IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 00106

BETWEEN	**MICHAEL POWELL**	**CLAIMANT**
AND	**KIRK SINGH**	**2ND DEFENDANT**
AND	**ANTHONY MARTIN**	**1ST DEFENDANT**
AND	**ADVANTAGE GENERAL INSURANCE CO LIMITED**	**INTERVENER**

IN CHAMBERS

Mr Clifton Campbell instructed by Archer Cummings and Company, Attorneys-at-law for the Intervenor/Applicant

Mr Paul Edwards instructed by Bignall Law, Attorneys-at-law for the Claimant/Respondent

HEARD: 20 March 2019 and 29 March 2019

Civil Procedure - Application to set aside substituted service - Civil Procedure Rule 11.18

Master Mrs Tania Mott Tulloch-Reid (Ag)

[1] Before I get into the crux of the matter, I wish to point out that this is Advantage General Insurance Company Limited's (the Applicant) second application to set aside the order of Master Tie (Ag) as she then was. The first application was filed on August 23, 2016 and was heard by my sister, Master R Harris, who dismissed the application on July 11, 2017, when it came up before her.

[2] After the first application to set aside Master Tie's order was dismissed, three months later, the Applicant, filed a new application on October 2, 2017 applying for permission to intervene in the proceedings for the purpose of making the application to set aside the order of Master Tie (Ag) and to set aside the said order. On January 17, 2019, Master Harris granted permission to the Applicant to intervene and adjourned the hearing of the application to set aside the order of Master Tie (Ag). The latter application is the one which I am asked to consider.

[3] I have before me the Applicant's application, which is supported by an Affidavit. I also have the Applicant's written submissions which were filed on September 18, 2018. I do not have written submissions from the Claimant nor was there an Affidavit in Response from the Claimant. The Claimant filed an Affidavit on March 20, 2019, the day of the hearing. However, I can give no notice to that affidavit as there is a defect in the jurat and it was short-served on the Applicant. The Claimant did not seek an adjournment to rectify the defect and I did not opt to allow one in any event, because I noted from the file that there were already seven adjournments in the matter, the first being on April 5, 2018 and so formed the view that a further adjournment should not be granted in these circumstances.

[4] In the Notice of Application for Court Orders filed by the Applicant on October 2, 2017, the Applicant states that it was served with the Claim Form and Particulars of Claim on February 17, 2016. Mr Edwards raised no objection to the date of service put forward by the Applicant and as such it would appear that the date given is indeed correct.

[5] The Applicant has grounded its application in part, on CPR Part 11.18 which empowers the Court to set aside an order made in the absence of a party, provided the absent party applies not more than 14 days after the date the order was served on it and evidence is given explaining the reason for non-attendance at the hearing and that it is likely that if the party had attended, some other order would have been made.

[6] I am aware that an application was made prior to this application and then dismissed and so it is clear to me that the Applicant has always had an interest in setting aside the order of Master Tie (Ag). However, the application which is before the court at present was made one year and eight months after the Applicant was served with the initiating documents and about two months after the first application was dismissed.

[7] The Applicant has put forward the reason for its non-attendance at the hearing of the application for substituted service as being that it was not served. It is not usual for the insurance company to be served in applications for specified service as the CPR at Part 5.14 says that the application may be made without notice. I therefore accept the Applicant's reason for being absent from the hearing of the application for specified service.

[8] I wish to however add that it may be useful for applicants in certain types of without notice applications to be guided by the decision of the Privy Council in the case of *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica): PC 28 Apr 2009.* Their Lordships were of the view that even when applications are without notice, parties should give notice as far as possible. Their Lordships had this to say

> *"there appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, audi alterem partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Pillar order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act."*

While the suggestion of the Privy Council was with respect to an application for injunction, I am of the view that the guidance provided by the Privy Council can be useful in without notice applications in which the applicant wishes to serve an insurance company in substitution for the insurance company's insured, especially in circumstances where the Claimant is expecting to that the judgment debt will be satisfied by the Defendant's insurance company.

[9] The Applicant has also indicated that had it attended the hearing of the application, other orders would have been made because they had not been in contact with the First Defendant for several years prior to the filing of the claim. The First Defendant had ceased to have a contract with the Applicant from as far back as 2009, which is when

the accident which is the subject of this claim occurred. It is very likely that if the Applicant were given notice and had turned up to the hearing, it would have been able to assist the Court by saying whether or not it would be able to bring the claim form and particulars of claim to the attention of the First Defendant. It is possible that a different order would have been made.

