[2024] JMSC Civ. 119

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2010HCV01336**

| | | |
|---|---|---|
| **BETWEEN** | **KEISHA ROSE JACKSON (Administratrix ad Litem in the Estate of Gloria Rose)** | **1ST CLAIMANT** |
| **AND** | **SHARON MCFARLANE (Administratrix ad Litem in the Estate of Gloria Rose)** | **2ND CLAIMANT** |
| **AND** | **NOEL DAVIDSON** | **DEFENDANT** |

**IN CHAMBERS**

**Matthew Palmer instructed by Archer Cummings and Company for the Claimants**

**Dr. Mario Anderson instructed by Kingston Legal Aid Clinic Limited for the Defendant**

**Heard July 15, 2024 and October 25, 2024**

**Civil Procedure-CPR 13.2, 13.3- Whether default judgment should be set aside because particulars amended after the default judgment was entered-Whether default judgment should be set aside because amended particulars were not served personally on the Defendant-CPR 39.6 Whether judgment on assessment should be set aside as notice of assessment not served on Defendant -Notice of assessment served by registered post-Service by registered post.**

**MASTER L. JACKSON (AG)**

## Introduction and Background

**[1]** The Claimant Ms. Gloria Rose (now deceased), filed a Claim Form and Particulars of Claim wherein she avers that, on January 24, 2009 she was lawfully travelling as a passenger in motor vehicle registered 3376 FD along Manchester Avenue in the parish of Clarendon. The vehicle was travelling at a fast pace, got out of control and collided in a light post. As a result of this, the Claimant sustained injuries. The vehicle was owned by Mr. Noel Davidson the Defendant.

**[2]** Mr. Davidson was served with the Claim Form and Particulars of Claim (which is not in dispute) but failed to file an Acknowledgment of Service as required by the CPR (also not in dispute). On October 1, 2010 judgment in default was entered by the Deputy Registrar, against the Defendant Mr. Davidson. The matter has a long history and a chronology of what obtained thereafter, will give a better understanding and picture as to why the Defendant made this particular application before the Court and so I will set it out below.

**[3]** The default judgment and notice of assessment of damages and other documents were served on Mr. Davidson on September 23, 2011. The matter was thereafter fixed for assessment of damages October 10, 2011 and was adjourned as the Defendant was short served. On December 19, 2011, the matter was adjourned as the Claimant was not ready. Similarly, on February 13, 2012, the matter was also adjourned. The Defendant did not attend any of these aforementioned dates. On March 30, 2012, the Defendant appeared and the matter was adjourned for him to seek legal representation. It is to be noted that up to that point, the Defendant was served with the notices of adjourned hearing by registered post as per the various affidavits of registered post filed by the Claimant's attorneys-at-law.

**[4]** On June 22, 2012, the Defendant was absent and the matter was further adjourned for the Claimant to seek a further medical. On September 25, 2012, the matter was adjourned for the same reason, the Defendant was not present.

**[5]** On November 28, 2012, the Defendant was present, the court adjourned the matter for the Claimant to file an application for expert witness to be appointed and also ordered that all subsequent documents that are to be served on the Defendant are permitted to be served by way of registered post. The address for service was also included in the order.

**[6]** On July 9, 2018 when the matter next came up for hearing, the Claimant and Defendant were absent and the matter was adjourned to June 25, 2019. On July 16, 2018 Amended Particulars of Claim were filed by the counsel for the Claimant and that along with the notice of adjourned hearing were served on the Defendant by registered post. An affidavit of service by registered post was filed in that regard on September 7, 2018.

**[7]** On the 26th of June 2019, the Claimant was present, but the Defendant was absent, the assessment of damages hearing occurred and judgment entered as follows:

> *"Special damages assessed and awarded to the Claimant in the sum of 853,908.31 with interest at 3% per annum from the 24th of January 2009 to the 25th of June 2019*
>
> *General damages assessed and awarded to the Claimant in the sum of 1,700,000 with interest 3% per annum from the 19th March 2010 to the 25th of June 2019*
>
> *Costs awarded to the Claimant to be agreed or taxed"*

**[8]** On May 11, 2020, the Judgment Creditor/Claimant filed a judgment summons for the sums owing with respect to the judgment obtained on assessment. The Claimant unfortunately died September 23, 2021. By way of an application for court orders, her daughters Keisha Rose-Jackson and Sharon McFarlane were appointed Administratrixes ad litem in her estate and substituted as Claimants.

