[2017] JMSC Civ. 177

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 06876

BETWEEN	**KEISHA BENNETT**	**1ST CLAIMANT**
	DENESHA DOCKERY	**2ND CLAIMANT**
	ROMAINE LAWRENCE	**3RD CLAIMANT**
AND	**BRIAN STEPHENS**	**1ST DEFENDANT**
AND	**ROMEO MCLEOD**	**2ND DEFENDANT**
AND	**ST. AUBYN GOLAUB**	**3RD DEFENDANT**
AND	**DWAYNE GOLAUB**	**4TH DEFENDANT**

ADVANTAGE GENERAL INSURANCE COMPANY LIMITED INTERVENING

CONSOLIDATED WITH

CLAIM NO. 2015 HCV 03728

BETWEEN	**KEISHA BENNETT**	**1ST CLAIMANT**
	DENEISHA DOCKERY	**2ND CLAIMANT**
	ROMAINE LAWRENCE	**3RD CLAIMANT**
AND	**BRIAN STEPHENS**	**1ST DEFENDANT**
AND	**ROMEO MCLEOD**	**2ND DEFENDANT**

ADVANTAGE GENERAL INSURANCE COMPANY LIMITED INTERVENING

Ms. Lorraine Moore instructed by Dunbar & Co. for the Claimants
Ms. Khadine Dixon instructed by Dixon & Associate Legal Practice for the Defendants

Heard: 13th October and 27th November, 2017

Order for specified service on insurance company - Whether insurance company made reasonable efforts to locate insured - What amounts to reasonable effort

ANDREA PETTIGREW-COLLINS, J. (AG.)

THE APPLICATION

[1] This is a Notice of Application for court orders filed on the 27th of July 2016 by Advantage General Insurance Company (hereinafter referred to as AGIC) to set aside an Order for Substituted Service. (It ought properly to be called a Notice of Application to set aside an Order for Specified Service). The applicant AGIC is seeking to set aside an order made by The Honourable Mrs. Justice S. Bertram-Linton (Ag.) as she then was. This order was made on the 8th of February 2016 giving permission to the claimants to serve the claim form, prescribed notes, Acknowledgement of Service Form and all subsequent documents in relation to the claim on AGIC who are the insurers for the 1st Defendant's motor vehicle, bearing registration number 5344 GA.

[2] The claim arose out of an accident which occurred on or about the 5th of September 2012 along the Shettlewood Main Road in the parish of Hanover. This accident involved a Toyota Land Cruiser Prado motor vehicle which apparently was being driven by the 3rd Claimant Romaine Lawrence, a Toyota Corolla motor car registered 5344 GA which was owned by the 1st Defendant Brian Stephens and was being driven by the 2nd Defendant Romeo McLeod, and an Isuzu motor truck registered CF 7681 driven by the 4th Defendant Dwayne Golaub and owned by the 3rd Defendant St. Aubyn Golaub. All three claimants alleged that they received injuries. The 1st claimant, Keisha Bennett is said to have received particularly serious injuries resulting in paralysis.

[3] AGIC is seeking to have the order set aside on the following grounds:-

1. The Applicant has been unable to locate Brian Stephens to advise him of the
claim against him and to notify him and bring the contents of the claim form and particulars of claim to his attention and knowledge.

2. That the Applicant made attempts to contact Brian Stephens on his contact number of 503-3459 by leaving numerous messages on his voicemail and which have garnered no response.

3. The Applicant made attempts to locate Brian Stephens at his last known address of Coconut Palm, Montego Bay #2 P.O., Mount Salem, St. James.

4. However the letters sent have been returned with notation of them not having been collected.

5. That the Applicant has no report of the accident that allegedly occurred on September 5, 2012 and does not know Romeo McDonald. (Apparently a mistake, as the correct name of the 2nd Defendant is Romeo McLeod).

6. Therefore, it cannot bring the contents of the claim form and particulars of claim to his attention.

CHRONOLOGY

[4] It will be useful to give an outline and a chronology of events, as by doing so will lend to a clearer understanding of this matter.

1. The accident giving rise to the claim occurred on the 5th of September 2013.

2. On the 13th of December 2013 the claim and particulars of claim were filed.

3. The claim was initially brought against all four defendants and was assigned claim No. 2013 HCV 06876.

4. AGIC was served with notice of proceedings on the 17th December 2013. (See affidavit of Keisha Bennett filed 23rd July 2014.)

5. An Acknowledgement of Service was filed on behalf of the 3rd and 4th defendants on the 30th of December 2013, indicating that they were served with the claim and the attendant documents on 19th December 2013.

6. On the 31st of January 2014, an ancillary claim was filed by the 3rd and 4th defendants naming the 1st and 2nd defendants as the ancillary defendants.

7. Notice of Proceedings in respect of the ancillary claim was served on the applicant on the 7th February 2014.(See affidavit of Kalima Bobb-Semple filed 28th February 2017).

8. A request for default judgment against the 3rd and 4th defendants was filed on the 5th of February 2014.

9. Interlocutory judgment in default was entered against them in judgment book no: 761 folio 95 on the 12th of May 2014.

10. On the 23rd of July 2014 an ex-parte Notice of Application for Court Orders and supporting affidavits were filed whereby the plaintiffs sought service by specified method on the 1st and 2nd defendants. It does not appear from the record that an order was made in respect of the application.

11. On the 29th of January 2015, a notice of Application for interim payment to the 1st claimant Keisha Bennett was filed. This application was supported by affidavit and is yet to be heard.

