[2018] JMSC Civ 59

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2012HCV04204

BETWEEN	**DAMION WELCH**	**CLAIMANT**
AND	**ROXNEIL THOMPSON**	**1ST DEFENDANT**
AND	**TYRONE BROWN**	**2ND DEFENDANT**

Ms. Keisha Grant instructed by Dunbar and Company for the Applicant.
Ms. Oraina Lawrence instructed by Kinghorn and Kinghorn for the Respondent

Heard September 25, 2018, October 17, 2018, November 15, 2018 and December 3, 2018

Civil Procedure – Substituted service – Application by insurance company to set aside Order for substituted service – Tests to be applied

MASTER N. HART-HINES (AG)

[1] The matter for the consideration of the Court is an application by Advantage General Insurance Company Limited (hereinafter "the Applicant" or "AGIC") to set aside an order for substituted service made on June 26, 2013, which permitted the Claimant to serve the Claim Form and Particulars of Claim on the Applicant, the insurer for a vehicle owned by the 2nd Defendant. The genesis of the claim is a motor vehicle accident which occurred at the intersection of Molynes Road and Washington Boulevard in the parish of St. Andrew on December 26, 2009. It is alleged by the Claimant (hereinafter "the Respondent") that he was a passenger in a public passenger vehicle bearing registration PD6278 and that he was injured when the vehicle was so

negligently operated by 1st Defendant that he caused a collision with another vehicle.

BACKGROUND AND CHRONOLOGY

[2] In determining the application, I must be satisfied that reasonable efforts were made by the Applicant to bring the Claim Form, Particulars of Claim and accompanying documents to the attention of the 2nd Defendant. However, the Applicant should act with alacrity in filing its application to set aside the order for substituted service and in attempting to locate the 2nd Defendant. In the circumstances, it seems prudent to examine not only the nature and number of efforts made by the Applicant to contact the 2nd Defendant, but also when these efforts were made. I therefore believe that it will be useful to set out the chronology of the events.

i. On October 22, 2009 an insurance policy was obtained from AGIC in respect of a public passenger vehicle bearing registration PD6278.

ii. On December 26, 2009, the aforementioned motor vehicle accident occurred in St. Andrew.

iii. On October 21, 2010, the said public passenger vehicle, owned by the 2nd Defendant, was no longer insured by the Applicant.

iv. On July 24, 2012 a Claim Form and Particulars of Claim were filed in respect of the said motor vehicle accident.

v. On August 3, 2012, the Notice of Proceedings was served on the Applicant. This is approximately 2 years and 7 months after the accident.

vi. On March 13, 2013 an ex parte application to dispense with personal service on the 2nd Defendant and to permit the service of the Claim Form and Particulars of Claim on his insurers was filed, and the Application was supported by an Affidavit of a Process Server indicating that attempts made to serve the 2nd Defendant at 5 Silbourne Road, Greendale, St. Catherine were unsuccessful. This was filed approximately 3 years and 3 months after accident.

vii. On April 17, 2013, the Applicant wrote a letter to the 2nd Defendant, to inform him that it had been served with Notice of Proceedings. This letter was sent to him at the last known address on its records, namely, 550 New Town, Braeton, Greater Portmore, St. Catherine. This is approximately 8 months after receipt of Notice of Proceedings.

viii. On June 26, 2013, an Order to dispense with personal service and to permit the service of the Claim Form and Particulars of Claim on the Applicant was granted.

ix. On July 2, 2013 the Applicant received a Formal Order dated June 26, 2013, along with the Claim Form and Particulars of Claim.

x. On August 15, 2013, the Applicant wrote another letter to the 2nd Defendant. This letter was returned.

xi. On August 18, 2013 the Applicant instructed Attorneys-at-law Dunbar and Company to file an Application to set aside the Order for substituted service.

xii. On October 5, 2013 Dunbar and Company wrote to Kinghorn and Kinghorn to indicate a difficulty in locating the 2nd Defendant.

xiii. On October 8, 2013 Dunbar and Company filed an Acknowledgement of Service on behalf of the Applicant, indicating that they were served on July 2, 2013 by way of substituted service order made on June 26, 2013 and that they intended to defend the claim.

