NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. C.L. 1999/B 055

BETWEEN	**EGON BAKER**	**CLAIMANT**
AND	**NOVELETTE MALCOLM**	**FIRST DEFENDANT**
AND	**STEADMAN LEWIS GORDON**	**SECOND DEFENDANT**

CONSOLIDATED WITH
CLAIM NO. C.L. 2001/B 098

BETWEEN	**EGON BAKER**	**CLAIMANT**
AND	**GUYTON CARR**	**DEFENDANT**

IN CHAMBERS
Miss Catherine Minto instructed by Nunes, Scholfield, Deleon and Company for the claimant
Mrs. Andrea Walters-Isaacs instructed by Palmer and Walters for United General Insurance Company

May 19, 29 and June 1, 2006

APPLICATION TO SET ASIDE ORDER FOR SUBSTITUTED SERVICE

SYKES J

1. Mr. Egon Baker, the claimant, was a pillion passenger on a motor cycle ridden by Mr. Guyton Carr. The motor cycle was involved in an accident with car driven by Mr. Steadman Lewis who was co-owner of the car with Miss Novelette Malcolm. Mr. Baker has sued all three defendants seeking compensation for the injuries he received. The accident occurred on March 15, 1997. At the time of the accident Mr. Carr was insured with United General Insurance Company. He could not be found so on October 30, 2001, the claimant was granted permission to serve his writ of summons and statement of claim on United General

Insurance Company. By the time service was effected on United General, Mr. Carr was no longer insured by it.

2. United General now applies to set aside the order for substituted service on the ground that at the time they were served Mr. Carr was no longer a client of theirs and consequently notice of the action would not be brought to his attention. United General say that the policy lapsed on October 28, 1997.

3. This identical point was argued before Mangatal J (Ag.) (as she was at the time) in the case of ***Lincoln Watson v Paula Nelson and Fitz Mullings*** Suit No. C.L. 2002/W062 (delivered December 9, 2003). That was case under the Civil Procedure Code ("CPC"). Her Ladyship reviewed the relevant cases and identified a special way of treating insurers of motor vehicles at paragraph 17:

> *The essential point is that under the C.P.C., once the Plaintiff (sic) 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. 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 a 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.***
> (My emphasis)

4. Mrs. Walters-Isaacs sought to say that Mangatal J (Ag.) said this in relation to the then procedural rules known as the CPC and consequently the dictum was not applicable to the Civil Procedure Rules ("CPR"). She further submitted that rule 5.13 (3) of the CPR now requires, if the claimant has chosen to serve other than by personal service, the claimant must show that it was likely that the contents of the claim form would be brought to the attention of the person intended to be served. This suggests, she submitted, that under the CPR a substituted method of service cannot stand if this criterion cannot be met. She

submitted that there is affirmative evidence that at the time of the service of the writ of summons and statement of claim the defendant was no longer the insured of United General. The necessary outcome of this submission is that whereas under the CPC the actual text of the rules did not lay down the criteria and so the court's discretion was at large, under the CPR the court's discretion is expressly circumscribed. This submission misses the point that a special rule has emerged in respect of motor vehicle insurers. That special rule does not turn on whether the application for substituted service was made under the CPC or CPR. The special rule stems from the relationship between the insurer and the insured.

5. Mangatal J (Ag.) traced the history of the matter and demonstrated that the actual wording of the rule 5.13 (2) and (3) of the CPR now incorporates the principles which the Masters of the King's Bench Division used when determining whether to exercise their discretion to grant an order for substituted service. The relevant provisions of the Rules of the Supreme Court which were very similar to sections 35 and 44 of the CPC only conferred the power to make a substituted service order but did not state what criteria should be used in making the determination. This omission, naturally, had to be filled by those who were entrusted with the exercise of the power. Over time, it emerged that one of the cardinal factors was whether service on the substitute would be likely to bring notice of the claim to the attention of the defendant. The passage cited above does say that a special rule has developed in relation to insurers of motor vehicles because of the nature of motor vehicle insurance contracts that give the insurer the right to control the litigation regardless of the wishes of the insured.

6. The law allows insurers of motor vehicles to contract with the insured to have full control over any litigation. The insurers can defend the claim over and against the wishes of the insured. They can even defend if the defendant cannot be found. The special position of motor vehicle insurers is reinforced by the Road Traffic Act. Insurers can apply to set aside judgments even if they were not defendants (see ***Windsor v Chalcraft*** [1939] 1 K.B. 279).

7. It seems to be that the reason why motor vehicle insurers are treated in this way is that the courts have taken a pragmatic view of the matter. Unless prohibited by procedural rules or primary or secondary legislation the courts will accept that the insurer is a proper person on whom substituted service can be effected. The possible reasons for this is that once the insured is not in breach of the policy the insurance proceeds are available for just the

eventuality that has occurred, namely, the defendant is liable to another for damage caused by him. The insurer is not precluded from raising defence that would make it not liable under the policy with the insured. The insurer is only paying what it would be contractually bound to pay had the defendant been served and was unsuccessful in defending the claim. There is nothing in the CPR that remotely suggests that these underlying considerations justifying substituted service on insurers of motor vehicles have been eroded. I am of the view that the special circumstances of motor vehicle insurers are still relevant today and so the order for substituted service stands. The application to set it aside is dismissed with costs to the claimant.