[2020] JMSC Civ 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2006HCV03800

BETWEEN	**JERMAINE EDMONDS**	**CLAIMANT**
AND	**OWEN MARQUESSE**	**1ST DEFENDANT**
AND	**JUNIOR WALLACE**	**2ND DEFENDANT**
AND	**DESMOND BERBICK**	**3RD DEFENDANT**
AND	**GLENDON DRYDSON**	**4TH DEFENDANT**

Mr. Jhade Lindsay and Ms. Stanecia Davis instructed by Pollard Lee Clark and Associates for the Applicant/Claimant.

Heard December 12, 2019 and January 24, 2020.

Civil procedure – Personal injury claim resulting from motor vehicle accident – Notification of proceedings served on insurance company in compliance with section 18(2)(b) of the Motor Vehicles Insurance (Third-Party Risks) Act – Whether this notification of proceedings can satisfy the requirements in rules 5.13 and 8.13 of the Civil Procedure Rules – Whether it is appropriate to dispense with the service of the claim form in these circumstances and after claim became time-barred – Rules 5.13, 6.8, and 8.13 of the Civil Procedure Rules.

MASTER N. HART-HINES

[1] The genesis of the claim is a motor vehicle accident which occurred along the

Washington Boulevard main road in the parish of St. Andrew on October 29, 2000. It is alleged by the Applicant that he was injured when there was a collision between a vehicle licensed 0686BW and a vehicle licensed 9201PP which were both negligently operated by the 1st Defendant and 4th Defendant respectively.

[2] The Court is asked to consider an application pursuant to rule 5.13 of the Civil Procedure Rules (hereinafter "CPR") that an alternative method of service, chosen by the Claimant, be deemed sufficient to enable the 3rd and 4th Defendants (hereinafter "the Defendants") to ascertain the contents of the claim form. This is an unusual case in that the Applicant/Claimant acknowledges that the claim form itself has not been served, but in effect seeks an order that the service of the claim form should be dispensed with having regard to the particular circumstances of the case.

[3] Pursuant to section 18(2)(b) of the Motor Vehicle Insurers (Third Party Risks) Act (hereinafter "MVIA"), a Claimant is obliged to notify an insurance company of the commencement of proceedings against its insured. It is the service of this notification that the Applicant asks the Court to deem as sufficient to enable the Defendants to ascertain the contents of the claim form.

[4] Though similar earlier applications were filed, the Court is asked to determine the application filed on January 10, 2013. For the sake of completeness, I will briefly summarise the orders sought in the earlier applications filed.

[5] By Notice of Application (hereinafter "the first application") filed on June 3, 2008, the Applicant applied for an order extending the validity of the claim form, pursuant to rule 8.15 of the CPR. The Applicant also sought an order dispensing with personal service of the claim form and permitting service via publication of a Notice of Proceedings in the Daily Observer newspaper, pursuant to rule 5.14 of the CPR. Alternatively, the Applicant also sought an order that the service of a document headed "Notice of Proceedings" on the 3rd Defendant's insurance

company, United General Insurance (now called Advantage General Insurance Company Limited), on November 6, 2006, be deemed sufficient to bring the proceedings to the attention of the 3rd and 4th Defendants (hereinafter "the Defendants"). This first application was adjourned on three occasions between October 30, 2008 and November 27, 2008.

[6] By Reissued Notice of Application filed on January 21, 2010, the Applicant applied for the same orders sought in the first application. This application was adjourned on May 6, 2010.

[7] By Reissued Notice of Application (hereinafter "the application") filed on January 10, 2013, the Applicant applied for the following orders:

> *"1. That service upon the Defendants' insurers of Notice of these Proceedings effected on the 6th day of November 2006 be deemed adequate service to bring the proceedings to the attention of its insureds for the purposes of CPR 2002 as an alternative method of service;*
> *2. That the Defendants be given 42 days from the date of service of this Order to serve their Defence herein, and*
> *3. That unless the Defendants file an Acknowledgment of Service and or Defence within the time stated in paragraph 2 hereof, Judgment be entered for the Claimant with damages to be assessed and costs to the Claimant."*

