[2018] JMSC Civ.42

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV03570

BETWEEN	**ANN THOMAS**	**CLAIMANT**
AND	**GUARDSMAN LIMITED**	**DEFENDANT**
AND	**NMIA AIRPORTS LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Raymond Samuels instructed by Samuels & Company for the Claimant

Ms. Ayanna Thomas instructed by Nunes, Scholfield and De Leon for the First Defendant

The Second Defendant was absent the claim having been discontinued against it.

Heard: February 26, 2018 and March 29, 2018

Application to set aside judgment entered in default of acknowledgment of service – what is proper service of registered article on a company – whether judgment entered irregularly – whether court ought to set aside judgment as of right or apply provisions of rule 13.3 Civil Procedure Code – section 52 Interpretation Act

WINT-BLAIR, J

[1] This application raises questions as to what constitutes proper service by registered post. The relevant provisions of the Civil Procedure Rules ("CPR") are Rules 5.7, 5.19 and 6.6 which are to be read with, section 52 of the Interpretation Act (the Act".) As the respondent/first defendant is a limited liability company, I have also considered Section 387 of the Companies Act which is identical to section 437(1) of the UK Companies Act, 1948 which provides:

> *"A document may be served on a company by leaving it at or sending it by post to the registered office of the company."*

[2] The issues to be decided are whether or not service on the first defendant has been deemed to have been effected as registered article proven to have been posted to the respondent's correct address were never collected. Would this constitute compliance with the section 52 of the Act?

[3] Should the default judgment subject of this application be set aside as of right or only in accordance with rule 13.3 of the CPR?

Submissions

[4] It has been argued by Ms Thomas that there was no proper service on the first defendant and accordingly, the judgment in default of acknowledgment of service entered on October 31, 2012 was irregularly obtained and should be set aside as of right. She based her submissions on the non-delivery of the registered article, namely, the claim form and particulars of claim in this matter. It is undisputed that the registered article was never received by the first defendant.

[5] Ms. Thomas relied on three affidavits of Sheryl Thompson, Legal Manager of the first defendant, the first of which was dated November 27, 2013 with an attached letter from the Head Postmaster for Kingston dated November 26, 2013. In respect of service, the third affidavit of Sheryl Thompson dated October 2, 2015 outlined the system for the receipt and collection of registered mail. She further

averred that any registered slips which were mislaid were due solely to inadvertence and not deliberate failure to collect the registered article.

[6] Ms Thomas noted that it is undisputed that in this matter other registered articles posted by the applicant's counsel and referred to in the Head Postmaster's letter, were returned to the sender on September 6, 2013.

[7] Ms Thomas has relied on these affidavits and the letter from the Head Postmaster as evidence of the non-delivery of the claim form and particulars of claim. That letter confirmed that the registered article numbered 9905 had been returned to the applicant's attorney-at-law on September 14, 2012.

[8] Ms Thomas, buttressed her submissions with the case of **A.C.E. Betting Co. Ltd. v Horseracing Promotion Ltd.** SCCA Nos. 70 & 71/90, a decision of the Court of Appeal delivered by Forte, J.A.(as he then was). In this case, the Court decided, having reviewed the Act, that a writ sent by registered mail which was not returned and with no intimation that it had been delivered, was deemed to have been served on the day that it would normally be delivered. The judgment entered in default of appearance in that case was regularly obtained and could not be set aside ex debito justitiae.

[9] Counsel also cited the decision of Lawrence-Beswick, J in **Loveleen Morgan-Taylor v Metropolitan Management Transport Holdings Limited** HCV0938/2007 delivered on November 24, 2011 in which my learned sister said that in the matter before her there was evidence of posting by way of registered slip as well as evidence that the letter had not been collected. The affidavit of the Postmaster General swore that the letter was unclaimed from the post office records. That letter was returned to the sender who signed as having collected the unclaimed letter and its contents. She found on a balance of probabilities that there had been no service, as it could not have been deemed to have been effected in the face of the non-delivery and return of the letter.

[10] Counsel also cited Panton, P in **Linton Watson v Gilon Sewell et al** [2013] JMCA Civ 10. The learned Judge of Appeal stated at paragraph 36 of the decision of the Court of Appeal that:

> *"The words in rule 5.19 "unless the contrary is shown", do suggest that the server or the recipient can attempt to show to the court, once in conformity with the rules, when actual receipt of the documents occurred. In respect of the claimant, evidence can be produced to show that the claim form was in fact sent earlier than the date on which service was deemed to have been effected, thereby dispelling the fiction of deemed service on any other day, and in my view, in respect of the instant case, that service may not have been effected at all. The presumption of the deemed date of service is therefore in my opinion, in relation to this rule, rebuttable....This evidence may be adduced on behalf of either the claimant or the defendant to show that the service of the claim form did not take place on the deemed day of service set out in rule 6.6 or at all."*

[11] Ms. Thomas further argued that given the fact of knowledge on the part of the applicant's counsel that the claim form and particulars of claim had been returned to his office, the request for entry of default judgment ought not to have been made. She also argued that in light of this, Mr. Samuels did not attempt another method of service as there was no such evidence.