xiv. On October 8, 2013, Dunbar and Company simultaneously filed an Application to Set Aside the Order for substituted service made on June 26, 2013. The application was not accompanied by an Affidavit in support, and was filed approximately 98 days after service.

xv. On November 29, 2013, a Request for Default Judgment was filed. A Defence having not been filed within 56 days of the date of service as ordered, judgment in default was entered by the Registrar in binder 761 folio 121 with effect from November 29, 2013.

xvi. On June 30, 2014 Dunbar and Company wrote a letter to the 2nd Defendant. This letter was also returned.

xvii. On July 9, 2014 Delroy Lawson, Process Server/Private Investigator instructed on behalf of the Applicant, visited the 2nd Defendant's address of 550 New Town, Braeton, Greater Portmore, St. Catherine.

xviii. On December 15, 2014, the Application to set aside the Order for substituted service (hereinafter "the Order") was first listed for hearing but was adjourned due to the absence of the parties. There still appeared to be no Affidavit filed in support of the Application as at that date.

xix. On October 13, 2015 the Affidavit of Delroy Lawson, was filed in support of the Application to set aside the Order. This is approximately 2 years after the Application was filed. The content of his affidavit will be discussed below.

xx. On December 17, 2015, the Affidavit of Ruthann Morrison-Anderson, Legal Counsel for the Applicant, was filed in support of the Application to set aside the Order.

xxi. On December 25, 2015, the claim became statute barred.

xxii. On February 2, 2016 the Assessment of Damages hearing was adjourned pending the outcome of the application to set aside the Order.

xxiii. On September 2, 2016, Delroy Lawson, revisited the address of 550 New Town, Braeton, Greater Portmore, St. Catherine

xxiv. On September 23, 2016, a further affidavit was filed on behalf of Delroy Lawson, indicating that he revisited the address of 550 New Town, Braeton, Greater Portmore, St. Catherine, that he made checks with the Transport Authority, and that he made checks at the address of the 1st Defendant at 5 Silburn Road, Greendale, St. Catherine.

xxv. There were three hearing dates when the Application was not heard between July 2, 2013 and December 25, 2015. These dates were December 15, 2014, October 12, 2015 and December 14, 2015. These dates were fixed by the Registrar and this suggests that the Applicant, the Respondent and their Attorneys-at-law did not appear at the hearings. However, the application could not have progressed until all the relevant affidavits in support of the Application were filed.

[3] In March 2013, the Respondent/Claimant's Application for permission to serve the said documents on the Applicant was supported by the Affidavit of Timoye Harriott (Process Server), and the Affidavit of Judy Ann Kinghorn (Attorney-at-law). Mrs. Kinghorn averred that she received instructions to institute proceedings against both the 1st Defendant (driver) and the 2nd Defendant (owner of the motor vehicle), and as a result, she subsequently instructed the process server Mr. Harriott to effect service on the 2nd Defendant at the only address she was able to obtain for him. She also indicated that the Notice of Proceedings was served on the Applicant on August 3, 2012. Mr. Harriott averred that he made three attempts to serve the 2nd Defendant at 5 Silbourne Road, Greendale, St. Catherine on August 7, 2012, August 10, 2012, and November 11, 2013, but he was informed that no one by the name of Tyrone Brown lived at that address. I must indicate here that since considering the current Application, it has become apparent that the address of 5 Silbourne Road, Greendale, was not the address of the 2nd Defendant, but rather the address of the 1st Defendant.

[4] On June 26, 2013, Master Lindo (as she then was) made an Order allowing for substituted service of the Claim Form and Particulars of Claim on the Applicant as insurers for the 2nd Defendant's motor vehicle. The Order was made in the following terms:

> *"1. That personal service of the Claim Form and Particulars of Claim on the 2nd Defendant be dispensed with;*
> *2. That permission been granted to the Claimant to serve the Claim Form and Particulars of Claim on Messrs. Advantage General Insurance Company Limited of 4-5 Trafalgar Road, Kingston 5, the insurer if the 2nd Defendant's motor vehicle registration number PD6278;*
> *3. That the cost of the Application and Order be costs in the claim;*
> *4. That the time within which to file an Acknowledgment of Service be 21 days from the date of service;*
> *5. That the time within which to file the Defence is 56 days from the date of service."*

[5] In its application to set aside the Order, filed on October 8, 2013, the Applicant now seeks the following Orders:

