[2022] JMSC Civ 37

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV03456

BETWEEN	**HERMAN STEWART**	**CLAIMANT/ RESPONDENT**
AND	**CHARLES HIGGINS**	**DEFENDANT**
AND	**JAMAICA NATIONAL GENERAL INSURANCE COMPANY LTD**	**APPLICANT/ INTERVENER**

IN CHAMBERS

Philmore Scott and Melissa Scott instructed by Scott Philmore H & Associate for the applicant/ intervener.

Nigel Jones and Mekelia Green instructed by Nigel Jones and Co. for the claimant.

2, 7 & 10 July 2020; 8 April 2022

Extensive delay satisfactorily explained – Erroneous information highly persuasive in grant of Order for substituted service – No full and frank disclosure of material facts – What constitutes reasonable efforts by an insurer to locate defendant varies – Each case turns on its peculiar facts – Court should be satisfied that contents of statement of case has come to defendant's attention before Order can be made – Order should be set aside where reasonable efforts to locate defendant have failed – Reasonable efforts must not be so onerous as to be unrealistic to achieve – Steps taken displayed reasonable efforts – Default judgement obtained on the mistaken basis that defendant was served must be set aside – Costs ordinarily follow the event.

D. FRASER, J

Ruling

The Application

[1] By Notice of Application for Court Orders (hereinafter 'NOACO') dated 14th May 2019 and filed 16th May 2019 the Applicant Jamaica National General Insurance Company Limited (hereinafter referred to as JNGI) seeks the following orders, that:

1. Permission be granted for the Applicant to be heard in the claim joined as the 3rd Party Intervener.

2. There be an extension of time to 16th May 2019 for the making of this application and that this NOACO and Affidavits in Support be allowed to stand as if filed and served within time.

3. The Acknowledgment of Service form filed on the 25th July, 2018 which specifically stated that the Defendant was not located and notified of this claim herein be allowed to stand as if filed and served within time.

4. The Order of Master Ms. Andrea Thomas (Ag.) (as she then was) for Substituted Service made herein on the 15th day of March 2018 to effect substituted service of the Claim Form and Particulars of Claim on JNGI in lieu of personal service on the Defendant, be set aside.

5. The Interlocutory Judgment in Default of Acknowledgment of Service, entered herein, and served on the 25th day of April 2019 and all other proceedings flowing from the substituted service of the initiation documents be set aside.

6. The cost of this Application be awarded against the Claimant.

[2] The application is supported by the affidavits of Felicia Gordon Attorney-at-Law, Claims supervisor (legal) in the Claims Department at JNGI and Brenda Singleton, private investigator both filed on 16th May 2019.

[3] The application is opposed by the Claimant who relied on three affidavits of Kay Knight Legal Assistant in the firm of Nigel Jones & Co., filed 3rd November 2017, 9th March 2018 and 13th March 2018, that were adduced in support of the application for substituted service which was granted on 15th March 2018.

[4] On the 10th July 2020, a detailed oral judgment was delivered and the following order made:

i) Permission granted for the Applicant to be heard in the claim and joined as the 3rd Party Intervener.

ii) Extension of time to May 16, 2019 for the making of this application and that this Notice of Application for Court Orders and Affidavits in Support are allowed to stand as if filed and served within time.

iii) The Acknowledgement of Service form filed on the 25th July 2018 which specifically stated that the Defendant was not located and notified of this claim herein is allowed to stand as if filed and served within time.

iv) The Order of Master Ms Andrea Thomas (Ag) for Substituted Service made herein on the 15th day of March 2018 to effect substituted service of the Claim Form and Particulars of Claim on JN General Insurance Company Limited in lieu of personal service on the Defendant is set aside.

v) The Interlocutory Judgment in Default of Acknowledgment of Service, entered herein and served on the 25th day of April 2019 and all other proceedings flowing from the substituted service of the initiating documents are set aside.

vi) Costs of this Application to the Applicant.

vii) Leave to appeal refused.