BACKGROUND AND CHRONOLOGY

[8] The chronology of the events is as follows:

i. On October 29, 2000 the aforementioned motor vehicle accident occurred. On that date, vehicle licensed 0686BW was owned by the 2nd Defendant and driven by the 1st Defendant, while vehicle licensed 9201PP was owned by the 3rd Defendant and driven by the 4th Defendant. The 2nd Defendant's vehicle was insured by the Insurance Company of the West Indies Limited ("ICWI"). At the time of the accident, the 3rd Defendant's vehicle was insured by United General Insurance ("UGI"), which is now called Advantage General Insurance Company Limited ("AGIC").

ii. Sometime in 2002, the Claimant commenced Claim No. E 40 of 2002 in the Supreme Court of Jamaica in respect of the said motor vehicle accident. The writ was not served as the defendants were not located at their alleged last known addresses, as indicated on the Police Report in respect of the

accident. On March 31, 2004 an affidavit was filed indicating that efforts made to serve the defendants had proved futile.

iii. On October 27, 2006 the relevant claim form and particulars of claim were filed in the Supreme Court of Jamaica.

iv. On November 6, 2006 the "Notice of Proceedings" was served on United General Insurance by fax at fax number 978-3688 at approximately 3:57p.m. At the time of service, this document was not filed. It was subsequently filed. The Notice of Proceedings stated the following:

> *"TAKE NOTICE that pursuant to Section 18(2) of the Motor Vehicle Party Risks) Act on the 27th day of October 2006 an action was commenced by the Claimant JERMAINE EDMONDS in the Supreme Court of Judicature in Claim No. HCV3800 of 2006 claiming damages for negligence arising from the negligent operation on or about the 29th of October 2001 of motor vehicle licensed 9201PP owned by the Third Defendant, DESMOND BERBICK and driven by the fourth Defendant, GLENDON BRYDSON the servant and /or agent of the Third Defendant and that we are informed that you are the insurers of the said motor vehicle."*

v. On November 8, 2006 the said "Notice of Proceedings" was filed in the Supreme Court Civil Registry.

vi. On November 8, 2006 an affidavit of Service, sworn by Terriano Powell, was filed pursuant to rule 5.12 of the CPR, seeking to prove service of the Notice of Proceedings by fax. The affidavit explained that there was a typographical error in the facsimile cover sheet in that it stated the incorrect fax number for United General Insurance, and that the correct number to which the document had been faxed was in fact 978-3718. A transmission verification report is exhibited to the affidavit of Service, confirming that the fax was sent to fax number 978-3718 at approximately 16:02 hours.

vii. On June 3, 2008 an application was filed pursuant to rules 5.13 and 8.15 of the CPR. In support of the application, an affidavit was filed on June 3, 2008, sworn by Attorney-at-Law Ingrid Lee Clarke-Bennett. Therein, reference was made to the earlier claim filed in 2002 and it was alleged that the defendants are evading service and that it seemed that the defendants never resided at the addresses stated in the Police Report prepared in respect of the accident. Mrs. Clarke-Bennett also referred to the fact that the Notice of Proceedings had been served on insurance company by fax on November 6, 2006. The Notice of Proceedings was exhibited to Mrs. Clarke-Bennett's affidavit, as well as the facsimile cover sheet, the

transmission verification report. Also exhibited were the affidavit of the process server (filed in respect of the earlier claim) and the Police Report dated November 16, 2001.

viii. On October 30, 2008 and November 13, 2008 the application was listed for hearing and the hearing was adjourned. No reason is indicated in the Minute of Order. On November 27, 2008 the hearing of the application was adjourned for a date to be fixed by the Registrar. Counsel Mrs. Clarke-Bennett was noted as present at the hearings on October 30, 2008 and November 27, 2008.

ix. On January 21, 2010, a Reissued Notice of Application was filed.

x. On May 6, 2010 the hearing of the application was adjourned for a date to be fixed by the Registrar. Counsel Mrs. Clarke-Bennett was present.

xi. On January 10, 2013, a Reissued Notice of Application was filed. An affidavit in support was filed on January 10, 2013, sworn by Ingrid Lee Clarke-Bennett in which Mrs. Clarke-Bennett repeated what she had said in her affidavit filed on June 3, 2008. Also exhibited to the affidavit is a "without prejudice" letter from United General Insurance dated December 5, 2006 in which the insurance company acknowledged receipt of the Notice of Proceedings which was sent by fax on November 6, 2006. At paragraph 8 of her affidavit, Mrs. Clarke-Bennett stated this:

