[2014] JMCA App 5

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 172/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**BRITISH CARIBBEAN INSURANCE COMPANY LIMITED**	**APPLICANT**
AND	**DAVID BARRETT**	**1ST RESPONDENT**
AND	**IVOR LEIGH RUDDOCK**	**2ND RESPONDENT**
AND	**JASON EVANS**	**3RD RESPONDENT**

Ms Racquel Dunbar and Ms Lorraine Moore instructed by Dunbar and Co for the applicant

Oraine Nelson instructed by Oraine Nelson and Co for the 1st respondent

2nd and 3rd respondents not appearing or being represented

10 and 11 February 2014

ORAL JUDGMENT

PHILLIPS JA

[1] My brother Brooks JA will now deliver the judgment of the court. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] This application examines whether the learned Master in Chambers erred in refusing an application by an insurer to set aside an order for specified service. That order authorised the claimant to serve the claim form, and all subsequent documents in the claim, on the insurer instead of serving it personally on the insured.

[3] British Caribbean Insurance Company Limited (BCIC), having been served with a claim form, applied to set aside the order for specified service on the basis that it had made all reasonable efforts, without success, to contact its insured, Mr Ivor Leigh Ruddock. It contended, as a result, that since it was unable to bring the claim to the attention of Mr Ruddock, service on it would not be effective service on Mr Ruddock. It therefore asked that the order for specified service be set aside.

[4] On 11 December 2013 the Honourable Master in Chambers, Master Lindo (as she then was), refused the application and refused permission to appeal. BCIC, aggrieved by those refusals, has applied to this court for permission to appeal and for an extension of time in which to file the notice and grounds of appeal. It asserts that the learned Master erred in the standard that she applied in assessing its efforts to contact its insured.

[5] The background to the present application will be set out before considering its merits.

The background facts

[6] On 27 June 2012, Master Lindo, made an order, on the application of Mr David Barrett, dispensing with personal service of a claim form and particulars of claim on Mr Ruddock and Mr Jason Evans. Mr Ruddock is said to be the owner of a motor vehicle, which, Mr Barrett asserts, struck and injured him on 27 April 2010. Mr Evans is said to have been the driver of the vehicle at the time.

[7] The learned Master ordered that service on Mr Ruddock could be effected by serving the documents on BCIC. Mr Ruddock had insured the vehicle with BCIC and the policy of insurance was in force at the time of Mr Barrett's injury. The learned Master allowed service on Mr Evans by way of advertisement in the Daily Gleaner, a local newspaper with national coverage.

[8] BCIC, having been served with the documents, asserts that it made efforts to contact Mr Ruddock, but these were unsuccessful. That was the evidence on affidavit given by Ms Monique Cohen. On 31 August 2012, BCIC filed the application to set aside the order that allowed the service upon it. The application came on before Master Lindo on 13 November 2013. She later made her order, as set out above.

[9] BCIC filed its application with this court on 18 December 2013.

The proposed grounds of appeal

[10] BCIC proposes, as presently advised, to argue two grounds of appeal, if it is granted permission. The grounds are:

> "(i) The Learned Judge [sic] erred in her findings of fact so that she arrived at an incorrect conclusion which resulted in her refusal to set aside the purported service on the 1st Defendant [Mr Ruddock] and the order for substituted service;
>
> (ii) Maintaining the order for substituted service in circumstances where the court has evidence before it that the 1st Defendant has no knowledge of the claim made against him or of the contents of the Claim Form…"

It seeks to argue additional grounds if it is granted permission to appeal and when it has had a chance to examine the learned Master's reasons for judgment. Those reasons are not yet available. It will be noted that the grounds of appeal speak to "substituted service". That term harks back to pre-Civil Procedure Rules 2002 (CPR) procedure, and is the precursor to the CPR procedure for specifying a method of service. That procedure is allowed by rule 5.14 of the CPR.

[11] Both parties seem to agree that the decision was based on the learned Master's dissatisfaction with the efforts made by BCIC to contact Mr Ruddock. There was no dispute in the court below, that an insurer may have an order for specified service set aside if it is not in contact with its insured. That issue has been discussed and clarified in the judgment of Morrison JA in **Insurance Company of the West Indies Ltd v Shelton Allen (Administrator of the estate of Harland Allen)** [2011] JMCA Civ 33. The decision had been brought to the learned Master's attention in the instant case.

The submissions

[12] Ms Dunbar, on behalf of BCIC submitted that the proposed appeal has a real prospect of success. She said that BCIC, in sending letters to the addresses that it had for Messrs Ruddock and Evans, and making telephone calls to the numbers that it had for Mr Ruddock, had made all reasonable efforts to bring the claim to Mr Ruddock's attention. She argued that the learned Master erred in assessing the evidence provided by Ms Cohen in respect of those efforts.

[13] The court brought to Ms Dunbar's attention Ms Cohen's evidence that BCIC had used the services of an investigator in 2010 to locate Mr Ruddock. Learned counsel pointed out that this was before the order for specified service was made. It was done after Mr Ruddock had made a report of the incident to BCIC. She argued that to use the services of a private investigator is expensive. She said that the industry would benefit from this court giving some guidance as to what efforts by an insurer, in these circumstances, would be deemed acceptable.