**[9]** The court subsequent to this, ordered the Judgment Debtor to file an affidavit of means. In addition to filing his affidavit of means, the Judgment Debtor filed an application on May 9, 2024 for court orders requesting that the default judgment be set aside as well as the final judgment made on assessment on the grounds that *"the Defendant never received the requisite notices of adjourned hearings of the matter or notice of assessment of damages".* In support of his application, the Defendant filed an affidavit stating that he never received the requisite notices of adjourned hearing. That he visited the post office and requested information and was told that the documents were returned a long time ago. He also attached to this affidavit, a handwritten letter dated May 24, 2024, signed by a T. Powell, Branch Manager for Toll Gate Post Office, where Osbourne Store P.O. is located. The letter states *"that a letter came to Toll Gate Post Office which is where Osbourne Store Post Office is located for Noel Davidson August 2, 2018 for Noel Davidson. It was coming from Archer Cummings and Company Attorneys-at-law 35 Phoenix Avenue Kingston 10. It was returned to the company October 19, 2018 as it was never collected by Noel Davidson"*.

**[10]** Mrs. Jacqueline Cummings Attorney-at-Law and partner at Archer Cummings and Company responded to this affidavit by way of an affidavit in response, indicating that they searched their offices and did not see any sign that a letter was returned by the post office and that it is the Defendant who is to prove that the letter was returned to their offices.

**Submissions by the Applicant /Defendant**

**[11]** When the application first came before the court, on July 15, 2024, the parties were allowed to submit orally, however, due to the myriad of issues being submitted on, the matter was adjourned for written submissions to be filed to supplement the oral submissions made.

**[12]** Dr. Anderson in his submissions centered his application on two issues. He contends firstly, that the default judgment should be set aside as it was irregularly entered as an Amended Particulars of Claim was filed subsequent to the default

being entered. As a result, what the Claimant should have done, was to file another request for default on the Amended Particulars of Claim. He also contends that the Amended Particulars of Claim were not properly served having been served by registered post when it ought to have been served personally. In his written submissions on this point, he went further to pray in aid part 5 and 6 of the CPR. He stated that there was no evidence that the Claimant filed evidence on affidavit proving that the service was sufficient to enable the Defendant to ascertain the contents of the amended claim as required by rule 5.13.

**[13]** The second issue is that, the Defendant was never served with the Amended Particulars of Claim and with the notice of adjourned hearing with respect to the assessment of damages as contained in his affidavit and supported by the letter from the post office exhibited to his affidavit. The Defendant he further argued has a right to be heard on assessment and having not been served with the notice of adjourned hearing, lost that opportunity and as such, the judgment entered on assessment was flawed and should be set aside.

**[14]** He relied on the authority of **Yvonne Virgo v Granvin Graham et al** [2023] JMCA Civ 31 that establishes that deemed service by registered post is rebuttable if the Defendant can show he did not receive the documents. He contends that Mr. Davidson was never served with any of the documents towards the assessment including any of the notices of the assessment of damages or the adjourned hearings and thus could not attend the hearings. Since the assessment was based on the Amended Particulars of Claim, then the damages assessed should also be set aside.

**[15]** Dr. Anderson's written submissions continued by way of further written submissions filed September 27, 2024 where he stated that if the court finds that the notice of assessments were not served then there was no need for rule 36.9 of the CPR to apply. In this regard, he cited **Al-Tech Inc Limited v James Hogan et al** [2019] JMCA Civ 9, where Edwards JA stated *"It therefore follows that, in keeping with this court's decision in Watson v Sewell, since the appellant did not*

*receive a copy of the notice of assessment of damages or the notice of the adjourned hearing of the assessment of damages; which was ordered by the court to be served on it, the assessment of damages is a nullity. On this premise, the appellant would be entitled to have the final judgment set aside without having to make an application under rule 39.6 of the CPR".*

**Submissions by the Respondent/Claimant**

**[16]** The Claimants' attorney Mr. Palmer in his oral submissions argued that there are several flaws in Dr. Anderson's arguments. He stated that any application to set aside default judgment is grounded in part 13 and the Defendant would have to satisfy the grounds under that part. He stated that there are two ways in which default judgments may be set aside; rule 13.2 or 13.3. As it pertains to rule 13.3(2) Mr. Davidson has not provided any explanation as to the delay in making the application over a decade after he was served with the default judgment or as to why he did not file an Acknowledgment of Service or Defence in the first place. He has not shown a real prospect of defending this Claim by the provision of a draft Defence or otherwise either.