12. An amended particulars of claim was filed on the 24th July 2015.

13. A new claim, 2015 HCV 03728 was filed on the 24th of July 2015.

14. On the 28th of July 2015 an order was made consolidating claim nos. 2013 HCV 06876 and 2015 HCV 03728. It is noted that at the time of signing the order, the Registrar corrected the date of signing that was printed and inserted the date of the 28th of May 2015. This was clearly based on the date on the typed version of the formal order seen on file. No original Minute of Order was seen on file. However, I accept that the correct date is the 28th of July 2015 since the claim was filed on the 24th of July 2015, and clearly the order could not possibly have been made before the claim was filed. There are other documents on the record referring to the date of the order as the 28th of July 2015.

15. On the 4th of September 2015, Attorney at Law for the claimants Mrs. Khadine Dixon's affidavit in support of notice of application for substituted service was filed.

16. The court did not locate on file an amended notice of application filed on the 18th of January 2016, however, on the 8th of February 2016 Bertram-Linton J. (Ag.) granted an application in terms of paragraph 1 (as amended) and paragraphs 2-6 of amended notice of application dated 18th January and filed 19th January 2016. It is service made pursuant this order that gave rise to the present application.

17. It is to be noted that there is no reference to service on the 2nd defendant; there was no order for specified service in relation to him.

18. A request for default judgment against the 1st and 2nd defendants was filed on the 5th of August 2016. The judgment has not yet been entered.

19. From the affidavit of Mrs. Ruthann Morris-Davidson filed on the 9th of January 2017 it is discerned that service was effected upon the applicant in lieu of service on the 1st defendant on or about the 21st of March 2016.

20. The subject application was filed on 27th of July 2016.

21. On the 8th of December 2016 an affidavit of service of Byfield Pryce (Private Investigator and Process Server on behalf of BCIC) was filed

22. The Notice of Application to set aside the order for specified service is supported by five affidavits: two from Mrs. Ruthann Morrison-Anderson Legal Officer for AGIC and two from Mr. Delroy Lawson, Private Investigator and Process Server for AGIC. The first of Mrs. Morrison-Anderson's affidavits was filed on the 9th of January 2017, the second, on the 27th of February 2017 and the third on the 5th of October 2017. Mr. Lawson's first affidavit was filed on the 20th of December 2016 and his further affidavit was filed on the 28th of February 2017.

[5] It might be useful to observe that by the time Bertram Linton J (Ag.) had made her order allowing service by way of specified method and extending the validity of claim form No. 2013 HCV 06876, both claims had been consolidated. The validity of that claim form was extended for six months from the date of the order. By virtue of Bertram Linton's J. (Ag.) order of the 8th of February 2016, claim form bearing no. 2013 HCV 06876 would have been valid for service up until the 7th of August 2016. It is apparent that at the time service was effected upon AGIC (21ST of March 2016) claim no. 2013 HCV 06876 would still have been valid for service. This court can only surmise that out of an abundance of caution, the claimants had filed claim no. 2015 HCV 03728 based on the uncertainty with regard to the legal position as to the validity of a claim form where an extension is granted extending the life of the claim form as at the date of the order in circumstances where there is a gap between the expiry date of the claim form and the date the order is made.

THE APPLICANT'S CASE

[6] Ms. Lorraine Moore, the applicant's Attorney at Law in her submissions, asked the court to have regard to the contents of the five affidavits filed on behalf of the applicant in this matter. She urged the court to say that the applicant had done all that was within its power to do in order to locate the 1st Defendant. She pointed out that the 1st Defendant was no longer insured with the applicant and so his current whereabouts may not necessarily be in keeping with the information that

the applicant has on its records in relation to the defendant. She pointed to the fact that BCIC's investigator was only able to meet with the defendant on 'a corner' and that it was clear that the contact phone number by which he was reached was not in the applicant's possession. She stated that the reason for the late filing of the application was because the applicant was consumed with its focus on the efforts to locate the 1st defendant, and it was only after comprehensive search that the applicant made its application to set aside the order whilst still continuing its exhaustive search. Ms. Moore directed the court's attention to the decision of Morrison JA in **Insurance Company of the West Indies Ltd. v Shelton Allen (Administrator of the estate of Harland Allen) et al** [2011] JMCA Civ. 33 as well as the case of **Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent**: [1914-15] All ER Rep 918 which was referred to in **Shelton Allen**. These cases will be discussed at the appropriate juncture.

[7] Miss Moore acknowledged that the order of Bertram Linton J. (Ag.) should only be disturbed if it is borne out that *"it was based on a misunderstanding of the law or a misunderstanding of the evidence before her or on an inference that particular facts existed or did not exist which can be shown to be demonstrably wrong,"* or if AGIC can demonstrate that after reasonable efforts, it was still unable to locate the defendant. AGIC's position she says is that after exhaustive efforts, the company has not been able to locate its insured. Ms. Moore accepted that the claimant had presented affidavit evidence before the Learned Judge which showed that service on the applicant was likely to bring the contents of the claim form to the knowledge of the 1st Defendant which she posits is what the Learned Judge needed to be satisfied with.