> *"1. That the order for substituted service granted on June 26, 2013 be set aside;*
> *2. That the time to bring this application be extended; and*
> *3. Any further and other relief as this Honourable Court deems just."*

[6] The application does not refer to the setting aside of the Default Judgment entered as a consequence of the failure to file a defence. However, it is clear from submissions that such an Order is sought. I am guided by **Rule 11.13** of the **Civil Procedure Rules** (hereinafter "the **CPR**") in this regard. I have noted that at the time of filing the application, no Affidavit in Support was filed. The Affidavits in Support of the application were filed more than two years later, on October 13, 2015, on December 17, 2015 and on September 23, 2016. The first Affidavit, filed on October 13, 2015, is that of Delroy Lawson, Process Server and Private Investigator instructed on behalf of the Applicant. This Affidavit indicates that Mr. Lawson visited the address of 550 New Town, Braeton, Greater Portmore, St. Catherine on July 9, 2014, but he was informed by one Owen Baptiste that the 2nd Defendant had used the address as a mailing address at a time when he was dating Mr. Baptiste's sister who had since migrated, and that the 2nd Defendant was not seen since then. No forwarding address was obtained for the 2nd Defendant. Mr. Lawson therefore indicated that he was unable to locate the 2nd Defendant.

[7] The next Affidavit filed in support of the application is that of Ruthann Morrison-Anderson, Legal Counsel for the Applicant, which was filed on December 17, 2015. This Affidavit indicates the various steps taken by the Applicant to communicate with the 2nd Defendant after the Notice of Proceedings was served on August 3, 2012, and to bring the documents to his attention after the Formal Order and relevant documents were served on the Applicant on July 2, 2013. Mrs. Morrison-Anderson indicated that on April 17, 2013, the Applicant wrote to the 2nd Defendant to inform him that Notice of Proceedings had been served on the Applicant and that once he had been

served with any documents, he should bring same to their attention immediately. There is nothing in Mrs. Morrison-Anderson's affidavit to suggest that that letter was returned as undelivered. Mrs. Morrison-Anderson also indicated that, after the Formal Order and accompanying documents were served, the Applicant wrote another letter to the 2nd Defendant dated August 15, 2013 and made numerous phone calls to the phone number on file for the 2nd Defendant but the Applicant was unable to reach him. The wording of the Affidavit suggests that the calls were only made after July 2, 2013. This second letter was returned and received by the Applicant on January 28, 2014, and a letter sent by Dunbar and Company, was also returned. Finally, the Affidavit indicates that searches were made on internet sites including google.com and facebook.com, but to no avail. Mrs. Morrison-Anderson's Affidavit indicates that up to December 17, 2015, the Applicant was unable to bring the documents to the 2nd Defendant's attention.

[8] A Further Affidavit of Delroy Lawson was filed on September 23, 2016. Therein, Mr. Lawson indicated that he revisited the address of 550 New Town, Braeton, Greater Portmore, St. Catherine on September 2, 2016, but he saw a lady there who indicated that she had recently purchased the house and she did not know the 2nd Defendant. Mr. Lawson also indicated that he made checks with the Transport Authority and was informed that the 2nd Defendant had not renewed his Road Licence since 2012. Mr. Lawson further indicated that he made checks at the address of 5 Silburn Road, Greendale, St. Catherine for the 1st Defendant Roxneil Thompson, and was informed that the 1st Defendant had relocated with no forwarding address.

THE SUBMISSIONS

[9] Ms. Keisha Grant submitted that the Applicant has taken sufficiently reasonable steps to locate and make contact with the 2nd Defendant but has not been able to do so. Ms. Grant relied on the Affidavit of Ruthann Morrison-Anderson indicating that the letters were sent and phone calls made in an effort contact 2nd Defendant, as well as the Affidavit of Delroy Lawson (Private

Investigator) which indicates that he visited the last known address for the 2nd Defendant and also visited the offices of the Transport Authority. In addition, the Applicant has indicated that the contractual relationship between it and the 2nd Defendant no longer subsists and has not existed after October 2010. Ms. Grant therefore submitted that the Applicant has clearly demonstrated that the steps taken by it have not enabled the 2nd Defendant to ascertain the contents, and it is not likely that he would have been able to do so. Ms. Grant relied on cases such as ***Insurance Company of the West Indies Ltd. v Shelton Allen (Administrator of the estate of Harland Allen) et al*** [2011] JMCA Civ. 33 and ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent***: [1914-15] All ER Rep 918.