[5] At the time the oral judgment was delivered, it was indicated that, after editing was completed, the written reasons would be made available in short order. Through an unfortunate oversight, that promise was not fulfilled. With sincere apologies, it now belatedly is.

The Background

[6] The Claimant was allegedly involved in an accident on 27th December 2012 along East Street in the vicinity of the Ministry of Labour in the parish of Kingston. The accident involved two motor vehicles and a pedal cyclist, who is the Claimant. The vehicles are motor truck registered PF 6640 owned and driven by Charles Higgins, the named defendant and the second vehicle a Nissan Sunny motor car registered PD 2725 owned by Eric Young and driven by Prince Dormer.

Chronology of Events

[7] In so far as the present application is concerned the following chronology of events provides a useful time line:

DATE	EVENTS
January 1, 2014	Defendant Charles Higgins cancelled insurance policy with JNGI
December 4, 2014	Claim No. 2014 HCV 05931 filed in the Supreme Court
June 8, 2016	Application for alternate service on JN General Insurance Co Limited refused by Master Mrs. S Jackson Haisley (as she then was)
October 31, 2017	Claim No. 2017 HCV 03456 filed in Supreme Court
March 15, 2018	Order for Alternative service granted by Master Miss Andrea Thomas (Ag.) (as she then was)
June 18, 2018	Formal Order served on JNGI

July 5, 2018	Request for default judgment filed
July 25, 2018	Acknowledgment of Service filed
April 11, 2019	Interlocutory Judgment in default of acknowledgement of service sealed
April 25, 2019	Formal Order served on JNGI
May 16, 2019	Notice of Application to set aside Alternate Method of Service

The Issues

[8] The following issues arise for determination:

1) Whether the Applicant has a good explanation for failing to make the application in time and therefore an extension of time for making of this application should be granted, so that the NOACO and Affidavits in Support are allowed to stand as if filed and served within time?

2) Whether the Order of Master Ms. Andrea Thomas (Ag.) made on the 15th day of March 2018 permitting substituted service of the Claim Form and Particulars of Claim on JNGI in lieu of personal service on the defendant should be set aside, that is:

    ii. Whether service of the Claim Form and Particulars of Claim on the Applicant was likely to enable the defendant to ascertain the contents of the documents?

    iii. Was there full and frank disclosure of material facts in the *ex parte* application made on behalf of the Claimant?

    iv. Whether the attempts to locate the Defendant on the part of the applicant were reasonable in the circumstances?

3) Whether the Acknowledgment of Service of form filed on the 25th July, 2018 which specifically stated that the Defendant was not located and notified of this claim herein should be allowed to stand as if filed and served within time?

4) Whether the Interlocutory Judgment in Default of Acknowledgment of Service, entered herein, and served on the 25th day of April 2019 and all other proceedings flowing from the substituted service of the initiating documents should be set aside?

5) Whether the costs of this Application should be awarded against the Claimant?

Discussion and Analysis:

Issue 1: Whether the Applicant has a good explanation for failing to make the application in time and therefore an extension of time for making of this application should be granted, so that the NOACO and Affidavits in Support are allowed to stand as if filed and served within time?

[9] The formal order permitting alternative service on the Applicant was served on the Applicant on 18th June 2018. The application by the Applicant to set aside that order was filed on 16th May 2019. Relying on Civil Procedure Rules (hereinafter 'CPR') rule 42.12, which deals with service of copy order on person not a party to the claim, counsel for the Applicant said the application to discharge the order permitting alternative service should have been made within 28 days of service. I am not sure that this is the correct rule as it deals with situations where an order is made in a claim that affects the rights of a third party. I understand that to mean substantive rights and not a situation like this which includes an obligation to execute service by way of substituted service. Counsel for the Claimant/Respondent on the other hand relied on CPR rule 11.18 that deals with applications to set aside or vary order made in the absence of a party which says

an application to set aside such an order must be made within 14 days of service of the order.

[10] I consider that the applicable rule is actually CPR rule 11.16 which deals with applications to set aside or vary order made on without notice application which provides a Respondent, (who does not necessarily need to be party), with an opportunity to apply to the court within 14 days. It is also subsection 3 of this rule which the affidavit of Felecia Gordon filed in support of the application, alleged was breached by the Claimant as will be outlined under the next section.

