IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. 2001/B-201

BETWEEN	VERONA COLEY BANTON	1ST PLAINTIFF
AND	MARCIA COLEY	2ND PLAINTIFF
AND	NANCY TULLOCH-DARBY	1ST DEFENDANT
AND	DERRICK DARBY	2ND DEFENDANT

Mr. Gayle Nelson for the Applicant
Mr. Orlando Terrelonge for the First Plaintiff/Respondent

Heard April 22, May 1 and May 3, 2002

APPLICATION TO SET ASIDE ORDER FOR SUBSTITUTED SERVICE

Sykes J (Ag)

The respondent to this summons is the first plaintiff in this matter. She issued a writ of summons, for service within the jurisdiction, against the two defendants. She cannot find the first defendant to effect personal service on her. She needs to serve her writ.

Section 35 of the Civil Procedure Code states:

When service is required the writ shall wherever 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 to promptly to effect service in manner aforesaid, the Court or Judge may make such order for substituted service or other service, or for the substitution for service of notice by advertisement or otherwise as may be just.

It is clear that the court has the power to order substituted service whenever personal service "from any cause" cannot be effected. However before the court can do this the applicant for substituted service must satisfy the court that there are good grounds for granting the order. This is set out in section 44 of the Code which states:

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

The respondent prayed in aid these two sections when she filed her summons dated the 8th of October 2001 applying for substituted service supported by her affidavit . The master heard the application on December 3, 2001 and granted the application.

The order was to the effect that the writ of summons and statement of claim could be served on the applicant on the summons before me, Horace Tulloch, who is the father of the first defendant. He now seeks to have that order set aside. He says in his affidavit dated March 27, 2002 that on March 15, 2002 he was served with an ex parte order for substituted service, an "undated affidavit of Verona Coley Banton", a copy of a writ of summons and a statement of claim.

Mr. Tulloch says at paragraph 10 of his affidavit that he has no knowledge of the whereabouts of the first defendant. He adds that the relationship between himself and his daughter have deteriorated to such an extent they do not communicate with each other. In effect, he is saying that there is no reasonable probability that the writ and statement of claim will come to the knowledge of the first defendant. I have deliberately summarised Mr. Tulloch's affidavit in his way for reasons which will become quite clear.

Mr. Terrelonge has asked me to dismiss the summons on a number of grounds which will now be examined. He submits that the court has no power at this stage to set aside the order unless there has been some material non-disclosure or deception practiced on the court or the court was mislead.

Mr. Terrelonge's submission seems to have overlooked the nature of an ex parte order. Whilst it is true that the court can set aside an ex parte order on the bases mentioned, the law as I understand it does not say that those are the bases. Lord Denning M. R. in the case of ***Becker v Noel and Another*** [1971] W.L.R. 803 had this to say about ex parte orders at 803:

> *Not only may the court set aside an order made ex parte, but where leave is given ex parte it is always within the inherent jufisdiction of the court to revoke that leave if it feels that it gave its original leave under a misapprehension upon new matters being drawn to its attention.*

Lord Denning M.R. was saying that once new information comes before the court then it has an inherent power to revoke any order that it had made. I dO not understand the Master of the Rolls to be saying that only a material non-disclosure, deception or misleading of the court by the applicant could be the bases of discharging an ex parte order. The Master of the Rolls used the word "misapprehension". This word is sufficiently neutral to cover the bases identified by Mr. Terrelonge as well as just simply new information that was not before the court. No one needs be at fault. In the instant case the respondent could not be accused of not making full disclosure.

A few years later another Master of the Rolls dealt with the nature of an ex parte order. In ***WEA Records Ltd. v Visions Channel 4 Ltd.*** [1983] W.L.R. 721 Lord Donaldson M.R. said at page 727

> *As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be*

given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.

These two cases were expressly approved on this point by the Judicial Committee of the Privy Council in the case of ***Minister of Foreign Affairs v Vehicles & Supplies*** (1991) 39 W.I.R. 270, 281g. Since this case no one, at least in Jamaica, seriously doubts that a judge has a discretion to vary or discharge an ex parte order if new information comes to his attention that was not before the court when the ex parte order.

Mr. Tulloch's affidavit was not before the master when the ex parte order was made. Mr. Terrelonge in his submission has not indicated to me that there is something inherent in the nature of an ex parte order for substituted service that would take such an order outside of the general principle relating to ex parte orders.

Mr. Terrelonge submitted that since substituted service was effected the applicant was too late and could not seek the intervention of this court in having the order set aside. The authorities that have been brought to my attention do not support this contention. The cases of ***Paragon Group Ltd. v Burnell and Others*** [1991] Ch. 498 C.A. and ***Abbey National PLC v Frost*** [1999] 1 W.L.R. 1080 C.A were cases in which the person on whom substituted service was made applied to the court to have the order set aside. These cases establish, if they do nothing else, that a person on whom substituted service has been effected may apply to the court to have the order set aside. Therefore I am satisfied that I can hear Mr. Tulloch's application.

Now that the issue of whether this court could entertain Mr. Tulloch's application has been settled I now turn to decide the issue of whether the order will be set aside.

