



[2020] JMSC Civ 265

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV03085

BETWEEN	SUSETT STONE	CLAIMANT
AND	DAUNAIS NORMAND	DEFENDANT

Vaughn O. Bignall instructed by Bignall Law for the Claimant

Kalima Bobb-Semple of British Caribbean Insurance Company Limited for the Applicant herein

Defendant absent and unrepresented

HEARD: February 17, 2020

CIVIL PROCEDURE - SUBSTITUTED SERVICE - NOTICE OF APPLICATION TO SET ASIDE ORDER FOR SUBSTITUTED SERVICE - INSURER SAYING THEY ARE UNABLE TO CONTACT INSURED.

GRAHAM ALLEN, J

The Court apologizes to the parties for the delay in delivering this judgement.

[1] This is an application by the British Caribbean Insurance Company Limited (hereafter referred to as the "BCIC") to set aside an order for substituted service of the Claim Form, Particulars of Claim, Prescribed Notes, Defence and Acknowledgment of Service form which was served on April 7, 2016 pursuant to a court order effected March 14, 2016.

Background

- [2]** The matter arose when the Claimant, Susett Stone filed a claim for damages as a result of injuries and loss sustained by the negligence of the Defendant, Daunais Normand.
- [3]** It is alleged that on April 25, 2015, the Defendant whether by himself, his servant and/or agent negligently caused his motor vehicle registered with numbers and letters 7484 FR to collide into the rear of the Claimant's motor vehicle which was travelling along Trafalgar Road in the parish of Saint Andrew.
- [4]** On October 29, 2015, the Claimant filed a without notice application for substituted service pursuant to rule 76.8 of the Civil Procedure Rules (hereafter referred to as the "CPR"). The Claimant sought permission to dispense with personal service, to serve the Claim Form, Particulars of Claim, Prescribed Notes, Defence Form and Acknowledgment of Service form on the Defendant's insurance company, BCIC.
- [5]** The grounds of the application states;

 - i. The Claimant could not locate the Defendant in order to effect personal service upon him.
 - ii. Service on BCIC was likely to bring the contents of the Claim Form and Particulars of Claim to the attention of the Defendant since the Defendant was insured by BCIC in relation to the motor vehicle registered with numbers and letters 7494 FR.
- [6]** On March 14, 2016, an order for substituted service on BCIC was made by Master C. Tie (Ag.) (as she then was). Service was effected on BCIC on April 7, 2016.

- [7]** On April 21, 2016, BCIC filed an application to have the order of the Master set aside. The application was made on the basis that the Applicant was not in a position to bring the suit to the attention of the Defendant since they were unable to contact the Defendant and had not engaged in any form of business with the Defendant at the expiration of his insurance policy in November 2015.

Issue

- [8]** The issue that the Court had to determine was whether there was a likelihood of the contents of the Claim Form and Particulars of Claim reaching the Defendant's attention if served on the Intervener/Applicant.

Law

- [9]** The CPR speaks to the making of applications to set aside or vary an order made on application made without notice, the relevant Rule 11.16 reads thus;

(1) A respondent to whom notice of an application was not given may apply to the Court for any order made on the application to be set aside or varied and for the application to be dealt with again.

(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.

(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.

- [10]** Pursuant to Rule 5 of the CPR the general rule is that service should be personal, However, Rule 5.14 states that the Court has the power to make order for service by specified method;

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. [emphasis mine]**

[11] In other words, the method of service in the application, that is service on the insurance company, should enable the person/Defendant being served to ascertain the contents of the documents being served. It would suggest that if that cannot be accomplished then the Court should be reluctant to grant such an order.

[12] The Court of Appeal case of **Insurance Company of the West Indies Ltd v Shelton Allen & Another** [2011] JMCA Civ. 33, is instructive on the process of setting aside of substituted service. Morrison JA had this to say at paragraphs 37 and 41,

[37]...that is, that in order for the court to sanction an alternative method of the claim form adopted by the Claimant pursuant to that rule, it must be clearly shown on affidavit and the court must be satisfied that the document is likely to reach the Defendant or come to his knowledge by that method.

[41] In support of its application to set aside the order for substituted service, the appellant adduced evidence, which was uncontradicted, that it had no report from the 3rd respondent of the accident which gave rise to this claim, that it was unable to locate or contact him and that it had no knowledge of his current address. It seems to me that there was therefore no evidence before the Master that could possibly satisfy the court that, if the claim form was service on the appellant, the 3d respondent would in fact have been able to ascertain the contents of the

documents, or that it was likely that he would have been able to do so, as the rules require in these circumstances.

[13] It is a fundamental principle of law that a Defendant is entitled to effective notice of the proceedings against him. For substituted service to be permitted it must be clearly shown that the Claimant is in fact unable to effect service and that the claim is likely to reach the Defendant or come to his knowledge if the method of substituted service which is asked for the Claimant is adopted.

[14] The principles of **ICWI v Shelton Allen & Another** was later applied in the case of **Richards v Spencer (Jamaica International Insurance Co. Ltd- Intervening)** [2016] JMCA Civ 6, where Sinclair-Haynes JA said at paragraph 35 of the judgment,

[35] The circumstances of this case are unlike those of ICWI v Shelton Allen & Others. Evidently, Mr. Brown is in contact with the intervener. The intervener's response to the appellant's attorney's request for information concerning both the respondent's and Mr. Brown's address/whereabouts makes it apparent that they are at least in contact with Mr. Brown but are reluctant to provide his particulars.

[15] Although the insurance company was in contact with a third party who might have known the whereabouts of the Defendant and failed to provide the information to the Claimant's attorney, the court did not believe there was any evidence to suggest that service of the documents in issue on the insurance company would result in them coming to the knowledge of the first Defendant. Therefore, the appeal was dismissed.

Analysis

[16] The Applicant has the right to make an application to set aside or vary an order on application made without notice.

- [17]** Based on the rules what must be ensured is that the contents of the documents are likely to come to the attention of the Defendant. Counsel for the Applicant contends that service on them would not ensure that the documents come to the attention of the Defendant and there is good reason to believe so.
- [18]** As per the ICWI case, once it is shown that the insurers took reasonable steps to locate the Defendant without success then the order should be set aside.
- [19]** The questions therefore are what reasonable steps have the Applicant taken to locate the Defendant and when did the Defendant's insurance policy expire. The Applicants have said in their affidavit that attempts were made to locate the Defendant at his address, without success. They have also indicated that the Defendant's policy expired in November 2015, which means that the Defendant was insured on April 25, 2015. However, he failed to inform his insurance company of the accident. The insurance company became aware of the accident on March 28, 2015 by way of a letter from the Claimant's attorney. The Applicant made several attempts to contact the Defendant, all of which proved futile.
- [20]** Given the circumstances where the Applicant would not be in a position to bring the contents of the documents to the attention of the Defendant, I believe the Applicant's application must succeed. It appears that the Applicant would be unable to bring the claim to the attention of the Defendant as the rule requires in the circumstances.
- [21]** This Court is not satisfied that the document is likely to reach the Defendant or come to his knowledge by this method of service.
- [22]** The Claimant will need to take other steps to ensure service of the claim on the Defendant. I believe the Claimant has two options available, either to make an application for the extension of time for serving a Claim Form or to abandon the claim.

Conclusion

[23] The Court orders as follows:

i The order for substituted service made on March 14, 2016 is set aside.

ii. No order as to cost.