[10] Ms. Oraina Lawrence submitted on behalf of the Respondent that the Applicant has not made sufficient effort to locate the 2nd Defendant and to bring the Claim Form and Particulars of Claim to the attention of the 2nd Defendant. Ms. Lawrence directed the Court's attention to the fact that the Applicant did not publish an advertisement in the press to seek to get the 2nd Defendant to contact it. Ms. Lawrence submitted that the Applicant's process server need not have visited the 2nd Defendant's address in 2014 as this address was previously visited by the Respondent's Process Server in 2012. I pause here to indicate that Ms. Lawrence seems mistaken here as the addresses visited by the process servers are in fact two different addresses, and the one visited in 2012 was 5 Silbourne Road, Greendale, St. Catherine, which was not the address of the 2nd Defendant, but rather the address of the 1st Defendant. In the circumstances it was necessary for the Applicant's Process Server to visit the address of the 2nd Defendant at 550 New Town, Braeton, Greater Portmore, St. Catherine. The addresses aside, one question for the Court's determination is whether the visit in July 2014 was timely. Ms. Lawrence further submitted, in the alternative, that by virtue of the Applicant's right of subrogation, even if the 2nd Defendant could not be located, the Applicant could conduct the litigation on behalf of the 2nd Defendant. Ms. Lawrence relied on dicta in the cases of ***Lincoln Watson v Paula Nelson***

and Fitz Mullings (unreported) Supreme Court, Jamaica, Suit No CL 2002/W-062, judgment delivered December 9, 2003, and ***Egon Baker v Novelette Malcolm and another*** (unreported) Supreme Court, Jamaica, Suit No CL 1999/B055, judgment delivered June 1, 2006.

THE ISSUES

[11] There are three main issues for consideration:

(1) Should the Application be heard when filed after 14 days of the Order being served?

(2) Whether the Claim Form and Particulars of Claim were likely to come to the attention of the 2nd Defendant as a result of service being effected on the Applicant; and

(3) Whether, the Order made on June 26, 2013 should be set aside, having regard to the delay by the Applicant, all the circumstances outlined in the Affidavits and having regard to the overriding objective of the **CPR**.

THE LAW

[12] The **CPR** provides for alternative methods of service and service by a specified method, and provide for the setting aside of an Order made on an application without notice. I will first consider **Rules 5.13** and **5.14** of the **CPR**, which permit service by an alternative method of service, and then I will consider **Rule 11.16** of the **CPR**, which addresses the timeframe within which an application should be brought to set aside or vary an Order made on an application without notice. I will also briefly consider other Rules which appear relevant to the determination of this application.

[13] **Rule 5.13(1)**, **5.13(2)** and **5.13(3)** and **Rule 5.14** of the **CPR** provide:

> *"**5.13(1)** Instead of personal service a party may choose an alternative method of service.*
> ***(2)** Where a party -*
> *(a) chooses an alternative method of service; and*
> *(b) the Court is asked to take any step on the basis that the claim form has been served, the party who served the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the Defendant to ascertain the contents of the claim form.*

(3) *An affidavit under paragraph (2) must -*
(a) give details of the method of service used;
(b) show that -
(i) the person intended to be served was able to ascertain the contents of the documents; or
(ii) it is likely that he or she would have been able to do so;
(c) state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents; and
(d) exhibit a copy of the documents served."

Rule 5.14 of the **CPR** provides:

*"**(1)** The Court may direct that service of a claim form by a method specified in the Court's order be deemed to be good service.*
(2) *An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit-*
(a) specifying the method of service proposed; and
(b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the Claim Form and Particulars of Claim."

[14] **Rule 11.16(1)** and **11.16(2)** of the **CPR** provide:

"(1) A respondent to whom notice of an application was not given may apply to the Court for any order made on the application to be set aside or varied and for the application to be dealt with again;
(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent."

[15] Part 11 of the **CPR** indicates general rules for applications for Court Orders. For the purpose of this application, **Rules 11.4** and **11.9** appear relevant. Also relevant to the determination of this application are **Rule 1.1** and **Rule 26(2)(c)** of the **CPR**, on the powers of the Court in the management of cases.