Mr. Terrelonge now submits that the order ought not to be set aside because the plaintiff would be in a difficult position. The submission really amounted to this: if the plaintiff is not able to effect service on Mr. Tulloch, the first defendant's father, then on whom should service be effected? This seems to be begging the question. The issue is

whether the order can stand having regard to the new information that is before the court. In order to determine this issue I will now have to see if there are any guiding principles.

One of the main principles which seemed to have emerged in determining whether an order for substituted service will be granted was that the "method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant." (per Lord Reading C.J. in ***Porter v Freudenberg*** [1915] 1 K.B. 857 at 899). Mr. Nelson has no quarrel with this statement. He says that at the time the order was made the master may have thought that the respondent had established that the writ will "in all reasonable probability, if not certainty" come to the knowledge of the first defendant. He stresses that the new information has displaced the initial conclusion reached by the master.

No one seems to have doubted the principle stated by Lord Reading C.J. until the judgment of Nourse L.J. in the ***Abbey National case*** (supra).

It is necessary to set out the facts of ***Abbey National*** (supra) in order to appreciate the analysis of Nourse L.J. In that case the plaintiff, Abbey National PLC, claimed against one Frost, a solicitor, damages for negligence and breach of contract. The defendant could not be found and so the plaintiff obtained an order for substituted service permitting the plaintiff to serve the writ on the defendant's insurers, the Solicitors' Indemnity Fund. The fund sought to have the order for substituted service set aside. Its application was dismissed by the master and the fund appealed to a judge of the High Court who set aside the order. The plaintiff appealed against the judge's decision to the Court of Appeal. The plaintiff in their notice of appeal sought to argue, inter alia, that the judge :

1. was wrong in law in holding that substituted service, whether within or outside the jurisdiction, could not be ordered upon the fund unless it was directed to drawing the proceedings to the attention of the defendant;

2. wrongly disregarded the existence of or failed to have regard to the nature, extent and effect of the residual discretion vested in the court to apply and regulate its own practice in furtherance of the interests of justice;
3. failed to have any sufficient regard to the purpose for which the fund was established and its nature and composition, namely for he protection of the public against the default of solicitors, in determining whether substituted service of the plaintiff's claim against a defendant was prima facie indemnified by the fund could be properly effected upon the fund.

Counsel for the fund submitted that ***Porter's case*** (supra) established "a general rule that substituted service will not be ordered where the defendant's whereabouts are unknown and there is no likelihood that the writ will reach him or come to his knowledge." This submission was undoubtedly founded upon the passage below where Lord Reading C.J. at page 888 of ***Porter's case*** (supra) said:

> *In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted. The Court may then make such order as may seem just: Order IX, r. 2. The terms of this rule are of very wide application, and give a very wide discretion which we are not inclined to limit.*

It is important to indicate at this stage that the relevant Orders in the ***Porter case*** (supra) (i.e. Ord. 9, r.2 and Ord. 10) are identical to sections 35 and 44 of the Civil Procedure Code which have already been set out at the beginning of this judgment. The Order that was before the court in the ***Abbey National case*** (supra) was Order 65.

Nourse L.J. formed the view that the difference in wording between the Orders in ***Porter's case*** (supra) and the one in the ***Abbey National case*** (supra) was insignificant. The learned Lord Justice in analyzing Ord. 9, r. 2 said that it was broadly the equivalent of Ord. 65, r. 4(1) and that Ord. 10 was the equivalent of Ord. 65, r. 4(2). Thus having

established the similarity between the Orders that existed at the time of ***Porter's case*** (supra) and the Order in the ***Abbey National case*** (supra) Nourse L.J. then referred to the principles that guided the court in making orders for substituted service **at the time *Porter' case* (supra) was decided** (see page 1086 of the ***Abbey case*** (supra)).

The learned Lord Justice of Appeal expressed the view that the principle expressed by Lord Reading C.J. (i.e that the writ is likely to reach the defendant or to come to his knowledge if the method of service asked for by the plaintiff is adopted) was a practice that had been adopted by the King's Bench masters when considering whether to grant an order for substituted service and was not a requirement of the section (see page 1087 of ***Abbey National*** (supra)). Consequently the court in ***Porter's case*** (supra) may have misread Ord. 9, r. 2. He said that the rule itself required only that the plaintiff was unable to effect prompt personal service. Once this was established then the discretion of the court arose. The second precondition (i.e. that the method of substituted service is one which will in all probability bring the knowledge of the writ to the defendant) was not required by the rule itself and consequently should not be incorporated in the rule itself. This being the case Nourse L.J. was unable to accept the submission of counsel for the fund.