[12] It was argued by counsel Mr. Samuels that his firm having sent the claim form and particulars of claim by registered post to the respondent at its correct address, that service had been effected in compliance with the rules as it was the first respondent who had failed in its duty to collect the registered article. The applicant cannot be blamed for its inaction and therefore the judgment ought not to be set aside as of right or at all. Mr. Samuels also relied on a letter from the Head Postmaster for Kingston identical to that exhibited by Ms. Thomas in terms of content, outlining the non-delivery of the registered article numbered 9905 as they had been returned to the sender, Samuels & Samuels, Attorneys-at-Law of 45 Duke Street, Kingston on September 14, 2012.

[13] Mr. Samuels further relied on the case of **Akram v Adam** [2004] EWCA Civ 1601. In that case, a defendant who had no notice of proceedings until after the entry of judgment in default had his appeal dismissed on the ground that the judgment had not been wrongly entered once the notice had been served by in accordance with the rules. He was not entitled to have the judgment set aside as of right but only on grounds set out in rule 13.3(1) of the UK CPR (rule 13.3.q)

Discussion

[14] In looking at section 52 of the Interpretation Act it would seem to me that the proper construction is one which prevents a miscarriage of justice. It is a fundamental principle of natural justice that before a party to a matter can be made subject to an order of the court he must be given reasonable notice of the proceedings, of course this does not include proceedings which may be heard ex parte or statutory exceptions.

[15] At common law a party always had the right to make full answer and defence in any proceedings in which an order against him could be made. It went so far as to compel the personal appearance of the defendant in person in court by a writ of capias which directed the sheriff "*to take the body of the defendant... and him safely to keep, so that he may have him in court on the day of the return, to answer to the plaintiff*" (see Blackstone's Commentaries III, 282.) Those days are behind us, however, the law still requires that a defendant be served personally. The obvious reason for this is to ensure that he knows of the proceedings against him. This common law requirement is preserved by the Civil Procedure Rules.

[16] In the CPR, service by registered post is allowed. The benefit of registering the documents to be served is that the delivery will only be to the addressee or to someone designated by the addressee to accept delivery on its behalf as is indicated in the Post Office Act.

[17] In the Post Office Regulations, 1941 made pursuant to the Post Office Act, section 78 provides as follows:

> *"78.-(1) No registered postal article will be delivered to the addressee unless and until he signs a receipt for it in such a form as the Postmaster-General may require, or, if this is not practicable, unless and until the receipt is signed by some responsible person known to be permanently connected with the house or place to which the article is addressed, or by some person authorized by the addressee in writing to receive registered postal articles on his behalf.*

The importance of this section is that the sender will know whether or not his registered item has been delivered for if it has not been, it will be returned to him.

[18] When the claimant requested that default judgment be entered against the first defendant, proof of service was required. Rule 5.11 provided that proof must be by way of affidavit of the person responsible for posting the claim form exhibiting a copy of the claim from and stating the, time and date of posting as well as the address to which it was sent. Proof took the form of an affidavit of posting from Shorna Coke, bearer employed to the firm of Samuels & Samuels, attorneys-at-law. In her affidavit dated and filed on the 10th day of October, 2012 she stated that on the 24th day of July, 2012, she received a sealed copy claim from dated June 4, 2012 with prescribed notes for defendant, acknowledgment of service form and defence form, true copy particulars of claim all filed June 26, 2012. She also received attachments to those documents. She was instructed to place the documents in an envelope addressed to the first respondent and to send it off by registered post. She did so on July 14, 2012, duly delivering to the Postmaster the documents in question and in exchange, receiving a Certificate of Posting of a Registered Article (colloquially known as a registered slip) bearing registration number 9905, the date stamp of the post office with a postal clerk's signature. This registered slip was attached to her affidavit as "SC2". The address for

delivery on Exhibit SC2 was "Guardsman Limited, 2-6 Emmaville Cresecent, Kingston CRO."

[19] It would seem to me that proof of service means proof that the registered article had not only been posted to the first defendant as required by the Rules but that it had not been returned, only then could it have been deemed to be effected or in other words, had been delivered.

[20] At common law, the defendant plainly received notice of the proceedings when he was taken into the custody by the sheriff as required by the writ. The CPR has preserved the common law position in that it is still a requirement that the defendant receive notice. As the presentation of the body of the defendant was proof that he had been given notice of the proceedings against him, so is the affidavit of service proof that the defendant **received** notice of the proceedings against him. It does not to my mind mean that an affidavit of service is or should be construed as proof of posting.