[14] Mr Nelson, on behalf of Mr Barrett, submitted that the learned Master was right in rejecting Ms Cohen's evidence as being inadequate. He pointed out that, although Ms Dunbar had submitted an affidavit to this court concerning some letters that were sent to what was supposed to have been Mr Ruddock's home address, that that evidence was not before the learned Master. In this regard, Mr Nelson is correct.

The analysis

[15] An application for permission to appeal must satisfy the provisions of rule 1.8 of the Court of Appeal Rules 2002. It has been determined by this court that despite the provisions of rule 1.8(5), only the court itself, and not a single judge, may grant permission to appeal (see **Attorney General v John McKay** [2011] JMCA App 26). The application must have been first made to the court below within 14 days of the order sought to be impugned. If the application is refused in that court it may be renewed in this court.

[16] No objection has been made concerning the procedural aspects of this application. BCIC made its application to the court below and, upon that application being refused, it promptly made the present application to this court. The matter which is in issue is whether it has a real chance of success if it were granted permission to appeal.

[17] In assessing BCIC's prospects of success, it must be noted that the issue before the learned Master was one which required an exercise of her discretion. That exercise turned on her assessment of the evidence as to efforts made to contact Mr Ruddock. This court has often said that it will not disturb a decision of a tribunal which turns on an exercise of discretion unless it is shown that the tribunal made an error of law or misinterpretation or misapplication of the facts involved in that exercise. That principle was set out in **Hadmor Productions v Hamilton** [1982] 1 All ER 1042 at page 1046 a-b. BCIC has not demonstrated any such error, misinterpretation or misapplication by

the learned Master. This was a case of inadequate evidence by BCIC of its efforts to contact Mr Ruddock.

[18] The evidence from Ms Cohen was that when it was served with the claim form, BCIC no longer had a current policy of insurance with Mr Ruddock. She said that BCIC attempted to contact Messrs Ruddock and Evans, but without success. She did not particularise the efforts that BCIC had made. Having been unsuccessful in its efforts, she deposed, BCIC referred the matter to its attorneys-at-law. Ms Cohen said that she was informed by BCIC's attorneys-at-law that they had made calls to the telephone numbers for the men, as provided by BCIC, but to no avail. The attorneys-at-law also informed Ms Cohen that they had sent out letters to both men but that "the letters sent have since been returned and the persons are not known at the address" (paragraph 10).

[19] She exhibited the returned letters in a further affidavit. The exhibits show that there was one letter addressed to each man. Although there were two addresses on each letter, one at 18 Helena Crescent, Patrick Gardens, and another at 50 Dumbarton Avenue Kingston 10, only the envelopes sent to the Dumbarton Avenue address were exhibited. No effort was made to say what, if any, efforts were made to mail letters to the Helena Crescent address, and if so what were the results of those efforts.

[20] Ms Cohen, in a second further affidavit, did attempt to explain why letters were sent to 50 Dumbarton Avenue. She said that in 2010, before the order for specified service was made, BCIC had sent out investigators in respect of the matter and the

investigators "had indicated that Ivor Ruddock and Jason Evans worked at premises located at 50 Dumbarton Avenue" (paragraph 5).

[21] The gap in Ms Cohen's evidence is that she has not demonstrated any attempt to contact Mr Ruddock at the Helena Crescent address, which it has identified to be his home address. Ms Dunbar sought to close that gap in an affidavit filed in this court in support of BCIC's present application. That evidence was, however, not before the learned Master.

[22] Another glaring omission in the evidence concerning BCIC's attempt to contact Mr Ruddock is that it made no effort to serve him personally with a letter. Despite having determined that both Mr Ruddock and Mr Evans "worked at premises located at 50 Dumbarton Avenue", there is no evidence of any effort to speak with them personally there, or to personally deliver a letter to either of them them at that address.

[23] It must be noted that Ms Dunbar's submission that it is "expensive" to secure the services of a private investigator does not assist BCIC in the present application. There was no evidence before the larned Master, or indeed this court, as to why it would have been unreasonable for BCIC to have sought the assistance of private investigators to locate Mr Ruddock and to bring the claim to his attention.

Conclusion

[24] In the circumstances it cannot be said that the learned Master was obviously wrong in finding that BCIC had not made all reasonable efforts to contact Mr Ruddock.

The exercise of her discretion cannot properly be criticised. The application for permission to appeal against her order must fail.

[25] As this is an application for permission to appeal, and not an appeal, it is not the most appropriate medium by which this court could give guidance as to what would constitute reasonable efforts by an insurer to contact its insured. It would seem, however, from the nature of the matter, that each case would turn on its own peculiar facts.

LAWRENCE-BESWICK JA (Ag)

[26] I too agree with the judgment of my brother Brooks JA and have nothing to add.

PHILLIPS JA

ORDER

a. The application for permission to appeal is refused.

b. Costs to the respondent to be taxed if not agreed.