[10] In deciding whether to enlarge the time in which the Applicant is allowed to apply to set aside the order of Master Tie (Ag), I have taken into consideration the fact that the Applicant has always shown an interest in having the order of Master Tie (Ag) set aside even though there was a delay in making the application. I am therefore allowing the Applicant to make the application.

[11] I must now answer the question whether the Applicant, having been served with the order of Master Tie (Ag) and the initiating documents, did all it could do, to bring the documents to the attention of the defendant, Kirk Singh.

[12] I place reliance on ground (i) of the Notice of Application filed October 2, 2017, which reads as follows:

> "*Based on the nature of the order for substituted service,* ***namely that AGIC was duty bound to do all that was in its power to try and bring the contents of the documents to the knowledge of their former insured, the 1st Defendant,*** *it was neither possible nor practicable for this application to be made within 14 days of the order being served on AGIC."* (my emphasis).

I understand this ground to mean that the Applicant, having been served with the initiating documents as per order of Master Tie (Ag), took steps to locate the First Defendant and it is because they felt obliged to take these steps that their application to set aside the order was made outside of the allotted time.

[13] I am supported in my understanding in that paragraph 29 of the Applicant's submissions says as follows:

"*…The 1st Defendant, at the time of the application and* ***even at the date the order was served on the applicant****, was not a customer/client of the applicant* ***and even after hiring an investigator to locate the Defendant, the Applicant was not able to do so. The Applicant has done all that is reasonable possible for it to do in the circumstances with no success****."* (my emphasis).

[14] The Applicant relies on the affidavit of Lionel Fairly to support its application for court orders. Mr Fairley in his evidence says that he received instructions in 2015 to conduct investigations into the whereabouts of the First Defendant. At paragraph 3 of his Affidavit filed October 2, 2017, his evidence is given as follows:

> *"3. Priority Investigations Services Limited was instructed by way of letter received June 29, 2015 to conduct investigations into the whereabouts of the insured, Mr Kirk Singh and the circumstances of an accident which allegedly took place on or about 3rd day of March 2009. The said letter is exhibited hereto and marked "LF1" for ease of identification."*

The letter was written on the Applicant's letter head. It is undated but a notation thereon reveals that it was received by Priority Investigations Services Limited, the company with which Mr Fairley is associated, on June 29, 2015,

[15] Mr Fairly then states that he tried to call the First Defendant but was unsuccessful, then he went to the premises in July 2015, spoke with a lady, who identified herself as Shantel Williams, the First Defendant's niece, and that that lady informed him that the First Defendant had migrated and was now living overseas and that she had no contact information for him. He asked other investigators to do follow-up visits to the premises, (no date was given on which these follow-up visits were done) but like him, their attempts at finding the First Defendant, were unsuccessful. I will assume that the follow-up visits would coincide with the year 2015 when he received instructions from the Applicant to make these enquiries.

[16] Mr Campbell in his oral submissions in rebuttal to Mr Edwards's submissions indicated that fault will always be found with the efforts of the insurance company and

reasonableness should be the measure used by the Court to assess the steps taken to find the First Defendant to effect service of the claim form and particulars of claim on him. He went on further to say that the hiring of an investigator was reasonable but was not sufficient to bring the claim to the First Defendant's attention and for this reason the order should be set aside.

[17] Based on the affidavit evidence before me and the submissions of counsel for the Applicant, there is nothing before me that would suggest that any efforts were taken to find the First Defendant **after** Master Tie's order was served on the Applicant. In fact, I can go further to say that since no such steps were taken, counsel for the Applicant's submission that the Applicant did all that it could reasonably do to locate the First Defendant is faulty. It is my view that Mr Fairley went to the premises in July 2015 not to carry out the order of Master Tie (Ag) (which had not yet been made) but to carry out investigations into the how the accident, which is the subject of the claim occurred, as per the Applicant's instructions.

[18] It would have been expected that the Applicant, having knowledge of the whereabouts of a relative of the First Defendant, would have had at the very least returned to the premises and made further inquiries of the First Defendant or leave the documents with the First Defendant for them to be brought to the First Defendant's attention. The investigator, acting on the instructions of the Applicant, could have called Ms Williams again. There is no evidence before me that suggests that since the service of the order any attempts were made to contact Ms Williams by phone. A visit back to the premises or a telephone call could have been made, but to have done absolutely nothing at all cannot be said to be reasonable.