[8] Mrs. Morrison-Anderson in her affidavit of the 9th of January 2017 deponed that AGIC was served with the formal order on the 21st of March 2016 and that upon receipt of the documents, the applicant conducted a search of its records to ascertain whether it was the insurer of the 1st Defendant at the time of the accident. She said AGIC's records indicated that the accident was not reported

by the insured. She stated further that the insured 1st Defendant's policy lapsed on or about the 25th of October 2012. I must observe the obvious at this point, which is that the applicant was the insurer of the 1st Defendant's motor vehicle at the time of the accident. She also deponed that attempts were made to get the 1st Defendant at his telephone number on record but that the calls went straight to voicemail and that messages were left but none of the calls were returned. She did not say how many calls were made and how many messages were left. She also said that letters were sent to the last known addresses of the defendant that AGIC had on record. These addresses she gave as Coconut Palm, Montego Bay #2 P.O., Mount Salem in the parish of St. James and Piggott Street, Montego Bay #2 P.O., Mount Salem in the parish of St. James but the letters were returned uncollected. She exhibited copies of the envelopes that were returned. Mrs. Morrison-Anderson further deponed that Dunbar & Co., Attorneys at Law, were engaged to represent the applicant based on what had transpired up to that point. It is her affidavit evidence that Dunbar &Co. retained the services of Mr. Delroy Lawson. She further deponed that checks were made on social media websites such as facebook but no one was found matching the 1st Defendant's description. In her affidavit filed on the 27th of February 2017, she stated that she wished to clarify and amend paragraph five (5) of her earlier affidavit which was the paragraph giving the date when the 1st Defendant's policy had lapsed. There was in fact no clarification or amendment and she restated the same information that had been given in her earlier affidavit. She however added that notices of proceedings were served on the applicant in or around November and December 2013 and that it was subsequent to service of the notices of proceedings that the steps were made to locate the 1st Defendant by phone calls and letters.

[9] Process server and private investigator Delroy Lawson deponed that on or about the 28th of May 2016, he received the documents to be served upon the 1st Defendant and that on or about the 10th of August 2016, he visited the community of Coconut Palm District in the parish of St. James which was the address given to him for the 1st Defendant. He said he made numerous enquiries

of individuals in the area but persons were tight-lipped. He took the view that this was due to an increase in violence in the area due to lottery scamming. He said he made a second visit to the district on the 8th of September 2016 with a view to locating the defendant. On this occasion, he spoke with taxi operators parked at the gas station on Main Street in Mount Salem but persons were not forth coming with responses. He said one lady who refused to give her name, offered that maybe the 1st Defendant "had lived in the area a long time ago but has since removed". He said he made a third visit to the community on the 3rd of November 2016 and made further enquiries, but with no luck.

[10] In his further affidavit filed on the 28th of February 2017, Mr. Lawson deponed that on the 26th of February 2017 he went to Piggott Street, Mount Salem, Montego Bay looking for the 1st Defendant. He said he observed that part of the street was numbered and part wasn't. He said he made enquiries of several persons about the 1st Defendant but again they were tight-lipped and reluctant to speak to him. He said that he was advised by persons that people are more likely to be known by their aliases but he said he did not have an alias for the defendant. He said that on this occasion he made checks at the Mount Salem police station. He said he spoke to one Corporal Chisholm who advised him that he had been stationed at Mount Salem for six to seven years and that he worked between Mount Salem and Barnett Street police stations. This officer said he did not know any Brian Stephens. He said he also spoke with a woman Constable Ellis who informed him that she is a former traffic officer and that she worked the patrol unit in Mount Salem and adjoining communities and that she also said that she did not know the defendant. Mr. Lawson further deponed, "Piggott Street is an inner city community and the police opined that it was dangerous to visit that location due to the lotto scamming and high crime rate, as such persons would not be very forthcoming with any information and would be very timid and tense. The police advised me to be careful in the area and indicated that I was brave to have ventured there asking for someone".

[11] In her third affidavit filed on the 5th of October 2017, Mrs. Morrison-Anderson craved the leave of the court to refer to an affidavit of one Byfield Pryce which was filed in this matter on the 8th of December 2016. Before I continue with the contents of Mrs. Morrison-Anderson's affidavit, I'll have regard to the contents of Mr. Pryce's affidavit. Mr. Pryce deponed to the effect that he was handed certain documents on the 20th of November 2014 to be served on the 1st Defendant, Brian Stephens. These documents were to be served on Mr. Stephens in his capacity as the 1st Ancillary Defendant in Claim No. 2013 HCV 06876. He stated that on the 24th of November 2014, at approximately 1:30 p.m., he attended upon the community of Reading in the parish of St. James and located Brian Stephens and served him with documents relating to the ancillary claim. He further stated that he did not know Mr. Stephens before but that Mr. Stephens answered to his name, and admitted that he was the 1st Ancillary Defendant and accepted service of the documents. Mrs. Morrison-Anderson continued that the applicant does not have a Reading address for the 1st Defendant. She deponed in paragraph five (5) "that Dunbar & Co. was advised by Mrs. Kalima Bobb-Semple, Attorney at Law at British Caribbean Insurance Company (BCIC) and I do verily believe that contact was made by the process server by telephone and a meeting was arranged for them to meet at an arranged location and service effected." I understood this to mean that the process server made contact by telephone with the 1st Defendant Mr. Stephens and arranged to meet with him at a specific location so that service could be effected and that this was in fact what transpired. She further deponed that Mr. Stephens not having reported the accident, he is not entitled to be indemnified by the applicant.

THE RESPONDENTS' CASE

[12] In urging the court to refuse AGIC's application, on behalf of the respondents, Mrs. Khadine Dixon raised what she said was a preliminary point (although it was not raised during the preliminary stage of the hearing) which is that the application to set aside the specified service order ought to have been made within fourteen days of the date AGIC was served with the court order. She

however accepted that the applicant was still in the process of trying to locate the 1st defendant during that 14 day period but pointed out that the application could still have been made to the court whilst those efforts were continuing. She opined that the delay was inordinate and stated that if the court should grant the order sought, it would result in prejudice to the claimant and would not be in keeping with the overriding objective. The court observed then that the relevant period was forty-two days. This aspect of the matter will be revisited later in the judgment.

