IN THE SUPREME COURT OF JUDICATURE OF JAMAICA Judgment Book

CLAIM NO. 2005 H.C.V. 5442

BETWEEN	**KHALIL DABDOUB**	**CLAIMANT**
AND	**ALLAN FLOWERS**	**1ST DEFENDANT**
AND	**SEYMOUR MCINTOSH**	**2ND DEFENDANT**
AND	**RADCLIFFE BUTLER**	**3RD DEFENDANT**

APPLICATION BY INSURER TO SET ASIDE ORDER FOR SUBSTITUTED SERVICE- INSURER STATING UNABLE TO FIND INSURED- NOT DENYING RELATIONSHIP OF INSURER AND INSURED, BUT CLAIMING INSURED IN BREACH OF MOTOR INSURANCE POLICY

IN CHAMBERS

Mr. Jalil Dabdoub instructed by Dabdoub, Dabdoub and Co. for the Claimant.

Mrs. Suzette Campbell instructed by Campbell & Campbell for the Applicant/ Insurer.

Heard : 31 October, 18 November, 2008, and 6th January 2009.

Mangatal J:

1. This is an application by United General Insurance Company Limited, now Advantage General Insurance Company Limited "the

Insurer", to set aside an order for substituted service made by Master McDonald(as she then was) ex parte on the 30th March 2006. By that order, the Claimant was granted permission to effect personal service on the Insurer in lieu of their insured, the First Defendant Allan Flowers. The insurer's application, which was filed May 8 2006, is also seeking to set aside all subsequent proceedings, including a default judgment entered against the 1st Defendant on or about the 2nd of November 2007. The insurer in addition seeks permission to file an acknowledgement of service.

2. The application has been vigorously opposed, and Mr. Jalil Dabdoub, on behalf of the Claimant, has taken the following preliminary points:
   (a) The Applicant is not properly before the court and has no standing at this time as it has failed to file an acknowledgement of service pursuant to the Civil Procedure Rules 2002 "the C.P.R.".
   (b) This court has no power to set aside the order for substituted service made by another Judge exercising concurrent jurisdiction.
   (c) The application is misconceived because there is in place a default judgment.

3. As to the first preliminary point, I agree with Mrs. Campbell who appears for the Insurer, that, by virtue of the fact that the application which the insurer purports to make is in its own right, and not as a Defendant, and is an application to set aside the order for substituted service on itself, it is not necessary that an acknowledgement of service be first filed.
4. As to preliminary point (b), whether this court has jurisdiction to set aside the order for substituted service made by the Master exercising the jurisdiction of a judge in chambers, it seems clear to

me that the order being an ex parte order, the court does have jurisdiction in the proper circumstances, to set aside or vary such an order. The decision of the Judicial Committee of the Privy Council in **Ministry of Foreign Affairs v. Vehicles and Supplies Limited** 28 J.L.R. 198 is supportive of the view which I have taken. Indeed, so too are all of the other English cases where applications were made to set aside orders for substituted service discussed in my unreported decision in Suit No. C.L.2002/ W-062, **Watson v. Nelson and Mullings**, delivered 9th December 2003, referred to in paragraph 13 below.

5. It was also submitted that the Court has no jurisdiction to set aside service since the application was not made within 14 days of the date of service. Mrs. Campbell indicates that the application was in fact served 3 days out of time and she asks this court to extend the time for making the application.
6. The third preliminary point is that the insurer's application does not meet the criteria necessary for setting aside a default judgment. I agree with Mrs. Campbell that if the court were to set aside the order for substituted service, then all subsequent proceedings, including the entry of the default judgment, would also fall to be set aside.
7. I am of the view that the substantive application ought to be heard and so I grant an extension of time for the making of the application.
8. The ground stated in the application is as follows:

> *The applicant is advised that the 1st Defendant is not in the jurisdiction and United General Insurance has no way of bringing the Claim Form and the Particulars of Claim to his attention.*

There are also other grounds set out in the supporting affidavit, but the above appears to be the main ground.