[11] The fact is however, whether the time frame was 28 or 14 days, and, as I have found that CPR 11.16 is the applicable rule, it was 14 days after service of the order. The application was however not filed until over 300 days after the expiry of the time allowed to seek discharge of the order. Counsel for the Applicant relies on Rule 26.1 (2) (c) of the CPR which grants the Court power to grant an extension of time where the Applicant fails to comply with the time stipulated by the CPR

[12] The Applicant relied on the following affidavit evidence of Ms. Felecia Gordon in support of its submission that the delay in making the application was reasonable in the circumstances:

a) The notice served on the applicant/JNGI did not contain a statement indicating JNGI's right to make an application to set aside the order under CPR rule 11.16(3);
b) The Defendant had severed contractual relations with JNGI on January 1, 2014;
c) Based on JNGI's investigations it was discovered that the Defendant had moved and there was no contact information on file;
d) A contracted private investigator tried without success to locate the defendant;
e) There was delay in briefing counsel as the file was inadvertently filed away for some time and not actioned;

f) Efforts made by counsel briefed to locate the Defendant also failed;

g) The Claimant on his application was aware the Defendant was out of the jurisdiction; and

h) JNGI wanted to exhaust all efforts to locate the Defendant before making the application, especially since this was the second time the Claimant was filing suit.

[13] In response to this issue Counsel for the Claimant/Respondent maintained that the explanation offered was not good as it does not account for such a long delay and the applicant could have filed the application based on the initial unsuccessful attempts made to locate the Defendant and withdrawn it later if necessary. Counsel also noted that the engagement of the private investigator was months after JNGI was served with the formal order. It was also submitted that breach of CPR rule 11.16(3) which deals with the inclusion of a statement of the right of the Applicant to apply to set aside the order, was not fatal as it was directory and not mandatory**.**

[14] In ***Jephtah Davis v Roy Marshall*** [2017] JMSC Civ 61 Master A. Thomas (Ag) (as she then was), having considered the case of ***Moranda Clarke v Dion Marie Godson and Donald Ranger*** [2015] JMSC Civ 48, exercised her discretion to extend time for the making of a similar application as this one, for an insurance company to intervene to set aside an order for substituted service; taking into account that the delay was caused by the efforts of the applicant/intervener to locate the defendant. The delay in that case was however less than a month. The delay in this case is substantially longer at over 10 months.

[15] Having carefully considered the matter I find that though the delay is long, it is satisfactorily explained by the Applicant's efforts to take all reasonable steps to try to locate the Defendant — efforts which will be examined in detail later in this judgment. It is also worthy of note that from the filing of the acknowledgment of service, albeit a few days late, the Claimant would have been aware that the applicant was saying it had not located the Defendant. Therefore, the Claimant

would not have been taken totally by surprise by this application. In the circumstances I consider it appropriate for the court to exercise its discretion to extend time under CPR rule 26.1(2)(c) for the filing of the application and supporting affidavits.

Issue 2: Whether the Order of Master Ms. Andrea Thomas (Ag.) made on the 15th day of March 2018 permitting substituted service of the Claim Form and Particulars of Claim on JN General Insurance Company Limited in lieu of personal service on the Defendant should be set aside?

Issue 2(i) Whether service of the Claim Form and Particulars of Claim on the Applicant was likely to enable the Defendant to ascertain the contents of the documents?

Issue 2(ii) Was there full and frank disclosure of material facts in the ex parte application made on behalf of the claimant?

Discussion and Analysis:

[16] The applicable rules of the CPR are rules 5.13 and 5.14. Rule 5.13 (**Alternative methods of service**) provides that:

(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 copy of the documents served.

(4) The registry must immediately refer any affidavit filed under paragraph (2) to a judge, master of 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.

[17] Rule 5.14 (**Power of court to make order for service by specified method**) provides, that:

(1) The court may direct that service of a claim form by a method specified in the courts' 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.