[13] Mrs. Dixon also directed the court's attention to the case of **Moranda Clarke v Dion Marie Godson and Donald Ranger** [2015] JMSC Civ. 48, a judgment of Master Bertram Linton (Ag.) (as she then was). She also directed the court's attention to the case of **Khalil Dabdoub v Allan Flowers et al** Claim No. 2005 HCV 5442, a decision of Mangatal J. I will return to these cases in due course. She pointed to her own affidavit evidence to the effect that AGIC had unreservedly accepted notice of proceedings in the matter and therefore had a duty to contact its insured once the company was served with the notice of proceedings in this matter. She also observed that it is not stated in Mrs. Morrison-Anderson's affidavit when it was that AGIC commenced the search for the 1st Defendant. However, she accepted that the affiant pointed to the existence of returned mail received by the applicant on the 15th July 2014 as well as to returned mail received by Dunbar and Co. on the 30th of November 2016. Mrs. Dixon also posited that based on the contractual relationship between AGIC and the 1st defendant, AGIC would have been in possession of information with regard to the 1st Defendant's next of kin and must have had information with regard to his work address as well. She also submitted that showing a photograph of the 1st Defendant to members of the community with whom AGIC's private investigator spoke might have proven useful in light of the fact that residents reportedly said they did not know persons by their correct names but knew persons mostly by their aliases. This she said would have enabled the investigator to locate the 1st Defendant. She opined further that AGIC ought to

have placed advertisements in an attempt to locate the 1st Defendant and she complained that the applicant had confined its search for the 1st Defendant to the community of Mount Salem. She placed heavy reliance on the fact that AGIC failed to act on the information from Ms. Kalima Bobb-Semple's affidavit filed on the 27th of February 2017. Its contents will be discussed shortly.

[14] Mrs. Dixon also asked the court to consider that the claimants are in possession of a judgment by default against the 1st and 2nd Defendants and that it would be prejudicial to the claimants if the court should grant the application being sought. (I will observe at this point that it is inaccurate to say that the claimants are in possession of a judgment as the default judgment has not yet been entered). She also adverted to the decision in **Workers Savings and Loan Bank Limited v Winston McKenzie et al and Workers Savings and Loan Bank Limited v Maco Finance Corporation Limited et al** (1996), 33 JLR 410 to show that the effective date of the claimants' default judgment against the 1st and 2nd Defendant would be the 5th of August 2016. It cannot be disputed that if judgment by default were to be entered based on the request for judgment filed on the 5th August 2016, this assertion would be correct, thus there is no further need to refer to this case but other pertinent observations will be made in relation to matter of the default judgment.

[15] Mrs. Dixon also relied on Ms. Bobb-Semple affidavit which was mentioned before. In her affidavit, Ms. Bobb-Semple urged the court not to set aside the order for specified service. She observed that BCIC's Process Server was able to locate the 1st Defendant and that the applicant had not made sufficient efforts to locate him. She also stated that the applicant had sufficient time since 2013 when it became aware of the claim, to carry out the necessary investigations in order to locate its insured.

THE ISSUE

[16] The central issue in this case is what efforts may be regarded as reasonable on the part of an insurer when tasked with the responsibility to locate its insured in

circumstances where specified service is effected upon the insurer in lieu of personal service on the defendant by virtue of a court order.

THE LAW

[17] In **British Caribbean Insurance Company Limited v David Barrett et al** [2014] JMCA App 5, the Court of Appeal declined to give the much needed guidance as Brooks JA took the view that the case did not provide the appropriate circumstances in which to do so because the application before the court was one for permission to appeal and not an appeal. The issue arising in that case was whether the Master in Chambers had fallen into error in refusing the insurer's application to set aside an order for specified service. The applicant British Caribbean Insurance Company (BCIC) made its application on the ground that all reasonable efforts had been made without success to contact its insured Mr. Ivor Leigh Ruddock. Mr. Ruddock was the owner of a motor vehicle which was insured by the applicant BCIC. An order had been made for specified service upon BCIC. The Master, in the exercise of her discretion refused to set aside the order, apparently on the basis that she was not satisfied with the efforts made by BCIC to locate its insured.

[18] The evidence before the Master was that BCIC had attempted to contact its insured Mr. Ruddock and Mr. Evans (Mr. Ruddock's driver) but without success. The efforts to do so were not particularized in the affidavit in support of the application. The affiant also stated that calls had been made to the known telephone numbers for the men but with no success and that letters sent out were returned and that persons were not known at the address. The returned letters were exhibited. There were two addresses on each letter but only the envelopes sent to one of the addresses were exhibited. There was no indication as to whether letters were mailed to the other address. There was also evidence that there was prior information garnered from an investigator sent out by BCIC which indicated that Messrs Ruddock and Evans worked at the address to which the letters had been sent. The Court of Appeal observed that there were gaps and omissions in the evidence. BCIC had not demonstrated that it had made any

efforts to contact its insured at his home address or that efforts were made to serve him personally with a letter. It was submitted before the Court of Appeal on behalf of BCIC that it was expensive to secure the services of a private investigator but the court observed that there was no evidence before the Master or even before the Court of Appeal itself to demonstrate why it would have been unreasonable for BCIC to secure the assistance of a private investigator. In the final analysis, the Court of Appeal refused to disturb the Master's decision not to set aside the order for substituted service.