**[17]** He continued by observing that Mr. Davidson's evidence is only that he did not receive the requisite notice of adjourned hearing or notice of assessment. There is no indication that he did not receive the Judgment in Default. Another flaw pointed out by Mr. Palmer in Dr. Anderson's submissions, is that the default was regularly obtained and that the Amended Particulars of Claim filed after the default, did not affect the regularly obtained default judgment.

**[18]** Finally, he said that any application to set aside the final judgment obtained at the assessment of damages hearing, would fall under rule 39.5(b) and 39.6 and that the Defendant has not satisfied the court in that regard. The former rule states that *"provided that the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules…; or (b) if one or more, but not all parties appear, the judge may proceed in the absence of the parties who do not appear".* Rule 39.6 states that the party that was not present at a trial at

which judgment was given or an order made in its absence may apply to set aside that judgment or order. The application must be within 14days after the date on which the judgment or order was served on the applicant. The application must be supported by affidavit evidence showing good reason for failing to attend the hearing and that it is likely that had the applicant attended, some other judgment or order might have been given or made.

**[19]** He cited a number of authorities to include **Leroy Mills v Roland Lawson and Keith Skyers** (1990) 27 JLR 196, **Holiday Inn Jamaica Inc v Carl Barrington Brown** (unreported), Court of Appeal, Jamaica SCCA No. 83 of 2008 and **Joscelyn Massop v Temar Morrison (By his mother and next friend Audrey White)** [2012] JMCA Civ 56 in support of his arguments. The crux of his submission is that like rule 26.8 of the CPR, unless an applicant under rule 39.6 applies within time or obtains an extension of time, then the court does not have jurisdiction to consider rule 39.6(3) and their application as a whole. He also stated that this applies to an assessment hearing as there is no dispute that an assessment of damages is a trial.

**[20]** Mr. Palmer also stated that the Defendant has not provided a sliver of evidence as to why he did not apply for the default judgment or final judgment to be set aside beforehand. His application has come at least 1,734 days after he became aware of the judgment. This delay is inordinate and in the absence of an exceedingly strong excuse for the delay, is inexcusable. The court has no jurisdiction to consider rule 39.6(2).

**[21]** As it concerns the Defendant's contention that he was never served, Mr. Palmer states that the letter being relied on by the Defendant is unusual and improper. It does not bear a letter head and makes no mention of the registered article in question. He went on further to indicate that, even if the court is minded to rely on this letter that, Mr. Davidson has not shown that if he had attended the assessment of damages hearing, then some other judgment might have been given.

**Issues**

*The issues to be determined on this application are: -*

*(a) whether the default judgment entered against the Defendant ought to be set aside*

*(b) whether the final judgment entered on assessment ought to be set aside on the basis that the Defendant was never served with the notice of adjourned hearing.*

**The Law**

*For the purposes of the application, the following rules of the CPR are relevant.*

***Service of claim form, normal method***
*Rule 5.1 (1) The general rule is that a claim form must be served personally on each Defendant.*

***Method of service***
*Rule 6.2 the court orders otherwise. Where these Rules require a document other than a claim form to be served on any person it may be served by any of the following methods;*

*(a)any means of service in accordance with Part 5;*
*(b) leaving it at or sending it by prepaid post or courier delivery to any address for service in accordance with rule 6.3(1);*
*(c)where rule 6.3(2) applies) FAX; or*
*(d) other means of electronic communication if this is permitted by a relevant practice direction, unless a rule otherwise provides or the court orders otherwise.*
*(Rule 3.6(2) enables the Chief Justice to make practice directions as to the electronic service of documents.)*

***Defendant's rights following default judgment***
*Rule 12.13 Unless the Defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a Defendant against whom a default judgment has been entered may be heard are:-*

*(a) the assessment of damages, provided that he has indicated that he wishes to be heard by filing a notice in form 8A pursuant to rule 16.2(4)*

*(b) costs;*

*(c) the time of payment of any judgment debt; enforcement of the judgment; and an application under rule 12.10(2).*

