IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2002/W-062

BETWEEN	LINCOLN WATSON	CLAIMANT
A N D	PAULA NELSON	1st DEFENDANT
A N D	FITZ MULLINGS	2nd DEFENDANT

Heard – 2nd and 9th December, 2003

Mr. Jeffrey Mordecai for the Claimant
Miss Camille Wignall and Miss Minto instructed by Nunes Scholefield, DeLeon & Co. for the 1st Defendant

MANGATAL J (Ag.)

1. Lincoln Watson claims that on the 11th of December, 1997 Fitz Mullings so negligently drove Paula Nelson's motor vehicle at the intersection of Duke Street and Church Street that Fitz Mullings caused Miss Nelson's motor vehicle to collide with Watson whilst he was riding a motor cycle . Lincoln Watson claims that he suffered injuries, loss and

damage as a result of the accident and it is in respect of those injuries and damage that Mr. Watson seeks to recover.

2. Paula Nelson had motor vehicle insurance coverage in respect of her vehicle carried by the Insurance Company of the West Indies Limited "I.C.W.I". On the 23rd of January 2003, Mr. Watson's attorney-at-law applied for and obtained an order for substituted service of the Writ of Summons and all subsequent process to be served on Paula Nelson by serving those documents on her insurers, I.C.W.I.

3. The affidavit evidence in support of that application for substituted service states that Guardsman Group Investigators Limited tried to locate Paula Nelson at her address but that she had removed from that address and accordingly, personal service on her could not be effected.

4. I.C.W.I. was served with the Order for substituted service, the Writ of Summons, and the Statement of Claim in April, 2003. I.C.W.I. now applies for permission to intervene for the purposes of seeking an order that the order for substituted service granted on January 23, 2003 be set aside and that service of the Writ of Summons and Statement of Claim be set aside.

5. The grounds of the application are set out in the Notice and supporting affidavits and are essentially two-fold. They are that I.C.W.I. is unaware of Paula Nelson's whereabouts and has been unable to locate her to bring these proceedings to her attention, and secondly, that Paula Nelson was residing (one of the supporting affidavits says may have been residing) outside of the jurisdiction at the time of the grant of the order for substituted service and the order was therefore irregular and improper.

6. I must first determine what rules are relevant in dealing with this application. Although the Civil Procedure Rules 2002 (C.P.R.) are now fully operational, at the time when the application for substituted service came on for hearing on 23rd January, 2003, it was the Civil Procedure Code (C.P.C.) which was applicable. The February 17 2003 Amendment to the C.P.R. indicates (Section 2.2.(4))that in all applications already fixed for hearing during the Hilary Term 2003, the C.P.R. does not apply. The application for substituted service was heard and determined during the Hilary Term 2003 and it is therefore to the C.P.C., the rules extant before the C.P.R., that one must look to see whether the application was in order.

7. The relevant provisions of the C.P.C. are as follows:-

S.35 – "How writs to be served"

35. "When service is required the writ shall whenever it is practicable be served by delivering to the defendant a copy of such writ under the seal of the Court; but if it be made to appear to the Court or a Judge that the plaintiff is from any cause unable promptly to effect service in manner aforesaid, the Court or Judge may make such order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise as may be just."

Title 9 "Substituted Service . Application for Substituted Service"

44. "Every application to the Court or a Judge for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit, setting forth the grounds upon which the application is made."

8. In **Murfin v. Ashbridge and Martin** [1941] 1 All E.R. 231, in an action against a motorist for personal injuries, the defendant could not be found, and an order was made for substituted service by way of advertisement in a newspaper. The defendant's policy of insurance contained the common clause giving the insurer control of any litigation thereunder, and in pursuance of that clause, the insurers entered a conditional appearance on behalf of the defendant. Thereafter certain interlocutory proceedings were taken in the name of the insurers. It was held that although the insurers had control of the proceedings, and could take any step in those

proceedings in the name of the defendant, they were not parties to the action, and no application or appeal could be made in their name. At page 235 Lord Justice Goddard stated: -

"Counsel for the appellant has said:

> *If they had not applied in this case to set aside service, or taken some such step, they would have been open to criticism."*

I do not understand that. They could decide for themselves whether or not they would defend the action. Their real complaint, as I understand it, was that, as they could not find their assured, they would not be able to put up a very good defence to the action. As Sir Wilfred Greene, M.R. has pointed out, that is their misfortune but it is not the plaintiff's fault. Possibly - I only throw this out in case there is any difficulty hereafter – in an order for substituted service in these cases it may be a proper thing to order substituted service on a defendant by serving his insurers. They are the people who are really interested and if they want to defend the action they can do so.