[19] In **Moranda Clarke** the applicant was the same applicant in this case, AGIC who sought inter alia, an order to set aside a substituted service order made on the 11th of December 2013 in relation to the 2nd Defendant. As it relates to the efforts made to locate him, there was evidence that a letter had been sent to his address as shown on the records, in January 2013 but that that letter had been returned unclaimed. They had employed investigators who located the 1st Defendant at an address previously unconnected with her based on their records. The investigators had received information that the 2nd Defendant had migrated. (I note that the source of this information was not stated.) This was also the information received from the 1st Defendant.

[20] The learned Master agreed with submissions from the respondent that AGIC ought to have provided affidavit evidence from the investigators Priority Investigation Services Limited, outlining the steps that were taken in their investigations and giving information regarding the source of their information; presumably the information that the 2nd Defendant had migrated. It is to be noted that the 2nd Defendant was also being sought in relation to other claims arising from the same accident. The court in that case recognized that it "must not fall into the trap of expecting necessarily the steps of enquiry to be so onerous that it becomes unrealistic for the insurance company to achieve". (Paragraph 37 of the judgment.) The court also observed that the affidavit outlining the steps taken to locate the 2nd Defendant fell short in several respects. It was pointed out that the 1st Defendant had stated that the 2nd Defendant was visiting relatives in Spanish

Town at the time of the accident and that there was no evidence as to whether any of these relatives was contacted to find out if they had knowledge of the whereabouts of the 2nd Defendant. Further, it was observed that there was no evidence as to whether an advertisement was done locally or abroad "by the several means available to indicate to the 2nd Defendant or anyone knowing him that attempts were being made to contact him." (paragraph 38 of the judgment.) The learned Master took the view that "these are reasonable steps utilized on a daily basis and endorsed by our very rules to bring claims to the attention of proposed litigants." She also stated that "if the claimant has already been unsuccessful in serving the 2nd Defendant at the given address, the insurer by virtue of the relationship and obligation under their contract should not be absolved if no additional step is taken." (paragraph 40 of the judgment).

[21] In paragraph twelve of **Khalil Dabdoub,** Mangatal J. stated the following:

> *"It seems to me that the relationship of insured and insurer is such that these parties have mutual contractual obligations and linkages in relation to the motor insurance policy. This agreement and relationship makes the motorist's insurer a proper party to be served by way of substitution. The provisions of the Motor Vehicle Insurance (Third Party Risks) Act and the respective statutory insurance liabilities of the parties in relation to third parties also support that position. The insurers are proper parties for substitution because they are in reality often the party that is really interested in the action and the ultimate financial liability may prove to be theirs. I note that it is not that the insurers here are denying that they were in fact the provider of motor insurance coverage to the insured at the relevant time. The fact that they cannot now find their insured or as in this case where they also say that the insured has breached the policy, does not affect the question of whether the order for substituted service was validly made."*

[22] In **Porter v Freudenberg** the English Court of Appeal held that "In order that substituted service of a writ may be permitted, it must be clearly shown that the plaintiff is unable to effect personal service and that the writ is likely to reach the defendant or come to his knowledge if the method of substituted service asked for by the plaintiff is adopted."

[23] It is apt at this stage to examine the case of **Insurance Company of the West Indies Ltd v Shelton Allen (Administrator of the estate of Harland Allen) et**

al [2011] JMCA Civ 33. (**Shelton Allen**) referred to before. The facts of **Shelton Allen** were that the Administrator of the estate of Harlan Allen deceased (the 1st Respondent) brought a claim against the other three respondents in the matter. On an application heard by Master Simmons (as she then was), an ex parte order was made dispensing with personal service on the 3rd Respondent Delan Watson and allowing instead service upon the applicant Insurance Company of the West Indies (ICWI), who were the insurers of the 3rd Respondent Watson. ICWI applied to have the ex parte order set aside on the basis that its insured, the 3rd Respondent was in breach of the policy of insurance and so was not entitled to an indemnity under the policy, that this fact was known to the 1st Respondent before he had made the application for substituted service, but did not disclosure it to the court, and further, that steps taken to locate the 3rd Respondent were unsuccessful. An application by ICWI to set aside the ex parte order was refused. ICWI appealed.

[24] As it relates to the issue of alternative method of service/ specified service and when it should be allowed, the broad principle to be extracted from the discussion in **Shelton Allen** as being applicable to our present regime under the Civil Procedure Rules is that this form of service should only be permitted where it is shown by affidavit evidence that the process to be served is likely to come to the knowledge of the Defendant by the method of service chosen. Morrison JA disagreed with Mangatal's J (Ag.) conclusion in **Lincoln Watson v Paula Nelson** (Suit No. CL 2002/W-062). The latter case was decided under the Civil Procedure Code and stated essentially that where a plaintiff had established that he was unable to effect personal service, the court had a wide discretion to order substituted service and that the insurer was a proper party on which to effect service and further, that this was so whether or not the insurer was likely to be able to bring the document served on it to the attention of the person to be served.

[25] The relevant provisions in the Civil Procedure Rules (CPR) are Rules 5.13 and 5.14. In the particular circumstances of this case, Rule 5.14 would be the

appropriate starting point, as the Applicant had by-passed the provisions of rule 5.13 and sought an order of the court instead of effecting service as provided for under rule 5.13, and then seeking the court's approval after the fact.

Rule 5.13 states;

> *(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.*
>
> *(4) The registry must immediately refer any affidavit filed under paragraph (2) to a judge, master or registrar who must -*
>
> *(a) consider the evidence; and*
>
> *(b) endorse on the affidavit whether it satisfactorily proves service.*
>
> *(5) Where the court is not satisfied that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the registry must fix a date, time and place to consider making an order under rule 5.14 and give at least 7 days*

notice to the claimant.