[18] By virtue of CPR rule 5.14 an applicant may apply to the court for an order directing that a claim and particulars of claim be served on a defendant through substituted service on another individual or entity (in this case the insurance company which was the insurer of the defendant at the time of the accident), where there is affidavit evidence accepted by the court, that such method of service was likely to enable the defendant to ascertain the contents of the claim form and particulars of claim.

[19] In challenging the order for substituted service which the Applicant seeks to have set aside, the Applicant says that there was material non-disclosure and misrepresentation when the application was made before the Master. With regard to non-disclosure, the complaint is that it was not stated that the Defendant had migrated and in relation to misrepresentation, it is that the court was erroneously informed that the defendant still operates his transport business in Jamaica and that the said insurance company still acts as insurers for the defendant.

[20] The Claimant says there was no non-disclosure or misrepresentation as the fact of the migration of the defendant was disclosed in the affidavits in support and there were also letters showing that JNGI denied liability on behalf of the insured defendant and that Philmore Scott & Associates represented the insured through the institutional client JNGI. That material it was maintained provided a sufficient evidential basis for the Master to make the order granting substituted service.

[21] Under these sub-issues the court has to look at what information was placed before the Master. The evidence before the Master disclosed that the Defendant had migrated, but that the Applicant had undertaken some measure of representation to protect his and their interests in relation to the claim made against the Defendant. However, it is also the case, which was not countered by the Claimant, that the information as to the Defendant still operating a business and still being insured by the Applicant was also before the Master. Counsel for the Claimant has said that the fact that the Defendant is out of the jurisdiction does not mean that he could not have been operating a business here, so that statement was not obviously and necessarily false. Also, that by virtue of the Claimant's claim in a context where the policy which insured the defendant at the time of the accident had not been declared invalid, a contractual relationship remained between the Applicant and the Defendant.

[22] The information provided to the Master that the Defendant still had a business and was still insured by the Applicant was double hearsay without the source of the information given. Also while it is possible for someone to operate a business from

overseas, the import of the statement that the Defendant still operated his transport business in Jamaica and was still insured by the Applicant was that it conveyed the impression that the Defendant still had active links to Jamaica and to the Applicant. At the very least the statement indicating that the Defendant was still insured by the Applicant was plainly wrong. I do not accept the technical explanation advanced by counsel for the Claimant.

[23] Objectively viewed, this erroneous information, even if innocently conveyed would no doubt have likely been highly persuasive in the Master's consideration of whether it was probable the Applicant could locate and serve the Defendant and therefore it was appropriate to grant the order sought. I am mindful of the learning in ***R v Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac*** [1917] 1 KB 486 that on an ex parte application it is the duty of the applicant to, *"state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it had taken on the faith of the imperfect statement"* (per Scrutton LJ at page 514). Therefore, this erroneous information provided to the Master I find weighs in favour of the order for alternate/substituted service being set aside.

Issue 2(iii) Whether the attempts to locate the Defendant on the part of the Applicant were reasonable in the circumstances?

[24] However even if the order was properly made based on the information that was before the Master, (and as I have indicated the evidence of the erroneous information presented to the Master casts that seriously in doubt), the question is whether at this stage, the court should look at information that has subsequently come to light concerning efforts to locate the defendant, to determine whether the order for substituted service, should now be set aside.

[25] There are a number of cases that answer that query. ***ICWI Limited v Shelton Allen Mervis Nash Delan Watson and Nichon Laing*** [2011] JMCA Civ 33, ***Nico***

Richards v Roy Spencer (Jamaica International Insurance Company intervening) [2016] JMCA Civ 61 and ***Jephtah Davis v Roy Marshall*** [2017] JMSC Civ 161 were all cases where evidence was adduced at the subsequent hearing to set aside the order granting substituted service/challenging service, showing unsuccessful steps taken after the order was served on the insurance company, on the basis of which the court was asked to set aside the order that had been made.