9. In **Gurtner v. Circuit** [1968] 1 All E.R. 328, the plaintiff was injured by the defendant who was riding a motorcycle. The plaintiff issued a Writ against the defendant. No steps were taken to serve the Writ for about one year, when it was discovered that the defendant had gone to Canada about

three years previously. The Writ was renewed and the defendant still not having been traced, the plaintiff's solicitor wrote to the Motor Insurers Bureau who asked an insurance company to investigate the matter, but neither the defendant's insurers nor the defendant were found. There were several renewals of the Writ and ultimately the plaintiff obtained an order for substituted service on the defendant in care of the insurance company which the bureau had asked to investigate the matter. It was held, amongst other things, that the order for substituted service had been wrongly made, but as no practical purpose would be served in the circumstances by setting it aside, service would be allowed to stand.

Lord Denning stated (at page 332 – 333) –

> "Once they (the Motor Insurance Bureau) are added as defendants they would be in a position to urge that the order for substituted service was not properly made and should be set aside. It seems to me not to have been properly made. The affidavit in support was insufficient to warrant the order for the simple reason that it did not show that the writ was likely to reach the defendant, nor to come to his knowledge. All that it showed was that, if the writ were sent to Royal Insurance Co. Ltd., it would reach The Motor Insurers' Bureau, but the Motor Insurers' Bureau were not defendants at that time. So that would not suffice. <u>It would be different if the defendant were insured with Royal</u>

> Insurance Co. Ltd. (my emphasis) but that was not suggested. In my opinion, the order for substituted service made on June 22, 1967, could be set aside if that would serve useful purpose. If there were any possibility of tracing the defendant in Canada, substituted service should be ordered by advertisement; but that seems be a useless procedure here. The practical course is to allow the order for substituted service to stand without incurring any further costs; and to allow the service to stand."

10. In **Clarke v. Vedel** [1979] R.T.R. 26, at p. 36, Stephenson L.J. stated:-

> "For my part, I do not find some difficulty in reconciling the general rule that substituted service should only be ordered where there is a probability that it will bring the document served to the notice of the defendant with, at any rate, some of the observations in **Gurtner v. Circuit** [1982] 2 Q.B. 587, and I conclude that this court recognizes that there may be cases where a defendant, who cannot be traced and, therefore, is unlikely to be reached by any form of substituted service, can nevertheless be ordered to be served at the address of insurers or the Bureau in a road accident case. The existence of insurers and of the Bureau and of these various agreements does create a special position which enables the plaintiff to avoid the strictness of the general rule and obtain such an order for substituted service in some cases."

11. I now turn to deal with **Abbey National PLC v. Frost**

(Solicitors' Indemnity Fund Ltd. Intervening) [1999] 1 W.L.R. 1080.

The headnote reads as follows:-

> "The plaintiff issued a writ claiming damages for negligence and breach of fiduciary duty against the defendant when acting as its solicitor in connection with a fraudulent mortgage transaction. The defendant having disappeared and his whereabouts being unknown, the plaintiff applied under R.S.C. Order 65, r. 4 for leave to effect substituted service against the Solicitor's Indemnity Fund Ltd. The grant of such leave by a district judge was upheld by the Master but set aside by the judge on the fund's appeal, on the ground that the court had no power to order substituted service of a writ if there was no likelihood that such service would bring the proceedings to the defendant's notice."

12. On appeal by the plaintiff, it was held, allowing the appeal and restoring the district judge's order, that the essential condition for the exercise of the court's discretionary power to grant leave for substituted service of a writ or other document under R.S.C.,Order 65 r. 4 was the impracticability of service of the document in the prescribed manner; that the provision in rule 4(3) for substituted service to be effected "by taking such steps as the court may direct to bring the document to the notice of the person to be served" did not limit the court's primary discretion under rule 4(1) by imposing a further requirement that

the order had to be likely bring the document to the notice of the person to be served; that the fact that the defendant's whereabouts were unknown and there was no likelihood of such service bringing the proceedings to his notice was therefore no bar to an order for substituted service on the fund if it would otherwise be proper to make such an order; and that, having regard to the purposes for which the fund was set up and the public nature of its obligations in relation to defaulting solicitors, such an order would be proper.

13. In this case the English Court of appeal rejected any general rule that a case is unsuitable for an order for substituted service where the order will not likely bring the document to the notice of the person to be served. The court considered sections which are identical to sections 35 and 44 of the C.P.C.

14. In **Abbey National** Nourse L.J pointed out that the rules themselves which existed at the time contemplated that once the plaintiff's inability to effect prompt service had been established, the court appears to have had a wide discretion in dealing in the matter. However, by way of supplement to the rules the King's Bench masters had settled and adopted a number of principles according to which their discretion would usually be exercised, one of them being that substituted service should not generally be ordered if the writ was not likely to reach the defendant or come to his knowledge. That principle was, however, qualified to the extent that it was not essential in all cases to show that it would do so.

In this present case, I.C.W.I.'S attorneys have sought to argue that the order for substituted service is improper and should be set aside because I.C.W.I. is unaware of the first defendant's whereabouts and are unable to locate her to bring the proceedings to her attention.