(6) An endorsement made pursuant to 5.13(4) may be set aside on good cause being shown.

Rule 5.14 states;

(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 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.

Morrison JA in **Shelton Allen** laid to rest any notion that alternative service/specified service on an insurance company is based on the existence of the contractual relationship. He gave clarity to the basis on which service on an insurance company is permissible. It is simply on the bases of the provision of Rules 5.13 and 5.14. The party seeking to effect service by an alternative method or a specified method must satisfy a court that the requirement in Rule 5.14(2)(b) is met. That is by "showing that the method of service is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim." Morrison JA stated the following at paragraph 35 of his judgment:

"It appears to me from the language of Rule 5.14 to be unarguably clear that the option given by the rule to the claimant to choose an alternative method of service is expressly subject to the claimant being able to satisfy the court on affidavit either that the defendant was in fact able to ascertain the contents of the documents… or that "it is likely that he or she would have been able to do so."

THE ANALYSIS

[26] In light of the foregoing, one has to be careful in stating that any obligation to locate and serve an insured arise by virtue of an insurance company's relationship with its insured or by virtue of any obligation under its contract of insurance. I therefore accept Ms. Moore's submission to the effect that service on

an insurance company in lieu of service on a defendant is to be based on a finding that, "the defendant was in fact "able to ascertain the contents of the document" or that "it is likely that he or she would have been able to do so." It follows that I reject Mrs. Dixon's submission that Mangatal J.'s statement of the law in the cases of **Lincoln Watson** and **Khalil Dabdoub** (referred to earlier) is a correct one. We are here concerned with a situation in which specified service was effected pursuant to a court order and so the primary issue is not so much the basis on which the order was made, and in any event, there was evidence before the Learned Master on which she could properly have made the order.

[27] As stated before, the primary issue is whether or not AGIC has made sufficient effort to locate its insured the 1st Defendant. It is true that the reason an insurance company is a candidate for specified/alternative service is because in the ordinary course of business, an insurance company will garner fairly detailed information in its proposal form from a prospective insured. So that by the time there is in effect a policy of insurance, an insurer will ordinarily have more information that most plaintiffs will have in circumstances where such an insured becomes a defendant in a claim. In many instances, the only information a claimant will have is that received from a defendant at the scene of the accident if the circumstances allow, or that exchanged at the police station, or the information garnered from the police accident report. The meeting between claimant and defendant usually is fortuitous and is more often than not occasioned only by the accident.

[28] It is therefore understood in an instance such as that with which we are confronted in this case, that the applicant insurance company had more information about the first defendant than the claimants did. The court must nevertheless guard against imposing too onerous a burden on an insurance company in terms of how much effort it is required to make in order to locate its insured. For policy reasons, the onus on the insurance company ought not to be too burdensome. The insurer ought to be required to make reasonable efforts to locate its insured; it ought not to be asked to embark on an exhaustive search at

great expense. I am mindful that there has been no complaint as to the expense incurred in carrying out the search in this particular case. There must be a careful balancing act. If insurers apprehend that they will very frequently be put to great expense by having to hire investigators to locate insured persons on account of court orders for specified service, the cost of insurance is likely to increase. One cannot however escape the thought that it may very well not be in the interest of the insurance company to locate its insured, as by doing so, it may give rise to adverse financial consequences in that the claim could be decided against its insured resulting in the insurer having to indemnify its insured in respect of any liability arising whether by agreement or pursuant to a judgment of the court.

[29] These observations bring me to examine the evidence that was placed before the court when the order for specified service was made. It is in my view important to dissect and carefully scrutinize the efforts made by the claimants to locate the 1st Defendant in the instant case. The purpose of this exercise is simply to demonstrate what efforts the claimant viewed as being sufficient so as to make the comparison with the comprehensiveness of the effort made by the applicant insurance company. I reiterate that I accept that the applicant in the instant case was in possession of more information in relation to its insured than the claimants. Notwithstanding that, I believe the claimants also had a responsibility to make reasonable efforts to locate the 1st defendant, of course acknowledging the constraints, based on the limited information available to them.

[30] The efforts of the claimants to locate the 1st Defendant are particularized in the affidavit of Chakakan Marshalleck, Process Server contracted to the claimants' Attorneys-at-Law Dixon and Associates Legal Practice. This affidavit was filed on the 4th of September 2015. I quote paragraphs 2, 3, 4 and 5 of her affidavit.

> *2. "That on or about the 25th day of July 2015, I received instructions from Mrs. Khadine Dixon, Attorney at Law for the claimants in this matter to serve the claim form, prescribed notes acknowledgement of service, defence from and particulars of claim in respect of claim no. 2015 HCV 03728 on the 1st defendant at*

Coconut Palm District in the parish of Westmoreland as indicated in the claim form." [Westmoreland seems to be an error].

3. Between the hours of 10 a.m. and 1 p.m. on the 27th day of July 2015, I boarded a bus in Montego Bay, heading to Mount Salem, in the parish of St. James, I started enquiring on the bus about Coconut Palm District, a lady on the bus then told me that she had a sister that lived in the district and she would know him as she sells right at the entrance of the lane leading to the Coconut Palm District. The lady called her sister and said her sister does not know anybody by that name living in that said district. Having heard that, I still proceeded to visit Coconut Palm District to confirm for myself that, the 1st defendant Brian Stephens, actually did not live in the said district.

