

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 0938/2007

BETWEEN LOVELEEN MORGAN-TAYLOR - CLAIMANT

AND METROPOLITAN MANAGEMENT
TRANSPORT HOLDINGS LIMITED - DEFENDANT

S. Campbell instructed by Campbell & Campbell for Applicant /Defendant

O. Nelson instructed by K.C. Neita & Co. for Respondent/Claimant

Heard: October 25, November 1 and 24, 2011

*Setting aside Judgment in Default of Acknowledgement of Service –
Service on limited company at Registered Office*

Lawrence-Beswick J

1. Mrs. Loveleen Morgan-Taylor (Mrs. Taylor) alleges that she suffered injury in a bus operated by Metropolitan Management Transport Holdings Limited (Metro). The quantum of damages due to her was assessed. She sought to recover the amount but Metro has not paid. The bus was insured by United General Insurance Company Limited, now Advantage General Insurance Company (AGI) and AGI pursuant to its right of subrogation has filed a Notice of Application on behalf of Metro seeking:

- a. to set aside the default judgment which was entered in this matter;
- b. to set aside all proceedings which flowed from it; and

- c. to stay execution of the final judgment dated May 4, 2009.
2. The ground of the application is that there was no service on Metro of the Claim Form and Particulars of Claim.

Background

3. Mrs. Taylor filed suit on February 26, 2007 against Metro claiming that on November 16, 2003, she had been a passenger in a bus driven negligently by Metro's agent and/or servant and had been injured as a result of his sharp application of the bus' brakes.
4. The Court documents filed to commence proceedings were sent by registered post on March 2, 2007 to the registered office of Metro at 36 Trafalgar Road, Kingston 10.

Metro filed no Acknowledgement of Service or Defence. On June 13, 2007, Interlocutory Judgment in Default of Acknowledgement of Service was entered. Damages were assessed on May 4, 2009.

5. Mrs. Taylor attempted to enforce her judgment against Metro's insurers, AGI. AGI now seeks to set aside the judgment alleging that Metro had been denied the opportunity to defend the claim as the Claim Form had never been served on it, and it had intended to defend the claim.

Service at Registered Office

6. The first limb of the argument of AGI is that the address of 36 Trafalgar Road, Kingston 10 to which the court documents were allegedly sent, at the time of posting was no longer the registered office of Metro and therefore Metro was not served.

7. Affidavits indicate that on March 29, 2004, Cabinet decided that proceedings should start to wind up Metro, and therefore Metro no longer occupied premises at 36 Trafalgar Road.

8. However, it is undisputed that up to January 2011 Metro continued to appear on the Register of the Registrar of Companies as an active registered company having its registered office at 36 Trafalgar Road, Kingston 10.

It would follow therefore that service on Metro could be properly done if documents were sent to that address.

The Civil Procedure Rules 2002 (CPR) provides:

“5.7 Service on a limited company may be effected -
a. by sending the claim form by prepaid registered post
addressed to the registered office of the company”

and further that

“5.19(1) A claim form that has been served within the jurisdiction by prepaid registered post is deemed to be served, unless the contrary is shown, on [21] days after the date indicated on the Post Office receipt.”

The initial ground filed that the service on Metro was incorrect because Metro no longer operated from that address must fail.

9. However, the further submission is that the evidence is that the registered letter was not delivered to Metro at 36 Trafalgar Road and that Mrs. Taylor’s attorneys-at-law knew that. Counsel, Mrs. Campbell, submits therefore that there was in reality no service of the documents on Metro.

Non Delivery of Post

10. There is exhibited a post office receipt in the form of a registered slip which is said to be the receipt from the post office for the letter in which were enclosed the Claim

Form and Particulars of Claim. This is evidence of its posting by K.C. Neita & Company, attorneys-at-law for Mrs. Taylor.

11. There is also evidence that that letter was not collected by Metro.

By affidavit, the Postmaster General swears that the records at the post office show that that letter was unclaimed, was returned to the sender and Mr. Teona Campbell signed as having collected the unclaimed letter and its contents on behalf of K.C. Neita & Company on May 22, 2007.

I therefore find on a balance of probabilities that the Claim Form and Particulars of Claim were not in fact served on Metro.

12. Denning L.J. in **Regina v County of London Quarter Sessions Appeals Committee ex parte Rossi** said:

“...[W]hen service of process is allowed by registered post, without more being said on the matter, then if the letter is not returned, it is assumed to have been delivered in the ordinary course of post and any judgment or order by default obtained on the faith of that assumption is perfectly regularBut if the letter is returned undelivered and nonetheless, notwithstanding its return, a judgment or order by default, should afterwards be obtained, it is irregular and will be set aside ex debito justitiae.”¹

13. Service can therefore no longer be deemed to have been effected in the face of evidence that it was not delivered and was returned to the hands of the sender’s representative.