Rule 11.4 of the **CPR** provides:

"Where an application must be made within a specified period, it is so made if it is received by the registry or made orally to the Court within that period."

Rule 11.9 of the **CPR** provides:

"(1) The Applicant need not give evidence in support of an application unless it is required by
(a) a rule;

(b) a practice direction; or

(c) a Court order

(2) Evidence in support of an application must be contained in an affidavit unless –

(a) a rule;

(b) a practice direction; or

(c) a Court order,

otherwise provides."

Rule 1.1(1) and **1.1(2)(d)** of the **CPR** provide:

"1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly.

(2) Dealing justly with a case includes -

(d) ensuring that it is dealt with expeditiously and fairly; …"

Rule 26(2)(c) of the **CPR** provides:

"(2) Except where these Rules provide otherwise, the Court may -

(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed"

[16] A review of the cases which gave consideration to similar applications to set aside Orders made pursuant to the Court's powers under **Rule 5.14(1)** and **5.14(2)** of the **CPR**, reveal that an earlier ex parte order may be disturbed in some instances. Some examples where the order may be set aside include:

i. Where the Order was obtained because the Respondent concealed something important from the Court, such as the fact that the relationship between insurer and a Defendant had ceased and that the insurers were not notified of the accident until three years after the expiration of the policy (see ***ICWI v Shelton Allen (Administrator of the estate of Harland Allen) and others*** [2011] JMCA Civ 33; or

ii. Where it was based on a misunderstanding of the law; or

iii. Where it was based on a misunderstanding of the evidence before the judge or it was based on an inference that particular facts existed or did not exist which can be shown to be demonstrably wrong; or

iv. An insurer may have an Order for service by a specified method set aside if it is not in contact with its insured (see ***ICWI v Shelton Allen***).

However, the Applicant should demonstrate that despite reasonable efforts, it was unable to locate the Defendant. Making "reasonable efforts" does not mean that the steps of enquiry ought to be "*so onerous that it becomes unrealistic for the insurance company to achieve*", per Master Bertam-Linton (as she then was) in ***Moranda Clarke v Dion Marie Godson and Donald Ranger*** [2015] JMSC Civ 48 at para 37.

[17] In ***ICWI v Shelton Allen*** Morrison JA (as he then was) considered **Rules 5.13** and **5.14**, and in essence said that service under those Rules should only be permitted where it is shown on affidavit evidence that the claim form is likely to come to the attention of the Defendant by the method of service chosen. I must therefore examine the Respondent's application to determine whether there was sufficient evidence before the learned judge to indicate that service on the Applicant would result in the contents of the claim form coming to the attention of the 2nd Defendant.

[18] In considering whether the Applicant has demonstrated that it made reasonable efforts to locate the 2nd Defendant, I am guided by the Court of Appeal decision in ***British Caribbean Insurance Company Limited v David Barrett and Others*** [2014] JMCA App 5. There, Brooks JA considered the efforts made by the Applicant insurance company to locate a Defendant (Ivor Leigh Ruddock) with whom an insurance contract had existed, and to locate the driver of the vehicle (Jason Evans). As in the instant case, BCIC applied to have the substituted service order set aside on the basis that efforts were made to locate the Defendants without success, and the Applicant relied on the fact that it had sent letters and made telephone calls. However, Brooks JA said that the learned Master could not be criticised for refusing to exercise of her discretion to set aside the substituted service order on the basis that BCIC had not made all reasonable efforts to contact Mr Ruddock, as there was no evidence that letters were sent to his home address or attempts to personally deliver any letter to either the home or work address.

ANALYSIS

Should the Application be heard when filed after 14 days of the Order being served?