4. I found the lane leading to the district and spoke with several residents in the district and was informed that they have never known a ***BRIAN STEPHENS*** *living in the Coconut Palm District. As a consequence the claim form, notice to the defendant, prescribed notes for defendant, acknowledgement of service form, defence form and particulars of claim were not served.*

5. That I verily believe that any further attempts to find the 1st defendant is either evading service or has moved from the said address, or never lived at the said address and I was unable to ascertain information as to where I may find him.

[31] It is this effort which was viewed as sufficient and formed the basis on which the Learned Judge made the order for specified service. It is clear that the applicant made far greater efforts to locate the 1st Defendant. The applicant had also hired a private investigator who stated that at great risk to his personal safety and security, he went into communities which are reputed to be riddled by violence on a frequent basis. I am mindful that the claimants' process server would have been exposed to the same risks when she visited the community. Counsel for the applicant has asked the court to note the fact that both communities are within the larger community of Mount Salem and she further asked the court to take judicial notice of the fact that Mount Salem is the first community to be designated as a Zone of Special Operations; this of course for the purposes of the Law Reform (Zones of Special Operations) (Special Security and Community Development) Act which came into effect 14th July, 2017. I am satisfied that the

investigator Mr. Lawson made detailed enquiries, but given the demographics of the communities, he was unable to garner any useful information. Counsel for the Respondent Mrs. Dixon opined that if a next of kin had been contacted, then that person may have been able to provide information with regard to the 1st Defendant's work address. I must point out that the available information is that the 1st Defendant is a taxi operator. Mr. Lawson, according to his undisputed affidavit evidence, would have made enquires of taxi operators in the area. It is accepted that enquires could have been made of next of kin if this information was available to the applicant. There is no evidence that it was. There is also no evidence that the applicant had in its possession any photograph of the defendant so as to have enabled its process server and investigator to show same to persons in the community of Mount Salem.

[32] I am not of the view that the applicant insurance company was obligated to incur additional expense to go the route of placing advertisements as suggested in **Moranda,** in order to locate the 1st Defendant. It would have been open to the claimants to take those steps if they formed the view that it was reasonable to do so. Why should this onerous burden be imposed on the applicant if the claimants themselves were not prepared to take those steps. Any greater duty imposed on an insurance company than that imposed on a claimant in order to bring the contents of the claim form to the attention of that insured defendant, in my view, ought to be imposed only to the extent that the insurance company possesses information on which it can act, which information is not within the knowledge of a claimant. An example of this would arise where it is shown that the insurance company has information in relation to the employment of the insured defendant or in relation to a next of kin. I take the position that to ask an insurance company to hire a private investigator as well as take additional steps such as placing advertisements would be quite onerous. A claimant is in as good a position to place advertisements in order to locate a defendant as an insurance company would be. The fact that an insurance company is likely to be in a better position financially than most claimants would, does not constitute a sufficient reason why an insurance company should be forced to take steps that a claimant is not able

or is not prepared to take in order to locate a defendant. After all it is the claimant who needs to locate the defendant.

[33] It is not known on the evidence before this court if the applicant was in possession of information regarding a next of kin for the 1st defendant. If it was in possession of such information then it ought to have acted on it. With that caveat in mind, I am of the view that up to 26th of February 2017, the applicant had done all that was reasonably expected in the circumstances, in order to locate the 1st Defendant in order to bring the contents of the claim form to his attention.

[34] It has not however escaped my notice that investigators from BCIC were able to locate the 1st Defendant in order to effect service of the ancillary claim on him. There is no evidence as to how it is that BCIC's private investigator Mr. Byfield Pryce was able to get the contact number for the 1st Defendant. One cannot by inference say that if this investigator was able to obtain the number, how is it that AGIC's investigator could not.

[35] The critical question is whether, having become aware of the information in Ms. Kalima Bobb-Semple's affidavit of 28th of February 2017, that BCIC was able to locate the 1st Defendant, AGIC was obliged at that stage to seek to get information from BCIC or its Process Server or Ms. Bobb-Semple as to how to locate the 1st Defendant. It is not clear from the evidence when exactly this information became available to AGIC. I note paragraphs 3, 4, and 5 of Mrs. Morrison-Anderson's affidavit filed 5th of October 2017 which among other things state that contact was made with BCIC by Dunbar and Co. (the applicant's Attorney-at-Law in this matter) and that Dunbar and Co. had information that BCIC's private investigator had made contact by phone with the 1st Defendant and had arranged to meet him at a particular location. I accept that Dunbar and Co. are for all intents and purposes the agents of AGIC and so any information in their possession and within their knowledge is attributable to AGIC.

[36] The only reliable evidence that the court can act on as it relates to when this information came to the knowledge of AGIC is to be derived by inference. The court can infer that this information came to the knowledge of AGIC or its agent sometime between the filing of the affidavit of Mr. Byfield Pryce on the 8th of December 2016, and the 5th of October 2017, the date of the filing of Mrs. Morrison-Anderson's further supplemental affidavit. Ms. Moore in her submissions did state that the information was garnered from Ms. Bobb-Semple's affidavit filed 28th of February 2017, even so, it is still not known when and in any event, this statement of course is not evidence. I am unable to infer that Mrs. Morrison-Anderson's latest affidavit was filed soon after AGIC was made aware of this information. It may have been helpful if AGIC had brought evidence to say precisely when the information came to its knowledge, because if the court were to have found that AGIC only became aware of how to locate the 1st Defendant close to the hearing date for the present application, it might have made every difference to the outcome of this matter.