> *"8. That it was our belief that negotiations with the insurance companies representing the Defendants were destined to bear fruit and due to said negotiations we are of the view that the Defendants would have been likely to have had notice of the contents of the Claim Forms and Particulars of Claim filed against them, and we believe further that the Defendants were wilfully evading service of the said documents."*

xii. On December 7, 2017, the hearing was adjourned to February 22, 2018. No reason was indicated for the adjournment. Counsel was present.

xiii. On February 22, 2018, the hearing was adjourned for a date to be fixed by the Registrar. Counsel was present.

xiv. On October 10, 2019, the application was listed for hearing before me. The hearing was adjourned to December 12, 2019 for the application to be served on the 3rd Defendant's insurance company, for written submissions to be filed, and for an affidavit to be filed in respect of attempts to serve the claim form issued in 2006. Nothing was filed by Advantage General

Insurance Company Limited and no representative attended the hearing on December 12, 2019.

xv. On December 12, 2019 the application was heard and judgment reserved to January 29, 2020. The hearing was brought forward to January 24, 2020.

SUBMISSIONS

[9] At the hearing on December 12, 2019, and in the written submissions filed, it was submitted that the law permits service by an alternative method and that the motorist's insurer is a proper party to be served, by virtue of the relationship between the insured and the insurer. Reliance was placed on the decision of ***Lincoln Watson v Paula Nelson and Fitz Mullings*** (unreported) Supreme Court, Jamaica, Suit No CL 2002/W-062, judgment delivered December 9, 2003. However, counsel Mr. Lindsay accepted that service on a defendant's insurer is permitted only in circumstances where it is likely that the defendant will be able to ascertain the contents of the documents as reiterated by Sinclair-Haynes JA in ***Nico Richards v Roy Spencer (Jamaica International Insurance Co Ltd - Intervening)*** [2016] JMCA Civ 61.

[10] Counsel further submitted that in the instant case, service of the Notice of Proceedings was sufficient to enable UGI/AGIC to ascertain the contents of the claim form and particulars of claim and to defend the claim if it so chose. Counsel posited that one reason UGI was able to ascertain the contents of the claim form was simply that the Notice of Proceedings contained relevant information pertaining to the claim. At paragraph 13 of the written submissions the content of the Notice of Proceedings was delineated, to show that it contained information such as the name of the Court in which the claim was filed, the claim number, the names of the parties, the cause of action, the date of the motor vehicle accident, and the vehicle registration plate number.

[11] Paragraphs 14 of the written submissions stated:

> *"14. While the Notice is not itself a substitute for the Claim Form and Particulars of Claim, it is submitted that service of the Claim Form and the Particulars of Claim is not the*

requisite standard to discharge the burden of proof regarding alternative service. All that is required is that the method of service was sufficient to enable the defendant to ascertain the contents of the Claim Form and based on paragraph 13 it is our submission that the Notice of Proceedings was sufficient to bring the contents of the documents to provide AGI with the opportunity to defend itself."

[12] Counsel made submissions that a contractual relationship existed between UGI and the 3rd Defendant, or at least, UGI did not seek to refute that such a relationship existed. At paragraphs 15 and 16 of the written submissions reference was made to two letters received from UGI (only one of which was filed as an Exhibit). The submissions indicated that in its letter dated December 5, 2006, UGI admitted that Desmond Berbick was its "insured" and that in another letter dated October 26, 2006, UGI stated that the driver's licence of Glendon Brydson was to be confirmed. It was submitted that since UGI did not state in its letters that it could not locate the 3rd and 4th Defendants, the contents of the claim form could come to the attention of the Defendants, by virtue of the service of the *Notice of Proceedings* in 2006 on UGI. Counsel continued to state at paragraphs 16 of the written submissions:

"16. …. In any event, hypothetically, even if it were the case that AGI could not locate its insured or the driver or even if the driver's licence was not valid, those facts would be irrelevant for the purposes of service and are only relevant as regards AGI's defence, for the reasons indicated by the court in Lincoln Watson and Nico Richards. Consequently, such facts are not a bar to the Notice of Proceedings served on AGI on November 6, 2006 being deemed good service. The pertinent issue being solely whether AGI had sufficient information to allow it to ascertain the contents of the Claim Form and Particulars of Claim."