*(Part 13 deals with setting aside or varying default judgments.)*

***Cases where court must set aside default judgment***
*Rule 13.2 of the CPR states that:*

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

***Cases where court may set aside or vary default judgment***
*Rule 13.3 provides:*

*"(1) The court may set aside or vary a judgment entered under Part 12 if the Defendant has a real prospect of successfully defending the claim.*

*(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the Defendant has:*

*(b) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.*

*(c) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.*

*(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.*

*(Rule 26.1(3) enables the court to attach conditions to any order.)*

***Application to set aside judgment given in party's absence***
*39.6 -*
*(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.*

*(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.*

*(3) The application to set aside the judgment or 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*

*(c) judgment or order might have been given or made.*

**Analysis**

**Whether the Default Judgment entered against the Defendant ought to be set aside**

**[22]** The burden is on the Defendant to establish why the default judgment ought to be set aside. Rules 13.2 and 13.3 of the CPR establishes two ways in which, default judgments may be set aside. As Brown E J (acting) (as he then was) stated, in **Hunter and Another v Hunter** *(unreported) HCV02371/2007 delivered 20.11.2009,* rule 13.2 and 13.3 of the CPR each exist in their own sphere and are not an alternative to the other. One is as of right, while the other is essentially an appeal of the Court's discretion.

**[23]** The Defendant has not prayed in aid any of these rules as the basis on which he seeks the order to set aside the default judgment. His notice of application for court orders and affidavit in support, simply states that he was never served with the notice of adjourned hearings of the matter or the notice of assessment of damages. It is in oral submissions that Counsel for the Defendant made heavy weather that the filing of Amended Particulars of Claim after the default was entered was not proper and it is on that basis that the default judgment entered should be set aside.

**[24]** Although he has not cited rule 13.2 or 13.3 of the CPR in his application, they would not assist the Defendant in his application. As it relates to "the as of right" provision (rule 13.2), the Defendant has not established that either of the circumstances exist for that provision to apply to him. That is, that he was never

served with the initiating documents, that is the Claim Form and Particulars of Claim and accompanying prescribed documents before the default judgment was entered against him. In fact, this is not his contention as evidenced in his affidavit filed in support of his application. His main contention is the non-service of the notices of adjourned hearing in the matter and the notices of assessment of damages hearing. As such rule 13.2 does not apply.

**[25]** Rule 13.3 of the CPR, is applicable where the Defendant is appealing to the court's discretion. This usually applies in instances where the Defendant has been served with the initiating documents, the judgment has been entered, but the Defendant is appealing to the court to exercise its discretion to allow him to file a defence. In such cases, the court will examine, whether the application was made as soon as reasonably practical, the reason for the delay (if any) in filing the application and whether the Defendant has a meritorious defence. Rule 13.4 requires that the draft defence should be exhibited to the affidavit in support of such an application.

**[26]** This rule would not assist Mr. Davidson as the applicant's application is being filed almost 14 years after the default judgment was entered against him, there is no reason proffered in his affidavit for the delay in filing the application, nor was any mention made of a meritorious defence or a draft defence exhibited to his affidavit in support of his application.

**[27]** The final point raised by Dr. Anderson is that the default judgment should be set aside as the Amended Particulars of Claim was not served personally as required by the rules. Having not been served personally, the default judgment entered is irregular and any other judgment flowing from same should be set aside.

**[28]** It is important to note that the Amended Particulars of Claim which amended the special damages being claimed, were filed (July 16, 2018), almost 8 years after the default judgment was entered and served along with the notice of adjourned hearing and other documents by registered post July 31, 2018. The filing of the Amended Particulars of Claim, after the default was entered do not nullify any judgment entered in default. What the Defendant would have to demonstrate is

that the default was irregularly entered as required by rule 13.2 or that he is asking the court to exercise its discretion under rule 13.3 of the CPR.

**[29]** As it relates to Counsel's contention that the Amended Particulars of Claim were to be served personally, it is to be noted that by virtue of rule 5.1, the requirements for personal service only applies to a Claim Form. Rule 5.1 states that the general rule is that a Claim Form must be served personally on each Defendant. Pursuant to rule 5.13 and 5.14, by applications to the court, an applicant can request for personal service of the Claim Form and prescribed documents (or any other documents) to be dispensed with and seek an order for an alternate method or specified method of service to be granted.