[19] Before I apply the principles in the cases of ***ICWI v Shelton Allen and others*** and ***BCIC v David Barrett and others*** and analyse the facts of the instant case, I must first consider the issue of whether or not the failure to file the application within 14 days after the Order was served on July 2, 2013 is fatal to the hearing of the application. In ***Moranda Clarke*** consideration was given to the wording of **Rule 11.16(2)** that "*a respondent must make such an application not more than 14 days after the date on which the order was served on the respondent*". Master Bertam-Linton (as she then was) agreed at paragraph 15 that "*CPR Rule 11.16(2) is meant to be mandatory … in keeping with the stated thrust of the Civil Procedure Rules … to prevent protracted litigation on an issue*". At paragraphs 16 and 17 of the judgment, the learned judge went on to consider dicta in other cases which reiterated that the Rules were introduced with a view to ensuring more efficiency in litigation and in the dispensation of justice. Notwithstanding, the learned judge said at paragraphs 17 and 19:

> *"[17] … The Rules however also under Rule 26.1(2) correspondingly provides for the extending of the time for such an application in the exercise of the Court's discretion and this provides some flexibility to ensure that justice is done….*
> *[19] In my judgment in the instant case, the over-riding objective would best be served by recognizing that the 1st Defendant is indeed in breach of the mandatory rule in Rule 11.16 (2) but the Court's discretion is justly exercised in allowing the substantial issues to be considered by enlarging the time to file the application in her favour."*

[20] In addition, I have also considered dicta in ***Leymon Strachan v The Gleaner Company Limited and Stokes*** (Motion No 12/1999, judgment delivered 6 December 1999, page 20), where Panton JA (as he then was) set out the principles that should guide the Court in considering an application to extend time generally:

> *"The legal position may therefore be summarised thus:*
> *(1) Rules of Court providing a time-table for the conduct of litigation must, prima facie, be obeyed.*

(2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.

(3) In exercising its discretion, the Court will consider -
(i) the length of the delay;
(ii) the reasons for the delay;
(iii) … and;
(iv) the degree of prejudice to the other parties if time is extended.

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[21] I believe that it is just and appropriate to permit the Applicant to be heard as regard to the issue of its attempts at serving the 2nd Defendant. This would be in keeping with the the overriding objective of the **CPR** of "*enabling the Court to deal with cases justly*". Adopting the approach in ***Moranda Clarke*** at this juncture, I therefore exercise my discretion in favour of the enlarging the time within which the application was to have been filed, to facilitate the hearing of the application and considering whether the Order made on June 26, 2013 should be set aside. I will apply the principles enunciated in ***Leymon Strachan*** by Panton JA when I decide whether the application itself should be granted.

Were the documents served likely to come to the attention of the 2nd Defendant?

[22] In ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent***: [1915] 1 KB 857, Lord Reading CJ said at pages 887-888):

"[a Defendant] is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him.… In order that substituted service may be permitted, ***it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the Defendant or to come to his knowledge*** *if the method of substituted service which is asked for by the plaintiff is adopted." (emphasis supplied)*

[23] In the instant case, the Respondent's Attorneys-at-law filed affidavits in 2013 suggesting that attempts were made to serve the 2nd Defendant at his home

address. I have noted an error in the Affidavits of Mrs. Kinghorn and Mr. Harriott that the address of the 2nd Defendant was 5 Silbourne Road, Greendale, St. Catherine, when, according the Applicant, this was the home address of the 1st Defendant. Notwithstanding that error, I cannot say that the learned judge had insufficient evidence before her to allow her to properly exercise her discretion in granting the Orders sought. The learned judge could have been satisfied on the evidence before her on June 26, 2013, that there was a relationship in existence between the Applicant and the 2nd Defendant at the time of the accident, and that once the claim form and the particulars of claim were served on the Applicant, the 2nd Defendant would in fact have been able to ascertain the contents of the documents, or that it was likely that he would have been able to do so. It is my personal view however, that caution ought to be exercised where a claimant is seeking an Order for substituted service to serve an insurance company many years after the accident, by which time the relationship between the insurance company and a defendant might have ceased. My opinion is based on the decision of ***ICWI v Shelton Allen***. It is unclear whether Mrs. Kinghorn was aware at the time of filing her Affidavit, over three years after accident, that the relationship between the Applicant and the 2nd Defendant had ceased two years before. In the circumstances, I find that as at the date of the Order on June 26, 2013, the Claim Form and the Particulars of Claim were likely to reach the 2nd Defendant or to come to his knowledge, through service the Applicant.

Were reasonable efforts made to locate the 2nd Defendant?