9. The Court's powers to make orders for substituted service and proof of that service are governed by Rules 5. 14 and 5. 15 of the C.P.R. These Rules state:

> *5.14(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 for substituted service 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.*
>
> *5.15- Service is proved by an Affidavit made by the person who served the document showing that the terms of the order have been carried out.*

10. The Affidavit in Support of the application for substituted service was sworn to by Mr. Jalil Dabdoub on the 8th day of February 2006. In his Affidavit, Mr. Dabdoub speaks of the efforts made by his firm's process server Mr. Neville Smith to locate the 1st Defendant and the lack of success in serving him with process. At paragraph 9 of his Affidavit, Mr. Dabdoub states:

> *9. That it is my opinion that (a) if process is served on United General Insurance Company Limited the company will bring the matter to the attention of the 1st Defendant.*

A copy of the notice of proceedings which was served on the insurer as required by the Motor Vehicle Insurance (Third Party Risks) Act was also exhibited to the Affidavit.

11. In my judgment, there is no proper basis put forward in the application upon which the court ought to set aside the order for

substituted service. The grounds of the application and Affidavit in Support were sufficient to warrant the order for substituted service for the simple reason that they did show that the method of service on the 1st Defendant's insurers was likely to enable the 1st Defendant to ascertain the contents of the claim form and particulars of claim. Service was proved pursuant to Rule 5.15, i.e. it was proved by an Affidavit showing that the terms of the order for substituted service had been carried out. This method of service on the insurer was by virtue of the order deemed to be good service.

12. 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.

13. The wording of Rule 5 .13 of the C.P.R. is different from the wording of sections 35 and 44 of the former Civil Procedure Code, which I discussed in detail in my unreported decision in Suit No. C.L.2002/ W-062, **Watson v. Nelson and Mullings**, delivered 9th

December 2003.However, I think that the reasoning in that case, and that set out in the authorities which I referred to there, in particular **Murfin v. Ashbridge & Martin** [1941] 1 All E.R. 231, **Clarke v. Vedel** [1979] R.T.R. 26, and **Abbey National PLC. V. Frost (Solicitors Indemnity Fund Intervening)** [1999] 1 W.L.R. 1080 nevertheless applies when the application by the insurer is to set aside an order for substituted service. See also the unreported decision of Sykes J. delivered June 1 2006 to the same effect in C.L. 1999/ B055 **Baker v. Malcolm and Gordon and Carr**.

14. This case is distinguishable from one in some of the cases cited by Mrs. Campbell where the insurer is seeking to intervene or to set aside a judgment in order to conduct the litigation on the basis that it is the party really affected. Here the insurer is seeking to set aside the order for substituted service because it cannot find the 1st Defendant and it claims that the 1st Defendant was in breach of the policy of insurance. The insurer is not therefore seeking to take over the proceedings on behalf of the insured and to play an active part as the matter goes forward.

15. As Lord Goddard stated at page 235 of **Murfin v. Ashbridge & Martin**, whilst it may be the insurer's misfortune that they cannot find their insured, that circumstance is not the Claimant's fault. Nor does it render the order previously made invalid. In my view there has been no misrepresentation or concealment of facts, or the revelation of any new material which could have been made available to the court by the Claimant when making the application for substituted service. Further, whilst the question of whether the 1st Defendant may have breached the policy of insurance with the insurer may be relevant to the question of the insurer's ultimate liability, it is difficult to see how that could affect the validity of the manner in which service was effected – see **Abbey National** at page 1089.

16. In a nutshell, the fact that the insurer upon whom substituted service has been effected says that they cannot now find the insured, does not render the order for substituted service, which was made upon an application that satisfied all of the requirements of Rule 5.13 of the C.P.R., invalid. It is to be noted that the provision in the Rule expressly states that when the court orders or specifies the method of service, that method is deemed to be good service. It does not say that it is actual good service; the provision is also a deeming provision.

17. The insurer's application filed May 8th 2006 is dismissed with costs to the Claimant to be taxed if not agreed or otherwise ascertained.