[26] Considering what would amount to reasonable steps or would constitute reasonable efforts by an insurer to contact its insured, in ***BCIC Ltd v David Barrett, Ivor Leigh Ruddock and Jason Evans*** [2014] JMCA App 5 Phillips JA posited that each case would turns on its peculiar facts. (see para. 25). Then in the case of ***Moranda Clarke v Dion Marie Godson & Donald Ranger***, **supra**, Master Mrs Bertram Linton (as she then was) stated at paragraph 37, that:

> *What is reasonable must be looked at, as in my judgment 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.*

[27] After a review of some of the relevant cases including, ***Tarzan Mighty v Michael Wilson and Ors*** CL 1999 M 188 Supreme Court of Judicature of Jamaica, ***The Insurance Company of the West Indies Ltd v Allen and Ors****,* and ***Loveleen Morgan-Taylor v Metropolitan Management Transport Holdings Limited*** Claim No. 2007 HCV 0938 Supreme Court of Judicature of Jamaica, judgment delivered 24th November 2011, Master A Thomas (Ag) in ***Jephtah Davis v Roy Marshall****,* at paragraph 19 succinctly distilled into two principles, what is required under this head They are:

i. Where a method of alternative service is employed by the claimant, the court should be satisfied that the contents of the Claim Form and Particulars of Claim are likely to come to the attention of the defendant. Once it is not so satisfied, the order for alternative (substitute) service and any consequential order and or judgment should be set aside; and

ii. Where service is effected on the insurers of the defendant, once it is established that the insurers have made all reasonable efforts to bring the contents of the Claim Form and Particulars of Claim to the attention of the defendant and has failed, then the alternative service should be set aside.

[28] In light of principle (ii) identified by Thomas J, a review of the steps taken in various cases and the view taken by the courts of their sufficiency or otherwise, compared to the steps taken in this case, will assist in determining whether I should find that reasonable steps have been taken in this case to locate the Defendant:

a) ***ICWI Limited v Shelton Allen Mervis Nash Delan Watson and Nichon Laing***

   i) Applicant insurance company received no report from its insured of the accident which gave rise to the claim; the policy of insurance had not been renewed on its expiry months after the accident; it had written to him and gotten no response and was unable to locate or contact him at his last known address; and it had no knowledge of his current address. – **Alternate Service on insurance company set aside on appeal.**

b) ***BCIC Ltd v David Barrett, Ivor Leigh Ruddock and Jason Evans***

   i) Insurance company seeking to set aside alternate service did not a) attempt personal service at the work address of the defendants b) send a letter via registered mail to the insured's home address or c) indicate why it would be unreasonable to hire a private investigator in the circumstances – **Master's finding that BCIC had not made all reasonable efforts to locate insured and order not to set aside alternate service on BCIC upheld on appeal.**

c) ***Nico Richards v Roy Spencer (Jamaica International Insurance Company intervening)***

i) Insurance company initially declined to disclose the address of its insured (owner of the vehicle which was involved in an accident while being driven by the respondent {with whom the insurance company had no relationship}). After alternate service for both the insured and the respondent ordered on insurance company, **the successful application to set aside alternate service, was upheld on appeal** as at time of filing application to set aside, insurance company filed acknowledgment of service disclosing the insured's address and the court was of the view that service of the claim form and particulars on the insured, would more likely have enabled the respondent to ascertain the contents of the documents.

d) ***Moranda Clarke v Dion Marie Godson & Donald Ranger***

i) Investigators who were employed located 1st defendant at an address not previously known to them, and indicated they had information (including from the 1st defendant) that the 2nd defendant had migrated. No checks were made with relatives of the 2nd defendant, who he had been visiting in Spanish Town at the time of the accident. No advertisement had been done locally or abroad to indicate to the 2nd defendant or anyone knowing him that attempts were being made to contact him – **Alternate service not set aside.**

e) ***Jephtah Davis v Roy Marshall***

i) **Application to set aside denied** as court found that the contents of the claim and particulars of claim were likely to come to the attention of the defendant as:

1. The claim form and particulars of claim were sent by registered mail to the defendant's known address and were not returned;

2. The report of the investigator for the applicant indicated that there were persons living at the defendant's address who are closely connected to him, including the defendant's father who informed the investigator that the documents could be left with him, as he conducts his son's business, and who the court was of the opinion was in a position to receive the letters sent by registered post; but inexplicably the documents were not left with the defendant's father or anyone else at his home.