[13] Counsel Mr. Lindsay posited that since UGI/AGIC can step into the shoes of the insured by virtue of the principle of subrogation, it was appropriate that the order be made pursuant to CPR rule 5.13. Counsel referred the Court to paragraphs 22 to 25 of a recent decision of the England and Wales Supreme Court, ***Cameron v Liverpool Victoria Insurance Co Ltd*** [2019] UKSC 6. Mr. Lindsay further submitted that as the MVIA serves to ensure that injured third parties are able to receive compensation from an insurance company, and since UGI had contractual authority to appoint counsel in respect of the claim, the order could be made pursuant to rule 5.13.

[14] Alternatively, counsel Mr. Lindsay submitted that it is possible to dispense with service of the claim form altogether and that this was an exceptional case in which such an order could be made pursuant to rule 6.8. Mr. Lindsay relied on dictum in the ***Cameron*** decision at paragraph 25 that where a defendant is deliberately evading service and cannot be reached by an alternative method of service, the Court may dispense with service of the claim form. Mr. Lindsay submitted that the affidavits of Ralph Edwards (process server) and Mrs. Clarke-Bennett stated that the Defendants were evading service and they should not be allowed to frustrate the Court process.

THE LAW

[15] For the purpose of this application, the relevant portions of CPR rule 5.13 and rule 5.14 provide as follows:

> *"**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."*
>
> ***(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.*
>
> ***5.14 (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 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. (My emphasis)

[16] In ***Insurance Company of the West Indies Ltd. v Shelton Allen (Administrator of the estate of Harland Allen) et al*** [2011] JMCA Civ. 33 (hereinafter "***Shelton Allen***"), Morrison JA (as he then was) considered rules 5.13 and 5.14 of the CPR and cited the dictum of Lord Reading CJ in ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent***: [1915] 1 KB 857. There, at pages 887-888 Lord Reading CJ said thus:

> *"[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."*
> *(My emphasis)*

[17] It is important to note the purpose of service of the claim form. In ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2008] 1 WLR 806, it was said at page 821 at paragraph 54:

> *"…service of the claim form serves three purposes. The* ***first*** *is to notify the defendant that the claimant has embarked on a formal process of litigation and to inform him of the nature of the claim. The* ***second*** *is to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted:* ***until he has been served, the defendant may know that proceedings are likely to be issued, but he does not know for certain and he can do nothing to move things along****. The* ***third*** *is to enable the court to control the litigation process.… But until the claim form is served, the court has no part to play in the proceedings…" (My emphasis)*

[18] It is settled law that service of the claim form and accompanying documents on a defendant's insurer should only be permitted in circumstances where it is likely that the defendant will be able to ascertain the contents of the claim form (see ***Shelton Allen***). Further, dictum in ***Nico Richards v Roy Spencer (Jamaica International Insurance Co Ltd - Intervening)*** [2016] JMCA Civ 61 (at paragraph 33) suggests that a court hearing an application pursuant to CPR rule 5.14 should be mindful of the amount of time that has elapsed between the date of the accident and the date of the hearing. A court should be mindful that with the passage of time, the contractual relationship between a defendant and an

insurer might have ceased, and the insurer might have no knowledge of the whereabouts of the defendant. In considering this application, the Court should therefore be satisfied that the service on UGI was sufficient to satisfy the requirements in CPR rule 5.13.

THE ISSUES

[19] The issues identified for the Court's consideration are:

1. What is the purpose of notification of the commencement of proceedings pursuant to the Motor Vehicle Insurers (Third Party Risks) Act ("MVIA")?
2. Whether service of the Notice of Proceedings on the insurance company pursuant to section 18(2)(b) of the MVIA, can satisfy the requirement in rule 8.13.
3. Whether an order could be made in relation to service of the claim form after the validity of the claim form has expired and after claim became time-barred.
4. Whether there are exceptional circumstances to justify making an order that personal service of the claim form be dispensed with.

ANALYSIS

What is the purpose of notification of proceedings pursuant to the MVIA?