15. Counsel for I.C.W.I. referred me to Rule 5.13 of the C.P.R., which deals with alternative methods of service.

16. Rule 5.13 of the C.P.R., unlike the sections of the C.P.C. which latter were applicable at the relevant time when this application for substituted service was made, appears to have incorporated the practice of the King's Bench masters referred to by Nourse L.J. in **Abbey National.** The rules state: -

> 5.13 (2) Where a party –
>
> (a) chooses an alternative method of service
>
> (instead of personal service)...
>
> ... the party who serves 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.

17. The essential point is that under the C.P.C., once the Plaintiff had proved that he was unable to promptly effect service personally on the first defendant, the court had a wide discretion to make an order for substituted service as may be just. The case law supports the position that the motorist's insurer is a proper party to be served by way of substitution. This is so whether or not they are in contact with the insured and whether service on them would be likely to bring the document to the notice of the person to be served. The fact that there may be no likelihood of such service bringing the proceedings to the notice of the insured was no bar to an order for substituted service on the insured. The fact that they may not be able to mount a strong defence because they are unable to locate the defendant is their misfortune, but it is not the fault of the plaintiff. The question of ultimate liability of the insurer, whether there has been breach on the part of the insured such as to prevent the insurer being liable under the policy ultimately, is not relevant to the question whether substituted service is properly effected on the insurer. This principle turns on the

nature of the contractual relationship between the insured and insurer and on the provisions of the Motor Vehicle Insurers (Third Party Risks) Act.

18. There is another point which I.C.W.I.'S attorneys have raised, and that is that they claim that the driver of the first defendant's motor vehicle was not at the material time a licensed driver. In a statement given by the driver to the insurers I.C.W.I. it appears as if he is saying that he had only a provisional licence at the time. (Paras. 9 – 10 of Mr. Potopsingh's Affidavit exhibit W.P. 3 & W.P. 4). I.C.W.I.'S position is therefore that they are not obliged to indemnify the first defendant in respect of the claimant's claim as the driver of the vehicle at the material time was not authorized to drive the vehicle under the policy, he being an unlicensed driver. Mr. Mordecai cited to me the case of **Reendelsham v. Dunne; Pennue Insurance Co. Ltd.;** [1964] 1 Lloyd's Report. This case is in my view some authority for the proposition that a provisional licence is included in the word "licence" in an insurance policy and that is so even if the driver with the provisional or learner's licence has failed to comply with the condition under the Road Traffic Act that he must be accompanied by the holder of a full licence. Be that as it may, and it is not necessary for me to decide that point at this time, it seems to me that whatever may be I.C.W.I.'S position in terms of liability at the end of

the day, this does not affect the question of whether the order for substituted service was or was not properly made.

19. In **Abbey National** Counsel for the Solicitor's Indemnity Fund sought to challenge the order for substituted service on the basis that the pleadings relied on an element of deliberate concealment by the solicitor in the context of a limitation issue. The judge who heard the Fund's Appeal said (at p. 1089 of the judgment),

> "while this may affect the S.I.F'S ultimate liability, it is difficult to see the relevance of that point to the manner in which service is to be effected."

See also Nourse L.J's judgment 1091G

20. I would deal with the second limb of I.C.W.I.'S application at this juncture i.e. that the first defendant was residing outside the jurisdiction at the time of the order for substituted service. The thrust of the argument on that ground is that where the defendant was abroad on the date of issue, an order for substituted service would not normally be made unless the plaintiff had obtained an order for service out of the jurisdiction – see Blackstone's Civil Practice 2002, p. 177.

21. The affidavit in support of the application for substituted service sworn to by Mr. Mordecai indicated that Guardsman Group

Investigating Unit, who had been retained to try and locate the first Defendant at her address at 108 Waltham Park Road, St. Andrew, informed Mr. Mordecai that the first defendant had removed from that address.

22. The affidavit of Mr. William Potopsingh in support of I.C.W.I.'S application indicates that S& S Comprehensive Security & Investigations Limited were retained to assist in locating the first defendant. In or around August 2002, the investigators by letter of August 12, 2002, ex W.P.2 reported to Mr. Potopsingh on their efforts. All the letter states without revealing any sources for the information, is that: -

"(the first defendant) has since left her address at 108 Waltham Park Road, as also sold her Toyota Corolla motorcar 7316 BQ to one Beverly Miller of Santoy, Hanover and is presently abroad. ... We do not know if and when Miss Nelson will return to the island".

23. In **Abbey National** where a similar submission was made Nourse L.J. (at P. 1091A) pointed out that there was no hard evidence that the defendant was outside of the jurisdiction when the writ was issued. Similarly here, there is no hard evidence that the first defendant was outside the jurisdiction when the investigators say

she was, nor when the Writ was issued since no sources of information are revealed. Further in his affidavit, para. 14, Mr. Potopsingh states:-

"That further the Order for substituted service was obtained on January 23, 2003, and the first defendant may (my emphasis) still have been outside the Court's jurisdiction at that time" (my emphasis).

24. In my view the order was properly made and there is still no hard evidence before this court that the first defendant was out of the jurisdiction at the relevant time..

25. It is for these reasons that I have dismissed/refused the application advanced on behalf of I.C.W.I.