[37] What is clear however, is that AGIC had already made its application before the court when it became aware of this information. One of the arguments advanced by the respondent in this matter is that AGIC was quick to make its application to the court before it had devoted much time and effort to locate the defendant. As indicated before, AGIC was served with the order of the court on the 21st of March 2016 and had filed its application to set aside the order for specified service on the 27th of July 2016. I do not share the view that the application was hurriedly made. I do accept however that up to that time, there was sufficient effort dedicated to locating the defendant. In fact it was also Mrs. Dixon's submission that AGIC was tardy in filing its application to set aside the order. To say on the one hand that AGIC hurriedly made the application and then to say in relation to the issue of whether or not the application for the extension of time to file the application should be granted, that the application was tardy, are clearly very inconsistent positions. Even if the court were to take the view that the application was hurriedly made, it is clear that the search continued after the application was made. It is Mr. Lawson's affidavit evidence that he made a total

of four trips to the two districts in the Mount Salem area which were the addresses on record for the 1st defendant. These trips were made between the 10th of August 2016 and the 26th of February 2017. Some four months had elapsed between the time that AGIC became aware of its obligation to locate its insured for the purpose of bringing the contents of the claim form to his attention and the time the application to set aside the order was made. I am cognizant of the respondent and BCIC's position that from the time AGIC was served with notice of proceedings in relation to the first claim, it ought to have set in motion efforts to locate its insured. It is clear that there had in fact been attempts to locate the 1st Defendant although there was no obligation imposed on AGIC by virtue of any court order at that time. The clear evidence of this is the fact that mail sent to him at one of his addresses that AGIC on record was returned to AGIC on the 15th of July 2014 before the order for specified service was made.

[38] No doubt, if the court were to make the order sought by AGIC, it would be disadvantageous to BCIC and its insured the 3rd and 4th Defendants. Firstly there is the possibility that total liability for the accident could rest with them if the 1st defendant or the 2nd defendant or both of them are not properly made defendants to the claim. Further, there is before the court an application for Interim Payment to the claimant Keisha Bennett who received severe injuries in the accident. Granting the order sought by AGIC would mean that the court could only make an order for interim payment against the 3rd and 4th Defendants, thereby imposing whether directly or indirectly an obligation upon BCIC to pay a sum of money to the 1st claimant. The claimants presently have a judgment by default against the 3rd and 4th Defendants and a judgment could be entered against the 1st Defendant at anytime if the court refuses the application. The effective date of that judgment would be of course the 5th of August 2016; which means that if the court were to refuse the order, a court, in considering the application for Interim Payment could make an order against the 1st Defendant as well. It is therefore recognized that BCIC and the 3rd and 4th Defendants have a vested interest in the court refusing the order being sought.

[39] I would observe at this point that the judgment by default cannot properly be entered against the 2nd Defendant as the order for specified service did not allow for specified service in relation to him. For ease of reference Order number 2 states *"that Personal Service of the Claim Form on the 1st Defendant is dispensed with"* and order number 3 states *"that permission is granted to the Claimants to serve the Claim form … and all subsequent documents in relation to this claim on Advantage General Insurance Company Limited (AGIC) who are the insurers for the 1st Defendant's motor vehicle lettered and numbered 5344 GA at 4-6 Trafalgar Road, Kingston 5 in the parish of St. Andrew*."

I am therefore uncertain as to why reference was made to the 2nd defendant (albeit by an incorrect name) in the ground put forward by AGIC in support of its application.

[40] Finally, in addressing the matter, the court did give consideration to whether or not an extension of time should be granted to the applicant in order for the application to be pursued since it was filed out of time. Rule 42.12 provides that

> *(1) Where in a claim an order is made which may affect the rights of persons who are not parties to the claim, the court may at any time direct that a copy of any judgment or order be served on any such person.*
>
> *(2) …*
>
> *(3) …*
>
> *(4) …*
>
> *(5) Any person so served, or on whom service is dispensed with,*
>
> *(a) Is bound by the terms of the judgment or order; but*
>
> *(b) May apply within 28 days of being served to discharge, vary or add to the judgment or order; and*
>
> *(c) May take part in any proceedings in any judgment or order.*

It is not disputed that AGIC would fall within the category of persons referred to in Rule 42.12. As is evident, this application was filed out of time. The court considered that although there was delay in bringing the application and that delay is usually unacceptable, it can be excused in the circumstances of this case because the applicant needed time in order to make efforts to locate the defendant and has demonstrated that the search continued after the application

was filed. Further the court accepted that the explanation offered for the delay was not unreasonable. The court also considered that the application was not without merit and was mindful of the fact that the claimants had not yet filed its request for default judgment against the 1st and 2nd defendants at the time the application was made. I therefore took the view that the application should be heard.

CONCLUSION

The court is mindful that it should not disturb the exercise of a judge's discretion if there is no clear basis in law to do so. AGIC having already been taxed with the responsibility pursuant to an order of the court to serve the defendant, should have acted on the information belatedly received through BCIC or its agent. I am mindful too that AGIC filed its application to set aside the order on the very day that claim form No. 2015 HCV 03728 expired. This claim form was the second one filed by the claimant in this matter and the validity of that claim form could not thereafter be extended. This is also in my view a relevant consideration. If there was evidence that the applicant had made even minimal effort consequent on receiving the information contained in Ms. Bobb-Semple's affidavit and was unsuccessful in contacting its insured at this late stage, I would have been minded to grant the application and set aside the order but I find myself unable to do so in the circumstances. This application is therefore refused. Costs of the application are awarded to the respondent and are to be taxed if not agreed.