**[30]** With respect to an Amended Particulars of Claim, Part 6 of the CPR outlines the manner in which other documents (which would include an Amended Particulars of Claim), are to be served. Rule 6.2 states that where these Rules require a document other than a Claim Form to be served on any person, it may be served by any of the following methods listed in part 5 of the CPR as well as sending it by prepaid post or courier delivery to any address for service in accordance with rule 6.3(1).

**[31]** In addition to the foregoing, on November 28, 2012, the Defendant was present at the assessment of damages hearing whereby it was ordered by the court that the Claimant was permitted to serve the Defendant with all documents thereafter by registered post. The address was also provided and documented as part of the order. For the Court to have made such an order it would mean that the Defendant who was present at the time, provided this information and would also be aware that documents in relation to the case from that date onwards would be sent by this method and to the address stated in the order.

**[32]** The service of the Amended Particulars of Claim by registered post is not only in conformity with the CPR (part 6) but also with the order of the court dated November 28, 2012. As a result, the Defendant's argument that the Amended

Particulars of Claim should have been served personally and the failure to serve same personally rendered the default judgment entered irregular, would also fail.

**Whether the Final Judgment entered on Assessment ought to be set aside on the basis that the Defendant was never served with the Notice of Adjourned Hearing.**

**[33]** Before I address the issue as to whether the requisite notices were served on the Defendant for the final assessment hearing, it is critical to first examine the argument raised as to under what circumstances can a final judgment obtained at an assessment of damages hearing be set aside. Mr. Palmer argued that in order to do so, the Defendant must comply with rule 39.6 of the CPR which he has not. Dr. Anderson disagrees and says that rule 39.6 is not applicable as an assessment is not a trial, as rule 39.6 only applies to trials. In his written submissions he went further to rely on **Al-Tech Inc. Limited v James Hogan et al** and stated that in any event, where the Defendant was not served with the notice of adjourned hearing of assessment of damages, rule 39.6 would not apply as the Defendant would be entitled as of right to have the judgment set aside without having to make an application under rule 39.6.

**[34]** Let me start with Rule 39.5 of the CPR. That rule states that if a judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with the rules and no parties appear, the judge may (a) strike out the claim and counter claim or (b) if one or more, but not all parties appear the judge may proceed in the absence of the absent party. Rule 39.6 gives the absent party an opportunity to apply to the court to set aside the judgment or order if (a) he applies within 14 days of the date of service of the judgment or order; (b) the application is supported by affidavit evidence showing (i) good reason for failing to attend the hearing and (ii) that it is likely that had the applicant attended some other judgment or order might have been given or made.

**[35]** **Watson v Roper** SCCA No 42/2005 (unreported) (delivered November 18, 2005) Karl Harrison JA held that the standard laid down by rule 39.6 is cumulative. This position was reaffirmed by the Court of Appeal in **Astley v The Attorney General**

[2012] JMCA Civ 64. The legal position now is that under rule 39.6, all the conditions stated there must be met and if they are not met the judge cannot set aside the judgment or order.

**[36]** The next question is whether rule 39.6 would apply to an assessment of damages. Sykes J (as he then was), stated in **Tyrell v Burrell and Another** *[2015] JMCC COMM 25* that this rule may cover cases where a default judgment is entered and damages are to be assessed since the assessment of damages is a trial. See also **Leroy Mills v Lawson and Skyers** (1990) 27 JLR 196, **Watson (Linton) v Sewell (Gilon) and Ors.** [2013] JMCA Civ 10 and **Al-Tech Inc. Limited v James Hogan et al**.

**[37]** Finally, what is the effect of non-service of the relevant notices on such an application? Justice Harrison in **Watson v Roper** stated that not being served with the notice of adjourned hearing, is a good reason that a Defendant can proffer for non-attendance. In **Al-Tech Inc. Limited v James Hogan et al** Edwards JA not only confirmed and accepted that an assessment hearing is a trial, but stated that the effect of non-service of the notice of assessment of damages or the notice of the adjourned hearing of the assessment of damages on the Defendant; which was ordered by the court to be served on it, would render the assessment of damages hearing a nullity. As such, there would be no need for the Defendant to make an application under rule 39.6.