[20] It is my opinion that the law requires service of notification of proceedings on an insurance company to ensure that it is informed of a claim made by a third party, in order to facilitate the insurance company conducting an investigation into the accident. Although an insured is required to notify the insurance company of an accident, the MVIA seemingly seeks to offer some protection to third parties by providing for the notification by third parties of a claim. Notification within the time period specified in section 18(2)(b) of the MVIA serves to guarantee indemnification in respect of an insured's liability which is covered by the terms of the insurance policy, should a judgment be obtained against the insured and/or an authorised driver. Section 18(2)(b) of the MVIA provides:

> *"(2) Subject to subsection (IA), no sum shall be payable by an insurer under the foregoing provisions of this section-*
>
> *…*

(b) in respect of any judgment, unless before or within ten days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;"

Can the service of notification under 18(2)(b) of the MVIA satisfy CPR rule 8.13?

[21] The service of the notification of proceedings on an insurance company is not designed to circumvent the law in relation to service of the claim form. The "Notice of Proceedings" served by a claimant pursuant to the MVIA is not a substitute for the claim from issued by the Supreme Court of Jamaica. Even though the "Notice of Proceedings" served in this case contained most of the information contained in the claim form, that would not be sufficient to satisfy the Court that the Defendants became aware of the contents of the claim form as well as the contents of the documents that should accompany the claim form. The "Notice of Proceedings" served in this case was not a document issued by the Supreme Court of Jamaica or ordered by a Judge or Master, and therefore could not replace the claim form.

[22] The law is clear that a claim form ought to be served. Further, the law is clear that the particulars of claim, a form of acknowledgment of service, a form of defence and the prescribed notes for defendants must accompany the claim form when it is served (see rule 8.16(1) and ***B & J Equipment Rental v Joseph Nanco*** [2013] JMCA Civ 2). The "Notice of Proceedings" served in this case could not satisfy the requirements of the CPR in respect of the need for service of a medical report with the claim form indicating the nature of the Claimant's injuries (rule 8.11(3)). While the Court has power to dispense with the service of documents pursuant to rule 6.8, in order to exercise my discretion to do so, there must be an exceptional reason for so doing, and I must only do so where it is fair to do so, having regard to the overriding objective.

[23] As aforesaid, until a defendant has been served with the claim form, the defendant can take no step in the proceedings and neither can the Court take control the litigation process. While I am of the opinion that the Court may

dispense with the service of the claim form pursuant to its power under rule 6.8, this must be done only in "exceptional" cases. In England, this power has been used only where the claim form was in fact served late pursuant to the deemed date of service or where there were some other exceptional circumstances. I will discuss this further below.

[24] Rule 5.13 of the CPR does not permit dispensing with service of the claim form altogether, but instead, it allows for service by a method other than personal service on a defendant. The wording of rule 5.13 is clear that there remains a need for the claim form to be served. What the rule provides for, is an assessment by the Court regarding the method of service of the claim form chosen by the Claimant. Rule 5.13(2) states that where 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*".

[25] I am therefore not persuaded by counsel's written submission that "*the pertinent issue being solely whether AGI had sufficient information to allow it to ascertain the contents of the Claim Form and Particulars of Claim*". It is not the insurance company that the Court is required to be concerned with, but rather the Defendants. The Court is required to be satisfied that (1) the claim form was served and (2) the method of service of the claim form is likely to cause a defendant to ascertain the contents of the claim form. While service of the claim form on an insurance company might be deemed good service on an insured/defendant, the service of "Notice of Proceedings" on UGI in this case cannot be deemed good service of the claim form.

[26] Neither am I persuaded by submissions that since UGI did not state that the 3rd Defendant and 4th Defendant could not be located, the service of the Notice of Proceedings on UGI by fax would cause the Defendants to become aware of the contents of the claim form. Although a contractual relationship existed between UGI and the 3rd Defendant at the time of the accident in 2000, it did not follow that

the relationship still existed in 2006. Further, it was not incumbent upon UGI to inform the Claimant's Attorney whether it could or could not locate its insured or the driver of the vehicle. The duty to indicate this would only arise when a Court order is served on UGI pursuant to CPR rule 5.14. UGI would then be obliged to notify the Claimant's Attorney, and more importantly, the Court, about any difficulties in locating its insured. This would be done if UGI wished to have the order made pursuant to CPR rule 5.14 set aside. Since the claim form itself and no Court order had been served on UGI, it was not required to indicate that the Defendants could not be located. UGI would be required to give the claim form to the Defendants if it had been served on UGI, but it was not required by law to give the Notice of Proceedings to the Defendants.