14. I respectfully adopt the opinion of Lord Denning M.R. in **Hewitt v Leicester City Council** where the learned Judge said:

¹ [1956]1Q.B. 682 at 694

“We are not bound to ‘deem’ a notice to be served at a particular time, when we know that in fact it was not served at all.”²

15. The CPR provides:

*“13.2(1) The court **must** set aside a judgment [entered in default of acknowledgment of service] if judgment was wrongly entered because –*
a. *...any of the conditions in rule 12.4 was not satisfied.”* (Emphasis supplied)

Rule 12.4 requires service of the Claim Form and Particulars of Claim to be proved.

It follows that in the absence of proof of such service, I must set aside the default judgment with the consequence that all other proceedings arising from that irregular judgment must also be set aside.

The Result

16. The result of this decision is that Mrs. Taylor cannot access the damages which had been assessed in her favour from 2009. She cannot file a new suit as the action is now statute barred. It may well be that she herself had no knowledge of the return of the process to the Chambers of her attorneys-at-law and was not involved in the service of the documents, in other words, she did not contribute to the absence of service.

17. It must be remembered at the same time, however, that Metro has the right to defend a claim against it. This is impossible unless it is aware of the details of the claim or the circumstances are such that it can be deemed to have been served with the details, i.e., the claimant and/or her attorneys-at-law had done all required by law to inform it.

The evidence is that Metro did not receive the Claim Form and Mrs. Taylor’s attorneys-at-law did not do all that was required by law to serve Metro that document.

² [1969]2 All E.R. 802 at 804

18. I believe it may be worthwhile to make some other observations concerning the service of other documents. Counsel for Mrs. Taylor has argued that all other documents sent to Metro at 36 Trafalgar Road by registered post were not returned and also that the insurer AGI was served with Notice of the Proceedings.

Service on Metro of other documents

19. It is unchallenged that Metro was served by registered post at its registered office with several documents other than the Claim Form. There is no evidence of them being returned.

These documents are deemed to have been served:

1. *Notice of Proceedings*

This was sent to Metro's Insurers, United General Insurance (UGI) (now AGI) on March 2, 2007. AGI acknowledges having received the Notice which stated the substance of the claim against Metro.

2. *Interlocutory Judgment in Default of Acknowledgement of Service filed June 13, 2007.*

This was posted on November 16, 2007 to 36 Trafalgar Road and showed that in the suit filed, judgment had been entered against Metro. because there was no acknowledgement of service,

3. *Witness statement of Mrs. Taylor*

This was posted on March 25, 2008 to 36 Trafalgar Road. This contained details of the alleged accident and where it had allegedly been reported.

4. *Notice of the date for the Assessment of Damages*

This was posted to 36 Trafalgar Road on February 6, 2009 and notified Metro that damages would be assessed on May 4, 2009.

5. *Amended Particulars of Claim filed February 11, 2009.*

This was posted by pre-registered post on February 12, 2009 and gave full particulars of the incident which allegedly caused the injury, the injury itself, and what the claim sought to recover.

6. *Final Judgment dated May 4, 2009.*

This was posted by registered post on May 19, 2009. This provided details of the amounts computed as damages.

20. It may well be said that by being served with all these documents, Metro and its Insurers should be taken to be aware of the details of the claim, the existence of a judgment against it, and the notice of the date when the Assessment of Damages would occur.

The missing information which would have been provided by the Claim Form which had not been served, were the procedural options open to a defendant on whom a Claim Form was served. Those options would specify what the defendant should do if it wished to defend the claim and the consequences of not defending the claim. The omission to serve the Claim Form and Particulars of Claim was fatal, according to law.

21. However, there is evidence that AGI was aware of an allegation of the pertinent accident.

The unchallenged evidence of Ms. Ruth Ann Morrison, on behalf of AGI is that on receiving the Notice of Proceedings it made several checks but could find no report of any alleged accident or knowledge that one had occurred. Further, her evidence continues, AGI so advised Mrs. Taylor's attorneys-at-law and requested them to provide a police report or further information which would allow it to investigate the alleged accident. There had been no response from Mrs. Taylor's attorneys-at-law. However, other relevant court documents were subsequently served on Metro.

22. Although the law is clear that I must set aside the Interlocutory Default Judgment dated June 13, 2007 and the final judgment dated May 4, 2009, I am recommending that in the interest of human relations, AGI consider and make an *ex gratia* payment to Mrs. Taylor because of the circumstances I outline below, which indicate that there was the real probability that AGI was aware of the details of the claim and of the options open to it to defend the claim before now.

23. **Circumstances supporting ex gratia payment**

1. There is evidence that a report of an accident involving a Metro bus was made at Half Way Tree Police Station and to a bus supervisor the same day of the accident.
2. The initial ground for the application was that Metro was in liquidation and no longer operated from "the alleged registered address" whereas the official Government records reflect it as operating at the address to which process was sent.
3. The damages assessed were approximately \$1 million plus interest.
4. Metro was insured by a reputable Insurance Company – which is still conducting business.

5. There is unchallenged evidence that all other pertinent documents were properly served on Metro and/or AGI, containing all relevant details.

24. The order that I make is therefore in terms of paragraph 2 of Notice of Application filed August 8, 2011, i.e., that the Judgment entered in Default of Acknowledgement of Service is set aside and all proceedings that flowed from it.

25. No Order as to costs.