[24] Aside from examining the nature of the efforts made to contact the 2nd Defendant, it is also important to examine when the efforts were made. In my opinion, the Applicant should act with alacrity in filing its application to set aside the Order for substituted service and in attempting to locate the Defendant. What will be regarded as a reasonable timeframe will be for a Court to decide based on the facts before it. I am not satisfied that the Applicant made all reasonable efforts to locate the 2nd Defendant in a timely manner. Firstly, the efforts made to visit the 2nd Defendant at his home address at 550 New Town, Braeton, Greater Portmore, St. Catherine, were

only made in July 2014, one year after the Formal Order was served, and nine months after the Applicant's application was filed. In my opinion, efforts should have been made promptly after the date of service of the Claim Form. Since the Applicant was alerted to the claim by way of the Notice of Proceedings, and since the claim was issued years after the accident and there was a chance that the 2nd Defendant had moved address, the Applicant should have acted more swiftly. Secondly, I see no evidence of any attempts to reach the 2nd Defendant through his next of kin, or at his place of work, and it is likely that the Applicant or its broker would have had information to facilitate additional checks. The attempt to locate the 1st Defendant seems superfluous since the Order was not made in respect of him.

Should the Order be set aside in circumstances of severe delay?

[25] Even if I had been satisfied that the Applicant made all reasonable efforts to locate the 2nd Defendant, I do not believe that it would be appropriate to set aside the order in these circumstances where the Applicant has delayed for two years in pursuing its application and where the claim is now statute barred. The overriding objective requires that a Court exercise its discretion, in a manner which accords with justice. **Rule 1.1(2)(d)** of the **CPR** indicates that a Court has to ensure that cases are dealt with fairly and expeditiously. In exercising my discretion, I am guided by factors such as (1) the length of the delay in filing the application supported by affidavit evidence, (2) the explanation for the delay, or lack thereof, and (3) the possible prejudice occasioned by the delay.

[26] The application was filed approximately 98 days after service, but of note, the application was not supported by an Affidavit until two years had passed. I believe that it is important to comment on this at this juncture. **Rule 11.9** of the **CPR** provides that an Applicant need not give evidence in support of an application unless it is required by (a) a rule, (b) a practice direction or (c) a Court order. The wording of **Rule 11.16** of the **CPR** does not appear to require that the application be supported by evidence on affidavit. When compared

with **Rule 11.18(3)** of the **CPR** (which addresses an application to set aside order made in absence of party), I have noted that **Rule 11.18** indicates that any application made pursuant to that Rule must be supported by affidavit evidence.

> ***11.18*** *(1) A party who was not present when an order was made may apply to set aside that order.*
> ***11.18*** *(2) The application must be made not more than 14 days after the date on which the order was served on the Applicant.*
> ***11.18*** *(3) The application to set aside the 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 order might have been made.*

[27] The silence in **Rule 11.16** of the **CPR** regarding the need for affidavit evidence appears to be an anomaly in the Rules. If evidence on affidavit is needed to obtain the order for substituted service under **Rule 5.14(2)**, then it should follow that evidence on affidavit is also needed to set aside that order, or, witnesses would have to be summoned to give evidence at the hearing of the application, the latter approach being the more time-consuming option. Further, since the order is not set aside as of right, an affidavit ought to be filed, setting out the grounds for the application, and indicating any reason for the delay in making the application and any attempts made to bring the Claim Form and Particulars of Claim to the attention of a Defendant. In ***James Hogan v Marian Kelly-Hogan*** (unreported) Supreme Court, Jamaica, Claim M02096 of 2008, delivered May 8, 2009, His Lordship Mr. Justice F. Williams (as he then was) at paragraphs 15 to 23 examined Rule 76.11(2) which also appeared to be anomalous and indicated that where such anomaly in the Rules would cause an injustice or unfairness, the Court would apply its powers under its inherent jurisdiction and have regard to the overriding objective. In the circumstances, though **Rule 11.16** appears silent regarding the need for affidavit evidence in support of the application, I would have regard to the overriding objective. Justice and fairness would require that an Applicant file affidavit evidence in support of its application at the time of filing said application, in order to ensure that the application was heard

expeditiously. Filing Affidavits in Support of the application two years after the application itself was filed seems tardy and the efforts made to locate the Defendants do not appear to justify the delay.