[27] I am also not persuaded by affidavit evidence that the Applicant's lawyer was engaged in negotiations with UGI and the submission that, due to the said negotiations, the Defendants would have been likely to have had notice of the contents of the claim form. It is settled law that an insurance company may negotiate and settle a claim without consulting with its insured, and even without the insured being served with the claim form[1]. There is no evidence before the Court that the Defendants had effective notice of the proceedings against them.

[28] It should also be noted that the mere fact that negotiations with an insurance company were ongoing would not be a good reason to defer service of the claim form, or a good reason to extend the time in which to serve the claim form[2].

Could an order be made pursuant to rule 5.13 of the CPR?

[29] As indicated above, rule 5.13 of the CPR requires that the claim form be served. In this case the claim form has not been served and so there would be no basis on which to make an order.

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[1] See ***Ramsook v Crossley*** [2018] UKPC 9.
[2] Per Dyson LJ in ***Hashtroodi v Hancock*** [2004] EWCA Civ 652 at paragraph 10, citing Adrian Zuckerman's Civil Procedure at page 180.

[30] Further, it would be inappropriate to make an order pursuant to rule 5.13 after the validity of the claim form has expired and after claim became time-barred nearly fourteen years ago. The overriding objective of the CPR is that cases be dealt with justly. Rule 1.1(2) provides that dealing with cases justly includes ensuring that the parties are on an equal footing. This requirement means that each party must have a reasonable opportunity to present his case under conditions which do not place him at a substantial disadvantage. It seems that the Defendants would be placed at a substantial disadvantage in responding to a claim nearly fourteen years after the expiration of the limitation period.

[31] The CPR is not to be used to enlarge, modify or abridge any right conferred on the parties by substantive law. Section 46 of our Limitation of Actions Act 1881 ("the Act") provides that the United Kingdom Statute 21 James I, Cap. 16, (Statute of Limitation 1623) has been incorporated into the Laws of Jamaica. Section 46 of the Act therefore provides that an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. Unlike the English Limitation Act (as amended in 1980), our Act does not give a Court power to extend the limitation period.

[32] Although the claim in negligence was filed within six years, the claim form was not served within its life. There is no evidence of any attempts made to serve the claim form between 2006 and 2007, and neither is there any explanation for what appears to be a failure to file an application for an order pursuant to rule 5.13 or 5.14 before the claim form expired.

[33] To deem that the claim form was served in 2006 and to cause the Defendants to be brought into the proceedings at this time would result in prejudice to the Defendants. Aside from the loss of a statute of limitation defence, the Defendants might also be prejudiced by the unavailability of witnesses since 2006. A defendant's right to a limitation defence should not be abridged without an exceptional reason. No exceptional reason has been proffered. I am mindful that

the Claimant stands to be prejudiced if the orders sought are not made, but there is no evidence before the Court to justify making the orders almost fourteen (14) years after the claim became time barred.

[34] Having regard to the affidavit evidence before me, I find that the balance of prejudice tilts in favour of the Defendants. I am not satisfied on the evidence before the Court that the interests of justice would be served by granting an orders sought, after the expiration of the limitation period.

Could an order be made pursuant to rule 5.14?

[35] During the hearing on January 24, 2020, the Court was asked whether consideration had been given to an order pursuant to rule 5.14. The Court has no jurisdiction to retrospectively extend the time for service of a claim form, unless (1) the claim form is extant at the date of the hearing of the application or (2) there is an existing application that can permit the Court to renew the claim form by six months, up to and including the hearing date. Once the claim form has expired and there is no pending application to extend it in compliance with rule 8.15(3), it cannot be resuscitated or resurrected.

[36] Had an application to extend the validity of the claim form been filed and heard before the claim form expired, a Master or Judge could have directed that the claim form be served on UGI. However, the first application in this case seems to have been filed on June 3, 2008, after the claim form expired (on October 27, 2007). In June 2008, no order could be made pursuant to rule 5.14, since the validity of the claim form could not be extended, and no order can be made now.