The discretion referred to here must mean, at least, that the court must then consider what is the best method of substituted service in the particular case. This position is supported by the cases of ***Mullows v Bannister*** 1872 W.N. 183 and ***Bank of Whitehaven v Thompson*** 1877 W.N. 45. In ***Mullows case*** (supra) Fry J on an application for an order for substituted service, where it was established the defendant had left his home and could not be found and his wife had left the home to live with her relatives, directed that the wife should be served, a copy should be left at the defendant's house, an advertisement should be made in Peterborough (this was near to the defendant's last known address) and a further advertisement should be placed in a Stamford newspaper. In the ***Bank of Whitehaven case*** (supra) the defendant to a foreclosure action had absconded and this wife and family did not know his whereabouts. The plaintiff applied for a receiver and for directions as to the mode of effecting substituted service. The Vice-Chancellor directed that the writ should be served by leaving a copy of it with the

defendant's wife and by advertising in the Times and London Gazette. The court even indicated how the advertisements should be framed.

The clear implication of the learned Lord Justice's analysis is that the practice of the King's Bench masters had the effect of whittling down the terms of Ord. 9, r. 2 which would have had the effect of narrowing the full scope of the Order thereby depriving plaintiffs of the full benefit of the Order. This practice adopted by the King's Bench masters was itself "qualified to the extent that it was not necessary in all cases to show that it would be so" (see ***Abbey National case*** (supra) at page 1086).

In spite of this analysis it is my view that there must still be some criteria for making and setting aside an order for substituted service.

Since the Court of Appeal in the ***Abbey National case*** (supra) was jettisoning the principle as expressed in ***Porter's*** case (supra) it had to develop some criteria for granting and setting aside an ex parte order for substituted service. In order to arrive at the criteria the court asked itself, "What was the purpose for which this fund was established.?" The answer was that the purpose of the fund was to safe guard the public and protect the interests of members of the public, therefore the case was an appropriate one for an order for substituted service to be made on the fund. This solution is too case specific to be of general application. It may well be that Nourse L.J.'s analysis may have the unintended result of upsetting a practice that has been settled for nearly one hundred years without replacing it with an equally reliable or better one.

The real difference between Lord Reading C.J. and Nourse L.J. is that the Chief Justice preferred an over arching principle of general application whereas the Lord Justice preferred a determination to be made on each case. For the Lord Justice once it is established that personal service is not practicable then the only issue is how best should substituted service be effected in the particular case. I also understand the Lord Justice to be saying that Lord Reading C.J.'s formulation is a factor to be taken into account but by itself should not determine the success or failure on an application for substituted service. This last statement is supported by the facts of ***Abbey National case*** (supra). **In that case**

the court said that it was proceeding on the basis that if the order for substituted service were to be restored there was no likelihood that the writ would reach the defendant or come to his knowledge. This led counsel for the fund to submit that if that were the case then no order for substituted service should have been made. The result of the appeal is instructive – it was allowed and the order for substituted service was restored. It may well be said the ***Abbey National case*** (supra) is unique in that the purpose of the service was to facilitate a claim on the fund that was established to meet the very kind of circumstance that arose. To deny the order for substituted service would be deny the plaintiff the remedy from a source that was established to provide the remedy that was being sought. This is not the case here. If the order were to be revoked the respondent is not prevented from making another application for substituted service.

Speaking for myself the approach of Lord Reading C.J. has the distinct advantage of being able to arrive at decisions with a great degree of consistency. It is not very clear what criteria Nourse L.J. would use to guide the court in deciding in making "such order...as may seem just" (see section 35 of the Civil Procedure Code). The court seemed to have been concerned with the fact that the plaintiff would be without a remedy if the order for substituted service was set aside.

On either Lord Reading C.J.'s approach or Nourse L.J.'s approach at the end of the day the court must decide what is the most appropriate order to make when considering an application for substituted service in any given case. That is a question that has to be decided by taking into account all the circumstances of the particular case. This means that what is appropriate for one case may not be appropriate for another.

The evidence before me that was not before the master is that Mr. Tulloch is not in contact with his daughter and he does not know her whereabouts (see paragraph 10 of affidavit). It is clear that there is no reasonable probability that the writ will come to the attention of the first defendant. This very fact in this case demonstrates the difficulties with the ***Abbey National case*** (supra). It is equally clear that, having regard to the new facts, this method of substituted service is not appropriate for this case. The fact that Mr. Tulloch is the father of the first defendant, without more, does not mean that substituted

service ought be effected on him. For all practical purposes, having regard to his affidavit, he and his daughter are strangers. There is no connection or bond, other than that of kinship, that would make him a suitable person on whom to effect service. Nourse L.J. could not be understood as saying that once the applicant came within the term of the relevant provision the court could simply order that substituted service be executed on any one. There must be something that would make any order made appropriate for that case. The respondent has not provided any evidence to rebut the affidavit of Mr. Tulloch and there is nothing in Mr. Tulloch's affidavit that would cause me to say that it should be rejected. Therefore I accept his affidavit as true.

In order to avoid any misunderstanding I wish to say that I am not saying that substituted service cannot be effected on relatives of a defendant. What I am saying is that if the substitute says "I have nothing to do with the defendant. We are, for all practical purposes, strangers", then it is difficult to see how the order could stand. In this regard the relative would be on the same footing as a total stranger who has no connection with the defendant.

In concluding I apply Lord Reading C.J.'s formulation and so the order must be set aside.