**[38]** Having, established therefore that an assessment hearing is a trial, the court must first consider whether the Defendant was served with the notice of adjourned hearing and assessment. This is because, if he was served, then rule 39.6 would be applicable and he would have to establish that the application to set aside falls within the ambit of that rule. If I find that he was not served, then the assessment of damages hearing is a nullity and the final judgment would have to be set aside.

**[39]** Rule 12.13 outlines the rights of the Defendant following the default judgment. This includes the right to be heard at the assessment of damages and as such the Defendant is entitled to be served with the requisite notice(s). The Defendant's

notice of application states that he never received the requisite notices of adjourned hearings of the matter or notice of assessment of damages. This includes the notice of adjourned hearing for the assessment of damages where the final order was entered against him. As a result of this, he argued that he lost his right to be heard at that hearing as required by rule 12.13.

**[40]** Before I address the notice of adjourned hearing that relates to the final assessment that was heard, I wish to address the contention by the Defendant, that he was never served with any of the requisite ***notices*** *(emphasis mine).* From a review of the minutes of orders, it would not be correct for the defendant to assert that he was never served with any notices in this matter.

**[41]** A part from the originating documents and the Judgment Summons, all the documents including the notices of adjourned hearings, notice of assessment, default judgment, Amended Particulars of Claim and documents required for the assessment hearing, were served on the Defendant by way of registered post. There are a number of filed affidavits of service by registered post to this effect. At least on two occasions, March 30, 2012 and November 28, 2012, the Defendant appeared at the assessment of damages hearings as scheduled as a result of such service. The Defendant has not rebutted this position as the letter he seeks to rely on from T. Powell from the Toll Gate Post Office, only speaks to one letter sent August 2, 2018, it does not refer to any other documents prior to that date. Therefore, it is not correct for the defendant to blankly assert that he was never served with any notices in this matter.

**[42]** I will now turn to the main issue, that is, whether or not he was served with the notice of adjourned hearing in relation to the final assessment held June 25, 2019 by registered post. The Defendant in his affidavit contends that he was not served with the documents. Exhibited to this affidavit, is a letter from a T Powell, Branch Manager of Toll Gate Post Office. The letter indicated that a letter came for Mr. Davidson by registered post on August 2, 2018 and that it was returned to Archer

Cummings and Co at 35 Phoenix Avenue October 19, 2018 as it was not collected by Mr. Davidson.

**[43]** In an affidavit in response to this, the Claimants attorneys indicated that the notice of adjourned hearing along with the Amended Particulars of Claim and other relevant documents geared towards the assessment of damages hearing, were sent to the Defendant by registered post. They indicated that they have searched their offices, and there is no indication that the letter and its contents were returned to their offices.

**[44]** The Defendant maintains that he was not served with the documents by registered post and seeks to rely on this letter from the branch manager as proof of this. The branch manager's letter states that the letter was indeed sent by the Claimants' attorneys by registered post on August 2, 2018 which is prior to the assessment of damages hearing date, but that Mr. Davidson did not collect same. As a result, the letter was returned on October 19, 2018. The issue is whether this constitutes non-service of the documents by the Claimants' attorneys.

**[45]** Counsel Dr. Anderson relied on **Yvonne Virgo v Granvin Graham et al** [2023] JMCA Civ 31 in arguing that deemed service by registered post is rebuttable if the Defendant can show that he did not receive the documents. Counsel Mr. Palmer took issue with the letter from the post office being relied on. He said it was handwritten, the name of the person is not clear as it only said T. Powell, there is no letter head and it makes no mention of the registration number of the registered article in question. He said this evidence should be rejected.

**[46]** Where a court makes an order for service by registered mail, the authorities have established that proving that the documents have been sent to the address that counsel provided to the court as being that of the intended recipient is not the end of the matter. See **Annette Giscombe and Ors. v Halvard Howe and Anor.** [2021] JMCA Civ 47. **Yvonne Virgo v Granvin and Graham et al** also endorsed this principle from **Annette Giscombe and Ors v Halvard Howe and Anor** and

