significant delay which the CPR is trying to root out.

(13) The overriding objective as established by Rule 1.1 requires the court to deal with cases justly. I must ensure that matters are dealt with in a manner which is fair and just and by giving equal consideration to the positions of both sides while at the same time ensuring that the integrity and philosophy of the CPR is upheld.

(14) Bearing this in mind, I have taken into account any detriment that would be caused to the Claimant in having a regular default judgment set aside. I also take into account the costs and judicial time that is likely to be wasted, if this matter should now go to trial as it is evident that the Defendant has no real prospect of successfully defending it. The Defendant will be saved the costs and expense involved in engaging in a trial as well as that which will be awarded against it, upon it being unsuccessful. To allow the application in these circumstances would be contrary to the spirit and the intention of the Civil Procedure Rules.

Application to set aside default judgment denied;

Costs of this application awarded to the Claimant.

Costs to be Agreed or Taxed.

1st Defendant's Attorney to prepare, file and serve this Order.