[28] I have seen no good explanation in the Affidavits themselves for the lengthy delay in filing same, as the efforts made by the Process Server were not extensive. The prejudice to the Respondent/Claimant is clearly great as the claim is now statute barred. Had the Applicant filed Affidavits in Support of the application within a reasonable time in 2013, indicating that the same steps had been taken to locate the Defendant, the application might well have been granted by another judge and the Respondent would then have had approximately two years to make further attempts to locate the 2nd Defendant and to make some attempt to locate the 1st Defendant. However, the Respondent cannot now do so. Whilst AGIC's Application was pending between October 2013 and December 2015, the Respondent who had obtained an order for substituted service, could not seek to make further attempts to serve the 2nd Defendant or to serve the 1st Defendant with a claim form which would have expired in 2013. With that said, it is not clear why the Respondent's Attorneys-at-law made no attempts to locate and serve the 1st Defendant at the very outset when the claim was filed in 2012. Ironically, it was the 1st Defendant's address which was visited in 2012 and 2013 when the Claimant's Process Server went in search of the 2nd Defendant. In far too many cases Claimants' Attorneys-at-law seem to make insufficient efforts to serve the drivers of the motor vehicles who are said to have negligently caused or contributed to motor vehicle accidents. Perhaps this is on the basis that the deeper pockets should pay, namely the owner of the said motor vehicles and their insurance companies, though the reason why is immaterial. This is unfortunate because efforts ought properly to be made to serve the drivers who are named as Defendants. Service of process on a driver of a motor vehicle might actually assist a Claimant to obtain an order for substituted service for service on the owner through the driver. In the instant case, had the Respondent's Process Server enquired of the 1st Defendant

when he visited 1st Defendant's address (in search of the 2nd Defendant), the Claim Form might well have been served on the 1st Defendant in 2012 and the case might have been determined on its merits by this point.

[29] Notwithstanding the unfortunate circumstance that the Respondent's Attorneys-at-law (1) appear to have mistakenly attempted to serve the 2nd Defendant at the wrong address, and (2) appear to have consciously made no effort to serve the Claim Form and accompanying documents on the 1st Defendant, in order to arrive at a just result in this case, I will not exercise my discretion to set aside the Order, as the right of the Respondent to prosecute his claim would be adversely affected since the claim is now statute barred.

[30] Having ruled that it is not appropriate or just to set aside the Order, I must nonetheless give consideration to any other application filed by or on behalf of the Applicant that addresses the substantive issue of liability. I have noted that there is no application to set aside the Default Judgment and no application for an extension of time to file a Defence. Indeed, it would have been difficult for the Applicant to frame such applications and to arrange for the drafting of a Defence when the efforts made to locate the owner and driver of the motor vehicle proved futile. In the absence of an application, I need not give consideration to setting aside the Default Judgment. Also, I need not address Ms. Lawrence's submission that by virtue of the Applicant's right of subrogation, the insurance company could conduct the litigation on behalf of the Defendant.

CONCLUSION

[31] My assessment of the evidence as regards the efforts made by the Applicant to contact the 2nd Defendant is that more could have been done, such as visiting his place of work, or contacting any next of kin named in the records kept by the Applicant. Further, the one-year delay (after being served on July 2, 2013) in attempting personal service on the 2nd Defendant seems to be inordinately long. Whilst I appreciate that it might be expensive to secure the

services of a Private Investigator, once the Applicant determined that it was reasonable and necessary to do so, Mr. Lawson should have been instructed swiftly. No explanation is offered for the one-year delay and no indication is given as to when the decision to so instruct Mr. Lawson was taken, but it is clear that either the decision should have been taken sooner or Mr. Lawson should have acted more swiftly. Finally, in light of the two-year delay between July 2013 and December 2015 in progressing the application, by not filing the requisite Affidavits, and in light of the fact that the claim is now statute barred, it does not appear to be just to set aside the substituted service Order.

[32] No application was made by counsel for either party for costs at the end of the hearing of this application. However, if an application for costs were made, I would not be minded to grant it despite my ruling on the substantive application in favour of the Claimant, as there appears to have been delay and/or errors by both parties in the progression of this matter, as aforesaid.

ORDERS

[33] In light of the foregoing, I now make the following orders:

1. The Application to set aside the Order for substituted service is refused.
2. Matter to proceed to assessment of damages.
3. No Order as to costs.