Dunbar Green JA in the latter authority, made a number of observations on the applicable law and the relevant facts in the matter including the following:

i. *A defendant should be served at what is his last known or current address and the claimant should provide evidence of how he ascertained this address (see para. [52]);*

ii. *There was no evidence that D35 Flintstone Close remained the owner's address at the point at which the registered mail with the claim form and particulars of claim were posted some 10 years later. In fact, there was evidence that the claimants had ascertained that the owner was residing at 1035 Flintstone Close. It could, therefore, not be said with any certainty that the owner was served at his last known address, and on that basis alone, service could be found irregular (see paras. [54] - [56]);*

iii. *For the presumption of deemed service by registered mail to prevail, the document to be posted must be properly addressed - the address must be "correct and complete" (see para. [67]);*

iv. *The presumption of service may be rebutted. What constitutes a rebuttal is a matter of evidence (see paras. [69] and [70]);*

v. *The return of documents by the postal authorities is strong evidence of rebuttal of deemed service, but is not necessarily determinative of the issue of service (see para. [83]); vi. vii. [70] While there was no direct evidence before the court as to how service by registered post was effected, it could be deduced from the letter by the postal authority that it involved the following steps: on receipt of the article, the post office sends a notice (registered slip) to the intended recipient. This registered slip alerts the recipient to the existence of a registered article at the post office for collection, and the recipient is expected to collect the article from the post office. Once it is proved that the registered slip was properly addressed, stamped, the fee paid and it was sent to the correct address, service is deemed to have been effected at a particular date; however, this is rebuttable (see para. [85]; and*

vi. *If the article is returned unclaimed, the onus would be on the insurance company seeking to set aside the judgment to provide evidence that the registered mail was sent to the wrong address and the owner did not receive the registered slip and this was the reason for the return of the registered mail (see para. [87]).*

**[47]** The Court of Appeal in **Yvonne Virgo v Granvin and Graham et al** applied these principles referred to above and noted that the judge was correct in taking into account affidavit evidence from the appellant that the bailiff had problems locating

the Defendants due to the wide geographical area involved and the inability to locate their specific dwellings. That neither of the addresses utilized referred to a particular post office and the registered mail was returned unclaimed. As a result of this evidence, the court agreed that the presumption was rebutted and there was not sufficient evidence that the Claim Form was actually sent to their address.

**[48]** In **Ann Thomas v Guardsman Limited and another** *[2018] JMSC Civ 42*, Wint-Blair J in examining the issue of service by registered post stated *"In short, service of process allowed by both the Act and rules by way of registered post means it can be assumed that the registered documents have been delivered in the ordinary course of post and any judgment or order by default obtained on the strength of that assumption is perfectly regular. If the converse is true and the documents are returned undelivered and, notwithstanding its return, a judgment or order obtained with this knowledge in default, is irregular and will be set aside ex debito justitiae".*

**[49]** Mott Tulloch-Reid J in **Leslie v Top Seal Company Limited** *[2022] JMSC Civ 110* stated that the question that must be answered was whether there was service by registered post as this will determine whether the default judgment must be set aside as of right. She stated: -

> *"The issue is, whether there was service of the Claim Form and Particulars of Claim on the Defendant in an instance where the Defendant did not collect them from the post office? The question is answered in the case of Ace Betting Company Limited v Horseracing Promotions Limited Court of Appeal SCCA 70 & 71/90 where it was held on page 13, the learned Court quoting from A/S Cathrineholm - 10 - v Norequioment Trading Limited (1972) 2 WLR 1242 at 1247 Lord Denning who said "When the plaintiff sends a copy of the writ by prepaid post to the registered office of the company, and it is not returned and he has no intimation that it has not been delivered it is deemed to have been served on the company and to have been served on the day on which it would ordinarily be delivered. If no appearance is entered in due time, the plaintiff is acting quire regularly in signing judgment." (my emphasis)*
>
> *Since I do not know when the Claimant 's attorneys-at-law would have been notified by the Post Office that the documents had returned unclaimed and since a default judgment was entered against the Defendant, I can only conclude that when the Claimant made the request for the default judgment,*

*she had no intimation that the initiating documents had not been delivered and therefore they were deemed served".*

**[50]** From a review of the principles, the registered post should be addressed to the last known address for the Defendant and he should be served at this last address and the Claimant would need to establish how the address was obtained. To rebut the presumption, the Defendant would need to establish that the registered mail went to the wrong address, the reason why it was returned was on this basis and that he did not receive the registered slip. Additionally, not only the return of the letter to the Claimant but the date when the returned letter was received and that they were well aware that it was returned when the judgment was obtained.