[29] Were the steps taken by the Applicant in this case adequate?

a. Hired an investigator to find the insured Defendant;

b. Wrote letter to the Defendant at his last known address, which was returned (exhibit FG-3);

c. Legal Assistant in the Claims Department tried calling the phone number on file, (see paragraph 16 of Ms Gordon's affidavit);

d. Physically sent an investigator to visit the last known address who swore an affidavit detailing her efforts. (See para 17 of Ms Gordon's affidavit.);

e. Instructed Counsel Philmore H. Scott & Associates, Attorneys-at-law to represent its interest and communicate to the Claimant's Attorney-at-law that the efforts to locate the Defendant proved futile.

[30] It should also be borne in mind that:

a. The Defendant cancelled the policy of insurance on January 1, 2014;

b. The Defendant had migrated and left the jurisdiction without leaving a current address or other contact information with the applicant;

c. The Investigator who swore to an affidavit stated that when she visited the last known address she was advised that the Defendant sold the said home and is no longer in the jurisdiction.

[31] As was said in ***BCIC Ltd v David Barrett et al***, what constitutes reasonable efforts of an insurer to find its insured is such that each case turns on its peculiar facts. The reasonable efforts must be viewed in the context of whether there is an ongoing contractual relationship between the parties at the time the efforts are being made, the information obtained if any concerning the whereabouts of the insured and the various methods used to try to locate the insured in light of the information available. As said in ***Moranda,*** the requirement for there to be reasonable efforts must not "*be so onerous that it becomes unrealistic for the insurance company to achieve*".

[32] In these circumstances, given that: i) the policy was cancelled 1st January 2014 before the 1st claim was filed; ii) a letter which was sent to the defendant was returned unclaimed; iii) the Defendant migrated without leaving a forwarding address; iv) unsuccessful calls were made to the Defendant's phone number on file by a staff member of JNGI; v) the private investigator who was engaged went to the last address and obtained information that the defendant had gone abroad and the premises had been sold, I find the steps taken eminently reasonable. There is no indication even that the investigator obtained information as to where abroad the defendant might be, to make the possibility of advertising a contemplation. I hold the steps taken display reasonable efforts made by the applicant to locate the defendant which proved unsuccessful.

Issue 3: Whether the Acknowledgment of Service form filed on the 25th July 2018 which specifically stated that the Defendant was not located and notified of this claim herein should be allowed to stand as if filed and served within time?

Issue 4:Whether the Interlocutory Judgment in Default of Acknowledgment of Service, entered herein, and served on the 25th day of April 2019 and all other proceedings flowing from the substituted service of the initiating documents should be set aside?

[33] Rules 12.4 and 13.2 of the CPR provide respectively, that:

> 12.4-The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgement of service, if-
>
> (a) the claimant proves service of the claim form and particulars of claim on that defendant;
>
> (b) the period for filing an acknowledgment of service under rule 9.3 has expired;
>
> (c) that defendant has not filed-
>
> (i) an acknowledgment of service; or
>
> (ii) defence to the claim or any part of it
>
> (d) where the only claim is for a specified sum of money apart from costs and interest, that defendant has not filed an admission of liability to pay all the money claimed together with a request for time to pay it;
>
> (e) that defendant has not satisfied in full the claim on which the claimant seeks judgment; and
>
> (f) (where necessary) the claimant has permission to enter judgment.
>
> 13.2(1)- The court must set aside a judgment entered under Part 2 if judgment was wrongly entered because-
>
> (a) in the case of a failure to file an acknowledgement of service, any of the conditions in rule 12.4 was not satisfied;
>
> (b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or
>
> (c) The whole of the claim was satisfied before judgment was entered.
>
> (2)- The court may set aside judgment under this rule on or without an application.