[21] Mr Samuels relied on the case of **Akram v Adam** [2004] EWCA Civ 1601 in which the claim form and particulars of claim were posted to the defendant by first class post. The defendant claimed not to have received his mail because his landlord from whom had become estranged had taken it, they were several other issues with documents being posted to him. He applied for an order of possession to be set aside on the basis that he was not aware of the hearing which had taken place. Letters sent to him at this sister's address had been received by him and his landlord knew this address but did not use it on this occasion. At paragraph 31 this case discussed the guidelines set down by the Court of Appeal for the service by post of High Court proceedings on a company at its registered office. The Court also reviewed the case of **Catherineholm v Norequipment Trading Lt**d. [1972] 2 QB 314, where the combination of section 437(1) of the Companies Act, 1948 and section 26 of the Interpretation Act, 1889 (identical to the Act) was interpreted to have the following effect:

> *"If a plaintiff could prove that a copy of the writ was sent by prepaid post to the defendant company's registered office and he received no intimation that the letter had not been delivered, he was entitled to proceed to sign judgment if no appearance was entered in due time, and the resulting judgment would be a regular judgment."*

[22] That court expressly approved the following passage from the dissenting judgment of Orr LJ in **Thomas Bishop Ltd. v Helmville Ltd.** [1972] 1 QB 464, 478-9:

> *"[T]he point of time to be looked at in deciding whether the judgment was regularly obtained is the time when the judgment was given or signed, and if at that time there is nothing known to the court (or to the plaintiff whose duty it would be to communicate it to the court) which indicates that the relevant process has not been delivered in the ordinary course of post, it is deemed to have been delivered for the purposes of that judgment, though it will be open to the defendant to apply have judgment set aside on the court's discretion on the ground, inter alia, that he was not served in time."*

[23] The argument made by Mr. Samuels that the documents had come to the respondent's attention by the delivery of the registered slip starts from the proposition that proof of posting is all that is required. In my view, it was not the registered documents which had been delivered but merely a notice that there was a registered article in the possession of the Postmaster. It would have been impossible for the respondent to say that which had been posted as the Certificate of Posting of a Registered Article exhibited to the affidavit of posting does not describe the article received by the Postmaster and in fact is simply a receipt to the bearer that an article has been received by the Postmaster who will in turn alert the addressee to the existence thereof. The documents would not have come to the respondent's attention until they had been delivered.

[24] Interestingly, it was the evidence of Raymond Samuels that he had written to the Post and Telecommunication Department and received a reply from the Head Postmaster, Kingston for the Postmaster General which he attached to his

affidavit. He relied on that document for the proposition that the respondent despite the delivery of the registered slip "failed to collect the registered article." The difficulty with this evidence is that it also disclosed that all the registered article which concern this application had been returned to his firm by September 14, 2012. This means that the applicant knew that the registered article had not been received by the respondent/first defendant. On, the 31st day of October, 2012 the counsel for the applicant filed a request for default judgment dated the 18th day of October, 2012. That request was based on the information contained in the affidavit of posting dated October 10, 2012 to which I have earlier referred.

[25] I would therefore decline to accept the submission that the court cannot set aside the judgment entered in default of acknowledgment of service as of right as this was a proposition based on **Akram v Adam** which is distinguishable on its facts. There was also the very clear statement by the court in that case, and the case of **A.C.E. Betting Co. Ltd.** that should be no intimation that the letter had not been delivered. Mr Samuels seemed to have overlooked the point made by both courts that at the time of the request for the entry of judgment in default, there should be nothing known to the court or to the claimant whose duty it would be to communicate it to the court, to indicate that the registered article have not been delivered in the ordinary course of post. There was clear evidence of knowledge of the non-delivery of the registered article on the part of Mr. Samuels. It is also rather troubling that the affidavit of service relied upon by Mr. Samuels to obtain the entry of judgment in default excluded the salient detail set out in the letter from the Head Postmaster, Kingston namely, that the registered article had not been delivered to the respondent as they had failed to collect them, thus they had been returned to sender. This was a vital omission and one from which the applicant can derive no benefit.

Conclusion

[26] What status should be accorded to undelivered registered documents? An undelivered registered article containing court process plainly means that the

respondent has not received notice of the proceedings. In short service cannot have been said to have been effected.

[27] 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 by obtained with this knowledge in default, is irregular and will be set aside ex debito justitiae.

Orders

1. The default judgment entered against the applicant/first defendant on October 31, 2012 as recorded in Judgment Binder 756 Folio 426 and all subsequent proceedings are hereby set aside.

2. Costs of the application are awarded to the applicant to be taxed if not agreed.