**[51]** The affidavit of service by registered post filed by Archer Cummings and Company, outlines all the documents served by this method and the manner in which it was done. It exhibits the registered slip with the address for the Defendant to include the post office which is the same that was ordered by the court as far back as 2012 for service by registered post to be effected. The date it was posted and the article number are also stated therein. Unlike what transpired in **Yvonne Virgo v Granvin and Graham et al**, there is an address and a post office on the registered slip for Mr. Davidson. Mr. Davidson did not deny in his affidavit that the address used by the Claimants' attorneys is his. This is also the address from the order of the Court made November 28, 2012. One can safely assume that if the Defendant was present when the order was made, the address must have been provided by him. I will also reiterate he has not challenged the address used.

**[52]** On the contrary, the Defendant only stated he has never received any notices and the letter from the post office merely says he did not collect it. I agree with Mr. Palmer that the evidence the Defendant seeks to rely on, the letter from the post office, does not indicate the number of the registered article the letter received and what exactly was returned to Archer Cummings and Company. It merely states a letter was received, the date it was received and that it was returned because it was not collected by Noel Davidson. It is not enough to say that the letter was

returned to Archer Cummings and Company because Mr. Davidson did not collect it.

**[53]** The basis on which it was returned must be established. In this case it was returned because Mr. Davidson failed to collect it. To now rely on the returning of the documents because he failed to collect same as proof of non-service is disingenuous to say the least. Was it the registered slip that he failed to collect or the letter? The letter from T Powell just says the letter was returned because **it** was not collected by Noel Davidson. This evidence presented by the Defendant is deficient in many aspects to rebut the presumption of service by registered post.

**[54]** Dunbar-Green JA in **Annette Gisbome and Ors.** puts my perspective on Mr. Davidson's position as it stands aptly when she said, *"It is my view that had it been established, on the evidence, that the registered slip was correctly addressed and sent in the ordinary course of service by registered post, notwithstanding the return of the article, unclaimed, the onus would have been on the 2nd respondent or the insurance company which sought to set the judgment aside, to provide evidence that the registered mail was sent to the wrong address and the 2nd respondent did not receive the registered slip, and this was the reason for the return of the registered mail. If it were otherwise, rule 5.14 would make no sense and a recalcitrant Defendant who is served with a registered slip would be able to wait until the postal authority returned the article to successfully claim non-service. It must be the intent behind rule 5.14 that such a Defendant would ignore the registered slip at his peril. Ultimately, whether a claim form is served is not a matter of pure law. It is also a matter of evidence".*

**[55]** Having failed to rebut the presumption, the only way the Defendant can now seek to set aside the final judgment made at the assessment of damages hearing, would be pursuant to rule 39.6 of the CPR. In order to do so, Mr. Davidson would need to (a) apply within 14 days of the date of service of the judgment or order; (b) support his application by affidavit evidence showing (i) good reason for failing to attend the hearing and (ii) that it is likely that had the applicant attended some

other judgment or order might have been given or made. Mr. Davidson has not met any of the above mentioned requirements and therefore, the final judgment cannot set aside pursuant to this rule.

**Conclusion**

**[56]** The Defendant has failed to establish that rules 13.2 or 13.3 of the CPR applies and that the default judgment entered should be set aside under either of these two rules. Furthermore, his contention that the Amended Particulars of Claim were irregularly served and therefore nullified the default judgment entered against him is flawed.

**[57]** He has also not rebutted the presumption that he was not served by registered post with the notice of adjourned hearing or the requisite documents geared towards the assessment of damages hearing. In addition, having found that he has not rebutted the presumption, and that he was duly served with the notice of adjourned hearing and assessment documents, it would be incumbent upon him to establish that the final judgment obtained at the assessment of damages hearing should be set aside pursuant to rule 39.6 of the CPR. He has also failed to establish this.

**Order**

1. The application filed May 9, 2024 to set aside default or judgment on assessment is refused
2. Cost awarded to the Claimants to be agreed or taxed
3. Leave to appeal refused.
4. Judgment Summons hearing is adjourned to December 11, 2024 at 2pm for 30mins
5. Counsel for the Respondent/Claimant is to prepare file and serve orders herein

**LUCIANA JACKSON**
**MASTER-IN CHAMBERS (ACTING)**