[19] I had asked Mr Campbell during the hearing of the application whether he had any knowledge of the documents being left with Ms Williams. Mr Campbell responded that he did not know. If the documents were served on the Applicant in February 2016 but Mr Fairley visited the premises in July 2015, the Applicant would not yet have received the documents and could not then have passed them on to Mr Fairley for delivery to the First Defendant. Having been served with the documents, it is my view that a visit to the

premises with the documents, should have been made. That would have been reasonable.

[20] I now refer to the Applicant's written submissions filed on September 18, 2018. In those written submissions I am referred to the Affidavit of Sharon Farquharson which supports the Applicant's first application to set aside the order of Master Tie (Ag). That application was heard and refused. There is very little strength in Ms Farquharson's evidence as it is clear from her affidavit that the attempts to locate the First Defendant, were with the investigation in mind and not to give effect to the order of Master Tie (Ag).

[21] I now turn to the Claimant/Respondent's case. Mr Edwards objects to the order of Master Tie (Ag) being set aside. This is quite understandable. The cause of action arose in 2009 and if the service is set aside then the Claimant will be left without a case as his claim would have expired and so would the limitation period. Mr Edwards therefore finds himself in a very precarious position.

[22] Mr Edwards relies on the judgment of Master Bertram Linton, as she then was, which was delivered on March 20, 2015 in the case of *Moranda Clarke v Dion Marie Godson and Donald Ranger (2013) HCV 03117.* He argues that the Court is to make a determination as to whether the Applicant made *bona fide* attempts to locate the Defendant and whether having made those attempts, it would still be unlikely that the documents would have come to the First Defendant's attention. He distinguishes the *Moranda Clarke* case from the case before me by submitting that the Applicant did not follow up with the information they received from the relative of the First Defendant. He said rather than make further attempts to contact the relative, they waited for her to call them. He said the Applicant, through its agent did not indicate what steps were taken to determine where the First Defendant was. He said the court had to ask itself whether the steps taken by the Applicant were sufficient to constitute "reasonable attempts in the circumstances". He argues that the Court should ask whether any more could be done with respect to Shantel Williams since she was the direct nexus to the First Defendant.

He said the answer to the question whether the Applicant's actions were reasonable in the circumstances, should be answered in the negative.

[23] Mr Campbell in rebuttal directed my attention to paragraph 37 of the *Moranda Clarke case.* The paragraph reads as follows:

> *"What is reasonable must be looked at, as in my judgement the court 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."*

I agree with Mr Campbell in this, but Mr Campbell has not satisfied me that the Applicant took any steps at all. It is my view, that there were reasonable steps available to the Applicant to explore, which could have brought the documents to the attention of the First Defendant. As mentioned earlier, reasonable steps would have included:

(a) returning to the premises to see if the First Defendant had returned to Jamaica; or
(b) returning to the premises and leaving the documents with his niece; or
(c) calling back the First Defendant's niece to see if she had heard from the First Defendant since their last visit; or
(d) putting a notice in the newspaper to enquire as to whether anyone knew the First Defendant or where he could be found and that the Applicant was trying to contact him.

I do not believe that any of those options is onerous. I believe they are all reasonable steps. None of them were however pursued by the Applicant. To throw one's hands up in the air without more is neither sufficient nor reasonable and so I order as follows:

1. The Applicant, Advantage General Insurance Company Limited, is permitted to file its application to set aside the Order of Master Tie (Ag) made on February 3, 2016 out of time.

2. The Application filed on October 2, 2017 with Affidavit of Lionel Fairly in Support of Notice of Application for Court Orders also filed on October 2, 2017 are allowed to stand as being filed and served in time.

3. The Order of Master Tie (Ag) for substituted service made on February 3, 2016 is not set aside and service of the Claim Form with accompanying documents and Particulars of Claim on Advantage General Insurance Company Limited in lieu of personal service on the First Defendant is to stand as good service.

4. Costs in the application in the amount of $20,000.00 are to be paid to the Claimant by the Applicant.

5. The Claimant's attorneys-at-law are to prepare, file and serve the orders made herein.

6. Leave to appeal is granted.