[34] Counsel for the Applicant has argued that if the alternate form of service cannot stand, then all that flows from it, including the interlocutory judgment in default cannot stand. Counsel argued that the matter ought not to go further if it is shown that the person was not served.

[35] Counsel submitted that pursuant to CPR 13.2 and 12.4 the court must set aside a default judgment where service has not been proven on the defendant. He further maintained that where there is service on an insurance company, that order gives the insurance company the burden of taking all reasonable steps to locate the defendant and bring the contents of the claim and particulars of claim to his attention. If the court finds that the applicant took all reasonable steps to bring the contents of the claim and particulars of claim to the attention of the defendant without success, then the substituted service as well as the default judgment must be set aside.

[36] On the other hand counsel for the Claimant has argued that the Applicant has first to satisfy the requirements for the setting aside of the default judgment before the question of the setting aside of the alternate form of service can be addressed. Counsel advanced that CPR rule 13.2(1)(a) and CPR rule 12.4 apply. Further, that the Defendant had until July 2, 2018 to file an acknowledgment of service. Hence judgment was regularly obtained and should not be set aside

[37] Counsel also argued that for the default judgment to be set aside the Applicant had to satisfy CPR 13.3 and show that the defendant had a real prospect of successfully defending the claim; which it has not done as it has not put forward a proposed defence: see ***B & J Equipment Rental Limited v Joseph Nanco*** [2013] JMCA Civ 2 and ***Merlene Johnson v Ainsworth Campbell*** [2015] JMSC Civ 195.

[38] Counsel further submitted that the defendant had not given a good explanation for failing to file an acknowledgment of service within time, as the acknowledgment of service was filed 37 days late and the application requesting an extension of time to permit it to stand was not filed until almost a year after. The reasons put forward,

that of taking time to try to locate the defendant showed a clear disregard for the rules of the Supreme Court: see ***Merlene Johnson v Ainsworth Campbell*** & ***B & J Equipment Rental Limited v Joseph Nanco.*** Counsel also maintained that the Defendant had not applied to set aside the default judgment as soon as reasonably practicable after finding out that judgment had been entered.

[39] Having considered the competing submissions and examining the rules and cited cases I am persuaded by the submissions on behalf of the Applicant. In this situation, the argument advanced on behalf of the Claimant is, by analogy, similar to it being said that you cannot cut down a tree from the root, unless you first cut off the branches. In the case of a default judgment obtained because of failure to respond to service, if that service is proven not to have been valid then the fruits of that service, in this case the default judgment, must also fall away.

[40] The Applicant had two main hurdles to overcome to get to this point. It had to satisfy the court: 1) that despite the delays in applying to set aside the order for substituted service and the default judgment the court should grant an extension of time for the making of the application and 2) that it adopted all reasonable efforts to locate the Defendant and bring the contents of the claim and particulars of claim to the Defendant's attention without success, hence entitling it to have the order for substituted service set aside. Having surmounted both hurdles, it is manifest that the default judgment which was obtained on the basis that the Defendant was served must also be set aside.

Issue 5: Whether the costs of this Application should be awarded against the claimant?

[41] Counsel for the Applicant has asked for costs of the application.

[42] Counsel for the Claimant submitted that costs should not be awarded against the Claimant unless exceptional circumstances were shown pursuant to CPR rule 26.8(4). It is also noted that the court in the case of ***Nico Richards v Roy Spencer (Jamaica International Insurance Company intervening),*** no order as to costs was made as the successful applicant insurance company had in the

circumstances unreasonably withheld information that could have assisted service in a manner that was not consistent with the current approach to litigation.

[43] In resolving the question concerning what is the appropriate order as to costs, I observe that this is not an application for relief from sanctions, but one for setting aside of an order made in the absence of the Applicant and of the fruits that flowed from that order. I also note that the concerns about the behaviour of the insurance company in the ***Nico Richards*** case are not extant in this one. There is therefore no basis to depart from the usual rule that costs follow the event.

Conclusion

[44] It was in light of the foregoing the court made the order as set out at paragraph [4].