Is this an exceptional case in which to dispense with service of the claim form?

[37] During the hearing of the application on December 12, 2019 the Court was asked to consider making an order dispensing with service of the claim form. Reliance is placed on the affidavits of Ralph Edwards and Mrs. Clarke-Bennett to the effect that the Defendants were evading service of the claim form.

[38] In England the law is clear that service of the claim form might be dispensed with in exceptional circumstances. In ***Anderton v Clwyd County Council (No. 2)*** [2002] EWCA Civ 933, the English Court of Appeal considered five joined appeals concerning the service of the claim form at the end of the limitation period, where in four of the cases, service was effected within the life of the claim form but was deemed late by virtue of the calculation of the deemed day of service. The court held *inter alia* that the court's power in rule 6.9 to dispense with service of a "document" applied to a "claim form", and that a court could make such an order prospectively or retrospectively, but only in exceptional cases, including where the limitation period had expired. What was required in the exercise of its discretion is that a court assess what is fair in the circumstances, having regard to the balance of prejudice between the parties. In ***Anderton***, there was no abuse of the fundamental principle that a defendant is entitled to effective notice of the proceedings against him since the defendants in four of the suits had in fact been served with the claim forms.

[39] It is noted that although the English rule 6.9 is similarly worded as our rule 6.8, in the English CPR no distinction is made between the service of the claim form and the service of other documents, as the provisions in respect of service generally were contained in one part, Part 6. However, our rule 6.8 falls under Part 6 of the CPR, which deals with service of "other documents", and there is no similar provision in Part 5, which deals with service of the claim form. Notwithstanding, it is my opinion that the power in rule 6.8 extends to the claim form. My opinion is based on a literal interpretation of the wording in rules 6.8 and 8.13. CPR rule 6.8(1) provides that the court may dispense with service of "*a document*" if it is appropriate to do so. CPR rule 8.13 provides that after the claim form has been issued it "*may"* be served in accordance with Part 5 or Part 7. It seems significant that the drafters of the CPR elected to use the word "*may*" rather than "*must*" in rule 8.13. A literal interpretation of the word "document" in rule 6.8(1), and of the word "may" in rule 8.13 would mean that the claim form is

a document with which service may be dispensed, in an appropriate case. I am therefore persuaded to apply the guidance in ***Anderton*** that while the general rule is that a claim form should be served on a defendant, there may be exceptional circumstances which may merit an order dispensing with the service of the claim form.

[40] In the instant case, the affidavits of Ralph Edwards and Mrs. Clarke-Bennett state that efforts were made to serve the claim form, but there is no evidence that efforts were in fact made to serve the claim form issued in 2006. The evidence relates only to the earlier claim. Further, while Mr. Edwards' affidavit indicates that efforts were made to serve the claim form that was issued in 2002, he did not state the dates and times of the visits. He merely said that he believed that the 2nd and 4th Defendants "*are very much residents at the respective addresses given [and] … have instructed other parties to deny knowledge of their existence in an attempt to further frustrate the Claimant's clam*". However, there ought to be evidence of attempts made to serve the claim form issued in 2006. There is insufficient evidence that the Defendants were deliberately evading service and could not be reached by an alternative method of service.

[41] In all the circumstances, I am not satisfied that this is an exceptional case in which to dispense with service of the claim form.

ORDERS

[42] The Court therefore makes the following orders:

1. The application made pursuant to rule 5.13 is refused. There is no evidence that the claim form was served and the service of the Notice of Proceedings on November 6, 2006 on the 3rd Defendant's insurance company is not sufficient to bring the claim form to the attention of 3rd and 4th Defendants.

2. The claim form having not been served on either UGI or the 3rd Defendant and 4th Defendant, there is no basis on which the Court can direct these

Defendants to file an acknowledgement of service or defence, or to enter judgment in default against them.

3. Further, the claim form having expired on October 27, 2007, and the cause of action having become statute barred on October 29, 2006, it is not just or appropriate to dispense with the service of the claim form (pursuant to rule 6.8) as that would have the effect of bringing the Defendants into the claim fourteen years after the expiration of the limitation period.

4. Leave to appeal granted.